THE PUBLIC-PRIVATE PARTNERSHIP LAW REVIEW

FIFTH EDITION

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We are very pleased to present the fifth edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of chapters in various publications in The Law Reviews series on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires’ corporate control, special purpose vehicles and government procurement), we identified the need for a deeper understanding of the specific issues related to this topic in different countries.

In 2014, Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004). Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment in large projects dates from the 1980s and 1990s.

This is the case for countries such as the United Kingdom and the United States. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986 to 2012, approximately 700 PPP projects reached financial closure. The United Kingdom is widely known as one of the pioneers of the PPP model; Margaret Thatcher’s governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports, and railways. The Private Finance Initiative was launched in the United Kingdom in 1992, aiming to boost design-build-finance-operate projects.

In certain developing countries, PPP laws are more recent than the Brazilian PPP law. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1,299/2000, ratified by Law No. 25,414/2000). The Argentinian PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investments in local security. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 govern the Public-Private Partnerships Law and other related PPP regulations, which establish procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has been enacted (Law No. 5,102) to promote public infrastructure and the expansion and improvement of services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives regarding PPP issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the world.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model. One specific feature of the PPP law in Brazil, for instance, is state guarantees. This
feature permits that the obligation of the public party to pay a concessionaire be guaranteed by, among other mechanisms authorised by law: a pledge of revenues; creation or use of special funds; purchase of a guarantee from insurance companies that are not under public control; guarantees by international organisations or financial institutions not controlled by any government authority; or guarantees by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee pursuant to PPP agreements is an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions – one that is viewed as crucial for the success of PPPs, especially from a private investor's standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This is made worse by the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. Unlike PPP projects in developing countries, government solvency has not historically been a serious consideration in other jurisdictions. That is the case in countries such as Australia, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks the most.

Brazil must adopt cutting-edge models for awarding PPP agreements. The winner is usually chosen based solely on the price criterion (offering of lower prices or highest offers), which sometimes leads to projects lacking advanced or tailor-made solutions. Despite the legal provisions on the role of technical evaluation of offers, they are becoming less relevant. However, some ongoing discussions regarding amendments to the Brazilian procurement legislation and new criteria, which are based on the international experience, could (fortunately) be approved.

We highlighted some discussions regarding the amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. One of the main innovations proposed in this debate is the competitive dialogue, a type of bid in which the authority engages with bidders to discuss and develop one or more solutions for the tendered project. After the conclusion of the dialogue phase, the authority will establish a term for the submission of bids.

Competitive dialogue is a reality in many jurisdictions (e.g., Australia, Belgium, China, France, Ireland, Japan and the United Kingdom). In Japan, for example, some projects are procured through the competitive dialogue process. This process may be adopted if a relevant authority is unable to prepare a proper service requirement, in which case it proposes a dialogue with multiple bidders simultaneously to learn more about the specific service it seeks to implement. As another example, in France a dialogue will be conducted with each bidder to define solutions on the basis of the functional programme. At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the bidder with the best price in accordance with the criteria established in the contract notice or in the tender procedure. We hope the importance of this tool is recognised in Brazil and reflected in our legislation.
Further, the Investment Partnerships Programme, as established in Federal Law No. 13,334/2016, is a legal plan regarding infrastructure development in the country, providing conditions for the attraction of investments in infrastructure projects and creating environments for greater integration between public and private sectors.

The PPI is comprised of two relevant bodies within the federal government: the PPI Board and the PPI Secretariat. The first one evaluates and recommends to the President the projects that should be part of the PPI, as well as decides on subjects concerning the execution of partnership contracts and privatisations. The second one is a taskforce that acts in support of the Ministries and Regulatory Agencies to execute the PPI’s activities. These entities, together with other bodies and controlling agencies, are expected to act in an articulated manner as to ensure stability, legal certainty, predictability and effectiveness of the investment policies.

With regard to the plans of the president-elect for infrastructure investments in Brazil, the responsible governmental team has already confirmed the continuity of the PPI, linked to the presidency and preserving the members of its current technical team. In addition, the new government team endorses the development of a programme by PPI to support public-private partnerships of states and municipalities, which would mainly cover sanitation and public lighting sectors. Given the lack of operational, technical and economic-financial ability of municipalities to manage such programmes, the federal government is expected to act closely with local entities to boost projects in priority areas.

In the fifth edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions. We would like to thank all of them for their support in producing *The Public-Private Partnership Law Review*, and in helping with the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this fifth edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs. We also look forward to hearing your thoughts on this edition, and particularly your comments and suggestions for improving future editions of this work.

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São Paulo
March 2019

*The authors would like to thank Bruno Werneck and Mário Saadi for their assistance in preparing this article.
Chapter 1

ARGENTINA

Maria Inés Corrá and Ximena Daract Laspiur

I  OVERVIEW

A public-private partnership (PPP) is an institution designed to develop an infrastructure project through a stable partnership between the public and private sectors, and on the grounds of joint interests and a distribution of risks.

Under a PPP regime, individuals and companies may enter into a cooperative agreement with the state to develop infrastructure projects or to provide public services.

In Argentina, the first legal framework to govern PPPs was established by Decree No. 1299/2000, ratified by Law No. 25,414 (2000). This Decree aimed at promoting private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, domestic transportation, airport facilities, highways and homeland security. In early 2001, Law No. 25,414 was abrogated by Law No. 25,556. Therefore, Decree No. 1299/2000 was deemed abolished.


Finally, on 30 November 2016, Congress passed Law 27,328 on Public-Private Partnership Contracts, which became effective from 9 December 2016 (the PPP Contract Law). The new regime has been implemented by the Executive Decree No. 118/2017 (which also abrogated Decree No. 967/2005).

The new regime has been conceived by the government as the main tool to regulate and stimulate private investment in key sectors of the economy, such as infrastructure, housing, services, production, applied research and technological innovation.

Pursuant to Section 1 of Law 27,328 and the implementing decree, PPPs can pursue the following public purposes: design; construction; expansion; improvement; maintenance; exploitation; operation; financing of projects; and the supply of equipment or other goods. The contracting entity may introduce clauses of any type of contract, provided they are compatible with the PPP regime and the nature of the specific project at stake.

According to the PPP Contract Law, public-private contracts are deemed as an alternative way for the state to perform public works or to develop public services, different from the administrative regime set forth in Laws No. 13,064 on Public Works Act No. 17,520 on Concession of Public Works Act and Decree No. 1023/2001 on General Public Procurement, any of which are applicable to public-private contracts.

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1 María Inés Corrá is a partner and Ximena Daract Laspiur is an associate at Bomchil.
Like in previous regimes, the provincial states and the city of Buenos Aires were invited to join the new regime by issuing similar laws in their jurisdictions. So far, 14 provinces and the city of Buenos Aires have adhered to the PPP Contract Law.

II THE YEAR IN REVIEW

Throughout 2018, the government continued to develop the PPP regulatory framework to reinforce investors’ confidence in the new regime. Most of the decisions taken were of a financial nature, such as the creation and later regulation of the PPP Trust Fund, the financial tool necessary for the funding of the PPP projects.

On the same path, on 4 December 2018, the government passed Law 27,467 (the 2019 General Budget Law), approving the public funding for the PPP projects for the 2019 period. Those projects are principally related to roads, highways and energy transmission but also to prisons, hospitals, housing, and water distribution and remediation.

Likewise, successful tender processes took place in 2018. The most advanced was Stage 1 of the Highways and Safe Routes project, a national and international public bid for the public procurement of the design, construction, enlargement, improvement, repair, remodelling, management, maintenance and commercial exploitation of six national road corridors. This tender ended up being the first national project in applying the new PPP regulatory framework.

Other ongoing projects in early stages of development are:

a. the Electricity Transmission Lines Project, which is pending launch and entails the construction of 10 transmission lines and complementary works in three stages, Stage 1 called ‘Extra High Voltage Line in 500kV ET Rio Diamante–New ET Charlone, Transforming Stations and Complementary Works in 132kV’;

b. the Vaca Muerta Railroad project, which will connect the recently discovered Vaca Muerta non-conventional hydrocarbon field to the cargo port of Bahía Blanca; and

c. the Regional Express Network project, for the interconnection of metropolitan railway stations in Buenos Aires.

Similarly, the government continued to launch tenders under the Federal Renewable Energy Programme set up by Law No. 27,191 and Decree No. 882/2016 (RenovAr). Although subject to another law regime, the RenovAr programme is also based on a PPP model.

III GENERAL FRAMEWORK

i Types of public-private partnership

Section 1 of the PPP Contract Law sets forth that PPP contracts shall be designed in accordance with the special features of each project and its financial needs.

Under that flexible criterion, Section 7 of the PPP Contract Law sets forth that the PPPs in charge of the execution and performance of the PPP contract may be organised as a special purpose vehicle (SPV), a trust fund, or any other vehicle or associative organisation. SPVs shall be incorporated as corporations. Trust funds shall be organised as financial trust funds pursuant to the Civil and Commercial Code provisions on the matter. Further, PPPs may be constituted and organised in such a way that allows them to issue securities under the provisions of Capital Market Law No. 26,831.
Further, the PPP Contract Law explicitly allows the state to create new corporations or trust funds to perform PPP projects.²

**ii The authorities**

Under the PPP Contract Law, the performance of the PPP contract is subject to the control of the public contracting party or the public body created for that purpose in the relevant jurisdiction. In addition, the bidding terms and conditions of the PPP project might require the appointment of external independent auditors to supervise the performance of the project.³

Pursuant to Section 22 of the PPP Contract Law, the General Audit Agency shall supervise all PPP contracts, their performance and results.

The new regime sets forth two new bodies: the Undersecretariat of PPPs, an official government entity, which shall centralise the regulation of PPP contracts, assist in the development and regulation of the PPP projects and support the public procurement agencies in the design and structuring of PPP projects;⁴ and the Congress bicameral commission, which is in charge of monitoring the PPP projects’ performance and compliance with the PPP regime.⁵

**iii General requirements for public-private partnership contracts**

In accordance with the PPP Contract Law, PPP contracts shall regulate, at a minimum, the items described in the law,⁶ including the following:

- **a** the contractual term and potential extensions, which cannot exceed 35 years in whole and must ensure recovery of investments, repayment of financing and a reasonable profit;
- **b** the parties’ duties and obligations and a fair and efficient distribution of the contract contributions and risks between the parties, ensuring the best conditions to prevent, assume or mitigate them and to minimise the cost of the project and facilitate financing conditions (see Section V.iiii). The PPP contract shall foresee the contractor’s right to transfer its duties to a ‘performing company’, within the limits set forth in the contractual documents. In this case, both the contractor and the performing company will be jointly and severally liable to the state party;
- **c** the minimum technical requirements applicable to the infrastructure involved in the project and the penalty regime (the application of any sanction in excess of the limits set forth in the PPP contract and regime being forbidden);
- **d** the procedures for the revision of the contract price so as to preserve its economic–financial equation (see Section V.iv);
- **e** the state’s power to unilaterally introduce modifications should be restricted only to the project performance and under no circumstance exceed 20 per cent above or below the total contract price. Any such modification shall be compensated so as to keep the original economic–financial balance (see Section V.iv);
- **f** the guarantee of minimum income if such provision is agreed upon (see Section V.ii);

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² The PPP Contract Law, Section 8.
³ ibid., Section 21.
⁴ ibid., Sections 28 and 29, and Decree No. 1119/2018.
⁵ The PPP Contract Law, Section 30.
⁶ ibid.
the events and procedures applicable to the contract’s termination and applicable compensation. If termination operates based upon public interest grounds, no state liability limitation set forth in administrative laws can apply (see Section V.vi);

the assignment of PPP contract rights or receivables arising as collateral and the right to securitise cash flows;

the right to temporarily suspend performance of obligations in the case of state default;

the contractor’s right to totally or partially assign the PPP contract to the extent the assignee meets the proper conditions to be a contractor and at least either 20 per cent of the contractual term has expired, or 20 per cent of the committed investment has been made. Contract assignment shall be subject to the state contracting party, funders and guarantors’ approval. Under these conditions, the assignment releases the original contractor of all duties;

the assets regime (see Section V.v); and

the procedures and mechanisms of settling contractual disputes, including the possibility to establish a technical panel to act throughout the contract life and in charge of solving contractual disputes before resorting to court litigation or arbitration. Arbitral agreements setting forth foreign venues shall be expressly approved by the Executive and communicated to Congress. This option is only available for PPP contractors that have foreign shareholders, according to a minimum percentage that must be established in each project.

IV BIDDING AND AWARD PROCEDURE

i Expression of interest

Pursuant to Sections 1 and 4(a) of the PPP Contract Law, the submission of a project to the PPP regime requires a previous justification by the state on the reasons why the PPP structure is suitable for the satisfaction of the public interest pursued through it.

By the same token, Section 13 sets forth that, before any invitation for a PPP public tender, the tender authority shall issue an opinion on, inter alia, the feasibility of the PPP project and the reasons underlying the submission of the project to the PPP regime as the most suitable solution for the public interest. That opinion shall be communicated to the Undersecretariat of PPP for its publicity.

ii Request for proposals

The contractor shall be selected by public or competitive, national or international tender depending on the complexity of the project, the ability of local companies to participate, economic or financial reasons connected to the project’s special features, or the origin of the funds in the case of projects that require external financing. Direct adjudication (i.e., without public and competitive tender) is forbidden.

Pursuant to the PPP Contract Law, the provision of assets and services made in the context of PPP contracts shall have a minimum domestic component of 33 per cent. This legal requirement may be exceptionally set aside or limited by the Executive if the project special features require so.© 2019 Law Business Research Ltd
If the PPP contract commits resources from the public budget, prior to the call for
tenders or competition, it must obtain the authorisation to commit future fiscal exercises,
as provided in Section 5 of Law 24,156.9 The availability of the public funding shall be also
confirmed prior to the execution of the contract.

If necessary, when the complexity or size of the project requires it, a transparent
procedure of consultation, discussion and exchange of views between the contractor and
the prequalified parties may be established, allowing the development and definition of the
most convenient solution to the public interest on the basis of which the tenders should be
formulated.10

The PPP Contract Law puts special focus on the need for transparency, publicity and
competitive conditions for bidders, including specific anti-corruption provisions.

iii Evaluation and grant

The contract shall be awarded to the most convenient offer, in accordance with the conditions
established in the bidding terms and conditions. This regime also requires the inclusion of
selection guidelines that give comparative advantages in favour of domestic companies and
small and medium-sized enterprises. Nevertheless, these comparative advantages may be
excluded if that is deemed necessary or convenient because of the particular features of the
project.11

V THE CONTRACT

i Payment

As regards the state’s contributions and payments, according to Section 9(g) of the PPP
Contract Law, these contributions may consist of:

- contributions of money;
- assignment of funds obtained from public credit operations;
- ownership of assets (budgetary, fiscal, contractual or of any other nature), the assignment
  of which is permitted by the applicable regulations;
- the assignment of rights;
- the constitution of surface rights over public and private property;
- the granting of guarantees, tax benefits, subsidies and franchises;
- the concession of rights of use, and exploitation of public and private property; and
- any other type of contributions that may be made by the state.

According to Section 18, payments may be made through: specific allocation or transfer
of tax resources, assets, funds and any kind of public credits or revenues, with the relevant
authorisation from the Federal Congress; or creation of trust funds or use of existing ones.
Moreover, pursuant to Section 20, in the case of the use of trust funds, instructions by
the trustor or the state bodies to the fiduciary are expressly forbidden.

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9 ibid., Section 16.
10 ibid., Section 14, and Decree No. 944/2017.
11 The PPP Contract Law, Section 15.
The PPP contract shall set forth the payment regime. Payments could be made by the state, users or third parties, depending on the specific project’s particular conditions. If the repayment of the assets, services or works is made by the state, the financing shall be made by the PPP contractor, the financing entities or third parties.

The PPP Contract Law excludes the application of Section 765 of the Civil and Commercial Code (which allows the payment of US-dollar debts in the domestic currency); and Sections 7 and 10 of Law No. 23,928 (which avoid the indexation of contractual debts) to the PPP contracts.

**ii  State guarantees**

To secure the payments, Section 18 provides for: the granting of security bonds and guarantees of entities of recognised solvency in the national or international market, and the constitution of any other instrument that fulfils the function of guarantee accepted by the current law.

Further, the PPP Contract Law allows contractual provisions on guarantees on minimum incomes.

Finally, pursuant to Section 19, the contractor may be authorised to grant guarantees on rights of exploitation of public or private property granted to secure the repayment of the necessary financing to carry out the project.

**iii  Distribution of risks**

The PPP regulations attempt to distribute risks between the state and the private party in order to reduce the related costs.

In this line, PPP contracts shall foresee the consequences arising from acts of God, *force majeure* and extraordinary economic events affecting the contract economic equation and the early termination of the contract.

Further, PPP contract may provide for automatic or non-automatic mechanisms for review of the contract price based on increased costs, including the financial ones.

**iv  Adjustment and revision**

Section 9(i) of the PPP Contract Law allows unilateral variations to the contract instructed by the state, but limits them only to the performance of the project, with a maximum limit of 20 per cent of the total value of the contract. Further, those variations shall be adequately compensated.

Likewise, under the PPP Contract Law, PPP contracts may foresee procedures for price revision in order to preserve the original economic-financial balance of the contract and the possibilities and conditions of financing, in the case of a relevant alteration of such balance as a result of unforeseeable events that are alien to the contractor.

**v  Ownership of underlying assets**

Regarding the ownership of the underlying assets, and pursuant to Sections 9(o) and (v) of the PPP Contract Law, the ownership, exploitation, assignment and destination of the property, movable and immovable, used or constructed during the term of the contract, shall be governed by the provisions of the PPP contract. In particular, those assets that are to be reverted or transferred to the state shall be duly specified in the respective contract.
Further, the PPP Contract Law states that agreements under which the ownership of the work or infrastructure is constructed may only revert to the state after full execution of the contract.

vi Early termination

Early termination is a widely known power of the state, and it may be used for several public interest reasons. It is one of the main regulatory risks that PPPs could face, and for that reason it seems important for a PPP regime to reasonably limit its consequences.

According to Law 27,328, in the case of early termination of the PPP contract by the state, compensation shall be fully paid out to the contractor before taking possession of the assets. In no case can compensation be lower than the non-depreciated investment. Further, financing repayment shall also be guaranteed to the extent effectively applied to the project.12

The parties’ liability shall be governed by the PPP Contract Law, its implementing regulations, the bidding terms and the PPP contract. The Civil and Commercial Code shall also be applicable on this matter.13 Therefore, PPP contracts are expressly excluded from all legislation restricting government liability or excluding compensation for lost profits in the event of early termination on public-interest grounds.

The unilateral termination of the PPP contract for reasons of public interest shall be declared by the Executive.

Finally, the suspension or nullity of the contract on the grounds of illegitimacy may be declared only by a court.

VI FINANCE

The PPP regimes aim at promoting private investments in public infrastructure projects that the state cannot, or deems it inconvenient to, afford alone. Therefore, PPP contracts shall adopt a flexible design in order to adapt their structure to the specific requirements of the project and its financing needs.14

For the same reason, the entity in charge of the performance of the PPP contract shall adopt a legal form able to access the capital markets to develop the project.15

As it usually happens, the resources needed to finance the projects of this kind are sought at the domestic and financial capital markets. Accordingly, the PPP Contract Law explicitly promotes the development of the domestic market and access to the foreign market.16 As a consequence, cross-border finance could be included in the terms of the tendering process for awarding the PPP contract.

In addition, the PPP Contract Law sets forth that the state contracting party may collaborate with the private party to obtain the necessary financing for the project.17

In order to structure the financing of the project, the regime allows the contractor to contract loans, issue debt securities with or without public offer, set up trusts (financial or otherwise) that issue debt securities or certificates of participation, create mutual funds

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12 Section 10 as regulated by Decree No. 188/2017.
13 The PPP Contract Law, Section 11.
14 ibid., Section 1.
15 ibid., Section 7.
16 ibid., Section 4(j).
17 ibid., Section 9(n).
or any other financial structure that could be guaranteed through the assignment of the PPP contracts or the credit rights arising from the PPP contract – including any certificates, minutes or investment recognition instruments or the provision in charge of the PPP contractor and securities, negotiable securities or similar that may be issued – as well as their corresponding guarantees.

As a remarkable feature, under the new regime, the PPP contract may include the conditions for the transfer of the controlling shareholding of the SPV or the certificates of the trust funds to the funders in the case of default of the SPV’s or the fiduciary’s obligations, in order to facilitate the restructuring of the debt and the project performance continuity (step-in rights). Likewise, the PPP contract may allow the assignment of the collection rights for securitisation.18

Further, the implementing regulation provides for the delivery of certificates, securities, negotiable securities or similar to the contractor, according to the progress of the project. The PPP contract may also set forth that the payment obligations represented by said certificates or instruments are negotiable, irrevocable and unconditional, not subject to deductions, reductions or compensations of any kind, to the extent established in the tender and contractual documentation.

The PPP Trust was created by Law 27,431, as amended by Law 27,467. In accordance with such laws, the PPP Trust may be constituted through a single trust or through different individual trusts called ‘individual PPP trusts’. The PPP trust or individual PPP trusts shall be set up as administration, financial, payment and guarantee trusts. The trustee of each PPP trust or individual PPP trusts may set up one or more fiduciary accounts per PPP programme or project. As set forth in the relevant trust agreement, each of these accounts shall constitute a patrimony by appropriation, autonomous and distinct from the other accounts created by the same trustee under the PPP trust or individual PPP trusts.

VII RECENT DECISIONS

Before the enactment of the PPP Contract Law, this instrument was not widely used. Thus, so far, no relevant judicial decisions are publicly available on the matter.

VIII OUTLOOK

During 2018, the first steps in the implementation of the new PPP regime were taken successfully.

The key factors of any PPP regime (such as payments, state guarantees and limitations of state power) are properly reflected in the new law and its implementing decree.

The fact that the basic features of the regime are now set forth in a law (rather than in an executive decree) reinforces the legal certainty needed to attract private investment. In emerging countries with a history of economic crisis and high political risks, explicit legal rules protecting private interests are sine qua non prerequisites for promotion of investments in public infrastructure and services through PPP projects.
Some of the most remarkable provisions of the new PPP regime are those aimed at facilitating access to capital markets by:

- providing sufficient freedom to the parties to design the best contractual structure for the PPP project and its financing needs;
- allowing the transfer of the controlling shareholding to the funders in the case of default of the PPP entity;
- securing prior compensation for the contractor and for the funders in the case of early termination of the PPP contract by the state;
- excluding the application of the administrative contractual laws (and, thus, the state's privileges set forth therein); and
- allowing the submission of contractual disputes to arbitration with or without foreign venues.

In sum, the current PPP regime should promote the entry of new direct foreign investments in relevant sectors (such as energy and public infrastructure), provided the necessary macroeconomic conditions for the development of the PPP projects is reached.
Chapter 2

AUSTRALIA

Andrew Griffiths, Nicholas Carney and Lan Wei

I OVERVIEW

Public-private partnerships (PPPs) play a vital role in the delivery of large-scale infrastructure in Australia. Australian governments have utilised models similar to the PPP model since the 1980s; however, there has been a proliferation of PPP projects in the past decade for the procurement of roads, rail, hospitals, correctional facilities, water treatment infrastructure, and other social and economic infrastructure. A large number of projects are in the pipeline for 2019 and beyond.

PPPs have been characterised by a contracting model in which government entities engage the private sector (typically a consortium) to design, construct, finance, operate and maintain infrastructure, and deliver related services over a concession term.

While many of the benefits of PPPs (e.g., transfer of construction and asset life-cycle risk) can be achieved using other models of procurement, PPPs have unique facets, such as extracting long-term value-for-money through risk transfer to the private sector over the life of the project – from construction through operations to handback.

II THE YEAR IN REVIEW

The year 2018 continued to be a busy period for infrastructure in Australia, with many PPPs in the tender process and the beginning of the tender process for several more.

The New South Wales (NSW) government has undertaken a busy programme of transport Infrastructure projects through a variety of models, including further stages of the WestConnex Motorway, Sydney Metro, Parramatta Light Rail and Regional Rail Project. Ancillary infrastructure for large transport projects has also been a focus area, with a number of over-station development projects procured. In 2018, the Martin Place Metro Project (an unsolicited proposal) achieved financial close, and the NSW government began the procurement process for the Victoria Cross Over-Station Development Project. The Queensland government carried out the request for proposals process for the Cross River Rail project in the second half of 2018. The Cross River Rail project is a tunnels and stations package, with related over-station development covering the Brisbane metropolitan area.

Australian governments at a state and federal level continue to affirm their commitment to the PPP model as well as the infrastructure and construction sector generally. In 2018, the
Victorian government published an updated suite of project document templates for use on availability PPPs (with different templates for linear and social infrastructure) along with guidance notes.

In June 2018, the NSW government published the ‘NSW Government Action Plan: A 10-point commitment to the construction sector’, a statement on the NSW government’s commitment to partner with the private sector on the delivery of a large pipeline of infrastructure projects, and the NSW government’s commitment to be a ‘best in class’ client in the construction industry. The 10 points, which include a commitment to procuring and managing projects in a more collaborative way, adopting a partnership based approach to risk allocation and reducing bid costs, are timely given the heightened level of activity in the infrastructure sector in NSW.

III GENERAL FRAMEWORK

i Types of public-private partnership

The National Public Private Partnership Policy Framework (the National PPP Policy) identifies the core elements of a PPP as: the provision of infrastructure and any related services by the private sector; the use of private investment or financing; and complex and lengthy contracts involving long-term obligations and a sharing of risks and rewards between the private and public sectors.\(^2\)

Further to the above, it is typically the case in Australian PPPs that: the government will enter into a project deed with a private sector counterparty, generally a special purpose vehicle incorporated by a consortium (Project Co);\(^3\) Project Co has sole responsibility for procuring the works and services that fall within the scope of the PPP and will subcontract those obligations to relevant subcontractors, for example, design and construction contractors and facilities management contractors. Usually, Project Co will enter into arrangements with debt financiers and equity investors to fund the project, and upon completion of the relevant infrastructure, the government will pay a service payment covering repayment of debt, return to equity investors and the cost of service provision.

In addition to the core documentation, a variety of side deeds and tripartite deeds will be entered into between the government, financiers and key subcontractors to regulate cure rights.

That said, there continue to be variations in the structure and scope of PPPs on a project-by-project basis to reflect particular requirements of that project.

In recent years, governments have begun to explore service-focused PPP models, particularly in the context of social infrastructure. These structures tend to be operator-led (rather than equity or builder-led) and focus on the underlying services that the government is procuring (e.g., health or housing services) rather than the facility or asset (e.g., the hospital or social housing), which is merely there to facilitate the delivery of those services.

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\(^3\) In practice, a governmental authority or entity will generally be the public sector counterparty to the PPP contractual documentation. However, for simplicity’s sake, the general term ‘government’ has been used to refer to the procuring authority or entity. Further information about which governmental authority is responsible for using a PPP is provided in Section III.ii, ‘The authorities’.

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The NSW Government’s Social and Affordable Housing Fund (SAHF) is an example of a service-focused PPP. SAHF was established in 2016 and has recently completed its second phase of procurement to bring the total number of social and affordable housing dwellings, funded by the SAHF, to 3,400. Governments are exploring these models in the context of social infrastructure because of the long-term recurrent savings they can achieve in areas where service-delivery costs are increasingly rapidly.

The authorities

Under the federal system that exists in Australia, the state and territory governments are responsible for the delivery of core services such as transport, health, education, water and corrective services, and the infrastructure required to deliver them. Specialist teams have been established within the treasury departments of the state and territory governments to develop and oversee the implementation of PPP policy and guidelines by the relevant government; for example, ‘Partnerships Victoria’ has been established by the Victorian government.

While treasury departments and their specialist teams exercise a coordination and supervisory function in respect of PPPs, individual projects are typically procured by the government agency that has responsibility for delivering the service that will be enabled by the infrastructure. For example, the New Grafton Prison was procured by the New South Wales Department of Justice, with New South Wales Treasury providing support in relation to PPP policy and financial matters. Similarly, transport-related PPPs are often implemented by transport and infrastructure agencies within each government – for example, the Melbourne Metro Rail Authority is responsible for the procurement of the Metro Tunnel project.

In a recent development, the Commonwealth government has established the specialist Infrastructure Project and Financing Agency, which will support the Commonwealth in structuring, awarding and implementing infrastructure projects.

States and territories have (to varying degrees) implemented template project documentation to ensure consistency of key-risk allocations across projects within their jurisdiction and reduce bid costs. In 2018, Victoria released an updated suite of project document templates. The creation of template documents has led to significant convergence in the form and risk allocation of the template documentation between the states and territories.

General requirements for PPP contracts

A government agency that is procuring a PPP must have statutory power to do so and must comply with any applicable legislative requirements, such as planning legislation. The statutory power requirement is typically satisfied by broad statutory powers to procure infrastructure and execute contracts rather than specific references to PPPs.

Beyond this, there is limited express legislative or regulatory constraints on the use of PPP contracts in Australia. Governments generally use policies and guidelines to set out the rules around the use of PPPs.

The most important of these is the National PPP Policy referred to above. The National PPP Policy has been endorsed by all Australian state and territory governments and applies to all PPPs that are released to the market. The National PPP Policy identifies projects with a total capital value exceeding $50 million as those likely to have potential to provide value for money using a PPP model.

In some states, the National PPP Policy is supplemented by state-specific PPP guidelines, for example, the NSW PPP Guidelines, which set out state-specific requirements of PPPs.
Australia

The PPP policies also set out financial thresholds and tests that must be applied in deciding whether to utilise a PPP. Financial thresholds vary between each jurisdiction, but a government will usually be required to consider using a PPP model if the value of the project is between A$50 million and A$100 million or over. In respect of tests, a government must consider whether a PPP is in the best interests of the public and delivers value for money. This determination will typically involve the development and assessment of a ‘business case’ for the proposed PPP, which will include a ‘cost-benefit analysis’ as well as comparing the cost of procuring the project as a PPP against the government building, operating, financing and maintaining the relevant infrastructure.

Certain pieces of state, territory and federal legislation will also be applicable to PPPs on a case-by-case basis. Two key pieces of federal legislation with common application to PPPs are the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA Act) and the Competition and Consumer Act 2010 (Cth) (Competition Act). The FATA Act regulates investments in Australian companies and infrastructure projects by foreign-owned entities or foreign governments. The FATA Act sets out thresholds for when a foreign entity or government must seek approval of the Foreign Investment Review Board (FIRB) to proceed with an investment. FIRB applies a broad ‘national interest’ test to determine whether to grant investment approval to the foreign entity or government. The Competition Act aims to promote competition, fair trading and consumer protection in Australia. Bidders participating in PPPs in sectors where there are competition concerns may be required to obtain approval from the Australian Competition and Consumer Commission.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

PPPs are generally awarded through a competitive tender process that seeks to ensure that the government obtains a proposal that maximises value for money.

The release of an invitation for expression of interest (EOI) is generally the first step in the competitive tender process. The EOI phase serves the purpose of establishing the terms and conditions of the procurement and informing the market about the project and the tender process, including timelines and the criteria that will be used to evaluate proposals. The EOI phase also serves to inform the government as to the level of market interest in the project, the capacity and availability of the market to actually deliver the project, and the market’s views on the best means of delivering the project. After receiving EOIs, the government will shortlist a number of parties to proceed to the next stage of the tender process.

ii Requests for proposals and unsolicited proposals

In a traditional PPP procurement the government will issue a request for proposal (RFP) to the bidders shortlisted from the EOI phase. The RFP will typically provide bidders with detailed information about the government’s technical, commercial and legal requirements, as well as more detailed evaluation criteria against which proposals will be assessed.

The government will also generally release draft versions of the contractual documentation that set out the legal terms and conditions upon which the government wishes to undertake the PPP. Bidders have the opportunity to propose departures to the contractual documentation as part of their response to the RFP.

During the RFP phase the government often holds a series of ‘interactive workshops’ with shortlisted bidders. At these workshops, representatives of the government and shortlisted
bidders meet to discuss key aspects of the project and how the project can best be delivered, including, for example, departures to risk allocation proposed by bidders. Ideally, the use of interactive workshops should facilitate the development of proposals that are mutually acceptable to both the government and the shortlisted bidders.

Finally, following evaluation of the proposals, the government may sometimes require some or all shortlisted bidders to submit a ‘best and final offer’ (BAFO). The decision to request a BAFO is purely at the government’s discretion, and it will often ask shortlisted bidders to improve their pricing and withdraw specific departures during the BAFO stage.

Unsolicited or market-led proposals are increasingly common in the Australian market. Every jurisdiction publishes guidelines that set out the process for submitting an unsolicited proposal and the criteria against which proposals are assessed. Although the exact assessment criteria differ between governments, proposals are generally required to demonstrate, among other criteria, uniqueness and value for money. The requirement of uniqueness is because of the fact that in adopting an unsolicited proposal, the government foregoes a competitive tender process. Accordingly, an unsolicited proposal will only be adopted where the proponent has offered a unique offering or proposal – for example, the ability to contribute land that is proximate to the site of the project.

In 2018, the Martin Place Metro Project achieved financial close. This project involved an unsolicited proposal by Macquarie Group to build a new underground train station at Martin Place in Sydney, as well as to purchase the air rights for two commercial and retail towers above the station. This project is a significant example of unsolicited proposals achieving value-for-money outcomes, as taxpayers are expected to bear only a ‘small portion’ of the A$378 million cost of the new station.4

Another notable recent unsolicited proposal was the West Gate Tunnel Project in Victoria, which reached its conclusion in late 2017. The proponent was able to offer the Victorian government a unique proposal by financing the transaction through the extension of its tolling concession on other Victorian toll roads.

iii Evaluation and grant

Following the RFP phase, the government will look to select a preferred bidder. The selection of the preferred bidder is determined through application of the evaluation criteria that accompanied the RFP. The government generally has a broad discretion in formulating the evaluation criteria it applies. For example, the government can elect to have a combination of weighted and unweighted criteria, ‘pass/fail’ criteria, or comparative assessment. Notwithstanding this flexibility, government procurement and probity guidelines and policies and the risk of a process contract having been formed dictate that the government must be consistent in its application of evaluation criteria. Consistency in this context refers to both applying the evaluation criteria in accordance with an evaluation plan or protocol and consistently across bidders.

Once a preferred bidder is selected, the government and the preferred bidder will move to negotiate any remaining departures to the contractual documentation so that it can be finalised and executed. This is generally a more intense and shorter phase as the government is motivated to achieve financial close and avoid prolonged negotiations in circumstances

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where competitive tension has been reduced. In some tenders the government may continue negotiations with two or more preferred bidders in order to maintain competitive tension; however, this is uncommon.

The government is generally not obliged to select a preferred bidder or award a contract. This is because the terms and conditions of most tenders will preserve the right of the government to elect to abandon the process in its absolute discretion. Situations where tenders have been abandoned include changes of government and changes in economic conditions.

V THE CONTRACT

i Payment

In recent years, infrastructure in Australia has been generally procured on an availability payment model. Under an availability payment model:

a Project Co will fund construction costs typically through debt and equity funding until the construction is complete and services commence;

b during the operations phase, Project Co will be paid a monthly or quarterly services payment to cover the costs of service provision, repayment of debt funding and return to equity investors. The service payment will be subject to abatement for failure to meet certain requirements and key performance indicators (KPIs). Such KPIs may relate to the level of availability, quality of services performed and other standards of performance that are driven by the policy objectives of the government (for example, on the New Grafton Correctional Centre PPP project, KPIs are calibrated to incentivise Project Co to minimise rates of recidivism). The extent to which service payments may be abated varies depending on jurisdiction; and

c the government may on certain projects make capital contributions during the construction phase or a contribution to pay down a portion of Project Co’s debt upon the project becoming operational and achieving certain conditions reflecting a steady state of operation.

Traditionally, economic infrastructure (such as toll roads and tunnels) had been procured on a user-charge format where Project Co had been entitled to collect tolling revenue from the ultimate user of the infrastructure in order to cover its costs of service provision, repayment of debt funding and return to equity investors. In a number of cases, actual traffic volumes (and therefore toll revenues) fell significantly short of modelled traffic volumes leading to the failure of the projects. Accordingly, there has been limited appetite over the past decade from private-sector financiers and equity investors for this payment model. There have, however, recently been a number of unsolicited proposals that have resulted in at least partial use of a user-charge payment structure.

ii State guarantees

Australian federal, state and territory governments have typically maintained credit ratings sufficient to not require financial guarantees for PPP projects. Further scrutiny may be required when the government counterparty is not a significant department or is some instrumentality of government. However, other than in NSW, it is unusual for any guarantee to be provided in respect of a PPP.
NSW has specific legislation governing the giving of government guarantees. Until
2018, this was legislated under the Public Authorities (Financial Arrangements) Act 1987
(PAFA Act), and it was common practice for PAFA Act guarantees to be provided on PPPs
in NSW. In 2018, the PAFA Act was replaced by the Government Sector Finance Act (2018)
(GSF Act), which provides for a substantially similar framework under which the state of
NSW may guarantee contracts entered into by government agencies, known under the GSF
Act as GSF Agencies.

iii Distribution of risk

A key attraction of the PPP model is the ability for government to allocate to Project Co the
risks it believes may be more efficiently priced or managed by the private sector.

The National PPP Policy sets out guidance in relation to typical allocation of risks in
PPPs. This is supplemented and adapted by various guidance issued by the state and territory
governments in relation to their particular approach to PPPs. The allocation of risk may also
vary where there are particular facets of a PPP that lend themselves to an adjustment of the
typical risk allocation.

The following table sets out certain key risks of a PPP and how they will be typically
allocated.

<table>
<thead>
<tr>
<th>Risk</th>
<th>Government</th>
<th>Project Co</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning</td>
<td>Y</td>
<td>Y</td>
<td>Risk of approval based on reference design allocated to government. Changes required to accommodate private-sector delivery solution allocated to Project Co.</td>
</tr>
<tr>
<td>Other approvals</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Land acquisition</td>
<td>Y</td>
<td></td>
<td>Other than in respect of extra land required to accommodate Project Co delivery solution.</td>
</tr>
<tr>
<td>Design risk</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Construction risk</td>
<td>Y</td>
<td></td>
<td>Subject to some limited project-specific 'extension events'.</td>
</tr>
<tr>
<td>Financing risk</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Completion risk</td>
<td>Y</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Site conditions</td>
<td>Y</td>
<td>Y</td>
<td>Generally allocated to Project Co although common to include some risk sharing in respect of contamination.</td>
</tr>
<tr>
<td>Operational performance</td>
<td>Y</td>
<td></td>
<td>Subject to some limited project specific ‘relief events’.</td>
</tr>
<tr>
<td>Maintenance/ life cycle</td>
<td>Y</td>
<td></td>
<td>Subject to some limited project specific ‘relief events’. Some road PPPs may include risk-sharing regimes in relation to maintenance costs where traffic thresholds are exceeded.</td>
</tr>
<tr>
<td>Demand risk</td>
<td>Y</td>
<td></td>
<td>See above in relation to the prevalence of availability-based PPPs.</td>
</tr>
<tr>
<td>Change in law</td>
<td>Y</td>
<td>Y</td>
<td>Change in law relief for Project Co is typically limited to a narrow category of project-specific changes in law during the construction phase. During the operations phase broader change in law relief is typically available to Project Co, although it is often subject to financial thresholds.</td>
</tr>
<tr>
<td>Inflation</td>
<td>Y</td>
<td>Y</td>
<td>Construction cost inflation risk is allocated to Project Co. The service payment during the operational phase will typically be indexed and certain services may be reviewable. Project Co takes risk of adequacy of contractual indexation and potential for certain reviewable services to be replaced.</td>
</tr>
<tr>
<td>Force majeure disruption</td>
<td>Y</td>
<td>Y</td>
<td>Risk generally shared – the specific sharing varies from project to project.</td>
</tr>
</tbody>
</table>
iv Adjustment and revision
Australian PPPs typically include a detailed modification and change compensation regime under which the parties agree the principles for allocating and valuing the time, cost and performance impacts of modifications to the project.

The cost of such changes can be calculated using a variety of methods, including reference to actual costs, pre-agreed margins, schedules of rates and the base case financial model. Most of the time, changes that are processed through the modifications regime do not require an amendment to the underlying project contract.

It is increasingly common to see modification regimes that also include mechanics to implement certain pre-agreed changes that were anticipated at execution but that may either require further development or approvals or may be contingent on the occurrence of other events.

There has been a trend over the past few years to include detailed augmentation regimes in rail PPP contracts to allow for the extension of projects. Augmentations have been undertaken on the Gold Coast Rapid Transit PPP project and are anticipated on the Sydney Metro NorthWest OTS PPP project and the Australian Capital Territory Capital Metro PPP project.

v Ownership of underlying assets
Most PPPs in Australia provide for the government to own the asset from the beginning of the operating term.

At the conclusion of the operating term there will typically be a handover process consisting of an asset condition audit and rectification process to ensure: that the government receives an asset that is in the contractually mandated condition; and the smooth transition of operations and maintenance responsibility.

vi Early termination
Australian PPPs usually contain a detailed regime for default (and related cure rights) and termination. Such regimes will invariably be asymmetrical, with the government counterparty enjoying the benefit of far more extensive rights with respect to default and termination than Project Co.

Typically Project Co’s termination rights (if any) will be limited to protracted force majeure disruption to the project. The default and termination regimes will often codify the rights of the parties to the exclusion of the parties’ rights at general law.

Default by Project Co
A cascading approach is commonly adopted for Project Co default:

a mere breaches of the contractual documentation may be dealt with by notification and remedy period;
b more serious defaults (often termed ‘major defaults’) will typically give rise to a cure or prevention regime; and
c the most serious defaults will give rise to immediate default termination rights.

A separate cure regime for financiers where Project Co has failed to cure usually applies through the financiers’ direct agreement with the government counterparty.
Compensation to Project Co for termination for default will usually be calculated based on the fair market value of the project (valued either through re-tender or by an independent valuer if there is no liquid market for the project).

**Termination for convenience**

Most PPP contracts include an ability for the government counterparty to terminate for convenience. It is extremely unusual for a government counterparty to terminate for convenience; however, it is a typical inclusion so that government’s operational discretion is not fettered.

Compensation to Project Co for termination for convenience will typically be on a more generous basis than for other termination scenarios and may, in some projects, include an amount to compensate Project Co for lost future profits.

**Termination for neutral events**

Most PPP contracts include provision to terminate for the occurrence of protracted *force majeure* or uninsurable events that materially disrupt the project.

Compensation to Project Co for termination for a neutral event varies; however, it will typically be sufficient to cover debt repayment, and will in some projects include partial compensation to equity investors.

### VI  FINANCE

Australian PPPs are usually financed through a combination of bank debt and equity investment, although there has been increasing speculation in relation to the return of bond financing to the Australian PPP market. In this regard, it was recently announced that the Victorian Outer Suburban Arterial Roads – Western Package PPP project was financed by a mix of bond, debt and equity financing.

In general, the gearing of debt to equity will depend on the particular risk attributable to the project.

As noted above, financiers will typically have entered into a contract with the government counterparty to regulate cure rights where termination rights have accrued in relation to the project.

### VII  RECENT DECISIONS

There were a number of significant disputes on PPPs in the delivery phase during 2018.

In particular, in NSW there has been a well-publicised dispute between Transport for NSW and the builder of the Sydney Light Rail PPP Project, Acciona. Acciona has made a number of claims directly against Transport for NSW rather than against the project vehicle. This has led to a tightening by procuring authorities of provisions regulating this type of direct claim and the subject matter of the claim across projects currently in procurement.
VIII OUTLOOK

There continues to be strong demand for infrastructure in Australia and we expect 2019 to continue to be a busy year for those involved in the PPP market. Looking around the states and territories:

a. in NSW, demand for infrastructure continues unabated and we expect current strong levels of activity to continue. In particular, Western Harbour Tunnel and Beaches Link Tunnel and further stages of the Sydney Metro project are expected to commence the RFP stage in early 2019;

b. Victoria is committed to bringing to market the North East Link PPP, further packages of its Outer Suburban Arterial Roads, and a programme of rail projects;

c. in Queensland, the Australian Rail Track Corporation has committed to commence the Toowoomba to Kagaru section of the Inland Rail freight corridor project; and

d. the Australian Capital Territory is formulating its business case for the augmentation of the ACT Capital Metro PPP project.

More broadly, we expect the following trends to continue to develop in 2019:

a. unsolicited proposals: namely, private-sector parties to continue to make use of the states and territories’ unsolicited proposal regimes to bring innovative solutions to infrastructure gaps;

b. bond finance: an increasing consideration by private-sector counterparties of bond-financing as an option for PPPs now that this has re-emerged as a viable and competitive option for some projects;

c. demand risk: more consideration of the private sector’s ability to take some appropriately bounded demand risk in PPP projects; and

d. service-focused PPPs: experimentation by government with service-focused PPP models such as NSW’s Social and Affordable Housing Fund Phase 2 (as discussed in Section III(i)), where the government is focused on service provision (as opposed to just capital asset development).
I OVERVIEW

While the development of infrastructure projects and the provision in general of public services in Belgium in the form of public-private partnerships (PPPs) is not new, its importance in government policy has grown rapidly over the past two decades. Historical underinvestment in qualitative infrastructure, the demand for better quality projects to be realised more quickly for the same price, and, importantly, a lack of available public funding necessitating spreading out investment needs over time, have all made for the strong revival of PPP projects in recent years. This has largely occurred at a federal level but to an even greater extent in the Flemish Region, where PPPs were one of the pillars of the government’s investment policy during the 2009–2014 administration. However, the evolving views on European System of Accounts (ESA)-conformity inspired the Flemish government to adopt a more reserved position during the 2014–2019 administration.

At the federal level, prominent examples of large PPP projects include the development of a new railway connection between the city of Brussels and the national airport (the Diabolo Project, completed in 2012), the construction of a tunnel underneath the river Schelde and extension of the R2 freeway (the Liefkenshoektunnel, completed in 1991), and the construction of a prison complex in Haren (Brussels), which will become the largest prison complex in Belgium.

In the Flemish Region, major investments were made in the creation of the Flemish PPP Knowledge Centre to further boost the introduction and implementation of PPPs. As a result, a large number of PPPs have been tendered in various sectors, including transport and related infrastructure projects, renewable energy infrastructure and social infrastructure.

So far, PPPs have been less of a factor in the Brussels and Walloon Regions. Nevertheless, some large investments have been made through PPP projects in these regions, including transport, social infrastructure and, more recently, shopping malls comprising leisure facilities and apartments.

1 Christel Van den Eynden and Frank Judo are partners, and Jan Vreys, Maurits Arnauw and Stefania Sacuiu are associates at Liedekerke Wolters Waelbroeck Kirkpatrick.

II THE YEAR IN REVIEW

i Major awards granted
In 2018, the Haren Prison complex PPP project reached financial close, and the construction of a congress centre and hostel in the northern part of Brussels (NEO 2) was awarded to Cofinimmo.

In the Flemish Region, in the second quarter of 2019, the award concerning the design, build, finance and maintain (DBFM) project for a second cluster of eight bridges over the Albert Canal will be granted (and contractual close will take place around that date) to one of the parties selected in February 2018.

In the Walloon Region, the new tramline in Liège was awarded to a consortium Tram’Ardent (Colas, DIF and CAF), after Eurostat decided the project complied with the ESA rules.

ii Procedures initiated
Procedures have been initiated in respect of the construction of the administrative centre of Verviers, the installation of LED street lights across the Walloon motorway network, the refurbishment of the Belgian military airbase in Melsbroek and another batch of the school cluster infrastructure project, referred to as the Schools of Tomorrow DBFM project. By July 2018, the Schools of Tomorrow project resulted in 182 pre-contracts (heads of terms) and 165 individual DBFM agreements. One hundred and fifty-seven of the Schools of Tomorrow DBFM projects are in the maintenance phase, whereas nine projects are in the building phase and 17 projects are currently in the design phase. According to a notice circulated by the Minister-President of Flanders in October 2018, the intention is to have 14 projects signed and five projects delivered in 2019.

iii Significant legal changes
In 2018, no significant legal changes occurred to the legal framework, given the major overhaul that took place in 2016 and 2017. The Belgian legislation on public procurement was indeed amended in 2016 and 2017 pursuant to the implementation of the Public Procurement Directives 2014/24 and 2014/25 and the Concession Contract Directive 2014/23. The Concession Agreement Law was adopted 17 June 2016. These new rules entered into force on 30 June 2017 and apply to all public procurement contracts or contracts that have been published or, in the absence of any publication requirements, for which from that date onwards an invitation to participate has been sent.

A Royal Decree of 15 April 2018 amended the above-mentioned new rules only on technical issues.

III GENERAL FRAMEWORK

i Types of public-private partnership
PPPs in Belgium can take many forms. Because of the complexity of its political and administrative context, Belgium does not really have a unified policy or a true Belgian PPP model. A basic distinction is that between ‘contractual’ PPPs and ‘participative’ PPPs.

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3 The Agency for Infrastructure in Education, €550 million (www.agion.be).
the contractual variant still bears a resemblance to an employer–contractor relationship, the participative variant implies the setting-up of a special purpose vehicle (SPV) by both the authority and the private partner. Combinations of both variants are also possible, but the participative variant has recently come under pressure following the entry into force of the ESA 2010 Regulation.

Various contractual structures are used, including a more traditional (more basic) contract setting forth specific performance criteria with limited PPP characteristics; and a more integrated contract approach with either a design and build contract (DB), a design, build and finance contract (DBF) or a design, build, finance and maintain contract (DBFM), possibly combined with an operating contract (DBFM(O)). Another model introduced in Belgium is DBM+F, whereby the DBM and finance tenders are split at the bidding phase and merged afterwards.

In other structures, long-term lease agreements, building rights agreements, concession contracts, other *sui generis* contracts or a combination thereof are used.

ii The authorities

Each public body, whether at the national, regional or local level, can initiate a PPP. No previous authorisation is required, except in the Flemish Region, where the Flemish PPP Knowledge Centre has to give its ‘advice’ before a project of a Flemish public body can formally be accepted as a Flemish PPP.

The responsibility for structuring, awarding and implementing PPPs remains a task of the relevant administration, but the supervising authorities (at the relevant regional, community or national level, as applicable) can always repeal or reform the decisions of the lower public bodies.

The Institute of National Accounts (the Institute) gives advisory opinions on PPP projects. The Institute is a government body at the federal level, charged with a review of the debt burden of the public sector, which assesses the project’s impact on the government budget and debt position, in particular with reference to the ESA rules, to the Manual on Government Deficit and Debt 2016 (MGDD) and to the *Guide to the Statistical Treatment of PPPs*. In 2018, the Institute issued opinions on five PPP projects (two at the federal level, one at the level of the Flemish Region and two at the level of the Brussels Metropolitan Region).

In Flanders, the Flemish PPP Knowledge Centre advises and guides the PPP policy of all public bodies and supports PPP projects in the Flemish Region. It assumes an advisory role (both in general and with regard to the specific project) and collects and shares PPP knowledge, experience and models with all parties involved. It has contributed substantively to standardising the contractual approach to PPPs in the Flemish Region.

There is no equivalent public body at federal level or in the Brussels Region.

In the Walloon Region, the government has established the Financial Reporting Cell, an entity of the Walloon administration that provides advice on PPPs for the Walloon Region, the French Community and for related public bodies before the adoption of a decision to implement PPP projects. It also has a role in the follow-up and assists these entities with the implementation of a PPP.

The Court of Audit exercises external scrutiny of the budgetary, accounting and financial operations of the federal state, the communities, the regions, and the public service.

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4 Article 4 of the Decree of the Flemish Region of 18 July 2003 on public-private cooperation.
institutions depending upon them. As part of its audit, it also reviews PPP projects involving any of the aforementioned institutions, for example, the maintenance of prisons by means of a public-private partnership.5

iii General requirements for PPP contracts

There are no specific legal constraints or requirements that apply to all PPPs. General public procurement rules (as interpreted by case law) or concession contracts rules apply.6,7 The Flemish and Walloon Regions have also adopted additional regulations with a view to facilitating PPPs in their respective regions.8

Public contracts, including PPP contracts, remain equally subject to general administrative law9 and the Civil Code, as well as to more specific legislation, such as the Companies Code, tax legislation and insurance legislation, except to the extent explicitly provided otherwise.

From a contractual point of view, the competent authority is free to organise its projects as it sees fit,10 no value threshold applies and, except for traditional services and missions of the state, such as the police and the army, all types of public works, supplies and services can be contracted through a PPP structure.

Two important modifications included in the 2016 Public Tenders Law specifically affect the general requirements that the contracting authority must observe while concluding PPP contracts. First, the contracting authorities must apply, on top of the principles of equality and of non-discrimination, the principle of proportionality. For example, this implies that minor irregularities committed by a candidate regarding facultative exclusion grounds can justify his or her exclusion only in extraordinary circumstances. Second, environmental standards play a more prominent role. Indeed, authorities are able to take into account environmental labels during the bidding and award procedure and the failure to respect such environmental obligation by the contractor or one of his or her subcontractors during the execution of the contract may be considered as a breach of contract and could, therefore, lead to the termination of the contract.

6 The Law applies for concession of works and only for concession of services of which the value is equal or greater than €5.548 million.
7 See Section IV with respect to the rules applicable to the award of contracts.
8 The rules applicable in the Flemish Region concern the various PPP projects, while the rules applicable in the Walloon Region and the French Community are sector specific. For instance, the Decree of the Flemish Region of 18 July 2003 concerning public-private partnerships, by means of which certain constraints in the public procurement rules were addressed, such as, under specific conditions, the participation of public bodies in PPP projects and the granting of security rights on public domain, the Ministerial Decree of the Walloon Government concerning the establishment of a reporting cell for alternative financing and financial statements of independent public authorities (Official Gazette, 13 April 2005) and the Ministerial Decree of the French Community regarding the establishment of a reporting cell for alternative financing and financial statements of independent public authorities (Official Gazette, 5 April 2006).
9 Including the principles of equality upon award, transparency, due motivation, fair play, etc.
10 This being said, the Flemish PPP Knowledge Centre evaluates whether a proposed project is suitable to be structured as a PPP and the Walloon Financial Reporting Cell examines the legal, financial and accounting aspects of a contemplated PPP project.
IV  BIDDING AND AWARD PROCEDURE

To the extent the PPP contract falls within the scope of the Belgian public procurement rules, the general public procurement rules apply. In accordance with the EU Public Procurement Directives, Belgian public procurement rules cover all contracts in writing for consideration between a contractor, a supplier or a service provider and a public purchaser for the undertaking of works, supplies and services. The Concession Contracts rules will apply if the economic operators receive the right to exploit the works or services that are the subject of the contract as consideration and the award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both.

Belgian public procurement legislation distinguishes between the following types of procurement procedures:

- **open procedure**: all economic operators can participate;
- **restricted procedure**: only selected operators can participate;
- **negotiated procedure**;
- **competitive dialogue**; and
- **innovation partnership**.

The negotiated procedure with prior notification, based on Article 26.4(a)(iii), of the Public Procurement Directive 2014/24/EC, was the procedure most commonly used to award DBFM contracts. It was also often applied to award concessions for public works, but less for build and finance contracts. More recently, however, some PPP projects have been awarded under the competitive dialogue procedure. The conditions for using the negotiated procedure and the competitive dialogue are those provided in the Public Procurement Directives. The awarding authority must substantiate its choice for one procedure over the other. According to the Directive 2014/23, the public authorities have the freedom to organise the procedure leading to the choice of concessionaire, with respect to the principles of equal treatment, non-discrimination and transparency.

It is important to note that the new legal regime brought some minor changes as to award procedures for PPPs. As competitive dialogue has proven itself to be effective in complex projects, European and national legislators wished to further enhance its use. Hence, the 2016 Public Tenders Law considerably widens the cases in which contracting authorities are authorised to make use of this procedure. Competitive dialogue is, therefore, subject to the same conditions as for the negotiated procedure.

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12 Contracting authorities may award public contracts by negotiated procedure, after publication of a contract notice, in the following cases: ‘the contract cannot be awarded without prior negotiations because of specific circumstances related to the nature, the complexity or the legal and financial make-up or because of the risks attaching to them.’
13 This procedure was used for projects including the prison complex in Haren, the Bus Depots Cluster II, the Project N60 Ronse and the cluster of school infrastructure projects in the Flemish Region.
14 This procedure was used, among others, for a complex public parking in Liège, a rest home in Moerbeke and typically also for gas stations along the highway such as the concession in Nazareth.
15 For example, for the Belgian Embassy in Kinshasa, social housing and the Design Centre in Liège.
16 Such as the Neo project, the tram route in Liège and the ‘Ecoquartier de Genappe’.
In a similar manner, ‘innovation partnership’ has been set up in the law as a new award-bidding procedure. Therefore, when a public authority’s needs do not meet the existing market, it can decide to conclude an innovation partnership in order to develop products, services or pioneering work, which can later be purchased by the same authorities. The 2016 Public Tenders Law now gathers in one award bidding procedure two formerly distinct procedures of development and purchase.

Additionally, even if a contracting authority is still authorised to start a bidding procedure only on the basis of the price criterion, there is no longer be a formal distinction between the quote request and adjudication; the general criterion of the ‘most advantageous offer’ will be the applicable criterion in all tendering procedures.

i  Expressions of interest

The invitation of interested parties and the assessment of expressions of interest are governed by the public procurement or concession contract rules, provided that the project falls within their scope. All public contracts, whatever their value, must be advertised in advance in the Belgian Public Tender Bulletin, which is an annex to the Belgian Official Gazette. If contracts meet the European threshold level, a notice should also be published in the Official Journal. The negotiated procedure with prior notification and the competitive dialogue are restricted procedures, which means that only the preselected tenders are invited to submit an offer. As long as the principles of transparency and equal treatment are respected, the tendering authority is allowed to contact the candidates to ask for clarification or to complete their expression of interest.

For PPP contracts that fall outside the scope of the Belgian public procurement rules, such as land agreements and service concessions under €5.448 million, appropriate advertising is also required. In the absence of any specific rules, the awarding of such contracts is subject to the basic standards regarding advertising and contract award that are mentioned in the European Commission’s Communicative Interpretation on the Community Law. The contracting entities are responsible for deciding the most appropriate medium for advertising their contracts. Other adequate and commonly used means of publication include the internet, national journals specialising in public procurement announcements, newspapers with national or regional coverage and specialist publications. The awarding authority can set criteria for qualitative selection, again, as long as the principles of transparency and equal treatment are respected. It is also allowed to contact the tenderers to ask for clarification or to complete their expression of interest, under the same conditions.

ii  Requests for proposals and unsolicited proposals

The use of e-tendering to solicit or submit a bid is permitted, required or prohibited, depending on the public procuring body involved. The federal authorities have developed IT tools to process public contracts electronically, which are also made available to the authorities of the other levels.

17 Except for concessions of services under €5.448 million.
18 ECJ, 14 November 2013, C-221/12, Belgacom; Council of State, 26 May 2014, No. 227.535, Belgacom.
19 Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02), Official Journal, 1 August 2006, C-179.
If a bidder has not been selected during the selection phase, he or she cannot submit an offer, except together with another bidder who has been selected.

With the 2016 Bill, however, the exclusion of a bidder is no longer be irrevocable. Bidders excluded during the selection phase are indeed able to take ‘corrective measures’ to correct the irregularities of their offer.

iii Evaluation and grant
In the context of the negotiated procedure with prior notification and the competitive dialogue, the contracting authority may provide that the procedure is conducted in stages, by applying the award criteria in the contract documents so as to reduce the number of tenders to be negotiated. Bidders are invited to submit a second offer or a best and final offer. The same procedure can be organised for the concessions and the contracts that fall outside the scope of the public procurement rules.

During the negotiation procedure, as long as the object of the contract remains the same and the principles of transparency and equal treatment are respected, the offers can be amended, except for the best and final offers. There are no specific legal provisions regarding changes at the preferred bidder stage. It is, however, generally accepted that ‘substantial’ changes to the contract are no longer possible at that stage.

During the competitive dialogue, the alternatives proposed by the candidates can be amended as long as the bidders do not deviate from the ‘essential’ elements mentioned in the contract notice and contract documents. Also, once they have been submitted, the essential elements of the final offers cannot be modified. After the selection of the most economically advantageous tender, only minor changes to this offer are still allowed.

On the basis of the award criteria, the contracting authority shall designate a preferred bidder. Normally, but not always, the other candidates are placed in a ‘waiting room’ in case the negotiations with the preferred bidder fail, which allows the contracting authority to designate another preferred bidder without having to organise a new tendering procedure.

Once awarded, all awards of contracts meeting the European threshold levels are to be published in both the Public Tender Bulletin and the Official Journal, with the exception of contracts that fall outside the scope of the public procurement rules.

V THE CONTRACT
i Payment
The payment mechanism is modelled in such a way that it allows the private partner to cover its costs and realise a ‘normal’ return on investment, while simultaneously providing for the desired quality at the lowest possible price.

In the majority of Belgian DBFM contracts, the payment consists of periodic payments made by the authority, usually starting at provisional acceptance, namely, the availability date of the entire assets or works, or a specific part thereof. Those payments are intended to cover the design, build, finance and maintenance and their amount is fixed. However, as a rule, the amount of the payment for the facility services, if any, is variable and takes into account the volume and frequency of the services to be provided (number of meals, number of users, etc.). To ensure that the private partner offers the required quality, a penalty point

20 For the prison complex to be built in Haren, the other candidates were not put in the waiting room.
Belgium

system typically applies and the payments to be made are abated with availability deductions or performance deductions. Sometimes, a bonus system is provided, for instance, in case of early availability.

A DB contract will typically involve milestone payments, namely, one-off payments usually made upon the provisional acceptance of (a specific part of) the assets or works. A combination of both payment mechanisms is also possible and will largely depend on the budget that is available to the contracting authority.

Payments in the context of other contract forms, such as a long-term lease agreement or a buildings rights agreement may be structured differently and may, for instance, merely consist of an indemnity corresponding to the value of the works upon termination.

ii State guarantees

State guarantees play an important role in the financing of PPP projects as they allow the private partner to optimise the financial part of its offer since the risk premium that the debt providers charge will decrease.

State guarantees have been institutionalised in the Flemish Region with the adoption of the Decree of the Flemish Region of 7 May 2004 relating to provisions with respect to cash, debt and guarantee management of the Flemish Region;\(^\text{21}\) the value of this guarantee is somewhat limited since it only applies to the principal amounts (while interests are capped) and can only be called upon in the last resort (i.e., after all personal and real securities given by the debtor have been exhausted).\(^\text{22}\) An alternative state guarantee mechanism was offered by the Decree of the Flemish Region of 24 April 2009 relating to the refinancing guarantee and the continued payment guarantee with respect to the availability payments and certain termination payments in the framework of certain Flemish PPP projects of the Flemish Transport Company (De Lijn).\(^\text{23}\) This Decree has now expired in relation to new projects as it only applies in respect of infrastructure works for De Lijn that have been publicly tendered or will be publicly tendered within three years following the entry into force of the Decree. This Decree cannot be applied together with the Decree of the Flemish Region of 7 May 2004. Both are mutually exclusive.

Often, depending on the contracting authority, a combination of ad hoc 'guarantees' is offered consisting of, for example, subsidy agreements,\(^\text{24}\) reservations in the budget and guaranteed loan agreements.\(^\text{25}\)

\(^{21}\) Official Gazette, 16 July 2004. The guarantee was, for instance, already applied in the context of the Bus Depots Cluster I PPP project of De Lijn.
\(^{22}\) Article 6, Section 4 of the Decree of the Flemish Region of 7 May 2004.
\(^{23}\) Official Gazette, 4 June 2009. This guarantee was already applied, among others, in the context of the Bus Depots Cluster I and Cluster II PPP projects of De Lijn.
\(^{24}\) Such as the Ministerial Decree of the Walloon Government of 24 November 2005 concerning the grant by the Walloon Housing Company of assistance to public service housing companies to promote the installation, development and implementation of PPPs (Official Gazette, 16 December 2005); the Ministerial Decree of the Walloon Government of 19 June 2008 concerning the grant to real estate operators of a subsidy to encourage the installation, development and execution of partnership operations (in the social house sector) (Official Gazette, 14 July 2008) and Article 404, 14° and 1490 of the Walloon Code of Social Action and Health (Rest Homes) (Official Gazette, 30 August 2013).
\(^{25}\) Such as the Decree of the French Community of 24 November 2008 on exceptional financing programmes for renovation, construction, reconstruction or extension of school buildings through public-private partnerships (Official Gazette, 3 March 2009).
As stated, the amount and the nature of the state guarantee that is provided may impact the ESA neutrality of a project.

### iii Distribution of risk

Although the 2016 Public Procurement or Concession Contracts Rules generally apply to PPP projects, typically the (major) Belgian PPP projects will have detailed risk allocation provisions in the project contracts, which will specifically exclude the application of the 2016 Public Procurement/Concession Contracts Rules in many respects.

A typical PPP contract will distinguish: ‘risks of the authority’ (i.e., risks borne by the contracting authority); *force majeure* events (i.e., risks more or less equally borne by the contracting authority and the private partner); and all other risks (i.e., risks borne by the private partner). The risks of the authority and the *force majeure* events are, generally, exhaustively listed in the DBFM agreement (or similar).

Generally speaking, the exact allocation of risks will differ from project to project and is subject to, among others, the cost allocation, the nature of the project or the existence of special circumstances, but there are signs of a market standard trend towards uniformity. The current preoccupation with the requirement of ESA neutrality has led to private partners having to accept a shift of risks.

In PPP projects with a shorter duration, or in case of ancillary works to the ‘main’ DBFM agreement (for example, in a separate DB or DBF agreement), the risk allocation principles set out in the 2016 Public Procurement Rules are more often applied without providing exceptions. In such cases, if the private partner encounters delays or suffers a prejudice resulting from circumstances attributable to the contracting authority or its personnel, the private partner is entitled to apply for an extension of the execution periods, a revision or termination of the contract or damages.

### iv Adjustment and revision

Any amendments to the PPP contract during its term should respect the transparency of procedures and the equal treatment of bidders, meaning that the amendments should not come down to a renegotiation of the essential terms of that contract.

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26 See footnote 12.

27 See Article 9 of the Royal Decree of 14 January 2013 on public procurement rules.

28 Authority defaults, interruption of the works due to the authority (or any affiliated persons), third-party interference (for instance, protests, vandalism, social conflicts), permitting issues, loss of ESA neutrality and a change in relevant law are generally deemed to be at the risk of the contracting authority; and natural disasters, war, terrorism, radioactive contamination, etc., blockades or embargoes in Belgium or the European Union and other circumstances of an abnormal nature resulting in a party being unable to fulfil all its obligations, insofar these circumstances could not reasonably be foreseen or were unavoidable are generally deemed *force majeure* events.

29 See Section II.

30 Article 38/5 of the Royal Decree of 14 January 2013 on public procurement rules; Article 68 of the Royal Decree of 25 June 2017 on the award and execution of concession contracts.
In PPPs using the DBFM model, the procedure for amendments, as well as the financial consequences of those amendments, are addressed in the contract. The private partner will only be compensated for additional costs in the case of amendments upon request of the authority or owing to a relevant change in law.

In contractual structures subject to the 2016 Public Procurement Rules (DB agreement, long-term lease agreement, etc.) a revision of the contract will only be possible upon request of the private partner if it suffers a very important prejudice, while the contracting authority can request such revision if the private partner has realised a substantial advantage pursuant to external factors.\(^{31}\)

Price revision constitutes a special case of revision and is built into the contract to allow flexibility and to lower the price; the price revision mechanism usually works both ways and is normally realised through a formula based upon indexation. Price revision is subject to some conditions.\(^{32}\) Often, it is limited to the maintenance and operation costs as the design and construction period is relatively short. To ensure that the services performed are always remunerated at market prices, a benchmarking mechanism or market testing mechanism is sometimes built into the contract.

Such contractual revision principle has been especially established in the 2016 Rules, which state that the execution provisions organise a ‘mechanism of revision for the cases wherein the contractual equilibrium is breached due to unforeseen circumstances’.

v Ownership of underlying assets

Whether the authority or the private partner is the owner of the underlying assets will depend on the type of contract that is entered into.

Typically, in cases where the PPP project is structured on the basis of a long-term lease agreement or a building rights agreement, the private partner will temporarily be the owner of the infrastructure. At the end of the contract, and in some cases of early termination, the private partner will be entitled to compensation by the authority, in principle, on an asset market value basis at the time of termination. Special requirements with respect to the condition of the assets upon transfer may apply.

If the private partner erects the constructions on the land owned by the authority on the basis of a *sui generis* right, the ownership will automatically vest with the authority as the works progress through accession. In a DBFM Agreement, the private partner will remain responsible for the maintenance of the asset, typically for 10 to 30 years. Although the authority will be the owner of the asset, the responsibility for the asset will only transfer to it upon the expiration of the term of the DBFM agreement. Special requirements with respect to the condition of the assets upon expiration of the contract will apply.

In a DB agreement, typically a one or two-year guarantee period after provisional acceptance will apply during which the private partner has to execute the works necessary to maintain the good condition of the infrastructure, make repairs and replace parts as necessary, allowing for the use of the infrastructure in accordance with the output specifications.

Granting of security over the assets will only be possible if the contractual framework allows for a transfer of real estate rights, which is normally not the case in DBFM structures, but is more often the case in other PPP structures.

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\(^{31}\) Articles 38/9 and 38/10 of the Royal Decree of 14 January 2013 on public procurement rules.

\(^{32}\) ibid., Article 38/7.
vi Early termination

In PPP structures governed by public procurement rules, the provisions on early termination set out in Article 38 and following of the Royal Decree of 14 January 2013 on Public Procurement Rules will, in principle, apply, allowing either party encountering a substantial delay or suffering a substantial prejudice as a result of an omission, delay or other facts attributable to the other party, to request the termination of the agreement, damages or both. In addition, the private partner can also terminate the agreement in the case of force majeure.33 However, in the majority of PPP projects in Belgium, the parties will negotiate specific termination clauses. Typically, in DBFM agreements, the following early termination clauses can be found:

a Generally, the contract will contain an exhaustive list of events, which, upon their occurrence, allow the contracting authority to ‘immediately’ terminate the contract, such as not reaching financial close, bankruptcy of the private partner or poor performance. In addition, the contracting authority will also be able to terminate the project agreement in the case of a default of the private partner that is not remedied within a reasonable period of time. In the case of termination, the contracting authority will generally compensate the private partner for the works that have already been carried out after deduction of certain amounts.34

b The private partner will be entitled to terminate the project agreement in the case of serious shortcomings by the contracting authority with regard to its obligations under the contract, such as the repeated failure to pay the availability payments. The private partner will typically be compensated up to the outstanding amount under the financing agreements (including any breakage costs) and will also receive a (partial) compensation for the loss of profits.

c Where a force majeure event or a risk of the authority (see footnote 30) occurs and the contract cannot be pursued, usually either party will be entitled to terminate the agreement with immediate effect. Owing to the nature of this cause for termination, both parties will bear some of the financial consequences of the termination.

d In the case of voluntary termination by the contracting authority, whether or not specifically provided for by the contract, the private partner will usually be compensated as if a default on the part of the authority had occurred.

Finally, PPPs that fall outside the scope of public procurement rules are subject to general rules of contract law unless the parties mutually agree upon termination provisions.

VI FINANCE

Usually, PPPs are financed through long-term debt ranging from 70–90 per cent of the total investment cost, while the remaining part is financed through equity (shareholder loans, equity bridge facilities, etc.).

Market practice reveals that, especially for larger projects (above €200 million), sponsors and lenders are looking for alternative solutions with medium-term debt to be refinanced,

33 Insofar as this force majeure event results in a significant prejudice for the contractor, equalling at least 2.5 per cent of the amount of the contract.
34 Compensation for additional costs, insurance payments received, etc.
ranging from seven to 10 years (‘mini-perm’ loans), bond issuance solutions, third-party subsidies, alternative investment strategies, etc., since funding for the whole life cycle of a PPP project is both expensive and difficult to obtain. For larger PPP projects, cross-border finance is also available. Further, a secondary market has developed, where international funds and investors acquire existing SPVs or running management and operation contracts.

Lenders can take security over, inter alia, subcontracts, receivables, bank accounts and shares. In this respect, it is worthy to note that a new law entered into force on 1 January 2018, which permits all creditors (and not only financial institutions) to take a pledge over a business. The new law permits to pledge movable goods (with the exception of vessels) and clarifies that a registered pledge on movable goods remains effective, even though these goods become immovable as a result of incorporation. Granting of security over real estate will only be possible if the PPP contract provides for and allows a transfer of real estate rights. Lenders may also have step-in rights, but those should be contractually provided.

**VII RECENT DECISIONS**

In 2018, the Belgian Council of State ruled that the award of a contract for the building and renting of an office building without applying the public procurement rules was illegal.

In connection with the construction of the Haren Prison, various lawsuits have been filed, primarily seeking to annul various administrative decisions to issue certain permits as opposed to lawsuits seeking to prohibit the use of the DBFM mechanism as such. These lawsuits are still pending.

**VIII OUTLOOK**

Although the implementation of ESA 2010 initially gave rise to serious discussions as to the future of PPP projects, market practice reveals that PPPs have a future beyond ESA 2010, although their appearance has changed: on the one hand, a number of ongoing projects are being or have been renegotiated, while new projects are being structured in line with ESA 2010 to guarantee budget neutrality; on the other hand, projects are being carried out despite being ‘on the balance sheet’.

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35 The Flemish schools project (2010) was financed by means of a six-year mini-perm loan for the construction phase and refinanced by a long-term debt upon completion, combined with a guarantee from the Flemish government.
36 The A11 highway (Bruges-Zeebrugge) has, for instance, been financed with EIB-supported project bonds.
37 For instance, subsidies from the European Union.
38 Such as the participation of insurance companies or institutional investors like pension funds.
39 Law of 11 July 2013 on the amendment of the Civil Code with regard to collateral on movable properties and the deletion of various provisions relating to this matter.
41 For example, Brabo 2; the Flemish public transport operator De Lijn was originally slated to hold a 26 per cent stake in the project, but this has been ‘significantly reduced’ as a result of a contract restructure to make the PPP compliant with ESA10.
42 For example, the Albert canal bridges PPP; under the terms of the contract, the project will involve no equity contribution from the public sector because the government wants to avoid the risk that the project is classified as a public sector asset in light of ESA10.
43 Such as the PPP project relating to the Antwerp local police master building.
As the ability of respective governments to invest directly is still limited, cooperation with the private sector, especially for infrastructure projects, still takes a prominent place in the Belgian PPP market. In this respect, it is interesting to note that listed regulated real estate investment funds are now authorised by law to make investments in PPP projects.

In Flanders, the Social and Economic Council of Flanders (SERV), an advisory body comprising representatives of employers and trade unions, commented on the Flemish government’s role in PPP Projects. SERV recommended that PPP structures should not be assessed in the light of budgetary or financial added value (which have been key criteria in the past), but instead in the light of demonstrated operational or social added value (i.e., a better price quality over the entire life of a project).

The European Fund for Strategic Investments has been up and running since autumn 2015, keeping the ambitious timetable set by President Jean-Claude Juncker to implement the Investment Plan for Europe. The future of PPPs in Belgium will, among other things, depend on the funds that will be made available by the EU for investment in infrastructure projects, as a means to support economic growth, and the ability of Belgian authorities to secure the necessary European subsidies through the European Investment Bank and the European Fund for Strategic Investments. Tax incentives endorsed by the federal government with regard to construction of school premises have allowed the broad strengthening of PPPs, especially in Flanders where many public schools are refurbished or constructed in this way (e.g., the ‘Scholen van Morgen’ project, which was resumed after the application of these tax incentives). Further, the release of the *Guide to the Statistical Treatment of PPPs* by the European PPP Expertise Centre and Eurostat has delivered some clarity with regard to the ESA rules applied to PPPs, as the guide takes precedence over the prior Eurostat evaluation documents. Both events kick-started the PPP market again, after it had suffered a significant decrease during 2015–2017.

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44 Law of 22 October 2017; the Law expands the asset classes in which listed regulated real estate investment funds may invest and expressly lists infrastructure and (renewable) energy installations.


46 ibidem., Point 164.


48 The Flemish government has already identified six priority sectors for which it shall examine the possibility to apply for support from the EFSI, including infrastructure and mobility, renewable energy, schools and social housing. The Flemish government has also set up an EFSI work group that is responsible for the coordination of the construction sites and the contacts with the EIB.
Chapter 4

BRAZIL

Thiago Luís Sombra and Thiago Fernandes Moreira

I OVERVIEW

The creation of the public-private partnership (PPP) model in Brazil dates back to 2003, with the publication of the PPP Law for the State of Minas Gerais (State Law No. 14,868/2003). Subsequently, in 2004, the PPP Law for the State of São Paulo (State Law No. 11,688) and Federal Law No. 11,079 (the Federal PPP Law) were also published reinforcing this type of partnership. The PPP legislation was born of the need to attract private investment in infrastructure projects in Brazil in the following areas: water and sewage, health and hospitals, administrative facilities and logistics, including roads, urban mobility, underground transportation and transportation in general.

The parties involved in a PPP contract are: the concessionaire, which is the private investor interested in carrying out the infrastructure project, and the government (which includes all entities of the Brazilian government, such as agencies, public foundations, state-owned companies and other entities controlled by the federal, state or local governments and the federal, state and local governments themselves, ‘granting authority’).

In Brazil, a PPP is a specific form of concession, which differs from ordinary concessions (governed by Federal Law 8,987/1995). In ordinary concessions, the economic-financial feasibility of the project is based exclusively on the levying of tariffs on users of the granted activities (services). On the other hand, the PPP model allows the granting to private parties of services in which the government is the (direct or indirect) user, and concessions for public services and other activities in which payment by the granting authority is deemed necessary for the structuring of a project, and to fees charged by the concessionaire to users of the services provided.

The main distinction between a PPP project and ordinary concessions involves the payment the granting authority executes to a PPP concessionaire throughout the performance of the agreement. The concessionaire and the government share the risks of the project in a PPP and a state guarantee is created, at the beginning of the project, to guarantee payments by the government to the concessionaire.

In view of the foregoing, a PPP is a great option for projects that: (1) are not self-sustaining; (2) require (or benefit from) significant investments; and (3) involve the provision of long-term services. PPPs encourage private-sector participation in government-related projects. Foreign

* The authors would like to thank Bruno Werneck and Mário Saadi for their assistance in preparing this article.
companies can participate in proposals for studies of ordinary concessions and PPPs and in the bidding procedure of projects, unless there is an explicit restriction to such participation in the relevant public notices.2

II THE YEAR IN REVIEW

The past years have been crucial for PPP projects in Brazil. In 2014, the Federal PPP Law reached its 10th anniversary without raising any constitutional challenge and with projects being implemented in the most varied sectors. Related tools, including requests for proposals from private parties, gained more strength and attracted significant participation from interested parties.

The main topic in 2017 was the ground-breaking activities the Investment Partnerships Programme (IPP) implemented in Brazil. Historically, the country lacked well-designed investment plans to allow private investments in infrastructure sectors. With the creation of the (IPP) through Federal Law No. 13,334 of 2016, which provides a roadmap for concessions and privatisations in infrastructure and energy sectors, some measures already put in place are attracting interest from foreign investors and may bring a new wave of investment into the Brazilian infrastructure sector. Therefore, the IPP represents a government effort to centralise the planning of national infrastructure development in a specific core team of the federal government that is able to combine a centralised approach to the study and structuring of projects with the participation of all government agencies that may influence its implementation. The main purpose of this strategy is to coordinate both government and private interests to ensure a successful bidding and implementation of the infrastructure project.

Such activities continued in 2018. On 2 July 2018, the federal government qualified new projects in the electric, rail, road and oil and gas sectors. At the same time, the IPP Board assumed the functions of the National Privatisation Council and the National Council for the Integration of Transport Policies. The IPP Board is currently competent to both approve matters relating to the privatisation of public enterprises and concessions of infrastructure projects, as well as to the definition of investment policies in the transport sector.

In addition, there are still many ongoing discussions to update Brazilian administrative laws. One of them is an amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. Another initiative is a restructuring of the federal agencies. Altogether, the above laws seek to foster private (mainly foreign) investment in Brazil in the coming year.

The unfortunate picture in the country, nevertheless, was the scenario related to PPPs. In 2018, a few PPP agreements were executed, including one for the provision of IT services in the State of Piauí and one for the provision of Sanitation Services in a City located in the State of Rio Grande do Sul. The City of São Paulo executed a huge PPP agreement for the provision of public lighting services, but such agreement was terminated by means of judicial decisions.

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2 The federal government released a brief Q&A on ordinary concessions and PPPs in Brazil. Available online: www.avancarparcerias.gov.br/frequently-asked-questions-faq.
III GENERAL FRAMEWORK

i Types of public-private partnership

A PPP is a mechanism under which the government hires a supplier of services to implement a relevant infrastructure project, which in turn commits to make investments pursuant to the agreement and is granted the right to operate the project throughout the long-term agreement.

There are two types of PPP concessions in Brazil. The first is the sponsored concession, whereby the private concessionaire, pursuant to the PPP agreement, receives fees from users of the services supplied and the agreed payments from the public partner.

The second type is the administrative concession, whereby the government is the direct or indirect beneficiary of the service to be provided by the private partner. In this case, payment is made exclusively by the government.

In both of the above cases, the concessionaire is allowed to explore ancillary activities to the concession or associated projects. This permission increases the concessionaires’ revenues and the investors’ interest in PPP projects. However, a portion of the additional revenue earned by the concessionaire on the provision of ancillary services must be shared with the granting authority or with service users.

The method of payment for ancillary services must be determined in the PPP agreement and the granting authority may elect to discount its share of payments on the payment it is obliged to the concessionaire or it might retain its share on the tariffs to be paid by users.

PPPs are largely useful for the government; they permit contracting for construction, management and provision of services with better payment methods and, as a result, they attract the interest of private investors who might introduce new methods and technologies. The government manifestation of interest, for instance, looks to PPPs when investments in key areas are needed but public funds or public expertise are lacking.

ii The authorities

PPPs may be executed in Brazil by the government, including special funds, agencies, state-owned companies, mixed public-private corporations and all other entities that are directly or indirectly controlled by the Brazilian federal government, the states, the federal district and municipalities.

At the federal level, the PPP Management Committee has jurisdiction to set priorities for services to be performed under a PPP model. The Management Committee is responsible for the coordination of such projects and is composed of members from the Ministry of Planning, Budget and Management, which is subordinated to the Ministry of Treasury and the Brazilian Presidency.

The Federal PPP Project Unit, which is responsible for outlining the technical, economic and financial aspects of federal projects and for undertaking feasibility studies, is part of the Ministry of Planning.

Additionally, other government branches at the federal level may develop their own projects and have powers to stipulate procedures for the execution of agreements and authorise the commencement of competitive bidding processes as well as approve bidding documents.

As an alternative to boosting PPP projects, the federal government has recently created the IPP to boost infrastructure in the country. The plan stipulates conditions for attraction of investments in infrastructure projects and creates an environment for greater integration between the public and private sectors.
The projects developed under the programme, by choice of the President, are subject to guidelines and extensive, long-term regulatory planning and rules regarding guarantees of the project, providing greater legal stability to the concessionaire. For instance, Federal Law No. 13,334 requires federal authorities to create long-term policy frameworks prior to the execution of PPP agreements to align contractual matters and public planning. To advise the President as to which projects should be included in the programme and the guidelines for planning and regulating these initiatives, Federal Law No. 13,334 created the Programme Board. It is composed of the IPP’s Executive Secretary, the Ministry of Interior, the Ministry of Finance, the Ministry of Planning, Development and Management, the Ministry of Transport, Ports and Civil Aviation, the Ministry for the Environment, and the presidents of two federal state-owned development banks (Banco Nacional do Desenvolvimento Econômico e Social and Caixa Econômica Federal).

Although the federal government has not yet made use of the Federal PPP Law, the federal Management Committee model has been followed by some states.

The states of São Paulo, Minas Gerais, Bahia and Pernambuco have all developed relevant PPP programmes with the execution of projects in different sectors, such as underground transportation, roads, stadia, public health and sanitation. Those states rely on the Management Committee, PPP units and state-owned companies or funds granting state guarantees in favour of concessionaires.

São Paulo State Law No. 11,688 of 2004, further regulated by State Decree No. 48,867/2007, created São Paulo’s PPP Unit, which is responsible for its PPP projects. Since 2004, São Paulo has executed the following projects under PPP agreements:


c. Maintenance work for trains of the Urban Railway Line 8 (2010): work and services necessary for the maintenance and repair of trains operating in the urban railway Line 8 in the city of São Paulo.


e. Medicine Manufacturing Plant in Américo Brasiliense (2013): work, management and operation of a plant to manufacture medicine in the city of Américo Brasiliense, as well as manufacturing and sale of medical products to the state of São Paulo’s public health system.


h. Hospital installations (2014): work, maintenance and management of hospital installations throughout the state of São Paulo. Additionally, the concessionaire must provide all non-medical services necessary for the operation of the hospitals (i.e., patient admission, management of patient schedules).

i. Tamoios Highway (2014): work, maintenance and expansion of the State Highway Tamoios, which connects the northern coastline cities of Caraguatatuba and São Sebastião to the state’s countryside.
In the state of Minas Gerais, Law No. 14,868 of 2003, further regulated by State Decree No. 43,102/2003, created Minas Gerais’ PPP Unit. Since 2003, Minas Gerais has executed the following projects under PPP agreements:

- **a** State Highway MG-050 (2007): work, maintenance and expansion of the State Highway MG-050 (Jatuaba–São Sebastião do Paraíso).
- **b** Minas Gerais’ Prison Complex (2009): construction, maintenance, operation and management of a prison complex that includes a number of incarceration units throughout the state.
- **c** Governador Magalhães Pinto (Mineirão) Stadium (2010): works, maintenance, operation and management of Mineirão Stadium.
- **d** Integrated Unit of Services (UAI) Phase I (2010): implementation, management, operation and maintenance of the state’s UAIs, a place where Minas Gerais state provides a number of essential services to local citizens (i.e., issuance of official documents) in the cities of Betim, Governador Valadares, Juiz De Fora, Montes Claros, Uberlândia and Varginha.
- **e** Integrated Unit for Services to the General Public Phase II (2013): implementation, management, operation and maintenance of the state’s UAI in 23 cities within the state.
- **g** Integrated Unit for Services to the General Public Phase III (2014): implementation, management, operation and maintenance of the state’s UAI at Praça Sete in the city of Belo Horizonte.
- **h** Solid Waste Sanitation Services (2014): provision of sanitation services, including the collection, treatment and final disposition of solid waste in the Metropolitan Region of Belo Horizonte.
- **i** Regional Airport Presidente Itamar Franco (2014): concession of the state’s regional airport located in the city of Guianá, including the provision of recovery work, maintenance and management of airport infrastructure.
In the State of Bahia, Law No. 9,290 of 2004, further regulated by State Decree No. 9,322/2005, created Bahia's PPP Unit. Since 2004, Bahia has executed the following projects under PPP agreements:

a. Jaguaribe wastewater system (2006): operation, maintenance and expansion of the wastewater infrastructure of System Jaguaribe, including the work and operation of the infrastructure necessary to allow the disposition of wastewater generated in the city of Salvador.


c. Salvador's Suburb Hospital (HS) (2010): construction, operation and management of Salvador's HS, including provision of medical services to patients.


e. Operation of Couto Maia Institute Hospital Unit (2013): provision of construction work, maintenance and management of the Couto Maia hospital complex in Salvador. Additionally, the concessionaire is responsible for providing all non-medical services necessary for the operation of the hospital complex (i.e., patient admission, management of patient schedules).

f. Imaging diagnosis (2015): operation and management of Bahia's Imaging Diagnosis Centre and provision of ancillary services to hospital units including imaging diagnosis as part of patient care initiatives encompassing the provision of radiology, mammography, tomography and magnetic resonance tests.

g. Road BA-052 – Estrada do Feijão (2018): operation, maintenance and update of State Road BA-052.

Finally, in the state of Pernambuco, Law No. 12,765 of 2005, further regulated by State Decree No. 35,378 of 2005, created Pernambuco's PPP Unit. Since 2005, Pernambuco has executed the following PPP agreements:


b. Water supply and wastewater sanitation services (2013): water supply and wastewater sanitation services in the metropolitan region of Recife. The scope of services includes construction and maintenance services necessary for the expansion of Recife's water sanitation infrastructure.


d. Pernambuco's Multi-use Arena (2010): construction, maintenance, operation and management of Pernambuco's multi-use arena. However, the last two projects were terminated.

### General requirements for PPP contracts

Generally, the following rules must be observed in PPP agreements:

a. the government may not delegate its regulatory and jurisdictional activities, or its exercise of police powers and other inherently public activities;

b. the parties must stipulate fiscal responsibility in the PPP agreement;
the parties must show transparency in their procedures and decisions;

the parties must objectively allocate the risks that may arise during the performance of the granted services; and

the financial sustainability and socio-economic advantages of a PPP project must be taken into account.

In addition, there are three main limitations on the use of PPPs:

the amount of the contract must exceed 10 million reais as per Law No. 13,529/2017, recently published by the federal government;

the term of the contract may not be less than five years or more than 35 years, including any applicable extension. The term must also be compatible with the repayment of the investment made; and

the PPP may not result in agreements with the sole purpose of hiring labour, supplying installation equipment or implementing public work projects.

The execution of a PPP agreement must also be preceded by a competitive bidding procedure and the commencement of the project is conditioned to the following:

authorisation from the relevant authority accompanied by a technical report demonstrating the convenience and timing of the partnership and the reasons that justify the choice of a PPP (the value-for-money test);

preparation of a financial impact estimation in the years in which the PPP agreement will be in force;

preparation of an estimate containing the inflow of necessary public funds to perform the obligations undertaken by the government during the term of the agreement; and

the inclusion of the scope of the PPP in the government multi-annual plan.³

IV  BIDDING AND AWARD PROCEDURE

A competitive bidding process must precede the execution of a PPP. Before the commencement of the competitive bidding, drafts of the invitation to bid and agreement to public consultation must be published in the official press, newspapers of general circulation and electronic media. This notice must stipulate the purpose for the bidding process, the identification of the scope of the project, the length of the contract and its estimated value. The notice must also stipulate a period of at least 30 days for comments, and at least seven days must elapse between the time the comments expire and the date of the official publication to bid.

The enactment of the notice of competitive bidding might also be subject to prior environmental permit or the issuance of directives for the environmental licensing of the project, depending on the scope of the contract.

³ The multi-annual plan is a budgetary tool used to estimate the expenses of the government for the following four years.
i  **Expressions of interest**  
PPP projects in Brazil may be drawn up directly by the government or in collaboration with a private party. A private investor may take part in the preparation of the request for proposals issued at the behest of the granting authority or the authority may grant private investors an authorisation to conduct feasibility studies for a PPP not proposed by the government.

A manifestation of interest or an unsolicited proposal is used for obtaining feasibility studies on specific public work projects. It is a tool employed by major public and private entities, and it seeks to encourage private parties to participate in the organisation of infrastructure projects. At the federal level, Decree No. 8,428 of 2015 governs expressions of interest.

Manifestations of interest may be prepared by public or private entities (such as companies under government control) and they make it possible to obtain from private-sector partners certain technical, legal and economic information regarding proposed infrastructure projects. Public authorities may also request additional studies to obtain a higher level of expertise from private partners.

ii  **Requests for proposals and unsolicited proposals**  
Unsolicited proposals precede the request for proposals. It begins with a formal request by any interested party to the government seeking to assess the feasibility of a specific PPP project. The government will review the request, and in the case of approval, publish a notice or announce its intention via digital media.

The government’s notice will include the purpose of the solicited proposal and it must include:

- an announcement of the government’s intention to receive proposals from interested private parties;
- the procurement of studies into the technical, financial, economic, environmental and legal viability of a project;
- an invitation for contributions that investigate methods and systems for implementing the project;
- demonstration of cost reduction when the proposed PPP model is compared with other models, which must be conducted by the granting authority;
- demonstration that the proposed project conforms to the most appropriate model; and
- preparation of feasibility studies concerning the project.

The public notice introducing the request for proposals must also indicate the scope of the project and specify the nature of the relationship between the public and private entities. The notice must establish the term during which interested parties will have to undertake research about the proposed project, as well as guidelines governing the use of this procedure by the government entity.

iii  **Evaluation and grant**  
The competitive bidding process for execution of PPP agreements may include a qualification stage under which bidders not able to reach a minimal standard will not be allowed to participate in subsequent stages.
Additionally, the government must either award the concession to the bidder with the lowest cost to the government or the bidder with the best proposal, when considering both the criteria above and the best technical skills available, according to a weighting system established in the invitation to bid.

The bidding documents must also state the manner in which bidders must present their proposals. Bidders might be required to provide written proposals in sealed envelopes, or written proposals followed by an invitation to bid. The latter must always be prepared inversely to the grading order of the written proposals. The invitation to bid cannot limit the number of proposals to be offered by the bidders. Nevertheless, the bidding document may limit the number of invited bidders to those whose written proposals have not exceeded 20 per cent of the amount set forth in the best proposal previously put forward.

Competitive bidding documents may also establish the reversal in the order of qualification and awarding stages, in which case once the stage of grading of offers has ended, the envelope containing the qualification documents of the highest-graded bidder must be opened to determine whether the conditions established in the invitation to bid have been met. The bidder will be declared after it has been determined that its bid meets the requirements set forth in the invitation to bid.

V THE CONTRACT

i Payment

A PPP agreement must stipulate the form of payment to the concessionaire by the public party. Payment must be made by bank transfer orders, assignment of credits other than tax credits, granting government rights, granting rights on public assets or any other means permitted by law.

A PPP agreement may establish that payment be conditioned to the performance of the service by the concessionaire. The granting authority must inform interested parties in the bidding documents that this will be the type of payment. Such requirement may vary case by case and depends on the operational and technical aspects applicable to each PPP agreement.

Generally, payment by the public party will be preceded by the completion of the work by the concessionaire. The main goal here is to create incentives for the concessionaire to complete all the work and timely commence the provision of services pursuant to the agreement.

As a result, only after the concessionaire begins to perform the service will the granting authority be obliged to make the payment. Nevertheless, the authority may be authorised, depending on specific terms agreed in a PPP agreement, to make payments that relate to portions of the service already available for use.

In addition, the granting authority may provide funds in favour of the concessionaire for the acquisition of certain assets required to carry out the concession. Such funds may be allocated prior to the beginning of the granted services. This type of advanced payment may help the implementation of the work and purchase of goods necessary for the provision of services. These goods will be reverted to the granting authority at the end of the concession period and may work as a financing alternative to the concessionaire.
ii State guarantees

Among the mechanisms authorised by law, payment obligations undertaken by the public party in PPP agreements may be guaranteed by:

- a pledge of revenues;
- b creation or use of special funds contemplated in the law;
- c purchase of guarantees from insurance companies that are not under public control;
- d guarantees by international organisations or financial institutions not controlled by any government authority; or
- e guarantees put by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee feature, which is permitted in PPP agreements, is an important innovation in agreements with the Brazilian government; this feature ensures payment of public partners’ obligations and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors that distinguishes the legal regime of PPP agreements from ordinary administrative agreements or concessions.

Based on the alternatives for the creation of public guarantees inaugurated by the Federal PPP Law, each PPP agreement should have mechanisms for the implementation of such guarantees. The alternatives would rely, for example, on the existence of: revenue to fund the project; public goods, which could be assigned to the private party; or government corporations or funds organised with the purpose of guaranteeing PPP projects.

iii Allocation of risk

PPP agreements must establish allocation of risks between the parties, including those relating to acts of God, force majeure, acts of state and extraordinary economic risks. The public partner must be responsible for relevant risks, especially those that may generate financial effects, including expropriation and geological issues, which are difficult to measure.

The São Paulo State Court issued a decision in September 2014 in a case discussing whether expropriations could be undertaken by a concessionaire of a project to build an underground subway line according to a PPP agreement. The responsibility related to the compensation for the expropriation was allocated to the granting authority. The owner of some properties in the affected area sued the concessionaire, alleging that it was illegal for a concessionaire to proceed with the expropriations.

The judges assigned to the case reviewed the relevant statutes, namely: the Federal Constitution, the Federal Concessions Act, the Federal PPP Law, the São Paulo State PPP Law and the PPP agreement. They decided that since the São Paulo State PPP Law authorises the allocation of expropriations to the concessionaire and the PPP agreement established that the concessionaire was tasked with the obligation to undertake necessary expropriations, the concessionaire was entitled to proceed with such expropriations, even though the required compensation would be paid directly by the state.

The Court in that case upheld the PPP statutes and the reporting judge reminded the Court that the law establishes the PPP regime in Brazil, which is supported by specific rules that have not been declared unconstitutional and therefore must be maintained.

In a nutshell, a well-addressed risk matrix is the means for ensuring the protection of private interest when executing PPP agreements. Generally, the risk should be allocated to the party that is able to manage it at the lowest cost.
iv Adjustment and revision

PPP agreements must contain methods for payment adjustment and indexation, as well as mechanisms for maintenance of the services throughout the years. Contract clauses establishing automatic payment adjustment based on mathematical indexes and formulas do not need to be submitted to the public party for approval; the concessionaire should send the invoice with the adjusted amount to the public party, which will have 15 days from the submission of the invoice to reject it, in which case it must include reasonable grounds for the rejection.

Contract adjustments and review methods must be stipulated in the PPP agreement and must be based on services to be executed and implemented during the concession.

v Ownership of assets

At the time of the execution of a PPP agreement, the granting authority must transfer to the concessionaire all public assets necessary for the performance of the service. The concessionaire will be tasked with maintenance of these assets. In addition, the concessionaire must purchase all equipment and products necessary for the adequate performance of the service. The assets involved in the provision of the granted services will become public property at the termination of the PPP agreement.

Upon termination of the concession, all assets and rights transferred to the concessionaire by the granting authority for the performance of the service must be returned to the granting authority, which will render the service (directly or by means of a new competitive bidding). The reversion of assets and equipment at the end of the contractual term is conditioned to an indemnification of the portion of the amount paid for the assets subject to reversal less their natural depreciation.

vi Early termination

Early termination of PPP agreements may occur as a result of:

a conclusion of the contractual term;
b public interest demand (as a result of a takeover launched by the granting authority);
c forfeiture;
d lawsuit initiated by the concessionaire against the granting authority;
e annulment; or
f bankruptcy or extinction of the concessionaire.

During the concession period, the granting authority may request the recovery of the service from the concessionaire based on collective public interest. This recovery requires prior payment of indemnification to the concessionaire and a specific law authorising the takeover of the service.

If the concessionaire is in breach of a PPP agreement, the granting authority reserves the right to either declare forfeiture of the PPP agreement or apply contractual penalties. The declaration of forfeiture must precede declaration of breach of the PPP agreement by the concessionaire through an administrative proceeding; the concessionaire will have the right to full defence and due process of law in the administrative proceeding. The forfeiture must be declared by a decree from the granting authority, regardless of prior indemnification, which will be determined in the course of a specific proceeding.
The PPP agreement may also be terminated by the concessionaire in the course of a lawsuit initiated by the concessionaire against the granting authority for breach of contract. The concessionaire of a PPP agreement must not interrupt the service until publication of a final court decision on a case in favour of the concessionaire.

VI FINANCE

Pursuant to the PPP model in Brazil, the concessionaire is responsible for financing and investing in the project. The financing structure is usually partially equity investment by sponsors of the project (i.e., shareholders of the special purpose company incorporated with the purpose of implementing and managing the partnership project) and part in debt investment usually contracted with state-owned or private financial institutions.

State-owned banks usually play a role in the financing of PPP projects offering credit lines with favourable market rates. Moreover, governmental measures have been developed to improve financing mechanisms involving public projects, such as infrastructure bonds.

VII OUTLOOK

After celebrating its 10th anniversary, the Federal PPP Law has been very well accepted in Brazil. It was created to attract capital to finance infrastructure projects in the country and it has been broadly adopted in the most diverse sectors. Although the federal government has not implemented any PPP project in the past decade, state governments have made extensive use of this mechanism. Some efforts have been made to develop PPP projects in specific sectors at the federal level such as highways, irrigation and defence projects, but none of them have been granted yet.

The expectation of PPP law in Brazil is that it will continue to play a decisive role in ensuring the viability of major and much-needed infrastructure projects in the country in the next few years, including airports, railways, urban transportation, hospitals, solid waste, sanitation, water supply and public lighting projects at the federal, state and municipality levels.

The government is totally focused on the quality of ventures and, to achieve that goal, recently an accredited certificate for projects in the country. According to the IPP, with the certification, pre-feasibility studies, engineering projects and the execution of infrastructure undertakings’ works will be assessed by specialised entities and will receive, based on technical requirements, a compliance certificate. The main motivation of this mechanism is to rescue confidence in the infrastructure market, aiming at attracting investors and providing better services to society. The certification is expected to have a direct effect on the decision-making processes of public authorities, financial institutions, insurance companies, licensing agencies, among others, bringing more agility, for example, in procedures to which environmental permits are required.

At the federal level, the opportunities for 2019 relate to projects embraced by the IPP, including those listed in the table below:

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<table>
<thead>
<tr>
<th>Project</th>
<th>Model</th>
<th>Estimated investment (reais)</th>
<th>Current status</th>
<th>Public notice</th>
<th>Auction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ferrovia Norte-Sul</td>
<td>Subconcession</td>
<td>2.76 billion</td>
<td>Preparation for the auction</td>
<td>30 November 2018</td>
<td>1st quarter 2019</td>
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<td>Ferrogrão</td>
<td>Ordinary</td>
<td>12.6 billion</td>
<td>Public consultation</td>
<td>2nd quarter 2019</td>
<td>3rd quarter 2019</td>
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<td>FIOL</td>
<td>Subconcession</td>
<td>-</td>
<td>Public consultation</td>
<td>2nd quarter 2019</td>
<td>3rd quarter 2019</td>
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<td>Highways BR-364/365/ MG/GO – Uberlândia to Jataí</td>
<td>Ordinary</td>
<td>2 billion</td>
<td>Public consultation</td>
<td>1st quarter 2019</td>
<td>2nd quarter 2019</td>
</tr>
<tr>
<td>Highways BR-116/ RJ – Além Paraíba to BR-040</td>
<td>Ordinary</td>
<td>-</td>
<td>Under review</td>
<td>4th quarter 2019</td>
<td>1st quarter 2020</td>
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<td>Highways BR 153/ GO/TO – Aliança do Tocantins to Anápolis</td>
<td>Ordinary</td>
<td>-</td>
<td>Under review</td>
<td>3rd quarter 2019</td>
<td>4th quarter 2019</td>
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<td>Southeast Block Airports</td>
<td>Ordinary</td>
<td>3.2 million</td>
<td>779.2 million</td>
<td>30 November 2018</td>
<td>1st quarter 2019</td>
</tr>
<tr>
<td>Central-West Block Airports</td>
<td>Ordinary</td>
<td>3.3 million</td>
<td>763 million</td>
<td>30 November 2018</td>
<td>1st quarter 2019</td>
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<tr>
<td>Northeast Block Airports</td>
<td>Ordinary</td>
<td>13.2 million</td>
<td>2.14 billion</td>
<td>30 November 2018</td>
<td>1st quarter 2019</td>
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<td>Vila do Conde’s Liquid Bulk Port Terminal/PA – (VDC 12)</td>
<td>Leasing</td>
<td>126 million</td>
<td>Public consultation</td>
<td>4th quarter of 2018</td>
<td>1st quarter 2019</td>
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<td>Port Paranaguá’s Grains Port Terminals/PR – (PAR 07, PAR 08 and PAR XX)</td>
<td>Leasing</td>
<td>328 million (PAR 07); 400 million (PAR 08) e 193 million (PAR XX)</td>
<td>Under review</td>
<td>TBD</td>
<td>TBD</td>
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<td>Liquid Bulk Port Terminals in Belém’s Port/PA – (BEL 02A, BEL 02B, BEL 04, BEL 08 and BEL 09)</td>
<td>Leasing</td>
<td>32 million (BEL 02A, BEL 02B, VEL 04); 107 million (BEL 08); 94 million (BEL 09)</td>
<td>TCU analysis</td>
<td>4th quarter 2018</td>
<td>1st quarter 2019</td>
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<td>Liquid Bulk Port Terminal in Vitória’s Port/ES</td>
<td>Leasing</td>
<td>128 million</td>
<td>Preparation for the auction</td>
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<td>1st quarter 2019</td>
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<td>Fuel Terminals at the Port of Cabedelo/PE – (AI-01; AE-10; AE-11)</td>
<td>Leasing</td>
<td>36.4 million (AE-10); 34.93 million (AE-11) (AE-11)*</td>
<td>Preparation for the auction</td>
<td>30 November 2018</td>
<td>1st quarter 2019</td>
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<td>Lease of Containers at Port of Suape/PE – (SUA-05)</td>
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<td>3rd quarter 2019</td>
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<td>Lease of Vehicles at Port of Suape/PE – (SUA 01)</td>
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<td>12.5 million</td>
<td>Under review</td>
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<td>Project</td>
<td>Model</td>
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<td>CPRM Mineral Rights</td>
<td>Concession of exploitation rights</td>
<td>46.884 million</td>
<td>Publication of the public notice</td>
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<td>1st quarter 2019</td>
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<tr>
<td>Privatisation of CEASAMINAS</td>
<td>Privatisation</td>
<td>-</td>
<td>Under review</td>
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<td>Preparation for the bidding</td>
<td>5 April 2018</td>
<td>5 February 2019</td>
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* There are no estimated investments for the Terminal AI-01, considering that the existing assets in the area already reverted to the port and are operational.
Chapter 5

CHINA

Jihong Wang, Jiangyu Han and Juan Miao

I OVERVIEW

In mainland China (China), public-private partnerships (PPPs) have been defined as the partnership between government and the social capital county or upper-level governments in charge of implementing the PPP projects within their territory. Social capital includes domestic and foreign enterprises acting as legal persons, which can be state-owned enterprises, private enterprises, mixed ownership and other types of enterprises, even for those local government ‘platform companies’ that have established a modern enterprise system and realised market-oriented operations, and the local government debts undertaken by them have been included in the government budget that has been properly disposed of and clearly announced that it will no longer assume the role of local government borrowing in the future can also be used as a social capital. Foreign investors’ participation in PPP projects is also subject to market entry policies.

China has gone through three stages towards accepting the PPP model. The first stage was around the 1990s, which began with building power stations using the build-operate-transfer (BOT) model, and followed with investments in toll roads. The second stage began with the landmark issuance of an administrative rule in 2004 by the Ministry of Construction regarding the administration of concessions, as of which BOT, transfer-operate-transfer (TOT), build-own-operate (BOO) and other models became formally accepted in the field of public utilities such as roads, water supply facilities, sewage or garbage treatment plants and gas stations. As the beginning of the third stage, the past several years have witnessed a burst of growth of PPP in China. At the end of 2013, the Chinese government started to promote PPP in more aspects of public product and public service fields. It is encouraged to adopt the various types of PPP to provide public services in more sectors, including energy, transportation, water conservancy, environmental protection, agriculture, forestry, science and technology, affordable housing, medical treatment, public health, elderly care, education, and culture, etc.2 The requirements for PPP investment are increasing consistently. As of 30 November 2018, the Ministry of Finance (MOF)’s PPP integrated information platform project management library3 has a cumulative total of 8,557 projects, with an investment amount of 12.836365 trillion yuan.

1 Jihong Wang is a senior partner, and Jiangyu Han and Juan Miao are senior associates at Zhong Lun Law Firm.

2 See the Notice of the General Office of the State Council on Forwarding the Guiding Opinions on Promoting the Public-Private Partnership Mode in Public Service Field.

3 See Notice on Regulating the Management of the Public-Private Partnership (PPP) Integrated Information Platform Project Library (CAIBANJIN (2017) NO.92), which stipulates that all projects are under preparation, procurement, implementation and transfer phase should be included in the project library.
Currently, China has no specific fundamental law on PPP. The legislative framework of PPP mainly consists of relevant laws, regulations and regulatory documents. The PPP related documents in force are relatively low in the legal hierarchy. In July 2017, the Legislative Affairs Office of the State Council has promulgated the Regulations on Public-Private Partnership in the Field of Infrastructure and Public Services (Draft for Comment), and the full text of the explanation solicits opinions from all sectors of the society, and includes the PPP regulations in the legislative work plan of the State Council in 2018. The public comments period for the draft has now closed. However, the authorities will conduct further draft and amends works based on these public comments. At the time of writing, the draft has not been formally promulgated but has been included in the legislative plan.

II  THE YEAR IN REVIEW

The year 2018 saw PPPs have a great and far-reaching impact on China. Since being popularised in China in 2014, the PPP model has been widely used in various fields of infrastructure and public service, following more than three years of strong growth and rapid development. At the same time, however, problems such as the abuse of PPPs, the illegal loan guarantee of pseudo-PPPs, and non-standard problems, such as exceeding the red line of financial expenditure, have revealed a larger hidden risk in PPP projects. To rectify these problems, prevent and resolve the major risks, and promote the sustainable development of China’s PPPs, 2018 and 2017 were expected by many ministries and departments to be the years of PPP reform and standards development. The MOF, National Development and Reform Commission (NDRC), State-Owned Assets Supervision and Administration Commission (SASAC) and other departments have successively issued a series of normative documents and management requirements for PPPs, and carried out the rectification and management of PPP projects, the most noteworthy of which are discussed below.

On 10 November 2017, the MOF issued the Notice on Regulating the Management of the Public-Private Partnership Integrated Information Platform of Project Databases (CAIBANJIN (2017) NO. 92), defining the new project storage standards. It stipulates that it is not suitable for adopting the PPP method, that the preliminary preparation work is not in place, that the effective payment mechanism is not established and that it is not allowed to enter the project database; and clarifies the standard of clearance and withdrawal of the items that have been entered into the project database. If value-for-money and feasibility assessments are not carried out according to the regulations, it is not appropriate to continue to adopt the PPP mode, which does not meet the requirements of standard operation, constitutes a guarantee for illegal borrowing, and clears and returns the items that have not been made public with information according to the regulations, and so on, to standardise the PPP project operation and project management, prevent the abuse of PPP generalisation and contain any hidden debt risk.

On 17 November 2017, SASAC of the State Council issued the ‘Notice on Strengthening the Risk Management and Control of PPP Business of Central Enterprises’ (GUOZIFACAIGUAN [2017] No. 192), which regulates the participation of central enterprises participating in PPP projects as important social capital, and requires strengthening group management, strict access conditions and scale control, improving project quality, preventing increasing debt risks, optimising cooperation arrangements, standardising accounting, serious accountability, and preventing illegal business investment behaviour.
On 28 March 2018, the MOF promulgated the Notice on Regulating Financial Enterprises’ Issues Concerning Investment and Financing Behaviours of Local Governments and State-Owned Enterprises (CAIJIN [2018] No. 23), which puts strict requirements on PPP financing, debt funds such as ‘fake equity, real debt’, shareholder loans, and borrowing funds cannot be used as capital for PPP projects; if the source of capital of the project is not implemented, the evaluation of value for money, the demonstration of financial affordability, the evaluation of value for money and the demonstration of financial affordability are not fully disclosed in PPP projects, and no financing shall be provided, etc.

On 24 April 2018, the MOF promulgated the Notice on Further Strengthening the Standardised Management of Public-Private Partnership Demonstration Projects (CAIJIN [2018] No. 54), which handles the classification of 173 demonstration projects that have problems in verification, and regulates project management from the aspects of pre-project work, procurement procedures, contracting entities, contract terms, project performance, etc., and strengthens project supervision and information disclosure.

Standardised governance leads to better development. The introduction of the above-mentioned PPP normative documents and the rectification and clean-up of PPP uncertainties by various ministries and departments of the country have made China’s PPP sphere gradually stabilise, which has been beneficial and conducive to realising the long-term development of China’s PPPs.

On the other hand, we have to acknowledge that in the process of consolidation and standardisation on PPPs, in some cases, departments have deviated from accepted PPP policy and implementation has been too fierce, leading to the emergence of increased quotas. As a result, approaches to PPPs have gone from aggressive to cautious, which has had a negative impact on the normal implementation and long-term development of PPPs.

III  GENERAL FRAMEWORK

i  Types of public-private partnership

The types of PPP mainly include operations and maintenance (O&M), management contract (MC), BOT, BOO, build–own–operate–transfer (BOOT), TOT, and rehabilitate–operate–transfer (ROT).

The type of PPP project is chosen in light of the specific conditions of each project and business or political requirement of the parties. In fact, the PPP-related rules do not prohibit the selection of other types of PPP. That said, although the build–transfer (BT) model formerly applied in some previous public utility projects, it is not deemed a formally adopted type of PPP in China in practice. Based on our understanding, this is because BT is generally prohibited in most public projects when being deemed as a disguised form of government debt raising, and second, BT does not cover the operation and maintenance of a project, and does not comply with the long-term or full life-cycle cooperation and risk-sharing nature of PPP projects, which is emphasised in China.

ii  The authorities

At the central government level, ministries of the state council take charge of the guidance and supervision of PPP promotion in relevant fields according to the division of functions. The MOF and NDRC act as coordinating authorities in developing PPP in different fields by establishing project libraries, organising evaluations and approvals, and improving the relevant systems and mechanisms. Both the MOF and NDRC have issued guideline opinions
on PPPs and published guidelines on PPP contracts. Both authorities have also published PPP project lists and project libraries to promote PPPs. Additionally, according to the needs of different projects, the administrative authorities for different industries, such as construction, transportation, water resources, environmental protection, health, education, culture, civil aviation, land, agriculture and forestry, are responsible for project guidance, implementation and supervision.

In practice, most PPP projects are promulgated by county, municipal or upper-level local governments. Besides following rules and policies issued by central government, the local governments are in charge of promulgating specific policies and carrying out the implementation thereof, pursuant to the existing plan and the realities of the region. Based on the provisions of the MOF or NDRC rules or other competent authorities regulations, in a specific PPP project, the competent county or upper-level government is mainly responsible for the review, organisation and coordination, as well as the examination and supervision of the PPP project.

For the purpose of implementing a single PPP project, the government will appoint an implementation institution to be responsible for the preparation, procurement, supervision and transfer work of the project. In practice, the local government itself and functional departments or non-profit institutions appointed by the local government could be the implementation institution of a PPP project. In addition, the government will designate one or more companies as government representatives to participate in the formation of a special purpose vehicle (SPV), exercise shareholder rights and fulfil shareholder obligations on behalf of the government.

### iii General requirements for PPP contracts

There are two major suggestive contract forms that govern PPP projects, including the Contract Guidelines for PPP projects published by the MOF, and the General Contract Guidelines for PPP Projects published by the NDRC. Neither of the proposed contract texts requires mandatory use.

PPP contracts follow the principles of contractual legality and compliance, equal government and social capital rights and obligations, public welfare, honesty, fairness, efficiency, and flexibility. It usually contains the project participants, the purpose of the contract, the principle of risk allocation, investment construction, operation and maintenance, transfer, payment mechanism, rights and obligations, breach of contract, dispute settlement and other core and key clauses. In practice, the content of the PPP contract will vary according to the industry area, project characteristics and operation mode of each project.

### IV BIDDING AND AWARD PROCEDURE

As indicated in the PPP Procurement Measures, social capital shall be selected through a legal procedure. The MOF provides that the selection of social capital should be a government procurement (PPP procurement), and provides five methods for PPP procurement, including public bidding, invitation bidding, competitive consultation, competitive negotiation, and single-source procurement.4 According to the characteristics of the purchasing demand of a

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PPP project, the project-implementing agency chooses the appropriate purchasing method according to law. If a method other than public bidding is proposed to be selected, the implementation institution should first apply for approval of the finance department of a certain level of government.

The NDRC Guiding Rules also provide that the social capital shall be selected through public bidding, invitation bidding, two-stage bidding, competitive negotiation, etc. However, the NDRC Guiding Rules further provide that, for PPP projects of which the engineering investigation, design, construction, supervision and supply of important equipment or materials are to be contracted to or supplied by the social capital investor itself, the social capital must be selected through bidding according to the Bidding Law.

### Expressions of interest

MOF and NDRC procedures are similar in this respect. An announcement of pre-examination of qualifications shall be released via the government procurement information release media designated by the relevant finance department at or above the provincial level (for projects listed in MOF project library) or on media appointed by the NDRC (for projects listed in the NDRC project library). The time period for submission of application documents for pre-examination of qualifications shall not be less than 15 working days from the date of release of the announcement (requirement of the MOF) or five days after the bidder issues the pre-examination invitation document (requirement of the Bidding Law). Where there are at least three social capitals that pass the pre-examination of qualifications, the implementation institution may continue the preparation of bidding documents. Where there are fewer than three social capitals that pass the pre-examination of qualifications, the implementation institution shall organise a new round of pre-examination of qualifications after adjusting the content in the announcement of the pre-examination of qualifications.

The bidding documents of a PPP project shall contain all procedural and substantive requirements of the project, and shall contain the evaluation method and criteria, draft contracts and other legal instruments for the PPP project. Among others, the bidding documents shall point out those details of the project contract that are variable during the negotiation for confirming procurement results. The PPP bidding documents shall also expressly state that the project contract must be submitted to central government at the corresponding level for approval and not take effect until it is approved.

The MOF further provides that, where a competitive negotiation or competitive consultation procurement method is adopted, the project procurement documents shall, in addition to the contents prescribed in the preceding paragraph, specify the contents that may be substantively changed by the evaluation team based on negotiations with social capitals, including the technical and services requirements under procurement needs and the terms of the draft project contract.

### Requests for proposals and unsolicited proposals

Generally, the requirements for bidding documents are set forth in the documents calling for bids. If the selection of PPP social capital is carried out through bidding, generally the proposal of bidders will respond to the substantial requirements and conditions as provided in the documents calling for bids.5

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5 See Article 34 of the Implementing Regulations of the Government Procurement Law.
Compared with the public bidding procedure, the other methods, especially by way of competitive negotiation and consultation, provide relatively more space for the social capitals respecting the variable details. In short, in the process of competitive consultation, the consultation group may make material changes to the technical and service requirements of the procurement and terms of the draft contract based on the consultation documents and the actual consultation situations. The material changes shall be effective parts of the consultation documents and be sent to all candidate social capitals. The candidates will submit a new response document accordingly.

A PPP project can be proposed by both the government and social capitals, but is usually proposed by the government. The recommendation of potential PPP projects by social capitals shall be made to the financial departments (PPP centre) in the form of a project proposal. The Administration Measures on Public-Private Partnership (PPP) Project Database in the Traditional Infrastructure Field (Trial) issued by the General Office of the NDRC provided that a PPP project can be filled in and submitted by industrial departments, public institutions and various types of enterprises to the project database so as to be listed in the PPP project library.

iii Evaluation and grant

A legally established evaluation team shall be responsible for pre-examination and bid evaluation. The members of the evaluation team shall sign the qualification pre-examination report and the evaluation report.

The implementation institution shall establish a special working group responsible for the negotiation and confirmation of the final bidding results according to law.

The public body and the bid-winning social capitals to conclude transactions shall enter into PPP project contracts within 30 days after the notice of winning the bid or concluding transactions is issued.

Public notification and public announcements are requested for each step above.

V THE CONTRACT

i Payment

There are three main kinds of payment mechanisms in PPP projects in China: government payment, user charges and viability gap fund (VGF).

The three mechanisms apply to different kinds of PPP projects. Public transportation such as highways, bridges and subways and public infrastructure for water and heat supply usually takes user charges. VGF refers to the economic subsidies the government provides to the project company to fill the gap for those PPP projects in which the user charges cannot cover the input cost and reasonable profits.

In practice, VGF can take different forms such as investment subsidies, equity investment, concessional loans, grant of other developing and operating rights and interests related to concession projects. In some projects applying the VGF mechanism, the government takes partial payment responsibility during the operation period.

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6 See Article 20 of the Interim Measures for the Management of Competitive Consultation in Government Procurement.

7 See Article 17 of the Concession Measures and the definition of value for money in the MOF Guidelines.
The principle for the price of public utilities includes cost compensation, fair return, resource conservation, high quality and high price, and equitable burden sharing. In practice, the price is decided during the PPP procurement procedure, but is also subject to the restriction by the government. For PPP projects applying the government payment mechanism or VGF mechanism, the proposal of PPP projects including a payment or subsidies arrangement must pass verification of fiscal capacity before the project applies the mode of PPP. For PPP projects applying the user charges mechanism, the price shall be subject to the approval of the price administration bureau, if it is listed in the catalogue of prices fixed by the government.8

Both the guidelines for PPP contracts of the NDRC and MOF confirm that the parties will provide the adjustment of price in the PPP contract. The adjustment of price will be according to the project execution situation and performance evaluation results. A public hearing will be held before the price is adjusted.9

The General Contract Guidance on Public-Private Partnership Projects (2014 edition) (the 2014 General Contract Guidance) provides that the contracts of PPP projects shall specify the method by which private capitals will obtain payment. According to the nature and characteristics of the specific projects, the sources of income of the projects mainly includes user charges, the combination of user charges and government subsidies and government procurement for the services.10

### ii State guarantees

According to Chinese law, the government is prohibited from providing a guarantee.11 The relevant rules provide that the minimum requirement risk of a PPP project may be taken by the government side. The measures for the government to take this risk in a project will be provided in the project proposal prepared by the implementation institution, among others, by making a payment to the SPV for the margin between the guaranteed usage and the actual usage.

The payment made by the government is subject to the government fiscal budget. In practice, the most popular method for local government to ensure its payment to the social capital according to the PPP contract is, although not of a guaranteed nature and not 100 per cent without risk, to confirm to the social capital that the expenditure of the PPP project will be listed in the local annual budget of the pay year. Previously, the confirmation was generally in the form of a comfort letter, which has the risk of being deemed as invalid.12

The current system construction work for PPP shed light on listing the government payment and subsidy under the PPP contract into budget in a formal and more controllable way. China will set up systems to guarantee sustained and healthy development of the PPP model by including operating subsidies, correct operating charges and other considerations in the annual budget and medium-term financial planning, reflect and manage the same in the financial reports of the government, and report to the people's congress at the same level or its

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8 See the Price Law of China.
9 See Article 10 of the Guiding Opinions.
10 See Article 8 of the 2014 General Contract Guidance.
11 See the Guarantee Law of China.
12 Government organs are now prohibited to issue this kind of comfort letter. See Notice of the MOF, the NDRC, the People's Bank of China and the China Banking Regulatory Commission on Deterring the Illegal Financing Behaviour of Local Governments (2012).
standing committee. The Concession Measures also provide that the payment or subsidy by the government in VGF concession projects shall be linked up with the government’s annual budget and mid-term fiscal planning to ensure the requirements of fund appropriation.

iii Distribution of risk
Risks are allocated between the government and the social capital according to the principle of risk allocation optimisation, risk return equivalence and risk controllable, and upon overall consideration, the management capability on government risk, the project return mechanism and the management capability on market risk. In principle, the commercial risks, including design, construction, finance, and operation and maintenance of the project, shall be borne by the social capital, and the risk of laws, policies and minimum requirements shall be borne by the government. *Force majeure* and other risks shall be borne by the parties jointly on a reasonable basis.

iv Adjustment and revision
Generally in practice, the PPP contract contains a general term saying that the contract can be revised or modified by the parties through mutual agreement and the revisions shall be in writing and formally signed by both parties. Even though the PPP contract does not have this term, the revision of contract by both parties through mutual agreement is a right under contract law. The Consultation Draft of the PPP Law requests the parties to sign a supplementary agreement through negotiation when it is necessary to make an alteration during the cooperation period. And the material change to the cooperation agreement shall be submitted to the original approving authority for approval.13

The parties may also provide in the PPP contract conditions or restrictions for the revision of contract on a specific issue. Of course, the conditions and restrictions can be abandoned through negotiation.

v Ownership of underlying assets
The transfer of the ownership of the underlying assets depends on the different type chosen (e.g., BOT, BOOT and TOT) and the terms of the PPP contract. In some types of PPP projects, the ownership of the underlying assets is not necessarily required to be transferred to the social capital together with the transfer of occupation (e.g., O&M). Some types of PPP projects do not have the necessity of ownership transfer, such as BOO. But most types of PPP projects have one or more asset ownership transfer step. For example, in a BOOT project, the social capital (in most cases through its SPV for the project) builds the project asset, owns the asset and operates the same in the cooperation period according to the PPP contract. Upon the expiry of the contract or early termination, it will transfer all the facilities, rights and interests therein (land use rights, etc.) to the government or the institution it appointed.

Transfer includes the transfer of occupation, and the transfer of ownership. Some PPP contracts do not emphasise the ownership of underlying assets, but owning assets during an operation could be important for projects having an asset-backed securities plan by the social capital. PPP contracts generally prohibit the asset being used as security for other projects. Besides the above, competent authorities generally use the performance test to ensure the perfect function of the assets and the validity of the IP rights and technical documents.

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13 PPP Law of the People’s Republic of China (Consultation Draft), Article 32.
vi Early termination

PPP contracts allow early termination in the following situations:

- **a** by the social capital owing to the default of the government partner;
- **b** by the government owing to default of the project company;
- **c** the government partner unilaterally terminates the contract under specific circumstances according to its legal power, which shall strictly follow the law and accompanied by adequate compensation;
- **d** any party may terminate the contract because of *force majeure* incidents that last so long or accumulate to some extent; or
- **e** a mutual agreement is reached to terminate upon negotiation.  

VI FINANCE

Besides traditional bank loans, financing PPP projects with new financial methods is encouraged. Social security funds, insurance funds and other public funds are permitted to support the project financing through debt, equity investment and other ways. Further, SPVs are encouraged to conduct structural financing and issue, among others, project-earning bonds, PPP projects special debts, project-earning notes and asset-backed notes.

In April 2017, the NDRC issued the ‘Guidelines for the Issuance of Special Bonds for Public-Private Partnership Projects’, which encourages and supports PPP project companies or social capital parties to issue special bonds for PPP projects to broaden the financing channels of PPP projects and raise funds for the construction and operation of PPP projects. Subsequently, Guangzhou Zhujiang Industrial Group Co., Ltd., Shanxi Construction Investment Group Co., Ltd., Meishang Ecological Landscape Co., Ltd. and many other companies have raised funds through the issuance of PPP project special bonds.

In addition, asset securitisation is also an important financing method for PPPs. In February 2017, the Shanghai Stock Exchange and the Shenzhen Stock Exchange issued the ‘Notice on Promoting Asset Securitisation of Public-Private Partnership Projects in the Traditional Infrastructure Sector’ to encourage the support of PPP project enterprises to actively develop the PPP project asset securitisation business. In June 2017, the MOF, in conjunction with China Securities Regulatory Commission and the People’s Bank of China issued the ‘Notice on Regulating Issues Related to Asset Securitisation of Public-Private Partnership Projects’, encouraging PPP companies to carry out optimised financing arrangements for asset securitisation. Despite incomplete statistics, up to now, there have been more than 40 PPP asset securitisation projects landing or ready to land.

However, although PPP projects have these multiple financing options available, since 2018, owing to uncertainty caused by the state’s rectification and clean-up of PPP projects, and the identification of the government’s implicit debts for the PPP project by the Central Document No. 27, financial institutions are wary of PPP projects, and the loans to PPP projects have been tightened and in some cases even stopped. At the same time, the ‘Guiding Opinions on Regulating Asset Management Business of Financial Institutions’, jointly issued by the People’s Bank of China, China Banking and Insurance Regulatory Commission, China Securities Regulatory Commission and State Administration of Exchange Control in April

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14 The Guide on Contracts for PPP Projects (30 December 2014, MOF) mentioned the first four occasions.
2018 also explicitly prohibits the cash pool, term mismatch, multi-level nesting, restricting the investment of stock bonds, breaking the rigid redemption, etc., all of which has a major impact on PPP project financing.

VII RECENT DECISIONS

According to the Administrative Litigation Law and the Explanation of the Supreme People’s Court regarding the Administrative Litigation Law, a concession agreement is an administrative contract, and lawsuits against the government’s failure to perform the concession agreement, or illegally modify or terminate early on the concession agreement, should be heard by the court in accordance with the Administrative Litigation Law.

In the relevant PPP provisions of the MOF and NDRC, where the project-implementing agency, successful bidder and social capital have disputes in the performance of the PPP project contract and cannot reach a consensus through consultation, they may apply for arbitration or file a civil lawsuit. In the Public-Private Partnership Regulations (Draft for Comment) on Infrastructure and Public Services issued in 2017, it stipulates:

Disputes arising from the implementation of the cooperative project agreement may apply for arbitration or bring a lawsuit in a people’s court in accordance with the law . . . with regard to specific administrative acts related to the implementation and supervision and administration of cooperative projects undertaken by relevant government departments, if the social capital party considers that they have infringed on its legitimate rights and interests, it shall have the right to make representations and arguments, and may file administrative reconsideration or administrative proceedings in accordance with the law.

Therefore, there should be appropriate dispute resolution depending on the type of dispute.

VIII OUTLOOK

Looking back over 2018, with the tightening of the PPP regulatory policy and the rectification and clean-up of PPPs, China’s PPP sphere slowed to more stable levels. In 2019, PPP projects will land at a slower pace than ever before, but develop more regularly.

At the same time, local governments need to pay fees or subsidies to social capital as PPP projects implemented over the past four years have entered the operational phase; however, as the domestic economy enters a downward channel, the growth of government revenue is weak, and the ability of local governments to pay their finances and credit is being tested. It is expected that PPP contract breaches will occur in the future and there will be more disputes regarding PPP projects. In addition, the process of PPP legislation has also been further accelerated; at present, the Regulations on Public-Private Partnership in Infrastructure and Public Services (Draft for Comment) has been closed for comments and included in the annual legislative plan, and is expected to be officially announced soon. The promulgation of these regulations will effectively improve the conflict of PPP policies between the NDRC, the MOF and other departments, and PPP projects will be better regulated and guided.
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.

The French PPP legal framework was reshaped a few years ago through the transposition of the European directives pertaining to public procurement and concession agreements under Ordinance No. 2015-899, dated 23 July 2015, relating to public procurement and partnership agreements (the Partnership Contract Ordinance) and its implementing Decree No. 2016-360, dated 25 March 2016 (the Partnership Contract Decree), and Ordinance No. 2016-65, dated 29 January 2016, relating to concession agreements (the Concession Agreement Ordinance) and its implementing Decree No. 2016-86, dated 1 February 2016 (the Concession Agreement Decree).

Even though the transposition of the European directives and the enforcement of the aforesaid ordinances and decrees aimed at clarifying and modernising the French legal framework, the legal rules governing public procurement agreements (including partnership contracts) and concession agreements remained scattered in about 30 different texts. Therefore, in 2018, it was decided to carry out the adoption of a Public Procurement and Concession Agreements Code. The main purpose of this codification project is to gather in one single document all rules related to public procurement and concession agreements so as to offer all companies a better access to it, with a focus on small and medium-sized companies (i.e., there are no changes on the substance of the legal provisions).

The Public Procurement and Concession Agreements Code was finally enacted at the end of 2018 through Ordinance No. 2018-1074, dated 26 November 2018, Decree No. 2018-1075, dated 3 December 2018 and Decree No. 2018-1225, dated 24 December 2018. This new Code will enter into force on 1 April 2019.

In this chapter, we will focus on the two main forms of PPP implemented in France: concession agreements, as regulated by the Concession Agreement Ordinance and the Concession Agreement Decree; and partnership contracts, as regulated by the Partnership Contract Ordinance and the Partnership Contract Decree.

1 François-Guilhem Vaissier is a partner, and Olivier Le Bars and Diane Houriez are associates at White & Case.
4 From this date, it would be necessary to refer to the “articles” of the Code instead of the “articles” of the ordinances or of the decree.
II THE YEAR IN REVIEW

Although political events have weakened the French market for PPP projects, it remains quite dynamic and appealing.

In particular, major PPP projects in the transportation sector have been refinanced, such as the A65 motorway project, initially financed in 2007; the A355 motorway project; and the high-speed railway Sud Europe Atlantique, which was the biggest rail PPP project ever launched in Europe and financed initially in 2011.

During 2018, public local authorities also signed several PPP projects, including:

- the design, construction, operation and maintenance of the future biology–pharmacy–chemistry centre located in Saclay in the south of Paris (around €283 million);
- the financing, design, construction and maintenance of a building complex including childhood development centres and schools in the municipality of Fréjus (around €20 million);
- the financing, design, construction and maintenance of a cultural complex in the municipality of Arcachon (around €21 million); and
- the financing, design, construction and maintenance of a nursing home for dependent elderly people in the municipality of Bar-le-Duc (around €20 million).

In another field, a noticeable €250 million concession agreement tendering procedure has been launched by the urban community of Evreux for the financing, design, construction, maintenance and exploitation of a recreation park. Besides, another partnership contract tendering procedure has been launched for the financing, design, construction and maintenance of the Futuroscope Arena, with a capacity of 6,000 seats, in the department of Vienne (around €38 million).

In addition, 2018 was a fruitful year for the definition of public investment programmes in the European Union and the implementation of the Juncker Plan. In July 2018, the European Commission and the European Investment Bank (EIB) published a joint report that stated that more than €335 billion had been invested from 2015 to mid 2018 in the European Union, which went beyond the initial target of €315 billion for this period. As French companies were allocated €10.4 billion within this period, France has thus been the EU country that benefited the most from the Juncker Plan. This Juncker Plan was initially a three-year European investment programme (2015–2018) but it has been extended until 2020. It is now planned to finance investments for a minimum amount of €500 billion until this date, in particular in the energy and research and development sectors, with a prime focus on small and medium-sized companies. However, this EU financial support to foster innovation could go beyond 2020. Indeed, in June 2018, the European Commission expressed the view that such EU investment policy should be addressed in the next long-term budgetary EU framework (2021–2027) through a new policy tool named InvestEU that will follow up on the Juncker Plan.

Several PPP project announcements have also been made in France, especially in the green energy and transportation sectors.

In June 2018, the French President Emmanuel Macron, announced that six offshore wind farms will be implemented in the coming years. These projects to be implemented

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5 In January 2018, the state put an end to the Notre-Dame-des-Landes airport project. This termination echoes the termination of the Ecotaxe partnership contract by the French state in 2014.
under a PPP scheme imply a very significant level of private investment (estimated around €2 billion for each project at the time of writing). Moreover, during summer 2018, the construction phase of the first floating photovoltaic power plant was launched.6

In September 2018, the French Minister of Transport Elisabeth Borne unveiled a two-phase investment programme for transport infrastructures and the development and the refurbishment of road, railway and river networks. An investment of €13.4 billion is expected for the first phase (i.e., the 2018–2022 period), while €14.3 billion would be spent during the second phase (i.e., the 2023–2027 period).

Borne unveiled an ambitious programme to finance investments for the maintenance and renewing of the high-speed train network. This programme also plans the development of the current network through the construction of new railway connections (i.e., Bordeaux to Toulouse, Montpellier to Perpignan, Marseille to Nice, Paris to Le Havre, and Charles de Gaulle airport and several cities in the region of Picardie) and suggests that the €26 billion Lyon–Turin high-speed line project still has a chance to get off the ground despite the reticence of the new Italian government.

In addition to these PPP projects announced in the transportation sector, it has to be highlighted that during the coming five years, the building phase of four new highway sections will begin. These new sections are the A69 Toulouse-Castres highway, the A79 highway in the department of Allier, the A133 and A134 circling the city of Rouen in Normandy and lastly, the completion of the A154 Rouen-Orleans highway.

III GENERAL FRAMEWORK

i Types of public-private partnership
As stated above, there are two types of PPP that are mainly used in France: concession agreements, which serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges; and partnership contracts, which can be compared to private finance initiative contracts.

Concession agreements7 and partnership contracts8 are both administrative contracts under French law. This distinction is important as the contractual relationship in an administrative contract is different from that in a private contract. Indeed, the parties are, de facto, unequal insofar as the public person benefits from public authority powers.

As stated in the Concession Agreement Ordinance, a concession agreement is defined as an agreement under which a grantor assigns, for a limited period of time, to one or several economic entities, the performance of works or the management of a service, it being specified that: a risk linked to the operation of such works or service must be transferred to the economic entity in exchange for the right to operate the said works or service; a fee in favour of the entity can be added to such operation right; and the risk transfer to the economic entity necessarily implies a real exposure to the market’s fluctuation.

A partnership contract is an administrative contract under which a grantor entrusts to a private party, for a period set according to the amortisation of investment or agreed

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6 This 17 MWc project which implies an investment of €17 million is about implementing 47,000 panels on an artificial lake in the Vaucluse region.
7 Article 3 of the Concession Agreement Ordinance.
8 Article 3 of the Partnership Contract Ordinance.
financing terms, a comprehensive project relating to the design, construction or conversion, maintenance, operation or management of works, equipment or intangible assets necessary to the public service, as well as to the total or partial financing of the latter.

The Partnership Contract Ordinance also clarifies that dismantling and destruction works, as well as the management of a public service, can be transferred to the private party under a partnership contract.

The two main PPPs can be differentiated according to their payment terms: under a partnership contract, the grantor will pay rent to the private partner in exchange for the performance of the mission, while under a concession agreement the compensation of the concessionaire will mainly arise from payments made by users of the service.

ii The authorities
The Concession Agreement Ordinance provides that, in addition to public authorities (the French state, local authorities and their public institutions), private entities (entities specially created to satisfy a non-commercial public interest or formed by several public entities in order to jointly perform certain activities and public undertakings acting as network operators) will be allowed to grant concession agreements.

The Partnership Contract Ordinance is also flexible regarding the grantor that may enter into a partnership contract. The state and its public institutions, local authorities and local public institutions, as well as public health facilities, social security bodies and some public or private entities pursuing a public-interest mission and mainly financed by public funds (i.e., public-private joint ventures and state-owned public industrial and commercial institutions) may all enter into partnership contracts.

For partnership contracts executed by the state, the ministries that are involved will depend on the scope of the particular contract. For partnership contracts, approval by the Minister of the Economy and the Budget is additionally required before signature.

The Partnership Contract Ordinance provides for an extended list of potential procuring authorities. Indeed, the granting authorities will be the same as those described in the Concession Agreement Ordinance. As such, private entities could also enter into a partnership contract.

Nevertheless, central administrations, public health facilities and medical cooperation public structures that used to be grantors before the European Directive will no longer be able to enter into partnership contracts.

Another important actor in the PPP sector in France is the PPP Support Service (FIN INFRA). The FIN INFRA is a dedicated unit within the Ministry of the Economy.

9 As mentioned under Articles 10 and 11 of the Partnership Contract Ordinance.
10 See Article 156 of the Partnership Contract Decree stating that a partnership contract may be signed by the state or a state public institution only after approval by the Minister of the Economy and Minister of the Budget. In addition, a public body established by the state must obtain the approval of the minister in charge of its supervision. Such approvals will be presumed if no reply is given within one month from the transmission of the contract. For local authorities, the principle of their free administration exempts them from any requirement for state approval. Thus, such authorisation by the Ministers of the Economy and the Budget is not needed.
11 Article 10 of the Partnership Contract Ordinance and Article 9 of the Concession Agreement Ordinance.
12 Article 71 of the Partnership Contract Ordinance.
that assists grantors in the implementation of partnership contracts. The FIN INFRA is primarily responsible for the validation of the preliminary evaluations prepared by grantors before launching a tender. The FIN INFRA also assists and advises public authorities in the preparation and negotiation of partnership contracts as well as any other complex public contracts or public contracts implying an innovative financing scheme.

According to the Partnership Contract Ordinance, the FIN INFRA will still be a major actor given that it will also have to issue an opinion about the financial sustainability of each partnership contract. This new requirement should be an efficient way to avoid the financial difficulties deriving from the implementation of some partnership contracts in France.

### iii General requirements for PPP contracts

Requirements are different for the use of partnership contracts and concession agreements.

The Concession Agreement Ordinance provides that concession agreements must include provisions pertaining to the duration of the contract and the tariffs applicable to service users. The Concession Agreement Ordinance also provides that concession agreements can include provisions pertaining to sustainable development and social objectives.

Moreover, to optimise cost monitoring, the Concession Agreement Ordinance aims to increase transparency relating to the performance of concession agreements.

As a consequence, concession agreements must specify that the concessionaire will be required to provide an annual report to the grantor and that the grantor will have to annually publish essential data pertaining to the concession (i.e., type of investments and applicable tariffs).

Unlike concession agreements, the use of partnership contracts is strictly regulated. The contemplated project has to be related to the construction or conversion, upkeep, maintenance, operation or management of work, equipment or intangible assets necessary for public service and to all or part of their funding. First, a preliminary evaluation has to be carried out to evaluate the project’s implementation method. Then, a second evaluation must assess the financial sustainability of the project. In light of these evaluations the grantor must demonstrate that the use of a partnership contract shows better cost-effectiveness than any other type of agreement. Finally the grantor is compelled to submit these evaluations to the FIN INFRA, which is in charge of issuing an opinion on the project’s implementation structure.

This preliminary procedure was introduced by the Partnership Contract Ordinance, aiming to simplify the former implementation procedure and answer criticisms raised during the past decade regarding the implementation of partnership contracts.

A partnership contract must include several mandatory provisions, such as the duration of the contract, the conditions for sharing risks between the grantor and its co-contracting party, the performance objectives assigned to the co-contracting party, the payment terms and the consequences of termination of the contract.

Both partnership contracts and concession agreements are thus entered into for a period determined by the depreciation period of the selected investments or financing terms.

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13 Before 2016, the FIN INFRA was the MaPPP, which was created by Decree No. 2004-1119, dated 19 October 2004, and modified by Decree No. 2016-522 of 27 April 2016.

14 Article 76 of the Partnership Contract Ordinance.
Bidding and awarding procedures for partnership contracts are closely regulated. Regarding concession agreements, the Concession Agreement Ordinance and the Concession Agreement Decree regulate the bidding and award procedures for concessions of a value greater than or equal to €5,548 million, excluding tax. The new legal framework applicable for concessions will remain flexible, with the aim of ensuring effective and non-discriminatory access for all potential bidders (including small and medium-sized companies). Nevertheless, in practice, most of those minimal requirements already existed in French case law.

As regards partnership contracts, the Partnership Contract Ordinance provides that three granting procedures can be implemented:

- a competitive dialogue, in the case of particularly complex projects where grantors are not objectively able to define the technical means or specify the legal or financial aspects of a project;
- a negotiated procedure for small projects below a certain amount defined by decree;
- a restricted call for tenders.

As competitive dialogue is the most common procedure for the awarding of partnership contracts, we will focus on that.

### i Expressions of interest

To allow effective competition among applicants (it being specified that applications can be submitted through a consortium), partnership contracts and concession agreements must be the object of adequate publicity.

Nevertheless, partnership contracts may only be used in the following cases: if the value exceeds €2 million for immaterial assets or if the contract contains specific targets on performance; if the value exceeds €5 million for network infrastructures; or if it exceeds €10 million in the other cases.

Regarding concession agreements, publication requirements are less strict. The public tender notice has to be published in a newspaper authorised to carry legal advertisements and in a specialised newspaper of the relevant economic sector. The notice must also specify the procedures for the applications’ submission and the essential characteristics of the concession agreement, including its purpose and nature. Granting authorities may also require the production of documents from the bidders in support of their applications (i.e., the presentation of sufficient professional and financial guarantees to ensure the continuity of the public service).

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16 Article 42 of the Partnership Contract Ordinance. The grantor conducts a dialogue with the candidates admitted to the procedure with the aim of developing one or more suitable alternatives capable of meeting the specified requirements.

17 The negotiated procedure is defined as the procurement procedure in which 'the contracting authorities consult the economic operators of their choice and negotiate the terms of contract with one or more of them'. The negotiation process enables grantors to negotiate the terms of the contract.

18 Article 42 of the Partnership Contract Ordinance.

19 Article 42 of the Partnership Contract Ordinance.

21 Article 75 II of the Partnership Contract Ordinance.
In both cases, the publication notice must specify the deadline for applications.

ii Requests for proposals and unsolicited proposals

For both partnership contracts and concession agreements, tendering documents will be communicated to shortlisted applicants.22

Regarding concession agreements, the grantor shall deliver a programme document to the applicant that defines the quantitative and qualitative characteristics of the required benefits and, if applicable, the service pricing conditions applicable to the end user.

Regarding partnership contracts, in a competitive dialogue, the grantor has to define the detailed needs and objectives that the project will have to meet in a functional programme that will be transmitted to the applicants selected for the dialogue.

The possibility of an unsolicited proposal is contemplated neither for concession agreements nor for partnership contracts.

iii Evaluation and grant

For partnership contracts, a dialogue will be conducted with each candidate to define solutions on the basis of the functional programme. The dialogue typically involves two or three phases, which are normally carried out over a period of nine to 12 months.

At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the candidate with the most economically advantageous tender in accordance with the criteria set out in the contract notice or in the tender procedure. The awarding criteria must include the overall cost of the tender23 and performance objectives defined according to the purpose of the contract. As soon as the preferred bidder is selected, the contracting authority shall inform the unsuccessful candidates that their tender was rejected. A standstill period of at least 16 days is required between the date of notification of the decision and the date of execution of the contract24 to allow for any eliminated candidate to initiate a summary proceedings challenge on grounds of a breach of the relevant procurement rules.25

For the sole partnership contracts to be entered by the state or entities linked to the state, the FIN INFRA must assess the impact on public finances and the fiscal sustainability of such agreement before its execution.

For all partnership contracts, once they have been signed, the procuring authority is required to send an executed copy of the partnership contract to the FIN INFRA.

At the end of the awarding procedure, a notification must be sent within 30 days to the European Union Official Journal.

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22 In concession agreements, the public authority lists applicants admitted to tender after consideration of their professional and financial guarantees and their ability to ensure the continuity of public service and equality of service users.
23 The 2004 Ordinance specified that the overall cost of the tender is intended to mean the sum, in current value, generated by the design, financing, construction or conversion, upkeep, maintenance, operation or management of works, equipment and intangible assets, and the provision of services specified for the term of the contract.
24 The duration is either 11 or 16 days depending on certain criteria (i.e., in case of electronic transmission of the decision to the rejected bidders).
Regarding concession agreements, before the negotiation phase, the grantor selects the potential bidders based on their capacities and abilities in accordance with the criteria set out in the publication notice.26 Once they have been selected, applicants have to submit tenders that will be freely negotiated with the contracting authority. At the end of these negotiations a concessionaire will be chosen and the applicants who have had their offers rejected will be notified. A standstill period, however, shall be respected.27

V THE CONTRACT

i Payment

Concession agreements and partnership contracts can be differentiated according to their payment terms.

Under a concession agreement, the operating risk is transferred to the concessionaire and this transfer necessarily implies a real exposure to the market’s 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.

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 very high rates to service users. For example, significant financial contributions are paid in concession projects related to railway infrastructure (high-speed railway) or motorways. Local authorities usually subsidise 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 additional revenues (e.g., proceeds from side activities such as advertising and fines).

Unlike concession agreements, partnership contracts are characterised by a regular payment from the grantor to the private partner throughout the term of the contract. This remuneration is determined for the services provided by the private partner (works, intangible investments, supplies and services) and is divided into several parts. One part represents the compensation of the partner 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 partner pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the partner must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructures.

The partnership contract shall define the terms of the calculation and disbursement of the payment to be made by the grantor. Such payment 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 partner may depend on performance targets set in the partnership contract. Premiums or

26 Article 22 of the Concession Contract Decree.
27 Article 1-1 of the Decree No. 93-471 of 24 March 1993 and in 2016, Article 29 of the Concession Agreement Decree.
bonuses may be paid (e.g., if the works are completed before the date specified in the contract). Likewise, penalties (e.g., in the case of a delay in completion) may reduce the amount of the rent to be paid by the grantor; and

b the collection of ancillary revenues\(^{28}\) – the Partnership Contract Ordinance allows the private partner to develop structures and equipment in order to benefit from complementary incomes.

The Partnership Contract 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 of the parties will have to be expressly distinguished in order to avoid any confusion with the legal framework applicable to concessions.

\(\text{ii State guarantees}\)

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\(^ {29}\) 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 (financing of €7.8 billion). This concession agreement was granted by 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 subscribed by the project company under a concession agreement or a partnership contract.

Moreover, the contracting 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.

\(\text{iii Distribution of risk}\)

PPPs rely on a clear allocation of the risks between the public and private entities. This allocation of risks is negotiated by the parties and is usually the object of a ‘risk matrix’. Except for the risk of use of the works, the risk matrix is fairly similar for concession agreements and partnership contracts.\(^ {30}\)

Risks relating to the performance of the contract (e.g., delays in the completion and delivery of the works, archaeological discoveries and design risk) are generally transferred to the private entity.

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\(^{28}\) The collection of ancillary revenues serves as a financial incentive for the partner, but also for the public party. Indeed, the rent paid by the public body may be reduced depending on ancillary revenues collected by the partner.

\(^{29}\) At this time, the name of the FIN INFRA was ‘MaPPP’ (Mission d’appui aux PPP). The MaPPP was replaced by the FIN INFRA in 2016.

\(^{30}\) Under concession agreements, the risk of the works being used by the end user is borne by the concessionaire.
In France, particular attention is given to public authority powers (i.e., powers to unilaterally amend or terminate the contract on public interest grounds) as the contract provisions may define the financial consequences of the use of public authority powers by the grantor.

iv Adjustment and revision

Being long-term agreements, PPPs 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. Should the grantor be a public authority, the PPP contract can, as a principle, be unilaterally modified by it. As stated in Section V.iii, French administrative case law establishes the possibility for the public authority to unilaterally amend the contract for reasons of general interest. However, the power of amendment is regulated so that the modification cannot result in a disruption of the overall structure of the contract. 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 new legal framework applicable to both partnership contracts and concession agreements strictly regulates their amendments by stating six limitative alternative cases under which modifications are acceptable.

Regarding concession agreements, any with a duration of more than five years will be determined in light of the period needed to amortise the investments required.

The provisions of the Partnership Contract Decree and the Concession Agreement Decree pertaining to the modification of French PPP contracts will apply even for contracts entered into before 1 April 2016. This improvement clarifies the legal regime and provides for greater flexibility in the implementation of concession agreements.

v Ownership of underlying assets

The legal regime applicable to concession agreements where the grantor is a public authority is organised around a classification distinguishing three types of assets:

a assets of compulsory reversion that shall revert to the public authority automatically once the contract ends. Because they are crucial to the provision of the public service, these assets are considered, when the contract does not address this issue, as the property

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31 These clauses must comply with Articles L. 112-1 to L. 112-3 of the Monetary and Financial Code that prohibit, with certain exceptions, indices based on overall inflation and requires the use of indices related to the obligations whose price is indexed.

32 Article 139 of the Partnership Contract Decree and Article 36 of the Concession Agreement Decree.

33 The contract may assign: (1) ownership of the works to the concessionaire for the duration of the contract, which, although necessary for the operation of public service, are not established as the property of a grantor; or (2) rights on such property (Supreme Administrative Court, 21 December 2012, Commune de Douai, No. 342788). At the end of the contract, if assets of compulsory reversion are not fully amortised, the co-contracting party is entitled to a payment equal to the net book value shown on the balance sheet if the depreciation period of the assets involved is less than or equal to the duration of the contract, or the net book value resulting from the depreciation of these assets over the term of the contract, when the term of the agreement is less than the normal depreciation period of the assets.
of the public authority \textit{ab initio}, that is to say, from the moment the concessionaire acquires an asset or completes specific works. Assets of compulsory reversion must necessarily return free of charge to the public authority at the end of the contract;

\begin{itemize}
  \item[b] assets of optional reversion, which are useful to the provision of the public service but are not necessary to ensure its continuity. The concessionaire is the owner of such assets for the duration of the concession agreement and they only become the property of the public authority if the public authority exercises its recovery right at the end of the concession agreement. The terms of payment of such assets are specified in the contract; and
  \item[c] assets that belong to the concessionaire. They are not subject to being returned to or eventually recovered by the public authority as they do not aim to ensure the continuity of public service.
\end{itemize}

Regarding partnership contracts, the private partner is the owner of the assets. The private partner sets up a financing that covers: the acquisition of assets; the cost of the works; and the cost of maintenance and renewal. Consequently, by paying rents to the private partner, the contracting authority pays for the acquisition of proprietary interests in certain assets. At the end of the partnership contract the partner transfers the assets to the contracting authority.

Assets that are not integrated in the financing base (i.e., not acquired by the grantor through the rent) can remain the property of the private partner. However, they may be subject to a contractual provision providing for their transfer against payment to the public authority at the end of the contract.

\section*{vi Early termination}

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

Specific legal frameworks exist for two types of termination: termination on the grounds of general interest and termination for contractual breach by the contracting authority.

\textbf{Termination on the grounds of general interest}

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

\textbf{Termination for contractual breach by the public authority}

Should the grantor be a public entity, the termination for contractual breach by the grantor cannot be a contractual ground under which the concessionaire may require the termination of a concession agreement.

To terminate a concession agreement on the basis of a contractual breach by the grantor, 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 of including in a contract, not related to the performance of the public service, a
provision allowing the partner to terminate the contract for a contractual breach by the public authority. Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

**Termination for failure to fulfil the obligations as determined by the Court of Justice of the European Union**

Both the Concession Agreement Ordinance and the Partnership Contract Ordinance provide that the agreement has to be terminated, in the case of a major breach, if the Court of Justice of the European Union states that the grantor has awarded the contract without complying with the obligations imposed by the European Directive (as provided under Article 258 of the Treaty on the Functioning of the European Union).

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

If a *force majeure* event or an unforeseen event occurs, the contract may be terminated and the contract will usually provide that the private entity will be indemnified on the basis of the ‘useful expenses’ 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.

One of the major points of both the Partnership Contract Ordinance and the Concession Agreement Ordinance, 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.

Indeed, in case of cancellation of the contract, the private entities can seek indemnification for all expenses incurred in accordance with the concession agreement or the partnership contract, which may include the financial expenses incurred to ensure the performance of the contract, to the extent that the said expenses have been useful to the grantor.

In respect of the concession agreement, such financial expenses are defined broadly and include the costs for the concessionaire relating to the financing instruments and those arising from the early termination.

It shall be noted, however, that the indemnification of the useful expenses can only apply when a schedule of the concession agreement and the partnership contract specifies in respect of the concession agreement, the main characteristics of financing to be set up for the purposes of the contract performance, and in respect of the partnership contract, the provision that binds the contracting partner to the financial institutions.

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34 Supreme Administrative Court, 8 October 2014, Société Grenke Location, No. 370644. It must be noted that: the case law did not concern a concession agreement or a partnership contract but there is a reference to administrative contract; and the termination is not automatic. Indeed, the public authority shall have the possibility to contest the termination.

35 Supreme Administrative Court, 19 April 1974, Société Entreprise Louis Segrette, No. 82518.

36 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 *force majeure*.

37 Article 89 of the Partnership Contract Ordinance.

38 Article 56 of the Concession Contract Ordinance.
Finally, both the Partnership Contract Ordinance and the Concession Agreement Ordinance provide that, if an indemnification clause is provided under the partnership contract or the concession agreement, then it is deemed separable from the rest of the said agreements.

The Concession Agreement Ordinance clarifies the quantum of the financial indemnification applicable in the case of cancellation or termination of a concession agreement by a judge following a third-party challenge.

As a consequence, the concessionaire may request to be indemnified for the expenses incurred under the concession agreement that have been useful to the grantor, including financing expenses and costs.

From a project finance perspective, such express reference to the theory of ‘useful expenses’ should be reassuring for both sponsors and lenders.

Indeed, the indemnification of useful financial expenses constitutes a major achievement for the lenders and all finance parties involved in a partnership or concession project because it covers the risk of third-party challenge, in particular, should a concession agreement or a partnership contract be held to be void as result of a challenge.

The contract may also be terminated for breach by the private entity. The possibility to terminate the contract on this ground and its consequences must be provided for in the contract. In this case, the private entity cannot receive compensation for the damage resulting from the early termination of the contract.

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

VI FINANCE

In France, PPPs are usually financed under a project finance scheme. The key feature of project financing is that it is an ‘off balance sheet’ financing for the sponsors.

Project finance generally involves high debt-to-equity ratios depending on the particular project and market. It refers to a limited recourse (or non-recourse) financing structure that does not impose any obligation on the project sponsors to guarantee the repayment of the project debt, should the project revenues not be sufficient to cover the total debt service. Shareholders of the project company are generally only liable up to the extent of their shareholdings.

In respect of the partnership contract, the Partnership Contract Ordinance provides that the procuring authority must be informed of any change in the project company shareholding. The partnership contract must contain provisions regarding the procuring of authority information, and as applicable, the proceeds sharing terms in the case of the sale of the project company shares.

The borrowing entity is a project company, namely, a special purpose vehicle (with no previous business or record) that will finance, design, build, operate and maintain the project. In France, project companies are often incorporated as liability companies or partnerships.

The repayment of the project loans by the project company relies on the future cash-flow projected to be generated from the operation of the project (primarily allocated to operating costs and then to debt service).

One of the main concerns of the lenders is to analyse the bankability of the project, which depends on several factors. For instance, the project’s cash-flow capacity, the mitigation
of the risks between all stakeholders, the project company’s contractual documentation and the security package must all be examined to ensure the successful financing of a PPP in France.

Many sources of financing are available, including commercial lenders (banks, insurance companies, credit corporations, etc.), sponsors’ equity, public bodies, international (multilateral) agencies, bilateral agencies and bondholders. These financiers might be based in France or abroad.

Prohibited under the 2004 Ordinance, the Partnership Contract Ordinance now contemplates the possibility for a procuring authority to contribute to the financing of the project.

State or local authorities or other public bodies, whether acting as procuring authority or not, are now entitled to take a minority stake in the project company. In this case, the project company by-laws must specify the allocation of risk between the shareholders and the measures implemented to prevent any conflict of interest.39

The Partnership Contract Ordinance also provides that partnership contracts are eligible for subsidies or other financial contributions. The terms and the payment schedule of the subsidies and other financial contributions can be adapted to the duration of the contract.

In respect of financing adjustment, the Partnership Contract Ordinance also specifies that the procuring authority may provide that financing terms referred to in the final tender can be adjusted, provided that this adjustment may not affect the conditions of the bidding procedure by exempting the procuring authority of the obligation to respect the principle of choice of the most economically advantageous tender or allowing the prospective candidate to affect the economic balance of its tender.40

In a typical project finance transaction, the lenders provide different types of debt to the project. Senior lenders provide a debt with a right of payment senior to that of the subordinated lenders. Moreover, some lenders might provide a tranche of debt for a specific period of time and with a specific interest rate and an amortisation differing from the tranche provided by others lenders. A wide range of French law debt instruments are also available to issue subordinated, high-yield or convertible bonds.

The standard types of project finance credit agreements may notably include:

- **a** the term sheet – an initial agreement between the project company (in its capacity as future borrower) and the lenders outlining the key terms and conditions of the financing;
- **b** senior facility agreements – agreements between the lenders and the project company (in its capacity as borrower) setting out the rights and obligations of each party regarding the senior debt;
- **c** a common terms agreement – an agreement entered into by the financing parties and the project company that defines the terms and conditions that are common to all the financing instruments and the relationship between the parties (for instance, definitions, events of default, order of drawdowns, project accounts, permitted investments, voting process for waivers and amendments, undertakings, covenants, representations and warranties, etc.). Such agreement ensures that all the finance parties have a common understanding of the key definitions and critical events;

39 Article 80 of the Partnership Contract Ordinance.
40 Article 82 of the Partnership Contract Ordinance.
subordinated loan agreements – loan agreements whereby subordinated creditors agree not to be paid until the senior creditors have been repaid. These loans are usually provided by the project sponsors or by third-party investors such as investment funds;

e a shareholders’ agreement – an agreement that sets forth the rights and liabilities of each project company shareholder especially with respect to capital contributions, transfers, conflicts of interest and restrictions on competition;

f an intercreditor agreement – an agreement between the project company and the lenders (senior lenders, mezzanine lenders, hedging counterparties, loan note holders and intra-group lenders, etc.), which regulates the creditors’ rights to receive payments (such as principal, interest and fees), notably in the event of default;

g hedging agreements – agreements that enable the project company to fix the interest rate on all or part of its debt or to limit its exposure to exchange rate risks;

h a direct agreement between the lenders and the project company under which the lenders will be entitled to take over the project (step in) regarding the key project agreements should the project company default under certain circumstances;

i sponsor support and third-party guarantee – senior lenders will often require sponsors or third parties to put in place certain credit-enhancement measures (parent guarantee, letter of credit, comfort letter);

j public sector support – public sector support instruments may also be set up (e.g., direct funding support by way of public sector capital contributions);

k contingent support or guarantees by the public sector or other private sector participants involving specific risks that cannot otherwise be effectively controlled by the project company or other private sector participants (e.g., minimum traffic and revenue guarantees for a toll road); and

l EU loan guarantee – an example is the Loan Guarantee for Trans-European Transport Network Projects, which is a credit-enhancement instrument set up and developed jointly by the European Commission and the European Investment Bank, facilitating a larger participation of the private sector involvement in the financing of Trans-European Transport Network infrastructure.

As project finance is carried out on a limited (or non-recourse) basis, it is critical to secure the finance parties through a collateral security package, which also helps to enhance the bankability of the project and the creditworthiness of the project company in its capacity as borrower.

Under French law, a security interest is generally created in favour of the creditors of the secured obligation.

French law recognises the role of security agent. Pursuant to Article 2488-6 of the Civil Code, a security agent may be in charge of setting up, registering, managing and enforcing any security interest for the benefit of the secured creditors. Indeed, security interests are granted in favour of each lender and not only for the benefit of the security agent, which means that each of the lenders might be entitled to act individually in enforcing its specific

The legal regime applicable to the security agent has been modified by Ordinance No. 2017-748, dated 4 May 2017. However, please note that, according to most of French practitioners, this modification provides for an incomplete legal regime and does not answer to many uncertainties.
security interests rights (subject to any restrictions in the financial documentation). The security agent is thus appointed by the creditors and acts under a power of attorney granted by the lenders.

The most common types of security interests used in PPP project finance transactions in France are:

- a pledge over bank accounts (governed by Article 2355 et seq. of the Civil Code);
- a pledge over securities accounts (governed by the provisions of Article L211-20 of the Monetary and Financial Code) involving a pledge over shares or other financial securities and a pledge over the bank account on which cash proceeds relating to such shares or financial securities are credited (e.g., dividend);
- a pledge over the project company’s ongoing business (governed by Article L142-1 et seq. of the Commercial Code) notably involving lease rights, logo and corporate name, goodwill, commercial furniture, equipment and machinery used for the operation of business, and certain intellectual property rights attached thereto;
- a pledge over equipment (governed by Article L525-1 et seq. of the Commercial Code or Articles 2333 et seq. of the Civil Code);
- a pledge over intellectual property rights (governed by Article 2355 et seq. of the Civil Code);
- a pledge over receivables – including future receivables, if such receivables are sufficiently identified – (governed by Article 2355 et seq. of the Civil Code);
- assignment by way of security over receivables (including contingent or future receivables if such receivables are sufficiently identified). Under French law, receivables are assigned by way of security, which is a simplified form of assignment of receivables for security purposes. It transfers the ownership of a receivable to the relevant secured creditor. Such security interest, which is governed by Article L313-23 et seq. of the Monetary and Financial Code, is only available, provided that:
  - the assignee is a credit institution licensed in France or otherwise licensed to carry out its activities in France through the European Passport, a financing company, or, since Ordinance No 2017-1432, dated 4 October 2017 and applicable as of 3 January 2018, an alternative investment fund;
  - the assigned receivables secure a credit granted by a credit institution (the assignor) to the assignor in connection with its business activities; and
  - the assigned receivables relate to business or professional activities;
- a trust by way of security (governed by Article 2011 et seq. of the Civil Code) whereby a debtor assigns the ownership of its assets on a temporary basis into a dedicated estate. Such a dedicated estate is managed by a fiduciary specifically appointed for this purpose;
- delegation of receivables (governed by Article 1336 et seq. of the Civil Code). A delegation is commonly used to take security over receivables under insurance policies. The debtor (i.e., insurance company) agrees to make payments directly to the secured creditor; and

42 Although this mechanism appears to be quite akin to the mechanism of ‘trust’ in common law jurisdictions, it differs from the trust as it is not based on a dismemberment of the right of ownership of the assets transferred into the dedicated estate (i.e., beneficial ownership versus legal ownership).
security interests (mortgage, lender’s lien, antichresis) on real property (land, buildings, rights of way and easements). Such security interests must be entered into by way of notarised deed and registered to the relevant land registry to become enforceable against third parties.

In addition to the above-mentioned security interests, creditors may require the sponsors to provide personal guarantees, notably independent guarantees such as first-demand guarantees and standby letters of credit.

A bill that aims to enhance the attractiveness of the French legal framework, including security law, is currently being discussed before Parliament (the PACTE Bill). The PACTE Bill, if enacted, may, inter alia, simplify the publicity formalities related to security interests on movable property, establish an ordinary-law assignment of receivables for security purposes, and amend the rules governing security interests within the framework of insolvency procedures.

At the closing date and before any subsequent disbursement of the loan, lenders will require that the borrower first comply with a set of conditions precedent, including (for the first drawdown): organisation and existence of the project company; execution and delivery of facility agreement, and related financing documents; security interests filings; availability of funds; related equity documents; sponsors supports documents; third-party support documents; guarantees; enforceability of project contracts; permits; insurances policy endorsements and insurance report; real estate surveys and title insurance; financial statement of project company and other project participants; construction budget and construction drawdown schedule; revenue and expenses projections; engineering reports; consultant reports; environmental review; legal opinions; ‘know-your-customer’ processes; no material adverse change; no defaults; and no litigation.

VII RECENT DECISIONS

In 2018, few major rulings affecting the legal framework for PPPs were issued by administrative judges.

First, in a decision dated 5 February 2018, the French Supreme Administrative Court developed its case law relating to the possibility of entering into a concession agreement without implementing a prior tendering procedure.

In such case, the French Supreme Administrative Court confirmed a precedent ruling dated 14 February 2017 in which it stated that the duration of such concession agreement cannot exceed either: the required duration to initiate and implement a new prior tendering procedure; or the required duration to properly prepare the service provision by the public authority itself.

43 Bill No. 1088 relating to Companies’ Growth and Transformation.
44 Article 16 of the PACTE Bill.
45 Supreme Administrative Court, 5 February 2018, No. 416581.
46 Supreme Administrative Court, 14 February 2017, No. 405157.
In the decision dated 5 February 2018, the French Supreme Administrative Court added that the signing of a temporary concession agreement cannot be justified by a purely financial interest put forward by the public authority. 47

Then, on 9 March 2018, the French Supreme Administrative Court ruled on the conditions under which a concession agreement in force may be modified through a contract amendment. 48 In this case, it has been ruled that the parties cannot introduce a substantial provision through a mere contract amendment. Indeed, a contract amendment can neither modify the main purpose of the concession agreement nor substantially alter the economic equilibrium of the concession agreement resulting from its duration, the amount of investments needed or the revenues collected from services users. 49

In a decision dated 14 May 2018, the Tribunal des conflits 50 detailed in which hypothesis the disputes arising from direct agreements 51 performance can be settled by the French administrative courts. 52

In addition, in two decisions, the French Administrative Supreme Court clarified the legal regime applicable to the termination of the tendering procedure:

a In a decision dated 4 April 2018, 53 the Court ruled that the public notice of invitation to tender should be regarded differently when the tendering procedure is initiated by the French state, on the one hand, or by another public entity, on the other hand. There is no obligation for the French state to adopt such a formal decision. Publishing a public notice of invitation to tender is only a declaration of intention without prejudice of the decision that would be taken at the end of the process. Thus, the French state remains free to reject all offers. Nevertheless, other public authorities are in that case compelled to adopt a formal public notice of invitation to tender.

b In a decision dated 17 September 2018, 54 the French Supreme Administrative Court ruled that, under certain conditions, a public authority that launched a tendering procedure is not compelled to select an offer. Thus, the Court ruled that the lack of competition among the offers that have been submitted constitutes an adequate ground to refuse to select an offer.

47 In this case, the court held that the city of Paris cannot justify the signing of a temporary service concession with the risk of losing revenues in the case of termination of the information boards’ local services.
48 Supreme Administrative Court, 9 March 2018, No. 409972.
49 In the decision, dated 9 March 2018, the court held that a contract amendment that increases the applicable prices from 31 per cent to 48 per cent is a substantial modification that goes beyond what could be lawfully decided by the parties through a mere contract amendment.
50 Tribunal des conflits, 14 May 2018, No. C4119. The Tribunal des conflits is a court responsible for settling conflicts of jurisdiction between the two French orders of jurisdiction, judicial and administrative.
51 When a PPP agreement is implemented under a project finance scheme, a direct agreement is usually entered into between the project company, the grantor and the financing parties in order to establish a direct relationship with themselves and specify the circumstances under which the financing parties may step in to remedy a default under the project documents.
52 It could be deduced from such ruling that, in some circumstances, direct agreements can be classified as public contracts. Therefore, the project finance practices could change as regard these agreements since the legal regime applicable to public contracts would apply to them (legal challenges from third parties, termination terms and conditions, etc.). However, the consequences of this ruling are not clear-cut today and additional rulings (especially from the French Administrative Supreme Court) will be necessary to understand them from a practical standpoint.
53 Supreme Administrative Court, 4 April 2018, No. 414263.
54 Supreme Administrative Court, 17 September 2018, No. 407099.
In a decision dated 18 July 2018, the Administrative Court of Cergy-Pontoise ruled that the state’s decision to terminate the Ecotaxe PPP on the grounds of general interest was not legally justified and consequently unlawful. Therefore, the companies that suffered a direct and certain loss because of this fault could be compensated.

Finally, the French Supreme Administrative Court dealt with the legal regime applicable to assets of compulsory reversion. In a decision dated 29 June 2018, it has been held that all assets owned by the concessionaire prior to the signing of the concession agreement and which are necessary for the public service provision are also classified as assets of compulsory reversion. Therefore, when not otherwise provided under the contract, such assets are handed over to the public entity for free at the contractual termination date of the concession agreement.

VIII OUTLOOK

The transposition of the 2014 European directives pertaining to concession agreements and public procurements substantially modifies the existing French PPP laws, which include several regimes with strong specificities (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

The key date in 2019 in the field of French PPP law is likely to be 1 April, when the new Public Procurement and Concession Agreements Code will enter into force. This new Code will not substantially change the legal rules governing public procurement and concession agreements, as it only aims at aggregating existing legal norms. The approach that was adopted while drafting this Code was to gather not only applicable laws and decrees but also legal principles resulting from existing French and European case law, provided that such case law can be deemed stable.

The entry into force of this Code, comprising 1,747 articles, will undoubtedly simplify the legal framework governing PPP contracts, which will benefit public authorities, companies and practitioners. Such changes, along with the renewed support of certain local entities, are likely to trigger noticeable dynamics concerning PPP projects in several key sectors (e.g., transport, health, education, urban equipment, environment, energy efficiency and telecommunications).

55 Administrative Court of Cergy-Pontoise, 18 July 2018, No. 1507487.
56 In 2011, the state and the company Ecomouv entered into a 13-year partnership contract for the design, financing, delivery and operating of a heavy-vehicle satellite tolling project. But in 2014, the state, facing heavy political lobbying from truck drivers and consumers against the tax over pass-through costs, terminated the agreement on the ground of public interest just before the beginning of the operating phase.
57 Supreme Administrative Court, 29 June 2018, No. 402251.
I OVERVIEW

The German public-private partnership (PPP) market was subject to considerable changes in recent years. In July 2017, the German parliament passed a reform of the motorway administration\(^2\) that may lead to more PPP projects for the construction and operation of German motorways. Several new projects are planned as PPP projects and the investment volume in high-building and transportation reached, in total, a new high by the end of 2018.\(^3\)

The term PPP, which has been used in the German Federal Constitution since 2017 (Article 90 (2)), is (at least in Germany) not conclusively defined. It involves forms of long-term cooperation between the government and a private company often relating to cost-intensive infrastructure projects. The PPP discussion in Germany often focuses on projects involving cooperation in the construction, maintenance or operation of public roads and buildings (e.g., hospitals). Apart from these projects, public-private cooperation has other, practically important, forms. Many German cities have granted concessions to private companies for the refurbishment and operation of urban electricity grids. Out-of-home advertisers conclude long-term contracts with major German cities. They offer professional advertisement services to the private sector, but also contribute to the investment in and maintenance of the cities’ infrastructure. The German toll collection scheme for the use of the motorways by heavy goods vehicles (HGVs) was designed, built and has until recently been operated by a joint venture of private sector companies. The agreements require substantial investments from the private sector companies and include cooperation obligations. Further, public authorities and the private sector established institutionalised PPPs in the form of joint ventures, \textit{inter alia}, for the operation of airports (e.g., the international airports in Frankfurt, Düsseldorf and Hamburg).\(^4\) These complex and diverse projects should be taken into account to better understand the potential for public-private cooperations in Germany.

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2 Gesetz zur Änderung des Grundgesetzes (Artikel 90, 91c, 104b, 104c, 107, 108, 109a, 114, 125c, 143d, 143e, 143f, 143g), Federal Law Gazette 2017 Part I, No. 47, pp. 2347 and seqq.
II RECENT DEVELOPMENTS

In 2017, the German parliament passed a reform of the motorway administration, which could lead to further PPP motorway projects. While the motorways have been and must remain in the ownership of Germany, the federal states have so far been responsible for the administration of the motorways. Based on these divided responsibilities, the federal and state governments were not always aligned on a potential use of PPP structures for motorway projects. The revised constitutional provision on motorways now allows the centralisation of the administration at the federal level. In September 2018, the federal government therefore established a private-law entity in the corporate structure of a limited liability company for the administration of motorways, which can decide – subject to the federal government’s consent – to use PPP structures for motorway projects. Additionally, the federal government established a new federal office responsible for the supervision of the sovereign rights transferred to this company. A comprehensive privatisation of the motorways, however, remains excluded.

Already in 2015, the federal government initiated a programme for a new generation of PPP projects for 600 kilometres of motorways with a total investment amount of €14 billion: €7 billion for construction and €7 billion for maintenance and operation. For now, this new generation programme includes 11 projects for which the government reviews the procurement option PPP. The financial close of the PPP motorway project of the Motorways 10 and 24 between Neuruppin and Pankow had been reached in February 2018 and the project is now under construction. The project consists of an extension of the motorway by 58.6 kilometres and the maintenance of 64.2 kilometres with a total volume of approximately €1.4 billion. A consortium of two private companies has been awarded the PPP contract in December 2017. Further, the public procurement procedure for PPP motorway projects of

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5 Legislative proposal of the federal government to change the Constitution (Article 90 et al. of the German Federal Constitution), Bundesrat document dated 15 December 2016, No. 769/16.
6 Most notably, the federal government issued a formal instruction to the government of Lower Saxony in 2013 to use a PPP structure for the extension of Motorway 7 between Salzgitter and Göttingen. See www.mw.niedersachsen.de/aktuelles/presseinformationen/rechtsgutachten-zu-oep-p-a-7-liegt-vor-weisung-trotz-kritik-des-bundesrechnungshofes-rechtlich-unangreifbar--118125.html.
the Motorways 3 between Biebelried and Fürth/Erlangen, 49 between Fritzlar and Ohmtal and the Federal Route 247 by pass Kallmerode is still ongoing. For the Motorway 3 project the awarding of the PPP contract is expected at the beginning of 2019.13 For the Motorway 49 first offers are expected also early in 2019.14 Other motorway projects are in preparation.15

These new projects were all designed according to the availability model (V model)16 rather than the extension model (A model).17 Under the availability model, which has been more frequently used since 2009, the level of remuneration for the private operator depends on the availability of the respective motorway section (rather than, for example, the amount of toll revenue) and thereby sets quality incentives. These models have also been discussed in the context of a legal dispute of the Motorway 1 consortium regarding the completed motorway section between Bremen and Hamburg. Since the revenue from the HGV toll – calculated and agreed as compensation for the project costs – has been far lower than expected, the consortium claimed in 2017 additional payment of approximately €778 million in a lawsuit against Germany.18 Following the reasoning of the court of first instance the circumstances did not meet the criteria for the clausula rebus sic stantibus doctrine (see Section 313 of the German Civil Code (BGB)) to adjust the contract because the risk for the traffic volume had been contractually allocated to the contractor. According to the court this leaves no room for a supplementary interpretation of the contract.19 However, the consortium’s appeal against this decision is still pending and the decision therefore not yet final.20

In 2016, the federal government initiated a public procurement procedure for the operation of the toll collection scheme for HGVs on all federal roads. The government envisaged using a call option on the shares in the current project company. The public tender provided for the acquisition of the shares in the project company by a private investor together with a new contract for the operation of the toll collection scheme for HGVs for a duration of 10 to 15 years.21 In January 2019 the government terminated the public procurement procedure without any contract award,22 and, having used the call option,23 will keep running the project company and toll collection scheme state-owned.

16 www.bmvi.de/SharedDocs/DE/Artikel/StB/oepp-geschaeftsmodelle-v-modell.html.
17 www.bmvi.de/SharedDocs/DE/Artikel/StB/oepp-geschaeftsmodelle-a-modell.html.
The initiative of the federal government to also introduce a toll scheme for the use of motorways by passenger cars started in 2014. Its conformity with EU law has been discussed controversially and been challenged in two infringement procedures against Germany, one initiated by the European Commission in June 2015 after the publication of the law in the German Official Gazette and another by Austria shortly before its parliamentary elections in October 2017.

The European Commission terminated its infringement procedure in June 2017, after having reached an agreement with the German Federal Ministry of Transport and Infrastructure on a reasonable pricing scheme for the vignettes. Austria, joined by the Netherlands, upheld its procedure against Germany before the European Court of Justice. In its opinion of 6 February 2019, the Advocate General argues – in accordance with the current position of the European Commission – that neither a discrimination on grounds of nationality nor any other violation of EU law can be found.

The toll scheme for passenger cars will be implemented differently to the existing toll collection scheme for HGVs, as the toll will be charged time-based (10 days, two months or one year), not distance-based as for HGVs. Therefore, instead of using the existing system for HGVs, the levying of the tolls is envisaged by public entrustment of another private company. The public procurement procedure for the setting up and operation of the system started in June 2017. At the end of 2018, the contract was awarded to a German-Austrian consortium for 12 years with an extension option for another three years. The start of the toll levying is envisaged for October 2020 – subject to the final decision of the European Court of Justice.

PPP structures are also used for the construction and operation of public buildings, such as hospitals, schools, administrative buildings, sports facilities and prisons. These types of projects had a total volume of approximately €242 million in 2017. The federal government in 2009 proposed an amendment to the Constitution, according to which the federal government and the federal states may no longer finance costs with new debt (the ‘debt brake’). The debt brake restricts the possibility of the federal government to take out new loans exceeding a total amount of 0.35 per cent of the gross domestic product. According to the Federal Ministry of Finance, PPP projects are partially exempt for the purposes of calculating the debt brake and have to be considered in the calculation only in the amount of the actual payment (comparable to other lease agreements). In contrast, infrastructure expenditures and loans for infrastructure expenditures have to be considered in the full amount as of the time of investment. It seems likely that this partial exemption will be

an incentive for financing public infrastructure projects through PPP. The actual limitation under these provisions has become binding for the federal government as of 2016. The provisions on the debt brake will become effective for the federal states as of 2020.

III GENERAL FRAMEWORK

i Types of public-private partnership

PPP projects may be structured in very different manners in Germany. For the construction of public buildings (e.g., hospitals, schools or administrative buildings), the public authorities in most cases want to continue to hold the property rights in the real estate and only transfer the right to build and operate or manage a building used for public purposes to a private investor. From a legal perspective, it is also possible that the private investor acquires title to the real estate and either has an obligation to re-transfer the real estate to the public authority or remains the owner at the end of the fixed term.

Public authorities may also award concessions to a private investor. The main difference between a public contract and a concession is the type of consideration granted to the contractor. While the contractor under a public contract usually gets a remuneration, a concession holder obtains a right to use or market the provided service or good (e.g., market the service to third parties). These types of contracts are predominant, for example, in the transfer and operation of electricity and gas grids in municipalities and cities (see Section 46(2) German Energy Act) with approximately 20,000 agreements in Germany. The concession holder obtains the right to market the capacity of the electricity or gas grid to third parties (i.e., to electricity or gas providers) for a maximum period of 20 years. Although in recent years of PPP in Germany', Management, Procurement and Law Volume 167, p. 180 et seq.

Such a build–operate–transfer contract would include a payment for a term sufficiently long for the investor to amortise its investment plus any profit and risk adjustment. See Jacob/Kochendörfer/Drygalski/Hilbig, ‘Ten years of PPP in Germany’, Management, Procurement and Law Volume 167, p. 180 et seq.

This model – known in Anglo-Saxon practice as build–operate–own – is discussed in Germany in two subcategories. The difference mainly relates to whether the public authority has an option to acquire the real estate at the end of the term for a fixed price or not. See Jacob/Kochendörfer/Drygalski/Hilbig, ‘Ten years of PPP in Germany’, Management, Procurement and Law Volume 167, p. 180 et seq.
years some municipalities and cities have shown a tendency to establish or mandate a public entity to operate the electricity and gas grid (re-municipalisation), the law provides that municipalities may not award concessions in-house without a public procurement procedure (see Section 46(4) German Energy Act). Therefore, private sector parties can participate and – with a good offer – be awarded such concessions in a public tender.

In addition, the public authorities may establish joint ventures with private partners (sometimes this is called institutional PPP), for example, in the corporate structure of a limited liability company. Such entities may be used, for example, in the areas of waste management, water supply services and sewage treatment. Public law restrictions generally require that the public authority holds a majority of voting rights in the joint venture. The shareholders’ agreement will also include additional safeguards for ensuring the fulfilment of public tasks. This may include a restriction of the statutory purpose of the company to fulfil the public task, obligations to fund the legal entity and options for the public authority to call shares under certain circumstances. Alternatively, a public law structure – institution under public law – has been used for such public-private joint ventures (e.g., previously for the operator of Berlin’s water supply system Berliner Wasserbetriebe until October 2012). This requires, however, an act of parliament that explicitly allows the participation of a private investor.

ii The authorities

The 16 federal states in Germany have certain political competences. For certain tasks – such as military, federal waterways and rail infrastructure – the federal government has (some) administrative competences. At the federal level, the Federal Republic of Germany is often the contract partner, represented by the ministry in charge of the relevant task (e.g., the Federal Ministry of Transport and Digital Infrastructure, the Federal Ministry of Defence or the Federal Ministry of Finance) or by a subordinated federal authority. Other public tasks and much of the infrastructure is administered by the federal states – such as state roads, universities, schools and prisons. At the state level, the state may be the contracting authority, represented by the state ministries or subordinated state authorities. In addition, projects may also be administered on the municipal or county level. This applies, inter alia, to hospitals, schools, local and regional transport by bus and train, electricity and water supply. The contracting authorities on the municipal level are the municipality or city, or its entities. In the case of regional tasks (e.g., hospitals) the contracting authority may be the county. Municipalities may also form special purpose entities fulfilling certain public tasks, in particular, in relation to regional traffic, water supply and waste management.

iii General requirements for PPP contracts

In Germany, there is no specific act on PPP projects or contracts, apart from the constitutional provision on the administration of motorways. The civil law framework and regulatory

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44 The Federal Court of Justice, judgment of 17 December 2013, Case: KZR 65/12, has confirmed this understanding and has obliged municipalities to award concessions in a transparent and non-discriminatory procurement procedure even if they intend to award the concession to an entity under public law fully controlled by the municipality.

45 Cruz/Marques, Infrastructure Public Private Partnerships, 2013, p. 4.

46 e.g., the airports of Düsseldorf and Hamburg, see Section I.

47 http://www.bwb.de/de/8368.php.
requirements apply to PPP projects (e.g., laws on taxes, social security, minimum wage, trade unions and health and safety). More specific requirements can derive from budgetary provisions, public procurement law and provisions on specific sectors, such as energy.

Before using a specific procurement structure such as a PPP, the government – under budgetary requirements – has to conduct a cost-benefit analysis on different procurement possibilities (see Section 7(2) Federal Budget Act). State legislation contains similar requirements for the states’ and municipalities’ decisions. This analysis shall also take into consideration the risks of different structuring possibilities and, in particular, the possibility to involve the private sector for the fulfilment of the task or service. For PPP projects, permits or consents may be required under the budgetary provisions. In particular, the consent of the ministry of finance or – for municipalities – the supervisory authority may be necessary for contracts under which the public authority grants a guarantee, takes a loan or enters into an agreement similar to a loan. In addition, approval of the federal or state parliament or the municipal council may be necessary for costs in the budget.48

A specific public law entrustment is necessary if the private partner will be authorised to take authoritative decisions with regard to third parties. Such an entrustment may only be granted in or based on an act of parliament.49 For example, the operator of the German toll collection scheme has been publicly entrusted with certain tasks in connection with the levying of tolls for the use of motorways by HGVs (see Section 8(2) Act on Levying Tolls on Federal Motorways). However, in most PPP projects the private partner acts only as an administrative assistant and the transfer of such tasks generally does not qualify as a public entrustment. Certain tasks may not be subject to PPP projects under German law, for example, tasks that (regularly) require the use of direct force.50 The details are controversial and have been discussed, for example, in connection with PPP projects concerning prisons.51

IV  BIDDING AND AWARD PROCEDURE

The legal framework for public procurement within the European Union is harmonised for public contracts (including supply, works and services contracts) and concessions that exceed certain EU harmonised thresholds. The relevant EU provisions were reformed in 201452 and Germany has implemented these provisions as of April 2016, so they are relatively recent. The main provisions under German law are implemented in Section 97 et seq. of the Act against Restraints of Competition (GWB). In addition, there are implementing regulations,

48 See for the limits of the emergency competencies of the Minister of Finance for permitting expenses: Constitutional Court of the State of Baden-Württemberg, judgment of 6 October 2011, Case: GR 2/11.
49 Federal Constitutional Court, judgment of 18 January 2012, Case: 2 BvR 133/10. This case related to the transfer of powers for the operation of a facility for the treatment of persons not legally responsible for their criminal acts because of a psychiatric condition.
such as the Public Procurement Regulation, the Concessions Regulation, the Regulation on Procurement in the Sectors of Transportation, Water and Energy Supply and the Regulation on the Procurement in the Sector of National Defence and Security.53

i Requests for participation

The contracting authority has to publish a contract notice in the Supplement of the Official Journal of the European Union if the value of a public contract exceeds certain thresholds.54 The standard form of a contract notice shows, inter alia, information on the type of the contract, its value, the criteria for the selection of the tenderer and the award criteria. The public authority has to review whether the applicants fulfil the selection criteria. The selection criteria relate to certain grounds for exclusion, for example, the commission of certain defined criminal acts by the management or responsible employees or the initiation of insolvency proceedings against the bidder. In addition, the contracting authority may use selection criteria that relate to the economic and financial standing of the bidder (e.g., minimum requirements on a specific annual turnover or minimum insurance requirements) and criteria that relate to the technical and professional capacities (e.g., references, licences necessary for the business or a sufficient number of suitable employees in order to execute the contract).

ii Requests for proposals

The contracting authority further defines the requirements for the proposals in the tender documents and invitation to tender. This may include requirements on works or service specifications, prices and additional information on the quality of services or works. Generally, the public authority will provide a rather extensive list of requirements for the tender.

iii Evaluation and award

The selection of the successful tenderer has to be based on the evaluation criteria as provided by the public authority in the tender documents. Permissible criteria are price-only or a mix of price and quality criteria, and possibly also environmental or social criteria. In most PPP projects the public authority will use a mix of criteria and assess the tenders accordingly.

After the selection of the successful tenderer the contracting authority has to notify the other tenderers of the envisaged award decision (see Section 134(1) GWB). The public authority may conclude the contract with the successful tenderer 10 to 15 days after the submission of the notification – depending on the form used for the notification – unless a competitor has filed a complaint against the award with the competent procurement chamber. The procurement chamber for federal cases is the procurement chamber at the Federal Cartel Office in Bonn. The procurement chamber’s decision can be appealed at the competent Higher Regional Court. The Higher Regional Court in Düsseldorf is competent for appeals in federal cases.


54 The value threshold depends on the type of contract. As at 1 January 2018 the threshold for works contracts is €5,548 million and for service contracts €144,000 or €221,000 depending on the type of the contracting authority. See Commission Delegated Regulation (EU) 2017/2365 of 18 December 2017. Similar provisions exist for other types of contracts. Below the threshold, certain – limited – procurement obligations may apply, see also Ordinance on the Procurement Below Thresholds (Unterschwellenvergabeordnung, UVgO) of 2017.
V  THE CONTRACT

i  Payment

The scope of payment depends on the individual contract type. In PPP projects relating to the construction of a building, the payment may include components of the planning, construction, financing, operation stages and in some cases the transfer of real estate. The public authority will in these cases make regular payments to the private partner for the contract term. The contract, generally, splits up the payments with regard to the individual components. The agreements may contain provisions on inflation adjustments as common also for other long-term service agreements.

With regard to the construction or enlargement of motorways, public authorities use different types of contracts. Some contracts – such as the contract for Motorway 94 – include a monthly payment by the government to the consortium. The public authority may reduce the payment if the motorway’s use is limited, for example, if a motorway lane is blocked for construction or if a speed limitation is necessary because of the (bad) quality of the road (availability model). Other motorway PPP contracts include a payment that is linked to the toll paid for the relevant section of the motorway. In Germany, HGVs have to pay a toll based on the number of motorway sections they use, which was extended to further federal routes (Bundesstraßen) as of 1 July 2018. Further, by 1 January 2019 new weight categories were introduced and lighter HGVs (7.5 tons and more) included in the toll collection scheme.\(^5\) Under this type of contract, the private investor obtains a claim against the public authority in the amount of the HGV toll paid for the relevant section by the users (extension model).\(^6\)

ii  State guarantees

The government often uses state guarantees and state grants to assist private investors to secure financing (e.g., in the case of motorway projects). With regard to municipal projects for the construction of buildings for public use, the private partner may apply for loans from public banks, such as the Kreditanstalt für Wiederaufbau or the European Investment Bank. The private partner may also apply for state grants (e.g., under programmes to finance hospitals). It is also possible for the public authority or the state to grant guarantees for bank loans. Such guarantees require a specific permit or consent from the ministry of finance or a municipal supervisory authority. State guarantees and state grants are subject to strict European requirements on state aid. In particular, large-scale public funding may trigger an obligation of the public entity to notify the funding to the European Commission.

iii  Distribution of risk

Major risks for PPP projects relate to the planning stage, the construction stage (specifically delays in construction), the operation stage and the subsequent use of the asset.\(^7\) With regard to the risk of construction (e.g., obtaining a permit, usability of the real property, delays), under German law – as a general rule – the risk is allocated to the party from which sphere

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55 [https://www.bmvi.de/DE/Topics/Mobility/Transport-Planning-Investment/The-HGV-Tolling-Scheme/The-HGV-Tolling-Scheme.html](https://www.bmvi.de/DE/Topics/Mobility/Transport-Planning-Investment/The-HGV-Tolling-Scheme/The-HGV-Tolling-Scheme.html).

56 In addition, the government offers a third type of contract that gives the private investor the right to levy an (individual) toll for the use of the relevant road (F-Model). This model has been used for very few bridge and tunnel projects. To date, these projects have been regarded as less successful.

57 Lorson/Haustein/Albrecht/Perlick, Der Betrieb, 2015, pp. 2705, 2711.
it originates. If a property provided by the public authority cannot be used for the project because of (severe) environmental damages, the risk is, under German law, generally allocated to the public authority (see Section 645 German Civil Code (BGB)). In contrast, if the architect’s plan commissioned by the private partner is incorrect and not appropriate for use, this risk is, under German law, generally allocated to the private partner. Exceptions apply – as usual – if the contracting parties concluded in their agreement that the potential risks arising from the subsoil shall be allocated to the private partner. This has been the matter in a recent law suit concerning the construction and operation of the Motorway 8 between Augsburg and Ulm.  

The parties may deviate from these general provisions in the contract. With regard to the construction of motorways, the main difference between the models used for PPP relates to the allocation of risks for the use of the motorway (by HGVs). Whereas the private partner has the risk that the motorway is not sufficiently used in contracts that base the payments on the amount of toll incurred for the section (i.e., under the extension model), the public authority takes this risk with regard to contracts that base the payment on the availability of the relevant section (i.e., under the availability model; see Subsection i). Similarly, in the case of the award of concessions, which allow the private partner to market its services to third parties (e.g., use public space for advertisement or levy a fee for the use of a parking deck in the city centre), the private partner assumes the risk that the facility is used sufficiently. In some of these cases, such as awarded electricity or gas concessions, these risks are reduced because the grid constitutes a natural monopoly for the private partner on the relevant services.

iv Adjustment and revision

Under public procurement law, the adjustment and modification of PPP contracts may require a new public procurement procedure if the contract has been materially changed (see Section 132 GWB). An adjustment or modification qualifies as material if it changes material provisions of the agreement and the amendment shows the intent of the parties to renegotiate the agreement. Further specific provisions regulate the exchange of the contractor, a change in pricing, a modification of the contract term and of the scope of works or services.

v Ownership of underlying assets

In most cases discussed in this section, the government would generally retain the private property. However, if the project encompasses a transfer of real estate, such an agreement has to be notarised (see Section 311b(1)(1) BGB). The actual transfer of ownership has to be registered in the private real estate register (see Section 873(1) BGB). In addition, the sale of real property by the public authority may require a permit from the ministry of finance or a supervisory authority.


59 See Section II, especially the law suit concerning the Motorway 1 between Bremen and Hamburg (A-model).
vi Early termination
The term of PPP contracts may reflect the amortisation period of the project, which in major infrastructure projects is often 15 to 30 years. Fixing the term under German law means that a termination without reason is excluded, unless the agreement contains an explicit right to terminate the agreement. From a procurement law perspective, it is helpful to include options for the prolongation of the agreement. PPP contracts usually contain additional termination rights for the contracting authority, most commonly for a material delay of the project, the non-compliance with material requirements for construction or financing, bankruptcy and cases of non-compliance with the law (e.g., corruption or antitrust violations).

VI FINANCE
PPP projects are often financed from mixed sources, including private and public funding. There are possibilities for state financing in programmes for specific sectors (see Section V.ii). Most PPP projects are at least partially funded by bank loans. In many cases the public authority will have a better credit rating than the private investor. To ensure the lowest interest rate possible, the private investor will have the right to sell its claims against the public authority to the banks in order to finance the project. The public authority will waive its rights to certain or all objections against the payment claim (forfeiting with objection waiver).60

With regard to motorway PPP projects that require a significant investment, generally, a mix of different instruments is used. The federal government finances part of the construction costs as advance payment. The rest of the investment amount has to be financed by equity and bank loans. The loans for these projects are provided by consortiums of banks, which may include private and public banks. The loan agreements between the project company and the consortium address the main risks for the bank consortium.61 During the construction phase, the main risk for the bank consortium is that the project is not realised. Therefore, the loan agreement may include partial loan instalments pursuant to a milestone plan. The bank consortium will also require a sufficient equity ratio to be provided by the sponsors and may require the sponsors to make additional contributions in the case of changes to the project plan or cost structure. In addition, the bank consortium will require that the construction agreement contains sufficiently strict contractual penalties for the contractor to ensure that the project is realised on time.

VII RECENT DECISIONS
During recent years, several municipalities have planned to transfer concessions for the operation of electricity and gas grids ‘in-house’ to wholly owned and controlled subsidiaries. In two landmark decisions on the award of concessions for electricity and gas grids, the Federal Court of Justice ruled that if a municipality awards a concession, this must be done in a non-discriminatory way and the municipality is prohibited from preferring its own municipal utility without objective reasons.62

60 Lorson/Haustein/Albrecht/Perlick, Der Betrieb, 2015, pp. 2705, 2707.
61 Baums, Recht der Unternehmensfinanzierung, 2017, Section 67, Para. 10, et seq.
62 Federal Court of Justice, judgment of 17 December 2013, Cases: KZR 65/12 and KZR 66/12.
With regard to certain types of PPPs, courts hold that the private sector company may itself, because of the influence of the state, qualify as a public authority. The Higher Regional Court in Düsseldorf ruled that even if the state does not hold any shares in a PPP joint venture, the contractual relationships can allow the government to have a dominant influence on the company.63

VIII OUTLOOK

The year 2018 brought about smaller changes to the PPP market in Germany compared with the significant changes of 2017. New projects are being initiated and investments for these projects are increasing, which demonstrates a solid basis for continued development in the future. However, the rejection of the claim for additional payment of the Motorway 1 consortium for the completed motorway section between Bremen and Hamburg by the court of first instance (appeal pending), in particular, is likely to have an indirect impact on how future major PPP projects in Germany will be funded.

The legal framework for the administration and financing of motorway projects was modified through an amendment to the Federal Constitution in 2017. Although privatisation of the motorways has been excluded, PPP projects in this area could continue to increase, not least because of the debt brake for the federal and state governments where PPP projects could help to fund such major infrastructure projects. Besides PPP projects and investments in the traditional sectors of high-building and transportation, there is potential for future PPP projects, particularly in the IT sector.

63 Higher Regional Court Düsseldorf, decision of 19 June 2013, Case: VII – Verg 55/12.
I OVERVIEW

In 1999, the Act on Promotion of Private Finance Initiative (Act No. 117 of 1999, the PFI Act) was enacted, and introduced the private finance initiative in Japan on a full-scale basis. Since then, the PFI Act has been revised a few times in furtherance of the promotion of PFI projects in Japan. For example, in 2011, the PFI Act was revised to allow the government to grant the concession rights of public facilities to the private sector. In 2013, a public-private fund called the Private Finance Initiative Promotion Corporation of Japan (PFIPCJ) was established by the revision of the PFI Act to provide new sources of financing and consultation support for PFI projects. In 2015, further revision was made to enable secondment of experienced public officials to private sector concessionaires to share the expertise of the public sector in operating the public facilities.

In December 2015, the Council for the Promotion of Private Finance Initiatives of the Cabinet Office (the PFI Promotion Council) established a guideline for the preferential consideration of diverse methods of PFI/PPP to induce local governments to preferentially examine the adoption of the PFI/PPP scheme when planning construction, operation or maintenance of public facilities. As a result, as at 31 March 2018, there have been 666 PFI projects announced under the PFI Act, amounting to approximately ¥5.8 trillion. The Japanese government aims to accelerate efforts to adopt the PPP/PFI method in order to tackle the increasing demand to maintain and renovate aged infrastructure, reduce the fiscal burden on impoverished local governments and cope with population decline in Japan.

II THE YEAR IN REVIEW

In light of the government’s above-mentioned strategy, in June 2018, the PFI Promotion Council announced the revised Action Plan for Promotion of PPPs/PFIs for fiscal year

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1 Kiyomi Kikuchi is a partner and Kazuyuki Waka is a counsel at TMI Associates.
2 The term PPP is used in Japan to describe a variety of different forms of public-private sector cooperation. This chapter, however, focuses principally on PFI, since it is, to date, the model that has been used for most PPP projects.
2018 (the 2018 Action Plan)\(^6\) to further the efforts by the national and local governments to promote the PPP/PFI scheme by: reinforcing the existing measures to achieve the plan; and adding two areas (hydroelectric power generation facilities and industrial water systems) to the existing priority areas for concession projects (airports, water and sewage systems, roads, educational facilities, public housing, passenger terminal facilities for cruise ships and MICE\(^7\)). To achieve the goals set forth in the Action Plans, the PFI Act was amended in 2018.\(^8\) The amendment aims to strengthen national government's support for PFI projects, and introduce a new system to facilitate the concession type PFI of public facilities and further incentivise PFI projects in the area of water business (see Section VIII).

i **Airports**

Among the priority areas for concession projects, airports are one of the growth areas with increasing demands for PPP/PFI transactions in Japan. In 2013, the Act for the Operation of Government Controlled Airports by Private Sector Entities was enacted to enable the central and local governments to privatise airports through concession, and the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) announced the Basic Policy on the Operation of Government Controlled Airports by Private Section Entities, which provides for the basic framework for all concessions of national airports.\(^9\)

Against this backdrop, in 2016, Sendai Airport in Miyagi Prefecture started operation through concession,\(^10\) and New Kansai International Airport Company, a private concession company, started the operation of Kansai International Airport and Osaka (Itami) International Airport.\(^11\) In 2018, airport concession projects continued to be initiated in the local areas of Japan, with the process to grant concession rights in respect of seven airports in Hokkaido area being announced in March by the government.\(^12\) In addition, the operation by the private sector of Kobe Airport in Kobe City,\(^13\) Takamatsu Airport in Kagawa Prefecture\(^14\) and Tottori Airport in Tottori Prefecture\(^15\) have started in 2018. Fukuoka Airport in Fukuoka Prefecture, Mt Fuji Shizuoka Airport in Shizuoka Prefecture and Nanki-Shirahama Airport in Wakayama Prefecture are aiming to commence operation with the private sector in April 2020.\(^16\)

ii **Water and sewage**

As opposed to airports, water and sewage is a mature area in Japan, with decreasing demands paralleling the decline in local population. Nevertheless, there are urgent needs to renovate the rapidly aging existing water facilities, especially by the municipal governments who

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\(^6\) See the Cabinet Office website: https://www8.cao.go.jp/pfi/actionplan/action_index.html.

\(^7\) Meetings, incentive tours or travels, conferences or conventions, and exhibitions.

\(^8\) See the Cabinet Office website: https://www8.cao.go.jp/pfi/hourei/kaisei/h30_pfihoukaisei.html.


\(^12\) See the MLIT website: http://www.mlit.go.jp/koku/koku_tk5_000046.html.

\(^13\) See the Kobe City website: http://www.city.kobe.lg.jp/life/access/airport/08.html.

\(^14\) See the MLIT website: http://www.mlit.go.jp/koku/koku_tk5_000022.html.

\(^15\) See the Tottori Prefecture website: http://www.mlit.go.jp/koku/koku_tk5_000022.html.

have traditionally provided the water supply services to their local residents. Therefore, the national government is placing specific emphasis in promoting the concession-type PFI projects in the area of water and sewage system.\(^{17}\) Hamamatsu City, Shizuoka Prefecture signed a concession agreement with a private company to operate the city’s sewage system in 2017, and in April 2018, the system commenced operation as scheduled.\(^{18}\) However, despite the efforts by the national government, the progress to privatise the water and sewage system by the municipalities in Japan has been slow. In response, the PFI Act and the Water Supply Act were amended in 2018 (see Section VIII).

iii Other areas

Another notable area for the PPP/PFI projects is in the area of utilisation and improvement of public properties. In May 2017, a successful bidder for the concession project to renovate a former prison into a hotel was selected. A part of the new facility is scheduled to open in 2019, and the hotel is expected to be in full operation by 2021.\(^{19}\)

In addition, in relation to another priority area, Aichi prefecture and Yokohama City (Kanagawa Prefecture) have signed concession agreements to operate MICE facilities, which are scheduled to start operation in September 2019 and April 2020, respectively.\(^{20}\)

III GENERAL FRAMEWORK

i Types of public-private partnership

In the past, approximately 70 per cent of the PPP/PFI projects were conducted by build-transfer–operate (BTO) methods, which rely on the ‘services fees’ or ‘availability payments’ from the government to construct social infrastructures (typically, government buildings and public schools). However, we may see an increasing number of concession-type PFI projects, especially in the area of economic infrastructures, such as airports, roads and port facilities.

In the 2018 Action Plan, the national government categorises the PPP/PFI projects into the following four types. Type I is a concession scheme introduced by the revision of the PFI Act in 2011, where a public authority confers on a private entity the right to operate public facilities for a certain period of time. Type II is a scheme to attach an income generating facility, which may produce revenues to cover the costs associated with the project, to the existing facility. Type III is PPP projects to make use of unused or underused publicly owned real properties. Type IV is other traditional PPP/PFI projects, which typically rely on ‘services fees’ or ‘availability payments’ from the government. Although the national government believes that traditional type projects serve as a first step for the municipal governments, it ultimately hopes to see more concession-type PFI projects. The 2018 Action Plan (which has a target of reaching the total size of ¥21 trillion over the 10-year period from 2013 to 2022) allocates ¥7 trillion to Type I projects, ¥5 trillion to Type II projects, ¥4 trillion to Type III projects and ¥5 trillion to Type IV projects.

\(^{17}\) Conference to Review Promotion of PPP/PFI Business in the Sewage Sector on 4 July 2017.
\(^{18}\) See the Hamamatsu City (Shizuoka Prefecture) website: https://www.city.hamamatsu.shizuoka.jp/g-sisetu/gesui/sein/pfi.html.
\(^{19}\) See the Ministry of Justice website: http://www.moj.go.jp/kyousei1/kyousei07_nara.html.
ii The authorities

In Japan, PFI projects are implemented, not only by the central government, but also by the municipal government at the prefecture, city, town and village level. At the national level, the sector ministries that govern the public facility will conduct the procedure to select the private business operator (e.g., the Ministry of Justice conducted the procedures for the Nara Prison PFI as it is in charge of national prisons and rehabilitation facilities, and MILT is sponsoring the Takamatsu Airport PFI as it is in charge of national airports). In addition, the Private Finance Initiative Promotion Office within the Cabinet Office plays a principal role in the PFI market in Japan, setting the general policy on PFI projects by issuing bills and guidelines and establishing action plans, among others, to support the promotion of the implementation of PPP/PFI projects.

iii General requirements for PPP contracts

The PFI Act sets out the general framework of the PFI projects, which governs most PPP projects in Japan. It requires that, when considering the implementation of public facility development projects, such services shall be procured from the private sector to the extent possible and suitable, and a publicly open procedure is in principal required when selecting the private business operator for the project.

To quantitatively assess the suitability and appropriateness of procuring the PPP/PFI method over other traditional options, value-for-money (VFM) analysis is conducted prior to selecting the PFI project by the relevant government. This analysis, which compares the life-cycle cost of the PFI project with the public sector comparator, helps the government to determine the model under which the public facility would be delivered at a greater VFM.

Public infrastructure facilities that are subject to PFI transactions under the PFI Act include the following:

- a public infrastructures: for example, roads, railways, ports, airports, rivers, parks, water, sewage and industrial water facilities;
- b public facilities: for example, government buildings and housing for government workers;
- c public housing, and educational or cultural, waste treatment, medical, social welfare, rehabilitation, parking and underground facilities;
- d telecommunication, heat supply, new energy, recycling, tourist and research facilities; and
- e transportation facilities of vessels and aircrafts, etc., and satellites.

The terms of contracts under which the national government owes an obligation to pay for more than one fiscal year is limited to 30 years. Local governments and governmental

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21 Article 2, Paragraph 3 of the PFI Act.
23 Article 3.1 of the PFI Act.
24 id., at Article 8.1.
25 id., at Article 68.

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organisations are not subject to such regulation. Notwithstanding, the Accounting Act and Preliminary Financial Results and Accounting Ordinance require that the deadline for the performance period be specified in the project agreement.26

When a municipal government enters into a project agreement that involves an estimated project amount for the purchase or lease of the public facility above a certain threshold amount, the government is required to obtain an approval of the local council in advance.27

In addition, a public bid is required for deals that are subject to the Agreement on Government Procurement of the World Trade Organization (AGP), and foreign entities may not be excluded from participating in procurement of PPP/PFI projects by the national government or local governments in accordance with the AGP.

IV BIDDING AND AWARD PROCEDURE

The Cabinet Office has issued a Guideline on PFI Project Implementation Process (the Procurement Guideline) to provide explanation on the process and practical guidance for participating in the selection process.28 Most PFI projects are awarded to private business operators either through competitive public bid or open proposal procedure. The general steps to be taken in the selection process are as follows:

a. the decision to initiate a PFI project is made after the relevant government examines the possibility of procuring PFI projects from the private sector;
b. the implementation policy is announced by the relevant authority to the public;
c. the relevant authority conducts a VFM analysis and determines the project to be conducted by the PFI method;
d. the opening of a public bid is announced or a formal request for proposal is issued by the relevant authority and a formal selection process begins; and
e. evaluation of the response or proposal from the bidders is conducted and the preferred bidder is selected and announced.

i. Expressions of interest

If the relevant authority intends to procure PPP/PFI projects, it must publish an implementation policy of the PFI project that outlines the selection process for the PFI business and private business operator, allocation of responsibilities and risks among the parties, information on the public facility (such as location and size), financial aid or support to be provided, and other items necessary for the implementation of the PPP/PFI business.29 To procure information in relation to the implementation policy, the relevant authority may conduct market hearings or soundings prior to or after the announcement of the policy.30

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26 Article 29-8 of the Accounting Act, Article 100 of the Preliminary Financial Results and Accounting Ordinance.
27 Article 12 of the PFI Act and Article 3 of the Enforcement Order of the PFI Act (Tokyo Metropolis and prefectures: ¥500 million, ordinance designated cities: ¥300 million, other cities: ¥150 million, towns and villages: ¥50 million).
29 Article 5 of the PFI Act.
30 Section 2-3 of the Procurement Guideline.
Sometimes, services and technical specification requirements are announced as early as concurrently with the announcement of the implementation policy to provide a better picture of the requirement to the interested parties at an early stage.

Publication of the implementation policy provides an important opportunity for the government to invite and assess expression of interest, and often comments and questions from the interested parties are solicited through the internet, and the government conducts hearing sessions.  

ii Requests for proposals and unsolicited proposals

Invitation to bid and requests for proposals

In order to invite private sector parties to take part in the public tender or submit a proposal in response to the formal request for proposal (RFP) by the public sector sponsor, public bid documents or the RFP is generally made available to the public on a relevant procurement website. To communicate a clear intention of what is required in the evaluation process, the bid document or RFP package will normally include detailed requirement for services and technical specification and the evaluation criteria, and the basic terms and conditions of the project agreement (or the draft itself). The authority normally provides opportunities to the participants to pose questions and receive answers through the procurement website or hold a question and answer session. Participants are normally requested to submit with the RFP responses their funding plans and measures to ensure the effectiveness of the proposals.

Unsolicited proposals

The PFI Act was revised in 2011 to clearly define that unsolicited proposals of implementation policy for the PFI projects from private sector companies are permitted. Even before the revision, unsolicited proposals were allowed. However, as a result of the revision, the government is now obliged to promptly review the proposal and notify the proposing company of the result of such review without delay. This does not mean that the private party that made the proposal will necessarily be awarded the project. The government must separately initiate the public selection process and select the winner, provided that, when selecting the preferred bidder, the government must properly evaluate the contribution made by the proposing party.

iii Evaluation and grant

The PFI Act requires that a private business operator to implement the PFI project be selected through an open procedure. Upon selection, objective evaluation (including evaluation on the effectiveness and efficiency of the project) must be carried out, and not only the price, but also the quality of the services to be provided to the public must be taken into account so that the technology and managerial expertise and innovation of the private business
operator will be fully utilised. Accordingly, most PFI projects are awarded to private entity either through public competitive bid or open proposal procedure (or competitive dialogue procedure). Evaluation of the responses or proposals will be in accordance with the scoring formula contained in the procurement document, with the participants’ response or proposal evaluated based on the price they propose (quantitative points) and other aspects of the responses or proposals they submit (qualitative points), and the participant with the highest accumulated points selected as the preferred bidder.

If it is difficult to assess the technical component or specification requirement only with the response or proposal submitted by the participant, the government may ask the participants to make a ‘technical proposal,’ in which case such requirement will be specified in the procurement document.

With regard to the negotiations during the selection stage, in the public bid procedure, requirements provided in the bid documents may not be modified or negotiated once the bidding procedure begins (provided that the bidders may be given opportunities to ask questions to the government in the public Q&A session). Whereas, in the public proposal procedure, the process is slightly more flexible, in that the relevant authority may have competitive dialogues with multiple bidders and the requirements and specifications may be amended as a result of such dialogues.

In selecting the preferred bidder, external consultant may be retained to provide objective advice or an evaluation committee (usually comprised of outside experts and professionals) may be established to ensure transparent and objective evaluation of participants’ responses or proposals.

Once the private business operator is selected through the public procedure, such party must be announced promptly to the public. After the announcement is made, the relevant authority and the selected private business operator will enter into the project agreement.

V THE CONTRACT

i Payment

In most traditional PFI projects, a business operator relies on a ‘service fee’ or ‘availability payment’ from the public authority for each component of the services (i.e., construction and management of the public facility). Typically, a project agreement provides for the calculation formula of such service fee, and the public authority often reserves the right for reduction and withdrawal of payment in the event of failure by the operator to meet the agreed-upon performance standard. The payment cycle of the service fee is usually on a semi-annual or quarterly basis. The service fee for the construction phase is not necessarily paid by the

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36 id., at Article 11.
37 id., at Article 10.
38 Section 4-1 of the Procurement Guideline.
39 id., at Section 4-1(11).
40 id., at Section 4-1 (12).
41 Article 11.1 of the PFI Act, Section 4-2 of the Procedure Guideline.
42 Article 4-2(3) of the Contract Guideline issued by the Cabinet Office.
43 id., at Article 4-3.
44 id., at Article 4-2(4).
public authority in a lump-sum amount, but in some cases, the service fee is paid by in equal instalments of principal and accrued interests, in which case the public authority can level its monetary obligation owed to the business operator over a period of time.

In contrast, the revision of the PFI Act in 2011 introduced a new scheme – a ‘concession scheme’ – in which the business operator is granted a concession right to operate and manage the public facility from the public authority, which includes the right to collect and receive a user fee directly from the users of the public facility. In a concession scheme, the business operator is expected to ensure profitability of PFI project on its own initiative. In other words, a concession scheme is a ‘self-supporting model’ or a stand-alone type of PFI project. The business operator in a concession scheme has the discretion to determine the user fee unless otherwise restricted by the implementation policy of the project, the concession agreement or by legislation.

ii State guarantees
In general, the PFI Act, which is the primary source of law governing PFI projects in Japan, does not have legal framework in which the state guarantees the payment obligation of the public authority to the business operator.

iii Distribution of risk
The Cabinet Office has released several guidelines related to PFI projects, including the Risk Allocation Guideline, the Contract Guideline and Concession Guideline. Notably, the Risk Allocation Guideline sets forth the basic principle for risk allocation among the parties that the party who is able to control the risk most efficiently should bear the risk, and identifies different types of risk as follows. If the distribution of risk is quite unreasonable such that PFI projects will not be performed in a proper and reliable manner, it is possible that the Prime Minister will request reporting from, or provide an advice or a recommendation to, the public authorities in charge of the relevant public facilities.

Force majeure
In respect of force majeure events, the Contract Guideline suggests that the business operator incur part of the loss caused by force majeure events to incentivise the operator to minimise the amount of loss. In this regard, the Standard Form of the Project Agreement released by the Cabinet Office for use in BTO scheme (the Model Agreement) states that, if the total amount of damage caused by force majeure events exceeds 1 per cent of the service fee, the public authority shall bear such excess amount, meaning that damage below such threshold amount shall be borne by the business operator. The Contract Guideline also suggests the

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45 Article 23 of the PFI Act.
46 There are several recent cases of concession scheme for which the entirety of the concession agreement is made publicly available (concession agreement for the operation of Sendai Airport, Kobe Airport, Takamatsu Airport, Tottori Airport, Fukuoka Airport, Mt. Fuji Shizuoka Airport and sewage treatment plant in Hamamatsu City).
47 Article 1, Section 2 of the Risk Allocation Guideline.
48 id., at Article 2, Section 6.
49 Article 4 of the Concession Guideline.
50 Article 6-9 of the Contract Guideline.
51 Articles 30 and 41 of the Model Agreement.
business operator should enter into insurance agreement for insurable risk and damages as a measure of risk mitigation. In some cases, extension of the stated contract term can be used as a measure to compensate for loss of profit.

**Fluctuation of price and interest rate**

Fluctuation of the price will affect the profitability of the PFI project with longevity. In this regard, the Contract Guideline suggests the parties agree to a mechanism for adjustment of the service fee in the event that fluctuation of a specific index (such as consumer price index) has exceeded a certain threshold or otherwise for adjustment of the service fee at a certain interval.\(^{52}\)

If the business operator has procured financing by way of floating rate loan, it is common for the operator to enter into an interest rate swap agreement with a financial institution.\(^{53}\)

**Reform of legislation**

In some cases, legislative reform could affect and increase the project costs. It is quite common that the public authority is required to bear increased cost arising from reform of specific laws that apply to the specific PFI project in question. On the other hand, the business operator is required to bear increased cost arising from reform of laws that apply to the private sector in general.\(^{54}\)

**Defect of the existing facility**

In a concession scheme, the business operator is sometimes granted the concession right in respect of an existing public facility. The Concession Guideline suggests that the parties should make an effort to minimise the loss arising from defect of the existing facility by way of disclosure of information from the public authority to the business operator.\(^{55}\) It is common to have a contractual provision that the public authority should compensate the business operator to a certain threshold amount or otherwise extend the term of the concession scheme if the business operator has suffered any loss because of the physical defect of the existing facility.

**Demand risk**

In a traditional PFI project, the revenue of the business operator relies on a stable fixed service fee paid by the public authority, which means that if the actual demand for the use of the facility fails to achieve the original expectation, such ‘demand risk’ is borne by the public authority; whereas, in a concession scheme whereby the business operator is expected to generate profitability on its own, the business operator will have to bear such demand risk.

As a measure to mitigate such demand risk, a ‘joint venture model’ where the business operator is entitled to receive a user fee directly from the users while the public authority also makes payment of service fee to the business operator may be adopted. It can be especially helpful in PFI projects where revenue from the public facility is expected to be volatile.

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\(^{52}\) Article 4-4(3) of the Contract Guideline.

\(^{53}\) id., at Article 4-4(4).

\(^{54}\) id., at Article 5-3.

\(^{55}\) Article 4 of the Concession Guideline.
iv Adjustment and revision
In traditional availability payment-type PFI projects, it is common to have a contract provision regarding adjustment and revision of the service fee in response to the fluctuation of price (see Section V. iii) or that will take into account of the innovation if any innovation of certain technology is expected that could affect the performance of PFI projects.56

In a concession scheme, the business operator is entitled to adjust user fees at its discretion unless otherwise restricted by the implementation policy of the project, the concession agreement or legislation.

v Ownership of underlying assets
In typical traditional PFI projects, such as BTO schemes, ownership of the public facility is transferred to the public authority upon the completion of construction.

Similarly, in a concession scheme, if the business operator is granted the concession right in respect of an existing public facility, the ownership of the facility remains at the public authority; whereas, if the business operator is asked to construct a new public facility, the ownership of the public facility will be transferred to the public authority upon completion of the construction.

Under the PFI Act, the concession right is deemed as a real property right, and the business owner can create a mortgage on it to secure the monetary obligation owed to the financial institutions. If the lenders intend to transfer the concession right to another party as a part of foreclosure, they must obtain consent from the public authority. The concession rights and mortgage created thereon are registered in a registration system held at the Cabinet Office.57

vi Early termination
The project agreement can be terminated prior to expiration of the stated contract term if there is a cause for early termination set forth in the project agreement. In general, the cause for early termination by the public authority is breach of the project agreement by the business operator. Even in this case, the business operator is usually granted a certain grace period to cure the termination events. If the breach is a failure by the operator to meet a certain performance standard, the public authority can take alternative measures such as reduction or withholding a part of the service fee before resorting to early termination.58

On the other hand, causes for early termination by the business operator include the failure by the public authority to pay the service fee and cure such payment default within a certain period.59

In addition to termination for cause, it is common to have a no-cause termination clause if management or operation of public facility is no longer required as a result of change in the policy or demand for the service provided by the public facility.60 The project agreement can

56 Article 4-4(5) of the Contract Guideline.
57 Articles 24 through 27 of the PFI Act.
58 Article 4-3 of the Contract Guideline.
59 Article 58 of the Model Agreement.
60 id., at Article 57.
also be terminated if, as a result of force majeure or legislative reform, it has become impossible or impractical to continue the PFI project in the same manner as originally contemplated, and the parties have failed to agree upon the measures to address such adversity.  

The business operator is obliged to compensate for damages to the public authorities if the project agreement is terminated because of reasons attributable to the business operator, in which case, a specific amount as penalty (such as 10 per cent of the construction cost) is commonly provided in the project agreement. It is common to have a contract provision adding that the public authority can seek recovery of its loss if the actual amount of loss exceeds the specified amount.

VI FINANCE

The business operator generally raises funds for construction and management of the public facility through project finance where source of repayment derives from project revenue.

If the business operator procures such funds by way of a loan, upon request from the lenders, shareholders of the business operator often execute a ‘sponsor support letter’ in which they agree to cooperate with the lenders in performing the project, including but not limited to making additional capital contributions to the business operator upon the occurrence of certain trigger events. In addition, security interests are usually created on the assets of the business operator, including the ‘concession right’ as well as the shares in the business operator held by the sponsors. The lenders also have the ‘step-in right’ to intervene in the PFI project and engage a successor entity acceptable to the public authority to continue the same project in the event of default of the existing business operator. In practice, lenders will exercise their option to transfer contractual status of the business operator with respect to each agreement related to the PFI project to the successor entity in the event of default.

Since identity of the operator is critical to the success of the PFI project, the project agreement usually states that the business operator requires the consent from the public authority to transfer such contractual status under the project agreement. The public authority and the lenders will therefore enter into direct agreement in which the public authority agrees to refrain from early termination for a certain period of time so that the lenders can exercise their step-in right without the project agreement being terminated. The public authority will also provide consent to creation of security interest in the contractual status of the business operator, as long as it is not harmful to the stable operation of the PFI project and service quality.

With regard to alternative financing resources, in relation to concession type PFI projects in which the business operator bears the demand risk (see Section V. iii), there has been a need for external investors who can provide risk money to the business operator in order to further promote the stand-alone type PFI projects. In response, amendment of the PFI Act in 2013 established PFIPCJ.

With respect to cross-border financing, while there is no restriction under the PFI Act that would prevent it, we rarely see such financing arrangements in PFI projects in Japan. Apart from the regulatory requirements, such as registration under the Money Lending Business

61  id., at Article 59.
62  id., at Article 56.
63  Article 5-1 of the Contract Guideline.
64  id., at Article 5-1 and Article 6-1.
Law of Japan, there are a few setbacks for cross-border financings or equity investments in PFI projects. First, the project size of PFI projects in Japan is still relatively small, and second, distribution of profits from equity investment in the business operator may not be lucrative enough to attract foreign investors. Limited liquidity in terms of equity interest in the business operator may also need to be improved with respect to PFI projects in Japan.

VII RECENT DECISIONS

In general, there has been no particular court precedent concerning PPP and PFI since the enactment of the PFI Act in 1999.

With respect to dispute resolutions in the area of construction works, in Japan, if parties are unable to resolve disputes through mediation or conciliation, such disputes will be settled through arbitration by the Construction Work Dispute Committee which is a semi-judicial institution organised in each prefecture pursuant to the Construction Business Act of Japan (Act No. 100 of 1949). The procedure of the arbitration held by the Construction Work Dispute Committee is not open to the public.

VIII OUTLOOK

The national government is striving to promote PPP/PFI to reduce the public financial burden of maintaining and operating infrastructure, and increase private investment and business opportunities in such areas, evident in the 2018 Action Plan. However, although the number of PPP/PFI projects in Japan has grown in certain areas, a surge is yet to be seen. One of the factors may be a lack of strong incentive on behalf of local governments, who are substantially subsidised by the central government in relation to public works, to commence the burdensome procedure to implement the PPP/PFI scheme. The harsh reality is, however, financial conditions of the local governments in Japan will become more severe while the number of public infrastructures requiring renovation will rapidly increase.

In response, in 2018, the PFI Act was revised to enhance further support from central government. For example, public authorities in charge of the public facilities and private business operators can submit enquires to the Prime Minister as to the availability of supportive measures from central government and applicability of regulations with respect to specific PFI projects. Consequently, the Prime Minister is now expected to serve as a one-stop contact point to receive and respond to such enquires. In addition, a 2018 revision of the PFI Act has enabled local governments to redeem their debt obligation (municipal bonds) owed to the central government in relation to the water works business prior to the original maturity date without any prepayment penalty being imposed, if such a fund was allocated to construction, renovation, operation or management of water supply and sewage systems, and subject to other certain eligibility requirements. Further, as a measure to promote concession type projects in respect of water supply, the Water Supply Act (Act No. 177 of 1957) was revised in 2018. Under the Water Supply Act, it is common for local governments to serve as a water supplier with the permission from the Ministry of Health, Labour and Welfare, and, if local governments intend to cease serving as a water supplier, they must obtain a separate permission from the same ministry. The 2018 revision of the Water Supply Act has made it possible for a local government to grant concession rights to private business operators with permission from the same ministry without losing its title as a licensed water supplier.

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I OVERVIEW

By enacting the Promotion of Private Capital into Social Overhead Capital Investment Act in August 1994, Korea introduced the public-private partnership (PPP) scheme in earnest. Under the PPP scheme, the government seeks to supplement its insufficient finances by inviting private funds to construct social infrastructure, such as roads, railroads, and harbours. Subsequently, Korea has continued to make efforts in creating an environment suitable for private partnership for approximately 20 years by statutory amendments and system improvements. The current PPP is being operated transparently and fairly, pursuant to the Act on Public-Private Partnership in Infrastructure (the PPP Act), its enforcement decree, the Public-Private Partnership Project Basic Plan (PPP Basic Plan), the detailed methods and guidelines prescribed by the Korea Development Institute’s Public and Private Infrastructure Investment Management Center (PIMAC), and ordinances legislated by each local autonomous government.

By amending and publicly announcing the PPP Basic Plan annually, pursuant to the PPP Act, Korea is responding to the changes in conditions of the private investment market. Moreover, by developing guidelines on various types of evaluation and enforcement processes and standardising the qualification examinations, infrastructure project basic plans, and implementation agreements, Korea is striving to enhance transparency and fairness in implementing PPP projects.

Triggered by the deterioration in government finances caused by the foreign exchange crisis in the late 1990s, the demand for PPP projects in Korea had increased exponentially. At that time, PPP projects were boosted by the large influx of foreign infra funds, which had an abundance of experience in implementing PPP projects and the requisite capital. The number of projects and the total invested amount eventually peaked in 2007, subsequently

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1 Soong Ki Yi and Joon Man Shim are partners, and James Jin Jung is a foreign attorney at Yoon & Yang LLC.
2 Several social infrastructures were constructed under the PPP scheme even before the enactment of this act. However, the aforementioned projects were tailor-made by enacting and applying special legislations for each project. The PPP scheme was not stimulated before 1994 because each piece of special legislation had raised controversy that each project was a government attempt to provide special benefits to the private enterprises that participated in the relevant social infrastructure projects.
3 This is a government agency established under the PPP Act and serves as an information investment agency in charge of assisting the PPP projects executed between private partners and competent government authorities by providing preliminary feasibility studies and qualification examinations for projects that exceed a certain size.
declining as the financial crisis subsided. However, PPP projects for social infrastructures, such as roads, railroads, harbours, and terminal sewage disposal plants, have continued to build and rebuild Korean infrastructure.

II THE YEAR IN REVIEW

PIMAC publishes an annual report on PPP projects each year; however, the 2018 Annual Report on PPP projects has not yet been published.4

According to the 2017 Annual Report on PPP projects, there were 712 PPP projects in total that were in progress or implemented as of the end of December of 2017 and the total investments in such PPP projects amount to approximately 108 trillion won as of the above-mentioned date. PIMAC had performed the review of the PPP Basic Plan and the PPP Project Plan, evaluation of project plan proposals, negotiation for execution of the concession agreement, review of the proposed concession agreement, review of and negotiation on refinancing (including reorganisation of the capital structure of project companies), and change of project implementation terms, for approximately 80 PPP projects.

III GENERAL FRAMEWORK

i Introduction

PPP projects in Korea are regulated by the PPP Act and its subordinate statutes. The statutory system governing PPP projects is described in the table below.

<table>
<thead>
<tr>
<th>System</th>
<th>Norms</th>
<th>Legislator or author</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPP Act</td>
<td>Social infrastructure specification, implementation method, PPP project implementation procedure, concessionaire's rights, industrial infrastructure credit guarantee fund, social infrastructure investment and loan collective investment scheme, PPP project dispute resolution committee, management and supervision, systematic support, and penalties</td>
<td>National Assembly</td>
</tr>
<tr>
<td>Enforcement Decree of the PPP Act</td>
<td>Elaboration of statutorily delegated matters</td>
<td>President</td>
</tr>
<tr>
<td>The PPP Basic Plan</td>
<td>Annual policy implementation direction and investment plan, general guidelines on implementation of PPP projects, and PPP project implementation procedure</td>
<td>Minister of Strategy and Finance</td>
</tr>
<tr>
<td>Detailed methods and guidelines</td>
<td>Detailed methods for qualification examination, detailed methods for funding, and detailed methods for evaluation and negotiation, etc.</td>
<td>PIMAC</td>
</tr>
</tbody>
</table>

Korean PPP projects are statutorily limited to six categories of projects under the PPP Act; however, by stipulating broad details regarding the fifth and sixth categories, the PPP Act, in effect, permits PPP projects to be implemented in diverse manners, such as build-transfer-operate, build-transfer-lease, build-operate-transfer and build-own-operate.

PPP project implementation projects can be broadly divided into two types: government initiated projects, wherein private partners are recruited by the government to implement a publicly financed project, where the government sees the private partner as having superior capacity and expertise to deal with the project than the government; and privately initiated projects, wherein a private partner independently discovers a project that is deemed profitable among the PPP projects and proposes its implementation to the government.

4 We expect the report to be published on 30 April 2019.
The types of social infrastructures that can be subject to PPP projects are enumerated in the PPP Act, and they are relatively diverse: roads, railroads, harbours, airports, water resources, information telecommunication infrastructure, energy facilities, logistics complex, environmental facilities, educational facilities, national defence facilities and cultural facilities.

ii PPP project implementation procedure

Government-initiated project

With respect to government-initiated projects, the Minister of Strategy and Finance commences the project implementation by establishing a basic plan regarding social infrastructure that conforms to priority order according to the principles of the beneficiary’s financial capability, profitability, business benefits and efficiency, in accordance with the PPP Act, and subsequently selects and publicly announces the social infrastructure to be constructed as a PPP project.

To elaborate, a potential infrastructure project is designated by the government – whether national or local – and a preliminary feasibility study for such a designated project is requested by the competent government authority\(^5\) to the Minister of Strategy and Finance. Upon receiving such a request, the Minister of Strategy and Finance commissions PIMAC to perform a preliminary feasibility study and report the result thereof. Based on such result, the competent government authority files an application with the Ministry of Strategy and Finance to designate and publicly announce the designated project as a PPP Project, if the total project cost is billion won or more (the competent government authority has the authority to designate and publicly announce any project with total project cost less than 200 billion won (build-transfer-lease type is 100 billion won)). Upon obtaining the designation and public announcement, the competent government authority prepares and publicly announces a detailed infrastructure project basic plan based on the PPP Basic Plan.

The Basic Plan acts as a reference for private partners to prepare a project plan to be submitted to the competent government authority – multiple private partners can competitively submit project plans for a single infrastructure project. The competent government authority would then review the project plans submitted by various private partners and designate one private partner as a preferred negotiating partner, which would subsequently negotiate on the proposed concession agreement and decide on the final proposed concession agreement for execution. Once the negotiation is over, the competent government authority and the private partner (or project implementing corporation established by the private partner) will enter into the concession agreement.

Based on the concession agreement, the private partner or project implementing corporation (the concessionaire) will apply for the competent government authority’s approval of implementation plan including an implementation design drafted pursuant to the proposed concession agreement. The concessionaire will commence the construction of social infrastructure as a PPP Project according to the implementation plan and the concession agreement upon the competent government authority’s approval based on the

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\(^5\) The competent government authority is difference for each PPP Project depending on the social infrastructure being constructed. For example, the competent government authority for roads is the Ministry of Land, Infrastructure and Transport, and for sewage treatment plant it is the Ministry of Environment. Social infrastructures that must be installed by local autonomous governments are governed by the relevant local autonomous governments.
latter’s review, in accordance with the relevant statutes and basic plan. After months or even years, the competent government authority will confirm the completion of construction and the relevant PPP Project will commence commercial operation.

**Privately initiated project**

A privately initiated project commences with the submission of a project proposal to a competent government authority by any private partner seeking to implement a PPP Project. Upon receipt of such project proposal, the competent government authority commissions PIMAC to review the relevant proposal in order to evaluate whether the project details proposed by the private partner are feasible. Subsequent to the review, PIMAC will submit its opinion to the competent government authority and the Minister of Strategy and Finance.

If PIMAC’s opinion is that the proposed project is economically feasible, the competent government authority will publicly announce the relevant project proposal, so as to invite other non-submitting private partners to also submit a project plan, or to provide other private partners with an opportunity to submit other project proposals (for the same project). If no other project proposals are received from other private partners, the project plans submitted by the private partners will be considered by the competent government authority. Conversely, if other project proposals are received, the competent government authority will request PIMAC to provide its review opinions on each of such other proposals.

By reviewing the submitted project plans or other project proposals, the competent government authority will select the preferred negotiating partner. If no other project proposals are submitted, the initial proposing party will be designated as the preferred negotiating partner; however, if other project proposals are submitted, the competent government authority will compare, review, and evaluate the proposals and project plans to designate the preferred negotiation partner.

After a preferred negotiation partner is designated, such a private partner (or a project implementation company established by the private partner) would negotiate the proposed concession agreement with the competent government authority, and nail down the final proposed concession agreement for execution. Upon the execution of such agreement, the private partner (or a project implementation company established thereby) would become the concessionaire and apply for the competent government authority’s approval of the implementation plan (including implementation design) drafted based on the proposed concession agreement.

Upon obtaining such approval from the competent government authority, the Concessionaire will commence the construction of the social infrastructure as a PPP Project pursuant to the implementation plan and the concession agreement. Once the construction is completed, the competent government authority will confirm such completion and begin commercial operation of the relevant PPP Project.

**iii Government agencies related to PPP projects**

Major government agencies and support institutions related to the Korean PPP projects include the Ministry of Strategy and Finance, the various competent government authorities, the PPP Project Review Committee, the PPP Project Dispute Mediation Committee, PIMAC at the Korea Development Institute, and the Korea Infrastructure Credit Guarantee Fund.
The Ministry of Strategy and Finance legislates and announces the PPP Basic Plan, and subsequently amends, changes and announces such PPP Basic Plan by reflecting the market conditions.

The various competent government authorities include the Ministry of Land, Infrastructure and Transport, the Ministry of Environment, the Korea Maritime and Port Administration, and the Ministry of Education, depending on the relevant project. Local autonomous governments may also be categorised as a competent government authority. Such competent government authorities are the public-sector parties that prepare the infrastructure project basic plan, review the project proposal or project plan, select the preferred negotiating partner and execute the concession agreement.

The PPP Project Review Committee is an organisation that reviews whether to approve projects with total estimated project costs of 200 billion won or more. The PPP Project Dispute Mediation Committee is an organisation that handles mediation in the event of dispute between the concessionaire and the competent government authority regarding the relevant PPP project (since the PPP project dispute mediation procedure is not a compulsory project, disputes more frequently proceed directly into arbitration procedure or other dispute resolution procedures pursuant to the concession agreement).

PIMAC prescribes detailed methods, guidelines and policies regarding the entire PPP projects pursuant to the PPP Act and PPP Basic Plan, publicly announces by establishing standardised concession agreement proposal, and submits opinions by conducting preliminary feasibility studies by each project (if public funds are invested or an agency invested with public funds participates in the project). If a given project is deemed unreasonable as a result of preliminary feasibility study, the relevant project is likely to be rejected; hence, PIMAC performs a very important role in the Korean PPP projects.

The Korea Infrastructure Credit Guarantee Fund provides credit guarantees for concessionaire if such concessionaire obtains loans for PPP project costs from lending banks. Such guarantees cover the obligations to return loan principals borne by the concessionaire, and the fund is established from contributions made by the central government and local autonomous governments pursuant to the PPP Act, income from guarantee fees, management profits from the fund, or loans from other financial institutions.

iv Financial support for PPP projects

Under the PPP Act, direct financial support can take the following three forms: construction subsidies, minimum revenue guarantees and termination payments.

Construction subsidies are financial supports provided at the construction phase, and timing of such support is decided in the concession agreement in connection with the concessionaire’s capital investment plan.

Under minimum revenue guarantees, the government or local autonomous governments guarantee a certain ratio of the revenue prescribed by the implementation agreement, which is intended to reduce the financial risk of private partners to pursue stimulation of PPP projects. However, multiple instances of side-effects wherein the contributions from the government or local autonomous governments increased due to excess estimation of demand occurred; hence, in concession agreements that were newly executed after 2006 (privately initiated project) and 2009 (government initiated project), minimum revenue guarantees are not prescribed. Moreover, even the already executed minimum revenue guarantee provisions are being subjected to attempts in changing them to investment risk-sharing schemes, such as investment risk-sharing types and profit-and-loss sharing types.
Termination payments are made to the private partners by the competent government authority when the concession agreement is terminated. Since ownership to the relevant infrastructure belongs to the government or local autonomous governments upon termination of the concession agreement, the termination payments were introduced so that the benefits that the government enjoys from such infrastructure projects do not constitute unjust enrichment for the government. Termination payments are paid in different ranges by each type of PPP Project.

Though not direct financial supports, other forms of supports are available for private partners. Provision of credit guarantee through the Industrial Infrastructure Credit Guarantee Fund performs the role of supporting private partners to more easily obtain loans.

The PPP Act explicitly stipulates the basis for establishing a collective investment scheme for PPP projects and provides exceptions on establishment and operation of such collective investment scheme, so as to pursue stimulation of PPP project financing. Moreover, the PPP Act permits the issuance of social infrastructure bonds so that private partners can issue long-term bonds to implement PPP projects.

Moreover, if meeting certain requirements, private partners may also be provided with tax-exemption benefits that exempt such private partners from paying development charges, overpopulation charges, or local taxes that they have to pay in the process of implementing the PPP project.

Key details of standardised concession agreement

PIMAC prepares and announces publicly a standardised concession agreement proposal for each PPP project infrastructure and for each type of project. A standardised concession agreement proposal is ultimately executed through negotiations between the parties for each matter, and the key matters included in this standardised concession agreement proposal are as follows:

a. designation of concessionaire and its rights and obligations: if a concession agreement is executed with a sponsor, the sponsor must establish a project company before the approval of the implementation plan;

b. periods for assumption of ownership and establishment of management and operation rights: the timing for assumption of ownership by the competent government authority is different for each project type. The period for management and operation rights is also differently established pursuant to negotiation by each infrastructure type;

c. total project costs and total private project costs, and procedure for changing total project costs: total project costs and total private project costs are clearly set based on constant prices, and the grounds for changes in total project costs are enumerated in a limited scope;

d. financing (owned capital and borrowed capital): the standardised concession agreement proposal includes provisions on the market price, method and procedure for the project financing. These provisions also include the approval procedure by the competent government authority when providing collateral for the procurement of borrowed capital;

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6 Though only a corporate-type collective investment scheme was permitted before 2011, a statutory amendment now also permits investment trust-type collective investment scheme. Accordingly, public-type infra funds have also been established.
matters related to design and construction: these concern agreed matters regarding the design standards, construction, and subcontracting (include basic matters to be included in the engineering, procurement and construction contract);

f. matters related to maintenance and operation: including basic matters to be included in the operation and maintenance agreement;

g. project rate of return and usage fee: after setting the pre-tax real rate of return, the usage fee is set to achieve the target rate of return. Subsequently, if the target rate of return is affected by the occurrence of grounds explicitly provided in the concession agreement, the procedure for adjustment of usage fee is included in the standardised concession agreement proposal. When minimum revenue guarantee was provided before 2009, the provisions on the size and procedure of contribution payments by the competent government authority were also included in this chapter;

h. support and obligations of competent government authority: if the competent government authority decides to provide financial support such as construction subsidies, this chapter will explicitly stipulate the matters related to the support by the competent government authority. This chapter also explicitly stipulates other matters related to the provision of project land, administrative procedure support, permit and licence support, and land compensation standards;

i. matters regarding risk: this chapter provides the subscription to risk insurance and the plan for handling the risk caused by reasons attributed to the concessionaire or competent government authority or risk caused by force majeure event;

j. conclusion of agreement: this chapter includes provisions on expiration of contract term, conclusion of agreement by termination, and follow-up measures pursuant thereon, and right to claim for purchase and termination payments;

k. disposal of rights and refinancing: these include provisions on disposal of concession rights, change of concessionaire, establishment of additional security, and grounds and procedure for refinancing; and

l. dispute resolution: though dispute resolution based on arbitration is preferred, a court decision-based resolution is also possible. Mediation by the PPP Project Dispute Mediation Committee composed pursuant to the PPP Act is not a requirement.

IRÉCENT DECISIONS

According to the 2017 PPP Project Annual Report published by PIMAC, PIMAC had conducted 31 reviews of preliminary feasibility study in 2017, and the total investment amounts for such 31 PPP project candidates amounted 21.149 trillion won. In 2016, the number of PIMAC’s review of preliminary feasibility study was 23, and the total investment amounts for such 23 PPP project candidates amounted 6.9 trillion won.

After PIMAC’s review of preliminary feasibility study in 2017, approximately 47.7 per cent of the PPP project candidates were economically feasible. In 2016, the rate was 56.5 per cent. These figures can be viewed as an increase in the number of preliminary feasibility studies and the investment amounts compared to the previous year’s statistics. However, PIMAC seems to apply harder standards for preliminary feasibility study of the PPP projects than those of previous year.

PIMAC is in search for an arrangement wherein private partners and competent government authorities can share the risk equally by changing the minimum revenue
guarantee agreement included in the concession agreements executed before 2009. Moreover, upon request by the competent government authority, PIMAC assists in negotiation on the change of risk-sharing arrangement on behalf of the competent government authority.

V OUTLOOK

In January 2019, the government took action to waive a preliminary feasibility study for 23 government-financed social overhead capital projects amounting to approximately 24 trillion won, which is likely to spur projects establishing infrastructures in Korea. Some of these major infrastructure projects are anticipated to be PPP projects. However, upon considering the size of input of the government budget and the economic feasibility of pending projects for regional development, government-financed projects are likely to be implemented first.

In the meantime, with more than 20 years of active implementation of the PPP projects in Korea, private investors’ management and operation rights are expected to expire in some of the PPP projects that had been implemented in the past. This pending expiration has invited earnest discussions on the plan to manage the facilities subject to private investment. Some of the plans being discussed include the government’s acquisition, and subsequent management and operation, of facilities for which the private investors’ management and operation rights are expiring; application of a new PPP project format; accompanying improvement or expansion of the relevant facilities; delegation of operational capabilities to private companies; or sale of the facilities to private companies. These discussions are anticipated to form one axis of the PPP projects in the years to come.

Further, with reduced political tension between North and South Korea, the significant construction demand for the establishment of infrastructure to stimulate the economy and improve the environment in North Korea is anticipated. To meet this demand, PPP projects are expected to increase in the future. Hence, many construction companies and financial institutions appear to be preparing for a construction boom in North Korea. However, at this moment, it is not certain whether the South Korean legal scheme for PPP projects would apply to such PPP projects to be implemented in North Korea.
I OVERVIEW

Kuwait has continued in its quest to procure more public-private partnership (PPP) projects following its success with the Az Zour North Phase 1 IWPP Project. It has over the past few years promulgated a number of laws concerning PPPs. In 2007, the Kuwaiti government enacted Law No. 7 of 2008 regarding Regulation of BOT Operations and Similar Systems (the BOT Law), which was essentially the first specialised law on the books regulating PPPs. The BOT Law and its Executive Regulations provided for the incorporation of a legal vehicle to implement the projects and established the procurement process of PPP projects across various industry sectors in Kuwait. Following the enactment of the BOT Law, the Partnership Technical Bureau (PTB), launched a number of PPP projects in various sectors, including power, railroad, hospitals, labour cities and schools. The procurement process was further guided by the Executive Regulations and the PTB Guide Book that had been developed in partnership with the World Bank.

The BOT Law was repealed and replaced by Law No. 116 of 2014 Concerning Partnerships Between the Public and Private Sectors (the PPP Law) and its Executive Regulations. The PPP Law was developed as an improvement to the BOT Law as the Kuwaiti government’s response to the difficulties and loopholes experienced by the investors, lenders and procuring entities as a result of the implementation of the BOT Law. This was generally viewed as a positive and proactive step by the government. The PPP Law provides for the establishment of the Kuwait Authority of Public-Private Partnership Projects (KAPP), which replaced the PTB. The PPP Law is now the general law that sets the guidelines for the procurement and implementation of PPPs on government-owned land across the sectors.

Before enacting the PPP Law, the government had enacted Law No. 39 of 2010 regarding the establishment of Kuwaiti Joint Stock Companies, which would undertake the construction and implementation of electrical power and water desalination plants (the IWPP Law). The IWPP law was subsequently amended by Law No. 28 of 2012 and Law No. 19 of 2015. The IWPP Law specifically regulates power and water desalination PPP projects, it having been identified that power projects would require their own special law.

1 Ibrahim Sattout and Akusa Batwala are partners at ASAR – Al Ruwayeh & Partners.
2 Decree No. 256 of 2008 regarding the Executive Regulations of Law No. 7 of 2008.
3 The BOT Law provided for the incorporation of a public joint stock company as the Project Company in certain instances.
4 The PTB had been established under the BOT Law as the authority charged with overseeing the implementation of the law and the PPP projects procured under the same.
5 Provided for in Decree No. 78 of 2015.
given their specific technical nature and economic and social importance to the country. That said, the provisions of the PPP Law apply to IWPP projects to the extent a particular matter is not specifically regulated by the IWPP Law.

i Government policy

Given the continuing decline in oil prices, there is a general consensus by the government that Kuwait needs to continue in its efforts to diversify its economy in order to reduce its dependence on oil as its primary source of revenue, and to provide the growing number of Kuwaitis in the labour market with productive employment opportunities. The government has, therefore, continued to engage in various efforts in an attempt to diversify Kuwait’s economy, as is the case with the other members of the Gulf Cooperation Council.

In line with the above, in 2017 the Kuwaiti government unveiled its plans to transform the country into a regional financial and cultural hub by 2035 through the Kuwait National Development Plan, branded ‘New Kuwait’, which sets the nation’s long-term development strategies. One of the strategies is the restructuring of the role played by the state so as to allow more private-sector participation. Accordingly, the government is adopting various forms of cooperation between the public and private sector and, in particular, PPPs.

II THE YEAR IN REVIEW

The year 2018 saw KAPP continue in its efforts to implement the initial public offering of the shares of Az Zour North Phase I Project Company. This was a significant milestone, triggered by the commencement of full-scale operation of the Project Company, at which point the Project Company is required pursuant to the IWPP Law to offer a designated portion of its shares to the Kuwaiti public. The initial public offering (IPO) process stalled following a number of regulatory and corporate issues that remain unresolved. The hope is that in 2019, these issues shall be settled allowing for the IPO to proceed.

Following the identification of the preferred bidder in the Um Al Hayman Wastewater Project, the Ministry of Public Works, KAPP and the investors completed negotiations on the project documents and the letter agreement was signed. The process of the incorporation of the Project Company is now fully under way, following which the Project Company will sign the project agreements and then commence implementation of the project. The Az Zour North Phase II project procurement process, which was cancelled, was revived in 2018. KAPP advertised for the submission of EOIs for both the Al-Khairan Phase 1 and Az-Zour North Phase 2 & 3 IWPP Projects.

KAPP also published the much awaited PPP Guidebook, which was developed in conjunction with the World Bank. The guidebook essentially provides guidance and details regarding each stage of the procurement process and the roles of the different parties involved in the process. It further discusses issues such as the project company incorporation process (for projects that require a public joint stock company), project financing issues, project implementation and monitoring, risk allocation and recommended contractual provisions.

The Ministry of Finance announced in February 2019 that it was planning to amend the PPP Law, with the first draft of this amendment submitted to the Fatwa and Legislation...
Department, following which it will be submitted to the Cabinet and then Parliament. It is understood that the amendments mainly aim to reduce the amount of time required for the project to reach financial close.

The Public Authority for Housing and Welfare (PAHW) launched a number of mixed use real estate development investment opportunities located in various locations around the country. PAHW intends to procure these projects as PPPs and it is yet to be seen what legal structure these projects will take given the combinations of laws that will be at play.\(^8\)

III GENERAL FRAMEWORK

i Types of public-private partnership

PPP projects under the PPP Law are essentially procured on a build, operate and transfer (BOT) basis. That said, variants of PPP models may be used, including design–build–operate–transfer or design–finance–build–operate–transfer. Essentially, a concession\(^9\) is granted to a successful investor, as defined in the PPP Law, to finance, build, operate and transfer the project and its assets to the state upon the expiry of the agreed term. The PPP Law, however, also envisions the use of service and management contracts.\(^10\)

The type and structure of the PPPs is further provided for in the definition of the PPP model in the PPP Law, which provides as follows:

*Public Private Partnership Model: a model whereby a private Investor invests in State-owned real estate property – if required – in one of the projects procured by the Authority [i.e., KAPP] in collaboration with one of the Public Entities after signing an agreement with the Investor to implement or build or develop or operate or rehabilitate a service or an infrastructure project, and to provide financing thereto and operate or manage and develop the project, for a specified term, after which the project shall be transferred to the State; the foregoing shall be carried out in one of two forms: 1) the implementation of the project in consideration for fees – for services or works performed – to be paid to the Investor by the beneficiaries or by the Public Entities who have entered into an agreement with the Investor, and whose objectives are in compliance with the project or by both the beneficiaries and the Public Entities; and 2) the purpose of the project is for the Investor to implement a project with strategic importance to the national economy and to exploit it for a specified term. In both cases, the Investor shall pay a fee for the use of any State-owned real property allocated for the project.*

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\(^8\) The PAHW has its own law based on which it intends to procure these projects in combination with the PPP Law.

\(^9\) Concessions may also take the form of long-term contractual arrangements, whereby the private party completely takes over all aspects of the management and operations of an existing facility from a public entity. This may include building, maintenance, specified rehabilitation and capital investment in facility upgrades and enhancements as well as raising capital for such upgrades and enhancements. The private party pays agreed concession fees to the public entity for the rights attending the concession. The public entity may also require a share of profits from its partner.

\(^10\) Article 30 of the PPP Law concerns procurement of management services for projects that have been transferred to the state at the end of PPP agreements.
While Article 10 of the PPP Law provides that the type of the PPP model to be procured, the mechanisms for the procurement and the implementation of the project are to be determined based on the approval of the Higher Committee and in accordance with the provisions of the PPP Law; it does not elaborate on the different types of PPP models.

The principal features of the PPP models contemplated by the PPP Law are that:

- **a** the project would be located on state-owned real estate property (if required);
- **b** the project would be procured by KAPP in collaboration with a public entity;\(^{11}\)
- **c** a PPP agreement would be signed between the public entity and the private investor to implement, build, develop, operate or rehabilitate a service or an infrastructure project and to provide financing thereto and operate or manage and develop the project;
- **d** the project would be for a specified term, after which the project and its assets should be transferred to the state;\(^{12}\) and
- **e** the investor would receive consideration for provision of the services or works required under the PPP agreement.

Additional features of the PPP model structure under the PPP Law include:

- **a** a public joint-stock project company that will undertake the PPP project will be incorporated by KAPP (for projects valued above 60 million dinars);
- **b** pursuant to Article 13 of the PPP Law, the shares of such project company will be distributed as follows:
  - no less than 6 per cent and no more than 24 per cent of the share capital shall be allocated to the public entities entitled to acquire such shares;
  - no less than 26 per cent of the share capital shall be allocated to the successful investor for subscription in accordance with the PPP Law, taking into account the percentage of shares allocated to the initiative proposer under Article 20 of the PPP Law; and
  - 50 per cent of the share capital shall be allocated for subscription through an initial public offering to living Kuwaitis listed in the register of the Public Authority for Civil Information on the date of the invitation to pay the price of the shares;
- **c** the procurement of these projects will be governed by the PPP Law and its Executive Regulations rather than the Public Tenders Laws that would otherwise regulate government projects;\(^{13}\) and
- **d** any consortium that is awarded the project is required to establish one or more consortium companies in accordance with Kuwaiti law. Such company will hold the shares of the successful investor in the project company if a public joint stock company is incorporated. If none is required, then such company will undertake the project.

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\(^{11}\) A public entity is defined in Article 1 of the PPP Law to include any government, Ministry or Department, or any public entity with a supplementary or an independent budget, that enters into an agreement with a private investor to carry out a project in pursuance of the PPP model and in compliance with the provisions of the PPP Law or that participates in the investment through a portion of the shares of the public joint stock company established for the implementation of the PPP project.

\(^{12}\) Pursuant to Article 18 of the PPP Law, the term of the investment in projects procured in accordance with the PPP Law shall not exceed 50 years. However, the term of investment for projects procured under the IWPP Law is 40 years pursuant to Article 1 of the IWPP Law.

\(^{13}\) Article 9 of the PPP Law expressly exempts projects procured under the PPP Law from the application of the Public Tenders Law.
Where the total cost\textsuperscript{14} of the project does not exceed 60 million dinars, the successful investor\textsuperscript{15} will have to establish a project company, but such company will not be required to be a public joint stock company with its shares distributed as per Article 13 of the PPP Law. Similarly, where a project is considered to be of special nature, and whose total cost does not exceed 250 million dinars, the successful investor will not have to establish a public joint stock company.

In light of the specific language of Article 34 of the PPP Law, which exempts companies formed under the PPP Law from the nationality requirements provided for under the Commercial Code,\textsuperscript{16} it is clear that the foreign ownership restrictions provided for under the Commercial Code should not apply to a project company established for purposes of executing a PPP project under the PPP Law. This would mean that a project company and the consortium companies established under the PPP Law may have foreign shareholders owning more than 49 per cent of its share capital. Additionally, once the company is listed on the Kuwait Stock Exchange, its shares may be freely bought by non-Kuwaitis, which may result in the majority of the company being owned by non-Kuwaitis.

The PPP Law also contemplates projects being procured as a result of unsolicited proposals or initiatives\textsuperscript{17} submitted to the government. If such a proposal is accepted by the Higher Committee, the project would follow the regular PPP procurement procedures; however, the proposer of such initiative would have his, her or its costs reimbursed by the project company, and would receive a 5 per cent advantage over other bidders if he, she or it participates in the procurement process. Additionally, if the project is implemented through a public joint stock company, a percentage not exceeding 10 per cent of the shares of the project company, deducted from the successful investor’s percentage, will be allocated to the proposer.

\section*{ii The authorities}

\textit{The Higher Committee}

Articles 2 and 3 of the PPP Law provide for the establishment of the Higher Committee for Public-Private Partnership Projects (the Higher Committee) and determine its competences and authorities. The Higher Committee is comprised of:

\begin{itemize}
  \item[a] the Minister of Public Works, the Minister of Commerce and Industry, the Minister of Electricity and Water, and the Minister of Municipality;
  \item[b] the Director General of the Public Authority for Environment;
  \item[c] KAPP’s Director General, as member and rapporteur;
  \item[d] three experienced specialists appointed by the Council of Ministers from among the civil servants; and
\end{itemize}

\textsuperscript{14} Total cost is defined in Article 1 of the PPP Law as the total capital expenditure for implementing the project or preparing it for operation in order to determine the method according to which the PPP project shall be procured.

\textsuperscript{15} The successful investor is defined by the PPP Law as the preferred investor with whom the negotiations successfully lead to a final agreement for the implementation of the PPP project.

\textsuperscript{16} Law No. 68 of 1980 as amended.

\textsuperscript{17} Initiatives are defined as an innovative and creative concept of a PPP project, unprecedented in the state of Kuwait, approved by the Higher Committee, based on a comprehensive feasibility study and submitted by the concept proposer to KAPP, providing an economic return or social benefits in line with the state’s strategy and development plan.
a representative of the relevant public entity sponsoring the PPP project, who shall be invited to meetings without having a voting right.

The competences of the Higher Committee now include: setting the general policies for projects and initiatives of strategic importance to the national economy; approving requests of public entities for the procurement of PPP projects; proposing PPP projects to public entities; identifying public entities that shall participate in the procurement of the projects; approving the requests for the allocation of land necessary for the project; approving studies and concepts of PPP projects; approving the successful investor based on KAPP’s recommendation; approving the PPP agreements to be executed by the public entity and deciding upon the request of the contracting public entity for contract termination (including for public interest).

**Ministry of Finance**

The decisions of the Higher Committee are only effective upon their approval by the Minister of Finance. Additionally, the Minister of Finance is required to present to the Council of Ministers an annual report on all the projects that have been executed or implemented in accordance with the provisions of the PPP Law and to forward a copy of this report to the National Assembly.18

**Kuwait Authority of Public-Private Partnership Projects (KAPP)**

Articles 4, 5 and 6 of the PPP Law provide for the establishment of KAPP and determine its competencies and the scope of its authority. KAPP’s competences include:

a. assessment and completion of feasibility studies;

b. development of the mechanism for the submission and evaluation of initiatives;

c. development of contract templates;

d. incorporation of the project companies;

e. follow up on implementation of PPP agreements; and

f. overcoming obstacles on implementation and proposing project incentives.

**Public entities**

These are the government entities that participate in the PPP projects and are defined by the PPP Law as any government entity, ministry, department or any public entity with a supplementary or independent budget that enters into an agreement with a private investor to carry out a project in pursuance of the PPP model and in compliance with the provisions of the PPP Law, or that participates by investment in the project company by owning shares in the project company established for the implementation of the PPP project.

**iii  General requirements for PPP contracts**

Article 35 of the PPP Law and Article 26 of the Executive Regulations to the PPP Law provide a list of the matters that should be incorporated into all projects contracts. These include but are not limited to:

a. the nature and scope of works and services that shall be executed by the project company and the terms and conditions of such execution;

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18 Article 33 of the PPP Law.
b technical, environmental, financial and safety conditions of the project;
c the ownership of the project’s funds and assets, the obligations of the parties in respect of handing over the project and the terms and conditions of transfer of ownership at the end of the project;
d allocation of responsibility for obtaining licences, permissions and approvals;
e each party’s financial obligations and its relation to the financing of the project;
f the price of products or fees for the service provided;
g regulation of the right of the public entities to amend terms of construction, maintenance, operation and other obligations of the project company;
h the events of termination of the agreement including for public interest;
i the distribution of risks in the event of amendment of laws, accidental events and force majeure, and determination of compensation as the case may be;
j the contract term, and the term of the investment period, construction and preparation or completion of development works; and
k the dispute resolution mechanism.

Article 36 provides that the public entity shall be able to amend the terms and conditions of construction, equipment, development and other works and fees for services provided for in the contract. However, such amendments may only be made in compliance with the terms of the contract and with the approval of the Higher Committee.

Article 39 of the PPP Law provides that while the PPP agreements should in principle be drafted in Arabic, the same article states that it may also be drafted in a foreign language (e.g., English) subject to the approval of the Higher Committee.

The Fatwa and Legislation Department and the State Audit Bureau are two government departments that play a crucial role in conclusion of the PPP agreements. They must both approve the agreements before they are executed.

IV BIDDING AND AWARD PROCEDURE

Article 9 of the PPP Law provides that procurement under the PPP Law will be exempted from the application of the Public Tenders Laws. Instead, the PPP Law and its executive regulations shall regulate the procurement and award procedures for such PPP agreement.

Accordingly, the rules and procedures for the submission of proposals, the technical and financial evaluation, the selection of the competent authority to undertake such evaluation, the procedures for opening the envelopes, the documents that would be submitted within each envelope and the pre- and post-qualification procedures are all derived from the PPP Law and its Executive Regulations.

Expressions of interest

The expression of interest (EOI) is the first step of the procurement process by which KAPP will gauge the interest of investors in the project and determine whether to proceed. The EOI should be published in the Official Gazette, local and international media (as considered necessary) and on KAPP’s website. The announcement should include a summary of the project and its objectives, the proposed location of the project, if any, the rules for submitting a response to the EOI and any other information or conditions related to the project.

The EOI is then followed by the qualifications stage. Once approved by the Higher Committee, KAPP in coordination with the relevant public entity should publish the
invitation for qualification (RFQ) for the project. The announcement shall be made in the Official Gazette, in at least two daily Kuwaiti newspapers in Arabic and English, other local or international media (as required) and by publication on KAPP’s website. Every investor interested in bidding for a project is required to prove his or her capability (qualifications) to perform the project and to perform his or her obligations if the project is awarded to him or her.

Companies may bid individually or as a consortium and will be evaluated by the Competition Committee based on the criteria developed by KAPP and the procuring public entity. The results of the evaluation have to be approved by KAPP and the Higher Committee, following which they shall be announced.

ii Requests for proposals and unsolicited proposals

The concerned public entity in cooperation with KAPP will prepare the project offering documents (RFP) in compliance with the PPP Law and present the same to the Higher Committee for approval. The public entity and KAPP may seek the assistance of local and international consultants to review and prepare the RFP. Pursuant to Article 22 of the Executive Regulations of the PPP Law, the RFP should contain the following:

- instructions to the bidder;
- reference conditions including the technical and financial conditions and specifications of the project and the basis of awarding the project;
- a confidentiality agreement;
- the contract form and language, including the draft partnership contract and the lease contracts of the plot, if any;
- the letter agreement if the project is awarded to a consortium and the substitution contract for the replacement of the investor in the event of the latter’s failure to perform its obligations; and
- any other conditions or documents in agreement with the nature of the project.

Articles 23 and 24 of the Executive Regulations further elaborate on the contents of the RFP. The announcement of the availability of the RFP (which can be purchased by the qualified bidders) shall be made in the Official Gazette, in at least two daily Kuwaiti newspapers in Arabic and English, other local or international media (as required) and by publication on KAPP’s website.

The instructions to the bidders will, among other things, include the instructions for submission of the response to the RFP. This will include the deadline for submission and the guidelines on the preparation of the same. The response will typically include two envelopes; one for the technical proposal and another one for the financial proposal.

The Competition Committee shall evaluate the technical proposal on the basis of the criteria provided for in the RFP, prior to considering the financial proposal. KAPP shall notify

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19 Defined in Article 1 of the Executive Regulations of the PPP Law as the joint team formed by a KAPP Resolution, subject to the approval of the Higher Committee, for each project, for the review, study and preparation of the project documents and papers, and the evaluation of the technical and financial bids leading to the awarding of the project. In addition to KAPP employees, the team shall include representatives from the public entities concerned with the project.

20 It is, however, possible for the Higher Committee to combine the RFQ stage with the request for proposal (RFP) stage.
the investors whose technical proposals are accepted and those excluded. The Competition Committee shall then hold a public meeting to open the financial envelopes of the qualified investors. Such investors shall be invited to the envelope opening session. A representative of the relevant public body shall also be invited to attend such session.

**Unsolicited proposals**

Private individuals and entities are permitted to submit ‘initiatives’ to KAPP for consideration. Initiatives are defined as:

> [A]n innovative and creative concept of a PPP Project, unprecedented in the State of Kuwait, approved by the Higher Committee, based on a comprehensive feasibility study and submitted by the concept proposer to the Authority, providing an economic return or social benefits in line with the State’s strategy and development plan.

Accordingly, the initiative must be submitted with respect to an innovative or unprecedented concept and with a comprehensive feasibility study. If the initiative is approved, the entity that submitted the initiative would be entitled to the reimbursement of the cost of the feasibility study and preferential treatment should they participate in the tender, as further discussed above.

**iii Evaluation and grant**

The Competition Committee shall evaluate the financial proposal on the basis of the criteria provided in the RFP, and shall prepare an evaluation report of both the technical and financial proposals. KAPP shall notify the preferred bidder of their status and the concerned public body of the name of the preferred bidder. KAPP shall also notify the other investors of their ranking and will release their bid bonds except for the preferred bidder’s and the second-ranked bidder.

KAPP shall then invite the preferred bidder to negotiate the details, reservations or explanations contained in the submitted bid. In all events, such negotiations should not involve any contractual conditions considered in the RFP as non-negotiable conditions or that constitute a material deviation according to the project offering documents. There should also be no amendment to the technical and financial conditions based on which the bid is provided.

If negotiations with the preferred bidder are unsuccessful, KAPP and the public entity may initiate negotiations with the second-ranked bidder. If an agreement is reached with the preferred bidder (or the second-ranked bidder), and upon approval of the Higher Committee of the recommendation to select such bidder as the winning investor, the bidder shall be invited to sign the Letter of Agreement and then the project contract with the relevant public body and KAPP.

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21 One of the contract documents signed by the public entity, KAPP and the winning investor or bidder, which is accompanied by the final contract documents as agreed thereon, including conditions precedent for specific and preparatory obligations for the validity and enforceability of the PPP contract.
V THE CONTRACT

i Payment

Article 27 of the PPP Law provides that the Executive Regulations will, among other things, provide the detailed formulae based on which the investor will collect fees for services rendered.

Articles 27 and 28 of the Executive Regulations envisages in this regard that either the project company would collect fees from the public for the services it is rendering or the public entity would pay to such project company for the services it renders. In this regard, Article 27 provides that the PPP agreement should include the rules on the basis of which the project company may collect fees for the services provided or the works carried out, in both or any of the following methods:

a through the public body, against:
   • providing a service in compliance with the agreed performance standards;
   • the use of service or infrastructure provided by the partnership project;
   • the minimum expected demand on the service or infrastructure provided by the partnership project;
   • completion of specific milestones in respect of the performance, operation or providing the infrastructure, provided that they are consistent with the applicable time schedule to execute the project; or
   • achieving such internal return rate as determined in the project offering documents; or

b through the users of the service or infrastructure, other than the public bodies, in accordance with the mechanism of calculating the consideration set forth under the partnership contract.

Article 28 of the PPP Law goes on to provide that the PPP agreement should determine the method of calculating the consideration to be charged by the project company for the service or infrastructure according to the nature and requirements of the partnership project. Upon determining such consideration, the following rules and principles should be taken into account:

a the prices of the services and works performed through the partnership project should be appropriate in considerations of the level of their quality;

b the consumers’ interest and the prices of similar services and works (where applicable);

c achievement of an appropriate financial return on the investment made;

d the inflation rates; and

e any support provided by the state to the project.

Similarly, the state may collect certain fees from the project company for use of the assets provided by the public body and the land allocated for the project.

ii State guarantees

There are no state guarantees per se offered to the investors or to the project company to guarantee payment by the state to the investors or project company other than the contractual obligations and undertakings that the public entity entering into the PPP agreements (on behalf of the government of Kuwait) agrees to and is therefore bound by.
Additionally, while public and private assets of the state may not be subject to attachment, there are no restrictions under Kuwaiti laws that protect governmental bodies and entities from being sued before courts. Accordingly, the public entity’s counterparty to a PPP agreement may be sued for their breach of a PPP agreement. However, third parties, if successful, may not attach the assets of the state of Kuwait to enforce a judgment issued in their favour.

That said, the critical nature of the public services offered under the PPP models, investment in the project company by state entities, the shares held by Kuwaiti citizens and the remedies offered for non-payment under the PPP agreement should offer some comfort to the investors of the government’s commitment to pay for the services rendered.

At issue also is the fact that PPP agreements are considered to be administrative contracts. Accordingly, such PPP agreements would not be considered purely commercial agreements but rather administrative agreements. The question which would then arise is what would be the implications of such characterisation under Kuwaiti laws. In this regard, we note that while Article 169 of the Kuwait Constitution provides for administrative disputes to be settled by special courts (i.e., administrative courts) and Law No. 20 of 1981 establishes the administrative court circuit in the Court of First Instance as required, the Kuwaiti legal system, however, does not contain a specific administrative law nor does it have a permanent administrative court; as such, it will be difficult to draw on precedents to understand the impact of defining a PPP agreement as an administrative agreement.

The absence of local precedents opens the door to arguments based on jurisprudence and various theories of administrative law largely developed in other civil law jurisdictions and all largely in favour of the government. An example of such unusual prerogatives is the government’s right to terminate the agreement at any time for public interest, and in certain circumstances probably without compensation. In our view, such a risk should be remote under the PPP Law, which provides for the payment of a fair compensation in the event of termination of the PPP agreement for public interest. Therefore, even though PPP agreements are considered to be administrative contracts, they should be governed by the PPP Law – a special law promulgated to regulate PPP agreements.

### iii Distribution of risk

Risk allocation in PPPs is undertaken in Kuwait as a process of allocating the responsibility of managing a particular risk to a particular participant (best placed to manage, control and mitigate such risk). In general, an attempt is made to have project-related risks allocated to the investor and non-project related risks to the state, while certain other categories of risk may be shared (e.g., force majeure). A few examples of risks and their allocation and mitigation follow below.

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22 The administrative courts will be composed of three judges, which shall include one or more chambers.

23 For example, it is well established before administrative courts in civil law countries that defining an agreement as an administrative contract would entail that the government enjoys certain exorbitant or unusual prerogatives or rights derogating from the generally applicable rules of law (whether under the civil code or the commercial code).

24 Article 19 of the PPP Law.
Design risk

Design risk is the possibility that the investor's design may not achieve the required output specifications.

This can be mitigated through clear output specification, consultation with and review by the public entity.

This risk is typically allocated to the investor.

Availability risk

The availability risk is the possibility that the services to be provided by the investor do not meet the output specification of the public entity.

This may be mitigated by having clear output specifications, performance monitoring and penalty deductions for non-performance.

This risk is typically allocated to the investor.

Force majeure risk

The force majeure risk is the possibility of the occurrence of certain unexpected events that are beyond the control of either party.

These can be mitigated through the careful definition of force majeure to exclude risks that can be insured against and that can be dealt with more adequately by other mechanisms such as relief events.

Such risks are typically shared.

Environment risk

Environment risk pertains to the possibility of liability for losses caused by damage to the environment.

This can be mitigated by the bidder undertaking a thorough due diligence of the project site and the public entity procuring independent surveys of the project site.

If the damage is caused by the construction or operation activities of the project company during the project term, this will be the investor's risk. If the damage is not attributable to the activities of the investor, this risk lies with the public entity.

Adjustment and revision

As a general rule, no modification or amendment to the PPP agreement once finalised and signed will be valid unless it is in writing and has been signed by both parties.

That said, Article 36 of the PPP Law provides that the public entity may amend the terms of the PPP agreement, the project company's rights and obligations including the consideration paid for the services. It may do so when public interest so requires, but within the limits agreed upon in the agreement, and after the approval of the Higher Committee.

This is, however, without prejudice to the right of the project company to compensation for any adverse effect of such amendment.

Ownership of underlying assets

With respect to the ownership of assets under the PPP regime, Article 18 of the PPP Law provides in part that the PPP agreements shall determine the assets that are to be owned by the investor among the assets of the PPP project, and shall also determine any state-owned assets allocated to the project for the term of the PPP agreement. There are, therefore, potentially
three categories of assets: those belonging to the project company; those belonging to the investor; and those belonging to the state. This is relevant, particularly in respect of the security package that would be available to be granted by the investor to the lenders, as further discussed below.

Upon expiry of the PPP agreement, the ownership of the project and facilities shall be transferred to the state along with any and all related assets at no cost, excluding the assets owned by the investor as set out in the PPP agreement. Such assets belonging to the investor may only be transferred to the state if paid for by the state. The PPP agreement is also required to regulate the transfer of the project to the state.

vi Early termination
Pursuant to Article 19 of the PPP Law, the Higher Committee may approve the (early) termination of a PPP agreement at the request of KAPP or the public entity for reasons based on public interest, provided that the Higher Committee justifies its decision and demonstrates the benefits of such termination and provides an estimate of the fair compensation to be paid to the investor in accordance with the PPP agreement.

Kuwait has, to date, only closed on one PPP project under the new PPP Law regime and there are, therefore, no examples yet of early termination of PPP agreements.

Termination may be based on the default of either the project company or the public entity, or as a result of a prolonged force majeure event. The consequences of termination based on such defaults are provided for in the various PPP agreements. These may include the right of the public entity to purchase the project for the price determined in accordance with the PPP agreement (a different price is typically provided for termination as a result of the project company default, the public entity's default or force majeure event).

If the termination is because of the project company’s default, the public entity may call on the performance guarantees provided by the project company.

The project is then handed over to the public entity (including all buildings and fixtures, all raw materials, consumables and spare parts, all governmental authorisations, all warranties of equipment, and all contracts and agreements, etc., needed to continue the project), which would take over construction or operation of the project pending the identification of an alternative contractor or operator.

VI FINANCE
Funding for the PPP projects is raised in a combination of ways, including equity and loans taken out by the investors and the project company. Article 23 of the PPP Law lists the assets that can and those cannot be used as security by the project company and investor, and these are provided for as follows:

\[ a \] the investor and the project company may not sell or mortgage the (state) land on which the project is located;

\[ b \] the investor and the project company may mortgage and create security interest on any assets owned by the investor and the project company from among the assets comprising the project;

\[ c \] the investor and the project company may create security interest in favour of lenders over any amounts payable to them (i.e., proceeds) for services they provide under the PPP agreements or income earned from the project on any other aspect.
the investor may mortgage its shares in the project company or the consortium companies to finance the project (only after the approval of the Higher Committee); and

with the approval of the Higher Committee, the finance documents may contain terms permitting the creditors or lenders, in the case of a breach of the financing terms by the investor, to own the mortgaged shares or request their sale.

The law further provides that the amount borrowed (i.e., the debt taken on) should not be more than that stipulated in the project’s documents.

Cross-border finance has been available for PPPs in Kuwait and investors have sourced funding from both international and local banks and financial institutions.

The exchange risk (i.e., the possibility that exchange fluctuations will affect the envisaged costs of imported inputs required for the construction or operation of the projects) is considered an investors’ risk and is dealt with primarily by the investor having hedging instruments put in place.

VII  RECENT DECISIONS

There have been a number of grievances submitted to the grievance committee established under the PPP Law. These have generally been decided on in a timely manner and decisions have been in favour of both the government or KAPP and the investors in certain instances. The general view is that the grievance committee has been competent in its decision-making and has endeavoured to follow due process in reaching its decisions. This, we believe, has given some confidence to investors with respect to addressing issues they may have pertaining to the procurement process.

VIII  OUTLOOK

To date, only one PPP project has been successfully closed (the Az Zour North IWPP Phase 1). The Az Zour North Phase 2, which had been cancelled, has now been revived by KAPP, which intends to proceed with the procurement of Az Zour North IWPP Phase 2 and 3 jointly. The Um Al Hayman Waste Water Project continues to progress and it is hoped financial close will be achieved in 2019. The KABD Municipal Solid Waste Project stalled following a number of regulatory and other issues raised by the State Audit Bureau that remain unresolved.

The PAHW has launched a number of mixed-use real estate development investment opportunities structured as PPPs. While it is clear that the PAHW would like to partner with the private sector in these projects, it is yet to be seen what legal structure these projects will take given the combinations of laws that will be at play.

The Ministry of Finance recently announced that it plans to amend the PPP Law. It is understood that the main amendments will result in the reduction of the time taken for projects to reach financial close.

Though progress is generally viewed as being slow with the procurement and closing of PPP projects, the government is developing its experience in structuring and procuring PPP projects, and this should hopefully translate into smoother and more efficient procurement processes.
Chapter 11

LEBANON

Hadi Melki

I | OVERVIEW

Lebanon suffered from war between 1975 and 1990. Its major infrastructure was destroyed or seriously affected, and public services were interrupted. Seventeen years after the end of the war, Lebanon has not yet completely reinstated infrastructure and public services that existed before 1975, nor has it developed the existing infrastructure and public services to cater for the growing population and economy. Basic utilities such as power, water and sewage are not being provided at the national level or on a sustainable basis. Social infrastructure and services, such as public hospitals, schools and housing, are either poorly provided or not provided at all. Land public transport is not organised and rail transport services do not exist.

Because of the limited government resources to fund the required infrastructure and public services, public-private partnerships (PPPs) constitute an important means of funding the development of the required infrastructure and public services. The absence of a holistic approach from the government towards PPP has not prevented certain ministries and other government agencies from resorting to PPP in their respective sectors. The Ministry of Telecommunications (MoT) procured the implementation of the mobile telecommunications networks and provision of mobile services (currently owned by the government) through build–operate–transfer (BOT) contracts with private investors, and the Ministry of Interior and Municipalities (MOIM) awarded to private investors vehicles inspection stations and services on a BOT basis. The procurement and implementation of isolated PPP projects is not generally prevented by the absence of a programme approach or a PPP legislative and institutional framework. But positioning a country as a PPP jurisdiction and reaping the benefits of PPP at the national level and across sectors and industries would require a clear political commitment to PPP, as well as a legislative and institutional framework providing political and regulatory visibility and certainty to investors and lenders.

On 6 April 2018, the government of France convened a conference called ‘Conférence Économique pour le Développement par les Réformes avec les Entreprises’ (CEDRE) during which the government of Lebanon outlined its vision for the stabilisation and development in Lebanon, including a long-term Capital Investment Programme (CIP) for which it seeks financing from lenders and donors for new projects, including non-traditional lenders and donors to enhance private sector participation in infrastructure investment. The government’s vision includes an increase of public investment through the implementation of projects for which foreign loans have been committed and launch a programme of new projects requiring investment in infrastructure through private sector participation.

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Recently, there has been an increased interest in PPPs, and we have set out details of such initiatives below. The government has announced that the CIP will focus on the following sectors: water, waste water, solid waste, transport, electricity, telecommunications, and infrastructure for tourism and industry. The total cost of the CIP during the first two phases of the programme (2018 to 2021 and 2022 to 2025) is estimated at US$17.253 billion, including the estimated cost of land acquisition at US$1.7 billion. The government envisages that all new generation capacity in the electricity sector, except for one replacement plant, will be provided through power purchase agreements with the private sector, including solar and wind sources. It also envisages the construction of facilities for the supply of liquefied natural gas through the private sector. About 30 to 40 per cent of the financing needed is expected to be provided by private investors, of which about US$3 billion will be for Phase I. PPP projects are estimated at around US$7 billion, and private investments are estimated at around US$5 billion for Phases I and II of the CIP.

II THE YEAR IN REVIEW

Following almost a decade of debates and discussions at the Council of Ministers (CoM) and parliament commissions, the draft PPP Law No. 42 of 14/9/2017 was issued and published in the Official Gazette on 14 September 2017 (the PPP Law). The authority of the Higher Council for Privatisation, which was initially tasked with privatisation projects, has been expanded to include PPP, and its name was accordingly modified to the High Council for Privatisation and PPP (HCPP). The HCPP has become the PPP unit of Lebanon. Lebanon has adopted a legislative and institutional framework governing PPP projects, which is a major step towards introducing PPP into a country’s legal regime. Several PPP initiatives have been identified, such as a waste-to-energy (WTE) project, 180MW photovoltaic solar farms and procurement of liquefied natural gas import terminals on a PPP basis. Further, the IFC has been appointed as transaction adviser for the expansion of the Beirut Rafic Hariri International Airport as well as two IPP projects and the European Bank for Reconstruction and Development has been appointed as transaction adviser for the Khaldeh–Okaibeh Expressway. The HCPP also appointed transaction advisers for the Lebanon Cloud Data Centre Project.

III GENERAL FRAMEWORK

i Types of public-private partnership

As previously indicated, PPPs were not regulated and institutionalised in Lebanon before the issuance of the PPP Law. The foregoing did not prevent certain PPP projects from being implemented by some ministries or other government agencies, such as the roll out of the first mobile telecommunications network procured by the MoT in 1994 and awarded to LibanCell and FTML on a BOT basis. The MoT reclaimed the network’s infrastructure in 2004 and procured their management to Alfa and MTC. Another notable example is the mandatory vehicles-inspection stations and services project procured by the MOIM in 2002 on a BOT basis. The MOIM reclaimed the network’s infrastructure in 2004 and procured their management to Alfa and MTC. Another notable example is the mandatory vehicles-inspection stations and services project procured by the MOIM in 2002 on a BOT basis. The private investor designed, financed, built, operated and handed over to the MOIM four vehicles inspection stations under a nine-year contract. Because of the delay in procuring the expansion of further vehicles-inspection stations, a management contract was entered into with the private investor in 2013 in relation to the four existing stations until a new tender for the expansion of the existing station was launched. This tender was
Lebanon

actually launched in 2016 but the administrative decision awarding the project was annulled by the Shura Council for violating the law. To date, the BOT model remains the main model used by ministries and other procuring entities. With the issuance of the PPP Law and the development of infrastructure requiring operations and management (e.g., mobile telecommunications network and vehicles inspection stations), further models are expected to be used. As previously indicated, several initiatives are being considered by several ministries and government agencies, and we expect further PPP opportunities to arise in 2019.

ii  The authorities
The HCPP plays a pivotal role in the inception, procurement and implementation of PPP projects. The HCPP is chaired by the president of the CoM and comprises the competent minister (depending on the project being procured), the Minister of Justice, the Minister of Finance, the Minister of Economy and Trade and the Minister of Labour. The HCPP has a secretary general who heads its Secretariat General (SG) and handles the daily business of the HCPP.

PPP projects are proposed by the chairman of the HCPP or by any competent minister. Municipal projects are proposed by the chairman of the municipal council. A preliminary study is required to be submitted to the HCPP. It will be considered by the SG, which will prepare a report concerning the feasibility of the proposed project and submit it along with its recommendation to the HCPP. The HCPP will then decide whether to proceed with the proposed project. If the HCPP decides to proceed, it will form a committee (the PPP Committee) chaired by the Secretary General and comprised of representatives of the competent minister, the Ministry of Finance, the chairman of the relevant regulatory authority and the chairman of the municipal council for municipal projects. The PPP Committee will be assisted by a work team, including consultants appointed thereby, a representative of the public entity who will benefit from the project, experts from ministries and regulatory authorities and a representative of the SG whose role is to coordinate the efforts of the work team. The PPP Committee, assisted by the work team, will prepare a complete study of the project covering technical, economic, legal and financial aspects, including the project award criteria and the level of interest of potential investors and lenders and will prepare a report and raise it along with its recommendation to the HCPP. Once the HCPP approves to proceed with the procurement of the project, it will transfer it to the CoM for its approval. Following the approval of the CoM, the PPP Committee launches the procurement process for the award of the project.

According to the PPP law, any ministry or other public entity or municipality may engage in PPP projects. As previously indicated, PPP projects may be proposed either by the chairman of the HCPP or by the competent minister, that is, the minister overseeing the public entity intending to engage in PPP projects.

iii  General requirements for PPP contracts
Any project of public interest initiated by the government, public entities or other government bodies (with the exception of municipalities, which have the option of whether to subject such projects to the PPP Law) in which the private sector contributes through financing and management and at least one of the following activities – design, building, development, refurbishment, equipment, maintenance and operations – is subject to the PPP Law, including telecommunications, power and civil aviation projects.
The PPP Law provides that the PPP contract should address the following matters:

a. the rights and obligations of the parties;
b. the basis for the financing of the project;
c. the time period of the PPP contract, provided that it does not exceed 35 years from the signature date of the PPP contract;
d. the revenue that the project company will generate from the public entity or that the public entity will generate from the project company, depending on the nature of the project, in consideration of the project company carrying out the required activities pursuant to the PPP contract and the terms of payment;
e. fees or taxes relating to the PPP project that the government or municipal council allows the project company to collect in the name and on behalf of the concerned public entity;
f. the key performance indicators applicable to the project;
g. reports relating to the implementation of the project that the project company has to prepare and raise to the public entity and the HCPP;
h. the risk allocation between the public entity and the project company and the measures to be adopted for the mitigation of such risks;
i. the limitations applicable to the modification of the initial terms of the contract;
j. the guarantees, undertakings and representations that may be granted by the project company, the private investor or the public entity for the implementation of the project;
k. the assets and property owned by the public entity put at the disposal of the project company throughout the term of the project for the fulfilment of its obligations, as well as the rights and obligations of the project company in relation to such assets and property;
l. the transfer of the project to the public entity upon expiry of its term;
m. project and services continuity upon expiry or termination of the PPP contract or upon breach by the project company of its contractual obligations thereunder;

n. remedies and penalties applicable to contractual parties in the case of a breach of their contractual obligations and detailed procedures for the implementation of such penalties; and

o. dispute resolution procedures including mediation, and national and international arbitration.

Although the PPP Law does not specifically require the HCPP to conduct a value-for-money exercise before approving the procurement of a project on a PPP basis, the PPP Law requires the PPP Committee to carry out a complete study of the project covering technical, economic, legal and financial aspects, including the project award criteria and the level of interest of potential investors and lenders and to raise recommendations in this respect to the HCPP, which transfers the file to the CoM for the final approval on the procurement of the project on a PPP basis. The PPP Law provides that implementation decrees may be issued by the CoM following the proposition of the president of the CoM. Such decrees have not yet been issued and further requirements may be set out in such instruments if and when issued by the CoM.

As previously indicated, the study of the PPP project covering technical, economic, legal and financial aspects should be approved by the HCPP and the CoM for the project to be procured by the PPP Committee in accordance with the procedure set out in the PPP Law.
IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

Once the approval of the CoM is granted for the procurement of the project on a PPP basis, based on the studies conducted by the SG and the PPP Committee and approved by the HCPP and the CoM, the PPP Committee starts the procurement process. The process starts with the advertisement of a public invitation for interested parties, including the prequalification criteria, which should be set out in accordance with the nature and scale of the project. The invitation should be published in local and international newspapers, specialised publications and the website of the HCPP one month before the deadline for the submission of expressions of interest. The PPP Committee examines the prequalification requests, with the assistance of the working team, assesses such requests based on the published prequalification criteria and raises a report to the HCPP, including a recommendation of prequalified and non-prequalified participants for the issuance of the final decision. Once the HCPP takes a decision in relation to the prequalified and non-prequalified participants, the result of the prequalification process is announced, provided that at least three participants are prequalified; otherwise, the process should be repeated.

ii Requests for proposals and unsolicited proposals

The PPP Law is silent with regard to unsolicited proposals.

Once the prequalification phase is completed, the PPP Committee, with the assistance of the working team, will prepare the request for proposals (RFP), which should include the following:

- the PPP project’s evaluation criteria, which should be objective, measurable, subject to evidence or testing, and set out in accordance with the scale and nature of the project; and
- instructions to bidders, as well as all financial, technical and administrative components of the project, enquiry and objection procedures, and procedures to make determinations in relation to objections.

iii Evaluation and grant

The PPP Committee will share the draft PPP contract with the prequalified bidders and conduct, with the assistance of the working team, consultations with the prequalified bidders and lenders in an objective and transparent manner to reach a comprehensive understanding of the technical and financial requirements of the project. The PPP Committee will amend, if necessary, the draft RFP in accordance with the result of such consultations. The PPP Committee will then raise the final draft of the RFP to the HCPP for approval. Once such draft is approved, the chairman of the HCPP will raise it to the CoM for final approval thereon. The draft RFP for municipal projects is raised by the chairman of the HCPP to the chairman of the municipal council following the HCPP’s approval thereon.

Once the RFP is approved in accordance with the foregoing process, the PPP Committee notifies it to all prequalified participants, who are then required to submit their technical and financial proposals to the PPP Committee in accordance with the instructions set out in the RFP. If fewer than three proposals are submitted, the project should be retendered. If only two proposals are submitted in response to the retendering procedure, then the procurement process may be resumed, subject to the approval of the HCPP.
The PPP Committee will open the technical proposals in the presence of the participants to assess their compliance with the requirements of the RFP. The PPP Committee may address enquiries to the participants or request that they provide missing requirements and confirm certain undertakings within time frames it may determine in this respect. Technical proposals that are not compliant with the RFP requirements should be rejected and the related financial proposals should be returned to the rejected participant without opening them. The rejected participants will be notified of the decision and the causes thereof.

The PPP Committee will assess, with the assistance of the working team, the remaining technical proposals in accordance with the project evaluation criteria set out in the RFP, and the PPP Committee will determine the technical proposals that have been found to be compliant with the evaluation criteria. If at least two technical proposals have not been found compliant, the project should be retendered for the sake of securing competition in bidding. The PPP Committee will then open the financial proposals submitted by the participants whose technical proposals have been accepted in the presence of such participants, and raise to the HCPP a report classifying the proposals in light of the technical and financial evaluation. The PPP Committee will also raise with this report its recommendation as to the best offer based on the project evaluation criteria set out in the RFP.

The PPP Committee may, by delegation from the HCPP, conduct negotiations with the participant who has submitted the best proposal, in order to enhance its proposal from a technical perspective. The project will be awarded to the participant who has submitted the best proposal based on the evaluation of the PPP Committee in accordance with the project evaluation criteria set out in the RFP with the approval of the HCPP. The PPP Committee will announce the result of the procurement process and notify the unsuccessful participants of the causes of the rejection of their proposals.

V THE CONTRACT

i Payment
The PPP Law provides for the possibility of payment from the public entity to the project company or from the latter to the former. No further details are set out in the said law. It also provides that implementing decrees may be issued by the CoM and such decrees may provide further details and requirements in relation to the payment mechanism (e.g., payment frequency, levels and key performance indicators). Until then, the foregoing aspects may be freely agreed between the parties to the PPP contract by virtue of the general principle of freedom of contract under Lebanese law. The suspension of payment in the event of the interruption or non-availability of the services required to be provided pursuant to the PPP contract may be freely agreed between the parties.

ii State guarantees
The PPP Law is silent with regard to state guarantees that may be provided for PPP projects. It only stipulates that the PPP contract should include provisions relating to security granted, inter alia, by the public entity. The constitution provides that any government undertakings resulting in financial obligations on the government require the passage of a law. State guarantees may be granted in favour of the project company or its sponsors, provided it is allowed by virtue of a law. Such law would typically provide the terms and conditions of the guarantee case by case, depending on the particulars of each project.
iii Distribution of risk
With regard to risk allocation in PPP projects, the PPP Law only stipulates that risk allocation should be agreed between the parties by virtue of the PPP contract. Subject to any requirements relating to risk allocation that may be issued by virtue of CoM implementation decrees, risks are expected to be identified as part of the study to be conducted by the SG and the PPP Committee and allocated to the parties by virtue of the PPP contract. Because of the absence of a Lebanese PPP model per se, there is no clear or standardised position on risk allocation. The uncertainty is expected to be resolved as PPP projects increase in number.

iv Adjustment and revision
The PPP Law is silent with regard to mechanisms of adjustment and revision of contract terms, including changes to the levels of payment, in PPP projects. Subject to any requirements relating to the foregoing mechanisms that may be issued with CoM implementation decrees, such mechanisms are expected to be freely agreed upon by virtue of the PPP contract. The PPP Law stipulates that the PPP contract should address, inter alia, the limitations applicable to the modification of the initial terms of the contract.

v Ownership of underlying assets
The PPP Law provides that the public entity that enters into a contract with the project company may put at the disposal of the latter, and throughout the duration of the project, land owned by the state for the purpose of the project. It further provides that the PPP contract should include the assets and property put by the public entity at the disposal of the project company and the rights and obligations of the latter in relation to such assets and property. The PPP Law is silent as to the possibility of security laid upon assets and property owned by the state and put at the disposal of the project company. But the general legal framework prohibits laying security over state-owned assets and property. The sponsors should seek alternative security for the bankability of the PPP project, such as a pledge of the project company’s shares, assignment of the project’s proceeds or assignment of insurance proceeds.

vi Early termination
With regard to early termination of the PPP contract and procedures applicable in the occurrence of events of defaults, the PPP Law only stipulates that the PPP contract should address project and service continuity in the case of early termination or breach by the project company of its contractual obligations. Based on the foregoing and based on the general principle of freedom of contract under Lebanese law, we may conclude that the public entity and the project company may agree and enter into direct agreements with lenders to grant them step-in rights to carry on with the project in the event of a project company event of default. This interpretation is confirmed by provisions in the PPP Law providing that the PPP contract should, inter alia, address project and services continuity upon termination of the PPP contract or breach by the project company of its contractual obligations thereunder.

VI FINANCE
Although the banking sector is one of the key sectors driving the Lebanese economy, project finance is not yet well developed in Lebanon. Once of the main reasons could be the high yield generated by Lebanese sovereign bonds in which banks have largely been invested, thus
the historical lack of appetite for long-term project financing. Lebanese banks have expressed their willingness to play an active role in developing PPP projects in Lebanon and engaging in long-term project finance. These actions should be encouraged and closely observed.

VII  RECENT DECISIONS

The PPP Law is silent on the subject of dispute resolution relating to the procurement and implementation of PPP projects. To date, disputes relating to public procurement are governed by the general legal framework applicable to public procurement. The Shura Council is the competent court to examine and settle disputes relating to public procurement in general and procurement of PPP projects. The most recent cases are the challenges filed by bidders submitting for the management of the existing vehicles inspection stations and the expansion thereof, which was being procured by the Tenders Department (and not the HCPP). The challenges resulted in a decision to annul the administrative decision awarding the project to one of the bidders for violations of the law.

VIII  OUTLOOK

Turning PPPs into an enabler for the development of a country’s economy requires more than passing a law and a programme (CEDRE and CIP). Practice plays a key role in attracting investors and lenders and positioning a jurisdiction on the regional or global PPP map. Education in this respect is key and should be spread across all PPP stakeholders to raise awareness about PPP, its rationale, requirements and ultimate purpose. Government officers and local lenders should play a key role in the development of PPP in Lebanon. Government officers should get acquainted with the rationale of PPP projects and PPP teams should be formed at the HCPP and different ministries that are likely to be involved in PPP to deal with the various stakeholders, namely, the HCPP, the bidders and their lenders. Once the PPP project is awarded, they should be in a position to administer the PPP contract and deal with the project company and its lenders. Local banks should develop project finance, non- or limited recourse and long-term financing capabilities, and take policy decisions to start diversifying their investment portfolio by moving away from steady yielded government bonds to other sources of revenue, such as those generated from PPP projects, which would contribute to the development of the economy. Once a local PPP model and practice becomes established, international investors and lenders will be more keen to consider investing in PPP projects in Lebanon.
I OVERVIEW

Mexico is a federal republic composed of 32 states and several municipalities within each state. As such, federal and local statutes apply to public-private partnerships (PPPs).

The development of PPPs in Mexico began in 2004 under the scheme known as projects for the provision of services (PPS), although the enactment of the Law on Public-Private Partnerships (the PPP Law) and its Regulations occurred until 2012. In Mexico, however, different types of public-private investment schemes have been used since the early 1990s to implement infrastructure projects, such as concessions, financed public works and investment projects with deferred expenditure registration. These schemes served as direct precedents of PPPs as understood at the time of writing.

PPPs constitute a long-term contractual relationship between the public and private sectors for the provision of services to the public sector or the end user, in which the private developer provides, partially or totally, the infrastructure required for such services and, generally, the public entity pays a monetary consideration to the private developer. PPPs have been used for government policy reasons to increase social welfare, offer more and better infrastructure and foster investment in the country.

Since the enactment of the PPP Law in 2012, there have been more than a hundred public biddings for the implementation of projects through the PPP model focused on the following sectors: health, transportation, telecommunications, social and hydraulic infrastructure. Also, the energy and environmental sectors have shown an increasing participation in PPPs.

To ensure transparency and access to information, the federal government created two websites known as CompraNet and Mexico Projects Hub. CompraNet is a digital platform that provides public information on projects, bidding processes, procurements, leases, public works and other related services; while Mexico Projects Hub contains updated detailed information of the most relevant energy and infrastructure projects that require private investment. The Hub is part of the Mexican government’s initiative to create an investor-relations office to link investment projects with domestic and foreign potential investors, encouraging long-term financing for infrastructure.

In the following years, the PPP agenda in Mexico may increase, particularly in the transportation and telecommunications sectors, since the new administration for
2018 to 2024 has shown particular interest in developing railways, highways, airports, as well as an extensive telecommunications network project to provide internet access and digital services across the country.  

II THE YEAR IN REVIEW

In 2018, different entities and agencies of the federal government awarded approximately 13 projects structured under the PPP Law across a wide range of sectors, including health, transportation and telecommunications. The main reason for the increase in the number of PPP projects compared to previous years was the clear objective to promote private investment in critical public infrastructure projects that could not be afforded on an exclusive basis by the Mexican government.

In the telecommunications sector, the shared network project (Red Compartida) reached financial closing. This project offers wholesale telecommunications services across the country as a result of the telecommunications reform, which seeks to create greater competition, as well as increase telecommunications coverage by offering access to its infrastructure and capacity as a service. Further, the federal government opened the tender process for the trunk network project (Red Troncal), attracting investment opportunities to domestic and international operators and investors. This project consists of a PPP contract for the design, installation, operation and maintenance of an optical fibre backbone to improve telephone and mobile data services, aiming to reduce the tariffs charged to customers. The decision for the award of this project is scheduled for February 2019.

In the health sector, two of the most important PPPs developed by the Institute of Social Security and Services for State Workers reached financial closing in 2018 with the National Bank for Public Works and Services (Banobras) and other financial institutions. It is expected that completion of the new hospitals occurs as scheduled in the contract and the operation phase will start on the second semester of 2020.

Finally, the first self-financed PPP project was awarded in 2018 to design, build, develop and operate an aquarium in the city of Mazatlán, Sinaloa. Although the federal government allocated public resources through the National Infrastructure Fund (Fonadin) and the Ministry of Tourism, most of the funds for the construction of the facilities shall be contributed by the private developer. Under the self-financed PPP scheme, the private developer assumed the ‘demand risk’ and will receive revenues exclusively through the tariffs charged to the users of the aquarium. Financial closing is expected this year, although construction started in December 2018.

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2 For more information on the projects agenda please refer to the following link: https://www.finananzaspublicas.hacienda.gob.mx/work/models/PPEF2019/paquete/politica_hacendaria/CGPE_2019.pdf.

3 For more information about the trunk network project please refer to the following link: https://www.proyectosmexico.gob.mx/proyecto_inversion/602-telecomm-red-troncal/#popme.
III GENERAL FRAMEWORK

i Types of public-private partnership
There are different structures to develop PPP projects in general, including the following:

a concessions, in which the private sector – concessionaire – builds and operates the project owned by the public sector and the investment is recovered through the fees or tariffs paid by the project’s end users;
b financed public works, in which the private developer invests in a project, and once it is constructed and operating, the public entity repays the total investment;
c joint ventures, involving particular risk-sharing models; and
d PPP contracts (stricto sensu), which regulatory framework consists of the PPP Law and its Regulations. It is relevant to mention that for projects that are not regulated by the PPP Law, there is a specific legal framework for each infrastructure sector (i.e., oil and gas, power or special economic zones).

Regarding PPP contracts in particular, the PPP Law and its Regulations set forth a classification related to the funding used for the project:

a pure PPP projects – completely funded with public resources, either:
  • provided in the annual federal budget; or
  • resources different from budgetary funds, including those granted by Fonadin;
b combined PPP projects – using both public funds and any other source of funding; and
c self-financed PPP projects – funded exclusively with private funds, other non-financial resources or with the cash flow generated by the project itself.

In the last year, a couple of PPP projects have been structured for the first time through the self-financed PPP model for the development and construction of water and energy facilities (i.e., Mazatlán Aquarium). As previously explained, the private developers will not receive any payment from the public contracting parties; rather, they will repay the financing and recover their investment entirely through the cash flow obtained by operating the project.

ii The authorities
The process of structuring, bidding and entering into a PPP contract is subject to the control of the public entity acting as contracting party in the relevant jurisdiction. As mentioned before, PPP matters are subject to federal and local statutes; therefore, the contracting party could be any federal, state or municipal authority developing a PPP project, whether state-owned companies, agencies, public trusts or any other governmental entity.

At the federal level, the PPP Law applies to federal public agencies and entities, federal public entities regulated by federal laws with autonomy derived from the Constitution, federal public trusts not considered state-owned entities, and any other governmental entities (state or municipal) that allocate federal resources to PPP projects.

The Ministry of Finance and Public Credit is one of the principal authorities for PPPs in Mexico. It has jurisdiction to interpret the PPP Law for administrative purposes and to enact complex rules to prepare viability studies required to structure a PPP. Another relevant authority for PPPs is the Inter-Ministerial Commission on Public Expense, Financing and Disincorporation, which approves those projects previously analysed and authorised by the Ministry of Finance and Public Credit to be developed under the PPP scheme and that have complied with the regulatory requirements provided for in the PPP Law and its Regulations.
Once the Inter-Ministerial Commission’s authorisation has been granted, the projects are submitted to the budget and Public Account Commission of the House of Representatives (in Congress) for the authorisation of the allocation of budgetary federal funds.

The Ministry of Public Affairs also plays an important role in PPPs as it is in charge of state-owned property, valuations and investigation of public officials’ responsibilities. The PPP Law also provides for the Ministry of Public Affairs’ responsibility to provide information related to PPP projects and the bidding processes through CompraNet, including the supervision of the project and the enforcement of the PPP contract.

The Ministry of Environment and Natural Resources also participates by authorising the environmental impact assessments for PPP projects, intended to protect the environment, as well as to preserve and restore the ecosystems for the purpose of avoiding or minimising the adverse effects on the environment of works and activities caused by the development of the projects.

Other authorities at the federal, state and municipal levels may also be involved in the implementation of PPPs, for instance, to grant the specific permits, licences or authorisations required to develop the project (i.e., land-use licences, water supply and wastewater discharge permits, civil protection and municipal operating licences, among others).

iii General requirements for PPP contracts

A public entity interested in developing a PPP must first complete a structuring phase for the project according to the following considerations:

\textit{a} if the PPP project involves budgetary funds provided in the annual federal budget, the public entity must prepare and obtain:

- the viability studies of the project;
- the registry in the Investment Portfolio of the Ministry of Finance and Public Credit;
- the authorisation of the Inter-Ministerial Commission on Public Expense, Financing and Disincorporation; and
- the authorisation of the budget and Public Account Commission of the House of Representatives;

\textit{b} if the PPP project involves federal resources different from budgetary funds, the public entity must prepare and obtain:

- the viability studies of the project; and
- the registry in the Investments Portfolio of the Ministry of Finance and Public Credit; and

\textit{c} if the PPP project involves other non-budgetary funds or other non-financial resources (such as self-financed PPPs), the public entity must only prepare the viability studies for the project.

Moreover, the viability studies that the PPP Law provides for must include the:

\textit{a} general description of the project;
\textit{b} necessary goods and assets (including real property) for developing the project;
\textit{c} necessary permits, licences and authorisations for developing the project;
\textit{d} social, legal, economic, financial and environmental feasibility; and

\footnote{See the previous section for information about the authorities involved in the structuring of PPPs.}
e financial analysis on the convenience of developing the project through the PPP scheme compared to other models of project financing. 5

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

After the project is structured and approved by the corresponding authorities, the public entity publishes a tender notice or call inviting the private sector to participate in a bidding process. The tender notice shall be published in the contracting entity’s website, in the Official Federal Gazette, in CompraNet and in a newspaper of major distribution. The PPP Law establishes that PPPs are subject to transparent and publicly available bidding processes.

Along with the tender notice, the contracting entity publishes bidding rules containing, among others, the:

a identity of the contracting entity;
b requirements for the participants to prepare and submit their proposals;
c term for the services to be provided;
d characteristics and technical aspects for the construction of infrastructure works and services to be provided;
e PPP contract model containing the rights and obligations of the parties and the distribution of risks;
f guarantees that participants must deliver; and
g ancillary documents that participants must submit together with their proposals.

After the tender notice and bidding rules are published, the contracting entity grants a period for Q&A with the participants (the PPP procedure shall have at least one Q&A meeting to clarify doubts and concerns that participants may have). Once that period is concluded, participants prepare and submit their technical and economic proposals. At the end of the bidding process, the project is awarded to the bidder that offered the best terms in price, quality, financing, opportunity and other circumstances as determined by the contracting party in the bidding rules.

Any person is allowed to attend the events of the bidding process as a public observer. Likewise, the bidding process shall have a social witness to verify that the procedures follow the principles of legality, free participation and competition, objectivity, impartiality, transparency and publicity.

ii Requests for proposals and unsolicited proposals

Any individual or entity that fulfils the requirements established in the bidding rules is allowed to participate in the bidding process, whether individually or as a consortium. The term for the submission of proposals is at least 20 business days after the last Q&A meeting or event as provided for in the bidding process calendar. Bidders must submit a technical and an economic proposal for the project in separate and sealed envelopes, which are opened in a public session for evaluation.

5 Article 14 of the PPP Law and Articles 21 to 31 of its Regulations provide for the preparation and submission of the viability studies for a PPP project.
The technical proposals shall contain, among others, technical aspects to carry out the project, including the development of the infrastructure and the provision of the services referred to in the bidding rules, as well as the commitment to create a special purpose vehicle (SPV) to develop the project. On the other hand, the economic proposals shall contain, among others, the minimum financial requirements, the project’s financial model, investment amounts committed for the project and the price of the services to be provided.

Additionally, the PPP Law sets forth terms and conditions for the submission of unsolicited proposals by private sector entities interested in implementing a PPP project. An unsolicited proposal begins with the request for an expression of interest by the private sector to the public entity; the public entity shall respond within 30 business days whether it is interested or not in developing the project. Once the private sector obtains a favourable expression of interest from the public entity, it must prepare the unsolicited proposal with the following documentation: the viability studies including the description and characteristics of the project; legal, technical, economic and financial feasibility of the project as a PPP; essential elements of the PPP contract; and financial requirements and estimated investments.

Furthermore, public entities can ask for proposals of PPP projects they are willing to accept, specifying the sectors, subsectors, geographical matters, type of projects, estimated goals, relationship between the proposal and the purposes described in the National Development Plan, as well as the expected benefits. Interested parties take into consideration this information to prepare more accurate unsolicited proposals that could be admitted for public bidding.

The public entity receiving an unsolicited proposal has three months to conclude the analysis and evaluation of the proposal. This term may be extended for an additional three-month period if the complexity of the project requires so. In addition, the public entity may as well transfer the proposal to other authorities or invite federal, state or municipal entities to participate in the project, if applicable.

After the analysis and evaluation period, the public entity issues an opinion on the feasibility of the unsolicited proposal. If the proposal is considered feasible, the public entity has the right to call for a bidding process inviting private sector participants, which is conducted under the general rules of bidding procedure as provided for in the PPP Law. Still, if the promoting party that submitted the unsolicited proposal is the only participant in the bidding, the PPP contract may be directly awarded if it fulfils the corresponding requirements.

The promoting party of an unsolicited proposal is entitled to obtain an incentive in the evaluation of its offer during the bidding process, which shall be no greater than 10 per cent of the evaluation method over other bidders. It also has the obligation to convey the necessary information, documents and studies to the public entity to ensure fairness in the bidding. If the promoting party does not win the bidding, it has the right to receive the amounts expended to carry out the studies for the unsolicited proposal.

### Evaluation and grant

When evaluating the technical and economic proposals submitted by the bidders, the public entity is required to verify their compliance with all the requirements set forth in the bidding rules and the integration of every element contained in each proposal.

The PPP Law emphasises the importance of the objectiveness in the evaluation of the proposals, so that no participant is favoured over the others. For such purposes, the public entity may use an evaluation matrix that could consist of percentage points, cost-benefit
criteria, point-rated criteria or any other quantifiable method that allows an objective and impartial evaluation. This evaluation criteria shall be clearly determined in the bidding rules so that every participant knows the method that the public entity will use to award the contract.

The public entity must evaluate the technical proposals of each bidder and, only if these proposals fulfil the necessary requirements provided for in the bidding rules, it continues with the evaluation of the economic proposals. The bidding rules provide for cases in which a proposal is considered insolvent, being the most common in the following cases: if the proposal is incomplete or its evaluation is impossible; if the proposal fails to comply with legal, technical or economic provisions contained in the bidding rules; and if the provided information is misleading or false.

After the evaluation of proposals, the public entity awards the PPP contract to the bidder whose proposal is considered solvent for fulfilling all legal, technical and economic requirements, in accordance with the evaluation criteria detailed in the bidding rules. If two or more proposals are considered solvent, the contract is awarded to the proposal that provides the best economic conditions for Mexico; and if two or more proposals are still in equal conditions, then the contract is awarded to the proposal that considers the greater generation of national employment, as well as the use of national or regional goods and services.

To support the public entity’s decision, it must issue a detailed opinion explaining the analysis of the proposals, the reasons for their admitting or discarding, a comparison between them, and the elements by which the winning proposal is considered to offer the best conditions for the project. The award is then notified to all participants in a public meeting and published in the entity’s website and in CompraNet.

V THE CONTRACT

i Payment

One of the main elements that the PPP contract model includes is the form of payment to the private party for the infrastructure and services provided during the project. Participants in the bidding process put special attention to the rules regarding consideration and payment procedure to prepare and submit their proposals.

The payment mechanism depends on the specific nature of every project and the allocation of risks established in the contract. A variety of payment models have been implemented in Mexico; however, the typical form of remuneration in projects awarded in the last couple of years consists of monthly payments that are subject to deductions or withholdings depending on performance indicators set forth in the contract, to ensure that the services are being rendered effectively according to the agreed upon technical specifications. Under the self-financed PPP scheme, the payment method includes solely the collection of fees by the private party from the end users of the infrastructure (e.g., highway tolls, energy and water tariffs). For instance, in the aforementioned trunk network project (Red Troncal), one of the largest projects tendered in 2018, the PPP contract model provided for continuous revenues in favour of the private party received from tariffs paid by the customers of the trunk network.
ii State guarantees

In general, federal PPPs do not offer state guarantees to secure payment by the public entity to the private developer. Approval of the required funds for the project and their provision in the annual federal budget as multi-annual expenditure commitments may suffice to prove the government’s solvency to comply with its payment obligations under the PPP contract.

Nonetheless, some guarantees to the private party could be contractually based, such as assuring a minimum level of revenue or usage of the project’s infrastructure. For instance, if the revenues generated by the project fall below the amount set forth in the PPP contract, the public entity may be responsible for the difference and this type of contractual provision is frequently used to enhance the bankability of the project.

On the other hand, sub-national PPPs must include mechanisms to guarantee payment obligations undertaken by state and municipal public entities in PPP contracts in order to be successful. Financial institutions are reluctant to finance state or municipal PPPs if they fail to provide an alternative source of payment different from the state or municipality budget allocation authorised for the project. Usually these guarantees include the creation of special funds with federal contributions that states and municipalities are entitled to receive from the federal government or the pledge of revenues collected from local taxes. Thus, the type of guarantees will depend on the availability of funds by the relevant state or municipality.

iii Distribution of risk

Risk evaluation and allocation represents a key factor for the project’s success. Project risks analysis is based on a due diligence process intended to ensure that all necessary information about the project is available, the identification of project risks and the distribution of such risks to the appropriate parties that can bear them efficiently through provisions in the PPP contract.

The main risks to be considered and shared among the parties depend widely on the specific nature of each project, but the most common risks that are constantly considered in the structuring of a PPP project in Mexico are:

a commercial risks: those inherent in the project itself, on the industry or market in which it operates (e.g., commercial viability, construction, revenue, operating and environmental risks);

b macro-economic risks: not directly related to the project, but to external economic conditions of the country or region;

c regulatory and political risks: relating to the effects of government action or political events, such as changes in law, war or civil disturbance, etc;

d financial risks: attempting against the funding of the project (including capital and debt requirements); and

e force majeure: unpredictable events that do not allow the ordinary course and development of the project;

Considering the above, the usual measures adopted to prevent and mitigate project risks include the following:

a Contract provisions: the PPP Law provides that the contract must contain among its provisions the efficient distribution of risks between the public and private parties, which must be properly balanced and, in any case, the contracting entities cannot guarantee any payment or indemnity for risks that are not established in the contract, the PPP Law or its Regulations.
b  SPV: the SPV or project company is the entity responsible for hiring financing for the project, entering into the necessary agreements (i.e., EPC and O&M) and being held liable in the case of default.

c  Insurance: the PPP Law also provides that the private party must hire insurance to cover, at least, the risks that the infrastructure, end users, assets and goods are exposed to during the term of the contract.

d  Guarantees: the private party must grant guarantees for completion, operation and performance level of the services as established in the bidding rules; and guarantees in favour of third parties by the nature of the SPV itself and with respect to the project.

e  Financial terms: lenders are usually willing to bear limited risk provided that they are adequately compensated through interest rates or other financial terms and conditions on the project loan.

iv  Adjustment and revision

Any adjustment to the PPP contract may be formalised in an amendment agreement and, when applicable, the necessary authorisations for the project shall be also modified. However, in emergency cases or when the security of the end users is at risk, the public entity may request the private developer to carry out the corresponding actions and changes in the operation of the project without entering into the relevant amendment agreement.

The adjustment of the PPP contract may only have the following objectives:

a  to improve infrastructure features, which may include additional works;

b  to increase the services or their performance level;

c  to deal with aspects related to environmental protection, as well as to the preservation and conservation of natural resources;

d  to adjust the project in case of unpredictable events during the structuring, award or development of the project; and

e  to restore the economic balance of the project.

To restore the economic balance of the project, the private party has the right to request the amendment of the PPP contract if an act of authority caused a substantial increase in the developer’s obligations or substantial reduction in the benefits. A substantial variation generally means any change that is long-lasting and puts the financial viability of the project at risk. However, specific requirements have to be met depending on the causes and effects of the adjustment to the parties’ obligations.

v  Ownership of underlying assets

The responsibility to acquire the necessary assets for the development of the project may rest with the public entity or with the private developer, as established in the bidding rules and agreed upon in the PPP contract. The acquisition may be achieved through conventional means (observing civil law property transfer rules) or through taking or expropriation proceedings. Nonetheless, in Mexico, the public entity generally has ownership and control of the underlying assets, since the projects are mostly implemented over state-owned real property. In such cases, a concession or permit is sufficient to authorise the developer to use, exploit and operate the assets provided that, upon termination of the contract, the underlying assets of the project’s infrastructure and the ones that were essential to provide the services will
remain under the public entity’s ownership and control, subject to the state-owned property regime. The public entity is also entitled to acquire from the private developer the remaining assets that are not strictly necessary for the project.

vi Early termination

The public entity has the right to terminate the PPP contract before the specified term for reasons of public interest or if the need for the contracted services or infrastructure no longer exists, and if the performance of the contract would cause an injury or damage to the state. The early termination decision must be accompanied by an opinion issued by the public entity stating the reasons for the termination.

If the contract is terminated for causes that are proven different to the private party’s fault, developers are entitled to receive a termination payment in the form of reimbursement of the expenses and investments that could not be recovered and have not been fully redeemed. The termination payment also covers the financial obligations assumed by the private developer in the project’s financing.

The PPP Law provides that the contract shall address termination causes for the public entity default, for the private party default, for extended force majeure events and for convenience of the public entity as explained herein.

VI FINANCE

In Mexico, PPPs are financed through a combination of equity and project finance-based debt, either public or private. The PPP Law requires that an SPV is formed by the sponsor upon the award of a contract. This structure requires the private sector sponsor to fund the project (at least partially) with equity. Public funds are also usually allocated to PPP projects mainly from Fonadin, the government agency responsible for coordinating the financing and development of infrastructure. The debt-to-equity ratio depends on the particular circumstances of each project, such as the participants’ desired leverage, borrowing costs and risks involved in the project.

Most common lenders include commercial banks, multilateral agencies and development banks. From the public sector, the main players in project finance transactions in Mexico are Fonadin and Banobras and, when publicly financed, the projects must meet additional legal requirements to ensure the proper repayment of debt in favour of lenders.

Whether by equity or debt (public or private), foreign entities are frequently involved in the financing of projects in cross-border transactions. Most of these transactions are funded in foreign currency and, in such cases, participants have to deal with exchange risks. Project sponsors engage in hedging or swap instruments to reduce the project’s sensitivity to changes in the foreign exchange rate. On the other hand, project sponsors may recur to local currency loans in Mexico if the market can offer the amount and term of financing to eliminate any long-term currency risk.

VII RECENT DECISIONS

Although there is no jurisprudence related to PPPs in Mexico yet, and there have not been relevant administrative or judicial procedures in the past years, in 2017, the Supreme Court upheld, in an amparo procedure, Article 130 of the PPP Law, providing for sanctions to individuals and entities that are in default of their obligations under PPP contracts for reasons
attributable to the private party and that may, therefore, cause serious damage to the public entity. Other similar judicial decisions have been made regarding early termination rights and termination payments. These rulings strengthen the application of the PPP Law as they seek a balanced protection of the parties’ interests and the principles of the bidding process to award PPP projects.

VIII OUTLOOK

Mexico represents an opportunity for the promotion of PPP projects since they have been a fundamental mechanism in developing economies to increase the offer of infrastructure and public services, involving public and private funding with the participation of the private sector in the development of projects where the private sector has better knowledge and experience. As of 2016, 41 new federal PPP projects have been structured and developed in Mexico; of those 41 projects, 18 are in the structuring and pre-investment phase; six in the bidding phase; and 17 in the development and operation phase. These projects are focused on the transportation, health, telecommunications, social and hydraulic infrastructure.

In 2018, the two main telecommunications projects were key factors in PPP development: the trunk network project (Red Troncal) and the shared network project (Red Compartida). The energy sector has also proven to be one of the biggest opportunity areas for PPPs since the enactment of the energy reform, allowing the private sector to actively participate in the previously monopolised sector controlled by PEMEX and CFE.

In addition, the new administration led by President Andres Manuel Lopez Obrador has announced an ambitious agenda in infrastructure, mainly focused on the south and southeast regions of the country, which are the most marginalised in terms of public services. This agenda includes the development of new railways, highways, ports and refineries that could benefit from the PPP model. Besides, to prevent a reduction in foreign investment, it is essential that the federal government turns to PPPs as a viable option for structuring and developing new infrastructure projects that are much needed in the country, gaining investors’ confidence and promoting the participation of the private sector in Mexico’s economic growth.

Moreover, the federal government recently announced a new treaty with Canada to rehabilitate and modernise the existing hydroelectric facilities in Mexico, a project that could bring new opportunities in the future and, more importantly, that shows the intention to pursue clean energy projects that are certainly achievable with the current energy legislation.

For the upcoming year, PPPs will become fundamental for the accomplishment of the goals established in the federal budget for 2019. If a safe environment for national and foreign investment is assured, PPPs can expect to grow in the following years with some expected changes to provide more transparent and objective mechanisms in public biddings, as well as to properly manage public funds in the implementation of PPPs. Therefore, 2019 may represent an unprecedented change for the current situation of PPPs. Special attention should be put to the upcoming reforms to the PPP Law and its Regulations, as well as to the entering administration’s intention to pursue PPP projects.
Chapter 13

NIGERIA

Fred Onuobia and Okechukwu J Okoro

I  OVERVIEW

The Federal Republic of Nigeria is made up of a central federal government, 36 state governments and 768 local governments. Each federating unit is, subject to some constitutional restrictions, responsible for infrastructural development within the territory over which it has or exercises control. 2 Theoretically, therefore, there could be as many public-private partnership (PPP) laws and frameworks as there are tiers of governments in Nigeria.

The late 1990s and beyond saw the federal government of Nigeria shedding some of its responsibility for infrastructural development by increasing private participation in critical sectors of the Nigerian economy through the privatisation and commercialisation of hitherto state-owned monopolies, especially in the telecommunications, electricity and financial services sectors. Undoubtedly, privatisation had been the preferred vehicle for private sector participation in Nigeria’s infrastructural development. There has, however, in recent years, been a shift towards PPPs. In Nigeria today, PPPs have increasingly become the model for social and economic infrastructure development projects, in spite of only very few states, such as Lagos State, the nation’s commercial capital, having formal legal framework for PPPs.

The Infrastructure Concession Regulatory Commission (Establishment, etc.) Act, 2005 (the ICRC Act) was enacted for ‘the participation of the private sector in financing the construction, development, operation, or maintenance of infrastructure or development projects of the federal government through concession or contractual arrangements; and the establishment of the Infrastructure Concession Regulatory Commission (the Commission) to regulate, monitor and supervise the contracts on infrastructure or development projects.3 In Lagos State, the statutory regime for PPP has evolved from the Lagos State Roads, Bridges and Highway Infrastructure (Private Sector Participation) Development Board Law enacted in 20044 to the more streamlined Lagos State Roads (Private Sector Participation) Authority Law passed in 2007 and finally to the Lagos State Public Private Partnership Law, 2011 (the Lagos PPP Law), which is the law currently in force.5

II  THE YEAR IN REVIEW

At the federal level, progress was made on the Ibom Deep Sea Port project in Akwa-Ibom State Nigeria, with Bolloré Africa Logistics—PowerChina International Group Limited

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Consortium (Bolloré Consortium) emerging as the preferred bidder for the project. Currently, there are ongoing discussions and negotiations between the federal government and the Bolloré Consortium on details of the investment and concession. Plans to concession Nigeria’s four major international airports (Lagos, Abuja, Port Harcourt and Kano) and the eastern and western railway lines are still ongoing. However, discussions on the eastern and western railway lines have been stalled following General Electric’s (GE) withdrawal from the project owing to the restructuring of its line of business. GE has handed over the railway project to South Africa’s Transnet SOC Ltd, which is also a member of the consortium.

The year 2018 also saw the signing into law of the Lagos State Electric Power Sector Reform Law (the Power Sector Law). The Power Sector Law essentially provided the legal framework for the Lagos State government ‘Light Up Lagos Initiative’. The initiative aims to boost electricity supply in Lagos State through the private sector, with the Lagos State government providing the necessary platform and support. The Power Sector Law has been applauded as the first of its kind by the government of Nigeria. A major highlight of the Power Sector Law is the provision that allows the Lagos State Ministry of Finance and the Lagos State Debt Management Department, subject to the approval of the State Governor, to provide guarantees and indemnities to certain private-sector actors under the initiative. This provision will no doubt incentivise private-sector participation under the initiative. Also within the year, the Kaduna State government commenced the construction of affordable 600 mass housing units under a PPP initiative. There are other PPP projects at different stages, with values running into billions of dollars, being developed by the federal, state and local governments in Nigeria.

The ICRC PPP Contracts Disclosure Web Portal has continued to be applauded for helping to ensure greater openness and transparency in PPPs in Nigeria. The platform continues to create public access to all non-confidential basic information relating to a project (including the parties), overview of the project (covering the PPP model used and the rationale for the model), procurement documents and the project milestones. According to the portal, the Commission is currently undertaking 69 PPP projects, covering key sectors such as transport, energy, education, housing and health. These projects are at various stages of development, procurement and implementation.

At the time of writing, a bill for the amendment of the ICRC Establishment Act, 2005 is pending before the federal legislature. If passed, the bill will vest the Commission with supervisory and disciplinary powers with respect to concession agreements. The bill also seeks to change the name of the Commission from ‘Infrastructure Concession Regulatory Commission’ to ‘Public Private Partnership Commission’, to clearly capture the mandate and scope of work of the Commission.

III GENERAL FRAMEWORK

i Types of public-private partnership

A wide range of PPP models are possible under existing legal frameworks in Nigeria. Provision is made for traditional models and there is latitude for innovation where needed. The ICRC Act provides that ‘any Federal Government ministry, agency, corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly
pre-qualified project proponent in the private sector’. ‘Concession’ is broadly defined to include ‘a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof’.7

In clarifying the law, the Supplementary Notes to the National Policy on Public Private Partnership (Supplementary Notes) explains that:

[A] wide range of contract forms – in turn represented by numerous acronyms (BOT, DBFO, BOOT, etc.) falls within the scope of the term ‘public private partnership’. It can be said to include: outsourcing and partnering; performance-based contracting; design, build, finance and operate (or build operate transfer) contracts; and sometimes, concessions.8

Over the years, governments in Nigeria have undertaken different PPP projects under different models.9 The Murtala Muhammed Domestic Airport Terminal 2 (MMA2), the domestic terminal of the international airport situated in Lagos and its ancillary facilities, were developed under a build-operate-transfer (BOT) agreement among the federal government, represented by the Minister of Aviation, the Federal Airports Authority of Nigeria and Bi-Courtney Aviation Services Limited, as concessionaire. The Katampe District Infrastructure was undertaken under a design, build, finance and transfer PPP model between the federal government, represented by the Federal Capital Development Authority, and a private partner, Deanshanger Project Ltd.

On its part, the Lagos PPP Law defines a ‘concession agreement’ as:

[An]y agreement between the government and any person, firm, company or limited liability partnership for the construction, maintenance, operation or management of public infrastructure, assets and facilities over an agreed period of time including, but not limited to, the following types of agreements – (1) Design, Build, Operate and Transfer (DBOT); (2) Build, Own, Operate and Transfer (BOOT); (3) Rehabilitate, Operate and Transfer (ROT); (4) Joint Development Agreement (JDA); or (5) Operation and Maintenance (OM).10

The Lekki-Epe toll road concession was executed on a BOT basis between the Lagos State government (LASG) and a special purpose vehicle specifically established for the project, the Lekki Concession Company (LCC). The Lekki-Epe toll road concession agreement provided for the payment of a toll by users of the road to LCC, the concessionaire.11

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6 Section 1(1), ICRC Act.
7 Section 36, ICRC Act.
8 See Part 4, Paragraph 2 of the Supplementary Notes.
9 Among others, the Tinapa Free Trade Zone & Tourism Resort and the Akampa toll road project were all developed by the Cross River State Government using PPP models. Also the River State Government is developing the Greater Port Harcourt housing project scheme under a PPP.
10 Section 35, Lagos PPP Law.
11 Control of LCC has since December 2014 being taken over by the LASG pursuant to a share purchase agreement between stakeholders of LCC and the LASG.
The regulators

There have been attempts to establish regulators or agencies with mandates that are specific to PPP. At the federal level, the Commission was established in 2008 pursuant to the ICRC Act as a body empowered to, among other things, ‘take custody of every concession agreement made under this Act and monitor compliance with the terms and conditions of such agreement; [and] ensure efficient execution of any concession agreement or contract entered into by the Government’.\textsuperscript{12} For states with PPP-specific laws, such laws invariably establish a body with responsibility for PPPs in the state. In Lagos State, for instance,\textsuperscript{13} the Office of Public Partnerships (the Office) has the power to grant concessions; negotiate with prospective private partners; inspect and monitor concessionaires to ensure compliance with the terms of any concession agreement; designate a public infrastructure or public asset as a service charge-, user fee- or toll-paying public infrastructure or public asset and specify the condition for the use of such infrastructure or assets. Further, the Office is empowered to approve the amount of money that may be charged by a private or public operator with respect to any public infrastructure, public assets or amenities as toll or user fees, subject to the approval of the Lagos State House of Assembly.\textsuperscript{14} Apart from the Office, the Lagos State Public Procurement Agency established by the Lagos State Public Procurement Act 2011, the Lagos State Ministry of Finance, Ministry of Budget and Economic Planning and Ministry of Justice, are also involved in PPPs in Lagos State.\textsuperscript{15}

The Bureau of Public Enterprises (BPE), established under the Public Enterprise (Privatisation & Commercialisation) Act 1999 (the PE Act) is charged with the responsibility of effecting the privatisation or commercialisation of government enterprises identified under the First and Second Schedules of the PE Act. The BPE in the performance of this function has been seen to make use of traditional PPP models such as BOT or concessioning in some circumstances. For instance, the Nigerian Ports Authority currently has about 25 terminals operated under concession agreements with private entities, with the concession terms ranging from 10 to 15 years. There are also at least two ports operating on a BOT basis, namely, the Tin Can Island Port Complex and the Rivers Port Complex.

The Supplementary Notes outlines the roles and responsibilities of ministries, departments and agencies (MDAs) and other stakeholders in PPPs to avoid duplication, reduce bureaucracy and promote consistency, clear responsibility and accountability. Apart from the Commission and the BPE, the key MDAs involved in PPPs are the National Planning Commission, the Federal Ministry of Finance, the Debt Management Office, Office of the Accountant-General of the Federation and the Bureau of Public Procurement (the BPP). There are also sector-specific regulators, such as the Nigerian Communications Commission (for telecommunications projects), the Nigerian Electricity Regulatory Commission (for power projects), the Nigerian Maritime Administration and Safety Agency, Nigerian Ports Authority and the National Inland Waterways Authority (for maritime projects) and so on.

\textsuperscript{12} ICRC Act, Section 20(a) and (b).
\textsuperscript{13} Other States also have similar ‘offices’ or ‘bodies’ under varying apppellations, with powers similar to that of the Office, established under their respective PPP laws.
\textsuperscript{14} Section 10, Lagos State PPP Law.
\textsuperscript{15} Paragraph 3.3, Lagos State PPP Manual.
iii General requirements for PPP contracts

PPPs can be utilised for any project in Nigeria, except those that relate to matters on the ‘negative list’. The actual terms of a PPP contract will depend on the negotiation prowess of the parties involved and any special considerations surrounding the project. There is no standardised PPP agreement that must be adopted by the parties. There are, however, certain provisions that must be complied with as stipulated under the ICRC Act or the laws of the relevant states, including provisions for arbitration as the dispute resolution mechanism. Generally, it is required that the project company possess the financial capacity, relevant expertise and experience in undertaking the relevant infrastructure development or maintenance before it can contract with a relevant MDA.

In addition, while the concession agreement might only be executed between the relevant government ministry or agency and the private entity, such an agreement would have been subjected to numerous consent requirements, depending on the peculiarities of the project. For instance, for prioritised projects under the ICRC Act, the approval of the Federal Executive Council is required before the relevant ministry or agency can enter into a PPP agreement. Also, the approval of the Federal Executive Council is required for a government ministry, agency or corporation to give any form of guarantee, letter of comfort or undertaking in a concession agreement.

The Executive Council and the governor are the approving authorities in Lagos State. However, the Lagos PPP Law further provides that ‘any Concession Agreement to be entered into by the Office must be presented before the House of Assembly for ratification before implementation’. This provision is peculiar to the Lagos PPP Law. There is no such consent requirement under the PPP laws of Ekiti and Rivers States, for example. The Ekiti State PPP Law provides instead that ‘the award of a Concession by the Ekiti State Public Procurement Board is subject to the approval of the Governor as the approving authority’. Finally, where a consortium is undertaking the project under a PPP, members would be jointly and severally liable under the contract and the withdrawal of any member of the consortium before or during the implementation of the project may be grounds for review or possible cancellation of the contract.

The duration of a PPP agreement will depend on the nature of the project. The ICRC Act does not limit the duration of PPP agreements.

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16 Section 31 of the Nigerian Investment Promotion Commission Act 1995 lists sectors to which investment is barred by both local and foreign investors. They are: production of arms, ammunition, etc.; production of and dealing in narcotic drugs and psychotropic substances; production of military and paramilitary wears and accoutrement, including those of the Police and the Customs, Immigration and Prison Services; and such other items as the Federal Executive Council may, from time to time, determine. See also, Public Procurement Act 2007, Section 15(2).
17 ICRC Act, Section 2(3).
18 This is the name of Nigeria’s federal cabinet or council of ministers.
19 ICRC Act, Section 3.
21 Section 26, Lagos PPP Law.
22 Section 8, Ekiti State Public Procurement Board, 2011.
23 Section 4(3), ICRC Act.
IV BIDDING AND AWARD PROCEDURE

i The federal government of Nigeria

In addition to the ICRC Act, the Public Procurement Act 2007 (PPA) also plays a central role in the award of concessions at the level of the federal government. The PPA established the BPP and makes due process provisions applicable to procurements by the federal government and its agencies. Essentially, the PPA requires every procurement entity to maintain a record of a comprehensive procurement procedure. Nevertheless, while the actual procurement process may differ from one entity to another, all procurement must comply with the principles and general framework laid down by the PPA. The principal feature of the PPA is that all procurement entities must obtain a ‘Certificate of “No Objection” to Contract Award’ from the BPP for every procurement to be formalised. The PPA establishes different procedures for the procurement of goods and works on one hand, and the procurement of services on the other hand. Central to both regimes is the general need for public advertisement of invitation for bids in respect of the procurement with a view to encouraging ‘open competitive bidding’.

Also noteworthy is that the PPA expressly permits preferential treatment for domestic or local bidders in situations where an invitation to bid for goods and works is also extended to foreign bidders. Section 34(1) of the PPA states that ‘a procuring entity may grant a margin of preference in the evaluation of tenders, when comparing tenders from domestic bidders with those from foreign bidders or when comparing tenders from domestic suppliers offering goods manufactured locally with those offering goods manufactured abroad’. The parameters of such domestic preference must be disclosed in the bidding document.

Finally, in determining the successful bid, the procurement entity must be mindful of the bid offering the most value for money with regard to the requirements of the proposal for bid.

ii The state governments

The bid and award process will differ from state to state depending on the specific regulatory framework in place. For Lagos State, the extant legislation on procurement applies to PPPs. The Lagos PPP Law expressly provides that ‘the Office shall be a procuring entity for the purpose of the Lagos State Public Procurement Law and shall comply with the intendment of that Law’. The provisions of the Lagos State Public Procurement Law 2011 (the Lagos Procurement Law) are very similar to that of the PPA. A significant difference is that under the Lagos Procurement Law, there is no provision for the issuance of a Certificate of No-Objection by the Office. Moreover, unlike the PPA, the Lagos State Procurement Law

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24 Procurement Entities ‘means any public body engaged in procurement and includes a Ministry, Extra-Ministerial office, government agency, parastatal and corporation’. PPA, Section 60.
25 PPA, Section 16(1)(b).
26 Exceptions to the need to publicly advertise the invitation for bids include emergency, and the availability of goods, works or services from only a particular supplier.
27 Open competitive bidding is defined as ‘the process by which a procuring entity based on previously defined criteria, effects public procurements by offering to every interested bidder equal simultaneous information and opportunity to offer the goods and works needed’. Section 24(2) PPA.
28 Section 11 Lagos PPP Law.
makes provision for e-procurement. Nevertheless, procurement by any procuring entity is governed by the same principles of open competitive bidding, promotion of competition and system of accountability, among others.

iii Unsolicited bids

The Commission’s Guidance Notes on Unsolicited Proposals govern unsolicited proposals at the level of the federal government. The Commission’s Guidance Notes encourage unsolicited proposals on the premise that they might contribute to the infrastructural development of the country. Unsolicited proposals are to be submitted directly to the relevant MDA. MDAs on their part are to review submitted unsolicited proposals against the following laid down criteria:

- Does the project serve a credible public interest?
- Is the project in line with the national development goals of the relevant MDA?
- Does the project fall under the category of critical infrastructure?
- Is the project viable without need for viability gap funding?
- Does the project proponent possess the requisite competence and profile to implement the project?

Upon completion of the MDA’s review, the proposal is forwarded to the Commission for its review and issuance of ‘no objection’ after a favourable technical and financial due diligence exercise. Thereafter, ministerial approval is sought, and if obtained, the project proponent is issued a formal acknowledgement as the project author and the project proceeds to a competitive bidding stage. At the bidding stage, the Swiss Challenge System will be applied to allow for submission of competing bids by other potential proponents via a transparent process. However, the investments made by the project proponent in preparing the proposal to the requisite OBC standard is taken into consideration, and as such, the original proponent is granted the right to counter-match the best offer and secure the contract. The successful bidder is determined on the basis of the most economically and financially viable submission.

For unsolicited bids, the approach of the Office in Lagos State is similar to that of the Commission outlined above. The Lagos State PPP Manual (the Manual) provides that ‘in select cases, the project could be initiated by the private sector as an Unsolicited Proposal under a transparent, competitive process which will also be managed by a MDA’. It appears, however, that Lagos State is less disposed to pursuing unsolicited proposals, as the Manual

29 Section 60(2) Lagos State Procurement Law provides that ‘subject to the provisions of this Law and its Regulations, it shall be lawful for any procuring entity to consider any or all of its tenders by electronic auction and or simulation on its electronic portal, provided that the use of electronic system shall be transparent, efficient and economical’.

30 Paragraph 3.2.1 ICRC’s Guidance Notes on Unsolicited Proposals.

31 This refers to the system where it is mandatory for a procurement entity that has received an unsolicited bid to request for competing bids from the public. The bid from the original project proponent is then assessed against the competing bids before a decision is reached.

32 This refers to the ‘Outline Business Case’ Standard provided under the Supplementary Notes.

33 Paragraph 8.6 ICRC’s Guidance Notes on Unsolicited Proposals.

34 Paragraph 2.1.1 Lagos State PPP Manual.
further provides that ‘while all proposals will be treated on a case-by-case basis, consideration of unsolicited proposals will be the exception rather than the rule, limited mainly to projects that demonstrate genuine innovation and/or use of proprietary technology.’

V THE CONTRACT

There is no standard or model PPP agreement. Thus each PPP agreement will be unique to the project and parties involved.

i Payment

The existing frameworks provide for both direct payment by the public procuring entity to the private entity and also for payment from the proceeds of the project. Under the ICRC Act, where payment is to flow directly from the government, such payment must be by way of amortised payments. Unfortunately, the ICRC Act does not further provide for the rate or interval of payment of these amortised payments. Also, under the PPA, mobilisation fees of up to 15 per cent may be paid to a contractor or supplier and future payments are subject to the issuance of an interim performance certificate. Payments must be settled promptly as payments that remain unpaid for more than 60 days after the date of the submission of an invoice, will attract a delayed payment interest. The PPA further provides that ‘all contracts shall include terms, specifying the interest for late payment of not more than sixty days’.

While the Lagos Procurement Law provides that a performance guarantee may be required as determined by the Office, the PPA makes the provision of a performance guarantee mandatory. Section 36 PPA provides that ‘the provision of a Performance Guarantee shall be a precondition for the award of any procurement contract upon which any mobilisation fee is to be paid, provided, however, it shall not be less than 10 per cent of the contract value in any case or an amount equivalent to the mobilisation fee requested by the supplier or contractor whichever is higher’.

ii Guarantees

MDAs are not permitted to give any guarantee, letter of comfort or undertaking in respect of any concession without the approval of the Federal Executive Council. On the other hand, in Lagos, it would appear that there is an outright prohibition on the provision by Lagos State or the Office of guarantees in support of PPPs. Section 17 of Lagos PPP Law states that ‘a public private partnership agreement must not contain provisions for any financial guarantee from the State, any Ministry, Department or Agency for the Public Private Partnership but may include provisions for indemnity or undertaking that would be given in the ordinary course of business.’ However, the Power Sector Law has relaxed this provision with respect to power projects in Lagos State by allowing for government guarantees and indemnities.

36 Section 7(3) ICRC Act.
37 These provisions are mirrored in Sections 62 and 64 of the Lagos Procurement Law. The Lagos Procurement Law, however, sets a higher threshold of 20 per cent as mobilisation fee (called advancement payment under the Lagos State Procurement Law) and advance payment of more than 20 per cent may be paid upon submission of a written request by the supplier or contractor justifying the need for such payment.
38 PPA, Section 37(4).
for electric power projects under the Lagos State ‘Light Up Lagos Initiative’. Considering Nigeria’s infrastructure deficit and the weakness of institutions of state, it may be prudent for government to incentivise private entities to enter into PPPs by providing guarantees and other fiscal incentives. A total ban on state support is not recommended.

iii Distribution of risk
The guiding principle for the distribution of risk is that risks will be allocated to the party best able to manage them. It is typical for the private entity to be completely or largely responsible for the design, development, finance and eventual completion of the project. Risks borne by government are thus restricted to matters such as those relating to the ownership and availability of the underlying assets, and other matters that are completely within the control of the government or inappropriate for the private entity to bear. In all, the policy as provided under the Supplementary Notes is that the government will aim to optimise, rather than maximise, the transfer of project risks to the private entity.

It is not unusual for the PPP agreement to mandate the private entity to obtain insurance to cover the risks to be borne by the private entity under the PPP agreement.

iv Adjustment and revision
Adjustment and revision of the PPP agreement can only be carried out as provided for under the relevant PPP agreement and this will vary with each PPP agreement. Suffice it to say that there is no law conferring on the government the right to revise a PPP agreement, except as provided under such agreement.

To start with, the Nigerian Investment Promotion Commission Act 1995 provides guarantees against nationalisation or expropriation of any enterprise and the compulsory surrender of interest in the capital of any enterprise. Moreover, on adjustment and revision in PPP agreements, ICRC Act, Section 11 provides that ‘no agreement reached in respect of this Act shall be arbitrarily suspended, stopped, cancelled or changed except in accordance with the provisions of this Act.’ There are also constitutional guarantees against expropriation of assets. Where assets are expropriated, the Nigerian Constitution mandates the payment of adequate compensation to the affected party. Nigeria is also a signatory of the ICSID Treaty. All these provide some level of comfort to the private enterprise intent on executing a PPP project.

v Ownership of underlying assets
The government usually owns the underlying assets involved in PPP projects and will also be responsible for the acquisition of such assets where the same is not readily available. The right granted to the private entity over the asset will depend on the project and the PPP model adopted. Ownership will invariably remain with the government or will be required to be reassigned to the government at the expiration of the concession term. However, during the pendency of the concession term, the private entity may use such underlying asset as security for obtaining finance for the project.

vi Early termination
The PPP agreement will typically make provisions for early termination by either party for default or force majeure reasons. Where early termination is as a result of default by a party, the defaulting party will be liable to pay compensation to the counterparty.
VI  FINANCE

More often than not, the private enterprise participating in a PPP has the responsibility for financing a PPP venture but the government may provide guarantees that will assist in negotiations with lenders. Most PPP projects have been financed through syndicated loans sometimes involving international lenders. Also important to note is the role played by the World Bank in providing guarantees on certain projects.39

VII  RECENT DECISIONS

There are no significant recent case laws on PPP contracts. Most PPP-related cases before the courts and arbitral tribunals in Nigeria are still at the preliminary stages. The practice of Nigerian courts is to give effect to the terms of agreements freely entered into by parties. The courts are, therefore, more likely than not to uphold the terms of a duly executed PPP agreement. Recently, the Commission has intervened to resolve disputes arising from PPP projects in Nigeria.

In the case of Maevis Ltd v. Sita Telecommunication Nigeria Ltd & Anor,40 the Federal High Court in Nigeria upheld the right of a private entity under a PPP agreement to enforce its contractual rights without interference from any third party. In this case, Maevis Ltd, the plaintiff, signed a PPP contract with the Federal Airports Authority of Nigeria (FAAN) in 2007 for the provision of services to four airports in Nigeria. In 2010, dispute arose between Maevis Ltd and FAAN in relation to the contract, following which the parties went to court but were referred to arbitration on the basis of the PPP agreement signed by the parties in 2007. The court also ordered the parties to maintain the status quo pending the outcome of the arbitration. However, on 24 March 2011, FAAN terminated the contract with Maevis Ltd and went on to execute another contract with Sita Telecommunications Nigeria Ltd and Société Internationale de Télécommunications Aéronautiques (SITA) (the defendants) on the same project. The defendants were informed during negotiations with FAAN of the PPP contract between FAAN and Maevis Ltd, and the pending litigation and the order of court for the parties to maintain the status quo. The defendants ignored the warning and contracted with FAAN. Maevis Ltd subsequently sued the defendants for inducing and/or procuring FAAN to breach its contract with Maevis Ltd. The court ruled that the defendants acted unlawfully by interfering with the contractual relations between Maevis Ltd and FAAN, even though it had knowledge of the pending litigation.

VIII  OUTLOOK

Giant strides have been taken in relation to PPPs both at the federal and state levels. Weak legal frameworks and institutions, poor access to finance, and lack of expertise have all contributed to the minimal role PPP has played in infrastructural development in Nigeria. Also instructive is the lack of continuity in government policies, especially in the area of infrastructural development resulting in myriad abandoned or uncompleted infrastructure projects. This degree of uncertainty militates against the existence of a conducive environment, which is needed for PPPs that are, at their very core, long term in nature.

39 An example is the World Bank Partial Risk Guarantee in the Azura-Edo Independent Power Plant project.
The enactment of PPP laws both at the federal and state levels is a welcome development. With the decline in government revenues following the drop in crude oil prices, more PPP projects are expected in different sectors of the Nigerian economy in the coming year. Nigeria has a huge infrastructure deficit. Hospitals, roads, railways, the sea ports, airports and the power grid require huge investments. It is expected that investments and developments in these sectors would be achieved by the utilisation of the PPP model.
I OVERVIEW

In relation to public investments, national budget limitations have always been an obstacle for Paraguay. For political reasons, a large part of the annual budget of the Paraguayan government is diverted to fund essential expenses leaving little remaining for infrastructure development. In this context, public-private partnerships (PPPs) are a useful and novel tool for financing important infrastructure projects that would avoid these budgetary difficulties. Regarding the implementation of PPPs, fortunately Paraguay has not been detached from the international experience in this matter and has incorporated modern and innovative provisions following international parameters aiming to promote investment and at the same time protect investors. Nevertheless, the law has also been mindful of local institutions and has made the necessary adjustments to the norms of the Paraguayan administrative system.

The regulation that establishes the PPP regime in Paraguay has been enacted through Law No. 5102 on the ‘investment promotion in public infrastructure and the expansion and improvement of goods and services provided by the state’ (the PPP Law), in force since the end of 2013. The implementation of several rules on PPPs was subject to Regulatory Decree No. 1350 (the Regulatory Decree), which was passed in March 2014. Since then, the administration has been focused on the task of developing institutions with the structure and functionality that this new legal instrument requires as well as identifying potential projects to be developed through the PPP regime.

The specialised public office in charge of following and coordinating PPP projects is the Public Private Participation Projects Unit (the PPP Unit) of the Technical Planning Bureau.

PPPs are definitely the instrument that will allow the creation of necessary infrastructure that is vital for the social and economic development of Paraguay by means of long-term contracts between the private and public sector and with the main goal of developing public infrastructure or rendering services complementary to that infrastructure.

II THE YEAR IN REVIEW

The PPP Law has been in force since 2013 and the Regulatory Decree since March 2014, and therefore the law is in full force. Numerous developments have since been implemented – mostly at the administrative and organisational level – including the web page publishing the
lists of PPP projects, both private and public initiatives (www.stp.gov.py), the appointment and training of specialised civil servants at different levels and establishing departments in charge of all the phases of the pre-contractual activities and contractual follow-up.

Numerous private-initiative projects filed by private companies (see Section II.i) have been analysed by the PPP unit at a prefeasibility stage; some have been approved and others are still being considered under a strictly confidential process.

Under the previous government, two important public-initiative projects reached the international tender stage during 2016–2018. The Route 2 & 7 highway roadwork, for US$507 million, with 11 pre-qualified companies, was awarded in October 2016 in favour of a consortium integrated by one local company and two international construction companies; the contract was signed in March 2017 and the funding agreements are currently being finalised. This contract represents the first PPP project to be implemented in Paraguay. The second public-initiative project launched during 2016 was the airport infrastructure improvement, operation and management project for US$132 million.

In August 2018, Mario Abdo Benítez was elected into office as president for a five-year term, and in early 2019, during the Paraguay Infrastructure Summit, officials confirmed their intention to invest US$681 million in PPPs. These projects include mainly roadwork construction, maintenance and operation along segments of Route I, Route 6, Route 9 and improvements of urban crossings along the Central Department.

Other projects defined by the former administration have been reoriented to be conducted by means of other legal instruments, such as the traditional public tendering, turnkey agreements with bond warranty, and other instruments that vary depending on the funding. These include the Alto Parana water supply, sanitation and water treatment infrastructure project; highway infrastructure works; Ypacarai Lake basin sanitary and water treatment infrastructure; Asunción and metropolitan area sewage system and water treatment plant, operation and maintenance; the ferry boat routes, railway system; and the construction, operation and maintenance of prison facilities.

III GENERAL FRAMEWORK

i Types of public-private partnership
There are two ways in which a PPP may originate. On the one hand, there are public initiative projects, in which the government proposes the project and then wholly or partially delegates its execution to a private participant. And on the other hand, there are private initiative projects, in which the private participants propose a project to the government and then they carry it out.

Public-initiative projects
Public-initiative projects are those in which the relevant public institution prepares and follows up a project of its interest and submits it to the PPP Unit.

The public initiative must include a pre-feasibility report, with a project of contents of the feasibility report. The pre-feasibility report will be evaluated by the PPP Unit and Ministry of Finance. Once a favourable opinion is rendered by those authorities, the feasibility report must be presented. The PPP Unit must then issue a new opinion, as must the Ministry of Finance. Once the favourable opinions are issued, the executive power must then grant its approval through a decree. After the decree is issued, the public bidding process begins for all interested parties. The minimum term to submit the offers is 60 days.
The terms and conditions of the bidding documents shall include the pro forma agreement approved by the PPP Unit as well as by the contracting administration. The offers will include a ‘technical offer’ and an ‘economic offer’. The government will also demand a warranty for the fulfilment of the offer, otherwise referred to as a ‘bid security’. After the opening of envelopes, the evaluation and comparison of the offers is carried out, the selection of the bidder is made and finally the bidder is awarded the contract.

To carry out the awarded PPP project, the bidder must incorporate a company with the sole corporate object of the accomplishment and development of the PPP project. The initial paid-in capital of the corporation must be at least 20 per cent of the project’s official budget, as estimated by the contracting administration.

**Private-initiative projects**

The PPP Unit of the Technical Planning Bureau is the institution in charge of receiving all the private initiatives as long as: the proposed project’s goal is not similar to another that has already been submitted; and either the contracting administration is performing studies for the project’s presentation through the public initiative process, or the contracting administration has expressly identified the project and incorporated it in its future planning as a project that will be carried out ex officio or by a public initiative regime.

Projects that are rejected may not be resubmitted for three years after their rejection. A private-initiative process comprises the following stages:

a. Presentation: the proponent must demonstrate the technical, economical-financial and legal capacity for the development of the project. Besides, it must demonstrate the viability of the project at a pre-feasibility level. The PPP Unit will analyse the presentation within 10 days and forward it to the contracting administration for further analysis. The costs of the pre-feasibility study and preparation and presentation of the project are borne by the proponent.

b. Evaluation: the PPP Unit and the contracting administration analyse the project for 60 days (which may be extended). Within this period, the Ministry of Finance will have to determine the viability of the project through the PPP regime. Acceptance at this stage implies a favourable opinion and a declaration of public interest.

c. Feasibility report: once a declaration of public interest is issued, the feasibility report must be submitted. The deadline for its submission will be established by the contracting administration.

d. Approval or modification: the PPP Unit has 120 days to approve or request modifications to the project. In the case of an approval, the Unit will pass the bid onto the executive branch for its approval and the preparation of the bidding documents and the terms and conditions. After this stage, the same provisions that apply to public bidding in a public-initiative project will be followed.

Unsuccessful bidders may be reimbursed for the costs of their feasibility studies.

Further, at the stage of evaluating the various bids, a 3–10 per cent bonus will be added on to the score of the original proponent’s bid (see Section IV.ii).

**ii The authorities**

There are three main authorities involved in the PPP process: the contracting administration, the PPP Unit and the Ministry of Finance.
The contracting administrations are the government entities and government-owned corporations that are empowered to award PPP contracts. Because Paraguay’s greatest deficit is infrastructure, the leading contracting administration is the Ministry of Public Works, which is by law in charge of the development and execution of all PPPs relating to transportation, roads and highways, dredging river services, riverine communications and airport infrastructure.

The contracting administration, with the coordination of the PPP Unit, is responsible for structuring, awarding and executing the PPP contract as well as exercising control in the correct execution of the contracts and monitoring parties’ compliance with their obligations. The PPP Unit (www.stp.gov.py) has been created as a special unit in charge of promoting and coordinating all authorities, contracting administrations, agencies and other parties regarding the implementation of PPP projects.

The Ministry of Finance has the key role not only in evaluating proposals and risk assessments for PPPs, but also in provisioning future payments to be included in the national budget. Further, in a PPP project, a trust fund is created for the sole purpose of guaranteeing payment and liquidity in relation to the PPP contract, and the Ministry of Finance acts as trustor in that trust fund.

This fund is created to collect, safeguard, invest and manage the financial resources that are part of it, and to fulfil the obligations undertaken by the government and the costs involved in the dispute-resolution process in the PPP contracts. The trustee will be the Financial Agency for Development, the government will act as the trustor or settler of the trust through the Ministry of Finance.

iii General requirements for PPP contracts

PPP contracts may involve a wide range of infrastructure and related service-provision projects, including but not limited to: road projects, railways, ports, airports, waterways and dredging and the maintenance of river navigability; social infrastructure, electric infrastructure, improvement supplying and urban development; drinking water supply and sanitary services; among other investment projects in infrastructure and services of public interest. PPP contracts may also relate to the production of goods and rendering of services that are intrinsic to government agencies and public companies in which the government holds an interest.

PPP contracts as defined by Law No. 5102 shall only be applicable to projects in which the estimated investment is equivalent or above 12,500 minimum monthly wages.

All contracts must contain specific provisions regarding the following:

\[ a \] distribution of obligations and costs of the project to be borne by the parties, with risk to be assigned to the parties in a better position to assume each risk;

\[ b \] the exact distribution of profit sharing;

\[ c \] the distribution of the legal and financial risks and consequences for contingencies that may occur during the execution of the contract;

\[ d \] the identification of the one-off payments, benefits and costs that third parties should assume;

\[ e \] the determination or indication of the procedure and steps to take in the case of any adverse events;

\[ f \] determination of the risks relating to each contract, which will depend on the type of contract. To name a few: construction and engineering risks, operational risks, market risks, social conflicts and environmental risks, financial risks, and political risks; and
the identification of all necessary authorisations, permits, licences and approvals to carry out the PPP contract, together with its costs and responsible party.

**Assignment of contract or shares**

The PPP contract will be executed by the contracting administration and the private party, who will operate by means of a local company incorporated with the sole corporate purpose of executing the PPP contract. The assignment of the contractor of the shares of the company requires the authorisation of the contracting administration, while the subcontracting of any type of activity will be allowed under the private law regime, except where expressly forbidden. During the execution of the contract the contracting administration will request the establishment of performance securities in each of the construction stages and operation, as well as insurances policies covering all types of risks including: third-party insurance, construction risks, insurance for work-related accidents and other types of insurance policies to be established in the bidding documents.

As for control, the contracting administration will have a wide range of powers to perform controls through, *inter alia*, external audits, performance and quality evaluations, inspections and expert testimonies in the technical, legal, economic, financial, accounting and environmental fields.

**Dispute resolution**

There are three levels of dispute resolution:

a at the first level, direct negotiations between the parties;

b at the second level, technical and economic issues will be discussed before a technical panel appointed by the parties upon signing the contract; and

c at the third level, the differences will be resolved by an arbitration procedure in accordance with Law No. 1879/2002 on Arbitration and Mediation.

The Regulatory Decree allows the appointment of foreign arbitrators. Parties may also agree on the venue of the arbitration proceedings. Legal issues may only be dealt with by direct negotiations or an arbitration procedure.

**IV  BIDDING AND AWARD PROCEDURE**

i **Expressions of interest**

As stated above, there two procedures by which the PPP process may begin: a public initiative or an unsolicited bid (private-initiative proposal). In the first case, the government has already identified its scope of interests and has already prepared a project for which it requests proposals. In the second instance, the PPP Unit receives a private initiative (up to the pre-feasibility level) that complies with the threshold for the invested amount, the corresponding authorities then analyse and evaluate the entire project proposal and eventually, if they approve, the government declares the project as being of public interest.
Requests for proposals and unsolicited proposals

Content of a private-initiative proposal (unsolicited bid)

The private-initiative proposal must be filed in compliance with the terms indicated in the application form for private initiative projects available on the PPP Unit’s website (www.stp.gov.py).

Further, the project to be filed must contain comprehensive information up to a pre-feasibility level, including at least the following information:

a documents proving the legal, technical and financial capacity of the private party;
b designation of the relevant contracting administration for the project;
c a proposal identifying the need, the problem and the potential benefit that the project pretends to bring, including the benefits and costs, performance and quality indicators, and socio-economic indicators;
d a market analysis, technical, legal, competition, economic and financial risk assessment;
e an estimation of government support during the applicable fiscal years and the commitment to be assumed by the government; and
f social impact, environmental studies of the project identifying the affected population and setting forth the mitigation plan for possible damages during or as a result of the deployment and development of the project.

Incentives granted to private initiative projects

Private proponents of PPP projects shall benefit from the following preferences:

a reimbursement of the costs of feasibility studies if the project is deemed of interest but the proponent is not awarded the contract;
b an advantage of 3–10 per cent in the evaluation score assigned during the evaluation of the offer, depending on the size and complexity of the project; and
c a waiver of the costs of submitting bidding documents.

Evaluation and grant

Private initiative

Once the private party has filed the proposed project with the PPP Unit, the project will be evaluated by the Unit, the contracting administration and the Ministry of Finance within 60 days, which may be extended. If the proposal is accepted, a declaration of public interest is issued by the government and the private party must file the studies at a feasibility level in accordance with the recommendations issued by the PPP Unit and the contracting administration.

The feasibility studies shall be analysed within 120 days, which may be extended. If the analysis is positive the government shall approve the project and the bidding documents, terms and conditions shall be prepared for the public tender.

Public initiative

The public initiative initiates with the contracting administration stating the intention to promote a PPP by public initiative and this must be informed to the PPP Unit together with a brief summary of the project.

The contracting administration then files the pre-feasibility studies for the first evaluation; at this stage the information contained must be similar to that private-initiative
Paraguay

proposal set out in Section IV.ii, including: a value-for-money evaluation, a fiscal and financial budgetary impact analysis, economic and social indicators of profitability and a proposal for the scope of the feasibility study.

The project will be studied by the PPP Unit and the Ministry of Finance within the terms set forth in the Regulatory Decree. If favourable opinions are issued, the contracting administration must file a feasibility study, which must contain additional, more comprehensive and updated studies, all of them provided for in the Regulatory Decree.

The bidding process

In both cases, the bidding process may consist of a standard international tender procedure with or without a pre-qualification of bidders.

In certain types of multifunctional projects that entail a high level of complexity and in projects in which the proponents need to file costly and complex studies, a pre-qualification stage will be implemented.

V THE CONTRACT

i Payment

Payment provisions shall be included in the bidding documents, identifying all contributions and costs, benefits, profits and remaining conditions. However, the PPP contract will contain in detail and with precision the exact composition of the public contributions and remunerations for the private party, in line with the principles of transparency.

The PPP Law and the Regulatory Decree do not contemplate a particular frequency or method of payments; this shall be proposed either by the private party in the project proposal or inserted in the bidding documents, depending mainly on the type of project to be rendered (infrastructure, services or both) and its complexity.

ii State guarantees

Trust fund

To guarantee payment, Paraguay has introduced the mandatory creation of a trust fund to facilitate payment and guarantee timely payment and liquidity on the part of the state. The trust will be administered by Financial Agency for Development, the sole second-floor banking institute in Paraguay.

The state shall act as the settlor of the trust through the Ministry of Finance, which is in charge of constituting the trust fund as a first step once the PPP contract is signed. Funds reserved for future PPP contract payments shall be transferred to the trust account and kept separated from remaining state liabilities. These funds shall not return to the state treasury and instead remain for the sole and exclusive purpose of honouring any future assumed liabilities.

Limitations to future indebtedness

According to mandatory norms provided for in the PPP Law, the Ministry of Finance shall be responsible for assessing and registering the payment obligations and contingent liabilities the state assumes in the course of PPP contracts. The accumulated amounts of obligations and contingent liabilities, net of income, assumed in PPP contracts must not exceed 2 per
cent of Paraguay’s gross domestic product (GDP) for the previous year. Equally, the amount assumed for obligations and contingencies, calculated yearly, must not exceed 0.4 per cent of the GDP of the previous year.

**Transparency, publicity and control of the PPP process**

The PPP Law sets forth numerous mechanisms of transparency, publicity and control of the PPP process. To this end a register of PPP projects has been created by the PPP Unit, which provides permanent and up-to-date information by electronic means. The register contains the following information:

- a legal provisions applicable to PPP projects and process, current policies and approved plans;
- b a list of approved public initiative projects;
- c general and standard bidding documents;
- d pre-feasibility studies and feasibility studies of PPP projects with the approval decrees and mandatory opinions;
- e pre-qualification calls and documents setting out the terms for pre-qualification;
- f decisions adopted in the pre-qualification process;
- g bidding documents for tenders, records of opening offers and awarding decisions;
- h PPP contracts and amendments;
- i technical, financial and accounting information of PPP contracts; and
- j pledges, trusts and constituted warranties.

With respect to mechanisms of control, the PPP Law provides the state with both the authority and the duty to carry out the planning, control, application of sanctions, regulatory supervision and monitoring of the execution of a PPP Contract. The contracting administration in coordination with the PPP Unit is in charge of controlling the correct execution and compliance with the obligations of the contracts.

Additional control and transparency mechanisms are:

- a the annual public report to be prepared and filed by the PPP Unit including the performance indicators, goals, results and target achieved;
- b external audits and an international audit shall be commissioned by the Ministry of Finance at least every four years covering the contingent liabilities and compliance with all obligations including an evaluation of quality of services;
- c management audits to verify the legal compliance and contractual of both parties;
- d each December, performance indicators reflecting quality-of-service levels shall be released; and
- e every semester, the contracting administration must release information regarding compliance with the terms of the PPP contract.

### iii Distribution of risk

In relation to the distribution of risk, the Regulatory Decree provides a non-exhaustive list of possible risks to be considered in PPP contracts on a case-by-case basis and according to the type of contract and the possibility of its occurrence:

- a construction and engineering risks, such as cost overruns, project delays, defective construction, price increase, geological problems, insufficient management, logistical and transport problems and unavailability of land;
Operational risks, such as expected decrease in production, technical obsolescence, transport risks and risk management;

Market risks, including the supply of goods and services, risks in the quality of primary goods and risks in the level of demand;

Financial risks of the project, such as the unavailability of funds, insufficient shareholder capital to guarantee financial support, risks related to variations in interest rates, inflation risks and risks applicable to exchange rates;

Political risks, such as risks of currency convertibility, unavailability of land, local or regional authorities decisions obstructing the roll-out of the project, nationalisation risks, terrorism risks, contractual non-compliance, risk of international conflict affecting multilateral projects, risks during the compulsory-purchase process, risks associated with allocation of permits and authorisations; and

Risks derived from force majeure and fortuitous events.

Adjustment and revision

PPP contracts may be adjusted or amended by means of the following procedures.

Unilateral modifications

A unilateral modification to a PPP contract may only be introduced if the contracting administration has the support of the technical opinion of the PPP Unit, the State Attorney General, the Ministry of Finance and a technical report taking into account public-interest considerations and an estimation of possible compensation. However, the contracting administration must compensate the private party for possible damages that may have occurred upon the alteration of the economic equation. The contracting administration may only introduce modifications that represent 15 per cent of the contract price (total investment). The private party must be compensated for any such modifications.

Mutually agreed modifications

The contracting administration and the private party may agree to modify certain aspects of the contract, such as the quality-of-service levels and technical standards, trying at all times to abide by the original nature and object of the contract.

Both parties may only modify up to an amount that represents 30 per cent of the contract price (total investment).

The private party is entitled to corresponding compensation if the agreed changes imply a less favourable economic result than in the original contract.

Modifications or amendments arising out of force majeure or fortuitous events

Upon the occurrence of such events, the private party may request the suspension of the execution of the contract and upon verification of the damages incurred by the private party, the compensation for such damages, subject to the provisions and procedures provided for in the Regulatory Decree.
v Ownership of underlying assets
The PPP contract will determine the existing or future assets that are property of the contracting administration or other state agencies, which will be granted in favour of the private party with a right to use and with the obligation to return them to the contracting administration at the end of the contract.

Assets acquired by the private party that are directly related to the PPP contract may not be transferred separately, nor be subject to any pledge, lien or security except with the consent of the contracting administration.

vi Early termination
The PPP contract may be terminated upon a material breach of contract by the private party according to a resolution reached through the dispute resolution mechanism.

In turn, the contracting administration may terminate the contract for public-interest reasons in accordance with the terms of the PPP contract and upon an agreed payment of compensation for damages. This may occur if the work or service hired has become unnecessary for the satisfaction of public needs or requires a redesign or complementary work that exceeds 30 per cent of the contract price. In this case, the private party is entitled to compensation payment to be calculated upon criteria set forth in the Regulatory Decree.

Any discrepancy regarding the compensation amount or other aspects shall be resolved by means of the dispute resolution mechanism, which includes the opinion of a technical panel.

VI FINANCE
According to the government’s current investment plan, which includes major infrastructure projects, many of these projects already count on partial or complete financing either by international organisations such as the Inter-American Development Bank or the CAF – Development Bank of Latin America. In the case of road works, another source of financing would be the concession regime.

VII RECENT DECISIONS
The Regulatory Decree, which sets out the specific rules and detailed provisions governing the PPP process and contracts, has been in force since March 2014; therefore, Paraguay is still in the initial stages of PPP implementation. During 2016 and 2017, guidelines and manuals were issued; these are intended to facilitate the technical analysis of the proposed projects and serve as a useful instrument in the decision-making process. Specific guidelines for target investment sectors were issued, which include guidelines for the formulation and evaluation of PPP projects in public works, airports, hospitals, waterways and dredges, and urban development.

Nevertheless, the basis for implementation, including the enactment of the PPP Law, its Regulatory Decree, the appointment of selected specialised personnel in all levels, training of civil servants and the identification of the government’s intended medium and long-term investment projects has been carried out in a serious and unprecedentedly transparent manner shown in the sharing, distribution and publication of all kinds of information regarding government plans.
The government continues to handle an interesting avalanche of international companies, organisations, financial institutions and third parties demonstrating genuine interest in future projects and offering vital information and recommendations based on real international experience on PPP contracts.

VIII OUTLOOK

Paraguay’s investment environment is healthy: the country has experienced steady growth in recent years, with an average of 5 per cent this decade. According to data published by Paraguay’s Central Bank, the economy expanded by 4.3 per cent in 2017 (originally estimated at 3.9 per cent by the International Monetary Fund) and is expected to grow by 4 per cent in 2019, driven by agriculture, trade and services.

With regard to the political situation, it is important point out that in August 2018 the newly elected president took office and, consequently, new officials were appointed in all ministries and departments, whose decision-making will affect current and future infrastructure projects. In spite of this political change and consequent policy change, which may affect leading projects, we still foresee a positive implementation of PPP agreements owing to the need for PPP projects in the country and interests of both private and public parties. The roadmap for this has been shared and there is interest in PPPs evident in both the public and private sectors.
I OVERVIEW

The public-private partnership (PPP) model started to be widely used from the 1990s onwards, with the purpose of equipping the country with modern infrastructure and services. The sectors that attracted more private investment in PPP have been, mainly, the road infrastructure and health sectors, with the innovative feature of placing clinical National Health Service (NHS) hospitals under private management with an aggressive risk allocation to the private sector. Such PPP activity was boosted further after the international financial crisis of 2008, with the purpose of enhancing the Portuguese economy's poor performance.

As a consequence of the sovereign debt crisis of 2011 and in the context of the bailout advanced by the European Union (EU) and the International Monetary Fund (IMF), the Portuguese government was forced to introduce an austerity programme. As a result, public funding for investment in public infrastructure was materially reduced and the government endeavoured to reduce the significant payments to be made by the Portuguese state under PPP contracts.

With this aim in mind, the government started a negotiation process with PPP concessionaires in January 2013. In several roads PPPs the negotiation process was successful and agreements were reached.

During this period, companies have also experienced difficult conditions, mainly owing to liquidity constraints and to the slowdown of the Portuguese PPP and construction markets in connection with the economic crisis, leading many of those companies to search for new opportunities in foreign markets, in particular in the Portuguese-speaking countries in Africa.

At the beginning of 2014, the Portuguese government approved the Strategic Plan for Transport and Infrastructure, which selects some infrastructure projects that may bring positive economic effects to Portugal between 2014 and 2020. The modernisation of the Portuguese rail freight sector, the development and increase in capacity of major Portuguese ports, a few projects in the road sector deemed essential to complete the road network, as well as the increase of cargo capacity at Lisbon Airport, are some of the priority projects. Owing to diverse aspects, such as limitations of the new European funds framework, some of these future infrastructure projects may be launched and executed under a PPP model.
II THE YEAR IN REVIEW

Over the past few years the growth of the PPP business in Portugal has been slow, with few greenfield projects coming to the market.

In addition to the recurring renegotiations within the existing road PPP contracts, the international public tender for design, construction, financing, operation and maintenance of the Hospital Lisboa-Oriental Complex, having already been postponed twice, has seen proposals submitted on 31 January 2019; its current stage concerns the analysis and evaluation of those proposals in order to select a maximum of three bidders to move to the negotiation phase. This is the first time in Portugal that a PPP in the health sector has been launched solely for the construction, operation, maintenance and management of the hospital building, staying the responsibility of the management of the clinical services in the hands of the NHS and not in the hands of a private entity.

2018 was also the year in which the Portuguese government approved the extension of the PPP contract concerning the management of the clinical services of the Hospital of Cascais until 31 December 2021, by which time a new public tender will be launched. Conversely, regarding the Hospital of Braga (which is, according to the Court of Auditors, one of the most efficient of the NHS, with less cost per patient than any other hospital), the existing PPP contract will expire on 31 August 2019 and the Portuguese government has already approved the launch of a new public tender for the management of clinical services of the hospital under a PPP model.

Further, the tender procedure concerning the extension of the Porto underground system launched in 2017 is now reaching its final stage, the beginning of the construction works being expected in 2019.

Nonetheless the award of these new PPP contracts, the renegotiation and restoring of the financial balance of the existing road PPP contracts (that covered the reduction of service requirements and availability payments and, in some road PPP contracts, the possible extension of the maximum duration of the concession contracts) is still the main subject matter and they still substantially contribute to the public expenditure.

Portugal is still one of the European countries with the highest costs assigned to PPP projects (mainly in the road sector), notwithstanding the slowdown in relation to new PPP-based projects over the past few years. In fact, according to the statistical information provided by the European Commission, Portugal recorded the highest ratio of PPP over total gross fixed capital formation between 2000 and 2014, which demonstrates the relative weight of PPP projects within the Portuguese economy.

Evidence of this is the choice of Portugal as the host country for the International Centre of Excellence on PPPs in water and sanitation, on May 2017, with the signing of a memorandum of understanding between the UNECE Executive Secretary and the Secretary of State for the Environment in Portugal. The Centre, affiliated to the UNECE International PPP Centre of Excellence in Geneva, will be hosted by the National Laboratory of Civil Engineering (LNEC) in Lisbon and was created with the aim of assist low- and middle-income countries to utilise PPP-based projects for water supply and sanitation services.

III GENERAL FRAMEWORK

i Types of public-private partnership

Decree Law 111/2012 of 23 May 2012 revoked the initial PPP legislation and establishes the general rules applicable to any PPP launched by the Portuguese state.
Portugal

It introduced several amendments to the previous PPP regime, in particular regarding the preparation, launching, execution and modification of PPP.

Both institutional and contractual PPP structures are available in Portugal. However, institutional PPP structures are not commonly used. In fact, the majority of PPP projects closed to date in Portugal are based on project finance contractual structures and typically follow a build–operate–transfer or design–build–finance–operate model.

The underlying contractual framework of a PPP transaction in Portugal traditionally includes a concession contract giving the project company the right to carry out the project or the relevant activity, equity subscription and shareholders' agreements to regulate the relationship between the sponsors or project company's shareholders and the equity contributions to the project, a typical set of finance documents, as well as project implementation and sector-related commercial contracts. Among these, there is typically a construction contract and an operation and maintenance contract in infrastructure PPP projects. Supply agreements, sales agreements or both may also be entered into in connection with the project.

In the vast majority of the Portuguese PPP transactions closed to date, the concession-based construction contracts used do not follow any standard form, such as those issued by the International Federation of Consulting Engineers, the Joint Contracts Tribunal, or the Institution of Civil Engineers. Hence, the form of construction contract used in each case has varied depending on the sector of industry at stake or the sponsors involved.

In relation to the infrastructure projects closed in Portugal in the 1990s and early 2000s, it was generally accepted that, given the need to adapt the legal structure of the facility agreements to international syndication, the whole financing package other than the security documents had to be governed by English law, while the project documents, notably the concession contract, were subject to Portuguese law. That ceased to be the case from the mid 2000s onwards, at which point the project financiers active in Portugal had become sufficiently comfortable with the Portuguese law and, therefore, most finance documents executed thereafter are governed by Portuguese law, notwithstanding closely following the structure of a typical English law project finance documentation package.

PPP major projects in the health sector, the second most relevant sector concerning PPP projects, also have some particularities in Portugal. The specific framework for PPPs in health sector, set out in Decree Law 185/2002 of 20 August 2002, as amended by Decree-Law 111/2012, of 23 May 2012, is still in place. The Decree Law, as amended, governs the development of PPPs for the construction, financing, operation and maintenance of healthcare units forming part of the NHS. An important feature of these PPPs is that they may envisage the private partner not only managing the hospital facilities but also providing clinical services as part of the NHS. When both managing facilities and clinical services provision are foreseen, two separate project companies must be incorporated. In such case, both project companies are bound to comply with their own obligations under a sole concession agreement, and one concessionaire is liable before the other provided that the non-compliance of its own obligations may give cause to the other concessionaire's infringement under the concession agreement. The health sector concession agreements set out different contractual periods for each concessionaire (10 years for the clinical services providers – which may be extended for additional 10-year periods up to a maximum of 30 years – and 30 years for the concessionaires responsible for the design, construction and operation of the hospital buildings).
In 2016, PPP projects in the health sector were subject to an evaluation by the Health Regulatory Authority (ERS), in order to assess the quality of healthcare provided under the mentioned projects. According to this study, the quality of clinic services provided by the private partner is similar to that of the services provided by the state-run public utilities. Notwithstanding the positive performance, the Portuguese government has set a target to reduce the public burden of PPP projects in the health sector. Therefore, renegotiations with the private partners are ongoing to reduce public payments. In this context, as mentioned above, the PPP regarding the Hospital of Cascais was extended for an additional three-year period and the Portuguese government has approved the launch of a new public tender for the management of clinic services of the Hospital of Braga.

In the road sector, different solutions were put in place regarding the concessionaires’ payment mechanism and risk matrices. Shadow toll systems were introduced in some road projects during the 1990s and onwards, but in all those projects such payment systems were replaced by road availability payments and real toll payment systems. An exception was made in Madeira and Azores, where the regional political authorities chose to maintain the shadow toll systems previously adopted in their respective road projects. More recently, real toll payment mechanisms were also substituted by road availability solutions under the recent renegotiation process on the PPP projects of the road sector. This renegotiation process also brought about specific solutions, including a set-off mechanism against toll revenues for the benefit of the concessionaires and an upside-sharing mechanism to encourage concessionaires to promote traffic in their concessions. At a municipal level, PPP activity took place through the launch of several projects for municipal water supply, wastewater treatment and waste management; Decree Law 90/2009 of 9 April 2009, and Decree Law 194/2009 of 20 August 2009, as amended, established the rules applicable to PPPs in the aforementioned sectors.

ii  The authorities

In general terms, the sector ministries (energy, infrastructure, transports, health, etc., and (when applicable) environment) are responsible for the launching, licensing and major regulation of the projects, either directly or through their governmental departments.

The approval of the Ministry of Finance is also required when the project involves public investment or, more generally, where the PPP legal framework applies.

Decree Law 111/2012 introduced several amendments to the previous legal regime, in particular regarding the preparation, launching, execution and modification of PPPs.

The main purpose of this new legal framework is to reinforce supervision, scrutiny and consistency of the decisions of the public partner and contemplates the creation of the Technical Unit for Monitoring Projects, which centralises and executes all main tasks related to the preparation and execution of PPP contracts.

Other PPP projects at a municipal or regional level are prepared and executed by the respective public structures and such projects are not subject to the Technical Unit for Monitoring Projects’s control.

iii  General requirements for PPP contracts

The legal framework applicable to the PPP projects expressly foresees the need to accommodate the type of expenditure within budgetary regulations and requires the preparation of economic and financial surveys to confirm the figures for the public sector comparator, as well as establishes general procedure rules applied to any type of PPP contracts.
Projects that require a global public cost above €10 million and an investment not higher than €25 million for the entire contractual period are not subject to the legal regime of the Decree Law 111/2012 of 23 May 2012.

Since the previous PPP Decree Law, dated 2003 (Decree Law 86/2003 of 26 April 2003), procurement procedures may only be launched and awarded after approval of the relevant environmental impact declaration and once the relevant environmental and urban planning licences and permits have been obtained, in order to ensure an effective transfer of execution risks to the private partner.

The regime concerning environmental impact assessment for each project was approved by Decree Law 151-B/2013 of 31 October 2013, as amended, pursuant to which any application for an environmental approval must enclose a detailed environmental impact study, the procedure for granting the relevant environmental impact decision implying a coordinated effort between a different array of entities for better assessment of the environmental risks associated with each project.

Depending on the sector of industry in question, a project may also be subject to environmental licensing under the new integrated pollution prevention and control legal framework, approved by Decree Law 127/2013 of 30 August 2013. The environmental licence (which is required, in particular, for industrial projects) must be obtained before operation commences and must be successively renewed during the entire period of operation of the plant, although simplified licensing procedures may be in place in accordance with the scope of the activities carried out.

Furthermore, in the context of the EU emissions trading system, for projects in certain industrial sectors and meeting certain conditions or thresholds, the operators must hold a permit to emit greenhouse gases, and be the holder of emission allowances.

Other industrial and construction licences and permits may be required depending on the type and specific conditions of each project to be implemented.

Finally, it should be noted that compliance with all legal conditions and procedures is subject to validation by the Court of Auditors. After the execution of a PPP agreement by any public entity, the Court of Auditors will verify and confirm whether all legal requirements are fulfilled and payments under those contracts can only be made further to such validation.

IV BIDDING AND AWARD PROCEDURE

Decree Law 111-B/2017 of 31 August has amended the Portuguese Public Procurement Code (PPC) approved by Decree-Law 18/2008 of 29 January.

The PCC applies to every public tender procedure launched by a public authority. The Code sets out different procedures for the procurement process applicable to administrative contracts, including those to be entered into in connection with PPP projects: the direct agreement, the public tender, the limited tender by pre-qualification, the negotiation procedure and the competitive dialogue. Unsolicited bid mechanisms are not foreseen in Portuguese law. Unlike the former legal framework for public procurement, the PCC does not automatically require a public tender for public works concessions or public services concessions, the awarding entity being entitled to choose between the launch of a public tender, limited tender by pre-qualification or a negotiated procedure.

In each procedure allowed by the PCC, administrative principles of equal treatment, legality, transparency and competition are duly reflected in the respective regulation. Moreover, such principles are directly applicable to each procedure and may be invoked.
by any interested party. If an interested party considers that an act under the procurement procedure does not comply with applicable regulation and principles, it may claim directly to the awarding entity but also to a court. In such case, the interested party may ask the court to declare the suspension of all subsequent acts in the procurement procedure by means of a temporary injunction, in order to ensure that its rights are not irreversibly threatened.

Substantive provisions dealing with public works and the public services concessions are included in the PCC, some of which are mandatory in nature. These mandatory provisions refer to relevant features of a PPP, such as termination by the contracting authority, and sequestration or step in. Other substantive provisions of the PCC will only apply in the absence of express provision in the relevant contract.

The granting of the approval by the Court of Auditors is a condition for the contracting authority to make any payments under the contract; the contract may, however, enter into force prior to the validation and all rights and obligations contained therein may be performed, except for public payments.


The recent economic crisis in Europe has made it necessary to reform public procurement rules: first, to make them simpler and more efficient for public purchasers and companies, and second, to provide the best value for money for public purchases, while respecting the principles of transparency and competition. The Directives comprise major changes to the European public procurement regime with the aim of:

- promoting environmental policies, as well as those governing social integration and innovation;
- improving the access of small and medium-sized businesses to public procurement markets;
- implementing stronger measures preventing conflicts of interest and corruption; and
- new simplified arrangements for social, cultural and health services listed in the Directives.

Decree Law 111-B/2017 introduced in the Portuguese legislation the European Union Directives, and puts forward several modifications to the existing legal framework. Among other things, the new Public Procurement Code introduced the following amendments:

- the most economically advantageous tender becomes the rule criterion for awarding;
- the value of the performance bond is reduced to a maximum of 5 per cent of the contract price;
- a simplified procedure for the provision of health and social services is foreseen; and
- the report obligations of the awarding authority on practices susceptible of distorting competition rules are enhanced.

V THE CONTRACT

i Payment

Remuneration mechanisms diverge considering the different sectors of activity and the different PPP projects.
In the road sector, different solutions were put in place regarding the concessionaires’ payment mechanism. Real toll systems and shadow toll systems coexisted under different projects but the shadow toll systems were generally replaced by road availability payments and real toll payment systems. In addition, some real toll payment mechanisms were substituted by road availability solutions under the recent renegotiation process on the PPP projects of the road sector. Upside-sharing mechanisms were set out thereunder to encourage concessionaires to promote traffic in their concessions.

Payments due under the PPP projects in the health sector are linked to the clinical services provided in accordance with a list of medical acts and complexity levels, and also to the availability of the hospital facilities. Both concessionaires are subject to payment deductions if any contractual requirements are not totally fulfilled, and additional revenues can be obtained through the performance in the hospital facilities of other related activities (the revenues of which are to be shared with the awarding entity).

Water supply concessions are generally paid by consumers – both at bulk and retail level – in accordance with the water consumption, the applicable tariff being determined in accordance with the concession agreement.

ii  State guarantees
The law establishes a type of sovereign guarantee which may be granted by the Portuguese government to secure payments by the state and related parties, such as state-owned companies or government departments. The maximum amount of the guarantees that may be provided in any given year must be approved and set out in the relevant state budget. However, PPP projects in Portugal usually do not include any type of sovereign guarantee to secure payments from the government or other public entities.

iii  Distribution of risk
According to Decree Law 111/2012 of 23 May 2012, project risks are to be shared between the public and private partners according to their capacity to manage such risks. Moreover, a PPP project should imply an effective and significant transfer of risks to the private partner. The concession contract, which is the most common form of PPPs, allocates the relevant project risks between the contracting authority and the project company. The risks that remain with the contracting authority are usually covered by the financial rebalance mechanism, which is a key concept in all concession-based transactions in Portugal.

Typical financial balance events include unilateral variations by the contracting authority, force majeure events, specific change of law and construction delays caused by the contracting authority.

Traditionally, archaeological and ground risks were borne by the public partner. That was, however, not the case in the PPP1 Poceirão-Caia high-speed rail project closed in May 2010 (which was cancelled as part as the austerity-led review of PPP projects) and in the PPP hospital projects, where that risk was partially assumed by the project company and transferred by the latter to the contractor.

Nationalisation, expropriation or requisition of private property can only take place on the grounds of public interest and provided that private entities are duly compensated. Public interest may also constitute grounds for termination of the concession contract by the contracting authority, in which case the contracting authority shall compensate the project company for all the damages caused (which may include loss of profit). Some concession
contracts set out the method for calculating the damages incurred by the project company in case of termination by reason of public interest. Such calculation usually takes into account the status of construction.

Other political risks, such as war, civil disturbance or strikes may be considered as events of force majeure and, therefore, the project company shall be relieved from its obligations under the concession contract to the extent affected by the relevant event of force majeure. Force majeure events may trigger the financial balance mechanism and, hence, the project company (and consequently, the construction contractor) shall be compensated. In the case of prolonged force majeure or if the restoration of the financial balance of the concession proves too onerous, the concession contract may be terminated.

Changes in law may also be treated as a political risk. Only a specific change in law entitles the project company to financial rebalance. The risk of change in general law is typically assumed by the project company.

In water concession projects additional events may give cause to apply the financial rebalance mechanism, as it is the case of water consumption levels below certain limits or additional infrastructure investment requirements.

The project company generally passes on to the contractor all design and construction obligations, liabilities and risks under a construction contract, which is fully back-to-back with the concession contract.

The contractor usually undertakes to perform the design and construction obligations on a turnkey and fixed-price basis and, hence, it bears the risk of price escalation of the material, equipment or workers. In some cases, the contractor is allowed to revise the price annually to reflect inflation.

Other risks that are transferred by the project company to the contractor under a classic concession-based construction contract include the delay in the completion of the works, approval risk, the risk of damage to the works and defects during the defects liability period.

The risks generally covered by the financial balance under the concession contract do not entitle the contractor to suspend the works or in any way relieve the contractor of its obligations under the construction contract. The contractor shall, however, be entitled to compensation in accordance with the ‘back-to-back, if and when’ principle, (i.e., the contractor will only receive compensation for any of the relevant events to the extent the project company is compensated for those same events under the concession contract).

With regard to limitation of liability, under general Portuguese law, any party is liable before the other for the breach of its obligations under the relevant contract. All damages caused by such breach must be compensated, including all direct damages and loss of profit but excluding indirect or consequential damages. Portuguese law expressly forbids prior general waivers of the right to compensation, although specific waivers after the occurrence of the fact giving rise to the right to compensation are permitted. It is possible, however, for the parties to agree an amount of liquidated damages for breach of obligations, provided that it represents a reasonable estimate of the damages that may result from such breach. Caps on liability are also generally admitted.

Portuguese project concessionaires usually have unlimited liability under the respective contracts. In recent years, the subcontracts executed by concessionaires with construction and operation and maintenance contractors set out liability caps in line with the commercial practices in other countries.

In contracts where a liability cap is foreseen, the same is often equivalent to the contract price and, since no restrictions are made to the type of damages that are considered for
compensation purposes, the relevant legal provisions will apply. In recent projects, contractors have successfully demanded the introduction of tighter liability caps and the exclusion of loss of profit suffered by the project company.

iv Adjustment and revision

The risks that remain with the contracting authority are usually covered by the above-mentioned financial rebalance mechanism. If a financial balance event\(^2\) arises, causing a deterioration in the levels of the project ratios, the contracting authority agrees to compensate the project company with a view to restoring the financial balance of the concession.

In general, any amendments to the PPP concession contracts should be subject to the procedures set out in Decree Law 111/2012 of 23 May 2012. These procedures include the creation of a negotiation committee to prepare and execute the negotiations with the private partner to reach a new agreement, which will be subject to a final report and approval process by the relevant government members. Other adjustment mechanisms not focused particularly on the payments are also set out, as is the geographic area the clinical services should encompass under hospital PPP projects. In fact, subject to certain constraints, the public health authority can modify the reference area for each type of medical treatment merely by a decision to be notified to the private partner.

v Ownership of underlying assets

Other than assets in the public domain (e.g., the hydric domain, mineral resources, roads, railways) which may not be appropriated by private entities, the ownership of land or other assets may be acquired by the private partner.

However, the exercise of a specific economic activity by use or operation of such assets may require a licence and, in the case of an asset of public domain, the attribution of a right of use (of the relevant asset, normally through a concession regime).

It is usual to set out that the private partner should deliver any assets at the term of the contract, even though such assets are owned by the private partner, provided that the same are required to perform the relevant activity under the agreement. The new Public Procurement Code further provides for new rules on the transfer of movable assets by public entities, pursuant to which the transfer may be temporary or permanent, including, for instance, the lease of the relevant assets to the private partner.

vi Early termination

Concession agreements may be terminated by either party owing to the infringement of the other party’s obligations. Also, concession agreements usually foresee the possibility of redemption or early termination on grounds of public interest.

Some concession contracts set out the method for calculating the damages incurred by the project company in such situations, which usually takes into account the status of construction and in some circumstances the financing agreements entered into between the private partner for the purposes of implementing the project.

\(^2\) i.e., an event that typically triggers a unilateral (but permitted) variation of the terms of the contract by the awarding entity or public party, a third party action or event (e.g., certain force majeure events), the risk of occurrence of which is allocated to the public party under the contract or the law.
Termination due to one party’s failure to comply with its obligations usually does not entitle the non-compliant party to any compensation rights. However, in some PPP projects – as is the case of the hospital PPP projects – compensation may be due in such situations taking into consideration the significant investments made by the private partner that should revert to the public partner.

VI FINANCE

Most the PPP projects in Portugal have been financed pursuant to the project finance structure. The use of project bonds or monoline structures to finance projects was not common until recently, but these instruments have now started to be considered as an alternative or complementary financing tool to traditional project finance (particularly in a brownfield context).

The finance package usually comprises a commercial bank credit agreement (as well as a European Investment Bank (EIB) credit agreement and an intercreditor agreement whenever the EIB is also providing finance to the project), an accounts agreement, a forecasting agreement, security documents and direct agreements between the lenders and the contracting authority or the major project parties, all in a form consistent with international market standards.

The two main types of security that can be created under Portuguese law are mortgages and pledges. Mortgages will entitle the beneficiary, in the event of a default, to be paid with preference to non-secured creditors from the proceeds of the sale of immovable assets or rights relating thereto or of movable assets subject to registration (such as automobiles, ships or planes). Pledges will confer similar rights to those created by the mortgages, but are created in respect of movable (non-registered) assets or credits. Portuguese law does not recognise the concept of a floating charge. Also, it does not permit the creation of security over future assets and, therefore, promissory agreements and assignments in security are entered into to overcome this hurdle. However, since Portuguese law does not recognise the concept of assignment by way of security as existing in most (if not all) common law jurisdictions, the instrument used is a true assignment of rights, with the occurrence of an event of default being either a condition precedent to the assignment or a termination event, depending on the bargaining power of the borrower and sponsors (as applicable). It also should be noted that Portuguese law does not foresee the concept of a security trustee, therefore, there is some uncertainty as to whether a Portuguese court would immediately recognise the authority of a security agent to enforce security interests on behalf of the secured creditors (the collateral takers), on terms similar to those accepted in a common law context.

Also, Portuguese law does not allow for remedies other than outright sale, other than in the case of financial pledges where appropriation of financial collateral is permitted on enforcement of the pledge, provided that the parties have agreed a commercially reasonable mechanism for evaluating the price. Financial pledges may be granted over cash on bank accounts or financial instruments (including shares but not quotas in Portuguese limited liability companies) and, more recently, credits over third parties.

Portuguese project finance documentation generally includes direct agreements between the lenders and the contracting authority and the lenders and any major contractors. All direct agreements contemplate step-in rights in favour of lenders, which may be exercised upon the occurrence of certain events: default of the concessionaire under the underlying contracts and, in certain cases, default of the concessionaire under the finance documents.
Shareholders are generally required to provide on-demand bank guarantees in order to guarantee their equity subscription and other funding obligations. Standby equity commitments to fund general investment, operational costs overruns or loss of revenues are often also supported by on-demand bank guarantees.

In health-sector PPPs, the shareholders have been requested to provide a corporate guarantee that, in the proportion of their shareholding in each project company (the ClinicCo and the InfraCo) and up to a certain amount, any lack of funds in the project and breach of the obligations of the project company.

VII  RECENT DECISIONS

No significant dispute under the existing PPP procurement procedures has been registered recently. However, some relevant disputes arose from the performance of those contracts. The main reasons evoked by the concessionaires included the variations imposed by the contracting authorities that were not settled by negotiation under the financial rebalance mechanism. In the first quarter of 2018, the total amount for the restoration of financial rebalances requested by the concessionaires to the state amounted to approximately €660 million. There are still some cases ongoing regarding legislative changes and changes in the corporate tax rates, which had a direct impact in some PPP roads projects. In these cases, the concessionaires are claiming considerable amounts to the state. According to the Stability Programme 2018–2010, presented by the Minister of Finance, the most relevant request of financial rebalance is in respect to one of the road PPPs.

VIII  OUTLOOK

The Portuguese economy is recovering, after the conclusion of the three-year EU–IMF adjustment programme in May 2014. There is, however, some uncertainty associated with political pressure – from left-wing parties supporting the government – to avoid PPP schemes, at least in areas of greater social sensitivity, such as health and public transport.

Public investment in several infrastructure projects – mainly in the freight rail and port sectors, as stated in the Strategic Plan for Transport and Infrastructure 2014–2020 – is still expected. Whether under a PPP model, these investments should have a significant positive impact on the Portuguese economy and create many business opportunities for all stakeholders in the relevant sectors. Other opportunities may arise from the recent focus of the Portuguese government in developing the Green Economy and Green Growth in Portugal, in relevant areas such as climate and energy, water and waste management, biodiversity and sustainable cities.

The international public tender launched in the end of 2017 for the construction of the Hospital Lisboa-Oriental Complex, which is intended to replace six hospitals of Lisbon, is now reaching its negotiation phase, with the beginning of the construction works expected in 2020. This project includes the design, construction, financing, operation and maintenance of the hospital, and it is probably the most important project under a PPP model launched in recent years.

Public investment in several infrastructure projects is still expected. On the other hand, according to the recently approved State Budget Law for 2019, public expenditure on PPP projects will still be considerable (around €2 billion), especially in the road, health,
railway and security sectors, but it is expected to be slightly reduced compared to 2018, with a decrease particularly in the road sector, a result of the expected conclusion of the renegotiation processes on the existing road PPP contracts.
I OVERVIEW

In Russia, the public-private partnership (PPP) sector is dynamically developing and contains many examples of successful projects in all key areas of the Russian economy – in particular, transport, healthcare and utilities. However, in comparison with some other countries, Russian PPP legislation is relatively new, as it was first introduced in 2005 when the Federal Law No. 115-FZ On Concession Agreements, dated 21 July 2005 (the Concession Law), was adopted. Based on it, one of the famous first concession agreements in relation to the Moscow–Saint-Petersburg Toll Express Motorway (15–58 kilometres) was signed in 2009. Along with this, some Russian regions started to introduce their own PPP laws. For example, Saint Petersburg was a pioneer in adopting its own law in 2006, which led to many successful infrastructure projects. The most notable projects with foreign investments in this city include the Western High Speed Diameter and Pulkovo international airport. Saint Petersburg has always been very active in promoting PPPs and developing legislation in this area.

Many other regions have decided to follow this approach and have adopted similar legislation. In 2009, the expert committee on PPP legislation under the Committee on economic policy and entrepreneurship of the State Duma of the Russian Parliament recommended that regional parliaments adopt the Model Regional Law on Participation of the Regional, Municipal Organisations in PPP Projects. This model law helped regions to develop their own legislation, and by 2015, more than 70 Russian constituent entities had their own PPP laws. Moreover, an important step in further establishing PPP legislation in Russia was the adoption in 2014 by the CIS Inter-Parliamentary Assembly of the Model Law on PPPs for CIS Countries.

Until recently, the Concession Law was the main legislative act in Russia governing the procedure for the implementation of PPPs at the federal level. However, concession legislation limits the structuring of PPP projects to a scenario where the right of ownership

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2 Prior to its adoption, the sphere was regulated by general regulation, such as Federal Law No. 160 on Foreign Investments, Federal Law No. 178 on Privatisation of State and Municipal Property and Federal Law No. 135 on Protection of Competition.

3 Total construction cost was estimated in 2009 at approximately 152.8 billion roubles. The project involves the European investors.

4 This project was one of the largest PPP projects in Europe and was awarded numerous internationally recognised awards as the PPP deal of the year. The project cost is approximately 109 billion roubles. The PPP agreement was signed in 2012.

5 The project cost is approximately 74.3 billion roubles.
of a facility remains only with the public authority (BOT scheme). Regional PPP laws often provided a greater flexibility for project participants, although this was not fully supported by federal legislation. This factor, together with a number of controversial provisions of the legislation and practical problems, led to the development of a special federal regulation in respect of PPP projects. On 1 January 2016, Federal Law No. 224-FZ On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and Amending Certain Legislative Acts of the Russian Federation (the PPP Law) entered into force. The adoption of this law represented a huge step forward in developing the PPP regulatory framework and market in Russia.

The PPP Law now coexists with the Concession Law, creating the legal framework for a wider use of PPP models that also allow the transfer of the ownership of a facility to an investor (project company). The regional PPP laws have been brought into compliance with this federal law.

However, the PPP Law currently has a number of provisions that are either unclear (and the approach to the application thereof must first be tested in courts) or too onerous to the business (such as the obligation to demonstrate that a PPP project has better value for money than a conventional state procurement) that are planned to be addressed in the future to make this model more appropriate for investors. This is why the concession model remains the most popular for investors and public partners.

In this chapter we will mainly focus on regulation of the concession agreements (CAs), if not specified otherwise.

II THE YEAR IN REVIEW

The key trends of 2018 included the continuing focus on the application of PPP tools in different sectors, as well as the further development of the legislation. No game changing legislation was adopted during the year. Here are some of the more prominent changes:

a. the law now legitimises concession and PPP agreements for the creation or rehabilitation of: information technology and its associated infrastructure and agriculture objects (if they comply with the criteria established by the government). The PPP Law now enables PPP agreements (PPAs) around communication facilities;

b. federal state budget institutions can now be a party to the agreement along with the grantor or public side in healthcare projects – this amendment will speed up and improve chances for a successful PPP because healthcare services in Russia are still mostly provided by budget institutions;

c. a Russian state infrastructure fund aimed at supporting a number of infrastructure projects has been established;

d. project companies running a road concession since 2018 were given a value added tax (VAT) relief till 2023; and

e. from a budget law perspective capital grants can now be formalised as a budget subsidy which simplifies the implementation of projects with state support.
III GENERAL FRAMEWORK

i Types of public-private partnership

Broadly speaking, there are different forms of public-private cooperation agreements and PPPs in Russia:

- CA under the year 2005 Concession Law;
- PPPA under the year 2015 PPP Law;
- life-cycle contract based on the state procurement law (Federal Law No. 44-FZ On the Contract System in State and Municipal Procurement of Goods, Works and Services dated 5 April 2013 (Law No. 44-FZ));
- offset contract for the period of up to 10 years with a minimum investment of 1 billion roubles under the Law No. 44-FZ (this type of contract was introduced in 2016);
- privatisation;
- leasing agreement with investment conditions; and
- other forms of cooperation between public and private sides.

In a more narrow and practical sense, usually only CAs and PPPAs are referred as PPPs, and we side with this approach.

ii The authorities

In Russian PPP projects, the public side (the grantor) is usually represented by central government, and governments and administrations at the regional and municipal levels. The key authorities working in the Russian PPP market are the following:

- the central government – adopts regulations on PPPs and concessions (e.g., Regulation No. 1044, dated 11 October 2014, On the Support Programme of Projects Implemented on the Project Financing Basis, and Regulation No. 300, dated 15 March 2015, On the Approval of the Form of a Proposal to Conclude a Concession Agreement with a Person Initiating the Conclusion of a Concession Agreement). One other important function is that it appoints authorities to oversee private finance initiatives (unsolicited proposals) submitted by private interested parties;
- the Ministry of Economic Development – takes part in the legislative procedure (develops guidelines and best practices reviews for PPP projects);
- the Ministry of Finance – prepares draft budget laws, provides state support, and regulates subsidies and budget investments in accordance with the Budget Code of Russia;
- other line ministries (Ministry of Transport, Ministry of Healthcare, etc.) are responsible for PPPs in their areas;
- the Federal Antimonopoly Service (FAS) is the authorised government body controlling the compliance of market players and the public side with the competition legislation (and is entitled to challenge tenders and awards); and
- the Accounting Chamber – controls the expenditure of budget funds, conducts investigations and publishes reports.

iii General requirements for PPP contracts

The requirements of the CA and the PPPA have some common features, but there are also important differences. We briefly summarise some features of both schemes below.
**Parties**

Under the CA, the private party (the concessionaire) may be, in particular, a foreign entity, a Russian entity, or two or more legal entities acting as a simple partnership (under an agreement on mutual activities). Exceptions are IT and military concessions and PPPAs, where a concessionaire must be a local company (also beneficially controlled by a Russian entity or individual). Under the PPPA, the private partner must be a Russian-incorporated legal entity only. However, there are no restrictions on indirect foreign companies’ participation in a project company under the PPPA. In comparison to the Concession Law, the PPP Law does not allow the state-controlled organisations (including banks) to act as a private partner or on their side.

**Facilities**

The list of the types of property that can be objects of a CA or PPPA (i.e., facilities or underlying assets) is quite broad and includes all key infrastructure objects (with some exceptions). The PPPA facility cannot be property that is exclusively owned by the state and that cannot be provided to a private owner. Thus, unlike CA facilities, the following property in particular may not be considered as PPPA facilities: highways (except where privately owned), subways, heat, gas, electricity or water supply, water treatment facilities, and seaport infrastructure facilities that can only be in federal ownership. Immovable property or immovable property and movable property, technologically related to each other and intended for carrying out activities stipulated in the contract can only be facilities under the CA and PPPA. However, one exception to this rule is if the IT infrastructure is an object under a CA or a PPPA (which could be represented depending on the project as just movable property).

Significant amendments have been introduced to the PPP and concessions legislation in 2018 with respect to IT infrastructure projects. The underlying law on amendments extends the lists of objects of CAs and PPPAs with IT facilities (in particular, software, databases, information systems, including with regard to states, and internet websites that include software and databases).

The law also sets forth a special regime for implementation of IT infrastructure projects and provides in both the Concession Law and PPP Law separate chapters with the rights and obligations of the parties to such facilities, and the specifics of drafting, executing and performing the relevant agreements.

**Main obligations**

According to the Concession Law, the concessionaire undertakes at its own expense to create or reconstruct certain facilities and carry out activities using the facility (i.e., to operate it). The ownership right to the facility belongs (or will belong) to the public party (the grantor).

The grantor undertakes to grant to the concessionaire the rights of possession and use of the facility under the CA for the implementation of the respective activity during the term established by the agreement. As a general rule, the concessionaire is obliged to maintain the object of the CA in good order, to carry out (at its own expense) renovations and to bear the maintenance costs.

The concessionaire is obliged to provide security for ensuring the performance of its obligations under the CA. The concessionaire can choose any of the following types of security: irrevocable bank guarantee, pledge of the concessionaire’s rights under a bank deposit contract in favour of the grantor, or insurance of the risk of the concessionaire’s liability for a breach of the obligations under the CA.
Term
The minimum term for the PPPA is three years; the Concession Law does not provide a minimum term but instead requires that it should correspond to the project payback period.

Provision of land plots
The public side is obliged to provide the investor with the required land plots for the whole term of the contract without conducting any separate tender procedures. Usually land plots are provided based on the lease agreements, although it is possible to provide land on any other legal basis.

Participation of third parties
The concessionaire or private partner is entitled to enlist third parties to perform its obligations (both at the construction and operation stages) provided that the concessionaire will be fully responsible to the public side for the third parties’ actions. The PPP Law explicitly states that the investor can be responsible only for technical operation and maintenance (which may be relevant for investors in, for example, the healthcare sector if they do not plan to provide medical services or if the public side prefers to leave medical services within the state budget enterprises). The Concession Law assumes that the concessionaire will be fully responsible for both the technical and designated use of the facility (i.e., its full operation). That said, we expect this to be revisited in the draft bill currently undergoing public hearings that permits concessions for technical operation.

Right of assignment
Rights under a CA may be assigned at any stage of the implementation of a project with the prior consent of the grantor. Rights under a PPPA may not be assigned, except in certain cases.

Dispute resolution
Subjecting PPP disputes to the Russian state courts is common. Generally, dispute resolution under CAs via international arbitration is possible, although the venue of arbitration shall be in Russia. The PPP Law does not contain any special provisions in relation to dispute resolution but our reading of the arbitration law is such that disputes under the PPP Law are non-arbitrable.

IV  BIDDING AND AWARD PROCEDURE

i  Expressions of interest
There are two main ways of entering into the project: tender procedure⁷ and the unsolicited proposals, the latter available since 2015. The competitive dialogue procedure is not used in Russia.

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⁷ In exceptional cases the CA can be signed without tender (e.g., if there is a special government decision to implement a project without a tender).
The bidding procedure starts from the procurement notice and comprises two subsequent phases: the pre-qualification phase (submitting and evaluation of the tender applications); and the submission and evaluation of the proposals (bids).

Notably, the PPP Law obliges authorised bodies prior to entering into the PPPA to analyse the project in the context of value for money and comparing the effectiveness of agreeing the PPPA using traditional government procurement contracts. There is a detailed and quite complex regulation of the value-for-money testing. At present there is no such requirement under the Concession Law, which simplifies the procedure for launching the project (although applying the same approach to concessions has been discussed).

ii Requests for proposals and unsolicited proposals

The legislation provides detailed requirements for submitting both tender applications and bids. Generally, the tender requirements are similar to tender requirements in other CIS-countries, although they have their own peculiarities. Tender documentation and other documents related to the tender must be published on a special official website (torgi.gov.ru) in order to ensure the transparency of the process.

The procedure for entering into a CA by way of private initiative (unsolicited proposal) may take up to 150 days (approximately) if there are no other applicants; under the PPP Law it is approximately 300 days (because of the value-for-money test procedure).

Tender procedures often take around one year from the announcement of the tender up to the signing of the CA or PPPA.

iii Evaluation and grant

The following tender criteria, in particular, may be set for the evaluation of bids:

- time for construction and (or) reconstruction of the object of the CA;
- technical-economic characteristics of the object of the CA;
- volume of output of goods, execution of work, and provision of services in the course of planned activity under the CA;
- amount of the concessionaire's payment;
- maximum prices (tariffs) for goods to be produced, work to be executed and services to be rendered or long-term parameters of regulation of the concessionaire's activities; and
- amount of the capital grant and the grantor's payment (if these are provided).

Bids are assessed in accordance with the procedure stipulated in the tender documentation. After the preferred bidder is announced, there may be negotiations before entering into the CA or PPPA.

If a contract is awarded through an unsolicited proposal mechanism, the applicant initiating the conclusion of a CA only needs to show that it has or is capable of raising at least 5 per cent of the amount of investments provided in the draft CA (confirmation may take different forms). This approach differs from the PPP Law regulation providing an obligation of the initiator to submit the independent guarantee (or bank guarantee) in the amount of 5 per cent of the forecasted amount of financing under the PPP project. The phrase ‘forecasted amount of financing’ is not specified in the law but our vision is that this refer both to capex and opex of a project.
V THE CONTRACT

i Payment

The Concession Law provides for two opportunities for co-financing of a project by the public side:

a The grantor is entitled to assume part of the costs for the creation or reconstruction of the facility and its operation (capital grant). The amount of the costs being covered by the grantor should be specified in the grantor’s decision in respect of signing the CA, in the tender documentation and in the CA itself.

b There is the possibility of providing a ‘grantor’s payment’ (which can be used along with the capital grant in the same project). The Concession Law does not include any detail on this form of state support, but in practice, this refers to what is well known in international practice as ‘availability payment’. The absence of a legal definition of the ‘grantor’s payment’ or a more detailed regulation governing this type of payment raises a number of legal questions (including the procedure and timing of the payment, how it relates to the capital grant, etc.) and may cause disputes in practice. The Bashkir case (see Section VII) demonstrates this problem.

At present, the Concession Law prohibits full financing of the costs of the concessionaire using a capital grant, but it does not contain any restrictions on the size of the grantor’s payment. Compensation of the minimum guaranteed revenue is also possible and is being carried out in practice.

The grantor may require from the concessionaire the provision of the ‘concession payment’, which should be provided during the operation stage. The amount and type of the payment (e.g., money or property) should be set out in the grantor’s project kick-off decision, which is taken prior to the tender procedure.

Russian concession law provides different options for investment return (direct toll and availability payments). However, the availability model is more popular in Russia at present. The direct toll model was used in some projects (for example, in M11 Moscow–Saint-Petersburg, 7–8 section) but its use is now quite limited.

ii State guarantees

Russian legislation gives the option to provide state guarantees under CAs and PPPAs. The Concession Law explicitly states that the grantor is entitled to provide the concessionaire with state or municipal guarantees in accordance with the budget legislation of the Russian Federation; the size, procedure and conditions for granting state or municipal guarantees to the concessionaire should be specified in the formal decision in respect of signing the CA, the tender documentation and in the CA. However, in practice, the public side does not grant such guarantees because of a lack of budget financing. Nevertheless, the state often provides contractual guarantees, which are formalised as relevant payment obligations envisaged in the CA or PPPA. They are equally enforceable and bankable as confirmed by numerous financial closes.

iii Distribution of risk

The regulatory framework does not involve an extensive risk allocation mechanism, so in practice, while there are certain market approaches to risk allocation, ultimately it will depend on the contractual agreements between the parties, the type of project and regional practice.
Like in many other countries, in Russia there are special guidelines and recommendations on how to distribute risks: this is issued by the Ministry of Economic Development together with the National PPP Development Centre (a non-commercial organisation promoting PPPs and monitoring the developments in this area), as well as by other line ministries and public authorities at regional level. The general principle of risk allocation is in line with standard international practice – the party that is best able to manage the risk (influence the occurrence of any risk and deal with the consequences) should bear it. Some examples of risk allocation in Russia are:

- Inflation risk is usually shared between parties or taken by public side;
- Risks of project delays, as well as construction risks, are generally borne by the private party, except if otherwise agreed;
- Land provision, political risks, as well as the discriminatory legislation changes' risks are within the public side;
- Foreign exchange risk in Russian projects is often not taken by the public side;
- Social risks (including protests) can be borne by the public side or jointly; and
- Risks from force majeure are generally jointly distributed.

The Concession Law states that in the event that new legislation leads to an increase in the aggregate tax burden on the concessionaire or deterioration of its position in such a way that it is largely deprived of what it expected to receive when entering into the CA, the grantor is obliged to take measures to ensure the return of the concessionaire’s investments and the receipt by the concessionaire of the gross proceeds in a volume no less than that originally set out in the CA.

In many projects, the parties usually provide a list of ‘special events’ (which is a combination of relief and compensation events known to many other jurisdictions) within the CA or the PPPA. In the case of the occurrence of such events, the concessionaire has the right to extend the terms under the agreement, compensate any additional expenses and – in the event of a prolonged special event – terminate the agreement early.

iv Adjustment and revision

Subject to the following exceptions, parties to a CA or a PPPA are free to amend it. Changing the material conditions of the CA requires the prior consent of the FAS. The list of ‘material conditions’ is laid out in the Concession Law and includes, inter alia, the amounts payable by the grantor, construction completion date, provisions governing compensation upon early termination, etc. Changes to the material conditions should be carried out in accordance with the Resolution of the RF Government as of 24 April 2014 No. 368 On Approval of the Rules for the Provision by the Antimonopoly Authority of Consent to Amend the Terms of the Concession Agreement. This resolution provides an exhaustive list of events when the CA can be changed (e.g., force majeure or significant deterioration of the position of the concessionaire). Amendments to the CA that lead to changes in the revenues of the budgets of the budget system can be taken in accordance with the requirements established by the budget legislation (which may have provisions requiring amendments to the budget laws, which could be a tricky process). Changes in the terms and conditions of the CA that were determined on the basis of a decision on signing a CA and a bid proposal may only be changed: on the basis of a decision of the respective public side; and in some other exceptional cases. Therefore, generally we would say that in many projects parties are attempting to cover as much as possible important provisions in the CA upon signing, because after that the
process of introducing amendments (except for not ‘material’ provisions in the sense of the Concession Law) is quite restricted. Amendments to PPPAs can be done in basically the same manner as with the CA.

v Ownership of underlying assets
As previously mentioned, under a CA there is only public ownership of underlying assets, which is different to PPPAs, where the investor acquires the right of ownership. However, if the amount of financing by the public partner and the market value of the property contributed by the public partner (or rights thereto) totally exceed the amount of expenses of the private partner, the right of ownership of the object should be transferred to the public partner upon the expiration of the term of the PPPA. The facility itself cannot be pledged under the Concession Law, although rights under the CA may be pledged in favour of financial providers. The private partner under the PPPA may pledge both the facility and the rights to the facility in favour of the financing organisations on the basis of a direct agreement.

vi Early termination
According to the Concession Law, the CA can be terminated in the following key situations:

a) upon the expiration of the CA;
b) upon the agreement of the parties;
c) in the case of early termination of the CA on the basis of a court decision;
d) upon the decision of the public side if the failure to perform or the improper performance of the concessionaire’s obligations under the CA causes harm to life or to the health of people; and
e) in some other exceptional cases provided by the Concession Law.

The CA can be terminated on the basis of a court decision following a significant violation of the agreement by one of the parties (the law stipulates which violations are deemed ‘significant’, although this list can be supplemented for in CAs), a significant change of circumstances, noncompliance with the CA of a reorganised concessionaire or other grounds provided in the laws or in the CA.

In case of early termination of the CA, the concessionaire has the right to demand from the grantor the reimbursement of expenses for the construction and (or) reconstruction of the facility. The amount of compensation ultimately depends on the parties’ agreement and the judge’s discretion (if it is claimed in court).

In practice, parties often provide a detailed regime for early termination (providing a list of grounds for termination without the court’s intervention on the initiative of the grantor, the concessionaire or by mutual agreement) and the amount of compensation based on the ground for termination. In any case, the private party attempts to include the sum of the senior debt and some other components in the compensation to be provided upon termination. Russian legislation includes the possibility of entering into lender direct agreements (between grantor, concessionaire or private partner, and financial institutions) in order to secure the interests of financial institutions (return of provided loans, step-in rights, etc.).
VI FINANCE

Russian PPPs are usually implemented on the basis of project finance with senior debt and equity provided by investors. Debt generally funds around 70 to 90 per cent of project costs, and equity provides around 10 to 30 per cent of the remaining costs. However, there are, of course, different financial structures depending on the project. The current economic situation in Russia has also contributed to the state and investors searching for new financial solutions. In many federal and large-scale regional projects, the governments co-finance construction, as well as provide availability payments during operation. Infrastructure bond financing is also used in certain projects for both the development and operation stages. This type of financing has potential for growth, however, this has not yet featured prominently in the Russian market. Some new mechanisms are also currently under development (e.g., infrastructure mortgages).

VII RECENT DECISIONS

Below, we discuss two important cases that directly deal with aspects of PPPs. Although both cases date back to 2017, they remain relevant.

i Bashkir case (No. A40-23141/17)

In 2017, the State Committee of the Republic of Bashkortostan for Transport and Roads (the organiser of tender) and LLC Bashkirdorstroy (the winner of the tender) brought a claim against the FAS to invalidate the FAS order to annul the results of the concession tender in relation to the Sterlitamak–Magnitogorsk road. The FAS and the court of first instance came to the conclusion that this project should have been implemented under the public procurement law (Federal Law No. 44-FZ) because the tender documentation provided that all the concessionaire's costs for the construction and operation of the road are to be paid entirely out of the regional budget (via the capital grant and the grantor's payment). The total cost of the project was around 12 billion roubles.

However, the appeal court overturned the judgment of the court of first instance and said that full budget financing of the concessionaire's expenses is allowed, but only if different financing instruments are used – namely, both the capital grant and the grantor's payment. The appeal court said that, unlike the capital grant, the grantor's payment is not made for a particular purpose and may be used for purposes other than the compensation of the costs of construction and (or) reconstruction of the facility.

In this case, the courts, literally interpreting the law, only analysed the situation where the investor's expenses are fully compensated by the state. Therefore, the model, which presumes that the costs are partially offset from the budget and partially from the revenues generated by the project itself, was not examined.

At the same time, the following question remains unresolved: if not completely, which part of the revenue (if not all of it) can be compensated for by the budget? There is no answer to this question in the law, and such uncertainty creates risks for investors. Although the private party won this case, to ensure future investment in infrastructure the FAS and the government decided to reform the current regulatory framework and prepare amendments to the law to minimise the risk of challenging PPP projects that provide for full coverage of investor's costs.
This case is also notable because the courts also considered other issues in relation to PPPs, for example, with respect to the requirements for financing experience, as well as the peculiarities in relation to providing a bank guarantee as a bid bond.

ii Glavnaya Doroga case (No. A40-93716/17)

Another famous dispute was JSC Glavnaya Doroga v. State Company Avtodor (2017).

The appeal court overruled the decision of the first instance, stating that disputes in respect of CAs are arbitrable, as is stipulated in Article 17 of the Federal Law On Concession Agreements. Further, the fact that Russia is a party to the CA does not mean that any related dispute has a public nature and is of public interest. It was identified that the dispute in question was one of private interest to the plaintiff, and that there were no grounds for recognising arbitration clause as null and void. On the issue of equating the nature of CAs to contracts on state procurement, it was indicated that: the Federal Law On Concession Agreements provides for a special competition process, which is not analogous to the procedure for entering into state contracts; and the Federal Law On Concession Agreements itself is not part of Russian procurement legislation.

VIII OUTLOOK

Within the current lack of budget financing, there is high demand for investments, and the public side has shown its willingness to implement a wide range of projects and create opportunities for efficient cooperation with investors. There is good evidence that parties to PPP projects in Russia are coming to a compromise to ensure, on the one hand, successful implementation of projects, and on the other hand, the return of investments.

Generally, we believe that in Russia the greenfield market will continue to be very attractive to investors. The transport and healthcare sector will also see development. According to the Order of the Government of Russia No. 1734-P, dated 22 October 2008, On the Russian Transport Development Strategy up to 2030, the use of PPP mechanisms was named as a priority tool for attracting investment. Based on the Presidential Decree as of 7 May 2018 No. 204, On the National Goals and Strategic Tasks of the Development of the Russian Federation up to 2024, the government adopted the complex plan on the modernisation and extension of the main infrastructure. It is reported that there are plans to spend more than 6 trillion roubles on such developments up to 2024. We also see there being a growing interest and readiness of the public side to modernise healthcare infrastructure by using PPPs.

Notably, the secondary (brownfield) market has also started to develop (e.g., the acquisition of the shares in the project company under the Pulkovo project by a foreign investor) and we expect new M&A deals in the infrastructure sector in the future.

The number of unsolicited proposals will increase in the years to come as market players are eager to suggest new ideas for projects to the public side.

The Russian PPP regulatory framework is expected to develop further. There is also currently a draft law undergoing public hearings, which proposes substantial amendments to the PPP legislation to make the market and the regulatory framework more favourable for investors. For instance, among other changes, in relation to the Concession Law, the draft law provides for a more detailed description of possible means for the public side’s
financial participation in projects, elaborates on the prequalification criteria and includes a provision for compensation of the reasonable expenses incurred by the initiator of the private concession initiative.
I OVERVIEW

Senegal is a leader among West African countries with regard to public-private partnerships (PPPs), having already put in place important projects for both service management and infrastructure development. The general framework of public works contracts comprises the Code of Obligations of the Administration and Law 90-09 of 26 June 1990 on the organisation and control of companies in the parapublic sector and private legal persons with financial support from public powers. This establishes the regime governing the preparation, procurement, execution and control of contracts concluded by the above-mentioned legal persons to meet their needs for performing work and purchasing supplies or services, as well as the award and control of contracts participation in the execution of a public service.

Unless otherwise provided by law or regulation, the conclusion of public procurement contracts (i.e., involving the participation of co-contractors of public persons to the performance of a public service referred to in Article 10 of the Code of Obligations of the Administration) is subject to the rules of control provided for in this Decree. Public procurement contracts are written contracts entered into by a contracting authority for payment to meet its needs for works, supplies or services, or a combination of the three. Public procurements are administrative contracts.

However, there are special procedures for awarding public contracts on the basis of a legislative derogation. This is the case for Law No. 2014-09 of 20 February 2014 regarding Public-Private Partnerships (the PPP Law), which provides for other contractual conditions owing to the fact that it is the co-contractor of the administration that finances and operates the constructed structure for a time before transferring ownership to the administration. In this sense, Article 2 of Law No. 2014-09 provides:

This Law applies to partnership contracts entered into by the State, a local authority, a public body, an agency, a majority public corporation, a national corporation and any other body or corporation of public law, and the associations formed by these people. . . . The provisions of this Act apply to all sectors of economic and social life, with the exception of sectors subject to special regulation, including the energy, mining and telecommunications sectors.

Therefore, it is the contract that provides for the transfer of ownership of the plant.

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II THE YEAR IN REVIEW

This year, there has been no new legislation. The institutional framework has been set by the PPP Law and its implementing legislation. As a result, there have been no substantial developments during this period.

On 4 December 2017 to 6 December 2017, the Minister of Investment, Promotion, Partnerships and Development of the State's Teleservices organised an international forum conference on the funding of public private partnerships.

III GENERAL FRAMEWORK

i Types of public-private partnership

Partnership contracts may be awarded in three ways, either by competitive bidding, direct agreement or negotiated procedure, according to the conditions defined by this law.

The PPP Law eases the terms and conditions for dealing with unsolicited offers to better capture investment opportunities, which is a significant change from the previous law of 2004.

ii The authorities

The PPP Law applies to partnership contracts entered into by the state, a local authority, a public institution, an agency, a majority public-participation company, a national company and any other body or legal person governed by public law, as well as the associations formed by these legal persons. It provides for different structures in charge of the governance of these contracts, such as:

a the National Committee of Support to Public-Private Partnerships, which is responsible for validating the project preliminary assessments prepared by the contracting authorities to provide support to public sector entities in the preparation, negotiation and monitoring of public-private partnerships and to disseminate and promote public-private partnerships. The composition, organisation and functioning of the Committee are fixed by decree;

b the body of regulation and settlement of disputes, namely the Infrastructure Council, which is responsible for the regulation of the system of PPP contracting and the settlement of disputes related to the execution of such contracts; and

c the Tendering Commission, which is the structure responsible for bid opening and bid evaluation, whose composition and functioning are specified by decree. It is constituted by the contracting authority.

iii General requirements for PPP contracts

There are provisions for adapting by means of regulations the award procedures described in this draft law, for local authority partnership contracts on the one hand, and for those of other public authorities on the other hand, not reaching a certain threshold specified by decree (Article 2). In addition, the provisions of the PPP Law apply to all economic and social sectors, with the exception of sectors subject to special regulations, notably the energy, mining and telecommunications sectors. This Act does not apply to contracts entered into by a contracting authority with a legal person of public law or with a corporation majority-owned by Senegal.

See Section III.iii on the pre-qualification procedure.
According to Article 16 of the PPP Law, a pre-qualification notice is published by the contracting authority. This publication may be made in print, electronic or audiovisual media, national or foreign, specialised or not. The dissemination of the pre-qualification notice is made to inform all potential candidates of the existence of the project. Applicants who successfully apply for pre-qualification are invited by the contracting authority to submit an offer under the conditions set out in Articles 13 et seq. A tender committee is then set up. The contracting authority must inform each candidate of the decision it has taken in this regard and communicate to any candidate who requests it the reasons for the rejection of his or her candidacy.

In addition to this main procedure, there is a special procedure for dealing with spontaneous supply. A private operator may send a spontaneous offer to a contracting authority. In this case, the operator carries out the preliminary studies so as to present a coherent project, including appropriate technical proposals and the corresponding financing solutions.

An unsolicited offer may also relate to the completion of a project whose studies were conducted by the contracting authority at least five years before the date of submission of the unsolicited tender. The unsolicited bidder submits a complete file to the contracting authority with technical and financial specifications. If the unsolicited bid is accepted, the contracting authority must refer it to the National Committee of Support to Public-Private Partnerships and the Minister of Finance, for examination and opinion on the basis of the file submitted by the holder of the spontaneous offer.

On the basis of the opinions obtained, the contracting authority shall request the Prime Minister or the deliberative body of the public authority to apply for authorisation to proceed with the negotiation of the contract with the holder of the unsolicited bid. In the event of a favourable opinion, the contracts are submitted, after signature by the parties, to the approval of the Prime Minister.

To conclude, a contract governed by the provisions of the PPP Law may be passed by a contracting authority, following the opinion of the Infrastructure Council on referral of the National Committee of Support to Public-Private Partnerships if:

- it is imperative to ensure the continuity of public service under conditions of delay that are incompatible with the implementation of the tender procedure provided for in this Law, and where the contracting authority cannot provide the service itself; and
- the infrastructure can be realised or exploited, for technical reasons or reasons relating to the protection of exclusive rights, only by a single economic operation.

The end of the procedure is sanctioned by a report drawn up by the contracting authority. The final partnership agreement, together with the minutes of the finalisation of the development and the tax schedule, if applicable, is sent for approval to the Minister in charge of Finance, after the opinion of the National Committee of Support to Public-Private Partnerships.

The partnership contract, once approved by the Minister of Finance, is sent for information to the Infrastructure Council and the National Committee of Support to Public-Private Partnerships.

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3 Article 24 of the PPP Law.
4 Article 27 of the PPP Law.
5 Article 29 of the PPP Law.
Partnership contracts are published in the Official Journal with the exception of clauses relating to business secrecy.\(^6\)

**IV  BIDDING AND AWARD PROCEDURE**

**i  Expressions of interest**

The selection of the project operator must pass global tender procedures in two stages preceded by a pre-qualification. In the first stage, the technical proposals are opened in public session, and in the second stage, the financial offers are opened in public session by the tender commission.

**ii  Requests for proposals and unsolicited proposals**

Candidates are pre-qualified exclusively on the basis of their ability to perform the contract and according to the following criteria:

- a specific technical experience;
- the material and human resources that candidates have to fulfil the contract; and
- financial capabilities.\(^7\)

The pre-qualification procedure shall be conducted by the contracting authority assisted by the tender commission referred to in Article 5 of this Law. The commission meets at the request of the contracting authority.

According to Article 16 of the PPP Law, a pre-qualification notice is published by the contracting authority. See Section III.iii.

**iii  Evaluation and grant**

Candidates are pre-qualified according to the aforementioned criteria (see Section IV.ii).

The contract is awarded to the candidate whose bid is evaluated as the best one in view of the selection criteria set out in the tender documents.\(^8\)

**V  THE CONTRACT**

**i  Payment**

Article 6 of the PPP Law provides that the remuneration of the co-contractor, under a partnership contract, comes mainly from payments by the public body throughout the duration of the contract. It is linked to performance objectives assigned to the contracting party or to the availability of works or equipment.

The partnership agreement may provide for the possibility for the other party to receive income on the basis of ancillary activities; or for a mandate from the contracting authority to the counterparty to collect, in the name and on behalf of the public body, the payment by the end user of benefits accruing to the latter.

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\(^6\) Article 22 of the PPP Law.

\(^7\) Article 15 of the PPP Law.

\(^8\) Article 14 of the PPP Law.
ii  **State guarantees**

Pursuant to Article 7 of the PPP Law, PPP contracts contain clauses on the methods of payment of the contractor by the public body. In Senegal, the state financial system is very centralised; indeed, it is the Ministry of Finance that manages this aspect. Therefore, in practice, no problems should arise with regard to state commitments.

iii  **Distribution of risk**

Article 7.2 of the PPP Law states that PPP contracts include clauses relating to the conditions under which risk-sharing is established between the contracting authority and the project operator.

iv  **Adjustment and revision**

The PPP Law provides for two kinds of adjustment and revision. First, under Article 30, a complementary contract to a partnership contract may be entered into by direct agreement by a contracting authority where a project under execution has been the subject of a partnership contract. For reasons of economic, social or cultural necessity, or related to consistency requirements in the technical and financial management of the project, the contracting authority decides on its extension. The authorisation to conclude the complementary contract by direct agreement is given by the Prime Minister, on referral to the National Committee of Support to Public-Private Partnerships, after consulting the Infrastructure Council and Minister of Finance.

In addition, under Section 31, any changes to the work, supplies, services or deadlines of the original contract initiated by the holder or the contracting authority must be subject to prior agreement between the parties by an amendment to the partnership contract. These changes cannot be substantial. Failing this, a new allocation procedure is necessary. An amendment is considered substantial if it:

a  introduces conditions that, if they had been included in the initial award procedure, would have permitted the selection of a candidate other than the one initially selected;
b  changes the economic balance of the partnership contract in favour of the partner for a cost greater than or equal to 30 per cent of the initial amount of the financial offer selected; or
c  considerably modifies the scope of the partnership contract. This is particularly the case when the addendum has the effect or purpose of substituting another contract for the original contract either by upsetting the economy or by changing the object.

Any amendment must be authorised beforehand by the Infrastructure Council.

v  **Ownership of underlying assets**

Article 23 of the PPP Law provides that, within three months of the signing of the partnership agreement, the project operator must be constituted in the form of a company incorporated under Senegalese law whose capital is made up of at least 20 per cent of the capital contributions from national economic operators.

The offer of securities is made after the determination or valuation of securities by an independent expert selected by the operator and the public person by mutual agreement or by an expert chosen by the Infrastructure Council, within a maximum of three weeks by public company advertising or investment mandate with a bank.
After fixing the price of the securities, the sale takes place for a period of 45 days. The operator or the authorised third party shall notify the Infrastructure Council of the list of acquirers, the number of securities acquired and their prices, and the number of securities not sold at the end of this period.

Securities not acquired by national investors at the end of the period indicated in the above remain property of the operator unless the state of Senegal decides to acquire them provisionally. In this case, the state must transfer the securities to national operators within two years or transfer them to the operator.

**vi Early termination**

The partnership agreement may provide grounds for termination for:

a. serious deficiencies of the contracting authority, whereby the judge decides to cancel the judgment at the request of the project operator, under the conditions laid down in Section VII. The project operator can then claim damages to the contracting authority;

b. serious misconduct by the project operator, whereby the contracting party terminates the contract partnership. The contracting authority may review the responsibility of the project operator before the judge in light of any mistakes he or she has made. Nevertheless, the contract of partnership may provide that, in this case, the contracting authority pays financial compensation related to infrastructure recovery;

c. a reason of general interest, in which case the termination is then pronounced by the contracting authority. The project operator is then entitled to an allowance covering expenses incurred and loss of profits;

d. cases of *force majeure*, at the initiative of each of the parties, under the conditions provided for in the contract; and

e. following a challenge to the financial balance of the project resulting from an action or decision of the contracting authority. Termination is pronounced by the judge at the request from the project operator under the conditions of Section VII. The project operator can then claim damages from the contracting authority.

The project operator may challenge the termination of the partnership and amount of compensation owed by the contracting authority before an arbitration body or national court under the conditions laid down in Section VII. However, the judge does not have the power to annul a termination decision taken by the contracting authority; he or she can only grant compensation to the project operator.

**VI FINANCE**

Senegal has put in place important measures for both service management and infrastructure development regarding PPPs:

a. In 1996, an agricultural PPP was achieved in the water subsector between the Senegalese Water Company, the private operator exclusively responsible for the operation of drinking water installations, and the National Water Company of Senegal, a public body responsible for managing the assets and controlling the quality of the operation of this public service. The original 10-year contract has since been extended by various amendments.

b. In the rail transport sector, Senegal and Mali granted the concession of the Dakar–Bamako railway to the company Transrail SA in 2003.
c A concession contract relating to financing, the construction and maintenance of the toll motorway linking Dakar to Diamniadio was signed in 2009 with SENAC SA. The motorway has been in operation since August 2013. An amendment to this contract was signed in June 2014 for the extension of this highway to Diass and the Blaise Diagne International Airport.

d In 2012, an axle load control concession involving the financing, construction, equipping and operation of weighing stations and measuring the gauge of heavy goods vehicles was signed.

e A subsidiary of DP World has been a concessionaire since 2008 and for 25 years the container terminal of the Autonomous Port of Dakar. DP World is not only in charge of the operation, but also the extension and rehabilitation of the container terminal in the northern area of the port.

f The operation, management and maintenance of the Baux Maraîchers urban and inter-urban bus station was entrusted to a private company as part of a PPP.

In these different partnerships, various financing schemes have been adopted in response to the specific nature of each operation.

VII LITIGATION PROCEEDINGS

In the absence of an amicable settlement, under Article 37 of Law No. 2015-09, disputes relating to the execution or interpretation of partnership contracts fall within the jurisdiction of the Senegalese courts or arbitral tribunals. Arbitration is conducted in accordance with the stipulations of the arbitration clause contained in the partnership contract. This clause opens a route of arbitration both before the regional arbitration bodies (i.e., the Common Court of Justice and Arbitration of the Organization for the Harmonisation in Africa of Business Law; and the Organisation for the Harmonisation of Corporate Law in Africa (OHADA)) but also international (the International Criminal Court, the International Centre for Settlement of Investment Disputes, the United Nations Conference on Trade and Development, etc.). Further, the OHADA Uniform Act on Arbitration Law, applicable in Senegal, provides for the enforcement of awards made by international arbitral tribunals.

There has been no significant case law yet. Nevertheless, considering the significant interest in PPPs from of private and public actors, we expect litigation in the future.

VIII OUTLOOK

The Emerging Senegal Plan will offer many opportunities to develop PPP projects. Promulgated by a priority action plan, this strategy aims to complete a series of infrastructure projects by 2023. To this end, the Senegalese government has set up an institutional and legal framework favourable to PPPs aimed at carrying out infrastructure projects to achieve the objectives set.

Indeed, significant investments are required for infrastructure development in Senegal. The lack of financial capacity of Senegalese public entities has led to an increase in the number of public-private partnerships.

Those upcoming public-private partnership projects are listed below:

a the Corn Value Chain Project in Grain Corridors;

b the Dakar–Bamako Railway Project (South) and the Rehabilitation Project;
c the Commercial Infrastructure Rehabilitation Project;
d the ANAM Port Project;
e the Bargny ‘Port du Futur’ Mineral Project;
f the Cheikh Anta Diop Student Housing Project;
g the Construction and Equipment Project for a Network of Higher Institutes of Professional Education;
h the Electricity Transmission Investment Project;
i the Niokolo-Koba Park Management Project;
j the Electronic Waste Management Project;
k the Seawater Desalination Plant Project;
l the Integrated Special Economic Zone Project;
m the Court Construction Programme;
n the Falémé Zone Iron Project (Eastern Senegal-MIFERSO iron mines);
o the Aristide le Dantec Hospital Reconstruction Project;
p Daga Kholpa Urban Pole Project; and
q other projects, such as the construction of prisons, courts, sports facilities, tourist centres (e.g., seaside offers in Pointe Sarène, the proposed development of the Mbodjène tourist site and development of the Joal Finio tourist site), agribusiness projects and projects on infrastructure (e.g., highway-development programmes).

The Emerging Senegal Plan was adopted in 2014 to accelerate socio-economic and infrastructural developments in Senegal. This plan constitutes the frame of reference for the country’s economic and social policy for the next 20 years, and is based on three tenets:
a the structural transformation of the economy through the consolidation of the current drivers of growth and development of new sectors that create wealth, jobs, social inclusion, and attract high-level experts and investment opportunities;
b the significant improvement of living conditions in the country, with more sustained action against social inequality; and
c strengthening security, stability and governance, the protection of rights and freedoms, and the state of law in order to maintain public policy.
I OVERVIEW

Public-private partnerships (PPP) were introduced in Serbia through the enactment of the Law on Public-Private Partnerships and Concessions\(^2\) (PPPCL) in 2011.\(^3\) In 2016, the Law was twice amended to account for several highly complex, challenging and high-value projects being undertaken. The enactment of these amendments significantly helped with the completion of these PPP projects in 2017 and 2018.

In 2012, the government of Serbia formed the PPP Commission\(^4\) to provide professional support to PPPs in Serbia. The PPP Commission is composed of nine members (i.e., representatives of the government, the Ministry of Economy, the Ministry of Finance, the Ministry of Construction, Transportation and Infrastructure, the Ministry of Mining and Energy, the Ministry of Public Administration and Local Self-Government, the Ministry of Environmental Protection, the representative for autonomous provinces, and the representative for Belgrade) and oversees PPP or concession proposals; consultations on various matters related to PPPs and concessions; opinions with regard to the approval procedure of PPPs; implementation of best international practices; and co-operation between competent state authorities, professional associations and the organisations involved in the preparation and implementation of PPPs in Serbia. The National Alliance for Local Economic Development\(^5\) and the Permanent Conference of Cities and Municipalities\(^6\) are also active in providing support for PPPs in Serbia, from raising awareness of the advantages of PPP projects to giving practical support to PPPs.

Since the enactment of the PPPCL, the PPP Commission has approved 95 projects as at December 2018, of which 56 approved projects were PPP projects and 39 were concession projects.\(^7\) The PPP Commission has also received thousands of PPP or concession project proposals since 2012.

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1. Jelena Gazivoda is a senior partner at JPM Jankovic Popovic Mitic.
3. Concessions were regulated in Serbia since the 1990s by the Concession Law, amended several times, and finally supplemented by the PPPCL in 2011, which currently regulates both PPPs and concessions.
PPP and concession contracts are public contracts registered through the registry of public contracts under the Public Procurement Portal. Pursuant to the publicly available data on registered public contracts, only 34 out of 95 approved PPP or concession contracts have been executed as at December 2018.8

At the time of writing, the value of contracted PPPs and concessions in Serbia exceeds €2.5 billion, with up to 10 projects representing 98 per cent of this value. The majority of these projects involve the central government or the city of Belgrade, and the city of Belgrade has the highest overall number of contracted PPPs and concessions.

Most PPP or concession project proposals have so far been prepared by municipalities or cities, or public companies under the ownership of municipalities or cities.

The majority of PPPs or concessions relate to the reconstruction and maintenance of public lighting and transport; production and distribution of heat from renewable energy resources; and processing, treatment and disposal of communal waste. There have been very few contracted PPPs or concessions in the domain of public garages, road infrastructure, telecommunication and optical fibre, and water and sewage infrastructure.

On average, excluding Belgrade, at the time of writing, 20 municipalities or cities have entered into one PPP or concession contract in total.

PPPs and concessions under the PPPCL represent the majority of sustainable, stable and long-term investments in Serbia, attracting world leaders in their respective industries, and continuing to attract foreign investments to aid the development of the economy and implementation of best practices in business operations.

Despite a huge potential for complex and valuable PPP or concession projects, the number of projects realised under the PPP or concession model in Serbia is still relatively modest compared with the leading economies and neighbouring countries.

Government institutions, non-government bodies and associations are taking different steps to raise public awareness concerning the importance of these projects for the overall development of the economy and society, especially with regard to the competitive advantages of PPPs or concessions over traditional public procurement, which, without the PPPCL, would be a risk-heavy model.

II THE YEAR IN REVIEW

There were many successful PPP projects in Serbia during 2017 and 2018.

At the national level, the government proposed a 25-year concession for the design, financing, construction and reconstruction, maintenance, and operation of the Belgrade Nikola Tesla Airport. The concession agreement was executed in March 2018, and Vinci SA offered €501 million with the promise to invest €732 million. Vinci SA formally took control of the the airport on 21 December 2018.

In September 2017, a French–Japanese consortium comprising Suez Groupe SAS and I-Environment Investments Ltd executed a PPP contract with the city of Belgrade for the design, construction, operation and maintenance of waste treatment facilities and the provision of other related services (including the acceptance, handling, management,
processing, treatment and disposal of certain types and quantities of waste) for a 25-year period, promising to invest €300 million. The financial close in the subject project was envisaged for the end of 2018 or early 2019.9

In 2018, there were few projects related to the construction of public garages, reconstruction of schools and social care facilities, and reconstruction and modernisation of facilities contributing to energy efficiency. However, we expect such PPP projects to garner more interest in 2019.

The importance of projects falling under the regulatory regime of the PPPCL was recognised in 2018 not only at a practical level by the parties proposing and implementing them, but also by eminent experts in the field. In June 2018, the first Serbian Public-Private Conference was held in Belgrade, gathering representatives from the Serbian government, respective ministries involved in the realisation of PPPs or concession projects, the city of Belgrade, the PPP Commission, the European Bank for Reconstruction and Development (EBRD), the International Finance Corporation (IFC), the European Investment Bank (EIB) and other experts in the field.10 The conference was aimed at presenting positive results of the most prominent and successful PPPs or concessions contracted in Serbia to highlight the advantages of this model in comparison with traditional procurement, as well as to discuss the issues and shortcomings of proposed PPPs and concessions in recent years.

III GENERAL FRAMEWORK

i Types of public-private partnership

Pursuant to the PPPCL, PPPs may be contractual or institutional. Depending on the subject matter of the project and relevant industries, a PPP may or may not include elements of concession; the PPPCL applies to PPPs regardless.

A contractual PPP is where all the rights and obligations of the parties are solely regulated by a public contract, the mandatory content of which is prescribed by the PPPCL. A public PPP contract that has the elements of a concession project could additionally regulate other matters relevant to the respective industry in which the project is realised.

An institutional PPP is based on the relationship between the public and private partner being the shareholders of a joint venture company, which could be established by the public and private partner either by the subscription of respective pecuniary or non-pecuniary contributions in the company, or by a capital increase by the private partner in the company owned by the private partner. In the case of an institutional PPP, upon the selection of a private partner, public and private partners enter into the public contract (with or without the elements of concession) and agreement on the incorporation of a joint venture company, which will be the company in charge for the realisation of the respective PPP project.

Pursuant to the PPPCL, the concession represents a contractual or institutional PPP with the elements of concessions governing commercial use of a natural resource or publicly owned assets in general use owned by the public partner. The private partner is contractually assigned the right to use the assets in the ownership of the public partner for an agreed period. The private partner bears the risk of commercial usage of the subject of concession.

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9 As at December 2018.
The concession always assumes payment of a concession fee, which is commonly paid by the private partner to the public partner. The PPPCL recognises concessions for public works and public services.

Concessions may be used for:

a. the exploration and exploitation of natural resources and operations in protected areas, as well as for use of other protected natural resources;

b. energy projects;

c. infrastructure projects (e.g., ports, public roads, public transportation, airports and railways); and

d. development projects in the fields of sports and education, culture, community, health and tourism.

ii The authorities

Pursuant to the PPPCL, public authorities are entitled to independently initiate the procedure of realisation of PPP projects from their respective competence. These authorities are:

a. the state authority, organisation, institution and other direct or indirect users of budgetary funds, as well as the social security organisation;

b. the public company;

c. the legal entity conducting the operation of general interest, which must meet at least one of the following conditions:

- at least 50 per cent of members of the management of the legal entity must be the representatives of the public authority;
- over 50 per cent of voting rights in the legal entity must belong to the representatives of the public authority;
- the public authority must supervise the operations of the legal entity;
- the public authority must hold more than 50 per cent of shares in the legal entity; or
- more than 50 per cent of financing of the legal entity must come from the public authority; and

d. the legal entity established by the public authority that performs an operation of general interest and meets at least one of the conditions set out in the sub-items of (c).

Pursuant to the PPPCL, the concession grantor could be:

a. central government;

b. the government of the relevant autonomous province;

c. the assembly of the relevant local self-governance unit;

d. a public company; or

e. the legal entity authorised for awarding the concession by a separate law.

The PPP project proposal is submitted to the PPP Commission for its evaluation and opinion on whether the respective project could be realised in PPP form.

If the PPP project is proposed by Serbia or a public authority, and if the estimated value of the respective project exceeds €50 million, the PPP Commission mandatorily requests the opinion of the Ministry of Finance.
The Ministry of Finance, competent authority of the autonomous province or local self-governance unit performs the supervision over the implementation of public contracts. Apart from the reporting supervision, the aforementioned authorities are entitled to initiate the supervision through respective inspections and the competent tax authority.

iii General requirements for PPP contracts

PPP contracts are executed for a term of between five and 50 years. If the subject of the PPP contract is a concession, the term of the respective PPP contract is determined within the above time frame, unless a different deadline is set out by a separate law governing the respective industry in which a concession may be granted.

The term of the PPP contract must not hinder competition more than necessary to procure the amortisation of the investment of the private partners and reasonable return of the investment. If additional time is needed following the elapse of the term of the PPP contract, a new PPP contract may be entered into with the election of private partners in the manner and procedure set out by the applicable law.

The PPPCL does not recognise any value thresholds for contracts, services and projects contracted or not contracted through a PPP structure. With regard to contracted PPP projects, the project value ranges between several million euros to several hundred million euros. The most important criteria for approving a PPP project by the PPP Commission is not purely the value of the proposed project but predominantly other criteria, such as:

a) public demand for the operation or services;
b) the resources or competences of the public partner to independently realise the respective project;
c) the efficiency and effectiveness of the proposed investment;
d) testing the advantages and disadvantages of a make-or-buy decision;
e) determining and testing the project’s value for money;
f) assigning a public sector comparator to the respective project;
g) an investment analysis (i.e., financial and economic flow);
h) analysis of vulnerability and sustainability of the proposed project; and
i) risk analysis and a distribution of risks review.

The evaluation of the PPP project proposal is conducted by the PPP Commission, which, on the grounds of the above, issues an opinion on whether the PPP project proposal could be realised through a PPP structure, as well as which model of PPP would be the most suitable model. The public authority is obliged to submit the PPP project proposal for adoption to the following authorities:

a) central government;
b) the government of the relevant autonomous province; or
c) the assembly of the relevant local self-governance unit.

Only PPP project proposals that pass the above tests and are approved by the competent authorities and the PPP Commission will be selected for implementation.

IV BIDDING AND AWARD PROCEDURE

The PPPCL sets out the principles for PPP, which include the principle of equal and fair treatment of all parties’ participation on the process of selecting the private partner,
prohibiting any form of discrimination in the process of selection or award. This principle also obliges the public partner to ensure that all the bidders are provided with complete and accurate information on the award procedure, and standards and criteria for selecting a private partner. No bidder can be subject to favouritism or advantage over another bidder in respect of time, information or access to the public authorities awarding the public contract.

The selection and on award procedures must be based on objective and publicly announced criteria known in advance, and the grounds and merits for rendering this decision must be provided to each bidder that participated.

Pursuant to the PPPCL, the selection of the private partner is conducted either through the procedure governing the public procurement regulated by the Public Procurement Law (Official Gazette of the Republic of Serbia, Nos. 124/2012, 14/2015 and 68/2015) (PPL) or for awarding of the concession regulated by the PPPCL, elaborated in more detail below.

If the PPP is to be granted as a concession, the tender documents must contain the:

- form, content and term of the bid;
- description of the subject of concession;
- draft concession agreement or main elements of the concession agreement;
- conditions and proofs, which the bidders must meet and document in the process; and
- specification of other requirements the bidders should meet.

The tender documentation must be prepared in the manner enabling the comparison of received bids for the concession award.

**Expressions of interest**

The procedure of awarding a public contract is initiated by a public announcement in the Official Gazette of the Republic of Serbia on the public authority’s website and on the Portal of Public Procurement. Public invitation is, when necessary, announced on the Tenders Electronic Daily website, the internet edition of the appendix to the Official Gazette of the European Union. This is a mandatory requirement under the PPPCL when the value of the PPP project exceeds €5 million.

Pursuant to the PPL, the procedures of public procurement are as follows:

- an open procedure, in which all interested parties may submit the bid;
- a restrictive procedure:
  - the submission of expression of interest, upon which the public partner examines the qualification of the parties that submitted an expression of interest; and
  - the submission of bids only by parties whose qualification has been confirmed by the public partner;
- a qualification procedure:
  - the submission of expression of interest, upon which the public partner examines the qualification of the parties that submitted an expression of interest; and
  - the submission of bids only by parties whose qualification has been confirmed by the public partner, whereby this procedure is applied when the public partner cannot plan the scope, quantity and time;
- a negotiation procedure, either with or without an announcement of invitation for the submission of bids;
- competitive dialogue;
- design concourse; and
- a low-value public procurement.
As PPP projects are projects of predominantly high value and the subject of the projects include design, financing, construction, reconstruction, maintenance and operation, the award of a PPP contract is not, in practice, realised in design concourse or low-value public procurements, nor in a qualification process.

The most common procedure is the restrictive procedure. However, in highly complex projects in which open or restrictive procedures cannot be implemented, the public partner conducts competitive dialogue until it recognises the solution or solutions to enable the efficient realisation of the PPP project. Competitive dialogue has been applied in several PPP projects recently in Serbia, owing to their complexity and the necessity to determine the best technical solution.

In the case of a concession, before preparing the concession proposal, the public authority appoints an expert team to determine the value of concession, prepares the feasibility study and undertakes all other necessary actions preceding the awarding of the concession. Based on economic, financial, social and other parameters, as well as the environmental impact assessment study, the competent public authority submits the concession act proposal to the above-mentioned authorities at the national, provincial or local level.

After the adoption of concession by the relevant competent authorities, the concession must obtain the approval of the PPP Commission and subsequently by the Ministry of Finance.

Awarding a PPP with concession elements is initiated by the announcement of a public invitation, which must contain:

- data on the concession grantor;
- the subject of the concession and term of the concession;
- the deadline for submission of bids;
- technical, financial and other conditions that the bidders must meet and relevant supporting evidence;
- criteria for selecting the best bid;
- the date of submission of information on the outcome of the selection process;
- an authority competent to decide upon the requests for protection of rights; and
- other relevant data.

The public invitation should state whether the procedure of selection of the best bidder is conducted with or without prequalification.

If the estimated concession value exceeds €50 million, the public authority may decide that the concession is awarded in phases, if this is envisaged in the concession.

### ii Requests for proposals and unsolicited proposals

Expression of interest and bids are submitted within the deadlines set out by the public authority, bearing in mind the complexity of the public contract and the time necessary for the preparation of a bid.

If the procedure of electing a private partner is conducted in accordance with the PPL, the following deadlines are considered reasonable and cannot be shorter than the following:

- In an open procedure, the shortest deadline for the receipt of the bids is 52 days from the date of announcement of the public invitation.
- In a restrictive procedure, following negotiation with announcement of public invitation and competitive dialogue conducted by the public partner:
• the shortest deadline for receipt of the bids, or receipt of expression of interest or qualification, is 37 days from the sending of the public invitation; and
• the shortest deadline for receipt of bids is 40 days from the date on announcement of the public invitation.

The deadline for the submission of bids for PPPs with concession elements is at least 60 days from the date of the announcement of the public invitation in the Official Gazette of the Republic of Serbia.

The PPPCL recognises the concept of an unsolicited proposal. The public authority may consider and accept the unsolicited proposal of the private partner if the unsolicited proposal does not relate to the project for which the procedure of award of a public contract or invitation has already been initiated or announced. Following the submission of an unsolicited proposal, the private partner will inform the public authority on the value of the prepared documentation, whose value the public authority shall reimburse to the private partner in the event of an award of the public contract to the private partner not being the one that has submitted an unsolicited proposal.

Within 90 days of the date of receipt of an unsolicited proposal, the public authority shall determine whether the project serves in the public interest. The public authority is entitled to discuss all aspects of the proposed project, including the justification of the costs and expense of the preparation of the project. If the public authority determines that the unsolicited proposal serves the public interest and decides to start the procedure of awarding the PPP contract, the public authority is obliged to initiate either the public procurement procedure or concession award, as elaborated above. If the procedure is initiated based on an unsolicited proposal, this must be stated in the public invitation.

A private partner that has submitted an unsolicited proposal is entitled to take part in the procedure of awarding the public contract if its participation does not hinder competition. If the private partner that has submitted an unsolicited proposal has competitive advantages over the other bidders, the public authority must provide all other bidders with information that could level the playing field. If the competitive advantage of the private partner that has submitted an unsolicited proposal cannot be neutralised, the public partner must exclude this private partner from the procedure of awarding of the public contract.

### Evaluation and grant

The best bidder is selected in accordance with the selection criteria, set in advance in the invitation for submission of bids and tender documents. The best bidder is selected in a competitive and non-discriminatory manner. The criteria for the evaluation of bids are ‘economically most favourable’ or the ‘lowest offered price’. The criteria of an ‘economically most favourable’ offer includes:

- **a** offered price, being the ‘net present value’ related to overall costs in the agreed term without value added tax;
- **b** offered discounts;
- **c** deadlines for providing respective services or operations;
- **d** expenses;
- **e** cost efficiency;
- **f** quality;
- **g** technical and technological advantages;
environmental advantages;
environmental advantages;
energy efficiency;
technical support;
guarantee period and type of guarantees;
spare parts commitments;
terms of maintenance;
number and quality of engaged personnel;
functional characteristics;
social criteria;
costs of ‘life circle’; and
other respective criteria.

The decision to select the bid relies on:
the data on the best bidder;
the subject of the PPP project;
the venue and term of the PPP project;
the type of procedure of selection of the best bidder;
the applied criteria;
the deadline in which the best bidder should be entered into a public contract with the public partner;
elaboration of criteria for the choice of the best bidder; and
other elements required by the law or by the tender documents.

Upon rendering this decision and before entering into the public contract, the public authority is obliged to submit the final draft of the public contracts to its competent authorities for consent. The relevant authority checks the compliance of the final draft of the public contract with the PPPCL and tender documents and gives its consent to the final draft of the public contract within 30 days of its receipt. The public contract can be executed only upon completion of the above procedure and obtaining of the consent of the relevant authorities (state government, government of autonomous province or assembly of local self-governance unit, as elaborated above). The same procedure applies to possible amendments of the public contract during its term.

The public contract is entered into within the deadline set out upon selecting the best bidder. The public partner is obliged to take over from the selected private partner on the date of entering into the public contract all required securities for payment of concession fee or any other fees under the contract, as well as securities for compensation of possible damage in accordance with the estimated value deriving from the rights given under the public contract (e.g., pledge statements, guarantees and promissory notes).
V THE CONTRACT

i Payment

Depending on the subject matter of the PPP project and more specifically on the demand for the respective works or services during the term of the public contract, the forms of payment could be:

a. made to the project company or SPV by the end users of the works or services subject to the PPP project, with no involvement of the public partner and no payments by the public partner (usually agreed where the project company or SPV comes into direct contact with the final users);

b. made to the project company or SPV by the public partner, usually agreed in PPP projects:
   • that assume either the public partner being the principal client of the project company or SPV;
   • where the collection of the fees is conducted by the public partner; or
   • that envisage payment of guaranteed prices for the services provided by the project company or SPV, such as in the case of a ‘power purchase agreement’ and similar projects including the payment of respective subsidies or guaranteed prices under ‘feed-in tariffs’, etc.; or

c. made to the project company or SPV by the end users of the works or services in combination with the respective payments made by the public partner (usually agreed in PPP projects where the demand for the works or services during the term of the public contract is not high, and it is important to ensure the repayment of debts and reasonable return of the investment by the private partner).

As the PPP works and services should meet the respective contracted criteria and standards, the payments to be made under the public contract could be deducted in the procedure set out in the public contract if the works and services do not meet the respective criteria or standards.

The public contracts may differ in the context of payment dynamics. Most commonly the payments are performed monthly or quarterly.

ii State guarantees

As PPP projects are related to the ‘off-balance sheet’ obligation of the public partner, the government refrains from issuing state guarantees as a security of payment by the state. In particular circumstances, owing to strict requirements of the International Monetary Fund (IMF) and state budget, the government has not issued any state guarantees for any PPP projects in the past. This was one of the reasons why such PPP projects failed in the award process: Serbia was not willing to meet the requirements of sponsors in respect of state guarantees.

On the other hand, some PPP projects envisaged other mechanisms of securing pecuniary obligations of the public partner, such as an availability payment, or escrow account, whereby respective funds are deposited for their respective purpose and beneficiary (i.e., the private partner), which serves as security for the payment of the public partner under the public contract.
It depends on the approach and mechanism of providing security for the payment by the state to the sponsor for the pecuniary obligations of the state or other public partners that have entered into the public contract whether these could be qualified as state aid and subject to respective procedure of state aid control.

The public partner is obliged to compensate the private partner (to make payments to the private partner) if events under the public contract occur that require compensation or if early termination of the contract by the private partner occurs owing to public partner default. As these obligations are not secured, the lack of such security (or inadequate financial security) represent a huge risk for a private partner as there is no security or very limited security guaranteeing the private partner that it will be paid, reimbursed or compensated in full.

iii Distribution of risk
The distribution of risks between public and private partners represents the cornerstone of each public contract, subject to the most complex and demanding negotiations over the public contract. In practice, each party wishes to pass as much risk as possible to the other party, believing that a good contract for them is one with limited risks, but a good risk allocation is one where each party handles the risks that it could better handle or mitigate.

The risks in domestic practice may either occur before the financial close of the PPP project (i.e., most commonly treated as closing of the public contract) or after financial close and until the elapse of the term of the public contract. The risks at the stage before financial close are usually shared between the public partner (usually in charge for the transfer of the public assets to the project company or SPV in good standing and properly inscribed in the relevant land registries) and private partner (most commonly in charge of obtaining necessary permits, consents or regulatory approvals).

After financial close, the larger burden of risks passes to the project company or SPV. The stage after financial close usually encompasses designing, construction or reconstruction. As a general rule, the risks associated with designing, obtaining necessary permits, consents or regulatory approvals required at this stage and construction risks are borne by the project company or SPV. However, depending on the peculiarities of the PPP project and characteristics of the area in which the project is to be realised (i.e., historical environmental liabilities and probability of archaeological findings), the risks could be shared so that the public partner shoulders the risk for a limited period of time, and afterwards the risk is passed on to the project company or SPV. The most common risks for the private partner (financial procurement, controlling of the costs of sub-contractors and risks related to meeting construction deadlines) are borne by the project company or SPV. The risk of a change in law or force majeure is usually treated as a shared risk, with peculiarities depending on the subject matter of each public contract.

Understanding proper risk allocation is crucial for sustainable public contracts whereby such understanding is commonly misinterpreted in practice.

iv Adjustment and revision
Upon the request of the public or private partner, the lenders or other financial institution, the public contract may be amended. The amendments of the public contract cannot affect the following elements of the public contract, which thus remain unchanged:
  a the subject of the public contract;
  b the term of the public contract; and
c in the case of public contracts with elements of concession, the amount offered for the concession fee.

If the amendments of the public contract are performed upon the request of financiers, in addition to the above restrictions in amendments, these amendments cannot jeopardise the balance of risk distribution to the detriment of the public partner, nor can the value of the public contract exceed more than 3 per cent.

The request of financiers must be economically justifiable, legally documented and acceptable for the public partner. In the case of amendments of the public contract upon the request of financiers, the opinion of the Ministry of Finance must be obtained for all the projects in which the opinion of the Ministry of Finance is required in preparation of the PPP project and awarding of the public contract.

All amendments of the public contract require the whole procedure applicable for entering into a public contract – such as consent of the relevant authorities of the public partner (as listed above).

In the case of concessions, the concession grantor may, without conducting a new concession award procedure, award to the concessionaire the additional works that have not yet been involved, which are necessary owing to the occurrence of unforeseeable circumstances, in accordance with the requirements and constraints set out in the PPL. In the case of a change in law after entering into the public contract that negatively affects the project, the public contract may be amended without the application of the above-mentioned restrictions, to restore the private or public partner to the position held at the time of entering into the public contract. The term of the public contract cannot be extended to exceed the maximum term of the public contract, namely 50 years.

Ownership of underlying assets

Upon the termination or elapse of a public contract, all facilities, equipment and other assets falling under the scope of PPPs or concessions become the ownership of the state, autonomous province, local self-governance unit, public company or legal entity empowered by a separate law governing the concession award, unless differently regulated in the lenders’ direct agreement (LDA).

The private partner or concessionaire hands over all facilities, equipment and other assets under the scope of the PPP or concession, as well as all other facilities subject to the public contract, which are the ownership of the state, autonomous province, local self-governance unit, public company or legal entity empowered by a separate law governing the concession award. Facilities constructed under the public contract, meeting the criteria set out in the PPPCL that are not the subject of the public contract (public facility, public service, public infrastructure, etc.), remain the ownership of the private partner, whereby the public partner is entitled to obtain these facilities from the private partner in accordance with the conditions and criteria set out in the public contract.

Public contracts regulate the respective notifications, time or deadlines, and handover procedure of the facilities, equipment and assets from the private partner to the public partner both in the case of early termination of the public contract and elapse of the term of the public contract, as well as the role of respective experts in the event of any dispute between the private and public partner in the subject process.
vi Early termination

The PPPCL regulates the case of early termination of the public contract, triggered by a breach of the public contract either by the private partner or by the public partner. The public partner may terminate the public contract if:

- in the case of a concession, the private partner has not paid the concession fee more than twice in sequence or it continuously unduly pays the concession fee;
- the private partner does not provide the services or conduct the works in accordance with the agreed standards for subject services or works set out in the public contract;
- the private partner does not undertake the measures and activities necessary for protection of the assets in general use, public assets, natural resources, cultural heritage or assets under the protection;
- the private partner has provided incorrect data that were decisive in the evaluation of its qualifications for the best bid;
- the private partner does not commence with the implementation of public contract within the agreed deadline;
- the private partner’s conduct contradicts its responsibilities set out in the public contract;
- the private partner has assigned to a third party its right from the public contract without prior consent of the public partner; and
- there has been any other breach of the public contract or terms regulated under the general rules of the law governing contracts and torts, and accepted rules applicable to the respective type of contract.

Before the early termination of the public contract by the public partner, the private partner should be warned in writing of the intention to terminate the public contract and the public partner should also grant the private partner a reasonable deadline to remedy its shortcomings or breach and provide an defence. If the private partner does not remedy the breach, the public partner is entitled to terminate the public contract.

In the event of early termination due to private partner default (breach of contract), the public partner is entitled to damages under the Law on Contracts and Torts. The consequences of early termination of the public contract due to private partner default are regulated by the public contract and under the Law on Contracts and Torts.

On the other hand, the private partner is entitled to early termination of the public contract due to public partner default, according to the rules set out in the public contract and under the Law on Contracts and Torts. The reasons for early termination of the public contract must be set out in said contract. Public partner defaults include:

- the expropriation, deprivation or takeover of the assets or shares of the private partner by the public partner;
- the breach of payment of due obligations of the public partner towards the private partner; and
- the breach of obligations of the private partner from the public contract where material aspects hinder or prevent the private partner from meeting its obligations.

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The consequences of early termination of the public contract due to public partner default are regulated by the public contract and under the Law on Contracts and Torts. In addition, the PPPCL regulates cases when the public contract ceases, as follows:

1. upon the fulfilment of legal obligations (in the case of an elapse of public contract, or in the case of liquidation or bankruptcy of the public partner);
2. termination of the public contract owing to public interest;
3. consensual termination of public contract; or
4. upon final judgement annulling or rescinding the public contract.

The PPPCL sets the requirements for regulating the causes and consequences of early termination, including the minimal amount that must be paid to the public or private partner, manner of payment of respective compensation and the funds from which such compensation is to be paid.

In practice, public contracts contain very similar provisions regulating the consequences of early termination of the public contract (private partner default, public partner default or prolonged force majeure). In general, the amount of compensation includes the aggregate outstanding debt the project company owes to the lenders, and equity (registered capital and shareholder’s loans) excluding permissible deductions. Depending on the grounds of termination, some elements differ.

VI FINANCE

PPPs are typically financed through a combination of equity and debt, including structured project finance, without limitation, provided by commercial banks or financial institutions (i.e., the lenders). The ratio of equity to debt differs by project and depends on the risks associated to it. Generally, the ratio is up to 20 per cent equity and at least 80 per cent debt.

With the magnitude of recent PPP projects in Serbia, no Serbian bank has yet been able to provide the necessary debt or project financing for these projects. This had resulted in cross-border financing, most commonly both from international commercial banks and international financial institutions, such as the EBRD, the IFC World Bank, and the EIB.

The project company or SPV is entitled, with the prior consent of the public partner, to constitute the pledge, burden or lien of any of its rights from the public contract, and respective proceeds deriving from subject right, as well as any assets resulting from the project, in favour of the financiers as a security for repayment of the loans.

Upon the request of the financiers and private partner, the public partner may accept to provide reasonable securities or undertake reasonable liabilities necessary for the private partner in respect of its obligations under the public contract, only under the proviso that these requests do not affect the distribution of risks determined in the respective PPP or concession contract.

The request of the financiers or private partner may include entering into an LDA between the public partner, private partner and financiers, pursuant to which the public partner may agree, inter alia:

1. that the financiers are entitled to step-in rights into the public contract, temporarily perform the contract instead of the project company and remedy any deficiency of the private partner, and that the public partner must accept these actions as undertaken by the private partner;
that the private partner shall not, without the prior consent of financiers, accept the termination of public contract upon the request of the public partner;

c that, pursuant to the public contract, the public partner shall not submit the request in respect of the deficiencies in performing of private partner’s undertakings without prior written notification made to financiers in that respect, giving to financiers, as well as to the private partner, the opportunity to remedy the determined deficiencies in performing the private partner’s undertakings; and

d that the public partner shall obtain consent in advance on the temporary or permanent assignment of a contractual position or any right of the private partner from the public contract, and that it will give the necessary approvals for strengthening the securities given to the financiers by the private partner.

All other customary provisions that are reasonable for the purpose of providing adequate security of the interests of public partner and financiers may also be agreed.

The public partner is obliged to obtain the necessary consent from the authorities specified above before any amendments to the public contract as well as before entering into the LDA. The consent issued in respect of the LDA assumes the right of financiers to conduct the activities and protect their rights gained by entering into the LDA without any subsequent consent by the public partner and its respective authorities.

Although the LDA is recognised in the Serbian legal system through the PPPCL and it is commonly executed in PPP projects, the enforceability of the LDA has still not been tested in domestic circumstances.

VII RECENT DECISIONS

Pursuant to the PPPCL, disputes arising from or in connection with the public contracts may be resolved by domestic or international arbitration. International arbitration may be agreed if the private partner or its direct or indirect shareholder is a foreign legal entity or individual, or, in the case of a consortium, if at least one member of the consortium or its direct or indirect owner is a foreign legal entity or individual. If the parties have not agreed to arbitration, the courts of Serbia are exclusively competent.

Public contracts are drafted and interpreted in accordance with the Serbian law. Owing to the fact that all registered public contracts have been entered into recently, there is still no jurisprudence with regard to public contracts. PPP projects that failed in the past all collapsed before public contracts were entered into.

With regard to the small number of concessions entered into under the previous legal framework, few envisaged international arbitration, such as the International Chamber of Commerce in Paris. One concession project in which a concession contract was entered into (2007–2008) ended in arbitration proceedings with burdensome obligations for the state.

VIII OUTLOOK

The years 2017 and 2018 could be considered the golden years for PPPs in Serbia, demonstrating an increased awareness of the importance of PPPs for the realisation of most complex infrastructure projects in the country, equally beneficial to the public and private sectors. These years were characterised by two valuable and relevant projects in the region: the PPP Vinča project and the Belgrade Nikola Tesla Airport concession. However, there
are still industries to benefit from PPPs, principally in the domain of healthcare, education and social care, with projects such as construction, reconstruction, and the modernisation of facilities and performance of services. A focus on these industries will be vital for the further development of the Serbian society and economy.

This year is expected to result in more PPP contracts being entered into, mainly the construction of car parks in several key cities in Serbia, energy efficiency projects, the construction or reconstruction of schools, hospitals and early childhood education facilities, public electricity and public transport. The number of contracted PPP projects shows there is still a predominance of PPPs without the elements of concession over PPPs with the elements of concession, and this trend is expected to continue in the future.
Chapter 19

SPAIN

Manuel Vélez Fraga and Ana María Sabiote Ortiz

I  OVERVIEW

According to the Spanish National Association of Construction Companies, between 2003 and 2011, Spain generated over 500 public-private partnership (PPP) transactions worth approximately €50 billion. However, since 2012, the PPP market fell to 2005 levels mainly as a result of budget cuts by the Spanish governments. The economic crisis and changes in financial markets affected ongoing PPP projects, those under construction and those recently awarded.

In view of the budget restrictions and the tight levels of public debt, PPP projects are an opportunity to foster investment in public infrastructures as the financing is mainly assumed by the sponsor and the public expense is prorated along the project life. In short, PPP can help the authorities overcome short-term budget constraints by making the most of the PPP advantages available, such as whole-life cost management and payment tied to service delivery, not asset provision.

There is a general conviction that infrastructure development contributes towards economic growth, and privately financed PPPs could be an option to deliver key infrastructure as they limit short-term pressure on both debt and deficit.

According to a report by A. T. Kearney regarding priority areas for sustainable investment in infrastructures in Spain, the country is in a good position with regard to certain infrastructures (namely high-capacity roads, high-speed railways, airports and ports), but it has deficiencies in the maintenance of current infrastructures, the transport of goods, accessibility and urban mobility, as well as secondary nets. In its analysis, A. T. Kearney recommends investment in eight priority areas: water, energy, social care, transport, environment, IT, urbanism (smart cities, mobility and urban integration) and infrastructure maintenance. PPP schemes are a way of obtaining that investment in view of the limited public funds.

The beginning of the recovery of the Spanish economy and the strengthened conception of PPP projects as the opportunity to foster investment in public infrastructures is contributing to initiate a new stage of the public investment in Spain through PPP schemes after the crisis period.

II  THE YEAR IN REVIEW

At the beginning of 2018, the Spanish Infrastructure Ministry approved several investment plans, mainly in roads, that were to be articulated through PPP schemes throughout 2018.

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However, after a successful no-confidence motion filed against the former Prime Minister, Mariano Rajoy, a new Spanish government led by Pedro Sánchez was formed in June 2018. This new government announced its wish to execute such investments plans not necessarily through PPP schemes, and, conversely, has shown to be particularly well disposed to the application of PPP formulas in the Spanish health sector.


The political situation in the region of Catalonia caused significant uncertainty across the Spanish market at the beginning of 2018. However, the general atmosphere appears to have calmed, and the Spanish market has stabilised.

III  GENERAL FRAMEWORK

i  Types of public-private partnership

In the Spanish market, a PPP is not strictly speaking a legal concept, but a type of public policy or management method that entails collaboration between a public entity and a private partner. This collaboration aims to implement, finance and manage public infrastructures in broad terms, including facilities, services and utilities. This clarification serves to avoid misidentifying PPPs in general, with a specific and single contract form under the Spanish Public Procurement Law.

Under the Spanish Public Procurement Law in force until 9 March 2018, there were three main types of PPP contracts: public works concession contracts; public service management contracts; and partnership agreements between the public and the private sector. The Law on Public Sector Contracts (Law 9/2017) has now repealed the Spanish Public Procurement Law.

Public works concession contracts

Traditionally, public works concession contracts are conceived under Spanish law as a contract under which the concessionaire develops a public works project and is remunerated for it through the right to operate the project (by collecting a fee or toll from users), at its own risk, during the term of the concession.

This type of contract keeps its main characteristics under the new Law on Public Sector Contracts and is the most commonly used in practice for new categories of projects such as: projects that require the involvement of the private contractor in defining the project; projects in which the contractor does not manage the public infrastructure or facility directly for private individuals, but for the public entity, which uses the infrastructure as a physical base for the provision of public services to citizens, which are provided by the public authority itself (using its own resources); and projects in which the contractor is not remunerated

2  Namely, Royal Legislative Decree 3/2011 of 14 November approving the Consolidated Public Sector Contracts Law.
directly by users, but by the public entity (either based on the number of users using the infrastructure (payment for demand) or on the conditions under which it is made available to the public authority (payment for availability)).

This broad concept of public works concession is firmly accepted under Spanish law. Currently, public works concession contracts can be executed for the following reasons according to Spanish law:

a the concessionaire may also be in charge of preparing the relevant project, on the basis of the preliminary plan or study approved by the contracting government department;
b the purpose of the public works concession contract includes not only the construction of new infrastructure, but also the renovation and repair of existing constructions, as well as the preservation and maintenance of the constructed elements. This broadens the potential use of this contract, which can now cover not only new infrastructures but also the operation of existing ones that require a significant investment with regard to renovation or maintenance; and

c they also include agreements under which the concessionaire uses the public infrastructure to make it available to the public entity (or to an indirect operator), so that it can use it to provide a public service. In this case, use consists of operating the infrastructure. The operation must be undertaken in accordance with its particular nature and purpose. Since the concession involves a public infrastructure, its nature determines that it must be established as an instrumental support to perform different activities and services of public interest, or for general use or enjoyment, in exchange for remuneration fixed through one of the mechanisms provided by law.

**Services concession contracts**

The services concession contract is an agreement under which the public entity entrusts a third party to manage a service on its behalf, provided that the concessionaire assumes operating risk.

The Law on Public Sector Contracts envisages important changes to the public service management contract, owing to the implementation of Direction 2014/23/EU on concession contracts. Under this Law, the public service management contract will be mainly to reduce the public service concession, although certain forms of the traditional public service management contract remain for local entities; however, the standard public service management contract has been generally classified as follows (even though the Law on Public Sector Contracts does not mention these categories):

a Public service management concession: a contract under which the public authority – responsible for a public service – awards the management of such service to a private entity to operate it at its own risk. The private entity may be paid by the users, the public entity or both.
b Special agreement: another sub-category of the public service management contract, which is characterised by the fact that the public entity awards the management of the service to an individual or legal entity that already provides similar services to the relevant public service. It is common in the education and health sectors.
c Public service management by a semi-public company: the semi-public company is a type of institutionalised PPP under which a company is incorporated through a contract between private and public capital, to then become a public contractor with the characteristic rights and obligations of a concessionaire. Semi-public companies have a long tradition under Spanish law in managing local public services.
There is also a fourth sub-category of public service management contract under the Spanish Public Procurement Law: stakeholder management, under which the public entity and the company share the operating profits of the service in the proportion agreed in the contract.

These categories have been widely modified under the Law on Public Sector Contracts, and only the type of contract ‘service concession’ remains as a PPP scheme for public services. The special agreement, the public service management by a semi-public company and stakeholder management disappear as general schemes (although the semi-public company can still be used by local entities under certain circumstances, and special agreements are still feasible under sectorial regulations). The service concession differentiates from the simple service contract in the risk assumed by the contractor. Whenever there is a transfer of the operation risk to the contractor, the Law on Public Sector Contracts considers it as a concession agreement. On the contract, if there is no a transfer of risk, the contract will be considered a service agreement, not a concession one.

Partnership agreements between the public and the private sector

Despite the fact that the Law on Public Sector Contracts eliminates this type of agreement, partnership agreements between the public and private sector are still in use in some cases.

The main characteristics of this partnership agreement are the combination of two elements:

- the execution by the contractor of a complex operation, which includes one or more of the following activities:
  - the execution of complex works, equipment, systems and utilities, as well as the maintenance, updating or integrated operation;
  - the integrated management of complex facilities; and
  - the provision of other complex services associated with the public authority’s performance of its specific responsibilities; and
- the initial financing by the contractor of the tangible or intangible investments required for the services that constitute the first of the elements.

Very few examples of this type of contract can be found in practice at the national, regional or local level. Some examples can be found in areas such as energy efficiency. In general, public entities have seldom used partnership agreements between the public and private sector.

The authorities

Spain is a regional state, which means it is a decentralised state formed of 17 regions with their own regional authorities. In addition to the national and regional governments, the Spanish Constitution gives local authorities some administrative authority.

Therefore, Spanish authorities are mainly arranged at three institutional levels: national government and its corresponding public entities, regional governments and their corresponding public entities, and local governments and their corresponding public entities.

The three levels have different but concurrent and coordinated powers. Each authority level can exercise these powers through PPP projects. For instance, the national government has authority over transport and can exercise its powers through PPP on transport infrastructures.
Regional governments have authority over health and social care and may develop hospital infrastructures through PPP. Local governments have authority over local services such as water and waste collection, and may implement these services through PPP projects.

Any department of public authority on one of these three levels may enter into PPP contracts in their specific field. For instance, the environmental department of regional or local government may call a procedure for the construction of water infrastructures under a PPP project. However, at the national level, there are two main ministries involved in PPP projects: the Ministry of Infrastructure, as it has authority over all transport involving public works; and the Ministry of Finance, which administers the state budget and expenses – an important role because of public debt restrictions – and analyses the impact of PPP projects on public accounting.

There is currently no specific authority in charge of PPP projects in Spain. In October 2015, the national government created the National Evaluation Office to improve the quality of the investments made by public authorities. The National Evaluation Office assesses the feasibility of public projects under public contracts, taking into account the rules governing budgetary balance. The National Evaluation Office may also assist regional and local governments. However, the ruling officially implementing this National Evaluation Office has not yet been issued, thus it is not yet operative, and, for now, is not regulated by law as a real PPP unit to foster PPP benefits or collect and improve PPP practices. Additionally, the Law on Public Sector Contracts has created the Public Contracts Cooperation Committee and the Public Contracts Supervision Office; both intend to supervise the public entities’ practice regarding contracts and coordinate interpretation criteria.

Apart from the national, regional and local authorities, there are other public entities mainly governed by private law, such as the Railway Infrastructure Administrator or the Port Authorities. These entities often enter into contracts to construct and operate public infrastructures and facilities that include some of the characteristics set out for the types of PPP contracts described in Section III.i. However, although their names and legal frameworks may coincide, totally or in part, with the provisions for PPP contracts governed by the Law on Public Sector Contracts, the effects and termination of these contracts are governed by private law. The general regime for PPP described in this chapter only applies to contracts entered into by other public entities when such entities so decide in the contract in question.

iii General requirements for PPP contracts

Public authorities must meet a series of internal requirements and approvals to enter into a specific PPP contract. Mainly, public authorities must evidence the need for which the PPP is to be executed and prove the advantages of using a PPP contract to cover that need over other types of contracts, or over the public authority implementing it directly. In addition, the public entity must make sure that there are sufficient funds to pay for the PPP contract before calling a public tender under a specific procedure. Likewise, the new National Evaluation Office must analyse the financial sustainability of the public works and public service, for example, whenever the price will be assumed totally or partially by the contracting authorities, not by the users.

In addition, prior to calling the public tender, the contracting authority must undertake to carry out a feasibility study that analyses the economic and financial basis for the contract. This study must provide an estimate of use demands and profitability of the contract,
operational and technological risks in the construction and operation phases, as well as an estimate of investment costs and the potential financing system to perform the work. This feasibility study constitutes the value-for-money assessment by the public authority.

Once the feasibility study has been prepared, and at all times prior to calling the public tender, the contracting authority must prepare the administrative and technical bidding terms that will govern the relationship with the awardee. These terms must be approved by the legal and technical advisers of the contracting body.

Once the internal requirements have been met and the bidding terms have been approved, the public entity can start the tender procedure.

Public works and public services concessions are subject to temporal limits established by law. Therefore, the term of the contract must be justified in the contract itself, taking into account the need to be satisfied and the recovery of the investment, but at all times in accordance with statutory limits, which, under the Law on Public Sector Contracts are: 40 years for public work concessions and for service concessions that include works; 25 years for service concessions not including health services; or 10 years if the service concession refers to healthcare services with no construction works.

In principle, there are no other general restrictions on the use of PPP to cover a public need. In any case, the services that involve exercising public powers cannot be managed by third parties and therefore cannot be entrusted to a contractor through a PPP project. They must be exercised by the public authority directly.

IV  BIDDING AND AWARD PROCEDURE

The Public Procurement Law mainly regulated four types of procedures to select and award the contracts included under the PPP category (see Section III.i): open procedure, restricted procedure, negotiated procedure (with and without publicity) and competitive dialogue. Under the Law on Public Sector Contracts, a fourth type of procedure has been added: association for innovation.

The open and the restricted procedures are called ordinary procedures because they can generally be used by the contracting authorities. Negotiated and competitive dialogue as well as association for innovation procedures can only be used under certain circumstances, such as if the matter is especially complex, in the case of competitive dialogue, or if the preliminary open or restricted procedure has been declared null, in the case of negotiated procedure.

In practice, the two main PPP contracts (public works and public service concessions) are awarded through open procedures, and rarely through restricted procedures. The preference for open procedures is because of the restrictions existing for using other procedures, the higher complexity of the other procedures and the aim of allowing as many participants as possible.

The open procedure results in mainly standardised PPP contracts, as the rights and obligations under the contract are mainly governed by standardised administrative and bidding terms. The bidding terms are not negotiable so they cannot be modified by the tenderers.

Our observations in the following subsections refer to the two most commonly used procedures (open and restricted) in PPP contracting in Spain.

i  Expressions of interest

The Public Procurement Law used to not provide specific procedure for the awarding body to request information from interested parties. However, this request and assessment of interest
could be channelled through the public hearings in preparing the PPP contract: in particular, the public hearing of the feasibility study, which must last a minimum of one month, and the public hearing that may take place in certain complex public projects regarding the construction project. Under Article 115 of the Law on Public Sector Contracts, the contracting authorities may undertake market studies and consultancies to the operators to correctly define the necessities to be covered in the future contract and inform the operators of the future contracting plans and the requirements to be complied with. The law does not prevent public entities from organising other hearings or consultations to obtain feedback from the market before calling a public tender.

Additionally, according to Spanish law, private third parties may submit feasibility studies on themselves in order to invite the public entity to cover a specific need through a public concession. Once the feasibility study has been submitted, the authority decides whether to proceed. If a public tender is called following a feasibility study, and the contract is awarded to another private party, the promoter of the feasibility study must be compensated for the expenses it incurred to promote such study plus 5 per cent. Despite this legal provision, private initiative in submitting feasibility studies has been practically non-existent in Spain. The Law on Public Sector Contracts adds that the promoter will obtain five extra points during the awarding procedure. If the promoter is not finally the awardee, the general compensation applies.

ii Requests for proposals and unsolicited proposals

Once the public entities approve the file to enter into a specific PPP, they can launch the public tender procedure. The procedure starts with an advertisement in the Official State Gazette and the Official Journal of the European Union, or in the Official Gazette of the autonomous community or municipality in question. This advertisement is particularly important because it is the start of the term to submit offers.

Under the open procedure, any third party may submit an offer. Submitting an offer implies the unconditional acceptance of the bidding terms, and the terms of the contract cannot be negotiated.

Between the call and the submission of offers, any interested party may request clarifications from the awarding authority. The queries made and answers provided during this phase must be generally available to all interested parties.

Unlike the open procedure, the restricted procedure is structured in two phases, during which a shortlist of offers is made. The existence of a preliminary selection phase means that, when preparing the contract (before its tendering), the contracting body defines the objective criteria of solvency in accordance with which it will choose the candidates (generally no fewer than five) that it will invite to submit proposals. These criteria are available from the moment the tender is announced. Only the pre-selected candidates may submit proposals.

iii Assessment of the offer and granting of the award

Beyond the preliminary contract preparation phase during which the content of the contract is defined, its content cannot be altered or specified by negotiation under either the open procedure or the restricted procedure. Submitting a proposal entails that the tenderer accepts the bidding terms in full.

Once the proposals have been filed, both the Public Procurement Law and the Law on Public Sector Contracts establish the procedure to open and analyse the proposals under transparency and parity criteria. The awarding criteria in PPP projects usually include both
economic and technical assessment and must be previously defined in the bidding terms in accordance with the purpose of the contract. The criteria that cannot be assessed using an automatic formula will be scored before those subject to automatic criteria to ensure parity.

The contract will be awarded to the bidder with the highest score, and will come into force once both parties enter into the formal agreement. This formal agreement is usually short and merely restates the main obligations that are defined in the bidding terms and the bidder’s proposal.

V THE CONTRACT

i Payment

The standard two methods of payment are suitable for PPP projects: by the contracting authority itself or by the users. However, payment can also be a combination of both methods. Therefore, the difference between the types of PPP contracts does not depend on who pays for the service provided by the sponsor. Direct payment by the users is usually regulated and capped by the contracting authority.

Likewise, payments made by the public entity may depend on the demand or level of use of the infrastructures (as in the case of shadow tolls), or on the availability of the infrastructure for the public entity measured in view of certain service standards or indicators.

There has been some debate over whether payment based on the availability of the public infrastructure to the public entity (payment for availability) is compatible with the existence of a risk for the concessionaire. Whenever the formulas for availability are defined in a clearly aggressive way to ensure that the concessionaire actually assumes the effects of inadequate performance of the contract, it can be said that the concessionaire assumes a real risk.

In practice, the misgivings regarding payment for availability have been precisely due to the establishment of insufficiently sensitive parameters of availability, which, as a result, significantly reduce the risk for the concessionaire.

The remuneration resulting from the operation of the infrastructure may be accompanied by a price paid by the public entity, and by other public contributions to the construction and operation of the infrastructure, making the system of concessionaire remuneration quite flexible.

ii State guarantees

Traditionally, public entities have been considered trustworthy and guarantees have not been required to secure payment. Because of the recent economic crisis, some public entities have had payment problems. This situation has been addressed by tightening the regulations to control public expenses and investments. Likewise, the state has implemented measures to support regional and local authorities in their obligations, but the Law on Public Sector Contracts does not introduce a scheme of guarantees to ensure payments by public contractors. It is focused on a stricter control of the existence of funds and the economic feasibility of the contract before it is executed.

In connection with the above, the Law on Public Sector Contracts introduces the following limits to public contributions and securities:

a public contributions and any type of security, guarantee and other measures to finance the project must necessarily be stipulated in the bidding terms and their amount must
be determined in the award procedure. This provision does away with the possibility of contributions being made at the end of the concession and the contribution being increased after the award resolution;

b bidders will determine the exact amount of public contributions in their offers within the maximums established in the bidding terms; and

c the bidding terms must state any reduction of the public contributions as an evaluation criterion for awarding the contract.

iii Distribution of risk

A key element in public concessions is the construction and operation of infrastructure by the concessionaire at its own risk. According to this principle, the concessionaire must assume the consequences, in financial terms, that may arise from performing the contract.

Under Spanish law, the principle that the contractor assumes its own risk is compatible with the guarantee to restore the financial–economic balance when the contract’s economic imbalance is caused by the public authorities, either by exercising their prerogative to modify the contract, or because of decisions of the contracting administration or other public authorities (including regulatory risk in general).

The risk principle is also compatible with restoring the concession’s economic balance when that balance is disrupted by risks unrelated to actions not only of the concessionaire, but also of the public authorities. This is the case of force majeure events and unexpected risk. Both the Public Procurement Law and the Law on Public Sector Contracts expressly regulate the former. If force majeure has a significant disruptive effect on the economic side of the contract, it gives rise to a right to restore its economic balance and, if the contract can no longer be performed, to its termination in such a way that the recovery of the concessionaire’s investment is guaranteed. However, the concept of force majeure under Spanish law is applied very restrictively and has traditionally been complemented with the concept of ‘unexpected risk’. Under unexpected risk, economic imbalances arising during the performance of a contract as a result of the emergence of a risk that could not have been foreseen when the contract was executed can be corrected. This is the case if the risk in question significantly disrupts the conditions to perform the contract, to the extent that providing the agreed service has become much more burdensome than anticipated for one of the parties. Although the doctrine of unexpected risk is currently quite prevalent, it is not actually referred to in legislation.

In addition to those described above, there is another group of risks that must be determined in the bidding terms as it is not established by either legislation or case law. In the specific case of financing, the risk known as financial closure risk is particularly important. This risk is assumed by the concessionaire and worsens in times of credit market crisis.

Financial closure risk can be defined as the fluctuation in the cost of financing required by the concessionaire to perform the contract, from the time the bid is awarded to the time when the financing is definitively confirmed after being awarded the contract. Generally, unless the bidding terms state otherwise, the tenderers assume the financial closure risk, in such a way that any differences between the financing conditions foreseen when the bid is submitted and the conditions secured when the financing is finalised after the contract is awarded, are assumed by the tenderer, who is not allowed to pass on a higher financing cost than that offered in the financial–economic plan. In practice, the tenderers have attempted
to cover this risk by negotiating derivatives of the main financing contract to cover exchange and interest rates. However, the coverage only comes into effect once the contract is awarded, and thus, until then, the risk continues to be assumed entirely by the tenderer.

iv Adjustment and revision

Public authorities have special prerogatives over the contractor, basically consisting of the power to construe the terms and conditions of the contract; unilaterally modify the contract for public interest reasons; impose penalties; and unilaterally terminate the contract under certain circumstances set out by law and in the contract, and establish the effects of this termination.

Therefore, according to these prerogatives, the contracting authority will retain its right to modify aspects of the contract for new and compelling public interest reasons, provided that the contractor is paid compensation. This legal prerogative can be challenged in court when it does not fulfil the relevant mandatory provisions.

The grantor modifying the concession is one of the events that triggers the contractor’s right to rebalance the financial terms of a contract, provided that the amendment affects the economic balance of the contract when it was awarded to the detriment of the concessionaire (beyond a mere reduction in the expected profits). The concessionaire can request the grantor to rebalance the financial situation by evidencing the unbalancing event and its actual effects on the existing financial plan approved as part of the contract. The rebalancing can be implemented by modifying any financial condition of the contract. The terms of the tender may limit when this financial rebalancing can be achieved.

The compensation to the concessionaire must be paid within the term set out in the bidding terms, which must not exceed the maximum legal term established by law, which is currently 30 days following the grantor’s approval of the service rendered. Late payment triggers default interest. When late payment exceeds a joint period, the contractor may suspend the contract, or even request its termination, as explained in Section V.vi.

The review or update of the compensation under public contracts also depends on the bidding terms that cannot be contrary to the legal requirements. The review of the price in public contracts was modified by Law 2/2015 of 30 March and further implemented for public contracts by Royal Decree 55/2017 of 3 February. Under these new regulations, the review can only take place when the investment return exceeds five years, and subject to the strict conditions set out in the regulations.

v Ownership of underlying assets

Assets in PPP contracts are owned by the public authority. Because of its connection to a public work or service, the public entity does not lose its right in rem over the assets during the contract, but the concessionaire is empowered to use them for the proper rendering of the service or the operation of the public works. At the end of concession contracts, the facilities must be returned to the grantor in adequate working condition to continue providing the services. To this end, the grantor may inspect the facilities to make sure that the grantor is complying with its obligations under the contracts.

Empowerment to use the assets to properly render the service or operation of the public works implies that the contractor can dispose of the assets with the assistance of the public entity, when necessary, to that end, and that the contractor may mortgage the concession

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itself in accordance with the mortgage legislation, and with the prior authorisation of the contracting authority. The mortgage cannot be used to secure obligations under contracts other than the relevant PPP.

According to both the Public Procurement Law and the Law on Public Sector Contracts, the contract itself cannot be assigned without the grantor’s prior authorisation. Spanish public procurement law has traditionally regulated the assignment of the contract. When the contract is silent, the transfer of the contractor’s shares does not require the grantor’s prior authorisation, except when the transfer may be considered equivalent to assigning the contract. Transferring shares may be considered an assignment when it only relates to a company whose sole object is to operate public concessions and the transfer of shares entails a change in the person who controls the holder of the concession.

vi Early termination
The public authority can terminate the concession early under certain circumstances set out by law and in the contract, and establish the effects of this termination. The effects (compensation) of early termination vary depending on the specific termination event.

The Public Procurement Law and the Law on Public Sector Contracts establish the following main early termination events for public concessions:

- the concessionaire loses its legal personality;
- the contractor enters into a creditors’ agreement or files for insolvency;
- foreclosing the concession mortgage is unfeasible;
- mutual agreement between the public authority and the contractor;
- the concession has been seized by the authority for longer than the agreed maximum term;
- payment delays by the public authority for over six months;
- the contract is revoked by the public authorities at their discretion (this unilateral termination is not connected to the concessionaire’s management);
- the exploitation of the public infrastructure or the public service is cancelled for public interest reasons;
- the infrastructure cannot be operated because of the contracting authority’s decisions after the contract was executed; or
- the concessionaire fails to comply with essential contractual obligations.

If the concession is terminated for public interest reasons, adequate compensation must be paid. According to case law, ‘public interest’ is an abstract notion that can only be determined and defined case by case and taking into account the characteristics and circumstances of a particular contract as a whole, such as its subject matter, purpose and nature. The grantor must justify its decision on public interest reasons, which can be challenged in court.

Among other consequences, rights arising for the contractor from an early termination event include the equity value of the investment, usually, albeit inappropriately, referred to as the pecuniary liability of the public authority (RPA).3

The method of calculating RPA was modified in 2015. Following the modification of 2015, the provisions on RPA distinguish two calculation methods: for cases involving a termination not attributable to the public authority, the RPA is determined in a new award

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3 Responsabilidad patrimonial de la administración.
process for the concession; and in cases of termination not attributable to the concessionaire, the regulation on compensation for investments is similar, but specifies that straight-line depreciation will be used.

Termination is not automatic. The contracting authority must undergo a procedure in which the concessionaire is heard.

VI  FINANCE

The private funds involved in a PPP project may come from two sources: tenderers (usually as capital of the special purpose vehicle responsible for carrying out the project) or third-party financers.

Financing PPP contracts in Spain usually follows the traditional scheme of bank financing. This scheme relies chiefly on pledges, and, in some cases, assignment to the financer of both the credit rights arising from the normal operation of the infrastructure (periodic cash inflows from the operation of the public works or services) and the credit rights arising from the early termination of the contract (the equity value of the investment or RPA, as explained above).

The financing is normally granted in the form of credit, which the concessionaire can obtain upon completing the project phases. The syndication mechanism is a response to the need to distribute the operating risks when they are too high to be assumed by a single entity. In the past few years we have seen growth in particular of uninsured or ‘club deal’ syndicated loans, under which each institution of the syndicate guarantees only its share, as opposed to other types where one or more institutions undertake to contribute all of the financing if they are unable to find enough institutions that wish to participate in the financing project.

Syndication of financing involves the execution of a contract by creditors including all the institutions in the syndicate that regulates, among other matters, the majorities required to adopt decisions related to financing and the rules to distribute the amounts obtained from the concessionaire company. Unless other debt and creditors’ seniority is established, loan repayments are usually distributed in proportion to each institution’s share in the financing.

To facilitate the operational management of the financing, one of the financial institutions assumes the role of agent bank. As such, it is responsible for delivering the funds to the company, distributing the repayments among all the financial institutions and channelling communications in each direction.

Given that the tendering procedure generally adopted to award concessions is a standardised one (open or restricted), negotiations with financial institutions begin in the phase prior to the contract, since the tenderer has to include the main characteristics of the financing that it will be able to secure in its financial bid. However, credit negotiations are only finalised a posteriori, once the tenderer is awarded the contract. At this time, the concessionaire’s negotiating position is very much influenced by the urgency of the financing to fulfil the contractual obligations it has assumed with regard to the public authority. Moreover, the added cost with which the financing may be finally secured will generally, but not always, be assumed by the concessionaire, who has little chance of passing it on to the public authority.

Guarantees play a fundamental role in bank financing. In fact, the granting of financing is generally conditional upon the prior or simultaneous granting of guarantees over the different assets, goods and rights that constitute the equity of the concessionaire company.
On the other hand, the Public Procurement Law and the Law on Public Sector Contracts expressly regulate the issue of bonds by concessionaires, as well as the securitisation of credit rights arising from the concession. Given that the concessionaire generally has no revenue other than these credit rights, the bonds and securities that could potentially be issued would essentially be those resulting from securitisation. The issue of these securities will require prior administrative authorisation from the contracting authority, which can only be denied if this is justified by the successful outcome of the concession or another factor of public interest.

VII  RECENT DECISIONS

The main recent relevant jurisprudence relating to PPP has concerned public concessions for the construction and operation of ring roads in Madrid. However, this jurisprudence, mainly related to expropriation costs and calculation of damages for early termination events, varies depending on the specific circumstances of the case at stake and is limited to exceptional circumstances that may not apply on a general basis. There has not been an established line of jurisprudence to strengthen or weaken the PPP model, which is a popular scheme in Spain, through the concession model.

VIII  OUTLOOK

Traditionally, investing in infrastructure has contributed to fostering the economy through the improvement of the country’s competitiveness and citizens’ welfare. Despite the high level of transport infrastructures (see Section I), there is still a significant investment deficit in Spain in other priority sectors, such as infrastructure maintenance, transportation of goods, social care (health and education) and water, compared with other European countries.

Alternative financing schemes are required because of public budget restrictions. In this scenario, PPPs are a perfect channel for private investment in infrastructures. This situation, together with the acceptance of the PPP model in Spain and the existence of brownfield opportunities, provides an ideal setting for PPP projects in Spain in the coming years. Accordingly, the former national government approved several investment plans, mainly in roads, which were to be articulated through PPP schemes throughout 2018, as is the case for the public procurement to award the new concessions for the exploitation of the toll roads recovered by the national government (the Extraordinary Road Investment Plan). However, according to the latest versions of this Extraordinary Road Investment Plan – now expected to be approved by the new government during the first half of 2019 – such PPP schemes seem to have been set aside for the time being, as a consequence of the lack of agreement between both the private and the public sector. Thus, the new months will be key in clarifying the government’s compromise with this alternative financing scheme.
Chapter 20

TAIWAN

Pauline Wang and Yung-Ching Huang

I OVERVIEW

In Taiwan, public-private partnership (PPP) schemes were prescribed under several laws before the Statute for Encouragement of Private Participation in Transportation Infrastructure Projects was enacted in 1994. The Statute for Encouragement of Private Participation in Transportation Infrastructure Projects covers only transportation infrastructure, which is supervised by the Ministry of Transportation. Taiwan High Speed Rail is a representative project of transportation infrastructure subsidised by the Statute for Encouragement of Private Participation in Transportation Infrastructure Projects.

As PPPs became popular in Taiwan, Taiwan strove to create a hospitable environment for PPPs by statutory enactments and amendments. In 2000, the Act for Promotion of Private Participation in Infrastructure Projects (PPIP Act) was enacted, covering various types of infrastructure, for example, transportation facilities and common conduits, environmental pollution prevention, water supply, and sanitation facilities. The PPIP Act not only establishes a set of fair bidding procedures but also offers many incentives, such as favourable rentals or tax exemptions.

Besides the PPIP Act, there are other laws governing private participation in specific infrastructure projects, including the Mass Rapid Transit Act, the National Property Act, the Local Government Public Property Administration Act, the Commercial Port Act, and the Electricity Act. Together, the different objectives and operating guidelines of those laws create a sound legal environment that has fostered many accomplishments through the united efforts of government agencies. However, the PPIP Act governs most PPP projects in Taiwan. Meanwhile, even when the PPIP Act does not apply in some projects, Article 99 of the Government Procurement Act may apply to the procedures by which an entity selects an investor to construct or operate a project approved by the competent authority for private investment, provided that the project is one in transportation, energy, environmental protection, tourism, and planned or approved by the government. But the benefits under the PPIP Act, such as favourable rentals or tax exemptions, will not apply.

There are various ways for private entities to enter into partnerships with the government in Taiwan. From 2003 to 31 May 2018, more than 1,500 contracts were signed, totalling over NT$1.31 trillion in value. To accelerate national development and curb government expenditure, the Taiwanese government works in earnest to promote PPPs. Well-known projects include the build–operate–transfer (BOT) projects for the Electronic Toll Collection, the Taipei Bus Station and the City Hall Bus Station; the operate-transfer (OT) projects

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II THE YEAR IN REVIEW

According to the Ministry of Finance (MOF), there were a total of 66 signed concession agreements as at October 2018. Major projects include Former Lung-Hua Elementary School Mall and Elderly Rental Houses in Kaohsiung (NT$375 billion), Taipei City Nangang Bus Station BOT Project (NT$307 billion), and Superficies Project of Taipei Air Force Recreation Center (NT$107 billion). The following projects are estimated to begin before the end of the year: the BOT project for Taichung Station Railway Cultural Park (NT$30 billion), Zhong-xiao-huai-sheng Urban Renewal in Taipei (NT$30 billion), and the Parkingland BOT Project of Land No. 470-1, Gong-yuan Section, Zhubei City, Hsinchu County (NT$17 billion).

Before some minor wording adjustment in 2018, there were several important amendments to the PPIP Act in 2015, including:

- a government office buildings were added in Article 3 of the PPIP Act as a kind of infrastructure project subject to the PPIP Act;
- a feasibility assessment before promoting PPP projects was added in Article 61 of the PPIP Act;
- Paragraph 2, Article 11 of the PPIP Act was amended to the effect that the concession agreement between the authority in charge and the private entity shall specify the payment of rental for the land. Additionally, ‘control and management of operation quality’ was added to Paragraph 7 of the same article for elaborating on the concession agreement and the efficiency of operation. ‘Adjustment and revision to or termination of the agreement’ was added to Paragraph 8, Article 11. The last addition requires the dispute resolution mechanism to be prescribed in the concession agreement;
- Paragraph 2, Article 14 of the PPIP Act was added to require that where environmental impact assessment, and soil and water conservation treatment and maintenance for the land needed for a major infrastructure project are compulsory, the assessment, treatment and maintenance be reviewed jointly or concurrently by the authorities concerned in accordance with the laws and regulations governing urban planning and regional planning; and
- Paragraph 1, Article 29 of the PPIP Act introduced the key performance indicators into the subsidy mechanism for the PPP projects in which private entities cannot fully self-finance their investment.

In 2017, in response to the 2015 amendments, regulations and guidelines for PPP projects were issued or amended by the MOF, as follows:

- The Regulations on Takeover of PPP Government Office Buildings were published. These Regulations cover the procedure and rights and obligation of both parties if the government agency takes over the project in the condition described in Paragraph 1, Article 53 – any failure to take immediate action may jeopardise major public interests or result in imminent danger.
The Evaluation Mechanism for Public Infrastructure was amended. This evaluation mechanism is meant to help government officials consider whether to initiate a PPP project. The evaluation factors include policy and financial aspects.

The Control and Management of Operation Quality Evaluation Guidelines were renewed. The guidelines elaborate on the control and management of operation quality evaluation procedure.

The PPP Operating Performance Subsidy Evaluation Guidelines were published, and these guidelines provide a basis for the government to evaluate the self-financing capability of the project and establish the key performance indicators for different kinds of public infrastructure.

The Guidelines for the Authority in Charge to Execute PPP Projects were reviewed and revised according to the amended PPIP Act.

In 2016, the MOF published the Regulations for Private Institutions Applying to Participate in the Infrastructure Project under its Own Planning, which would be discussed in detail in the privately initiated project.

In 2016, the Guidelines for Mediation Committee in Performance of Concession Agreement in PPP Projects were published by the MOF. Such guidelines clarify the composition, appointment and the mission of the committee in Article 48-1 of the PPIP Act, in hope of enhancing the efficiency of mediation.

III GENERAL FRAMEWORK

i Types of public-private partnership

Pursuant to Article 8 of the PPIP Act, a private entity may participate in an infrastructure project in any of the following ways: BOT, build–transfer–operate (BTO), ROT, OT and build-operate-own (BOO):

a BOT: the private entity invests in the construction and operation of a new infrastructure, and upon expiration of the operation period, transfers the ownership of such infrastructure to the government;

b BTO: either:

- the private entity invests in the construction of the infrastructure and, upon completion of the construction, relinquishes the ownership to the government without compensation. The government then lets the private entity operate the infrastructure. Upon expiration of the operation period, the right to operate reverts to the government; or

- the private entity invests in the construction of the infrastructure. Upon completion of the construction, the government acquires the ownership by paying the construction expenses in a lump sum or in instalments. The government then lets the private entity operate the infrastructure. Upon expiration of the operation period, the right to operate reverts to the government;

c ROT: the private entity invests in the extension, reconstruction or repair of an existing infrastructure, and operates the infrastructure. Upon expiration of the operation period, the right to operate reverts to the government;

d OT: the private entity operates an infrastructure facility built with investment from the government. Upon expiration of the operation period, the right to operate reverts to the government; and
BOO: the private entity invests in the construction of an infrastructure on private land provided by the private entity itself, has the ownership thereof upon completion of the construction, and then operates the infrastructure itself or commissions a third party to operate it.

In addition, PPP project implementation projects can also be divided into two types:

- government-initiated projects, wherein private entities are recruited by the government to implement a publicly financed project, where the government sees the private entity as having superior capacity and expertise to deal with the project than the government, and expects the private entity to be more efficient than the government; and
- privately initiated projects, wherein a private entity independently discovers a project that is deemed profitable among the public-private partnership projects and proposes its implementation to the government.

ii The authorities

According to Paragraph 1, Article 5 of the PPIP Act, the competent authority is the Public Construction Committee of the Executive Yuan, which became the Department of Promotion of Private Participation of the Ministry of Finance (the DPPP) in 2013. In practice, the DPPP is the agency in charge of the PPP scheme. Besides helping the Ministry of Finance (MOF) interpret the PPIP Act, the DPPP also drafts guidelines, frameworks, principles and programmes and announces them in the name of the MOF.

Besides the above, the DPPP engages in a wide range of work to promote PPPs. For example, it publishes investors’ manuals, explaining approaches to the PPIP Act and related incentives or benefits to foreign investors. It also schedules training courses for officials participating in PPP. To incentivise execution and consultation, ‘Golden Thumb Awards’ are given every year to consultants or authorities in charge and private entities for well-executed projects.

In addition, according to Paragraph 2, Article 5 of the PPIP Act, the authority in charge refers to any authority in charge of matters relating to private participation in infrastructure projects, which may be the central authorities in charge of the industries, the municipal governments at the municipal level or the county governments at the county level. An authority in charge may authorise any of its subordinate agencies to execute matters to be handled as authorised by the Act.

iii General requirements for PPP contracts

According to Article 3 of the PPIP Act, projects for constructing any of the following facilities for public use and for promotion of public interest could be deemed an infrastructure project under the PPIP Act:

- transportation facilities and common conduits;
- environmental pollution prevention facilities;
- sewerage, water supply and water conservancy facilities;
- sanitation and medical facilities;
- social and labour welfare facilities;
- cultural and educational facilities;
- tourist attractions and lodgings;
- power facilities and public gas and fuel supply facilities;
- sports facilities;
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j parks and green spaces;
k industrial, commercial and hi-tech facilities;
l development of new towns;
m agricultural facilities; and
n government office buildings.

As previously stated, there are other laws governing private participation in specific infrastructure projects; therefore, if a project does not fall within the types prescribed in Article 3 of the PPIP Act, it may still proceed under the PPP scheme. However, in such cases, the benefits under the PPIP Act, for example, favourable rentals or tax exemptions, will not apply.

Besides the limitation on types of projects qualifying under the PPIP Act, Article 11 of the PPIP Act also requires the following matters to be specified in concession agreements case by case:
a the planning, building, operation and transfer of the infrastructure;
b the payment of the rental for the land;
c the royalties, the relevant expenses, the fare rate and the adjustment;
d renewal of the agreement upon the expiration of the operation period;
e risk allocation;
f the solution in the case of poor construction or operation;
g the step-in right of the related parties;
h the auditing, construction control and management of operation quality;
i a dispute-resolution mechanism;
j the arbitration clause; and
k amendment to or termination of the agreement, and any other agreed matters.

IV BIDDING AND AWARD PROCEDURE

Private entities interested in making an application can submit required documents for the government to select the best qualified applicant. Following selection, both parties enter into negotiation and sign an agreement. If, after the selection, the best applicant fails to execute the agreement in accordance with the schedule, then the government may make another public notice to negotiate and sign an agreement with the second-best applicant.

i Expressions of interest

As previously stated, PPP project implementation can also be divided into two types: government-initiated projects and privately initiated projects.

To the government-initiated projects, the authority in charge has to first evaluate whether the PPP scheme is suitable for the project. According to the Evaluation Mechanism for Public Infrastructure proposed by the MOF, the evaluation for feasibility covers the current public infrastructure operation, public policy, the type of PPP, finances and land ownership. After such an evaluation, evaluation of feasibility and preliminary plan should be done. According to the Guidelines for Governmental Agencies in Promotion of Private Participation, feasibility in market, engineering technology, finances, law and land securing should be evaluated carefully. Moreover, environmental impact assessment (EIA) has been a significant concern in evaluating feasibility in recent years.
Based on the evaluation of feasibility, the government should commence the preliminary plan for the project. The preliminary plan should include:

- the goal of the project;
- the term and scope of the approval;
- the plan for construction and operation;
- the timetable for EIA;
- finances and risk management;
- approved investment; and
- the plan for implementing the agreement.

The guidelines specifically point out that the plan for construction and operation has to cover EIA and carbon emission reduction initiatives. To the privately initiated projects, a private entity needs to submit:

- a land utilisation plan;
- a building plan;
- an operational plan;
- a financial plan;
- a letter of intent to finance issued by a financial institution; and
- other documents required by applicable laws (the requested documents) to the authority in charge for approval.

If the authority in charge finds the application meets the policy requirements, the application shall be reviewed according to the following procedure:

- where the private entity applicant provides private land needed by the project, the application shall be reviewed by the authority in charge; and
- where the authority in charge provides land and facilities needed by the project, the private entity applicant shall submit a project outline in advance.

After the project outline passes the preliminary review of the authority in charge, the application guide will be made and announced by the authority in charge. Then the original applicant and other applicants may submit the requested documents accordingly. To evaluate the applications, the authority in charge shall organise a selection committee to establish the evaluation criteria based on the purpose of the infrastructure project concerned, examine and evaluate the materials submitted by the applicants on a fair basis, and then select the best applicant within the evaluation period.

**ii Requests for proposals and unsolicited proposals**

After the evaluation of feasibility and the preliminary plan in the government-initiated projects, the government would make a public notice to invite bids from interested entities to the privately initiated projects, where the authority in charge provides land and facilities needed by the project.

The public notice should specify:

- the character, basic requirements, concession period and scope of the infrastructure project;
- the qualification requirements for the applicant;
- the items and standards of application review;
- the items awaiting negotiation;
the date of announcement, the deadline for application, the application procedure and 
earnest money; 
the scope for the ancillary enterprises allowed for private investment and the concession 
period for the land needed; and 
the matters authorised or commissioned by the authority in charge in accordance with 
Paragraphs 2 and 3, Article 5 of the Act.

Besides the information given in the public notice, the tender documents shall state the 
following items:

- information in the public notice;
- the main content and format of the investment proposal;
- the method and schedule of the application review;
- the commitment and cooperation matters of the government;
- the items and procedures of negotiation, only when negotiations are allowed;
- the deadline for contract negotiation and execution; and
- the draft of concession agreement.

If a private entity is interested in a project, then it may submit a bid by following the 
instructions on the public notice and the tender document.

### iii Evaluation and grant

According to the Regulations Governing the Organisation of the Selection Committee and 
the Evaluation for Private Participation in Infrastructure Projects, the authority in charge 
has to organise a selection committee for private participation in infrastructure projects 
(the Selection Committee) for each project. The Selection Committee has to be established 
before a public notice inviting private participation is posted, and should be dissolved upon 
completion of the review process and when there are no outstanding issues.

The duties of the Selection Committee include prescribing or approving evaluation 
criteria and ways of selection, conducting comprehensive evaluation of the applications, 
helping the authority in charge to interpret matters related to the evaluation items, evaluation 
criteria and the selection outcome. When prescribing or approving the evaluation items 
and evaluation criteria, the Selection Committee has to first consider the purpose of the 
infrastructure project and public interest. Evaluation criteria should include the financial 
plan and appropriate allocation standards; innovation and creativity may be included in the 
evaluation criteria or sub-criteria, subject to the type of the project. The financial plan has to 
cover the royalties or governmental premiums, subject to the type of the project.

As required by this regulation, the Selection Committee should consist of seven to 17 
members appointed or retained by the authority in charge and have expertise or experience 
in fields related to the infrastructure project. To ensure fairness, at least half of the Selection 
Committee members have to be external experts or scholars.

### V THE CONTRACT

i Payment

The payments typically made by the private entity in a PPP Project include the land rental 
and the royalties. Unlike royalties, which can be waived when the private entity’s finances 
decline during a project, land rental is compulsory. According to the Regulations for
Favourable Rentals Regarding Public Land Lease and Superficies in Infrastructure Projects, rental calculation for public land in infrastructure projects is divided into building period and operation period. In the building period, the rental is equal to land-value tax plus the necessary maintenance fee. In the operation period, rental is 60 per cent of the amount calculated by the rental standard of State-Owned Land Lot. However, the amount of the rental may not exceed 106 per cent of the previous rental. Rental is an issue because the announced land value was once considerably lower than the market price, and today the announced land value is getting closer to the market price. During the bidding process, the rental is calculated using the announced land value. Therefore, if during the operation period, the market price of the land and the announced land value around the projects soar, then the private entity may face unforeseen financial risks.

ii State guarantees
In Taiwan, only a few kinds of agreements involve state guarantees, for example, the guaranteed amount of sewage for operation and disposal fees calculation for sewer PPP projects, and there are fewer agreements having such guarantees in recent years.

iii Distribution of risk
In concession agreements and civil law, the doctrine of change of circumstances and clauses in force majeure events are the principal means of distribution of risk.

The common terms regarding force majeure and changes in circumstances are:

a force majeure, which includes:
• wars (whether declared or not), invasions, actions of foreign enemies, rebellions, revolutions, insurrections, civil wars or terrorist activities;
• radiation or radioactive contamination from explosion of nuclear fuels or burning of wastes;
• natural disasters, including but not limited to earthquakes, floods, tsunami, lightning, or any occurrences due to forces of nature;
• strikes, labour riots or other labour disputes not attributable to Party B or its contractors, which will affect the performance of this Agreement;
• discovery of monuments or sites protected by laws and regulations, which will affect the construction procedure or the expected commencement of the operations; and
• environmental pollution occurred in the construction sites which will affect construction workers; and

b changes in circumstances, which are not attributable to either party and refers to:
• events other than force majeure events, changes in government policies, revisions of laws, administrative orders, sanctions, actions or no action that has significant adverse effects on Party B’s construction or operations hereunder or its financial condition and is likely to impact the performance of this Agreement;
• major changes in the overall economy causing significant adverse impact on Party B’s construction or operations hereunder or its financial condition, and likely to impact the performance of this Agreement or render the project not self-liquidity;
• Party B’s delay in obtaining construction-related licences and permits for over a certain number of days for causes not attributable to Party B; and
• other non-force majeure events.
Once an event is identified as either a *force majeure* event or a change in circumstances, the parties can take one or more of the remedial measures set forth below according to the terms of the concession agreement:

- the damage resulting from *force majeure* events or change in circumstances shall first be indemnified by the insurance policies procured by the private entity or any of its contractors, suppliers, professional advisers or trustees;
- a reduction of the rents or other taxes in accordance with the applicable laws;
- if the private entity sustains material damage as a result of natural disasters, the authority in charge shall negotiate with financial institutions for extending serious natural disaster damage recovery loans or other reliefs to the private entity;
- to suspend the construction and operation periods in the concession agreement, and extend such periods as appropriate;
- adjusting the fee schedule of the public utilities or the operations of Party B approved by Party A; and
- other measures agreed on by the parties.

### Adjustment and revision

Adjustment and revision clauses are usually in the concession agreement. Common grounds for agreement revision include:

- occurrence of any *force majeure* events, exceptions, or changes in circumstances causing the continued performance of this Agreement to be unfair or difficult;
- out of consideration for public interests, continued performance of this Agreement or continued handling according to this Agreement that may have adverse effects on public interests;
- substantial reduction of Party B's construction and operation costs or tax burden results from causes other than Party B's performance of this Agreement;
- if revised, the schedules or appendices have no adverse effects on public interests and are not unfair; and
- a revision that is necessary for performance of this Agreement, is agreed on by the parties, has no adverse effects on public interests, and is not unfair.

In addition, as most concession agreements are long-term contracts, the MOF also encourages adding a term for regular review into the contract, such as a certain number of years after the signing of this Agreement or the last revision of this Agreement, the parties may review whether it is necessary to revise this Agreement. Issues to be reviewed include but are not limited to whether events not attributable to Party A have a great impact on Party B's performance of this Agreement. The events in question are as follows:

- the annual change in the price index announced by the Directorate-General of Budget, Accounting and Statistics of the Executive Yuan rises by a certain per cent or falls by a certain per cent for certain consecutive years;
- the national economic growth rate announced by the Directorate-General of Budget, Accounting and Statistics of the Executive Yuan rises by a certain per cent or falls by a certain per cent for certain consecutive quarters;
- Party B's accumulated construction and operation costs in a certain number of years increase by over a certain per cent as compared with the estimated costs set forth in the original financial schedule; and
other factors, such as fluctuations of price indexes in other fields, or new technologies, new materials or new engineering technologies for medical tests or smart transportation systems, where product technology changes fast.

Ownership of underlying assets
To prevent interruptions in or abandonment of PPP projects, the PPIP Act imposes the following limitation on transferring the underlying assets in most cases. Pursuant to Article 51 of the PPIP Act, a private entity shall not transfer, lease out or create any encumbrance on the concession obtained under the concession agreement, nor shall it make such concession an object for enforcement in a civil action, unless the authority in charge declares that such an act is necessary for the improvement plan or the proper measures specified in the cases prescribed in the PPIP Act. This situation may happen in BOT or BOO cases, when the private entity owns the underlying assets. In short, unless the government’s consent is obtained, the underlying assets may not be transferred, leased or set as security.

Early termination
The common grounds for early termination include:

a mutually agreed termination, which means that during the term of the agreement, the parties may mutually agree to terminate the agreement;
b termination for causes attributable to the private entity; and
c termination for causes not attributable to the private entity, such as force majeure events or changes in circumstances, termination for a reason attributable to the authority in charge, or termination due to changes of government policies

For each termination cause, the effects on the termination will be stipulated in the concession agreement.

VI  FINANCE

Before Paragraph 1, Article 29 of the PPIP Act was amended in 2015, if a project could not be fully self-financed, the authority in charge can subsidise the loan interest or invest in the project. However, shadow tolls under the private finance initiative module in the United Kingdom were consulted in the drafting of the 2015 amendment, and the above subsidy was replaced by the following alternative: if a private entity cannot fully self-finance its investment in an infrastructure project, even if other incentives under the PPIP Act are applicable, the authority in charge may, for the amount of the shortfall, subsidise the part of the interest on the loan needed by the private entity or grant a subsidy, depending on whether the private entity reaches the key performance indicators stipulated in the concession agreement. This system provides motivation for enhancing operational performance. The reason for the amendment provides that it is in the public interest for government agencies to be supportive, yet if subsidies were given improperly, they would lead to rampant speculation and cause inefficiency of the projects. Therefore, the private entities can be better motivated if the subsidies are contingent upon their operational performance.
VII RECENT DECISIONS

Since Article 48-1 of the PPIP Act indicates that the concession agreement of every PPP project shall provide for the formation of a mediation committee for contract dispute resolution and may require that disputes be submitted to arbitration if mediation fails, more and more disputes that arose in the PPP projects can be resolved by either mediation or arbitration within a limited period.

In addition, disputes in PPP projects usually revolve around financial conditions, and if one party is not satisfied by the financial conditions, it will propose adjustments. In the past, it was usually the private entities that initiated such adjustment; however, in recent years, the government has initiated such adjustments to adjust the royalties.

VIII OUTLOOK

In recent years, compared with local projects, major national projects have been rare. To boost the number of PPP projects, the government has developed more sophisticated standard operating procedures in different kinds of projects, and the types of projects open for PPPs are broader and more contemporary. Both central and local governments fully support and promote PPP projects, and foreign investment is especially welcome. We believe that in the coming year, the Taiwanese government will establish an even more conducive environment for the PPP scheme.
Chapter 21

TANZANIA

Nicholas Zervos¹

I  OVERVIEW

The Tanzanian legal system has evolved largely on the basis of English common law because of British presence in the country from 1919 until independence in 1961. In Zanzibar, the legal system has evolved from both English common law and Islamic law. The legal framework in Tanzania comprises statutes, rules and regulations enacted by Parliament as well as those formulated by other statutory and professional bodies. The Constitution is the fundamental law prevailing over all other legislation and includes a Bill of Rights.

The government of Tanzania published a National PPP Policy in 2009 that recognises the role of the private sector to bring about socio-economic development through investments and to ensure efficiency, effectiveness, accountability, quality and outreach of services.

The projects relevant for public-private partnerships (PPPs) are in ‘productive and social sectors’ including, but not limited to, the following sectors:

a  agriculture;

b  infrastructure;

c  industry and manufacturing;

d  exploration and mining;

e  education;

f  health;

g  environment and waste management;

h  information and communication technology;

i  trade and marketing;

j  sports, entertainment and recreation;

k  natural resources and tourism; and

l  energy.

II  THE YEAR IN REVIEW

The Public-Private Partnership (Amendment) Act 2018 (PPP Amendment Act 2018) is now in place to rationalise the PPP framework by merging the two original PPP Units into one PPP Centre, replacing the PPP Technical Committee with the Public-Private Partnership Steering Committee, and deleting the National Investment Steering Committee. The Minister of Finance and Planning is the minister responsible for PPPs and procurement through an open and competitive bidding process (both solicited and unsolicited proposals), and the

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Minister for Investment prepares specific regulations for unsolicited proposals. Further, the PPP Amendment Act 2018 provides that the Minister of Finance and Planning may exempt procurement of an unsolicited project from the competitive bidding process where it meets the given criteria.

The PPP Regulations 2015 are now in the process of being reviewed and are expected to be gazetted in 2019.

PPPs have been identified as a key tool in aiding development. Major ongoing undertakings include the Dar es Salaam Rapid Transit project.

### III GENERAL FRAMEWORK

The PPP Act came into effect in 2010 with the PPP Regulations, and there have been various subsequent amendments to the legislation, the latest taking place in 2018. Although the PPP Act was revised in October 2018, the PPP Regulations 2015 are still in the review process.

The PPP Act and PPP Regulations provide for the institutional framework for the implementation of PPP agreements between public- and private-sector entities, and set rules, guidelines and procedures governing, *inter alia*, PPP procurement, development and implementation. Under the amended PPP Act:

- the PPP Centre administers PPPs as a one-stop centre and, for effective discharge of its functions, seek recommendations from the ministries responsible for investment, finance, planning or any other ministry, department or agency; and
- the PPP Steering Committee considers and approves PPP projects and agreements.

The Minister of Finance and Planning creates regulations to aid carrying out the provisions of the PPP Act, prescribing:

- levying of fees and charges;
- investment opportunities and promotion;
- functions of local government authorities under the PPP Act and clear linkages of roles between the implementing ministries and appropriate bodies at the local government;
- evaluation, operation and management of projects under the PPP Act;
- the management of, and terms and conditions for, accessing the Facilitation Fund;
- procedures for procurement of private parties and matters incidental thereto;
- the manner in which the empowerment of citizens of Tanzania may be implemented including provision of goods and services by Tanzanian entrepreneurs, training and technology transfer, employment of Tanzanians and corporate social responsibility;
- process and procedure for scrutiny and analysis of projects that require provision of government support; and
- any other matter in the promotion and furtherance of objectives of this Act.

In addition to the above powers, the Minister of Finance and Planning may also make rules and guidelines for the better implementation of the PPP Act.

Each project requires a feasibility study to demonstrate the PPP shall, among others, be affordable to the contracting authority, provide value for money, and transfer appropriate technical, operational or financial risks to the private party.

The Public Procurement Act and Regulations do not apply to PPPs. The PPP Act and Regulations govern the procurement procedures of the PPPs. PPP projects that relate to natural wealth and resources shall take into account the provisions of the Natural Wealth and
Resources (Permanent Sovereignty) Act 2017 and Natural Wealth and Resources Contracts (Review and Re-negotiation of Unconscionable Terms) Act 2017. A Facilitation Fund shall also be set up (see Section VI.i). The PPP Centre functions include:

a mobilising resources;
b ensuring that government departments integrate PPP plans;
c implementing a fair, transparent, competitive and cost-effective procurement process;
d dealing with fiscal risk allocation;
e monitoring and evaluate the performance of the PPP projects; and
f undertaking research on PPP matters.

The PPP Steering Committee functions include:
a reviewing policy, legislation, plans and strategies pertaining to the promotion, facilitation and development of PPPs and to advise the Minister of Finance and Planning accordingly;
b advising the Minister of Finance and Planning on matters relating to implementation of the PPP Programme;
c considering and approving detailed projects report, selection of preferred bidders, agreements and any amendment to the agreements;
d approving allocation of project development funds from the Facilitation Fund or the Treasury;
e assigning to the contracting authority’s terms and conditions for utilisation of the Facilitation Fund; and
f subject to the recommendation made by the PPP Centre, approving feasibility studies, selection of preferred bidder agreements and amendment to agreements.

Both solicited projects (i.e., competitively tendered initiated by the public sector) and unsolicited projects (i.e., initiated by a written proposal from a private party to a contracting authority) are permitted.

PPPs in the energy sector have additional requirements that are set out in more detail in Section IV.

PPPs must endeavour to provide opportunity for empowerment of the citizens of Tanzania. The government has resolved to take measures designed to promote and facilitate economic initiatives aimed at empowering Tanzanians; and has agreed in terms of the National Economic Empowerment Policy 2004 and the National Economic Empowerment Act 2004 that natural resources, trade, agriculture, industry and other economic opportunities must generate wealth, and boost the small and medium enterprise sector, to bring about a sustainable affirmative action and facilitate genuine and positive economic empowerment to the population of Tanzania. It has also stated that economic empowerment is a central means for bringing about economic growth and social justice among Tanzanians that is necessary for the promotion of peace, tranquillity and social stability.
IV  BIDDING AND AWARD PROCEDURE

All PPP projects shall be procured through an open and competitive bidding process except for unsolicited projects exempted by the Minister of Finance and Planning having met the following criteria:

a  the project shall be of priority to the government at the particular time and broadly consistent with the government’s strategic objectives;

b  the private proponent does not require government guarantee or any form of financial support from the government;

c  the project shall have unique attributes that justify departing from a competitive tender process;

d  the project is of significant size, scope and requires substantial financing as per conditions provided in the regulations;

e  the project shall demonstrate value for money, affordability and shall transfer significant risks to the private proponent;

f  the project has wide social economic benefits including improved services, employment and taxation; and

g  the proponent commits to bear the cost of undertaking a feasibility study.

All solicited and unsolicited projects shall be procured through an open and competitive bidding process and in a manner prescribed in the PPP Regulations. The current PPP Regulations 2015 specify that for solicited projects, at least two months before the beginning of the budget cycle, each contracting authority will submit to the PPP Centre a list of potential projects to be undertaken in partnership with the private sector. Based on the recommendation of the PPP Centre, the contracting authority may then proceed to conduct a full feasibility study of the project.

For unsolicited projects, upon approval of project concept, the private proponent shall make a commitment to undertake the project by depositing a refundable amount of not exceeding 3 per cent of the estimated cost of the project to be conducted. The private party is required to put forward a project concept to the proposed contracting authority, which may then be forwarded to the PPP Centre for review.

The PPP Regulations 2015 provide for the involvement of local government authorities in small-scale PPPs, these being PPPs whose total project value does not exceed US$20 million (as per the PPP Amendment Act 2018, which reduced this from US$70 million) and that entail an agreement not exceeding a maximum duration of 15 years.

There are additional requirements in respect of PPPs in the energy sector, which include:

a  the electricity utility, TANESCO, must obtain approval first of the regulator, the Energy and Water Utilities Regulatory Authority (EWURA), before initiation of procurement of any power project;

b  the application to EWURA must be made for solicited proposals, before releasing the tender and for unsolicited proposals, after TANESCO has accepted the proposer’s project concept but before commencing any formal negotiations for a power purchase agreement;

c  EWURA will evaluate compliance with all required legislation, including the PPP legislation; and

d  EWURA may nominate a representative to observe the procurement process to be followed by TANESCO.
There are special regulations and a standard power purchase agreement (SPPA) for energy projects of less than 10MW under the recently enacted Electricity (Development of Small Power Projects) Rules 2018.

Wind and solar projects must be solicited proposals (i.e., competitively bid) approved by EWURA. Hydro and biomass projects shall be procured through a letter of intent with an SPPA power buyer.

There are further special rules for projects of less than 1MW (very small power projects), such as no requirement for EWURA approval of the retail tariff, but EWURA may review the tariff if petitioned to do so by 15 per cent of affected households.

V THE CONTRACT

A contracting authority can enter into an agreement with the private sector for the performance of functions of the contracting authority.

The contracting authority shall form a multidisciplinary negotiating team with knowledge, skills and experience on the subject matter of the project.

The contract shall cover the following items:

a. specify the responsibilities and the private party;
b. specify the relevant financial terms;
c. ensure for the management of performance of the private party;
d. provide for undertaking by the contracting authority to the private party in obtaining licences and that may be necessary for the implementation of the project;
e. provide for the return of assets, if any, to the contracting authority, at the termination or expiry of the contract;
f. specify the roles and risks undertaken by either party;
g. provide for the payment to the private party, by way of compensation from a revenue fund charges or fees, collected by the private party from users or customers of the service provided by it;
h. specify payment of the private party to the contracting authority;
i. provide for remedies in the event of default by either party;
j. impose financial management duties on part of the private party, including procedures relating to internal financial control, budgeting, transparency, accountability and reporting;
k. provide for the termination of the contract in the case of a breach of terms and conditions by either party;
l. provide for the conditions for the provision of service, where necessary;
m. provide for the period of execution; and
n. contain such other information as may be necessary.

The contract shall ensure that:

a. the private party undertakes to perform a contracting authority’s function on behalf of the contracting authority for a specified period;
b. the private party is liable for the risks arising from the performance of its functions;
c. the environmental impact assessment certificate has been issued in respect of the project;
d. government facilities, equipment or other state resources that are necessary for the project are transferred or made available to the private party on a timely basis; and
e. the public and private assets are clearly specified.
The rights, obligation and controlling interests of the private party in the project shall not be transferred or assigned to a third party without the prior written consent of the contracting authority.

The duration of a contract shall be provided for in the contract and shall not be extended unless:

a. there is a delay in completion or interruption of operations due to circumstances beyond any party’s control;
b. there was an increase in costs arising from requirements of the PPP Centre or contracting authority that were not foreseen or included in the contract; and
c. the service is required and the contracting authority has no capacity or immediate intention to take over and run the project.

A violation of these provisions by either of the parties shall render a defaulting party liable for any pecuniary loss incurred by the other party.

i. Termination of the agreement

Under the PPP Regulations 2015, parties shall have a right to terminate the project if it fails to fulfil the conditions set out under the project agreement. Any such reasons and resultant compensation are required to be included as provisions in the agreement. Upon such termination, the contracting authority may, pursuant to the PPP Act and Regulations, engage another party.

ii. Contract approval

The contracting authority shall ensure that the contract is executed under procedures stipulated and through institutions specified under the PPP Act.

The contract shall be signed by the accounting officer of the contracting authority after it has been considered and approved by, among others, the Office of the Attorney General. The accounting officer shall sign the contract upon fully satisfying him or herself that the contract has complied with the provisions of PPP Act and any other relevant laws. Any person who contravenes these requirements commits an offence.

The accounting officer who has entered into a contract shall take all necessary and reasonable steps to ensure that:

a. the outsourced activity is effectively and efficiently carried out in accordance with the contract;
b. any public property that is placed under the control of the private party, in terms of the contract, is appropriately protected against forfeiture, theft, loss, wastage and misuse; and
c. the contracting authority has adequate contract management and monitoring capacity.

The contract shall be submitted to the Office of the Attorney General for a legal opinion.

iii. Contract dispute resolution

The contract shall be governed and construed in accordance with the laws of mainland Tanzania.
Any dispute arising during the course of the contract shall be resolved through negotiation, mediation or arbitration and (as per the PPP Amendment Act 2018) in the case of mediation or arbitration, be adjudicated by judicial bodies or other organs established in Tanzania and in accordance with laws of Tanzania.

iv Offences
Any person who commits an offence under:
\(\text{a}\) the PPP Act where any person who commits an offence to which no specific penalty is prescribed shall be liable to a fine of at least 5 million Tanzanian shillings and no more than 50 million Tanzanian shillings in addition to any illicit money gained or to imprisonment for a term of at least three months and no more than three years, or both.
\(\text{b}\) the Electricity (Initiation Power Procurement) Rules 2014 may be liable to a fine from 10 million Tanzanian shillings to 100 million Tanzanian shillings, or imprisonment for a term of up to three years, and this applies to directors, managers or officers of the utility in breach.

VI FINANCE
i Project development
The Facilitation Fund shall be set up with:
\(\text{a}\) money allocated by Parliament and from development partners, public entities, parastatal organisations and social security funds and funds previously advanced to contracting authorities; and
\(\text{b}\) approval by the PPP Steering Committee.

It will be used for:
\(\text{a}\) financing wholly or partly feasibility studies and other project preparation costs as may be required by a contracting authority;
\(\text{b}\) providing resources to enhance the viability of projects that have high economics benefits that have demonstrated to be of limited financial viability; and
\(\text{c}\) any such other purposes as may be prescribed in the regulations.

ii PPP fees
A PPP contract enables the private party to receive a benefit for performing on behalf of contracting authority function or from utilising the public property, either by way of:
\(\text{a}\) consideration to be paid by the contracting authority, which derives from a revenue fund, or, where the contracting authority is a central government or local government authority, from revenues of such authority;
\(\text{b}\) charges or fees to be collected by a private party or its agent from users or customers; or
\(\text{c}\) a combination of such consideration and such charges or fees.

iii Government support
The PPP Centre shall mobilise government support to PPP projects.

There is a definition of ‘contingent liability’ of government in the PPP Act but it is not used in the present PPP Act.
Tanzania

For unsolicited projects, a contracting authority shall not conduct a procurement process proposal that requires government financial support.

There is specific legislation relating to the government guarantee of loans, but not for the guarantee of contractual obligations of a contracting authority.

iv Security for lenders

Collateral available in Tanzania includes mortgages over land, fixed charges over assets (including cash at bank), share charges and pledges, assignment by way of security (including the benefit of contracts and receivables) liens and floating charges (together with security interests) and guarantees.

Generally, there is no restriction of foreign ownership or management of companies established in Tanzania except in some highly regulated sectors, such as natural resources, financial and telecoms. Foreign ownership of title to land is not permitted unless the foreign-owned company has a certificate of incentives from the Tanzania Investment Centre, which has approved the project for investment purposes.

Generally, inter-creditor agreements are used by local banks in Tanzania to subordinate debts and to adjust the ranking of secured creditors by way of contractual agreement. The enforceability and operation of these inter-creditor agreements have not, to our knowledge, been challenged in the courts in Tanzania.

In the case of a company insolvency, preferential debts will be paid as a priority. Preferential debts include specified taxes, specified government rents and specified wages or salaries.

Generally, a security interest is perfected by registration at the Business Licensing Regulatory Authority within 42 days of the date of its creation, otherwise it will be void on the insolvency of the company against the liquidator or administrator, or any creditor of the company. Mortgages must also be registered at the relevant land registry, and some documents should also be registered at the registry of documents. The priority of security interests is generally determined by the date of the document, and the priority of mortgages is generally determined by the date of registration at the relevant land registry, in each case, provided it is registered in time and there is no agreement to the contrary.

VII RECENT DECISIONS

Steps are under way to assist PPPs by, for instance, capacity building, more project preparation, viability gap funding and covering other costs necessary for the government to develop PPP projects.

Despite various amendments and revisions to the current PPP legislation and regulations, there remain some gaps and areas that need to be improved to create a solid basis on which a PPP programme can be developed.

VIII OUTLOOK

PPPs are recognised as an important instrument for the government to attract private investment with a view to providing better public services. The PPP Amendment Act 2018 provides that the Minister of Finance and Planning shall, for the purpose of ensuring investment in PPP projects and in consultation with the minister responsible for investment,
prepare programmes for the development and maintenance of a favourable environment for investment through PPP arrangements. It is anticipated that the PPP Regulations 2015 will be amended in 2019.

The outlook for PPPs in Tanzania is improving quickly as steps are taken to clarify and improve the processes and formal relationships between public and private sectors in a clear regulatory framework.
Chapter 22

THAILAND

Weerawong Chittmittrapap and Jirapat Thammavaranucupt

I  OVERVIEW

Public-private partnerships were formally introduced to the Thai legal framework by the promulgation of the Private Participation in State Undertakings Act BE 2535 (1992) (the PPSU Act). For two decades the PPSU Act served as the foundational piece of legislation administering PPPs in Thailand; however, it lacked clear-cut criteria addressing matters of scope, duration and authority with regard to initiating and implementing PPPs.

To remove such ambiguities, the Private Investments in State Undertakings Act BE 2556 (2013) (the PISU Act) was enacted. The PISU Act explicitly remarks that Thailand is in need of infrastructure constructions and various other forms of public services, an imperative that is echoed in many other state publications addressing state policy stated in the Constitution, development goals and plans.

PPPs are beginning to take a stronghold nationally as the government relies on PPPs as the main mechanism in developing the nation’s infrastructure. They can be observed in two different regimes: under the PISU Act and under the Eastern Economic Corridor of Thailand (EEC). With such growth in the utilisation of PPPs came the official realisation that the framework laid out by the PISU Act needed to be further developed and improved.

In the current political climate, and with the need for the development of Thailand’s infrastructure, there is a push for new legislation to repeal and replace and the PISU Act with a new act (the New PPP Act) to allow PPPs to be conducted in Thailand in accordance with international standards. Notable objectives include attracting high-quality private participation, both locally and abroad, ensuring better consideration of the partnership aspect in the various facets of PPPs, and creating an infrastructure plan that will specify various details of PPP projects. The New PPP Act was approved by the cabinet in December 2018 and was passed by the National Legislative Assembly (NLA) in March 2019 and became effective from then.

II  THE YEAR IN REVIEW

The PISU Act is composed in such a way that a series of ancillary laws could ensue after its enactment. These can manifest in the form of a Notification issued by the Public-Private Partnerships Policy Committee (the Committee), a Notification issued by the State Enterprise

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Thailand

Policy Office (the Office), or a Ministerial Regulation. When prescribed to applicable areas of the PISU Act, these notifications and regulations serve to clarify some of the rules governing certain procedures in relation to PPPs.

The above-mentioned improvements to the PISU Act have been based on principles that reflect international standards and touch upon the following points: the applicability criteria of PPP projects; the business case and the development thereof pursuant to guidelines drafted with the aim of ensuring fair risk sharing that does not overburden the state; full consideration of possible and befitting government support measures; transparent procurement procedures inclusive of negotiation; and opening up the option of authority step-in for cases that may be detrimental to national security. For the EEC, the Eastern Special Development Zone Act BE 2561 and a number of ancillary laws have been enacted to establish the rules and procedures in relation to PPPs:

a Notification of the EEC Policy Committee regarding Rules, Conditions and Procedures for Private Investments BE 2560 (2017);
b Notification of the EEC Office regarding the Structure and Details of the Study and Analysis Report of the Project BE 2560 (2017);
c Notification of the EEC Office regarding the Rules and Procedures in Market Sounding BE 2560 (2017);
d Notification of the EEC Office regarding Invitation for Bids, Procedures for Invitation for Bids, Rules regarding Selection Procedures, Details of the Documents in Selection Procedures, and Standards to the PPP Contract BE 2560 (2017);
e Notification of the EEC Office regarding the Qualifications of Consultants BE 2560 (2017); and

To assist in the proper implementation of the above notifications governing PPPs in the EEC, the EEC Office is in the process of finalising guidelines that reflect best practice standards.

Current outstanding EEC projects include U-Tapao International Airport, with the projected capacity of 60 million passengers annually; a high-speed rail linking three airports, connecting Rayong province and Bangkok metropolitan city; Laem Chabang Port, Phase 3; and Map Ta Phut Industrial Port Development, Phase 3.

The total amount of investment for all of the projects in the EEC area exceeds 1.5 trillion baht. All aforementioned projects have obtained approvals from the relevant authorities, including the Cabinet, and are in the process of selecting private entities for the projects, which are expected to be completed by the first quarter of 2019. Further, there are other projects in the ECC currently under way, including Digital Park Thailand, which is expected to be acknowledged by the Cabinet within the second quarter of 2019. The project implementation period for these projects is considerably faster compared to the implementation of projects under the PISU Act, and public sector involvement in the development of these projects is increasing as the EEC ancillary laws require the collection and analysis of the private sector’s opinion acquired through market-sounding procedures.
III GENERAL FRAMEWORK

i Public-private partnership applicability criteria

The PISU Act very loosely defines projects that fall under the PPP purview as the state intends for PPPs to serve as a mechanism to develop infrastructure in Thailand indefinitely. According to the PISU Act, any project that falls under the criteria of being both a state undertaking and a public-private joint investment will be eligible for PPP procurement.

However, the New PPP Act is projected to clarify the applicability criteria and focus and reserve the use of PPPs for infrastructure projects, such as hospitals, roads, schools and trains, to maximise the use of state assets. The use of state assets is being studied and reviewed for PPPs in the EEC, but such criteria is open to other projects that the government may want to encourage and support for the development of the national economy and its markets.

ii Types of public-private partnership and the transfer of the assets used in the project

PPPs in Thailand may take many forms, because under the PISU Act there is no classification for the types of investment undertakings. The type of PPP project is chosen based on the specific conditions of each project and further defined by the functions under the responsibility of the private entity. The most common type of PPP for infrastructure projects are:

a. design–build–operate–maintain (DBOM): the private entity is in charge of the development and long-term operation and maintenance of the asset, as well as the arrangement of financing; and

b. operate and maintain (O&M): the private entity is in charge of the operation and maintenance, as well as the arrangement of financing.

For the transfer of the project’s assets, most PPP projects in Thailand have used the following contractual structures: build–own–operate, where a private organisation builds, owns and operates some facility with some degree of encouragement from the government; build–transfer–operate, where a contract is signed between an authorised state agency and investors to build an infrastructure facility completely, and then the investors transfer the facilities to the authorised state agency and obtain the right to operate such facility commercially for a fixed term; and build–operate–transfer, whereby the investor transfers the facilities at the end of the concession. As such, the investors are able to finance, design, construct and operate a facility stated in the concession contract, and this enables the project proponent to recover its investment, operating and maintenance expenses in the project.

Although the type of PPPs are disencumbered, some caution must be made to the type of assets that are being transferred and owned by the private entity as the Constitution prohibits the private ownership of infrastructural public utility services that are essential for the nation’s subsistence and security.

iii The authorities

Under the PISU Act, there are three main authorities involved in the PPP process: the Cabinet, the Committee and the Office.

The Cabinet plays an important role in administering the principles of the particular PPP project, and in budgeting the annual government statement of infrastructure for the PPP project. The Cabinet is the final approving authority when it comes to the private entity
selection and the draft PPP contract during the procurement stage. The role of the Cabinet
during the procurement stage may be reduced in the upcoming New PPP Act to increase
efficiency and flexibility in the PPP process.

According to Section 8 of the PISU Act, the Committee is composed of the Prime
Minister as chairman, the Minister of Finance as vice-chairman and the Director-General
of the Office as a member and secretary. The Committee has powers and duties mainly to:
prepare a strategic plan; give approval in principle to a project involving a private investment
and the operation of a project; prescribe rules and regulations under the PISU Act; and give
decisions on issues pertaining to the implementation of this Act.

The Office serves as an ancillary body to the Committee, responsible for carrying out
secretarial tasks (i.e., supporting the Committee in the implementation of PPP projects).
According to Section 18 of the Act, the Office shall have the following powers and duties to:
prepare a draft strategic plan for submission to the Committee; study and analyse projects
and submit opinions to the Committee for consideration and approval; study, research
and prepare a database relating to private investment in state enterprises for dissemination,
provision of education and advice to state agencies and the general public to promote and
build an undertaking of private investments in state undertakings; and report problems and
obstacles arising from the implementation of the PISU Act to the Committee.

As for the EEC region, there are three main authorities: the Cabinet, EEC Policy
Committee, and the EEC Office. In comparison to the current PISU Act, the role of the
Cabinet is confined to approving the principles of the PPP project and apportioning the
state budget. The EEC Policy Committee plays a role similar to the Committee and has the
authority to independently approve the private entity selected from the procurement process,
without screening or approval of the Cabinet. Similarly, the EEC Office plays a role similar
to the Office.

### General requirements for PPP contracts

In general, PPP contracts must conform to the framework of the 2013 PISU Act and the
requirements of the Notification of the Office regarding Standard Contract Terms for
contract must contain the standard contract terms for investment contracts as prescribed by
the SC Notification with the approval of the Committee. Generally, PPP contracts must at
least contain the following clauses:

- **a** duration, provision of services and the implementation of the project;
- **b** rights and duties of each party;
- **c** the ownership of the project assets and their valuation. If state assets are utilised in
  implementing the project, the right and duty of each party in relation to the utilisation
  and maintenance of the aforementioned assets shall also be specified;
- **d** changes to the nature of the provision of services under the project;
- **e** changes to a contracting party, contractor, subcontractor and the assignment of claims;
- **f** *force majeure* events and actions in the case of a *force majeure* event, including payment
  of compensation;
- **g** causes for termination of the contract, methods of termination, consequences of
  termination other than termination as a result of expiry, as well as information relating
to actions to be undertaken to continue the provision of services if the suspension of
the project, and payment of damages arising from the termination of the contract;
- **h** step-in right and details thereof;
the host agency shall not be bound to settle a dispute by arbitration unless the host agency demonstrates the reasons and necessity for doing so because of this being the general practice for that particular type of PPP contract; and

j the governing law of the PPP contract and the implementation of the project shall be Thai law.

Notably, the PISU Act and the PPP regime under the EEC allows the concept of a direct agreement, an agreement to be entered by and between the private entity, the bank and the procuring government agency in order to increase the bankability factor. The step-in right specified in such agreements protects the banks, and ultimately the project, with the recourse of a capable private entity ‘stepping in’ to preserve the continuity of a project under distress induced by the collapse of the former private entity. Under the EEC framework, the direct agreement is to be attached as an annex of the PPP contract signed between the host agency and the private entity.

Apart from the main requirements listed above, it is prohibited for the PPP contract to contain any provisions allowing a unilateral renewal or extension of the duration of the project under the PPP. Legal provisions regulating all general PPPs and PPPs under the EEC framework reiterate the same principle and prohibit granting the private entity the unilateral right to adjust or amend any contractual conditions in a manner that will have an impact on the provision of public services or the benefits to the public sector.

Language requirements in the Thai context means that PPP contracts and other documents integral to the implementation of a PPP must be prepared in Thai. If any part of a PPP contract is prepared in English, a provision must be included in the contract indicating that, in the event of any conflict or discrepancy between the two, the parties will comply with the original Thai document.

Once the private entity selection and negotiation results have been obtained, and a draft investment contract has been prepared, the Selection Committee will submit the draft to the Office and the Office of the Attorney-General for their review of those submissions. Those reviews are then submitted to the responsible minister for his or her review, who will then submit them to the Cabinet for its consideration and approval.

IV,BIDDING AND AWARD PROCEDURE

i Expressions of interest

In Thailand, the selection of the private investor commences at the level of the host agency, who plays a key role in publishing relevant notices. Thus, virtually all expressions of interest are implied by the submission of a proposal by the bidder, and all proposals must be solicited by these notices.

The process begins with the host agency’s drafting of the invitation for bids. The document must contain, among others, the terms of reference detailing the background, objectives, scope of work and commitment duration of the project, a statement declaring that the bidder must have not been granted privileges or immunities from the courts, the required qualifications of the private investor, information related to the request for proposal and its fee, and the selection criteria.

The Selection Committee, made up of the host agency as chairman, representatives of the Office and the Office of the Attorney-General as members, is granted the authority to approve the draft invitation for bids as well as the discretion in selecting the private investors.
Once the Selection Committee is established, the actual bidding and award procedure begins. The Selection Committee under the EEC framework is a distinct entity, but similarly composed of the host agency as chairman, representatives of the EEC Office and the Office of the Attorney-General as its members.

The Selection Committee may also, when it deems appropriate to narrow down the number of applicants, shortlist a pool of qualified bidders before publishing the invitation for bids. In this case, only the selected investors will receive the invitation for bids.

The Selection Committee and the host agency can jointly decide to opt out of the bidding procedure in selecting the pool of private investors. If the Office concurs, the Office may petition the Committee for its approval. Where there are disagreements between the Selection Committee and the host agency, the Office will petition the Committee for its approval only when the Office also deems opting out to be more appropriate to the case at hand. If the Committee approves, the host agency has to provide the rationale behind such decision, and disclose the names of the chosen investor or investors along with supporting justifications.

ii Requests for proposals and unsolicited proposals

Once approved, the host agency must publish the invitation for bids at least 60 days before the submission deadline of the proposals in three different mediums. Thereafter, it is the responsibility of the interested party to purchase the request for proposals at the designated place, time and date as specified in the invitation for bids.

The request for proposals solicits the following information to be provided by the interested party: the qualifications of the bidder related to the nature of work, a business plan that also details financial aspects, and an implementation plan stating its benefits proposed to the state.

The submitted proposals must contain all the information requested in both the invitation for bids and the request for proposals at a minimum. Any foreign entities and foreign individuals who wish to participate in the bid may submit their proposals in the same manner.

As mentioned above, there are no procedures that would allow private investors to submit unsolicited bids.

iii Evaluation and grant

Once all of the proposals have been collected, all bidders or their representatives gather for the opening of the proposal envelopes. Strict evaluations of the submitted proposals are then conducted, at which stage the Selection Committee may request additional information from the bidders, but any bidder who wishes to amend or provide any unsolicited content is prohibited from doing so. The Selection Committee plays a significant role in the project implementation to evaluate and select the private investor.

After a negotiation with the selected party is concluded, the Office and the Office of the Attorney General will jointly submit their opinion to the responsible minister for consideration and approval. Under the PISU Act, the final grant is approved by the Cabinet. Therefore, although the Selection Committee is allowed to enter into negotiations with the bidders having passed the evaluation, the project implementation must be approved by the Cabinet. As mentioned above, however, this role will be shifted to a minister of a relevant
As for the PPPs in the EEC, the EEC Policy Committee grants the final approval. The standard of the evaluation process developed is safeguarded via the incorporation of the one-stage, two-stage and multi-stage processes.

V THE CONTRACT

i Payment
No specific regulations impose restrictions or limitations on the way in which private parties in PPP contracts are remunerated in Thailand. As such, the parties are free to determine all variables, such as the frequency of payment and rates of payment, through the PPP contract. In general, however, two forms are prevalent.

The first is where the private investor collects and allocates the revenue according to the agreed terms in the contract. Any increase in the amount of profit will be reflected in the amount of remuneration. Because of the nature of the payment, it is most frequently paired with PPPs that involve commercial development projects.

Another is where the state assumes the responsibility for collecting revenue, and makes a fixed payment to the private investor. Because of the nature of the payment, it is most frequently paired with PPPs that involve social development projects.

ii State guarantees
No separate regulation regarding state guarantees exists in Thailand. Nonetheless, the PISU Act stipulates that private investments in state undertakings must be granted with consideration to financial and monetary discipline. Thus, state guarantees are considered in the same manner.

There have been no clear state policies regarding state guarantees in the past, but since the enactment of the PISU Act, policies have leaned favourably towards state guarantees to private entities of PPPs. For instance, the state issued a policy granting state guarantees to private investors of PPPs in the form of aid to be used in the project.

iii Distribution of risk
As a general rule, PPP projects must have regard to suitable risk allocation in the project between the state and private entity. However, the PISU Act does not incorporate the detailed risk-allocation rules and regulatory provisions for the PPP projects. Hence, for both the New PPP Act and the current EEC framework, there are legal specifications made to the risk sharing measures between the state and the private entity that factors in the partnership concept.

The distribution of risk is due to be regulated by appropriate guidelines, which will be enacted for the proper conduct of the business case, and the drafting of the PPP contract.

iv Adjustment and revision
As a result of PPPs being eligible under two different regimes in Thailand, there are two different procedures involving adjustments and revisions of the PPP contract.

Under the PISU Act, the emphasis is on whether the adjustment is of a material nature. Depending on such determination, the proposed amendment will be passed through different authorities and require additional oversight. For instance, where the Supervisory Committee finds that the amendment of the contract is material in nature, the host agency will submit
the proposed amendment issues, the impact of the investment contract amendment and other relevant details to the Supervisory Committee for consideration. If the Supervisory Committee agrees to the amendment, the host agency shall submit the draft amendment to the Office of the Attorney General for review before forwarding the Supervisory Committee’s opinion along with the amendment as reviewed by the Office of the Attorney General to the responsible minister for submission to the Cabinet for approval.

For amendments to the PPP Contract under the EEC framework, soon to be implemented in the new PPP Act, the process goes as follows.

If the alterations as mutually agreed by the parties do not affect the scope of the project, the reasons and necessity for such alteration; points to be amended; effects of such amendments; and other details shall be sent to the Supervisory Committee, then the comments will be sent back to the project owner agency, who will then send it to the Office of the Attorney General (after whose consideration will be sent back to the project owner agency). The project owner agency will then send comments of the Supervisory Committee; points to be amended; and the PPP contract that has been newly considered by the Office of the Attorney General to the EEC Office, who will then pass it on the EEC Policy Committee. The EEC Policy Committee will then be the final approving authority.

If these alterations do affect the scope of the project (the scope of the project that has been previously approved by the Cabinet), the process will be the same; however, after the EEC Policy Committee gives its approval, the EEC Office shall pass it to the Cabinet, which will be the final approving authority.

v Ownership of underlying assets

Under the PISU Act and the EEC framework, there is no provision stipulating clearly which contractual party has ownership of the underlying assets. Nevertheless, the PISU Act notes that a standard PPP contract must contain a clause indicating the transferring and holding of ownership of the project. The transfer of ownership of the underlying assets depends on the type of PPP contract used. In practice, ownership of project assets is usually provisioned under the PPP contract to be transferred to the public sector. If state assets are utilised in implementing the project, the rights and duties of each party in relation to the utilisation and maintenance of the aforementioned assets will also be specified. As mentioned above, heed must be paid to private ownership of assets that relate to infrastructural public utility services that are essential for the nation’s subsistence and security.

vi Early termination

Although the consequence for early termination is absent in the PISU Act, it is featured in the EEC framework and the New PPP Act. If the early termination is not the fault of the private entity, the government is to provide appropriate compensation that is fair and by which it applies a proper calculation mechanism. This reflects the partnership concept and ensures qualified private participation. For cases where the early termination is because of acts or deeds by the private entity, however, the state is entitled to recover its loss arising out of such breach from the private entity.

VI FINANCE

In Thailand, PPPs are generally financed via capital markets or financial institutions. One option is for the concessionaire to list its company with the Stock Exchange of Thailand and
to offer its shares to the general public as a means of raising capital (initial public offering). Second, it could be privately financed by setting up an infrastructure fund and offering its fund units to the general public. To mention a few examples of infrastructure funds established in the past, the BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF) and Jasmine Broadband Internet Infrastructure Fund (JASIF) were established in 2013 and 2015, respectively, to finance their respective PPP projects. These options do pose some limitations to PPP transactions in that the concessionaires must receive the prior approval of the grantor to be listed on the stock exchange. In addition, any transfer of concessionary rights must also receive the prior approval of the grantor even when it becomes inevitable as a result of changes to the company’s shareholding structure.

Project financing via financial institutions also imposes similar limitations to those mentioned above. Generally, project funding requirements must contain a step-in clause; in case of critical situations the financial institution, as a creditor of the project, shall have rights to step in and take control of the PPP project granted in favour of the financial institution. Thus, the possibility of the financial institution exercising its step-in rights remains open at all times throughout the venture, which, if petitioned, must receive prior approval from the relevant state authority.

There is no restriction under Thai law for seeking cross-border financing; therefore, so far it has been freely employed. BTSGIF and JASIF were open for sale indiscriminate of borders.

Under both the EEC framework and the New PPP Act, there are specifications that instil the use of a direct agreement to promote bankability and confidence in the project coming to successful completion. Step-in and step-out rights are available for banks to opt for, which makes it possible for banks to retain steady inflow of compensation for the repayment of loans throughout the life cycle of the projects. The procedures are outlined in the guideline regarding the PPP contract.

VII RECENT DECISIONS

A look at recent court judgments indicates a strict adherence to the rules and regulations governing PPPs and suggests a failure to do so would warrant legal and binding consequences.

An example is the judgment of the Highest Administrative Court No. Aor. 349/2549, where the Court ruled that the latest amendment to a PPP contract made by the relevant state agency and ITV Public Company Limited was non-binding as it failed to comply with the PSU Act in relation to the procedure of amendment to the PPP contract. The legal consequences of the court judgment in relation to non-binding PPP contracts remain unclear, meaning that unlawful amendments to a PPP contract should be void or voidable or automatically terminated or still valid until it is terminated by the relevant state agency.

VIII OUTLOOK

As a growing nation, Thailand has a tremendous need for investments in infrastructure development and public services to promote the nation's economy, support the fast-paced urbanisation and enhance the quality of life of the general public. However, the capacity of the government to provide funds directly to infrastructure and public services projects is limited. Therefore, the government recognises the innovative PPP mechanism as a prominent
instrument in the implementation of projects in Thailand, as evidenced by the amount of PPP projects successfully implemented or currently undergoing bidding and procurement procedures.

Because the PISU Act is still in effect, relevant governmental agencies must operate PPPs to full completion under the PPP Strategic Plan 2017–2021. The total estimated investment cost of projects included in the Public Private Partnership Strategic Plan is 1.4 trillion baht, and currently there are 55 projects in the PPP project pipeline. The next novel piece of legislation of the New PPP Act will be coupled with a more detailed infrastructure plan, which will send rippling effects through infrastructural developments in Thailand where PPPs will be elected as the mechanism.

Apart from the projects currently under way in the EEC, the government is seeking to introduce and increase the number of available projects pursuant to state policies aimed at increasing the interest of foreign investors.

In light of the robust trend in public sector investment projects and the fact that a number of PPP undertakings are being rolled out along with the enactment of the New PPP Act, it is anticipated that the implementation of PPP projects in Thailand will continue to be in significant demand. Accordingly, the PPP market in Thailand will continue to grow in the coming years.
I OVERVIEW

i Background
Public-private partnerships (PPPs) are infrastructure delivery models based upon joint working and risk sharing between the public and private sectors. Generally, these are long-term models, with the United Kingdom’s Private Finance Initiative (PFI) structure (until recently the UK government’s preferred PPP model; see below) typically existing over a concession period of 25 to 30 years.

There are many forms of PPP, from private contracting as part of a state business through concession-based PPPs to regulated private sector entities. These are described in greater detail in Section III.

In respect of PFI, the Chancellor of the Exchequer announced at the 2018 Budget that PF2 (the updated PFI model) would no longer be used to procure infrastructure. This announcement did not affect existing projects procured under these models. A new preferred model is yet to be consulted on or announced by the UK government. In the absence of a replacement preferred model, this chapter concentrates on the prevailing PFI/PF2 models.

PFI projects can arguably be characterised as having been a continuation of the privatisation programme pursued by the UK government under Prime Minister Margaret Thatcher, where publicly owned utility companies such as gas, electricity, water and telecommunications were privatised with the intention of both facilitating new capital investment in these sectors and reducing (on the balance sheet) government liabilities.

However, while certain sectors, in particular prisons, hospitals, schools and the Ministry of Defence estate, were not considered practically or politically suitable for full privatisation, the intention to reduce government liabilities and increase capital investment through private sector financing could still be fulfilled through the use of PFI projects.

The UK government first adopted the PFI model of contracting in 1992 (pre-PFI examples of the United Kingdom using PPP procurement models include the Dartford Crossing and Severn Bridge, commissioned in 1987 and 1990 respectively). The PFI model was generally a design–build–finance–operate or design–build–finance–maintain PPP structure. While, as with PFI, most UK PPPs are funded through availability payments made by the public sector, a minority of PPPs (mainly road projects and bridges) are funded by the end user (for example, through road tolls). PFI projects were generally structured so that no demand risk is taken by the private sector contractor.
By contractually transferring delivery, cost and performance risk to the private sector, the government sought to protect the public sector from delays, cost overruns and poor performance in the delivery of infrastructure,\(^2\) while utilising private sector depth of expertise, management and commercial skills and procurement experience (arguably problematic deficiencies in the public procurement of infrastructure).

However, as a fundamental tenet of PPP, best practice dictates that risks should be allocated to those parties best able to manage their occurrence and impact. Some commentators argue that PFI attempted to transfer too much risk to the private sector, with the private sector pricing projects accordingly to cover this inefficient transfer of risk – resulting in projects that were more expensive for the public sector than if the public sector had retained certain risks (and the costs associated with those risks). This, among other factors, has led to the increased questioning of whether PFI represents value for money.

Uptake from the first PFI project, the Skye Bridge, was initially slow both in the number and value of projects, but accelerated with the election of Tony Blair’s New Labour government in 1997 and the standardisation of the contracting approach (the current approach being Standardisation of Procurement Contracts, Version 4 (SOPC4)).\(^3\) The number of PFI projects rose from no more than one a year up to 1995, to a peak of 68 in 2004 (with at least 45 projects a year between 1999 and 2007).\(^4\) Since the global financial crisis of 2008 and the implementation of Basel III (making long-term debt more expensive as a result of creating stricter capital adequacy regulations), the number and capital value of PFI projects fell steeply, and no projects have reached financial close since 2016.

ii PFI to PF2

PFI, then being the UK government’s preferred approach to PPPs, was updated in a second generation of the PFI model, PF2, in 2012. Since 2012, more than £1 billion of capital investment has been made in 46 schools and one hospital. However, no PF2 investment has reached financial close since the Midlands Metropolitan Hospital project reached financial close in 2016.

As a result of PFI and PF2, PPPs have delivered in excess of £59 billion of private sector capital investment in over 722 UK infrastructure projects since 1992.\(^5\) These projects included new schools, hospitals, roads, housing, prisons, and military equipment and accommodation.

PF2 involved a number of structural changes to the PFI model. The key changes included:

\(a\) the public sector taking a minority equity interest in PFI vehicles alongside the private sector (typically a 10 per cent interest);

\(b\) the introduction of funding competitions for part of the private sector equity interest in PFI vehicles;


\(^5\) ibid.
accelerating delivery by reducing the length of the tendering process;

the removal of soft facilities management services (e.g., cleaning) from the scope of services, and flexibility on the potential exclusion of minor maintenance services;

open-book approach and gain share mechanism for surplus life-cycle funding;

greater transparency, including in relation to private sector equity return; and

risk reallocation, with the public sector taking additional risk allocation, including the risk of additional capital expenditure arising from an unforeseeable general change in law, utilities costs, site contamination and insurance.\(^6\)

While no PFI projects have reached financial close since early 2016, the 2016 Autumn Statement\(^7\) provided that the government would develop a new pipeline of projects suitable for delivery through PF2 (it was stated these projects would likely focus on roads, education, defence and primary care). This pipeline was initially expected to be revealed in 2017, but tightened government departmental budgets combined with increasing political antipathy (see below) raised the question of whether this pipeline would actually appear. While some elements of the pipeline were announced, the cancellation of PF2 has brought into question how these projects will be financed (see below).

### iii Political antipathy

Throughout the history of PFI, but with increasing frequency since the global financial crisis and the re-emergence of ‘old’ Labour, left-wing politics in the United Kingdom, there has been a growing political antipathy towards PFI, both from ideological and value-for-money perspectives. Combined with the recent coalition and current Conservative governments’ austerity policies since the global financial crisis, PFI has increasingly been characterised in the media as providing for excessive private profit at public expense (most often in relation to National Health Service hospital PFI projects).

In particular, Labour MP Stella Creasy’s rejected proposal for a windfall tax on the profits of PFI projects\(^8\) (proposed to be equivalent to removing any decrease in corporation tax the relevant companies have been subject to since the relevant PFI project reached financial close) exemplified the increase in political antipathy towards PFI/PF2.

### Carillion insolvency events

The January 2018 insolvency of key PFI contractor Carillion plc (the second-largest construction group in the UK before its liquidation) has further hardened public sentiment towards PFI. In particular, Midlands Metropolitan Hospital and other projects such as the new Royal Liverpool Hospital and Aberdeen Bypass, the latter being a non-profit-distributing (NPD) project (see Section I.iv.), were heavily behind schedule and over budget at the point of Carillion plc’s collapse.\(^9\) In addition to political antipathy towards PFI, major contractors

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\(^{6}\) See footnote 2.  
\(^{9}\) ‘The collapse of an over-stretched Carillion’ Financial Times, https://www.ft.com/content/0e29ec10-f925-11c7-9b32-d7d59aace167 (last accessed 29 January 2018).
have increasingly moved away from large fixed-price construction contracts (a key risk transfer aspect of PFI) because of their often wafer-thin margins and the systemic risk they represent to these contractors.

Further, the Leader of the Opposition in the United Kingdom, Jeremy Corbyn, and the Shadow Chancellor of the Exchequer, John McDonnell, made statements following the insolvency of Carillion plc to reinforce their opposition to PFI, with current Labour policy proposing that there will be no new PFI projects and most existing PFI projects will be brought ‘back in-house’ if a Labour government is elected, although the detail provided to date on these proposed policies goes little further than refinancing some PFI projects and passing some form of statutory instrument to set a price for the nationalisation of equity in some existing PFI projects.10

As of the time of writing, there remain significant questions as to the financial health of a number of major PFI contractors.

iv Varying approaches to PPP across the United Kingdom

The devolved administrations in Wales, Scotland and Northern Ireland have the capability to follow alternative PPP models. The Scottish and Welsh governments have previously used the NPD model, a model whereby there is no dividend bearing equity and capped return for private sector participants (any excess return is retained by the public sector). However, the extent of control and profit retained by the public sector under the NPD model has meant that these projects have been reclassified as ‘on balance sheet’ (increasing public sector debt) as a result of changes to EU rules (further below). This reclassification has reduced the attractiveness of procuring through the NPD model.

The Welsh government also has a mutual investment model structure, whereby the private sector builds and maintains assets, and in return the Welsh government pays a fee to the private sector to compensate for construction, maintenance and financing. At the end of a MIM contract, the asset is then transferred to public ownership.11

v New models for PPP

With the PF2 model cancelled, and the MIM and NPD models currently being subject to significant (if differing) questions over their future viability, the question arises as to what future role PPPs might have in the future infrastructure procurement in the United Kingdom. As exemplified in Section III, there is a range of PPP models that the United Kingdom could explore to procure infrastructure.

While one route may be to increase government borrowing through issuing gilts (currently relatively cheap by historical comparison), this may potentially create problems if it would result in the UK exceeding its 3 per cent and 60 per cent deficit-to-GDP and debt-to-GDP ratios respectively (under the Treaty on the Functioning of the European Union). Though the United Kingdom is set to leave the European Union in March 2019, significant divergence from European law is (at least initially) unlikely, and breach of these thresholds may lead to a sovereign debt rating downgrade (making government borrowing more expensive and potentially reducing the finance available for infrastructure investment) or be problematic in the context of any future UK–EU trading relationship.

Given the likely implications of any new large-scale government borrowing programme (with the government intending to spend between 1 per cent and 1.2 per cent of GDP on infrastructure between 2020 and 2050),\textsuperscript{12} there would, however, appear to be a continuing opportunity for private finance in delivering infrastructure in the United Kingdom, with Her Majesty’s Treasury announcing an infrastructure investment programme of around £600 billion up to 2028, of which the UK government anticipate almost half will be privately financed.\textsuperscript{13} For nearly £300 billion of investment to be privately financed over a 10-year period, it has been suggested that public sector support for private sector infrastructure investment will be continued, including through Contracts for Difference (a subsidy mechanism for low-carbon energy investment that guarantees a certain price for energy), the UK Guarantee Scheme (see Section VI.ii), and the Regulated Asset Base (RAB) model (see Section III.i).

Another possible solution may be for the government to increase the use of direct procurement (currently used for regulated utility infrastructure provision, for example, the Thames Tideway Tunnel) in the wider provision of infrastructure. Increased competition and innovation through competitive tendering of project financings (combined with minimum stipulated government contractual protections) certainly has the potential to address any value-for-money concerns over PFI/PF2.

It is not clear how exactly the role of private finance will develop in the provision of UK infrastructure, but it is clear that new models and risk allocations are needed. If the government wants to increase infrastructure investment, PPP innovation will be required. Delay to consulting on or announcing a new preferred model may delay decisions on and construction of new infrastructure, and while the government may consult on a new preferred model in 2019, the reduction in civil service bandwidth as a result of the United Kingdom’s decision to leave the European Union could mean that a new model is not settled on by the UK government for a significant period of time.

II THE YEAR IN REVIEW

i Brexit

The United Kingdom gave notice of its intention to leave the European Union on 30 March 2017. The notice period for withdrawal is two years, during which time the United Kingdom remains a full EU member with all its existing rights and obligations. At the end of the notice period, the United Kingdom will automatically leave the European Union unless it agrees alternative transition arrangements. The proposed date for withdrawal is 29 March 2019. As at the time of writing there is some debate as to whether (as a consequence of the inability of the UK government to pass legislation in respect of a withdrawal deal) the withdrawal will be delayed or, in the extreme, cancelled. Discussions have identified the likelihood of a two-year transition period to allow the parties to move to a post-Brexit trading model, but it is not yet clear what this will entail.


\textsuperscript{13} ‘Written questions and answers’ Parliament.uk, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons&keywords=%22private+finance+initiative%22.
The UK government intends to legislate for withdrawal in the European Union (Withdrawal) Bill, which, in summary, will seek to repeal and then immediately re-introduce all EU-derived law into UK law at the date of exit. Decisions will then be made at the nation’s leisure as to whether to keep or amend each law. The key issue is that many EU laws cannot be repealed and reintroduced to the UK as they are, as many sections will not make sense without full EU membership. Most EU-derived laws must be amended in some way prior to being included again on 29 March 2019, and the scale of this task is vast in the time available. As mentioned above, the UK government has not currently been able to obtain support for its proposed withdrawal legislation. This opens the possibility of either a second referendum on the United Kingdom exiting the European Union, withdrawal without a deal in place or a general election.

It is the intention to retain all EU-derived procurement law in the United Kingdom immediately following Brexit. Procurement law that is compatible with Europe’s will be vital to ensure that cross-border trade is encouraged, and the United Kingdom is still considered not only ‘open for business’, but likely to treat non-UK based companies on a level playing field. It is also likely to be a requirement of any future UK–EU trade deal.

Continued uncertainty over the future relationship between the United Kingdom and European Union has negatively impacted and, at least in the short term, is likely to negatively impact inbound investment by overseas infrastructure investors in UK-based infrastructure projects. The United Kingdom may take the opportunity outside the European Union to consider its wider procurement laws and labour law standards, which could have a positive effect on the United Kingdom’s competitiveness.

ii Future role of the European Investment Bank in UK infrastructure

One key impact on UK infrastructure from Brexit may be the United Kingdom’s withdrawal as a shareholder from the European Investment Bank (EIB) and what may have to be paid on leaving the EIB. In the short term, post-Brexit UK projects have been warned that they may have to insure against the risks of Brexit, and in the long-term, lending from the EIB may reduce or end completely, cutting off an important source of funding. Addressing this concern, the joint report on preliminary matters released on 8 December 2017 expresses the United Kingdom’s hope that a relationship with the EIB can be maintained, saying: ‘The UK considers that there could be mutual benefit from a continuing arrangement between the UK and the EIB. The UK wishes to explore these possible arrangements in the second phase of the negotiations.’ There has been little by way of further clarification of the potential role of the EIB in a post-Brexit United Kingdom.

iii The National Infrastructure Commission

The National Infrastructure Commission (NIC) was established in 2015 with the remit of providing expert and impartial advice on infrastructure to the government, in part, by providing a report on the long-term infrastructure requirements once in each parliamentary


term. The NIC’s reports, when coupled with the United Kingdom’s government’s commitment to spend between 1 per cent and 1.2 per cent of UK GDP on infrastructure, 16 should ensure that a ‘short-termist’ approach can be avoided for a more beneficial, long-term vision of what infrastructure the United Kingdom needs.

The NIC has published some important studies on, for example, new technologies, the Cambridge–Oxford Growth Corridor and the future of freight. 17 It is expected later this year to publish a report on the regulation of the United Kingdom’s energy, telecoms and water industries, including in respect of ensuring the necessary levels of investment in these infrastructure sectors. The NIC’s long-term approach to infrastructure makes the institution an important part of United Kingdom’s infrastructure industry.

iv Green Investment Bank sale

The government sold the Green Investment Bank to Macquarie in April 2017. The government justification for the sale was that the Green Investment Bank could not raise further capital while constrained by public sector ownership and as such it needed to be privately controlled to grow. 18 Since its sale, the Green Investment Bank has rebranded as the Green Investment Group. The government is in the process of disposing of the residual assets retained from the sale of the Green Investment Bank.

v Secondary market

The UK PFI market has benefited from an active secondary market in equity stakes in PFI projects. The United Kingdom, by volume, is the most active secondary market for the trade in PPP equity stakes. However, the number of secondary market trades has been reduced as the number of newly originated greenfield PFI projects has halted. When coupled with the desire of close-ended equity infrastructure funds holding their equity stakes to maturity, we anticipate the volume of sales of PFI equity stakes on the secondary market to continue to reduce. While the volume of equity trades is reducing (due in part to long-term investors holding assets to maturity), equity holders have an opportunity to take advantage of historically low interest rates and significant debt liquidity, including the use of holding company leverage in their acquisitions.

vi Budget 2018

The 2018 Budget announced the cancellation of the PF2 model, and subsequent ministerial answers to questions in parliament have clarified that the key elements of the existing infrastructure investment pipeline which were anticipated to be financed by PF2 (specifically Glen Parva prison, the A303 Stonehenge tunnel and the Lower Thames Crossing tunnel) will not be privately financed, but will be financed using public financing. 19

17 See https://www.nic.org.uk/our-work/ (last accessed 29 January 2018) for further information.
19 ‘Written questions and answers’ Parliament.uk, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-questions-answers/?page=1&max=20&questiontype=AllQuestions&house=commons&keyword=%22private+finance+initiative%22.
Preferred PPP Model review
In October 2017, the government commissioned a review of SOPC4 with the intention that a new generation of PFI projects could be developed to revitalise the infrastructure sector. However, the National Audit Office’s recent review of PFI dampened the government’s plans by suggesting that PFI has not provided value for money for the taxpayer. The subsequent cancellation of the PF2 model means that any updated SOPC may coincide with the government consulting on or announcing a new preferred model for private investment in PPPs.

We understand that the government’s review of SOPC will identify changes to reflect recent EUROSTAT regulatory changes. In addition, as a result of recent political events, the government may also take the opportunity to incorporate additional changes to the SOPC, reflecting upon lessons learnt from the Carillion insolvency and other incidents associated with PFI/PF2 service delivery. But it is not clear, and there has been no current indication from government, as to exactly what form the new model will take. We would, on balance, suggest that it may be a model where the private sector participants received a capped return.

III CONTRACTUAL FRAMEWORK

i Types of public-private partnership

Outside of PFI/PF2, there are several other forms of PPP used in the United Kingdom, considered below.

Concessions
Under a concession, a private entity is granted an exclusive right to build, maintain and operate specific assets for a period of time. These projects are financially free-standing and usually the contractor is paid through usage charges, availability fees or a combination of both to ensure the operating model can encourage both ongoing capital expenditure and service delivery innovation. This structure is often used for projects such as tolled roads and river crossings. The United Kingdom’s rail franchise model is also a form of concession operating in a highly regulated industry.

Strategic infrastructure partnerships
In a strategic infrastructure partnership, a public sector body enters an arrangement with a private sector partner as a joint venture or under a contract. This structure is usually suitable where there may be several phases of works or where several similar small projects are bundled together.

Public delivery organisation (integrator)
The public sector appoints a contractor to adopt a ‘client-side’ role and manage the delivery of a project from preparation to operation. The contractor will usually only manage rather than deliver the project. This approach may be suitable where the project is long-term and requires a flexible approach.

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Regulated asset base structures

The regulated asset base model structure is used to license out a commercial activity, and the licensee will recover returns on expenditure used to develop and operate the assets. Competitions are held for the award of the licence, and the activity and returns on investment are usually subject to independent regulation. The regulated asset base model has been used successfully in the regulated water, power distribution and airport sectors.

With a regulated asset base model, the initial value of assets (often at privatisation) is added to the cost of further investment allowed by the regulator (each subject to depreciation) and the value realised from any disposal is subtracted. This regulated asset base (RAB) (also known as a regulated asset value) is then subject to indexation, creating a net invested capital value.

While models vary dependent on industry, the RAB (i.e., CAPEX) is, in basic terms, then used to calculate the required revenue for the provider through a (risk-weighted) allowed return (which will take account of a number of factors including the provider’s weighted average cost of capital) being applied to the RAB. This allowed return is then (subject to an amortisation allowance) added to allowable OPEX costs to calculate a total required revenue. This required revenue is then raised from customers (subject to provision of any grants or other funds from the public sector) through their usage or bills.

Direct procurement

Ofwat, the water sector regulator, and Ofgem, the electricity regulator, exemplify a further procurement option. Ofwat has used direct procurement to deliver large-scale assets. This model encourages partnership arrangements for the delivery of an asset to increase competition for financing with the hope of driving down financing costs. Thames Water’s Thames Tideway Tunnel project is an example of the use of direct procurement in the regulated water sector. In the case of the energy sector, Ofgem has used direct procurement methodology for Offshore Transmission Operators and had previously intended to use direct procurement for its Competition in Onshore Transmission programme (a programme that has now been suspended).21

Joint ventures

The government may adopt a joint venture model to deliver a project utilising limited companies or partnerships. Joint ventures may be adopted to operate a public service where the revenue does not cover the operational costs, or to realise development potential in publicly owned real estate.

Government-owned, contractor-operated companies

An authority may want to retain control of a strategic asset but will need a contractor to operate it for the duration of the services. Once in operation, the asset will be transferred back to the government.

Hybrid projects

Structures may develop that combine together aspects of the above structures and these may be used for specific one-off projects that have special requirements.

ii The authorities

The following public bodies are responsible for PPP in the United Kingdom:

a the European Commission, which sets the regulatory framework for public procurement in the European Union. Post Brexit, much of the existing framework will remain in UK law but the extent of future application of EU rules will depend on any final agreement;

b Her Majesty’s Treasury, which controls public spending and sets the general direction and policy on PPP. It also approves the project business cases;

c the Cabinet Office, which oversees the standards and efficiency of government functions and procurement and approves procurement structures;

d the Infrastructure and Projects Authority (IPA), which helps translate long-term planning into successful projects. The IPA publishes National Infrastructure Delivery Plans to cover infrastructure policy over a five-year period;22

e procuring bodies: the authorities that structure and procure projects. They are the contracting party and manage the project and pay the contractor;

f independent regulators: some areas of activity are regulated by a specific body, for example, gas and electricity, large airports, water, and environment;

g planning authorities that decide whether to grant development consent for a project. The size and location of the project will define who the relevant planning authority is; and

h the Comptroller and National Audit Office, which scrutinises government spending. The Comptroller and National Audit Office recently published a report on the costs and benefits of PFI/PF2.23

iii PPP project requirements

In the United Kingdom there is no PPP law as such, unlike in many other jurisdictions outlined in this book. UK PPP projects are promoted under the general legislative powers of government and public bodies. A PPP concession is granted by government under English contract law (or under Scottish law where the concession is granted by the Scottish government using devolved powers), although in some sectors of government, primary legislation has been passed to enable PPP projects to be financeable. The powers of central government departments are mainly unfettered unless limited by common law or legislation. Local government and other public bodies will have more restricted powers conferred by legislation.24


24 For example, the National Health Service (Private Finance) Act 1997 which allows the NHS to enter into development finance agreements. Also, the Localism Act 2011 extended the powers of local governments.
The choice of what PPP model to use on each project is up to the procuring body to decide and there is no standard approach or correct structure when procuring a project. The Cabinet Office and Her Majesty’s Treasury will oversee any decision on the structure of the project and ultimately (and most importantly) the source of funding for the project.

Similarly, the approach to PPP contracts will depend on the structure of the project. However, the contracts for PFI/PF2 projects have been standardised by Her Majesty’s Treasury in SOPC4. SOPC4 sets out recommended and required provisions that should feature in the contract.

By way of example, in the United Kingdom, PFI/PF2 projects had to be approved before procurement and a typical framework for approval is:

- the Cabinet Office approves the procurement route. The IPA operates a staged assurance process that the project must go through when proceeding to procurement; and
- the strategic outline case, outline business case and final business case must be approved by Her Majesty’s Treasury. The strategic outline case will be approved at the beginning of the project, the outline business case at the pre-market stage and the final business case before any final negotiations begin.

Each procuring body must follow its relevant approval process. Local government bodies and other public bodies usually require sign-off from their sponsoring department.

All of these approvals are obtained by the procuring body and not the contractor. Once it has successfully bid for the project, the contractor will have to obtain various consents such as planning consents and environmental permits. The contractor is not required to obtain any PPP-specific consents.

IV BIDDING AND AWARD PROCEDURE

The procurement of works, goods and service contracts by public bodies in the United Kingdom is governed by the Public Contracts Directive 2014/24/EU (the Directive) as implemented in UK law in the Public Contracts Regulations 2015 (the Regulations).25

The Directive applies when works, services or supply contracts are procured that have a value in excess of the published thresholds for that year and they are not excluded contracts.26 It describes three regimes. The primary regime requires fully regulated procurement, and this applies to most contracts above the thresholds. It involves advertisement of the opportunity in the Official Journal of the European Union (OJEU) and compliance with detailed rules when carrying out the competition. This regime applies to the majority of PPPs.

The second regime describes a ‘light touch’ procurement process that must apply to a limited number of specific types of contract referred to as ‘social and other specific services’.27 There is a higher financial threshold, and while advertisement in OJEU is still required, the process itself is less prescribed. This process may be used, for example, in the procurement of medical equipment or social services.

Finally, there is very limited regulation in respect of ‘below threshold’ contracts that are between a de minimis threshold (£10,000) and the main threshold. The below-threshold regime requires advertisement on a national website, though not the OJEU. In the United

25 This covers only procurements commenced after 26 February 2015.
26 Thresholds can be found at: www.ojec.com/thresholds.aspx (last accessed 29 January 2018).
27 These include contracts in the field of health, education and law.
United Kingdom this website is Contracts Finder, and will include most, if not all, contracts, whether above or below the thresholds. It is familiar to most contractors in the United Kingdom and the preferred source of contract opportunities.

There are two ancillary Directives that may apply in specific circumstances:

a. The Concessions Contracts Directive 2014/23/EU applies when public bodies procure concession contracts, that is, contracts where the contractor receives remuneration from third parties by exploiting the relevant asset or concession (e.g., toll roads). This came into force in the United Kingdom in 2016 under the Concession Contract Regulations 2016.

b. The Defence and Security Directive 2009/81/EC applies to the procurement of contracts that require a higher degree of confidentiality and data security because of their sensitive nature.

Though an OJEU notice is still required, the Concessions Contract Directive offers less-onerous rules of competition. Though it could apply to many infrastructure projects and PPPs, the public sector has been slow to make use of it in the United Kingdom, preferring the familiarity of the main Directive.

All of the Directives require the application of overriding principles of fair procurement, namely: the equal treatment of all bidders; transparency of the procurer’s requirements and decision-making processes to bidders; and non-discrimination.

Where the full regime applies; there is a choice of five procedures:

a. the open procedure;

b. the restricted procedure;

c. the competitive dialogue procedure;

d. the competitive procedure with negotiation (often referred to as the ‘negotiated procedure’); and

e. the innovation partnership procedure.

In summary, the open and restricted procedures do not allow any form of negotiation or discussion between the bidder and the authority (although clarification of proposals is allowed). They are generally considered unsuitable for procuring complex PPPs. Innovation partnerships are a new feature of the 2014 Directives but do not appear to have gained much traction. They are appropriate where the authority is looking to the market to develop a new product to meet its needs and be the ‘first customer’ of such product.

Common practice in the United Kingdom for PPPs has oscillated over the years between the negotiated procedure and the competitive dialogue procedure. An earlier version of the negotiated procedure was preferred until 2006, being extremely flexible and allowing the deselection of one bidder early in the process. However, the United Kingdom was heavily criticised for this and it was generally felt that the lack of competition during the key contract negotiations prolonged the award of the contract rather than facilitated it, as all terms were often erroneously considered up for negotiation by the ‘preferred’ bidder and the authority. By 2006, the United Kingdom had worked with the EU Commission to devise the competitive dialogue procedure as an alternative, which enabled negotiation with multiple bidders until the submission of final tenders only, after which there would be no further discussion. Between 2006 and 2015, the UK government championed this new process, but

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it was generally considered the worst of all worlds in practice. It required significant resources and time (for bidders and authorities) to negotiate more than one contract to the stage where a final tender could be capable of acceptance without further discussion.

The 2014 Directives dealt with this criticism by amending the competitive dialogue procedure to allow some negotiation with the preferred supplier post-final tenders, provided there is no material modification. Meanwhile, the negotiated procedure in the Public Contracts Directive\(^\text{29}\) no longer allows negotiation post-final tender.\(^\text{30}\) Competitive dialogue is arguably now the more flexible procedure. Perhaps for this reason, the UK government has relaxed its policy prohibition on the use of the negotiated procedure and, ironically, public bodies have flocked back to it, perhaps in the belief that it still provides its previous flexibility. It is once again the most common procedure for large PPPs.

Whichever process is chosen, lack of government resources and a tightening of legal budgets has led to a focus on reducing procurement timetables. To do this, public bodies tend to limit which areas they are prepared to discuss or negotiate. Often, the main terms and conditions may not be debated at all, only the technical solutions. As much as possible of any negotiations are also now conducted electronically by use of web-based applications. The days of PPPs taking three years to negotiate are long gone.

EU procurement law provides a number of remedies to disgruntled bidders such as a right to damages and in some circumstances a right to have a contract rendered ineffective. These remedies can be found in the Directives and Regulations, though are subject to very short limitation periods. Courts in England and Wales have in the past arguably been unsympathetic to procurement law challenges, and litigation levels remain relatively low compared with the rest of Europe (and with a comparatively low success rate, though it has been steadily increasing over the past decade).

Procuring authorities are also subject to freedom-of-information laws and concluded contracts are generally published (usually with redactions of particularly sensitive information).

### Expressions of interest

All above threshold contracts to which the Directives apply must be advertised in the OJEU. The name, description and value of the contract is given together with the link or contact details for obtaining further information. This information usually consists of an information memorandum detailing the opportunity and background information, together with anticipated timescales and selection criteria for the initial shortlisting of those who will be invited to tender. It may also include a draft contract and evaluation criteria to apply to the tenders at the next stage.

Vitaly, the information pack will also include a selection questionnaire to be completed by interested parties and returned within a 30-day period (other than in cases of urgency where this period may be reduced). Most public bodies now use the UK government’s standard form questionnaire.\(^\text{31}\) It asks a series of questions aimed at identifying the bidding organisation or bidding consortium, its financial strength and experience, and whether

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\(^{29}\) The negotiated procedure in the Utilities Contracts Directive remains flexible allowing negotiations with one preferred supplier from an early stage.

\(^{30}\) See Regulation 29(13).

there are any mandatory or discretionary grounds for exclusion (e.g., a history of criminal conviction, fraudulent activity, tax evasion or poor performance on previously awarded public sector contracts).

Respondents will be assessed against their ability to meet the minimum thresholds with regard to financial standing, and technical ability or experience. Only those that meet the minimum requirements shall be scored, and a shortlist of usually between three and five respondents will be invited to the tender stage of the competition.

ii Requests for proposals and unsolicited proposals

Private parties often liaise with public bodies in an effort to persuade them to enter into PPP arrangements with them. These discussions more often than not take place in the context of official pre-market engagement exercises, which are now specifically allowed under the Directive and promoted by the government. Care must be taken by the authority to ensure they are transparent about these discussions and provide the same level of information to all interested parties (though information received in return should be kept confidential). Sometimes, however, discussions are entered into on an exclusive basis but an authority may not accept any unsolicited offer without considering whether the contract in question would be subject to the Directives. If it is, the body may not accept such offer without the risk of procurement law challenge, and the potential contract must be advertised in OJEU.

Assuming a contract has been advertised and pre-qualified respondents shortlisted as described in Section IV.i, then the shortlisted bidders will be provided with a suite of documents referred to as the 'Invitation to Participate in Competitive Dialogue', or 'Invitation to Negotiate' (as applicable to the chosen procedure). The documents will include: details of the timetable and process for negotiation, including whether it will take place in successive stages and whether bidders may be rejected at each stage; the technical requirements and specification; the draft terms and conditions; the evaluation criteria that shall be applied to each tender and the final tender; and the deadline by which initial tenders must be submitted.

iii Evaluation and grant

Following the receipt of initial tenders, there is a period of negotiation with each bidder. The authority may, in theory, discuss and negotiate all aspects of the tenders but must have regard to the core principles of equal treatment. This means that they cannot agree to change to their requirements with one bidder and not others. However, they must balance this against maintaining the confidentiality of each bidder's technical solutions.

As set out above, the scope of matters that are likely to be negotiated has decreased drastically over the years. Mark-ups of the draft terms and conditions are often not allowed at all and may result in exclusion, be limited to some clauses only, or be heavily penalised in the scoring. As a result of this, public bodies have ensured that by the time final tenders are requested, the contract has been largely accepted and there is minimal negotiation thereafter. Only time will tell whether this will produce long-term contracts that are truly fit for purpose.

Once the final tenders are received, the authority shall apply the evaluation criteria to the tenders. Evaluation criteria must be set out at the outset in the procurement documents and have the objective of identifying the ‘most economically advantageous tender’. This means there must be a price-to-quality ratio applied to the weighting of scores. The contract may only be awarded to the bidder that receives the highest-weighted score. Following award,
final negotiations may be carried out to finalise details of the contract if the competition dialogue process is used. In practice, it also takes place where the negotiated procedure is used, though this is now prohibited by Regulation 29(13).

Public bodies must notify all bidders of their intention to enter into the contract and refrain from signing the contract until a period of at least 10 days has elapsed from the date of the notification to give unsuccessful bidders an opportunity to issue a claim before the contract is signed.

V THE CONTRACT

This section focuses on SOPC4, which provides guidance and drafting for PF2 contracts. The SOPC4 was first released in 2012 and is currently being reviewed. Some PPP contracts use the PF2 position as a starting point but use their own template documents, for example, the Education and Skills Funding Agency and the Ministry of Defence. As mentioned above, it is understood that, in due course, a new preferred PPP model for the UK government will be announced; however, for the time being, the following note concentrates on the mechanics of existing PF2 contracts.

i Payment

Under PFI/PF2, contractors are generally paid with a single unitary charge, which should not be paid until the commencement of the service. The payments will be linked to the ‘availability’ and performance of the service, and the contractor should be incentivised to provide quality services to the authority for value for money. Irregular payment profiles are not recommended as this may mean the project is more difficult to finance, and ultimately more expensive for the government.

Payment mechanisms are monitored and payments are indexed so that they can adjust for inflation and changes of law over the project term.

The payment and performance regime gives financial effect to the project’s risk allocation. It is unusual for the contractor to take demand risk in PFI/PF2; however, in certain projects this may be appropriate.

ii Asset and land ownership

The authority will usually own the land and lease or licence it to the contractor. However, where a project is equipment-based (rather than building-based), the contractor usually acquires the assets and the authority should be given the ability to use and, in certain cases, obtain ownership of the assets to fulfil its statutory duties.

iii Amendments and variation

As PF2 projects are long term, the contract should allow flexibility to account for any changes in requirements; this includes the introduction of the small value change regime in PF2. In

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33 Chapter 4, ibid.
34 Part F, ibid.
addition, PF2 model contracts seek to exclude certain auxiliary services such as cleaning and catering, as these were considered better value for money when delivered over significantly shorter and more flexible contract terms.

PF2 project contracts usually cover for three main changes, namely use or functionality of the asset, changes in capacity of the asset or service, and change in the specification and standards of the service.

If the contractor wishes to amend project and finance documents, the authority’s consent will be required, though certain minor changes may only have to be notified to the authority once they have been amended.

Changes should be priced and agreed in accordance with the provisions of the contract, and it is prudent to allow for independent determination to resolve any disagreements.

iv Risk allocation

The authority’s main contractual protection will be the ability to withhold or reduce payment if the service stops or is not of an appropriate standard. The authority may also be given comfort through parent company guarantees from the contractor, letters of credit and other credit support. The contractor will indemnify the authority against damages resulting from death, personal injury, property damage, third-party claims and breach of statutory duty.

The contractor’s main protection will be regarding supervening events, namely:

a compensation events – events whereby the risk should clearly lie with the authority and the contractor should receive compensation on a ‘no better, no worse’ basis;
b relief events – management and financial risk of these events (generally capable of being insured) should remain with the contractor as they are best placed to deal with the events; however, they should not lead to termination (but during operations can lead to payment deductions);
c force majeure events – limited circumstances (generally not capable of being insured) that are neither party’s fault and best managed by the contractor. Termination rights may arise if the event cannot be addressed within a reasonable time frame; and
d a change in law – the contract will also provide protection to the contractor for any changes in law that cause the costs of the project to increase.

v Early termination and compensation

The authority will generally have the ability to terminate the contract for contractor default or persistent breach. The project contract should allow the contractor time to rectify breaches. Authority termination rights will usually be subject to the step-in rights of the project’s senior funders. In some circumstances, the authority may have to compensate the contractor on termination if, for example, termination leads to the automatic acquisition of the asset or land necessary for the project. The project contract may include rights for the authority to voluntarily terminate the contract, and in this case the contractor should be fully compensated, including the repayment of project senior debt and the contractor sponsor’s equity returns.

35 Part G, ibid.
36 Chapter 15, ibid.
37 Part I, ibid.
The contractor will usually be able to terminate the contract for authority default, which will include non-payment, breaches that frustrate the services and breach of assignment restrictions (including lock-in periods). Usually, the contractor will be fully compensated in these circumstances. Continuing force majeure events that cannot be resolved within a reasonable time frame will lead to termination. As these events are neither party’s fault, the financial consequence should be shared, and as such, compensation will be on a no-fault basis. So while senior debt will be repaid, the contractor sponsor’s equity will be repaid back at ‘par’ only.

The contract will set out in detail the provisions for calculating any compensation owed under it. This is a fundamental requirement for project’s senior funders and equity investors.38

vi Refinancing
Standard form PF2 contracts include provisions for sharing of refinancing gains. The authority should have the right to approve any refinancing, and provisions should be included in the contract to allow the authority to share in any qualifying refinancing gains achieved through refinancing.39

VI FINANCE
PFI/PF2 projects are financed by a mixture of debt provided by lenders on a limited recourse basis (i.e., the lenders’ principal recourse is to the project’s cash flows only and does not extend to other assets of the project or the project’s equity investors, subject to any further credit support, such as construction guarantees or letters of credit, that may be given) and equity. PFI/PF2 projects have a high level of debt-to-equity, typically a ratio of 90:10. Recently, the public and private sectors have been exploring alternatives to the traditional sources of funding, which have become more limited following the 2008 global financial crisis, and innovative solutions to improve the financial models for such projects.

i Equity
PFI projects funding generally comprises approximately 90 per cent of debt and 10 per cent of equity and is set up as a conventional holding company-project company structure. Historically, it was the building contractors bidding for the projects that provided the equity capital investments. More recently, however, equity funding from third-party financial investors (such as equity infrastructure funds) has become more common as a result of market growth and contractors’ capital constraints.

One of the fundamental differences between PFI and PF2 is government involvement in the project equity structure. In PF2 projects, the UK government, through an arm’s-length HM Treasury unit, is given the opportunity to provide an element of the equity capital into the project vehicle.

In recently financed PF2 projects, Her Majesty’s Treasury will, via a wholly owned company, take a minority stake (typically 10 per cent) in the project and are under no obligation to provide further funding to the amount agreed at financial close. It is hoped by

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38 Chapter 24, ibid.
39 Chapter 28, ibid.
the government that taking an equity stake in PF2 projects will strengthen the collaboration between the public and private sectors, and enable the public sector to benefit from increased financial transparency and decision-making capabilities on such projects.

Her Majesty’s Treasury also stated[^3.6] that holding a minority stake in the project would lead to better value for money through its entitlement to a percentage of investment returns, which in turn reduces the cost of funding these projects to the public sector. In practice, the developer, third-party equity provider and Her Majesty’s Treasury enter into a shareholders’ agreement, under which equity is provided in the form of subscription monies and subordinated debt, the latter issued by way of unsecured loan notes by the holding company SPV to the shareholders. Colloquially, this subordinated debt is regarded as equity for financial ‘gearing’ ratio purposes.

Another key change that was proposed in Her Majesty’s Treasury’s PF2 launch document is the higher levels of equity (20–25 per cent) compared with the debt-to-equity ratio commonly found in PFI projects. However, from information publicly available, none of the PF2 projects that have reached financial close have achieved a high level of equity, with debt-to-equity ratios remaining at approximately 90:10. Her Majesty’s Treasury’s rationale for the proposal was to widen the investor base to attract pension funds, insurance companies and institutional investors (Other Investors) to invest in PF2 equity, and thereby reduce the cost of debt and circumvent the perceived shortage of available debt funding in the market. However, no Other Investors had participated in any of the six PF2 projects as at January 2018 (and the debt-to-equity ratio remained the same as for PFI for all six PF2 projects).[^3.6] This, coupled with the improvements in the conditions of the lending market, led Her Majesty’s Treasury and the IPA to ultimately scrap the proposal.

**ii Debt**

Senior debt from banks and other financial institutions was traditionally the most common type of the majority of the financing for PFI projects.

Another debt financing source is the debt capital markets. Bond finance products have been developed for the financing of projects following the construction phase or the refinancing of completed projects on more favourable borrower terms. With banks having been increasingly reluctant to issue long-term loans because of stricter regulatory requirements and capital constraints as a result of the 2008 financial crisis, public bond financing was seen as a possible source of alternative sources of debt financing to fill the void. The reality, however, was somewhat different as a wide variety of sources of financing from insurance and pension fund investors, private placements and an active monoline insurer has provided a large amount of infrastructure debt liquidity.

As discussed in Section VI.i, the Other Investors have not been keen to take equity stakes in PFI/PF2 projects. They have, however, taken on a much more active role in relation to the debt financing aspect, both through the PFI/PF2 schemes and direct investment in such projects. Furthermore, greenfield PFI/PF2 projects have seen debt funding from infrastructure debt funds at pre-development and refinancing stages.

Another policy that was established to encourage alternative debt funding is the UK Guarantee Scheme (the Scheme), under which the government guarantees debt raised by


[^ibid]: ibid.
the borrower (i.e., the holding company or project company) of infrastructure projects of national significance. The government announced in November 2016 that the Scheme will continue until at least 2026, and nine projects covering different sectors and deal sizes have already benefited from the Scheme since its inception. Since borrowing guaranteed under the Scheme would in effect render it to be classified as sovereign-backed debt, borrowers are generally able to achieve more favourable funding terms. While the Scheme has been utilised on a number of projects, many commentators see the Scheme as unnecessary for the majority of well-structured investment-grade infrastructure projects.

VII RECENT DECISIONS

Perhaps the notable PPP/PFI decision in 2018 was *Tees Esk & Wear Valleys NHS Foundation Trust v. Three Valleys Healthcare Limited and Bank of Scotland PLC*, which concerned the ability to terminate a project agreement pursuant to the service of termination notices under a funders’ direct agreement (FDA). The FDA provided that two specific notices had to be served by the public authority. The funders disputed the validity of the second notice on the basis that the notice was to detail amounts owed by the project company to the public authority and other obligations of the project company (the public authority having made ‘proper enquiry’) but did not contain such information and was therefore invalid. The intention of this second notice was to give the funders the opportunity to assess whether it wanted to step into the project, and the funders’ argument was that the second notice delivered by the public authority was invalid as it contained insufficient detail (with some heads of claim marked ‘TBC’). The funders also argued that there was no evidence that the public authority had made ‘proper enquiry’. The judge ruled against the funders, detailing that if the funders had chosen to step into the project following the second notice, it would have only been liable for the quantified liabilities. However, the public authority did not have to quantify the other obligations, and there was no (implicit) obligation on the public authority to provide evidence of its enquiries for the notices to be valid.

Notable procurement law decisions in 2018 include *SRCL Ltd v. The National Health Service Commissioning Board* [2018] EWHC 1985 (TCC), which concerned and summarised a public body’s obligations regarding abnormally low tenders. The court confirmed that the public body has the discretion to determine whether a tender gives rise to a suspicion that it is abnormally low. If it does suspect this it must enable the bidder to justify its prices. Moreover, the public body is not obliged to exclude the tender, except in limited circumstances.

Another case, *Ocean Outdoor UK Ltd v. Hammersmith and Fulham LBC* [2018] EWHC 2508 (TCC), gave guidance as to when certain concession arrangements fall within the full scope of the EU procurement regime or whether public bodies are free to negotiate directly. It concerned leases for advertising space granted by a local authority on its land. The court found that concessions that did not include any explicit obligations to build anything or to deliver services to the public body were not covered by the procurement regime, despite rental payments being made on the assumption advertising services would be undertaken and a termination right existing if rent was not paid.

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A similar ruling by the Court of Appeal in *Faraday Development Ltd v. West Berkshire Council and St Modwen Developments Ltd* [2018] EWCA Civ 2532 determined that development agreements that also had an absence of directly or indirectly enforceable obligations to deliver public works or services would also not be covered. However, in that case, the Development Agreement (which had not been tendered in accordance with the EU procurement regime) was the first UK contract to be rendered ineffective; as it had included enforceable obligations to do works within the leases which the developer could call down when certain conditions were met.

The three UK cases above highlight, once more, an increasing tendency to litigate on procurement matters and to challenge public body decisions.

**VIII OUTLOOK**

It is clear, with the government discontinuing PF2 but outlining an intention to procure nearly £300 billion of infrastructure through private finance up to 2028, that the private sector will continue to play a key role in future infrastructure investment in the United Kingdom. However, what exactly this role will be and what models will be used to procure such investment is not clear.

A new preferred PPP model will invariably seek to address the key political and financial concerns in respect of PFI/PF2. We would tentatively suggest that mechanisms may be introduced into the new model to mitigate against possible private sector windfalls (including in relation to future reductions in tax rates) and there may even be a cap on rates of return. While the government may also seek to create a simpler model, we would expect that the new model may reflect existing models, such as the mutual investment model and even PF2 to some extent (though the political toxicity of the phrase means that ‘private finance’ is unlikely to be used). The model will also likely seek to comply with current Eurostat guidance such that these investments are classified as not being on the government balance sheet for net public sector debt and deficit calculations.

RAB models have been strongly promoted by the government (including as a potential solution to investment in nuclear power), but these can inherently only provide a partial solution – RAB models are only of relevance to privatised sectors so it is difficult to see how these structures could be applied in part, if at all, to sectors such as defence or to prisons, hospitals or schools. While investment in utilities and airports (and hence the RAB model) may take up a significant part of the circa £300 billion, a further PPP model is likely to be needed for non-privatised industries: the public sector may be funding previous ‘PF2 projects’ such as Glen Parva prison, the A303 Stonehenge tunnel and the Lower Thames Crossing tunnel, but public finances are still significantly restricted (and unlikely to be significantly increased in the government’s 2019 Comprehensive Spending Review) and, notwithstanding a potential Labour Party government, private investment in PPPs is likely to be necessary to build much-needed infrastructure. Inevitably, the political reality of Brexit may delay consultation on or announcement of a new preferred PPP model, but it is clear that this model is greatly needed and will hopefully be confirmed in 2019.

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43 e.g., ‘Regulated asset base model could benefit nuclear industry’, *UtilityWeek* https://utilityweek.co.uk/regulated-asset-base-model-benefit-nuclear-industry/.
Chapter 24

VIETNAM

Kazuhide Ohya, Vu Le Bang and Nguyen Van Trang

I OVERVIEW

In 2018, Vietnam made its debut in the top-five countries for total volume of private participation in infrastructure. According to the World Bank’s database, 107 PPP projects are said to have reached financial closure in Vietnam during 1990–2018. However, no official statistics on the number of PPP projects have been published in Vietnam and the PPP projects mentioned in the World Bank’s database also seem to be only focused on major projects and many small projects and provincial level projects are missing from the database, especially in the areas of electricity, roads, and water and sewerage.

In 1986, the Đổi Mới policy adopted at the 6th National Congress of the Communist Party of Vietnam introduced market economy in Vietnam and opened the market to foreign investors. Since then, Vietnam has faced a gap between the huge demand for infrastructure development with a rapidly growing population and economy and a scarce governmental budget, and, therefore, expectation to the private funds for the infrastructure development has existed. The history of PPP legislation in Vietnam started in 1992, when the amended Foreign Investment Law mentioned build–operate–transfer (BOT) for the first time. In 1994, it was reported that the first BOT contract was entered into for the water treatment plant project of Binh An Water Corporation Limited. In this phase, PPP legislation was limited mainly for foreign investment and several PPP projects with foreign investors emerged.

Around the time when the Asian currency crisis started in 1997, Decree 77-CP dated 18 June 1997 also provided BOT regulations for full participation of domestic investors for the first time. At this stage, PPP projects of domestic investors were mainly established by the state-owned enterprises (SOEs) with the aim to implement such projects without state budget allocation, but those aims were not always successful.

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1 Kazuhide Ohya and Vu Le Bang are partners, and Nguyen Van Trang is a senior associate at Nishimura & Asahi.
4 Unofficial source of statistics revealed that there were about 200 projects that have been licensed in the past 20 years. Among which, 158 BOT projects and BT projects in transportation sector, nine BOT projects in power sector and five PPP projects for water treatment (See https://theleader.vn/viet-nam-khong-co-du-an-ppp-nao-chuan-theo-quy-dinh-1543895758822.htm (accessed on 2 January 2019).
6 For example, Huynh Tan Phat Road Project originally developed by Vietnam Urban and Industrial Zone Development Investment Corporation and Ong Thin Bridge Project originally planned to be developed by Civil Engineering and Construction Company 5 as BOT projects did not become profitable and were...
With Vietnam’s participation in the World Trade Organization, distinctions between the foreign investors and domestic investors were abolished in principle,7 and BOT regulations were also unified in 2007. Subsequently, two regulations for PPPs – Decree 108/2009/ND-CP and Prime Minister Decision 71/2010/QD-TTg – co-existed without mutual coordination for a while, but this confusing situation was resolved in 2015 by Decree 15/2015/ND-CP (which was replaced by Decree 63/2018/ND-CP, taking effect on 19 June 2018). Decree 30/2015/ND-CP on selection of investors and Decree 63/2018/ND-CP are currently in effect for PPP regulations in Vietnam.

II THE YEAR IN REVIEW

In 2017, the Standing Committee of the National Assembly issued Resolution No. 437/NQ-UBTVQH14, in which the government and the Prime Minister are requested to establish a PPP law. At the 29th Standing Committee of the National Assembly on 10 December 2018, the government announced its plan to submit a PPP law for comments at the 7th Session of the National Assembly (May 2019) and for approval at the 8th Session of the National Assembly (October 2019).8 The draft PPP law has been circulated for comments by ministries and published on the website of Ministry of Planning and Investment (MPI) since June 2018.9 It is expected to set the criteria on selection of PPP projects, evaluation of financial capacity of investors, and the equity ratio applied to each group of projects.

On 19 June 2018, Decree 63/2018/ND-CP replacing Decree 15/2015/ND-CP came into effect, and the legal framework set forth under this Decree is expected to encourage private investors to invest in PPPs. The key highlights of this Decree are the simplification of the procedure for investment in PPP projects10 and the expansion of the funding sources for the state’s participation in PPP projects.11

As a matter of fact, the Vietnamese government is calling for PPP investments in many projects12 and it is no surprise for the Vietnamese government to make efforts to improve their PPP framework to attract more foreign investors. On the other hand, controlling the increasing public debt is also an inevitable task for the Vietnamese government. We see the tendency of conditions for government guarantee and undertakings (GGU) getting stricter in Law No. 83/2015/QH13 on State Budget, Law No. 20/2017/QH14 on Public Debt Management and Decree No. 91/2018/ND-CP on issuance and management of government guarantee. In 2017, no GGU was issued.13 Recently, the Prime Minister issued Instruction No. 31/CT-TTg dated 8 November 2018 to request the Ministry of Finance to refrain from issuing GGU to the maximum possible extent and the Deputy Prime Minister turned down the proposal of the Ministry of Finance on the application of a pilot mechanism for issuance eventually transferred to public sectors.

10 Article 9 of Decree 63/2018/ND-CP.
11 Article 11 of Decree 63/2018/ND-CP.
12 Decision No. 631/QD-TTg dated 29 April 2014 of the Prime Minister promulgating the list of national projects in which foreign investments are called for by 2020 (including by PPP). The following links are for the projects calling for PPP investment: http://ppp.mt.gov.vn/pppunit/Projects; http://ppp.mpi.gov.vn/Pages/project.aspx.
of GGU to guarantee for PPP projects in transportation sectors.\textsuperscript{14} The unavailability of the GGU was one of the major blockages for foreign investors to establish international standard PPP projects in Vietnam with appropriate risk allocation between the public and private sectors, and such tendency of imposing stricter conditions may further frustrate foreign investors. Actually, except for projects for thermal power plants using imported coals,\textsuperscript{15} it is not easy for foreign investors to be granted GGU for their PPP projects in Vietnam.

As a result, the following two types of domestic investors may have a higher possibility of implementing PPP projects in Vietnam: (1) strong domestic investors such as major SOEs that have enough influence to procure GGU; and (2) domestic investors who can implement PPP projects without government guarantee by utilising domestic loans from state-invested banks, such as the Joint Stock Commercial Bank for Investment and Development of Vietnam (BIDV), the Joint Stock Commercial Bank for Foreign Trade of Vietnam (Vietcombank) and the Joint Stock Commercial Bank for Industry and Trade (VietinBank). The latter pattern is predominant in the area of road infrastructure projects. It is said that the state-invested banks mentioned above are taking huge commercial risks in such area (including step-in rights) and are currently bridging the gap between the huge demand for infrastructure development and a scarce state budget.

Another trending topic in the infrastructure development area in Vietnam is the boom in the renewable energy sector. With the Vietnamese government’s strong supports for promoting environmentally friendly energy sources, including raising feed-in tariff for solar and wind power projects and efforts to improve the regulatory framework for investments in such projects,\textsuperscript{16} an increasing number of investors are lured into such projects.\textsuperscript{17}

\section*{III GENERAL FRAMEWORK}

\subsection*{i Types of public-private partnership}

Under the current PPP regulations, the following seven principal public-private partnership structures are provided:

\begin{table}[h!]
\centering
\begin{tabular}{|l|p{0.6\textwidth}|}
\hline
\textbf{Structure type} & \textbf{Definition} \\
\hline
BOT & Structure for the construction of infrastructure facility upon the completion of which the investor has the right to commercially operate such facility for a fixed term, and upon the expiry of such term, the investor transfers the facility to the state.\textsuperscript{a} \\
\hline
Build–transfer–operate (BTO) & Structure for the construction of an infrastructure facility upon the completion of which the investor transfers such facility to the state and has the right to commercially operate the facility for a fixed term.\textsuperscript{f} \\
\hline
\end{tabular}
\end{table}


\textsuperscript{15} Projects for thermal power plants enjoy certain preferential treatments, including GGU, under Decision 2414/QD-TTg dated 11 December 2013. In these projects, participation of foreign investors who are capable of implementing such projects is necessary because of the lack of capacity and experience of domestic investors for such projects.

\textsuperscript{16} Notable regulations are Decision 11/2017/QD-TTg, which raised feed-in-tariff for on-grid solar power plants, Circular 16/2017/TT-BCT on project development and model purchase agreements for solar power projects, and Decision 39/2018/QD-TTg on amendment and supplementation of some articles of Decision 37/2011/QD-TTg on the support mechanisms for development of wind power projects in Vietnam.

\textsuperscript{17} However, not all of these projects are implemented under PPP regulations.
<table>
<thead>
<tr>
<th>Structure type</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Build–transfer (BT)</td>
<td>Structure for the construction of an infrastructure facility whereby the investor transfers such facility to the state and is rewarded by way of land use rights, working headquarters, infrastructure assets, or the right to commercially operate facilities or provide services to implement other projects to recover capital invested in such facility.‡</td>
</tr>
<tr>
<td>Build–own–operate (BOO)</td>
<td>Structure for the construction of an infrastructure facility upon the completion of which the investor owns and has the right to commercially operate the facility for a fixed term.§</td>
</tr>
<tr>
<td>Build–transfer–lease (BTL)</td>
<td>Structure for the construction of an infrastructure facility upon the completion of which the investor transfers such facility to the state and has the right to provide services on the basis of operating and exploiting the facility for a fixed term; and the state has the authority to hire such services and shall make payment to the investor periodically on the basis of the volume and quality of services.¶</td>
</tr>
<tr>
<td>Build–lease–transfer (BLT)</td>
<td>Structure for the construction of an infrastructure facility upon the completion of which the investor has the right to provide services on the basis of operating and exploiting such facility for a fixed term; the state has the right to hire such services and shall make payment to the investor periodically on the basis of the volume and quality of services; and upon the expiry of the term for provision of such services, the investor transfers the facility to the authorised state agency.#</td>
</tr>
<tr>
<td>Operate–manage (O&amp;M)</td>
<td>Structure for an investor to commercially operate a facility partly or entirely for a fixed term.**</td>
</tr>
<tr>
<td>Mixed contract</td>
<td>Structure that is a mixture of two or more of the above types for the construction or operation of an infrastructure facility.††</td>
</tr>
</tbody>
</table>

**Notes**
- * Article 3.3 of Decree 63/2018/ND-CP.
- † Article 3.4 of Decree 63/2018/ND-CP.
- ‡ Articles 3.5, 10.4, 15.3, 33, 34, 35 and 36 of Decree 63/2018/ND-CP.
- ¶ Article 3.6 of Decree 63/2018/ND-CP.
- § Articles 3.7 and 15.2 of Decree 63/2018/ND-CP.
- # Articles 3.8 of Decree 63/2018/ND-CP.
- ** Article 3.9 of Decree 63/2018/ND-CP.
- †† Article 3.10 of Decree 63/2018/ND-CP.

BOT, BTO and BT are traditional structures in Vietnam. The difference between BOT and BTO is the timing of transfer of the project assets to the state. Once the project assets are transferred to the state, they are classified as ‘public assets’, which are subject to stricter control or management of the state. In that sense, BOT investors, under which the transfer will be made after the operation, may enjoy relatively more flexible control or management over the project assets than BTO investors. BT is recognised as a PPP structure in Vietnam, though no operational or management risk is passed to the private sector.

BOO, BTL, BLT and O&M structures were newly introduced by Decree 15/2015/ND-CP. BOO was implemented in practice even before being introduced by Decree 15/2015/ND-CP. BTL and BLT are new concepts introduced by Decree 15/2015/ND-CP. The elements that differentiate BTL and BLT from BOT or BTO structures are the payment method to the service of the investors and the payer to the service of investors (i.e., payment by the state on the basis of volume and quality of service including availability payment, not fees from end-users or off-takers).

Decree 63 adopted all types of PPP structures under its predecessor regulation and newly introduced a new concept of mixed contract.

**ii The authorities**

In Vietnam, there is no unified service window for PPPs. A certain ministry, branch or provincial people’s committee is authorised to enter into project contracts within the scope of its jurisdiction.
of its functions, duties and powers, and to perform rights and obligations as agreed with investors in project contracts, with certain power to delegate such authority. Investors are recommended to consult with experts such as lawyers in the early stage of project preparation for PPPs to identify which state agency will be the key counterpart for discussion and negotiation for the project to facilitate the project establishment. For example, depending on the sectors of PPP projects at the central government level, the following state agencies would be the competent contracting or regulatory agencies:

<table>
<thead>
<tr>
<th>Sectors</th>
<th>Competent contracting/regulatory state agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Roads, railways, ports, airports</td>
<td>Ministry of Transportation</td>
</tr>
<tr>
<td>Water, wastewater</td>
<td>Various governmental agencies, including the Ministry of Natural Resources and Environment</td>
</tr>
<tr>
<td>Energy</td>
<td>Ministry of Industry and Trade</td>
</tr>
<tr>
<td>Information communications technology</td>
<td>Ministry of Information and Communications</td>
</tr>
</tbody>
</table>

The State Steering Committee for PPP is an inter-Ministry specialised governmental entity that facilitates the PPP programme in Vietnam (the Committee). The Committee was established by Decision 1624/QD-TTg in 2012 and strengthened its function by Decision 2048/QD-TTg in 2016, which replaced Decision 1624/QD-TTg. The Vice Prime Minister is the chair of the Committee. The MPI is also the central Ministry among the governmental Ministries to promote PPP regime in Vietnam. The Ministry of Finance, Ministry of Justice and SBV also play important roles in the formation of PPP projects.

iii General requirements for PPP contracts

A project must satisfy all the following conditions to be eligible for making an investment policy decision in the PPP investment form:20

a a conformity with development master plans for the industries and sectors and socio-economic developmental plan as approved by the competent authorities;

b being in one of the following investment sectors:

• transportation;
• power plants and power transmission lines;
• public lighting systems; clean water supply systems; water drainage systems; waste water and waste collection and treatment systems; parks; housing and yards for parking cars, vehicles, machinery and equipment; and cemeteries;
• headquarters or offices of state agencies; official residential housing; social housing; resettlement housing;
• health; education, training and vocational training; culture; sport; tourism; science and technology; hydrometeorology; information technology application;
• commercial infrastructure; infrastructure of urban zones, economic zones, industrial zones, industrial clusters, and centralised information technology zones; high-tech technical infrastructure; and incubation establishments, technical establishments, and common working areas supporting small and medium-sized enterprises;

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20 Article 20 of Decree 63.
• agriculture and rural development; development services for connecting production with processing and sale of agricultural products; and
• other sectors as decided by the Prime Minister of the government;
• not overlapping with other projects for which an investment policy decision or investment decision was made;
• being capable of capital recovery for the investor;
• conforming with the capability of balancing the state portion for participating in a PPP project; and
• having an environmental impact assessment report as prescribed by the law on protection of the environment.\(^21\)

There is no pre-fixed limitation for the term of the project, and it will be agreed among the parties in the project contract considering the sector, size, characteristics and type of project. The overall outline of the procedure for solicited PPP projects is as follows:\(^22\)

a formulation and evaluation of the pre-feasibility study report, issuance of the investment policy decision and the announcement of the project;
b formulation, evaluation and approval of the feasibility study report;
c procurement for selection of investor;
d negotiation, establishment of the project company (if any) and signing of the project contract; and
e implementation of the project, accounting finalisation and transfer of the facility.\(^23\)

Within seven business days after the approval of a project proposal, the announcement of the project will be made on the national bidding network system in accordance with the Law on Bidding.\(^24\)

The authorities to ‘evaluate’ feasibility study reports are (1) the State Evaluation Committee for national important projects; and for projects using official development assistance (ODA) capital and concessional loan capital of foreign donors as the state capital contribution portion in the sectors of national defence and security, and religion; (2) ministers, heads of ministerial equivalent agencies and chairmen of provincial people’s committees assigning their PPP co-ordinating for projects other than those prescribed in (1).\(^25\) The authorities to ‘approve’ feasibility study reports are: (1) the Prime Minister for national important projects; and for projects using ODA and concessional loan capital of foreign donors as the state capital contribution portion in the sectors of national defence

\(^21\) Article 20 of Decree 63/2018/ND-CP.
\(^22\) BT projects, Group C PPP projects and high-tech projects follow different procedures. Group C PPP projects are not required to formulate and evaluate a pre-feasibility study report or to issue an investment policy decision, but the project must be announced after the feasibility study report is approved. The selection of investors of high-tech projects will be conducted after the pre-feasibility study report and project approval. As a result, the selected investors will be responsible for preparing the feasibility study report.
\(^23\) Article 9 of Decree 63/2018/ND-CP.
\(^24\) Article 21.1 of Decree 63/2018/ND-CP.
\(^25\) Article 30.1 of Decree 63/2018/ND-CP.
and security, and religion; and (2) ministers, heads of ministerial equivalent agencies and
government agencies, and chairmen of provincial people's committees for projects other than
those stipulated in (1).26

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest
Based on the approved feasibility study report for a PPP project, pre-qualification shall be
conducted before preparing the plan for selection of investors to identify investors with
sufficient capacity and experience to satisfy the project requirements and to invite them to
participate in open bidding.27 Within three business days from the publication of the notice
of invitation of pre-qualification applications on the national bidding network system or
in the bidding newspaper, pre-qualification invitation documents must be issued.28 The
application period is at least 30 days from the pre-qualification invitation.29 If investors
wish to clarify pre-qualification invitation documents, they can send a written request to
the inviting party until five business days prior to the bid closing date.30 Pre-qualification
is conducted in accordance with the assessment criteria set out in the pre-qualification
invitation documents.31 Investors will be required to prove financial-commercial capacity
and ability to raise funds, implement the project and experience in similar projects, declare
the preliminary method for implementing the project and commit to implementing it, and
declare any dispute or litigation arising out of current or earlier contracts.32

ii Requests for proposals and unsolicited proposals
The selection of investors is basically made through international open bidding. Domestic
open bidding is only allowed: where participation of foreign investors is restricted for the
investment sectors by international treaties or laws of Vietnam; where foreign investors did
not participate in or pass international pre-qualification; in Group C PPP projects; or in
certain small-scale investment projects using land.33 Invitation of bidding will be sent to the
investors who passed pre-qualification.34 Bidding procedures for Group C PPP projects and
projects using land are provided separately from bidding procedures for other PPP projects.
By the bidding application closing date, bidders need to provide bidding deposits, the amount
of which is between 0.5 per cent and 1.5 per cent of the proposed total invested capital.35

26 Article 31.1 of Decree 63.
27 Article 16 of Decree 30/2015/ND-CP. Certain small projects may be exempted from this process.
28 Article 6.3 of Decree 30/2015/ND-CP.
29 Article 6.4 of Decree 30/2015/ND-CP.
30 Article 18.2(c) of Decree 30/2015/ND-CP.
31 Articles 17.1(d) and 20.1 of Decree 30/2015/ND-CP.
32 Articles 17.1(c) and 20.1 of Decree 30/2015/ND-CP.
33 Article 9 of Decree 30/2015/ND-CP.
34 Article 29 of Decree 30/2015/ND-CP.
35 Articles 11.2 and 11.3(b) of the Law on Bidding.
Direct appointment of the investor (without bidding procedure) is allowed only in quite limited circumstances, that is, if:

a only one investor registers and satisfies the requirements set out in the pre-qualification invitation documents or only one investor passes the pre-qualification;
b only one investor has the capacity to implement the project because of intellectual property, commercial secrets, technology or arranging capital funding; or
c an investor proposing a PPP project (i.e., an investor of an unsolicited proposal project, which is further discussed below) satisfies the requirements for project implementation with the highest feasibility and efficiency, considering that:
   • the investor has a feasibility study report that has been approved already;
   • the service prices proposed by the investor, amounts of economic assistance by the government or social benefits are reasonable; and
   • there is a necessity for national security. 36

Unsolicited proposals of PPP projects from investors are possible in Vietnam. If the investor is a state-owned enterprise, it must form a consortium with another enterprise to propose the project. Under unsolicited projects, investors need to prepare the pre-feasibility report and the feasibility study report mentioned in the overall outline of the procedure for solicited PPP projects in Section III.iii (bullet points (a) and (b)), by their own expenses. 37 If the feasibility study report is approved, such investor is entitled to preferential treatment (5 per cent) in the financial–commercial assessment process of the bidding.38

iii Evaluation and grant

The evaluation process consists of assessment of technical proposals and assessment of commercial–financial proposals. 39 Through these assessments, investors who satisfied the requirements will be ranked in the list. The investor ranked first will be invited to negotiate an investment (preliminary) agreement, 40 which is not a PPP contract itself, but rather a preliminary agreement on the draft PPP contract. If preliminary negotiations are unsuccessful, the next ranking bidder will be invited to negotiate the same. 41

Once the investment (preliminary) agreement is concluded, if necessary, the investor will proceed to the process of establishment of the project company in accordance with the general procedure provided by enterprises law.42 Under the new legal framework, the investor is no longer required to obtain an investment registration certificate for a PPP project.

After the project company is established, the investor may either sign the project contract then assign the rights and obligations of the investor under the project contract to the project company; or together with the project company to sign the project contract. 43 Guarantee for contract performance must be provided prior to the date on which the PPP contract takes effect. 44 An amount of a contract performance guarantee is stipulated in the bid invitation documents at a level between 1 per cent and 3 per cent of the total investment capital of the project.45

Procedures for Group C PPP projects and projects using land are provided separately from procedures for other PPP projects.

43 Article 39 of Decree 63/2018/ND-CP.
44 Article 72 of the Law on Bidding and Article 47 of Decree 63/2018/ND-CP.
45 Article 72.2 of the Law on Bidding.
V THE CONTRACT

i Payment

Payments by the state to the investors in PPP projects are one of the inevitable factors for such PPP projects to be viable. Under the old PPP regime, Decree 108/2009/ND-CP and Prime Minister Decision 71/2010/QD-TTg respectively provided the limits for available state investment capital of 49 per cent and 30 per cent of the total investment capital of a project. These limits were abolished under the current PPP regulations.

The state’s participation in a PPP project may be made in one or more of the following forms ((a) and (b) will not be available for projects whose investors are selected by direct appointment):

a the state’s capital contribution, which shall be used to support construction of facilities for the purpose of ensuring the viability of projects, excluding BT projects;

b capital for payment to the investor, which shall be used to make payment to investors providing services under BLT or BTL contracts;

c land fund, working headquarters or infrastructure assets as payment to the investor or the right to commercially operate and exploit the facility and the services assigned to the investor in a BT project; or

d capital for supporting construction of auxiliary works, and arranging compensation, site clearance and resettlement.46

46 Article 11 of Decree 63/2018/ND-CP.

State investment capital to be used to support construction of project facilities via viability gap funding will be disbursed in accordance with the procedure to disburse for capital originated from the state budget.47 As a general principle, the payment will be made after certain volume or value of construction as agreed in the project contract has been completed in accordance with the ratio, value and progress, and other conditions agreed in the project contract.48

Under BTL and BLT contracts, the state will make payments to investors periodically as from the time of service provision as agreed in the project contract and on the basis of volume and quality of service (key performance indicators) as agreed in the project contract including availability payment.49 Availability payments or performance-based payments have been used in utilities PPP projects (power generation and water supply projects) in Vietnam, and recently, a newly introduced BTL/BLT contract form was actually used.50

A BT contract is a unique type of PPP contract under which the investor will be rewarded by way of land use rights (not payment by cash) in order to implement other projects to recover capital invested in the facility.

47 Article 17.1 of Circular 88/2018/TT-BTC.
48 Article 17.2 of Circular 88/2018/TT-BTC.
49 Article 18.1 of Circular 88/2018/TT-BTC.
ii State guarantees

Government guarantees on loans

The guideline for government guarantees on loans is available under Law No. 83/2015/QH13 on State Budget, Law No. 20/2017/QH14 on Public Debt Management and Decree No. 91/2018/ND-CP on the issuance and management of government guarantee. For debts of investors or project companies to be guaranteed by the government, they need to obtain the in-principle approval from the Prime Minister. According to the Ministry of Finance, the total guaranteed amount as of the end of 2017 is equivalent to US$26 billion. Government guarantees issued to foreign loans accounted for more than 84 per cent of the guaranteed amount. The total outstanding principal is equivalent to US$12.5 billion, of which 64 per cent was attributable to the power sector. Among them, US$89 million went into default. All those debts were repaid from the accumulated fund for loan repayment and only half of defaulting debtors could fully return the defaulted amount to the fund.

Government guarantees on other obligations

Decree 63/2018/ND-CP also provides government guarantees on provision of raw materials, on consumption of products and services, and on other contractual obligations to the investor, project company or other enterprises participating in project implementation, and a guarantee for performance by state-owned enterprises of the obligation to sell fuel and raw materials to, and to purchase products and services from, the investor and project company. For example, government guarantees were provided for the contractual obligations of EVN (off-taker) in power plant projects and of the providers of water pipes in water plant projects. For these types of guarantees, the Prime Minister’s decision to appoint the guarantor is also necessary. However, it has not seemed to be easy to obtain these guarantees recently. In addition, if the local level people’s committee is a provider of the guarantee and does not have enough budget to implement such guarantee obligations, investors need to request necessary arrangements to secure the required budget for the local authorities to implement such a guarantee obligation.

Guarantee on foreign currency balancing (availability)

The Vietnamese dong is not traded in the international market and no commercial bank will be able to sell United States dollars, even in Vietnam, if the bank’s rate is outside the range of rate decided by the State Bank of Vietnam because of Vietnamese foreign exchange regulations. As a result, there is a risk that conversion from Vietnamese dong to hard currencies becomes impossible, and this risk became a reality in 2008. Government guarantee on the foreign currency balancing (availability) is a critical issue for foreign-invested PPP projects under which the income of the projects are denominated in Vietnamese dong, such as power plant projects, water plant projects and toll fee road projects.

51 Article 13 of Decree 91/2018/ND-CP.
53 Article 61 of Decree 63/2018/ND-CP.
54 id.
55 Decision 230/QD-NHNN dated 11 February 2011 and Article 5 of Circular 15/2015/TT-NHNN.
Article 64 of Decree 63/2018/ND-CP provides guidelines for such government guarantees on foreign currency balancing. Investors and project companies of the following project may be considered to be granted a government guarantee on foreign currency balancing (availability):

- projects that fall under the authority of the National Assembly or the Prime Minister to approve the investment policies; and
- projects for development of important infrastructures.

The Vietnamese government does not have enough foreign currency reserves (though the situation has been improving recently), so the procurement of this type of guarantee is not easy, as illustrated above.

**Other guarantees**

Decree 63/2018/ND-CP also provides for other types of government guarantees that include a guarantee on the purpose of land use right for the project being unchanged even if the lenders exercise their step-in rights (Article 63), a guarantee on the priority provision of public service (Article 65) and a guarantee on protection from confiscation of project assets (Article 66). Foreign investors of PPP projects in Vietnam have tried to obtain GGU even for the types of guarantees not clearly provided in the PPP regulations. Such guarantees include on the overseas fund transfer, permission of overseas bank account opening and of protection from the change of laws.

**iii Distribution of risk**

Risk allocation is a mandatory item to be provided in pre-feasibility study reports and feasibility study reports.\(^\text{56}\) In Vietnam, there is no official standard or reference risk allocation template, and risk allocation needs to be negotiated with the authorised state agency case by case. This negotiation takes quite long time and foreign investors often encounter difficulties.

**iv Adjustment and revision**

PPP project contracts may be amended or supplemented as a result of a change of project size, technical specifications of the facility or the total investment capital already agreed; a force majeure event; an amendment of the feasibility study report; or other circumstances as stipulated in the project contract.\(^\text{57}\) In practice, several terms of BOT projects were extended to make up for deficiencies caused because of the changes in the situation expected at the stage of project proposal and feasibility study.\(^\text{58}\)

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\(^{56}\) Article 18.3 and Article 29.1 of Decree 63/2018/ND-CP.

\(^{57}\) Article 44 of Decree 63/2018/ND-CP.

\(^{58}\) e.g., Rach Mieu Bridge (https://tuoitre.vn/du-an-bot-xay-dung-cau-duong-thang-it-thua-nhieu-168513.htm).
v Ownership of underlying assets

The provincial people's committee is responsible for site clearance and for completing procedures for allocation or lease of land to implement the project. Site clearance and resettlement in Vietnam often face difficulties and cause delays in implementation of PPP projects.

If a project involves transfer of a project facility, the authorised state agency and the investor shall reach agreement in the project contract on the conditions and procedures for such transfer, in accordance with the following principles:

a. the investor notifies the authorised state agency about transfer of the project facility one year before the date of transfer or within such other period as agreed in the project contract;

b. the authorised state agency arranges verification of the quality, value and status of the project facility;

c. the investor and project company ensure the discharge of any financial or other obligation of project facility, undertakings of necessary repairs, maintenance and overhaul, and others, in accordance with the project contract; and

d. the authorised state agency organises management and operation of the facility after it is handed over.

The transfer is only permissible upon the completion of construction works or commencement of the operation of such projects.

The investor and project company are permitted to mortgage assets and land use rights in the project and the right to commercially operate the project facility with the lender. However, only credit institutions authorised to operate in Vietnam are eligible for taking mortgage on the land use rights, and foreign financial institutions are not qualified to do so.

vi Early termination

Early termination of PPP project contracts may happen as a result of breach of contract without taking effective remedial measures, a force majeure event or in other circumstances stipulated in the project contract. In practice, if a project turns out to be commercially not feasible, solutions through revision of contract term, as mentioned above, or taking over by governmental institutions are sought.

VI FINANCE

There are international and domestic banks (including BIDV, Vietcombank and Vietinbank) that have capacity to finance PPP projects in Vietnam. In certain sectors, banks (especially international banks) are facing bankability issues caused by various reasons including foreign exchange-related issues and lack of appropriate risk allocation.

59 Article 49 of Decree 63/2018/ND-CP.
60 Article 43.1 of Decree 63/2018/ND-CP.
61 Article 62 of Decree 63/2018/ND-CP.
62 Articles 174 and 175 of the Law on Land. It is not clear whether foreign bank branches in Vietnam are included in 'credit institutions authorized to operate in Vietnam' or not. At this point in time, opinions of the state authorities are not necessarily unified.
63 e.g., Huynh Tan Phat road project mentioned in footnote 6.
VII RECENT DECISIONS

In Vietnam, both international and domestic arbitrations are allowed for dispute resolution method in PPP projects. According to the United Nations Conference on Trade and Development’s website, six investment disputes are reported with Vietnam as respondent state, three of which were decided in favour of the state (the latest case is RECOFI v. Vietnam, whose decision was finalised in 2016). Vietnam is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and foreign arbitration awards should be recognised and enforceable in accordance with the rules thereof. In practice, however, recognition and enforcement were often unreasonably denied by Vietnamese courts because of reasons of inconsistency with the basic principle of law of Vietnam or that the dispute is not a commercial one covered by the New York Convention. Domestic arbitration is also growing rapidly and increasingly recognised and utilised in Vietnam.

VIII OUTLOOK

As mentioned above, a new PPP Law is expected to be finalised in the near future. Currently, it is not certain how Vietnam will tackle the issues caused by limited state budget, including unavailability of appropriate GGUs, but we hope several positive changes that are somehow implied in the publicised drafts will be included in the new regulations.

One of the desired changes is the facilitation of brownfield investments. Even if foreign investors have difficulties in forming greenfield PPP projects as a result of limited provision of GGUs, etc., they may take risks of such projects after local investors, especially major SOEs, take the development risks of such projects. Local investors can also benefit from brownfield investments by collecting funds earlier than originally scheduled. We hope the new regulations will clarify the procedures and conditions for brownfield investments that are not clear enough under the current regulations and facilitate brownfield investments.

Another change is enhancement of existing funds or establishment of new funds specifically reserved for supporting PPP projects so as to cover a shortage of state budget and to attract investors’ private investment capital source. However, details including possibility of inclusion of such change are not available yet.

Although many challenges still exist in PPP projects in Vietnam, there is no doubt about the huge demand for them.

64 Available at http://investmentpolicyhub.unctad.org/ISDS/CountryCases/229?partyRole=2 (accessed on 6 February 2019). This website provides information on investment disputes and does not focus on PPP projects.

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As a specialised external legal consultant, Dr Parquet has advised in numerous technical and financial assistance projects in favour of the Paraguayan government, under international cooperation agreements celebrated with the Inter-American Development Bank, World Bank, USAID, United Nations Development Program, the government of Japan and EU representatives in Paraguay.

Dr Parquet provides legal services to government agencies such as the Central Bank of Paraguay, the presidency or executive branch, the Ministry of the Treasury and the Social Welfare Institute. As an external consultant he has participated in drafting several laws and regulatory decrees and most recently Law No. 5102 on ‘Investment promotion in public infrastructure and the expansion and improvement of goods and services provided by the state’ and its Regulatory Decree.
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Manuel Protásio was born in Lisbon and graduated in law in 1984 from the College of Law of the Portuguese Catholic University in Lisbon.

He worked on secondment at a Deutsche Bank investment bank subsidiary in Lisbon for approximately one year and has been involved in project finance matters since 1992.

He joined VdA in 1991 and currently is the group executive partner of the infrastructure, energy and natural resources group, and heads the energy and natural resources practice. In this capacity he has participated and led teams involved in the most relevant transactions carried out in Portugal to date on the power (including the renewable energies), oil and gas, road, transport, water and wastes sectors. He has also been actively working in regulation and public procurement procedures of those sectors.

Manuel Protásio is admitted to the Portuguese and Timor-Leste Bar Associations.

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Olga is the regional partner for infrastructure and PPP practice for Europe, including Russia and CIS at Herbert Smith Freehills international law firm. Olga advises clients on infrastructure projects, including PPP/concession projects across Europe. She has developed particular expertise in central and eastern Europe, Russia and the CIS. Olga advises public clients (state authorities, state-owned and regional companies), and domestic and foreign private investors (including infrastructure funds and financial organisations) on all aspects of transport projects (airports, roads, rail roads, ports, parking), utilities (water supply, heating systems, waste disposal) and energy projects. Olga is a Russian and French advocate (a member of the Paris Bar and the Moscow Bar). She speaks fluent English and French. Every year since 2007, Chambers Europe has ranked Olga Revzina in the highest tier of PPP specialists.

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Mark heads Bryan Cave Leighton Paisner LLP’s EMEA environmental, energy and infrastructure finance team. Mark provides multidisciplinary advice to public and private sector clients on a wide range of complex, high-value and innovative energy and infrastructure projects structured using PPP, external finance and government contracting techniques.

With over two decades of experience, Mark has been involved in some of the most high-profile infrastructure deals in the United Kingdom and overseas, including advising on equity (including secondary market trades), debt structures, infrastructure fund trades, leasing and structured finance, and concession-based structures.

Mark is a non-executive director of the International Project Finance Association and is recommended as a leading expert on PPP in the The Legal 500 and Chambers and Partners legal directories.
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Marc Roberts has practised for several years as a lawyer specialising in regulatory and compliance matters, with a focus on public procurement in Jan Bonhage’s team. In this context, he advised companies in the finance sector as well as in transport and infrastructure (including German toll collect scheme/PPP, EU subsidies for roads and infrastructure) and the energy sector (including conventional, nuclear, offshore, renewables and networks).

Marc studied in Greifswald (Dr iur) and Montreal. He was admitted to the German Bar in 2011 and worked at Hengeler Mueller between 2011 and 2017. In 2016, Marc was seconded to the New York law firm Cravath Swaine & Moore. Marc started his position as general counsel of Raisin GmbH in 2017 and is responsible for all legal matters in this Berlin-based financial technology company, but with a special focus on banking regulation and compliance.

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Alejandro Rojas V specialises in projects and project finance, structured finance, financing of public entities, real estate finance and investment, and mergers and acquisitions. Alejandro’s projects practice focuses on project finance and public-private partnerships, including the Mexican PPS model, energy and infrastructure projects. Alejandro advised both the state of Mexico and the state of Sonora on the structuring, bidding and implementation of the first PPS state projects. He has since continued to be involved in major PPS projects including hospitals, roads, water treatment plants, energy and gas.

Alejandro has strong international experience. He regularly advises multinational clients, particularly major hotel, tourism and leisure groups, on real estate investments and development in Mexico, as well as in forming bidding consortiums and other aspects of infrastructure and energy projects in Mexico. He also advises financial institutions participating in tourism, energy and infrastructure.

Alejandro has been recognised by *Chambers Latin America* as an innovative and skilful lawyer for complex transactions. Alejandro worked in the International Law Firm Mayer Brown LLP in New York. He obtained his LLM from the University of Columbia, School of Law and passed the New York Bar Exam. Alejandro graduated as an attorney from the Instituto Tecnológico Autónomo de México with honours.
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She holds a master’s degree in law from the University of Brussels (ULB 2015) and a bilingual bachelor’s degree from the University of Saint Louis (USL 2013).

Stefania is a member of the Brussels Bar since 2015 and joined Liedekerke Wolters Waelbroeck Kirkpatrick in 2015.

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Ibrahim’s experience includes banking and finance, public-private partnerships, government projects, commercial and corporate, acquisition transactions, capital markets and arbitration. He has been extensively involved as lead and co-counsel for the Kuwaiti government, local and foreign investors and lenders on the major BOT and PPP projects undertaken in Kuwait, in addition to acquisition transactions, debt and equity arrangements, and financing transactions.

Ibrahim led the ASAR team that advised the Kuwait Authority for Partnership Projects (KAPP) (formerly, the Partnerships Technical Bureau) and the Ministry of Electricity and Water (MEW), with regard to the structuring and procurement of the Az Zour North IWPP Phase 1.

Ibrahim was the lead counsel of the ASAR team that advised the KAPP and the MEW as part of the transaction adviser, on all local legal aspects of the Az Zour North IWPP Phase 2 and the Al Khairan IWPP Phase 1. Ibrahim has been and is currently also advising the lenders, government sponsors and investors with regard to certain government projects in Kuwait, including Umm Al Hayman WWTP, the Municipal Solid Waste Treatment Facility – Kabd, the Al Abdaliya ISCC Project, KNPC Clean Fuel Project, Kuwait Integrated Petroleum Industries Company K.S.C.C and LNG Import Facility Project.

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Joon Man Shim is a partner at Yoon & Yang LLC and his practice concentrates on finance, M&A, corporate consultation, and corporate litigation. As a financial expert, Shim performed acquisition financing (for the takeover of Daewoo Infracore, Kukdong Construction, Hanwha Life, BC Card, and more) to provide capital for corporate takeovers, and he conducted most of domestic main asset-backed securities (ABS) transactions, including trade receivables transactions for corporate financing and corporate real estate securitisation transactions and provided ‘social overhead capital’ private investment agreements and project financing (PF). He successfully took the lead in conducting large-scale PF transactions related to domestic real estate development projects and is instrumental in the tasks of providing a wide range of legal advice and handling litigation on finance and securities.

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Jirapat Thammavaranucupt is a senior associate in the projects, infrastructure and public sector practice group at Weerawong C&P. He has substantial experience advising domestic and international clients on public-private partnerships (PPPs), capital markets, mergers and acquisitions. He recently advised the Asian Development Bank on public procurement and the Ministry of Finance on PPPs in Thailand. He is a regular speaker at training sessions on PPPs, corporate governance and anti-corruption law arranged by the Thai Institute of Directors and national law schools. He currently advises various state agencies in the preparation of the New Draft PPP Act and has provided counsel in establishing the current framework for PPPs in the EEC. He is also a core team member developing all five outstanding EEC projects including U-Tapao International Airport, High Speed Rail Linking 3 Airports, Laem Chabang Port, Phase 3, U-tapao Aircraft Maintenance Repair Overhaul, and Map Ta Phut Industrial Port Development, Phase 3.

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Ms Nguyen Van Trang is a banking and finance lawyer based in Hanoi Office of Nishimura & Asahi. Her practice involves a wide range of banking and structured finance transactions. She has deep knowledge about banking products and operations and she has developed particular expertise in cross-border financing and securitisations. She also engages in general corporate, M&A and other practice areas from time to time. She is a graduate of Nagoya University (LLM, 2010) and Hanoi Law University (LLB, 2004) and is admitted to Hanoi Bar Association.
François-Guilhem Vaissier is a partner in White & Case’s Paris office’s energy, infrastructure and project finance team. His practice mainly includes private sector participation and all aspects of the structuring, procurement and financing of energy, infrastructure and industrial projects.

An expert in public, construction and energy law, François-Guilhem Vaissier has managed the negotiation and drafting of project documentation relating to large transactions in France (railways, motorways, road tunnels, airport operations, co-generation plants, wind farms), Europe (underwater tunnels, water and wastewater concessions), Africa (hydro-power plants and aluminium smelter projects, coal-fired power plants, cement plants, motorway concessions, mining concessions, free-zone areas, oil production sharing agreements and privatisation of a national air carrier), Asia (first public-private partnership for a metro project in India) and the Middle East (airport BOT, real estate financing).

Christel Van den Eynden is a partner in the corporate and finance practice group and is a member of the board of Liedekerke. She specialises in mergers and acquisitions, project finance and complex projects (including PPPs). Christel’s recent PPP expertise includes, among others, the A11 project, Livan I (closed December 2012), Bus Depots Cluster II projects (closed in January 2015), the Haren Prison project (ongoing), Spartacus (ongoing), Brussels Stadium (UEFA 2020) (ongoing), etc. In addition to her law degree from the University of Antwerp (1987), Christel has a master of arts in international relations from the Johns Hopkins University Paul H Nitze School of Advanced International Studies (Bologna, Italy, and Washington, DC) for which she was awarded a Fulbright Scholarship.

Manuel Vélez is a partner in the Madrid office of Uría Menéndez. He joined the firm in March 2003 and is a member of the public and environmental law practice areas.

He regularly advises public and private entities on all aspects of public law (sanctioning procedures, public procurement, payment management before public authorities, energy, public infrastructures, telecommunications, authorisations and permits, liability of public authorities, subsidies, public property, constitutional law, anti-money laundering, etc.). He regularly appears before Spain’s contentious-administrative courts and the Constitutional Court. In the 2015 edition of Iberian Lawyer he was named one of the top 40 lawyers under the age of 40 in Spain and Portugal.

Jan Vreys is part of the corporate and finance practice group and focuses his activities on corporate law, mergers and acquisitions and financial law. In addition, he represents clients in commercial disputes.
He has a law degree from the University of Leuven (KU Leuven 1987) and a master of laws from University College London (1988).

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Kazuyuki Wakasa is a counsel attorney at TMI Associates whose primary practice areas are real estate finance and project finance. He has much experience representing lenders, arrangers, borrowers and originators in both of domestic and cross-border transactions. He also has expertise in providing legal advice to financial institutions, including banks, investment management firms, securities companies, insurance companies, insurance agencies and money-lending business operators in relation to regulatory issues. He was educated at the University of Tokyo and Harvard Law School. He started his career as a practising lawyer at one of largest law firms in Japan, and then moved to an in-house position at an international life insurance company where he dedicated himself to business transfer projects and supported the investment division in connection with real estate investment, ISDA documentation and alternative investment. After resigning from the in-house position, he joined TMI Associates in 2014.

JIHONG WANG

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Jihong Wang is a senior partner at Zhong Lun Law Firm and an experienced arbitrator of CIETAC. She co-chairs the firm’s construction and infrastructure department, and currently serves as legal expert for Ministry of Finance PPP Centre and NDRC PPP projects.

Ms Wang has extensive experience in public-private partnership (including concessions) and EPC projects in China and over a dozen other countries, providing comprehensive legal services including assisting cross-border investors with transactional structure design, contract negotiations, tendering, construction, transfers and operations, as well as advising on various avenues of project financing such as bond issuance, government sub-loans, financial leasing, collective trusts, and loan schemes, and also providing post-construction legal services such as introducing and working with strategic partners both in China and abroad on capital increases, M&A, and asset securitisation.

Ms Wang primarily advises with the infrastructure, construction, energy, natural resources, and environmental protection sectors, and many of her projects have obtained annual awards for her law firms. She is currently a senior partner at Zhong Lun Law Firm, and co-chairs the Infrastructure, Real Estate and Construction Department.

PAULINE WANG

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Pauline Wang is a partner at Lee and Li. She graduated from the National Taiwan University in 1989 and obtained an LLM from the Columbia University in 1993. She also passed the New York Bar Examination.

Pauline specialises in government procurement and private participation in infrastructure projects and has vast experience in assisting clients in handling the project planning, bidding process, contract negotiation, contract management and dispute resolution. She assisted the
Promotion of Private Participation Ministry of Finance in drafting and modifying the model contracts for various private participation modes (such as BOT, BOO, OT, ROT, BTO, etc.). She also acted as counsel to either the private entity or the authority in charge in many PPP projects; her efforts were recognised with a Golden Thumb Award for Consulting Firms from the Public Construction Committee of Execution Yuan in 2007.

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Lan is a solicitor at Herbert Smith Freehills. Lan has advised project sponsors and contractors on a range of public-private partnerships. Most recently Lan has advised on the procurement of critical water infrastructure in NSW and the award-winning ACT Capital Metro PPP.

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Soongki Yi is a partner at Yoon & Yang LLC and specialises in energy and natural resources, cross-border mergers and acquisitions, corporate finance and acquisition financing, among others. He is a member of both the New York and Korean bars and received an LLB from Seoul National University in 1992 and an LLM from the University of California in 2005.
Nicholas Zervos is a partner at VELMA Law and a senior commercial transactional lawyer with expertise in international corporate matters and project and structured finance, particularly in East Africa, the United Kingdom and central and eastern Europe.

Nicholas has lived and worked as a lawyer in Dar es Salaam since November 2006. Before then he was a senior partner with a major firm in London (and Hong Kong), advising sponsors and banks on commercial and financing agreements for infrastructure projects in developed and emerging markets. His areas of specialism include commercial law, project finance, finance and corporate law.

Nicholas has a law degree from the University of Nottingham, and is admitted to the English, Tanzanian and Hong Kong bars. Nicholas is a member of the Law Society of Tanganyika and the Law Society of England and Wales.
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