Chapter 5.
The impact of Covid-19[1]

[1] This chapter was written in 2021 following the worst of the pandemic. Some of it will have been overtaken by events by the time of publication. It may increasingly be seen as a matter of historical interest. But then again, pandemics may recur in the future.

1. Introduction

This study was conducted and written in 2021, when the Covid-19 pandemic was still at its height. Although some of what this chapter speculates about has already been realised, discussions of Covid-19's impact, the importance of infrastructure and the exploration of post-crisis responses remain useful. No one knows when the next pandemic will occur and while "one may erroneously presume that one can afford to wait another 100 years before experiencing another such event…this impression is false".[2] The hope of the lessons explored in this chapter is that when the next one comes, we will all be more prepared, with the necessary infrastructure in place to endure.

The Covid-19 pandemic that spread globally at the start of 2020 – the plague year, as it may come to be known – has had a devastating impact on much of the world's infrastructure, PPPs included. A good deal has already been said about this in published articles, papers and seminar presentations.[3] This study would not therefore be complete without some discussion of the subject, as PPPs have been so directly affected by the pandemic and will be vital to the recovery from it, while not a few of the statements we have made about the legal frameworks and contracts for them may need to be revisited in light of its long-term repercussions.

One general lesson of the pandemic, as the foreword to a special edition of the quarterly WAPPP Magazine trenchantly put it, is that "no country, no company, no sector is an island".[4] It has served as a stark reminder of our connectedness, our mutual dependence and the close inter-relationships between public and private sectors on many levels. For years to come, "public policy, planning, financing and service delivery will be even more intertwined with private initiative, management, financing and service delivery". PPPs are likely to become more critical than ever to harness and leverage the resources of both sectors. The expansion of public-sector debt to perhaps unprecedented levels must surely lead to greater reliance than before on private finance to develop infrastructure, and an enhanced awareness of the strengths of the private sector to carry programmes into effect, which no tier of government can any longer afford to ignore.

2. Adverse impact

The infrastructure sector in both advanced and emerging economies has in many ways been "knocked sideways" by Covid-19, just as various other sectors have come to a virtual standstill. Lower economic activity has meant shrinking gross domestic product. Many projects already in operation have suffered disruption or drastically reduced revenues, while others under construction or development have been delayed or paralysed by supply and demand shocks resulting from lockdowns, enforced suspension of services, travel and shipping restrictions, labour and staff shortages, supply-chain disruption and a sharp deterioration in domestic and international financial markets.[5] Many embryonic projects have failed to reach financial close. Many other existing ones have slid into technical default. Demands for relief or bailouts, contractual claims, disputes and renegotiation of terms have proliferated. Restructuring and refinancing work have exploded. Project pipelines have had to be reassessed. Doubts that were already harboured about certain aspects of PPPs may have been intensified in some cases.

Inevitably, the exact impact has varied from subsector to subsector and across different project types. Some areas, such as health and information and communication technology, have naturally experienced unprecedented demand, while others, such as airports, have seen demand virtually dry up; in a substantial part of Asia, daily commercial flights fell from 110,000 to fewer than 30,000 over a two-month period.[6] Projects that depend heavily on the wider strength of the economy, such as transport and power, have fared worst, while assets that are less exposed to demand risk or user charges and based on project finance structures have proved more resilient. (Project finance structures can typically withstand liquidity shortfalls of 6-12 months with the help of their in-built risk mitigation measures, such as debt service reserve accounts.) At the same time, though, actual or potential projects tied to government revenue streams have been experiencing a different form of stress, as governments have had to shift resources and priorities to areas of greatest immediate demand (such as healthcare and furlough schemes) in response to the emergency, while incurring reduced revenues and rising fiscal deficits.

[2] Gabriel G. Katul on Intensity and frequency of extreme novel epidemics (August 2021), published by Proceedings of the National Academy of Sciences Volume 118, Issue 35

[3] See the attached list of sources in Annex I.

[4] Ziad Alexandre in PPPs and COVID-19, Spring 2020 edition, published by WAPPP.

[5] See, in particular, the World Bank reports on this subject released in 2020, including those listed in Annex 1.

[6] See Asian Development Bank (2020), Navigating COVID-19 in Asia and the Pacific.

Reduced liquidity in international debt markets, tightening credit lines, hard currency capital outflows, local currency depreciation and credit rating downgrades have all contributed to the damage, particularly in emerging markets), as they did during the Great Recession more than a decade ago (and before that during the Asian financial crisis of the late 1990s). Sponsors and financiers have become more cautious about investing, against a background of macroeconomic turbulence and a negative economic outlook. There are heightened concerns about credit quality, borrower liquidity and contracting authority financial standing that will linger and stifle investment decisions for the foreseeable future.[7]

At a contractual level, this has inevitably led to an exercise in crisis management on a vast scale. In many cases, various familiar forms of protection and relief may be available. It is by no means a given, however, that the parties will automatically be able to invoke some of the contractual doctrines relating to unforeseen risks to protect themselves in this situation, such as force majeure, hardship or financial balance remedies. It will always depend on how exactly the project in question and the party seeking relief have been affected, the laws of the relevant jurisdiction and the terms of the contracts concerned. Common law jurisdictions tend to be somewhat less accommodating to these concepts than civil law ones, as we have seen, with their stricter insistence on the wording of the signed contract.

Force majeure clauses tend to contain fairly familiar and standard core principles but vary widely in the types of relief or compensation that may be available. Ostensibly, losses lie where they fall. The contract may or may not have provided for some kind of compensation for loss where it is invoked. PPP contracts often do not provide for compensation when “natural” events of force majeure – such as a pandemic – occur, but simply allow for relief from liability for any resulting failure to perform. Hardship provisions are extremely difficult to invoke under common law, as they generally mean that performance must have become impossible and then resulted in termination of the contract. That may be of questionable benefit to anyone, unless termination triggers fair compensation payments. Financial balance remedies may be available if the jurisdiction or contract so provide, but there may still be much uncertainty about how exactly any compensation is calculated or applied. Lastly, there are many signs that contractual provisions are, in fact, being tightened in the present circumstances, to make it more difficult – not easier – for parties to qualify their liabilities to allow for the impact of Covid-19 in the future. Some lenders now include clauses in their loan agreements which assume that all planning for the impact of Covid-19 and government responses to it must have been done by the borrower, who cannot therefore seek any forbearance, deferral or suspension if the crisis recurs.

The statistical picture for PPPs in 2020 was stark. The World Bank’s PPI Database for the first half of the year[8] explains that total investment commitments in EMDEs came to a mere US$ 21.9 billion in 128 projects – down 56 per cent on the same period in 2019. The East Asia and Pacific region suffered a 79 per cent fall, to a total of just US$ 4.4 billion. Only two megaprojects achieved financial close in that six-month period – “a clear sign of the uncertainties and financial duress private investors were facing”.[9] The Middle East and North Africa region experienced its lowest average investment level in a decade. For the first time, the Latin America and Caribbean region dominated global investments, with some 39 per cent of the total, while investor appetite held up well in sub-Saharan Africa, helping to redress the overall balance. Transport commitments, which usually lead the way, were down 82 per cent on the first half of 2019. The energy sector outperformed transport in some respects for the first time, with US$ 15 billion of investment across 17 projects, or 69 per cent of the global total. Unsurprisingly, renewable energy monopolised the energy sector, with solar power at the forefront. By way of contrast, and to put these figures in perspective, during the global financial crisis a decade ago, equivalent investments fell just 15 per cent in 2009-10.

3. Recovery

Nevertheless, there is now something of a global consensus that infrastructure will play a critical part in the (hopefully imminent) recovery period as the pandemic crisis starts to recede. Demand for new and improved infrastructure continues to grow all over the world, driven by long-term megatrends, while the funding gap between that demand and the financial resources available to governments to meet it yawns still more widely.[10] The well-recognised stimulus that infrastructure can provide to job creation, economic

[7] See the World Bank PPI Database.

[8] Published in October 2020.

[9] The World Bank PPI Database.

[10] Estimated at US$ 14 trillion globally for 2016-40 by the Global Infrastructure Hub.

growth and productivity make it an obvious, indeed inevitable, tool to deploy, which has been used to great effect in the past to boost recovery from even more terrible disasters, such as the Great Depression and the aftermath of the Second World War. Given diminished economic growth and the tight government budgets likely to be with us for years to come, PPPs will, in turn, surely be a central part of infrastructure's role as a driver of recovery, as a crucial way to mobilise new forms of long-term finance and harness the full range of private-sector skills and strengths in innovative ways.

The priority should, where possible, be to support the functioning of the project pipeline and its sustainability. If it shuts down altogether, it may take years to revive. There may be a temptation to de-emphasise it or even suspend it altogether, to focus on more visible or immediate priorities instead, as certain countries did after the financial crisis of the late 1990s. This is now thought to have been a major error, however, that led to a "lost decade" of infrastructure investment and growth in South East Asia. The danger is of a vicious circle developing of falling infrastructure investment, slowing economic growth, reducing government revenues and then further cuts in infrastructure spending. This should be avoided as far as possible. Severe financial crisis heightens the need to maintain infrastructure investment to the extent feasible, one way or another, as a motor of wider economic growth and stimulus.[11] And this certainly seems to be the approach most governments are taking in response to the present crisis.

The challenge of climate change and the ever more insistent demands of ESG (environment, social and governance) concerns strongly reinforce this view. The emphasis on infrastructure as a vehicle of recovery allows governments to take vital steps to tackle climate change and rebuild their economies in sustainable ways after Covid-19 at the same time. This represents an invaluable "double whammy" opportunity to address both crises simultaneously, which some governments are now rushing to seize. It is to be hoped that may others will follow. The Green New Deal policies of then-US-President-elect Joe Biden and the Green Industrial Revolution plans unveiled by former UK Prime Minister Boris Johnson towards the end of 2020 are cases in point, as (now) is the European Union's Green Deal.

The pandemic has highlighted the central importance of the sustainable finance agenda, as investors increasingly prioritise social and environmental issues in their strategies (as explained in Chapter 2).[13] Renewables and digitalisation are two of the fastest growing areas of investor appetite. The pension and insurance fund investors who have driven the growing demand for infrastructure assets in capital markets have consistently highlighted the need to match long-term assets and stable, counter-cyclical returns with their long-term liabilities. This is now being reinforced by the emphasis which ESG values place on resilience and sustainability. As a result, as the World Bank has argued, institutional investors are likely to show heightened interest in "SDG-linked infrastructure assets through the recovery phase".[14]

This overlapping of efforts in the infrastructure development and energy transition areas is likely to lead to new international initiatives to "build back better" (to use a phrase that many countries now seem to be adopting), which will involve shared policies, regulatory reform, common standards and coordinated responses. PPPs are likely to be at the heart of them – and specifically SDG-compliant ones.[15] In the words of the keynote speaker at an IFC seminar in 2020 on post-pandemic investment opportunities: "As the international response continues, we know that infrastructure will have a leading role to play, not only in rebuilding economies, but [also] in the geopolitical shifts that may occur as the world recovers from Covid-19."[16]

PPPs have, of course, already played an important part in the response to the pandemic, as the summary analysis of several different countries attached in Annex II shows. The UNECE PPP Working Group and its associated Centres of Excellence have published a helpful study on this subject,[17] giving specific examples of how they could be used to provide assistance and disaster mitigation at three distinct

[11] See the report on PPA renegotiation by Castalia and Christopher Clement-Davies referred to in Annex I.

[12] See, for example, the editorials on this subject published in the International Energy Law Review in 2020.

[13] See Chapter 2 and the World Bank note Infrastructure Financing in times of COVID-19.

[14] See World Bank report referred to above.

[15] The United Nations has developed a concept of people-first PPPs to advance their SDG compatibility, as explained in Section (B)3(iv) of this chapter.

[16] See the many interesting points made in the papers from the IFC seminar on this subject in the Republic of Korea referred to in Annex I, item 4.

[17] See the reference in Annex I, item 1.

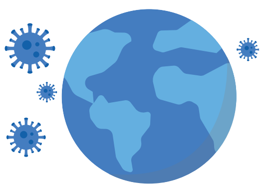
phases of a Covid-19-type pandemic – namely, prior preparedness, response to the acute pandemic phase and post-pandemic recovery. For example:

(i) During the period of preparing for a pandemic, they could be used to supply and stockpile suitable personal protective equipment in private warehouses, to develop and apply new electronic track-and-trace systems, and to forge new (cross-border) supply-chain partnerships or cooperation agreements between hospitals, clinics and manufacturers or warehouses.

(ii) During the acute pandemic phase, they could assist with food distribution networks, to help build resilience and strengthen education services at a local level, to harness innovative and concessional financing initiatives, to strengthen care-home protections, to repurpose hotels as emergency facilities supporting hospitals, to manage field-testing agencies and to give effect to new monitoring and surveillance mechanisms (subject to data privacy rights, of course).[18]

(iii) During the post-pandemic recovery, they could be deployed to refurbish rundown hospital facilities and buildings, build new hospitals and healthcare facilities designed to provide appropriate emergency facilities in the future, develop new virus detection infrastructure at airports, improve home education services, or develop improved sanitation and recycling facilities.

These are just examples of PPPs directed specifically at pandemics. The UNECE paper gives many more. And outside their use in a specific pandemic context, they are likely to prove critical across the board, as we have argued, in global economic recovery programmes all over the world, as infrastructure development is placed at the forefront of stimulus efforts.



4. Reconsidering PPP frameworks and contracts; post-crisis recovery response

At the same time, a good deal of new thinking can be expected to go into certain aspects of PPPs, their contracts and the legal and policy frameworks for them as part of the recovery process. Indeed, it is already well underway, with ideas and suggestions being exchanged eagerly and rapidly, particularly among the leading multilateral sources of knowledge about PPPs referred to in this study. The increasingly sophisticated debate that has taken place in recent years[19] about the strengths and weaknesses of PPPs, their uses and abuses, "do's and don'ts" and what constitutes international best practice, has been given new intensity by the Covid-19 crisis and the response to it. The need for change in some areas was already being marked out before the pandemic struck. But existing patterns and trends are likely to be accentuated and accelerated as a result of it, and new innovations added to the mix. We summarise below some of the areas discussed in this study that we think are most likely to be affected.

4.1 Frameworks

- **Greater ESG emphasis.** As we have said, there is likely to be a renewed emphasis on ESG values to make PPPs more sustainable, resilient and SDG-compliant than ever. The sheer human cost of the pandemic will surely trigger new interest in the priorities and objectives of the SDGs, while the urgency of net zero will channel efforts and funding more than ever into renewable energy projects, "green revolution" developments (such as "smart" cities, "smart" power, transport and water systems, "smart" everything) and PPPs that support them.[20] The FAST-Infra initiative is another example of this heightened emphasis, and the Covid-19 crisis will surely reinforce it.

- **Revised project criteria.** Governments everywhere will start to rethink and reexamine the criteria they use to define, approve and evaluate projects and proposals for them, so they comply with the latest thinking. The FAST-Infra initiative is already having this effect. Covid-19 is likely to drive further change.

[18] It is more than likely that, during the acute pandemic phase, contracts of this kind will not meet many of the tests typically applied to PPPs, precisely because they will be about quick, emergency responses. They will be short term rather than long term, often involve cost-plus arrangements rather than tight whole-life costing and will be let at short notice, often without competitive tendering. They might be better described as emergency outsourcing to the private sector than PPPs, which of course begs the question again of what exactly should be treated as a PPP. To the extent that they are about innovative collaboration with the private sector to meet public service demands, however, they will clearly qualify. Precise terminology in this context is not necessary.

[19] In particular, the last 10 years, we would argue.

[20] This may also intensify interest in the United Nations People-First Principles, which are all about advancing the SDGs. The EBRD/UNECE Model People-First PPP Law, set out and explained in Chapter 2 (Vol I of PPP Regulatory Guidelines Collection), already provides a paradigm for translating the People-First Principles into PPP legislation.

• **Adjusted project pipelines.** They are then likely to review and reorder their PPP project pipelines on the same basis, prioritising projects that offer the greatest benefit and highest value, judged by the revised criteria. New and severe budgetary constraints will further spur this process.

• **Better integral planning.** As it is, many EMDE countries still lack procedures that align PPPs optimally with public investment priorities or contingent liability management processes.[21] The planning dilemmas and contingent liabilities likely to be brought into play by the various projects going into default, now or in the short term, will shine a harsh light on this deficiency. Planning will hopefully improve markedly in many countries in response.

• **Strengthened PPP frameworks.** It is now a truism that the main constraint to greater use of PPPs in emerging markets is a shortage of bankable, well-structured projects, more than a lack of available finance. All the elements of a mature PPP framework ideally need to be in place for the pipeline to function properly, including the legal and regulatory ones described in this study, but extending to the technical and commercial ones that go beyond its scope, and which also form an integral part of a fully effective whole. It is only then that a steady stream of viable, bankable projects can be counted on. Unfortunately, many EMDEs cannot yet claim to have such a framework in place. Ultimately, this comes down to the need to define an adequate framework and to build the government capacity to give effect to it – two formidable challenges that can take years to get right. Many IFIs and multilateral institutions have been doing what they can to accelerate the process. Time is now shorter than ever, though, if PPPs really are to play a critical part in the recovery, especially for cash-strapped governments in desperate need of better infrastructure. Emerging markets competing for scarce global PPP resources and funding simply have to plug this gap.[22] The Covid-19 crisis may have the effect of accelerating their ability to do so, together with the capacity-building assistance that multilaterals can offer them.[23]

• **Constructive unsolicited proposals.** It has been argued[24] that allowing unsolicited proposals is one method by which inexperienced and under-resourced governments can bridge the knowledge gap within their ranks that may be inhibiting greater use of PPPs. This must be especially true of governments under exceptional pressure to make use of them as part of their crisis-recovery strategy. Provided the in-built safeguards in the legal framework for them, described in Section D, are well defined and reliable enough to prevent abuse, there is no reason this should not be the case. Many governments may now take steps to encourage the private sector to come forward with attractive proposals for the types of project that are needed.

• **Deeper international cooperation.** The new forms and modes of international cooperation that will hopefully accompany the recovery may well lead to new regulatory structures, business models and processes that have an effect on PPP frameworks and, in particular, the areas mentioned above.

• **Refined risk allocation.** Even though risk allocation is at the heart of every PPP, and has become a well-understood and sophisticated process over the years, there is a sense now that aspects of it may have to be re-examined in light of the pandemic, to enable projects to respond more flexibly to this type of crisis in the future and ensure as fair and rational an allocation of its risks as possible when they occur. New protections may need to be devised, for example, against the macro-economic risks that can result, such as severe economic disruption and recession. As we have seen, the civil law concept of financial equilibrium already offers some built-in relief in this context; common law does not, requiring parties to PPP contracts to address it explicitly, if at all, in provisions which can be difficult to negotiate. Under both systems of law, more precise forms of relief may need to be made available.[25] Similarly, the full allocation of demand risk to private partners in certain types of PPP – which can be controversial in any case – may become subject to further qualifications, with contingent protections from government entities (for instance, partial revenue guarantees) kicking in in appropriate circumstances.

[21] See, for example, the discussion of this problem in the Asian Development Bank report on the impact of Covid-19 in Asia, cited in Annex I, item 3.

[22] See the comments made along these lines by Irina Zapatrina at a seminar in Washington DC in 2020, referred to in Annex I, item 23.

[23] The revised UNCITRAL Model Clauses and the EBRD/UNECE Model Law should now make it significantly more straightforward for governments to define or refine their PPP statutory frameworks.

[24] For example, by Irina Zapatrina in the seminar referred to above.

[25] Although also note the comments made above about tightening terms in loan agreements.

• **More innovative finance.** As with the previous financial crises, governments will need to do what they can to maintain liquidity in financial markets and its availability for infrastructure development. As well as encouraging capital markets to offset the tightening of credit lines in bank markets, this is likely to imply a greater use of innovative financing tools where feasible, to help maintain the flow of funds to projects, such as bridge finance, "mini-perms" and PPP hybrids,[26] equity participation, limited guarantees and so on.

• **New business models.** New PPP business models – meaning new types of PPPs, PPP structures and perhaps applications for them (including in sectors where they have not been used much or at all in the past) – may then start to take shape, to give effect to the reconsidered project definition and evaluation criteria, refined approaches to risk and financing structures, with new forms of partnership, government protection, guarantee and financing structure on offer. Times of great crisis also tend to be times of great innovation.

• **Small PPPs.** One possible example of a new business model which might surface is a small-scale PPP, which could be deployed relatively quickly and easily, relying on standardised documents and a simplified, accelerated tendering procedure. (This possibility is mentioned in Section D of the main chapter, where minimum size is discussed.) In the context of another pandemic, it could have particular appeal in terms of its efficiency and speed of application.

4.2 Contracts

• **Compliant provisions.** As ESG values and related principles are re-emphasised, they will increasingly find their way into the clauses of PPP contracts, as well as being reflected in the nature and structure of projects and the applicable evaluation criteria.[27]

• **Risk allocation.** Where patterns of risk allocation are refined or modified, this will be reflected in PPP contracts, which are the primary vehicle for giving effect to them. Clauses dealing with unforeseen risks, which are designed to protect a party adversely affected – force majeure, change in law, financial balance/exceptional event and "hardship" provisions – will be re-examined, to see to what extent they cater adequately for the impact of future pandemics. There is no simple answer to that question, as the relevant clauses can vary so much in content and are often the result of intense negotiation. But it is a fairly safe assumption that explicit references to pandemics and their consequences will be built into many force majeure clauses in the future (they typically refer to plague or epidemic as it is), and that change of law clauses will start to include legal changes introduced in response to pandemics. The economic dislocation resulting from this type of crisis will also start being referred to expressly in financial balance/exceptional event clauses, as will any emergency measures that may have to be taken to deal with it. The remedies that come into play as a concomitant of the operation of these clauses will start allowing for an equitable allocation of the economic pain involved, so that the risks concerned are being genuinely shared.[28]

• **New forms of contract.** To the extent new business models and partnership structures evolve from the crisis, the contracts will again have to give effect to them. These may not be radically different from existing ones, but there may be some interesting and significant differences, nevertheless.

• **Flexible contracts.** A great deal has been written recently about the long-term inflexibility and confrontational nature of PPP contracts, which in the view of some is damaging confidence in this form of procurement.[29] The Covid-19 crisis seems to be heightening those concerns. Our own view, however, is that PPP contracts do not need to be inherently inflexible, or unduly rigid, and that a range of mechanisms is anyway already available to avoid them becoming so. On the other hand, they do have to be sufficiently stable throughout their term for their basic (as opposed to unforeseeable) risk assumptions to work, their whole-life valuation approaches to be feasible and their long-term debt finance to be possible. That inevitably implies a certain inflexibility, which is unavoidable but offers compensating advantages. It is also a fact of commercial life, where long-term, high-value contracts are involved, that confrontation between the parties is sometimes unavoidable. Various attempts have been made in the construction industry in the past to develop a fundamentally different approach, where all interests are fully aligned and all major decisions made

[26] Essentially, projects that are initially let in the form of traditional government procurement and then refinanced through the private sector post-completion.

[27] See, for example, the references to them in the PPP contracts section of the chapter on the EBRD/UNECE Model Law.

[28] These are all provisions of PPP contracts, as opposed to the loan agreements for PPPs where, as we have said, covenants are arguably moving in the opposite direction.

[29] See, for example, Mark Moseley's paper for the ADB on this subject.

collaboratively; on the whole, however, these do not seem to have worked well.[30] We would not expect attempts to do the same with the much more complex, much longer-term structure of PPP contracts.

Well-drafted, well-structured PPP contracts do not need to be unduly inflexible, as we have said. The mechanisms designed to give them greater flexibility include benchmarking provisions and financial balance/change of circumstance clauses of the kind mentioned above, as well as clauses designed to encourage parties to approach unforeseen shocks on a collaborative basis, looking for "win-win" solutions, as opposed to a confrontational one, where each side looks solely to its own immediate interests. We would certainly encourage greater use of these mechanisms in PPP contracts in future, with a view to fostering a genuine spirit of partnership at all times. This is likely, in our view, to be another result of the crisis.

- **Dispute resolution and consultation mechanisms.** Part of the art of avoiding a fundamental breakdown in relations between the parties in times of crisis and severe tension between them is to craft dispute resolution provisions for the PPP contract that are tailor-made for different types of issue and leave full-blown litigation as only an available last resort. Litigation can quickly and easily lead to a hardening of positions and a protracted, expensive standoff between the parties, which can make the kind of compromise necessary to handle a difficult crisis much more elusive. These provisions include third-party experts to make simple adjustments to certain clauses in response to changed circumstances (such as an indexation or currency adjustment), mediation arrangements, a tiered or "staircase" approach to disputes to avoid sudden escalation, with formal meeting requirements, a mediation stage and finally arbitration at a recognised international venue (unless the local courts must be used). But they can also include a panel or disputes board, consisting of a standing group of (usually three) experts from different disciplines, familiar with the project, who can be used to attempt to resolve virtually any dispute under the agreement (perhaps in place of mediation) and apply the change provisions referred to in the previous paragraph, failing which litigation or arbitration can finally take over. This last mechanism has been used in many PPPs and construction contracts for many years, apparently with a great deal of success.[31] Provisions of this kind are now likely to attract much more attention going forward, as parties think hard about the possible consequences of future crises.

- **Planning for renegotiation.** Governments may start thinking much more widely and systematically about how they should best approach a wide-ranging flood of contractual claims and demands for relief, where a Covid-type crisis occurs which affects a series of PPPs simultaneously. The lessons to be learned include the critical importance of looking for consistent, fair, win-win solutions; the need to involve sophisticated professional advisers and experts from an early stage; the need for a readily available "toolkit" of constructive responses and solutions; and the advantage of planning ahead with a well-defined, well-organised and managed, transparent process to renegotiation.[32]

- **Greater standardisation.** More use of PPPs around the world during the recovery period is likely to mean an acceleration in the process (noted in the conclusions to these studies) of moving towards more standardised provisions and patterns of risk allocation. What constitutes best market practice will have to become more widely recognised to speed up the flow of projects, hold down transaction costs, build local capacity and improve project implementation.

5. Conclusion

It remains to be seen how many of these developments quickly become evident as the recovery from the Covid-19 crisis gathers momentum. These cover our current expectations, but there could be many others we have not touched on, especially outside the legal and regulatory spheres. Development banks and multilateral institutions such as the EBRD will be at the forefront of this process – providing funding and technical assistance, building capacity, commissioning know-how and encouraging knowledge-sharing and the pooling of ideas, experience and data. But if PPPs are going to play a central part in the recovery, as many of us expect, we will all have vital contributions to make.

[30] Again, see the discussion in Mark Moseley's paper.

[31] See the description of panels in the paper by Mark Moseley referred to above; but the author of this study has also seen many instances of panels in PPP contracts.

[32] See the discussion of this subject in the World Bank paper by Castalia and Christopher Clement-Davies, referred to in Annex I.

Annex I: List of published sources that discuss the impact of Covid-19 on PPPs

Publications issued by international bodies

1. United Nations Economic Commission for Europe (2020). Examples of Partnerships during the 3 stages of a pandemic.

2. Moseley, Mark (2020). Restoring Confidence in Public - Private Partnerships: Reforming Risk Allocation and Creating More Collaborative PPPs. ADB Manila: The Governance Brief.

3. Asian Development Bank (2020). Navigating COVID-19 in Asia and the Pacific. Manila: ADB, pp. 198-200.

4. International Finance Corporation Korea (2020). Infrastructure Investment Opportunities in the post-COVID-19 era.

5. Tandberg, Elvind, and Allen, Richard (2020). Managing Public Investment Spending During the Crisis. Washington, DC: International Monetary Fund.

6. APMG (2020). PPPs and COVID-19: Your Questions Answered. APMG International.

7. WAPPP (2020). WAPPP Quarterly Magazine: Special edition: PPPs and COVID-19. Geneva.

8. Global Infrastructure Facility (a G20 Initiative) (2020). The Impact of the COVID-19 Crisis in Emerging Market Infrastructure Finance & PPPs Part I: State of Global Markets, World Bank Response and Impact on Infrastructure PPPs.

9. Serebrisky, Tomás et al. (2020). Sustainable and digital infrastructure for the post-COVID-19 economic recovery of Latin America and the Caribbean: a roadmap to more jobs, integration and growth. Washington, DC: Inter-American Development Bank.

10. Infrastructure Finance PPPs and Guarantees Group (2020). Practice Note on PPP Legal Frameworks Post-COVID-19. Washington, DC: World Bank.

11. World Bank (2020). Infrastructure financing in times of COVID-19: A driver of recovery. Washington, DC.

12. World Bank (2020). PPPs and COVID-19 Resources Factsheet.

13. World Bank (2020). How the World Bank is looking at COVID-19 and public-private partnerships, right now and post-crisis.

14. World Bank: Review of Past International Experience in Renegotiating Power Purchase Agreements, in the Context of the COVID-19 Global Economic Crisis by Castalia Advisers and Christopher Clement-Davies (2021).

Other texts, articles and studies

15. Baxter, D. and Casady, C.B. (2020). A Coronavirus (COVID-19) Triage Framework for (Sub)National Public–Private Partnership (PPP) Programs. Basel: Sustainability.

16. Pritchard, Joshua et al. (2020). Public-private partnerships: Lessons from COVID-19. London: Confederation of British Industry.

17. Del Ponte Duarte, J.M., Nobre Fernandez, R., & Vaz Silva, R. (2020). Public-private Partnerships for Medicine Provision: an Alternative to the Combat to the COVID-19 Pandemic. Brasilia: Revista Do Serviço Público.

18. Dimakou, O., José Romero, M., Van Waeyenberge, E. (2020). Never let a pandemic go to waste: How the World Bank's COVID-19 response is prioritising the private sector. Brussels: Eurodad.

19. Y. Vaslavskiy (2020). COVID-19 Pandemic: Expanding the Public-private Partnerships Practice in the "Epinomic" Policy. Amsterdam: Atlantic Press.

20. Baxter, David, and Casady, Carter B (2020). Pandemics, public-private partnerships (PPPs), and force majeure. COVID-19 expectations and implications. Construction Management and Economics.

21. Baxter, David, and Casady, Carter B (2020). Proactive and Strategic Healthcare Public-Private Partnerships (PPPs) in the Coronavirus (COVID-19) Epoch.

22. Mitra, R. (2020). COVID-19 is killing education budgets: are educational public-private partnerships an answer? Journal of Professional Capital and Community.

23. National Academies of Sciences, Engineering, and Medicine (2020). Public Private Partnership Responses to COVID-19 and Future Pandemics: Proceedings of a Workshop in Brief. Washington, DC: The National Academies Press.

Annex II: Country-specific summaries of responses to the Covid-19 crisis

(A) Spain

In Spain, a PPP is not a strictly defined legal concept; rather it is "a type of public policy or management method that entails collaboration between a public entity and a private partner".[33] An arrangement of this kind covers implementation, financing and management of public infrastructure in rather broad terms, including facilities, utilities and services. The general concept needs to be distinguished from the particular contract forms governed by the Spanish Public Procurement Law Under this Procurement Law, three main types of PPP contractual arrangements are available: public works concession contracts, public service management contracts and partnership agreements between the public and the private sector.[34]

An earlier Procurement Law[35] was amended in 2017. The new Law 9/2017 of 8 November on public sector contracts (LCSP, to give it its Spanish acronym) transposed the European Parliament and the Council Directives 2014/23/EU and 2014/24/EU, of 26 February 2014, into the Spanish legal system. LCSP came into force on 9 March 2018 and repealed the previous Royal Legislative Decree 3/2011 of 14 November along with other regulations incompatible with its provisions. This new law applies only to procurement arrangements commenced (or awarded) after it came into effect.[36]

LCSP accommodates electronic procurement and simplification of formalities, and prioritises life cycle as a criterion for awarding contracts.[37] This law also reinforces general principles, for example, "efficiency, transparency, disclosure, integrity, equity of treatment, proportionality and non-discrimination".[38] The scope of subjects and potential parties became broader, to encompass political parties, trade unions, employer organisations, associations and similar foundations whose funding is primarily public, together with contracts that are subject to "harmonised regulation".[39] Among a variety of amendments, LCSP also introduced new measures to encourage small and medium-sized enterprises.

During the pandemic, Spain promptly adopted a sophisticated response to Covid-19, to relieve the burden on the private sector in the PPP realm. For instance, it undertook measures to support the viability of PPP contracts, including allowing the recalculation of financial equilibrium in certain municipal transport contracts by means of changing the fee structure.[40] Although, in Spain, Covid-19 was not generally seen anyway as constituting force majeure, the Spanish government has formally excluded force majeure as a trigger of compensations for falls in revenue due to confinement measures.[41]

(B) Slovak Republic

The Slovak Republic has never had a specific PPP law. However, this has not diminished the feasibility of PPPs in the past couple of decades. PPP arrangements concerning the choice of private partner have been regulated primarily by the Act on Public Procurement (Act no. 343/2015 Coll: the "Public Procurement Act") and its subsequent amendments. This law covered the concession for public works and concessions for services that constitute PPP forms.[42] Concessions for construction works, in terms of their possible impacts on public debt, have to date been governed by the Act on the Public Administration's Budgetary Rules and the Act on the Financial Rules of Local Self-Government.[43]

The Slovak Republic responded rapidly to the impact of

[33] Fraga, M.V. Spain, The Public-Private Partnership Law Review (3 ed.), p. 199. https://www.uria.com/documentos/colaboraciones/2023/documento/SpainThe_PublicPrivate_Partnership_Law_Review.pdf?id=6997_en.

[34] Ibid.

[35] Royal Legislative Decree 3/2011 of 14 November approving the Consolidated Public Sector Contracts Law.

[36] "Novelties in Law 9/2017 of 8 November 2017 on Public Sector Contracts," Audiconsultores: Advocats & Economistes, p. 1,http://www.audiconsultores.com/wp-content/uploads/2018/03/04-2018-Novelties-in-Law-9-2017-on-Public-Sector-Contracts.pdf.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] "Infrastructure financing in times of COVID-19: A driver of recovery," World Bank, 2020, p. 7.

[41] Ibid.

[42] "Country report on the legal framework on Public-Private Partnership (PPP): SLOVAKIA," Interreg Central Europe, May 2017, p. 6, https://www.interreg-central.eu/Content.Node/T1.1.4-.pdf.

[43] Ibid., p. 7.

Covid-19. Amendments were introduced on 25 March 2020 when the Slovak National Council passed Act No. 62/2020 Coll. on certain extraordinary measures in connection with the spread of Covid-19, amending the Public Procurement Act.[44] These amendments enabled the contracting authorities to conclude a contractual arrangement with a tenderer that is not registered in the Register of Public Sector Partners (or whose subcontractor is not registered therein), subject to certain conditions, for example, that such agreements are concluded for the purpose of ensuring the protection of life and health during a state of emergency.[45] In the Slovak Republic, the Covid-19 pandemic is recognised as an extraordinary situation, which allows the use of direct negotiation procedure by contracting authorities without wider notification. Nevertheless, the Slovak Public Procurement Office said that even during the pandemic situation, public funds should be spent according to the principles of effectiveness and transparency.[46]

The amended Public Procurement Act also allowed for automatic suspension of certain deadlines for remedies, modifications of existing contractual arrangements in the context of the global pandemic, and the extended use of simplified procurement procedures.

(C) France

France has a complex and sophisticated legal framework for PPPs[47] that consists of a variety of codes, laws, decrees and other legal instruments that cover different types of PPP arrangements and the applicable award procedures. The core of this legal framework is established by Ordonnance No. 2004-559 of 17 June 2004 and the laws of 2008 and 2009 that amended or/and complemented this ordonnance (together, the PPP Laws).[48]

In 2020, in the midst of the pandemic, the French parliament enacted several legal instruments, for instance, Law No. 2020-289 and Law No. 2020 dated 23 March 2020, which are implemented by Decree No. 2020-293 dated 23 March 2020 and Order No. ECOT2008090A dated 23 March 2020, concerning the adoption of rules governing the conclusion, time schedules, execution, early termination and contractual penalties for all public contracts, including concession agreements and other types of PPP arrangements. The measures provide for the possibility of the private contracting party requesting an extension of the contract term if its performance under the original terms has come to represent a manifestly excessive burden; and to prohibit applying contractual penalties or enforcing other liabilities against the private partner where performance, under specific circumstances, has become impossible, in whole or in part, as a result of the pandemic. Moreover, according to these measures, the private party has a right to compensation when the conceding authority requests material changes to the contract, which would require new investments that are seen as a manifestly excessive burden for the private contracting party.

(D) United Kingdom

As we explained earlier in this chapter, the United Kingdom does not have or need a comprehensive PPP law or legislative framework for PPPs. Only occasional, highly focused pieces of legislation were needed to address certain aspects of the PFI system on a sector-specific basis during the quarter of a century or so in which it remained in force. However, the United Kingdom did transpose the EU Public Sector Directive (2004/18/EC, which applies to public works contracts, public supply contracts and public service contracts) and the Utilities Directive (2004/17/EC for entities operating in the water, energy, transport and postal services sectors) into national legislation through the Public Contracts Regulations (SI 2006/5) and the Utilities Contracts Regulations (SI 2006/6).[49] This was to ensure that PPP/PFI procurement procedures were regulated and standardised in accordance with the requirements of EU law, as all member states were obliged to do.[50] It remains to be seen whether changes will be made to these regulations in future now that the United Kingdom has left the EU.

The regulations specify four available procurement

[44] "A guidance for public procurement procedures in Slovakia in times of COVID-19", CMS Law Firm, 02 April 2020, https://www.cms-lawnow.com/ealerts/2020/04/a-guidance-for-public-procurement-procedures-in-slovakia-in-times-of-covid-19.

[45] Ibid.

[46] Ibid.

[47] EPEC, "France: PPP Units and Related Institutional Framework", p. 35, https://www.eib.org/attachments/epec/epec_france_ppp_unit_and_related_institutional_framework_en.pdf.

[48] Ordonnance No. 2004-559 du 17 juin 2004 ur les contrats de partenariat, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000438720.

[49] EPEC, "United Kingdom: PPP Units and Related Institutional Framework", p. 23, https://www.eib.org/attachments/epec/epec_uk_england_ppp_unit_and_related_institutional_framework_en.pdf.

[50] Ibid.

procedures: the open procedure, the restricted procedure, the negotiated procedure and the competitive dialogue procedure.[51] The open procedure was not used for PFI projects in the United Kingdom, especially in England. Until 2006, the negotiated procedure was used more widely.[52] From 2006, government policy was that PFIs should usually be procured under the competitive dialogue procedure.[53] In 2018, however, the government formally announced that there would be no more PFI projects,[54] while leaving the door open to other forms of private investment in infrastructure and PPP in the future.

Hundreds of PPP projects were in place in the United Kingdom when Covid-19 struck. To address its impact, the UKgovernment procured the issue of a Guidance Note in April 2020 on "Supporting vital service provision in PFI/PF2 (and related) contracts during the COVID-19 emergency".[55] This details how the government modified KPIs and certain other contractual requirements to allow for greater flexibility (for example, granting time extensions for completing certain project milestones or accepting lower standards while maintaining availability payments) to alleviate the burden on the private sector. Further, on 9 June 2020, Procurement Policy Notice 04/20 was issued, focusing on the Covid-19 response in the medium- and longer-term recovery and transition for public sector suppliers. This called for contracting authorities and suppliers to work in an open, pragmatic partnership to address the impact of the pandemic.

(E) italy

In Italy, PPPs have been generally governed by Law No. 109 of 1994 (Law on Public Works) as amended and then replaced by Legislative Decree 163 of 2006 (Code of Public contracts for the implementation of Directives no. 2004/17/CE and 2004/18/CE), and its subsequent amendments (the "Code"). The Code of Public Contracts provided for by Legislative Decree 163 of 2006 constitutes the legal framework both for public procurement and PPP.

As Covid-19 paralysed the country, the government on 17 March 2020 issued Decree No. 18/2020,[56] also known as the Cura Italia Decree. It aimed to (i) strengthen the health sector and (ii) mitigate the impact of Covid-19 on business in general and in relation to the broader emergency and day-to-day life.[57] In the PPP sector, the decree enacted several measures, including:

• exclusion of liability due to contractor's compliance with the emergency measures adopted at a national level in order to face the pandemic in the event that this leads to an infringement of contractual provisions (for example, a delay in the delivery of supplied goods)[58]

• suspension of deadlines for submitting an expression of interest or tenders and other procedural deadlines, such as those for responding to requests for preliminary assistance, proof of requirements, verification of abnormally low tenders, or for approving the proposed award (Article Art. 103 of Law Decree no. 18/2020)[59]

• allowing contracting authorities to have recourse in certain circumstances to a negotiated procedure, without a prior call for tenders, and to sign and implement the contract immediately after the conclusion of the procedure without having to comply with the usual stand-still period of 35 days.[60]

Besides the Cura Italia Decree, the Supreme Court of Italy also published Thematic Report No. 56 concerning "Substantive new legislation on 'emergency' anti-COVID 19 law in contractual and insolvency matters".[61] In the report, the Supreme

[51] Ibid.

[52] Ibid.

[53] Ibid.

[54] The then Chancellor of the Exchequer, Philip Hammond, in a budget statement to the House of Commons.

[55] "Guidance: Supporting vital service provision in PFI/PF2 contracts during the COVID-19 emergency", The UK Government Website, published on 2 April 2020, last updated on 25 June 2020, https://www.gov.uk/government/publications/supporting-vital-service-provision-in-pfipf2-contracts-during-the-covid-19-emergency.

[56] DECRETO-LEGGE 17 marzo 2020, n. 18, https://www.normattiva.it/atto/caricaDettaglioAtto?atto.dataPubblicazioneGazzetta=2020-03-17&atto.codiceRedazionale=20G00034&atto.articolo.numero=0&qId=&tabID=0.3904362740410672&title=lbl.dettaglioAtto&generaTabId=true (in Italian).

[57] Meacci, Carloandrea. "Cura Italia Decree - Law Decree No. 18 of 17 March 2020", (Milano: Ashurst, 2020), p. 1.

[58] "Practice Note on PPP Legal Frameworks Post-COVID-19". World Bank: Infrastructure Finance, PPPs and Guarantees Group, 2020, p. 4.

[59] Ibid., p, 5.

[60] "The impact of COVID-19 on public contracts from the perspective of the Italian legislation. Measures adopted and PPP contracts", Italy: National Anti-Corruption Authority, 2020, p. 3.

[61] Corte Suprema di Cassazione, Rel. No. 56, 8 July 2020, Rome, http://www.cortedicassazione.it/cassazione-resources/resources/cms/documents/Relazione_Tematica_Civile_056-2020.pdf (in Italian).

Court acknowledged that the economic shock resulting from the spread of Covid-19 had given rise to two interconnected issues: (a) the management of contingencies which interfered with the original balance of contractual performance; and (b) the related legal and contractual remedies.[62] As such, the impact of Covid-19 is said to have encompassed the characteristics of an event of force majeure, although a case-by-case evaluation would always still be required. Consequently, these circumstances open up the possibility of each party being able to renegotiate the terms of its contract for any ongoing PPP project.

(F) Poland

PPPs in Poland are regulated by the Act on Public-Private Partnerships, dated 19 December 2008, further referred to as the PPP Act. Yet, there are two other Acts that also become cross-cutting regulations governing PPPs, including the Act on Concessions for construction works or services dated 9 January 2009 (Concessions Act) and the Public Procurement Act dated 29 January 2004 (PPL Act). These acts create the regulatory framework for undertaking joint projects between public authorities and business entities.

The government of Poland enacted multiple regulations in 2020 in response to Covid-19. These regulations came in packages known as "Anti-Crisis Shield". As of January 2021, there were five such packages. Their purpose is to aid companies in mitigating the negative economic effects of the pandemic. Some of the notable regulations are:

a. Prior to Anti-Crisis Shield 1.0, on 2 March 2020, the government enacted the Act of 2 March 2020 on Special Arrangements for the Prevention, Counteraction and Combating of COVID-19, Other Infectious Diseases and the Crisis Situations Caused by Them.[63] This Act provides new provisions and amends several provisions related to PPPs. For example, Article 12 (1) exempts the design, construction, reconstruction, overhaul, maintenance and demolition of buildings, including changes in use, in connection with the Covid-19 response, from certain regulations that would otherwise restrict them, including:

- the Act of 7 July 1994 – The Construction Law
- the Act of 27 March 2003 on Spatial Planning and Development
- the Law of 23 July 2003 on the Protection and Care of Monuments
- if it is necessary to extend the basis for granting health benefits, also the provisions provided under Article 22(3), (4) and (4a) of the Act of 15 April 2011 on Medical Activity.

Furthermore, Article 25 of this Act amends several provisions of the Act of 5 December 2008 on Preventing and Combating Infections and Infectious Diseases in Human Beings, one of which is Article 46c, which stipulates "the provisions on public procurement shall not apply to service, supply or works contracts awarded in connection with preventing or combating an epidemic in the area where the state of epidemic or state of emergency epidemic has been declared". A mechanism has been created, in other words, to take PPP contracts out of the public procurement regime altogether where necessary as part of the response to Covid-19. The Act also allows changes to be made to any public procurement contract (including a PPP contract) if Covid-19 affects its performance.[64]

a. On 31 March 2020, as part of Anti-Crisis Shield 1.0, the government of Poland passed an act amending the 2 March Act (Covid-19 Amendment Act).[65] This is designed to provide suppliers with a temporary solution to avoid incurring penalties under their PPP contracts. In the case of each PPP project, the contracting authorities will assess whether the circumstances surrounding the occurrence of Covid-19 may affect the proper performance of the obligations under the PPP contract. In the event that they determine it may, they have the power, in agreement with the private partner, to amend the contract, in particular by:[66,67]

i. suspending or changing the deadline for performance of the contract in whole or in part;
ii. changing the way supplies, services or works are carried out;
iii. changing the scope of the contractor's obligations, with corresponding changes to its remuneration, provided that any resulting increase in remuneration does not exceed 50 per cent of the original contract value.

[62] L. Possagno et al., "Italy: The Impact Of Coronavirus On Commercial Contracts Subject To Italian Law: The Latest Guidelines Of The Supreme Court.", Mondaq, 2020. https://www.mondaq.com/italy/operational-impacts-and-strategy/990904/the-impact-of-coronavirus-on-commercial-contracts-subject-to-italian-law-the-latest-guidelines-of-the-supreme-court.

[63] DZIENNIK USTAW 2020 R. POZ. 374, https://dziennikustaw.gov.pl/DU/2020/374 (in Polish).

[64] B. Nożykowski et al., "Laws on COVID-19 Handbook", Warsaw: Baker McKenzie, 2020, p. 28.

[65] Link: http://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20200000568 (in Polish).

[66] S. Cairns and P. D. Jørgensen, "COVID-19 impact on public procurement around the world", London: Bird & Bird, 2020.

[67] Nożykowski, Radosław, op. cit., pp. 29-30.