European Bank
for Reconstruction and Development

EBRD
PPP Regulatory Guidelines Collection
2024

Volume III

EBRD PPP
Regulatory guidelines collection

Volume III

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Foreword

This publication consists of three volumes, issued electronically with a limited number of hard copies. The collection is a culmination of over five years of hard work by a dedicated group of experts, most of whom took an active part, either on a pro bono basis or with a symbolic honorarium, in leading efforts for at least one of the chapters.

This publication was led by Chief Editor Alexei Zverev, Senior Counsel at the EBRD, with support and contributions from Reviewing Co-editors Christopher Clement-Davies, independent lawyer and consultant, and Chris Shugart, independent consultant. Additionally, this collection has benefited from a series of substantial commentaries and edits by a wide circle of stakeholders and contributors. The EBRD extends its thanks to all those who contributed to the publication, with special mention to Dražen Crčić and Sapun Ltd, the collections publishing agents, for their wonderful cooperation and dedication in bringing this publication to fruition.

The publication was created in response to feedback from governments and authorities in EBRD economies regarding the need for internationally accepted standards and best practices for the public-private partnership regulatory and institutional frameworks.

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Volume III of the PPP regulatory guidelines collection

This is the third and final volume of the PPP Regulatory Guidelines Collection. This volume consists of a number of studies focusing on the standards, formation, financing and future of public-private partnerships (PPPs). In addition to the other volumes, this one aims to deepen the understanding of PPPs among policymakers and public and private actors. It is hoped that strengthening the understanding of such issues will help increase the effective implementation of such projects. See the chapter executive summaries below.

Chapter 1:

Recent developments in international PPP standards and regulatory policy trends

This chapter analyses developments in international PPP standards and regulatory policy trends between 2015 and 2022. These changes were, in part, catalysed the activities of the United Nations Commission on International Trade Law (UNCITRAL),[1] the United Nations Economic Commission for Europe (UNECE)[2] and the European Union[3] (EU). During this period, 26 of the economies in the EBRD regions made significant changes to their PPP/concession legal frameworks. In these regions and beyond, several trends surrounding PPPs have been noted. Some of these trends include the following:

- There has been continued movement by policymakers towards specific PPP and/or concession laws.
- Institutional frameworks in EBRD economies have remained underdeveloped.
- EU procurement laws are the main driver of legislative change in the EU and in countries associated with the EU.
- The core goal of most economies where the EBRD operates is to create avenues that attract private financing for infrastructure projects.
- Contract preparation and the selection of good projects that are fit for PPPs are increasingly becoming a priority.
- There has been notable criticism of PPPs from western Europe, especially from the United Kingdom, as being risky, complex and failing to deliver value for money.
- A comparison between 2016 and 2022 has revealed a decrease in the aggregate value of projects reaching financial close.
- PPPs remain primarily concentrated in the transport sector (in terms of value and number of projects), with the education sector occasionally surpassing this solely in terms of number of projects.

Chapter 2:

The legislative and regulatory framework for PPPs

This chapter provides guidance on the legal framework for public-private partnerships (PPPs) in infrastructure development, both for policymakers and legislators who want to create or improve such frameworks, and for private-sector participants who want to understand and evaluate them. It covers various aspects of the legal system that affect PPPs, such as company law, procurement law, environmental law, contract law, dispute resolution, tax law, sector-specific law, constitutional and administrative law, and human rights law. It also discusses the need for and the process of drafting a comprehensive PPP law, which may be necessary for countries that want to adopt PPPs more systematically. The chapter is divided into five sections: general legal issues, sources of guidance and precedent, structuring and drafting a PPP law, supporting regulations and guidelines, and final recommendations.

[1] The UNCITRAL Legislative Guide on Public-Private Partnerships (2019). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_final.pdf. Model Legislative Provisions (2019). Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11011_ebook_e_1.pdf.

[2] The UNECE Working Party on PPPs officially endorsed the UNECE-EBRD Standard on Public-Private Partnerships/Concessions legal framework in support of the SDGs (previously named People-first Private-Public Partnerships/Concession Model Law) on 2 December 2022.

[3] EU Directive 2014/23/EU on the award of concession contracts (the Concession Directive) of the European Parliament and the Council of 26 February 2014.

Chapter 3:

Structuring and negotiating PPP contracts

This chapter offers an overview of the main aspects and challenges of structuring, drafting and negotiating PPP contracts. The analysis aims to assist emerging-market countries, especially those in the EBRD regions, in their first approaches to PPPs and PPP contracts, drawing on the practices and insights of developed economies where relevant. The chapter covers the typical contents of a PPP contract, the main legal and practical issues that arise in their structuring and negotiation, the contrasts between common law and civil law approaches, the meaning and implications of the concept of concession, the legislative framework for PPPs and the purposes and objectives of these agreements. It also highlights the need for flexibility and creativity in finding solutions that suit the specificities and expectations of each project and its participants, while acknowledging the growing consistency and predictability of PPP contracts as they become more widely used and understood around the world. The chapter is part of the EBRD PPP study/toolkit, which aims to facilitate the development and management of PPP projects with the commercial and financial participation of the private sector.

Chapter 4:

Regional study on financing models for public-private partnerships in EBRD economies

This chapter studies alternative PPP financing models, going beyond traditional bank lending. It aims to help governments in EBRD economies gain a better understanding of potential financing alternatives for PPPs and explore how to increase the funding available for PPP projects via these alternative mechanisms. The study deals with the initial upfront financing of PPPs, namely financial structures, instruments and sources. There is also some discussion on the classification and rating of PPP projects by credit agencies, which could boost financing for such projects when infrastructure is considered to be an asset class. This chapter is accompanied by a practical tool that draws on and complements this chapter. The tool provides a brief summary of the benefits and limitations of the financing structures, instruments and sources discussed, in the hope of drawing readers' attention to the sections most relevant to the risk appetite for specific PPP projects.

Chapter 5:

The impact of Covid-19

This chapter explores the impact of the Covid-19 crisis on the legal frameworks for PPPs. The analysis aims to assist and encourage key stakeholders in thinking about how to build more robust frameworks and draws attention to the critical role that infrastructure plays in post-pandemic recovery. The chapter discusses three core themes. First, the adverse impact Covid-19 has had on the infrastructure sector as an inevitable consequence of reduced economic activity and the subsequent supply chain issues. Second, it looks at the role of infrastructure in post-pandemic recovery in creating jobs, increasing economic growth and boosting productivity. Third, and most importantly, the chapter discusses how to build better, more robust, PPP frameworks that tackle the typical criticisms of PPPs while enhancing their obvious benefits. As the final chapter in Volume III of the PPP Regulatory Guidelines Collection, it seeks to stimulate discussion among policymakers on how to construct PPP legal frameworks that are robust enough to serve and withstand an increasingly uncertain world.

Chapter 1.
Recent developments in international PPP standards and regulatory policy trends

Acronyms

CIS: Commonwealth of Independent States

CIS IPA or IPA: CIS Interparliamentary Assembly of Member Nations

the EBRD, the Bank: European Bank for Reconstruction and Development

EEA: European Economic Area

EIB: European Investment Bank

EU: European Union

PFIP or PFIP Legislative Guide: Legislative Guide on Privately Financed Infrastructure Projects

PPP: Public-private partnership

SDGs: Sustainable Development Goals

SEMED: Southern and eastern Mediterranean

UNCITRAL: United Nations Commission on International Trade Law

UNECE: United Nations Economic Commission for Europe

Summary

Identifying the recent sources of international public-private partnership (PPP) standard developments and reviewing upgraded standards and international PPP regulatory policy trends

Developments in international standards in the PPP sector emerged from three major sources in 2015-22: the United Nations Commission on International Trade Law (UNCITRAL), the United Nations Economic Commission for Europe (UNECE) and the European Union (EU). Their reference documents are:

- **The UNCITRAL Legislative Guide on Public-Private Partnerships** (2019)[1] and its accompanying **Model Legislative Provisions**[2] replaced and updated the Legislative Guide on Privately Financed Infrastructure Projects adopted in 2000 and the Model Legislative Provisions on Privately Financed Infrastructure Projects of 2003.

- **The UNECE-EBRD Standard on Public-Private Partnerships/Concessions legal framework in support of the SDGs** (previously named People-first Private-Public Partnerships/Concession Model Law) was officially endorsed by the UNECE Working Party on PPP on 2 December 2022.

- **EU Directive 2014/23/EU** on the award of concession contracts (the Concession Directive) of the European Parliament and the Council of 26 February 2014, which had to be incorporated into member countries' national legislation, while EU associated countries have an obligation of approximation/harmonisation due to their association agreements with the EU. The rules that apply to non-concession PPPs also must be adapted to the revised public procurement directives of 2014.

Other noteworthy initiatives in this area on the part of the World Bank, in association with other multilateral organisations (including the European Bank for Reconstruction and Development (EBRD)), are the World Bank PPP Reference Guide (2017), the Guidance on PPP Contractual Provisions (2019 edition) and the Guidance on PPP Legal Frameworks in 2022. The EBRD's Environmental and Social Policy and related Performance Requirements, updated in 2019, should also be mentioned. In addition, following the adoption of the Commonwealth of Independent States (CIS) PPP Model Law, CIS work has continued with the drafting of an official commentary and compilation of enabling guidelines and templates.

The EBRD has prepared this PPP regulatory guidelines, presenting modules covering core PPP matters and issues (model regulatory outlines) applicable to PPPs under most legal systems.

Analysis of the potential impact of PPP regulatory policy trends on EBRD economies

The continuation of a very active legislative process regarding PPPs is evident in the EBRD regions. Of the 37 economies covered in the final report of the EBRD's 2017-18 Public-Private Partnership Assessment, 26 made major changes to their PPP and/or concession legal framework in 2015-22. This fact, combined with changes that took place over 2011-15, shows that nearly all of those economies have adopted new PPP/concession legislation or substantially changed their existing PPP/concession legal framework in the last decade.

The EBRD's 2017-18 assessment of the legal framework for PPPs and concessions found that the trend towards specific PPP and/or concession laws continues and that institutional frameworks are underdeveloped in most of the regions covered. The assessment also found that EU procurement laws are the main factor generating legislative changes not only among EU members, but also in associated countries that were required to transpose or harmonise their

[1] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-10872_ebook_final.pdf.
[2] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-11011_ebook_e_1.pdf.

legislation with the EU's 2014 directives, including the Concession Directive.

Most changes in EBRD PPP and/or concession legislation pertaining to EU membership or accession concern the definition of concession, limits on direct negotiation and detailed development of the amendment process control, as well as review and challenge procedures. Such provisions directly affect the procurement process, which is the main EU single market concern.

Separately, the review of recent PPP/concession legislation shows that the common goal of most EBRD economies is to develop avenues for securing private financing for much-needed infrastructure. This objective prevails over all other considerations.

Differentiating procurement rules so that PPP and concession contracts can be awarded according to rules that are specific to PPPs rather than public procurement is no longer a priority. This is because UNCITRAL's Public Procurement Model Law of 2011 accelerated the modernisation of national procurement regulations.

A review of recent PPP/concession legislation shows that contract preparation and selection of good projects that are fit for PPPs have become priorities.

The European Court of Auditors, the British government and some emerging economies have recently criticised PPPs for failing to deliver value for money, being the source of significant fiscal risk to government" and/or being "inflexible and overly complex".

Such negative comments stem largely from political concerns and were amplified by the Covid-19 pandemic and probably also by Brexit. As such, they cannot be considered a global trend as they do not seem to have affected EBRD economies or other countries. Indeed, PPP legislative activity is booming and emerging markets are rapidly adopting PPPs – often with the support of the G7 or G20 – to cover the infrastructure funding gap. Public investment financing needs private funds more than ever following the pandemic, which has seriously affected public budgets worldwide including in EBRD economies.

Nevertheless, such comments should be regarded as warnings with respect to future PPP developments and the need to choose a PPP model that is not only financially oriented, but follows the standards described above. That means greater emphasis explicitly given to "value for people" in a people-first approach, provided the deal remains bankable.

Introduction

Consultants research and identify PPP developments in statutory and regulatory standards in terms of (i) how they reflect recent and current trends in international PPP standards evolution and (ii) their potential impact on EBRD economies over the last seven years (that is, since the 2015 consultant memorandum on the status of international standards in the PPP sector).

Three major sources of new developments in international standards in the PPP sector from 2015-22 were identified: UNCITRAL, UNECE and the EU. There were also a few other important initiatives from multilateral organisations including the World Bank, the EBRD and the CIS Interparliamentary Assembly of Member Nations (IPA).

A. Current sources of international PPP standard developments and review of newly upgraded standards and recent PPP regulatory policy trends.

1. The UNCITRAL model legislative provisions and the legislative guide on public private partnerships

Background

UNCITRAL adopted its new Legislative Guide on Public-Private Partnerships and Model Legislative Provisions at its 52nd session (Vienna, 8-19 July 2019).[3]

These two UN publications expand and replace two earlier UNCITRAL texts: the Legislative Guide on Privately Financed Infrastructure Projects (the PFIP Legislative Guide), adopted by UNCITRAL at its 33rd session in New York in 2000,[4] and the Model Legislative Provisions on Privately Financed Infrastructure Projects, adopted by UNCITRAL at its 36th session in Vienna in 2003.[5]

The PFIP Legislative Guide, which international institutions and legislators considered to be the benchmark for PPP legislation for almost 20 years, had to be adapted to the rapid evolution of the international practice of public-private partnerships since they emerged in the early 1990s. UNCITRAL kept the guide updated so it did not become obsolete and inapplicable.

[3] Available at https://undocs.org/en/A/RES/74/183.
[4] Available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/pfip-e.pdf.
[5] Available at https://www.uncitral.org/pdf/english/texts/procurem/pfip/model/03-90621_Ebook.pdf

UNCITRAL's sole concern was not updating the PFIP Legislative Guide. Rather, it was keen to draft a PPP model law to complement the recently adopted UNCITRAL Model Law on Public Procurement (2011). It was only after years of effort by the UNCITRAL Secretariat that permission was finally granted in 2017 to update "where necessary all or parts of the Legislative Guide" (PFIP) with the help of international experts. The Secretariat was also charged with updating and consolidating the accompanying legislative recommendations (2000) and the PFIP Model Legislative Provisions (2003).

The Secretariat organised and convened the Third International Colloquium on Public-Private Partnerships (Vienna, 23-24 October 2017), which concluded that most of the recommendations in the PFIP Legislative Guide reflected good policy and practices, and remained relevant. Some revisions were deemed necessary, however, to take account of developments that came into practice after the guide was issued in 2000. These can be summarised as follows:

(a) Some wording should be refreshed (references to PPP, value for money, PPP unit and so on) and some sections of the guide updated. For instance, "public-private partnerships" has become the term generally used to describe the arrangements considered in the PFIP texts and should replace "privately financed infrastructure projects". Also, certain elements (scope, institutions, preparatory and project selection work, monitoring, contingent liabilities) were deemed to be essential topics that needed to be thoroughly updated. Other issues, such as unsolicited proposals and direct negotiations, were to be revisited.

(b) The PFIP texts should fully reflect the objectives and requirements of the United Nations Convention against Corruption, given the extent of ratification of that text. The requirements, contained in articles 9(1) and 9(2) on public procurement and public financial management, respectively, are that systems should be based on principles of transparency, competition and objectivity in decision-making. The PFIP texts should be expanded in regard to good governance throughout the life cycle of PPPs and recent developments should be considered – for example, those encouraging greater transparency in PPPs through open contracting and open data as well as transparency in procurement procedures.

(c) An earlier instruction from UNCITRAL to the Secretariat to consolidate the PFIP texts should be applied as part of the update. The texts should therefore offer commentary, legislative guidance and legislative recommendations as well as model legislative provisions, as appropriate, on each aspect of PPPs covered. Legislative recommendations should form the central scoping provisions (and could be integrated in laws governing PPPs at the national level). Commentary on issues of implementation and use would be necessary to ensure that the legal framework functions as intended, and so should be included (reflecting the approach of the existing PFIP texts). Updated PFIP texts would therefore take the form of a single legislative guide containing all guidance, recommendations and model provisions.

After more than seven years of hard effort by the UNCITRAL Secretariat and international experts, the Legislative Guide on Public-Private Partnerships and its Model Legislative Provisions were adopted at INCITRAL's 52nd session (Vienna, 8-26 July 2019).[6]

Another major achievement of the new guide was the widening of its scope to demarcate government-pay PPPs and concessions as two separate categories. The PFIP Legislative Guide, as previously drafted, did not pay sufficient attention to so-called non-concession PPPs. This is no longer the case and constitutes the most significant expansion of the scope of the PPP Legislative Guide.

Other key achievements resulting from the update were:

- development of the project preparation and project selection phase
- use of the value-for-money concept as part of the required feasibility study
- alignment of the PPP contract award procedures with the 2011 UNCITRAL Model Law on Public Procurement
- modification of the unsolicited proposals initiation process to underline the exceptional nature of this procedure, which requires special precaution as well as transparency and competition in the award process
- improvement of the PPP challenge process in accordance with the underlying principles of the United Nations Convention against Corruption.

The restricted mandate given the Secretariat to update the guide and not to draft a model PPP law to complete the UNCITRAL Public Procurement Model Law of 2011 has opened the way for the CIS Interparliamentary Assembly (IPA) of Member Nations to work on a PPP model law specific to the CIS region

[6] Bruno de Cazalet (August 2020), "The New UNCITRAL Legislative Guide on Public-Private Partnerships (PPP and new Model Legislative Provisions)", RDAI/International Business Law Journal No. 4.

and for UNECE to work on a universal PPP model law oriented towards value for people ("people-first PPP), both with the support and assistance of the EBRD. UNECE, the World Bank, the Organisation for Economic Co-operation and Development and the EBRD have, however, derived much inspiration as far as PPP best standards are concerned from UNCITRAL's PPP Legislative Guide.

2. EBRD/UNECE model law on public-private partnerships/concessions in support of the SDGs (2022)[7]

2.1 Background

UNECE and the EBRD started work on 14 September 2017. UNECE soon gained the EBRD's support for the two institutions to jointly draft a "people-first" model law while at the same time remaining bankable (respecting the requirements and expectations of international financial markets). This required many meetings of a large team of PPP pro bono experts from around the world. It was concluded on 19 November 2019, when the project team leader submitted a draft "people-first" model PPP law and commentary to the UNECE Secretariat for review by all stakeholders.

This Model Law was previously named the People-first Private-Public Partnerships/Concession Model Law. It was officially endorsed by the UNECE Working Party on PPP on 2 December 2022.

UNECE initiated the drafting of this document with the support of the EBRD in response to the widespread sentiment that a new approach to PPPs was needed, notably to address the concerns of emerging economies.

The UNECE-EBRD PPP Model Law was not explicitly people-first oriented at the outset. It took on this approach as UNECE was focusing on the Sustainable Development Goals (SDGs) and in light of the drawbacks faced by some PPP projects, mainly in the United Kingdom and Europe.

In preparing the texts, the project team ensured that the draft model PPP law and the commentaries were as consistent as possible with and complementary to UNCITRAL's Model Legislative Provisions to avoid confusion between two different UN PPP instruments. To ensure consistency between the two instruments, the UNCITRAL Secretariat was the first agency to review the draft UNECE-EBRD Model Law and the draft was harmonised with the Model Legislative Provisions.

The two documents contain different provisions in various articles, but not inconsistent or conflicting ones. The procurement clauses are very similar, though other areas of the draft model PPP law were handled in different ways. These differences were thought to be helpful rather than problematic, as they would give governments alternative approaches and options for particular provisions.

On 22 November 2019, the draft model PPP law was put on the UNECE website for a public review period. The UNECE Secretariat sent a notification to the PPP network and other key stakeholders soliciting comments and observations on the draft law. UNECE completed its public review in March 2020. The document has been very positively received by commentators and governments around the world, with many saying it is the best example of a precedent of this kind available in the market today. The draft has the full support of the UNECE team in Geneva.

The comments received during the public review stage were taken into account in the revised draft submitted to the UNECE Bureau in May 2020 for its review. The Model Law was set to be officially endorsed by the Bureau and then formally adopted by the United Nations at the end of 2019. However, administrative and political issues delayed official issuance of the document, which was finally adopted in December 2022 after a few final revisions to accommodate the remaining minority opinions.

2.2 A PPP model law in support of the SDGs

The SDGs are a collection of 17 global goals designed to be a "blueprint to achieve a better and more sustainable future for all". The SDGs, approved in 2015 by the United Nations General Assembly and intended to be achieved by 2030, are part of a UN resolution called the 2030 Agenda for Sustainable Development. The targets and indicators for the SDGs are included in the UN resolution adopted by the General Assembly two years later, on 6 July 2017.

SDGs call for different forms of partnerships, including PPPs (SDG 17) as a tool to close the infrastructure gap.

The UNECE-EBRD Model Law aims to capture the elements of international best practice in the area of PPP/concessions legislation and to establish a legal framework for SDG-oriented public-private partnerships. That means PPPs moving from being a mere financing and risk allocation tool at inception in the United Kingdom to – following a process requiring an economic/social assessment – an instrument that

[7] See https://unece.org/eci/documents/2022/10/working-documents/standard-public-private-partnershipsconcession-model-law.

explicitly refers to value for people and value for the planet in addition to value for money.

PPPs structured and implemented according to the provisions of the UNECE-EBRD Model Law can be expected to promote those outcomes. Thus, they should represent enhanced value for money in the true sense of value for people, in terms of their long-term, net value for consumers, government and the wider public, considered over their life cycle in light of all their key impacts, for the greater good of all.

2.3 UNECE subsequent evaluation and rating initiatives

The UNECE People-first Impact Assessment Tool (2020) and assessment methodology were further developed (2021) as a mechanism to evaluate the compliance of infrastructure and PPP projects with the SDGs and to determine the extent to which they meet the people-first PPP designation that can measure impact and score projects. The UNECE PPP and Infrastructure Evaluation and Rating System is a new assessment platform and evaluation methodology for the SDGs (2022).

3. European Union concession directive of 2014

EU Directive 2014/23/EU of 26 February 2014 on the award of concession contracts (the Concession Directive) must be transposed into the national legislation of member countries. EU associated countries wanting to become an EU member, or those recognised as EU candidate or EU acceding countries waiting for agreed incorporation after signature of a treaty (together referred to as prospective members),[8] have an obligation of approximation/harmonisation resulting from their association agreements with the EU. The rules that apply to non-concession PPPs have also had to be adapted to the revised public procurement directives of 2014.[9] This has obliged members and prospective members to adapt their definition of concession and, in many cases, to separate their concession and non-concession procurement rules (sometime in the same act) to benefit from the flexibility given by the Concession Directive to the choice of the procurement process.

Some believed the absence of clear EU rules governing the award of concession contracts gives rise to legal uncertainty, creates obstacles to the free provision of services and causes distortions in the functioning of the internal market. That is why the Concession Directive precisely defines concessions to reflect the specificity of concessions compared to public contracts. As a result of their specificity – relying mainly on the level of operating risk undertaken by the concessionaire – concessions are considered as the sole exception justifying the application of a specific, more flexible procurement regime that differs from national public procurement laws (compliant with the Public Procurement Directive).

This separation trend, however, only affects the procurement phase of the PPP cycle, which is the EU's main (if not sole) concern in regulating the EU single market. Members and prospective members are free to specify their own provisions in other areas within the boundaries of the EU acquis – the body of common rights and obligations that is binding on all EU members.

The other EU standard that affected members' and prospective members' PPP regulatory procurement trend is related to direct negotiation, which has to be limited to very exceptional cases. For the same reason of transparency and risk of collusion/corruption, the provisions apply to contract amendments, which usually are negotiated directly (without new tenders being adopted) to comply with precise rules and only allowed under specific limits and conditions.

The EU Remedies Directives[10] on the award of public contracts and for utilities procurement which are applicable to the award of concessions are also part of the required transposition or harmonisation process with EU directives and the EU acquis, requiring generally significant changes to their review and challenge procedures for new acceding members and associated countries.

[8] For the purposes of this document, "prospective members" means EU candidate countries and all other countries that have association agreements with the EU that require them to harmonise their legislation with that of the EU.

[9] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance and Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance.

[10] Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors.

4. Continuation of CIS work

The CIS IPA, created on 27 March 1992, is an interstate body of the CIS, consisting of eight member states' national parliamentary delegations: Azerbaijan, Armenia, Belarus, Kazakhstan, Kyrgyz Republic, Russia, Tajikistan and Uzbekistan. Ukraine and Moldova used to be members but withdrew in 2018 and 2023, respectively. The CIS IPA is tasked with harmonising commercial legislation in member states and has been drafting and enacting model legislative acts and other instruments, including in various commercial law sectors, taking into account national and international experience and recommending their implementation in member states' national legislation.

The EBRD cooperated extensively with the IPA over the past two decades following the signature of a memorandum of understanding. The Bank has sponsored the development of the CIS model PPP law.

The CIS PPP Model Law was developed based on internationally accepted standards in PPP and approved by the IPA in November 2014. It has been recommended for incorporation into the national legislation of CIS member states. The PPP guidelines expected to be developed under this EBRD-CIS IPA technical cooperation project include some that are published in this collection.

5. World Bank PPP reference guide and guidance on PPP legal frameworks

The third edition of the Public-Private Partnerships Reference Guide (2017) is a joint product of the Asian Development Bank, the EBRD, the Global Infrastructure Hub, the Inter-American Development Bank, the Islamic Development Bank, the Organisation for Economic Co-operation and Development, UNECE, the United Nations Economic and Social Commission for Asia and the Pacific, and the World Bank Group. It is not a legislative guide but is part of an effort by the World Bank Group and other multilateral organisations to help decision-makers and PPP practitioners. It aims to disseminate good practices on infrastructure and PPP policies and implementation.

The third edition of the guide focuses on the development of efficient legal and institutional frameworks that help governments identify and select PPP projects, and structure and procure affordable, sustainable PPP contracts that deliver needed services to populations. It expands into new subject areas, notably stakeholder communication and engagement, environmental and social studies, and climate change. Additional sections address municipal PPPs and private participation in fragile and conflict-affected states.

The World Bank Guidance on PPP Legal Frameworks (2022) is also intended to help government officials learn about and establish sustainable PPP legal frameworks. It sets out key considerations and sample drafting in relation to numerous critical provisions in PPP legislation and supporting instruments. The publication explains the background to these essential legislative provisions, while providing benchmarking examples from markets with different legal traditions and maturities, to highlight the need to cater to a government's specific set of circumstances.

A primary objective of the World Bank Group and the other institutions that have contributed to these publications is to help governments make well-informed decisions about their infrastructure programmes, based on sound analysis and commensurate with their macroeconomic objectives and institutional capabilities. To this end, the World Bank Group and the other organisations are generating global knowledge and diagnostic tools and offering advisory services and technical assistance.

6. EBRD environmental and social policy and performance requirements: 2019 update

Many international financial institutions, including the EBRD and the World Bank, require adherence to environmental and social principles and completion of environmental impact assessments before a project can receive their financing and proceed. These standards should be included in the parameters of the project agreement, but the law may require other standards to be met.

Following extensive internal and external consultation, the EBRD Board of Directors approved the Environmental and Social Policy and its related Performance Requirements in April 2019. The Environmental and Social Policy is one of the Bank's three good governance policies, together with the Access to Information Policy and the Project Accountability Policy. It represents a fundamental governance policy of the EBRD and a key document that guides the Bank's commitment to advocating for environmentally sound and sustainable development in the full range of its investment and technical cooperation activities. The policy specifies how the Bank should undertake its commitment in practice and on its projects.

In line with the previous EBRD policy and related Performance Requirements approved in 2014, the policy details the Bank's commitment to promoting environmentally sound and sustainable development in the full range of its activities and to refrain from financing projects with adverse environmental or social impact. It also brings to governments' attention the need to select suitable projects and to contribute to the SDGs in accordance with specified standards to boost the chance of private financing of infrastructure projects.

The EBRD standards were set up to conform with the European Principles for the Environment, launched in response to the drive for greater harmonisation of environmental principles, practices and standards associated with project financing. The Council of Europe Development Bank, the EBRD, the European Investment Bank (EIB), the Nordic Environment Finance Corporation and the Nordic Investment Bank have adopted these principles.

EBRD-financed projects are expected to be designed and carried out in compliance with good international practices relating to sustainable development. The Bank has defined 10 Performance Requirements (PRs) covering key areas of environmental and social issues and impacts to help its clients improve the sustainability of their business operations.

EBRD Performance Requirements:[11]

PR1: Assessment and management of environmental and social risks and impacts

PR2: Labour and working conditions

PR3: Resource efficiency and pollution prevention and control

PR4: Health, safety and security

PR5: Land acquisition, restrictions on land use and involuntary resettlement

PR6: Biodiversity conservation and sustainable management of living natural resources

PR7: Indigenous peoples

PR8: Cultural heritage

PR9: Financial intermediaries

PR10: Information disclosure and stakeholder engagement

Where possible, projects should avoid adverse impacts on workers, communities and the environment. If they cannot be avoided, negative impacts should be reduced, mitigated or compensated for, as appropriate. New facilities or business activities financed by the EBRD must be designed to meet the Performance Requirements from the outset.

If a proposed business activity relates to existing facilities that do not meet the requirements at the time of Board approval, the client will be required to adopt and implement a satisfactory environmental and social action plan.

B. Analysis of the potential impact of recent PPP policy trends on the EBRD regions

1. Rapid evolution of the PPP legislative frameworks of EBRD economies

We have observed the continuation of a very active legislative process in the EBRD regions. Indeed, 26 of the EBRD economies – eastern European economies as well as southern and eastern Mediterranean (SEMED) economies – made major changes to their PPP/concession legal frameworks in 2015-22. Combined with changes made in 2011-15, this shows that almost all EBRD economies adopted new PPP/concession legislation or substantially modified their PPP/concession legal framework in the last decade.

2. Changes in PPP legislation in eastern European countries, CIS member states, the Western Balkans, and Greece

(i) Albania: On 27 July 2015, the Albanian Parliament approved Law No. 77/2015 On amendments and additions to Law No. 125/2013 on Concessions and Public Private Partnerships.

(ii) Armenia: A PPP law was adopted on 28 June 2019 that includes concessions (drafted with EBRD assistance).

(iii) Azerbaijan: A draft law on PPPs (drafted with EBRD assistance) was signed into law on 27 December 2022.

(iv) Belarus: Law No. 345-Z On Public-Private Partnership was enacted on 30 December 2015 and amended in 2019 by the Act On amendments to the Law of the Republic of Belarus On Public-Private Partnership. First amendments to the law were made in 2019, taking into account the practical work on preparing pilot PPP projects, Law of the Republic of Belarus No. 194-Z, dated 18 July 2022.

(v) Bulgaria: The Concessions Act SG 96/1/12/2017 was enacted in 2017.

[11] https://www.ebrd.com/who-we-are/our-values/environmental-and-social-policy/performance-requirements.html

(vi) Croatia: The Concessions Act (Official Gazette 69/2017) was enacted in 2017 and the Act on Amendments to Public-Private Partnership Act in 2018 (Official Gazette 114/2018).

(vii) Czech Republic: Act No. 134/2016 on public procurement, which also regulates procurement for concessions and PPPs, was enacted in 2016.

(viii) Estonia: The Parliament of Estonia (Riigikogu) passed amendments to the Public Procurement Act (RHS) in May 2022.

(ix) Georgia: Law 2273 on PPP was adopted on 4 May 2018 covering PPPs including concessions (drafted with EBRD assistance) followed by Governmental Decree No. 426 dated 17 August 2018, Approving Rules on Development and Implementation of PPP.

(x) Greece: Law 4413 (Gov. Gaz. A' 147 and 148/08.08.2016) entitled Award and Execution of Concession Contracts was enacted on 8 August 2016.

(xi) Kazakhstan: The Law on Public Private Partnership was enacted in 2015 (No. 379-V, of 23.11.2015); amended by Law No. 399-VI, On Amendments into Certain Labour-Related Legislative Acts of the Republic of Kazakhstan (the Amendment Law) on 2 January 2021.

(xii) Kyrgyz Republic: Law No. 95 About public-private partnership was enacted on 22 July 2019. In 2021, President Sadyr Zhaparov signed a new edition of law on public-private partnership. Law No. 98 of 11 August 2021. On 25 March 2022, the Cabinet of Ministers adopted a resolution on PPP issues in the Kyrgyz Republic, approving a number of subordinate legislative enactments pertaining to PPPs.

(xiii) North Macedonia: Numerous laws amending and supplementing the Law on Concessions and Public Private Partnership have been amended, most recently on 12 April 2022 (Official Gazette of the Republic of North Macedonia Nos. 6/12, 144/14, 33/15, 104/15 and 215/15 and Official Gazette of the Republic of North Macedonia Nos. 153/19, 261/19 and 89/22). A new draft PPP law is being prepared.

(xiv) Romania: The 2018 PPP law (Government Emergency Ordinance No. 39/2018) recalled Law No. 233/2016 on public-private partnership as subsequently amended and supplemented. Law No. 208/2022 promulgated by the Romanian president amends and supplements the following normative acts of major importance in the field of public procurement:

- Law 98/2016 on public procurement

- Law 99/2016 on sectoral acquisitions

- Law 100/2016 on works concessions and service concessions

- Law 101/2016 on remedies and appeals in the matter of awarding public procurement contracts, sectoral contracts and works concession and service concession contracts, as well as for the organisation and functioning of the National Council for the Resolution of Appeals.

(xv) Poland: The country's long-awaited PPP law amendment came into force in September 2018.

(xvi) Russia: Federal Law No. 224-FZ On Public-Private Partnership, Municipal-Private Partnership in the Russian Federation and the Amendment of Certain Legislative Acts of the Russian Federation was enacted on 13 July 2015. It was supplemented by the amendments of 29 December 2015 and last amended on 3 July 2016. As of 1 January 2016, seven decrees of the Russian government and four orders of the Ministry of Economic Development and Trade have taken effect. The Law on Concession Agreements of 2005, last amended 30 December 2015 (Federal Law No. 265-FZ), and 3 July 2016 (Federal Law No. 275-FZ) were both amendments to the Law on Concession Agreements.

(xvii) Serbia: The Serbian Law on Public-Private Partnership and Concessions was enacted in 2016 (Official Gazette of the Republic of Serbia, No. 88/2011 and 15/2016).

(xviii) Turkmenistan: The new Law of Turkmenistan regulating public-private partnerships entered into force in June 2021.

(xix) Ukraine: The Law of Ukraine on Concessions No. 155-IX (drafted with EBRD assistance) was enacted on 3 October 2019. The Law of Ukraine on the Public-Private Partnership of 1 July 2010 was amended on several occasions including substantially by the Law of Ukraine on Concessions No. 155-IX of 3 October 2019.

(xx) Uzbekistan: The Legislative Chamber adopted the law of the Republic of Uzbekistan on Public Private Partnership on 26 April 2019. The Senate approved the law on 3 May 2019. On 22 January 2021, the president of Uzbekistan signed Law No. 669, which addresses gaps in Law No. 537 on Public-Private Partnership, adopted on 10 May 2019.

(xxi) Turkmenistan: PPP Law dated 5 June 2021.

3. Changes in PPP legislation in SEMED countries

(i) Egypt: Amendment to Law No. 10 of 2010 (December 2021) and Prime Ministerial Decree No. 3217 of 2022 Amending Certain Provisions of the Implementing Regulations of the Law Regulating Partnership with the Private Sector in Infrastructure Projects, Services and Public Utilities, promulgated by Law No. 67 of 2010.

(ii) Jordan: The Public-Private Partnership Law No. (17) of 2020 (PPP Law) repealed PPP Law No. (31) of 2014; the Public Private Partnership Regulation Number (23) of 2021 repealed the Public Private PPP Projects Regulations No. (98) of 2015.

(iii) Lebanon: Law 48 dated 7 September 2017 Regulating Public Private Partnerships.

(iv) Morocco: Law No. 86-12 relating to public-private partnership contracts promulgated by Dahir No. 1-14-192 of 24 December 2014 (hereinafter Law 86-12), entered in force on 4 June 2015. Date of publication of the decree adopted for its application (Decree No. 2-15-45 of 13 May 2015, hereinafter the decree); Dahir No. 1-20-04 of 6 March 2020 promulgating Law No. 46-18 modifying and completing Law No. 86-12 relating to public-private partnership contracts.

(v) Tunisia: The law on public-private partnership (Law No. 2015-49) excluding concessions was enacted in 2016 (finalised with EBRD assistance), while Law 2008-23 of 1 April 2008 on the concession regime was amended by Law 2019-49 of 29 May 2019 relating to the improvement of the business climate and completed by Government Decree No. 2020-316 dated 20 May 2020, fixing the conditions and procedures for granting concessions and their follow-up.

4. PPP legal frameworks in EBRD economies are evolving

Our review of changes in PPPs/concessions in the EBRD economies since 2015 identifies some key developments in various aspects of PPPs, in line with the evolution of best practices and international standards mentioned previously in the PPP regulatory guidelines.

4.1 What trends did the EBRD's 2017-18 assessment observe?

The EBRD's Public-Private Partnership Assessment 2017-18 identified the following major evolution of PPP/concession legislative frameworks:

"4.1 Legislative and industry trends since the 2011 assessment

Many of the results of this assessment are only valid for certain aspects or regions. However, three main trends could be identified that are true across all jurisdictions:

4.1.1 Trend towards specific PPP and/or concession laws continues

The trend of adopting specific laws for privately financed infrastructure projects and the provision of public services by private parties has definitely continued since the 2011 assessment. In many jurisdictions, there is a PPP law and a separate concession law or at least one law for either or both of these groups' project models.

Only very few countries developed in the opposite direction and replaced their specific laws for PPPs and concessions with one overarching public procurement law (these countries include Poland and the Czech Republic). What confirms the general trend even further is that the explanations for these very limited exceptions are – at least to some extent – specific, national circumstances.

4.1.2 Underdeveloped institutional frameworks

The legal framework in the countries assessed continues to be better than the institutional framework and PPP policies.

The country-focused in-depth assessment, however, showed that the experts and stakeholders in most countries clearly welcome institutional support in public project preparation for know-how transfer and project approval.

Further, stakeholders almost uniformly pointed out that political support for each particular project on top of an institutional framework was an indispensable requirement for the success of PPPs/concessions. However, without proper project development and approval, political support is much more difficult.

All results confirm that at least strong political support for PPPs (even if there is no PPP policy in place) is absolutely necessary to make large and complex projects like PPPs successful.

4.1.3 EU Procurement Law is the most important

Single driver for legal development: The EU Procurement Law is the prevailing influence in all countries in which [the] EBRD is active and which are also EU member states or accession states.

All other reasons for legal developments were more specific and thus less far-reaching. The implementation of the 2014 procurement package directives was the main driver for legislative developments in EU member states and accession countries. However, many of them only focused on EU law compliance and may thereby have missed the opportunity to have implemented other useful standards at the same time.

On the other hand, the 2014 directives were so complex that lawmakers may have preferred to exclude other matters that would have further increased the number and complexity of legal amendments. Hopefully these lawmakers will be ready to deal with other international standards at a later stage.

Nine out of the top 10 jurisdictions in private party selection, and none of the lowest 10, are EU member states or accession countries. The top 10 group includes one accession country, Serbia, and one Asian country, Mongolia. The 'champion' in LFA compliance, Serbia, is among the top three regarding its legal framework for private party selection. However, it not only scores highly in terms of compliance with EU procurement rules, but also in project securities and government support, and is excellence regarding its policy framework. Unsurprisingly, the project pipeline is filled with numerous projects and the award rate is improving, too.

Mongolia is also excellent in terms of its rules for the project agreement. Greece also has a legal [procurement] framework that achieved an outstanding rank in several aspects, namely project agreement as well as security and government support aspects.

However, there is obviously a downside to this trend too and further drivers are needed for the future. EU Procurement Law only aims at ensuring proper competition for contracts paid with taxpayers' money. It therefore focuses on the award process by means of non-discrimination and transparency rules as well as legal protection against awarding authorities. EU Procurement Law, however, completely ignores all aspects of project preparation.

As its application ends with the contract award, it also largely ignores contractual matters as well as project implementation. Another development supporting this effect is the 2011 UNCITRAL Model Law on public procurement, which in many ways became better adjusted to dealing with PPP.

One example is that the so-called best economic value selection criteria are now accepted and not the lowest price only. Further, a wide range of selection processes (procurement procedures), such as the competitive dialogue, has been introduced in the UNCITRAL Model Law. Due to their increased flexibility such procedures also fit well for PPPs.

On the initiative of the EU member states, the EU accession countries faced pressure to comply with the new EU Directives and the 2014 Concession Directive in particular. This, among other reasons, caused states with a PPP law to include concessions into the scope of application of their law or to introduce a specific PFI law in order to apply public procurement rules for non-concession PPPs. Now that this task has been accomplished, new goals should be targeted."

The trend mentioned in the assessment benefits countries which, until recently, had no real legal PPP/concession framework – such as Albania, Armenia, Azerbaijan, Belarus, Georgia, Tajikistan, Turkmenistan, Uzbekistan and, to a lesser extent, Kazakhstan, where concessions were usually limited to mining or oil and gas concessions, but not oriented towards the private financing of infrastructure, which is now urgently needed and where no specific concession or PPP legal framework existed. These countries have chosen a large scope of PPPs, including concessions for work and services and government-pay PPPs, either in a unique PPP law including concessions or with two different sets of laws.

We also observe that some countries have undergone several consecutive changes since 2015. This is true of the Kyrgyz Republic, as well as Romania, Russia, Ukraine and others. Contrary to the trend noticed for 2011-15, these changes no longer reflect the need to extend the scope of PPPs previously limited to concession-type projects (or build-operate-transfer) to include some derived forms of build-operate-transfer. These include build-own-operate (without transfer of ownership to the public sector) and build-own-operate-transfer, where the transfer of new facilities only happens when the concession period expires or aims to include government-pay (availability payments) types of private finance initiatives in addition to user-pay concessions.

5. The EU transposition or approximation trend and treatment of non-concession PPPs

Requirements for compliance/approximation with the EU acquis dictate most changes in EBRD economies that are EU members or prospective members. This was the case for Bulgaria, Croatia, Georgia, North Macedonia, Romania, Serbia and Ukraine, which face a deadline to transpose or approximate their national laws with the 2014 EU Directives on public procurement and concessions.

The difficulty faced by EU members or prospective members was related to the difference between objectives of the EU and PPP best standards. The EU is only interested in fair competition in the single market – which means the procurement rules and not project preparation and selection or the implementation or follow-up of PPP projects. But PPP standards apply to the entire PPP project cycle, from the initiation until ex-post assessment, with procurement being just one of the phases.

The EU believes all public procurement must follow public procurement rules. The sole exception is for concessions justified by the level of operating risk undertaken by the concessionaire. Although the EU compromised by allowing more flexible treatment of concessions, it refuses to recognise a third non-concession PPP route between concession and traditional public procurement: granting special treatment to government-pay PPPs. The EU's public procurement and concessions directives of 2014 confirm this position.

The EU has never felt very comfortable in the domain of concessions and PPP, where it has faced different views from common law and civil law countries leading to compromise positions. This may change with Brexit, as Ireland is the sole representative of common law countries in the EU, while Malta has a hybrid common law/civil law system. All other EU members are civil law countries.

Candidate countries for accession as well as recently acceded EU members face very strong pressure from the EU authorities to harmonise their legal framework for public procurement and PPP with these new Directives, and sometimes to sacrifice a well-designed concession/PPP law to this EU compliance requirement. This was the case for newer EU members countries, such as Croatia, but also for Bulgaria and Romania.

Mature EU countries are also affected. France, for instance, had to incorporate its specific government-pay PPP law known as the partnership contract law (contrats de partenariat to become marchés de partenariat) into its Public Works Code because the EU authorities would not accept a third public procurement mode between public works and concessions.

The main EU criterion for a concession is not the payment by users, but the operating risk (including supply and demand risk), which should prove that a "significant" part of the revenue is at risk (traffic, operation, performance). Depending on the satisfaction – or not – of this criterion, either the concession law applies with respect to concession awards or the regular public procurement rules will apply.

Excluding non-concession PPPs from the flexible procurement regime for concessions may appear contrary to PPP best practice and international standards and prejudicial to the development of non-concession PPPs (government-pay PPPs on an availability and performance basis) and to the private financing of infrastructure.

The trend, which countries including Bulgaria, Croatia, Montenegro, Romania and Serbia have followed to satisfy EU requirements and avoid relinquishing the non-concession PPP instrument, has been to separate concession and non-concession treatment only as far as procurement is concerned, by referring to the public procurement law for the contract award of non-concession PPPs. The EU seems to accept this position, provided national public procurement rules are followed for the award of non-concession PPPs.

Other countries, such as North Macedonia, have abandoned all specific procurement processes for concession and non-concession projects to the general public procurement rules. Still others, including Ukraine, resist and want to continue with specific procurement treatment for both concession and non-concession projects.

In any case, this question is less important today with respect to best standards than in the past as all EU members or prospective members have harmonised or are in the process of harmonising their public procurement regulations with the EU Public Procurement Directive, under which contracts are awarded to the most economically advantageous tender, identified on the basis of the lowest price or the best price-quality ratio.

6. Other legislative trends since the EBRD's 2017-18 assessment

All EBRD economies are supposed to be in a transition or development stage; this is a criterion for them to be eligible for financing by an international reconstruction and development institution such as the EBRD. The transposition or approximation requirement for EU members or associated countries aside, the common goal of these eligible countries is to develop and boost private financing for infrastructure. For these countries, this economic development objective associated with value for people usually prevails over the benefit expected under the best-value-for-money concept, which plays a secondary role.

Furthermore, the differentiation of the procurement process to enable PPP and concession contracts to be awarded according to specific rules tailored for PPPs and not the public procurement rules is no longer a priority.

The UNCITRAL Public Procurement Model Law of 2011, which greatly inspired the drafting of the EU Public Procurement Directive, has accelerated the modernisation of national procurement regulations. This is why UNCITRAL's PPP Legislative Guide and its new PPP model provision refer to the UNCITRAL Public Procurement Model Law and open the possibility of simply referring to public procurement rules for the award of public-private partnerships in PPP legislation.

In addition to commercial and financial considerations, a handful of new PPP laws address the SDGs by including socioeconomic considerations, environmental protection and public involvement. When the 2017-18 assessment was published, the EBRD circulated a checklist that, for the first time, also included a few questions about public involvement and public hearings. The positive response to these questions was limited, signalling that these issues were still of little concern to PPP legislators. Conversely, preparation work and feasibility studies have improved considerably in most countries.

Contract preparation and the selection of good projects fit for PPP have become priorities, along with effective and accelerated capacity building.

Modern PPP legislation must address sustainable development issues such as the environment and socioeconomic consideration, as well as the involvement of the public. All the international best standards mentioned in first part of this memorandum (except EU rules) acknowledge the importance of these issues. EU rules concentrate narrowly on the procurement process, once a decision has been made to undertake a public investment.

The CIS Model Law acknowledges that the public should be involved from the start of a project – that is, from project selection, through a public enquiry or otherwise, and during implementation of the concession through regular information and efficient complaint procedures where consumers' interest is involved. The UNECE-EBRD Model Law also considers the public's role to be a major concern.

Potential environmental damage and the impact on society are always key issues when planning an infrastructure project under a PPP scheme. Governments must determine if the detrimental impact of a project on the environment or on society outweighs its potential benefits, whether the project is necessary, and how the negative impact can be kept to a minimum. This is especially important today to fight the wave of criticism of PPPs that is sweeping across Europe.

7. Negative political trend in western Europe

PPPs face considerable criticism in Europe, especially in the United Kingdom, where the Private Finance Initiative (PFI) and Private Finance 2 (PF2) – under which private companies provided public services and infrastructure – were scrapped in the wake of the collapse of construction firm Carillion.

The UK National Audit Office questioned the financial and economic benefit of the PFI in 2018, saying that "many projects are more expensive (up to 40 per cent more expensive than project directly publicly financed)" and noting a "lack of data available on the benefits of private finance procurement". PPPs were heavily criticised for failing to deliver value for money, causing "significant fiscal risk" to the government and for being "inflexible and overly complex". Then Chancellor, Philip Hammond, said the government would no longer use the controversial PPP contracts, though existing contracts would be honoured.

This does not mean that the United Kingdom – the pioneer in PPP projects, at least as far as government-pay PPPs are concerned – has eliminated all forms of private finance for public projects. The country uses other types of private finance to deliver infrastructure, including the recently rediscovered form of user-pay concession for which a law was enacted in 2016 for the transposition of the EU Concession Directive, but also the use of Power Purchase Agreement for Renewable energy projects which represent a very active and promising sector of infrastructure development in the United Kingdom.

The United Kingdom is still the top project finance centre in Europe, the hub from which international project finance deals are structured, negotiated and documented, despite the underlying PPP projects being located elsewhere. According to Market Intelligence Project Finance 2022,[12] the international English law finance market far exceeds the domestic UK project finance market in both volume and size (and often complexity) of deals. The United Kingdom continued to be very active in cross-border financing in 2021 despite Brexit and Covid-19 and this is likely to continue, as PPPs are very popular across emerging markets and have the official support of the G7 and G20.

The European Court of Auditors and some governments in Europe (including France) have also criticised the PPP model. For instance, the court's 2018 report, based on a study of 12 PPPs co-financed by the European Union, noted the "widespread shortcomings and limited benefits of PPP resulting in

[12] Interview with Milbank LLP about project finance in the United Kingdom on 17 March 2022. Market Intelligence Project Finance 2022.

€1.5 billion of inefficient and ineffective spending". The court concluded that "value for money and transparency were widely undermined in the studied cases, in particular by:

unclear policy and strategy

inadequate analysis

off-balance-sheet recording of PPPs

unbalanced risk-sharing arrangements".

The European Commission and member states should "not promote more intensive and widespread use of PPPs until the issues identified have been addressed", the court said.

The current PPP situation in Europe as assessed in the EIB's European PPP market updates for 2016-22 (see Table 1) shows a somewhat negative trend since 2019. The situation has improved since 2019, but has not recovered completely. The reports note a reversal of situation of the user-pay concession type of PPP compared to government-pay PPPs in Europe: 20 per cent of transactions closed in 2016 were user-pay, but by 2022, that share had reached 70 per cent.

The following PPP market trends emerged over 2016-22, according to the EIB reports:

(i) A steady decrease in the number of transactions reaching financial close from 69 in 2016 to 29 in 2019, with a rebound to 45 projects in 2022.

(ii) A drop in the aggregate value of projects reaching financial close from €12 billion in 2016 to around €14.5 billion in 2017 and 2018, to €8 billion in 2019 and 2020, before rising again to €9.8 billion in 2022.

(iii) Various countries were the most active in value terms from year to year; these included the United Kingdom, Türkiye, Italy, Germany and France. The value of PPP projects in the United Kingdom declined after 2018 but France still came first in terms of the number of projects.

(iv) Transport was the largest sector over the entire period, both in terms of value and number of projects. The education sector, based only on the number of projects, was the biggest in some years.

(v) The percentage of government-pay PPP transactions closed fell steadily, from 80 per cent in 2016 to 30 per cent in 2022, while the popularity of user-pay transactions increased.

Pessimism about PPPs in some European countries, stemming from political concerns further amplified by the Covid-19 pandemic and probably by Brexit, cannot be considered a global trend as it does not seem to have affected EBRD economies or other developing economies. Indeed, PPP legislative activity is booming worldwide and PPPs are being adopted across emerging markets.

Still, this pessimism should be regarded as a warning about future PPP development and the requirements to select a suitable model of PPP that is not exclusively financially oriented but takes a people-first approach – provided the project remains bankable.

PPP has always been a sensitive topic, especially in civil law countries (which include most of the EBRD economies). This is because PPPs are closely related to public services and public wealth, even though they are an essential component of public investment financing.

C. Risks and opportunities linked to Covid-19 and post-pandemic realities

Public investment financing needs private financing more than ever following the pandemic, which has seriously affected public budgets worldwide, including in the EBRD regions.

PPP/concession contracting counterparties should cooperate to ensure the continued delivery of public services, as the Covid-19 crisis is not – and should not be – regarded as an event of force majeure unless a contract specifically provided for such a force majeure event. Contracting authorities should work closely with PPP contractors to use all available options to maintain public services in such a crisis. This includes maintaining service payments (enabling PPP contractors to pay their workforce and suppliers), revising contract requirements/standards (including scope changes where necessary) and moderating payment and performance mechanism regimes where appropriate.

PPP/concession contractors should ensure their contingency plans are up to date and have been reviewed and discussed with contracting authorities to enable continuity of full services as far as possible to respond to the crisis and maintain vital public services. This is particularly true across national health services, but also public services necessary for the day-to-day life of citizens and to restart an economy. If this were not the case, PPPs/concessions might lose all credibility and generate strong resistance to the delegation of public services to the private sector in the future, or even to any private involvement in them through any form of PPP.

Table 1: EIB European PPP market updates, 2016-22[13]

The headlines for the 2016 EIB report on PPPs show that:
• 69 PPP transactions reached financial close, for an aggregate value of €12 billion
• in number terms, the market grew 41 per cent compared to 2015
• in value terms, the market decreased by 22 per cent compared to 2015
• the most active market was the United Kingdom (by value and number of projects)
• 10 countries closed at least one PPP project
• transport was the largest sector in value terms, while the education sector recorded the highest number of projects
• more than 80 per cent of the transactions closed were government-pay PPPs.

The headlines for the 2017 EIB report on PPPs show that:
• 42 PPP transactions reached financial close, for an aggregate value of €14.4 billion
• in number terms, the market decreased by 38 per cent compared to 2016
• in value terms, the market grew 22 per cent compared to 2016
• the most active markets were Türkiye (by value) and the United Kingdom (by number of projects)
• 12 countries closed at least one PPP project
• transport was the largest sector in terms of value and jointly by number of projects (with the education sector)
• more than 60 per cent of the transactions closed were government-pay PPPs.

The headlines for the 2018 EIB report on PPPs show that:
• 39 PPP transactions reached financial close, for an aggregate value of €14.6 billion
• in number terms, the market decreased by 11 per cent compared to 2017
• in value terms, the market decreased by 4 per cent compared to 2017
• the most active markets were Türkiye (by value) and France (by number of projects)
• the United Kingdom and Italy declined (as did France)
• 10 countries closed at least one PPP project
• transport was the largest sector in terms of value, while education recorded the greatest number of projects.

The headlines for the 2019 EIB report on PPPs show that:
• 29 PPP transactions reached financial close for an aggregate value of €9.8 billion
• in number terms, the market decreased by 24 per cent compared to 2018
• in value terms, the market decreased by 31 per cent compared to 2018
• ihe most active market was the United Kingdom in value terms and France in terms of the number of projects
• nine countries closed at least one PPP project
• transport was the largest sector, both in terms of value and number of projects
• 55 per cent of the transactions closed were government-pay PPPs.

The headlines for the 2020 EIB report on PPPs show that:
• 34 PPP transactions reached financial close, for an aggregate value of €7.9 billion
• in number terms, the market decreased by 11 per cent compared to 2019
• in value terms, the market decreased by 27 per cent compared to 2019
• the most active market was Germany in value terms and France in terms of the number of projects
• 10 countries closed at least one PPP project compared to 11 in 2019
• transport was the largest sector, both in terms of value and number of projects
• 41 per cent of the transactions closed were government-pay PPPs.(NB: Project values and numbers for 2019 have been updated to reflect the latest available data.)

The headlines for the 2021 EIB report on PPPs show that:
• 40 public-private partnership transactions reached financial close, for an aggregate value of €8 billion.
• despite expectations of a greater reduction in activity due to the pandemic, the number of projects decreased by just 7 per cent compared to 2020
• in value terms, the market decreased by 13 per cent compared to 2020.
• the most active markets were Italy in value terms and France in terms of the number of projects
• 13 countries closed at least one PPP project compared to 11 in 2020.
• transport was the largest sector, both in terms of value and number of projects
• the rise in demand/revenue-based projects has continued, with more than two-thirds of transactions taking this form and government-pay PPPs declining.

The headlines for the 2022 EIB report on PPPs show that:
• 45 public-private partnership transactions reached financial close for an aggregate value of €9.8 billion
• the number of projects increased by 2 per cent compared to 2021
• in value terms, the market increased by 17 per cent compared to 2021
• the most active market was France, both in terms of value and number of projects
• 15 countries closed at least one PPP project compared to 14 in 2021.
• transport was the largest sector, both in terms of value and number of projects
• the rise in demand/revenue-based projects has continued, with 70 per cent of transactions taking this forms.

[13] Some of the data in this table were changed in EIB reports in subsequent years.

EBRD PPP regulatory guidelines collection

Chapter 2.
The legislative and regulatory framework for PPPs

This report has been produced with the assistance of the European Bank for Reconstruction and Development (EBRD). The contents of this report are the sole responsibility of the authors and do not necessarily reflect the views of the EBRD.

Contents

Appendices

(A) Introduction

This chapter provides summary guidance, primarily to policymakers and legislators, but also to private-sector participants, on the nature and contents of the wider legal framework for PPPs. This may help the former create or refine that framework, especially when they are moving from the use of PPPs as occasional, impromptu arrangements to a more systematic application of them for infrastructure development. It may give the latter a deeper understanding of that framework and help them to evaluate the efficacy of a country's legal system from the PPP perspective, when they are considering or structuring a project investment.

Many areas of a country's laws and legal system can be relevant to privately financed infrastructure projects and PPPs, and their structuring, award and implementation. These range from laws relating to companies and property, procurement, the environment, contract and tort (or equivalent), construction, dispute resolution, banking, finance and security, and tax and investment protection to sector-specific laws, constitutional and administrative laws, laws governing the exercise of ministerial powers and duties and the provision of public services, and – ever more prominently – laws governing international, public law obligations and human rights (to name just the more obvious ones). Above all, the host country's legal system may already have a fully fledged PPP law in place or a collection of laws and rules directed specifically at the private sector's involvement or participation in infrastructure development. Or it may not, potentially leaving a yawning gap that might need to be filled if a new PPP system is to work satisfactorily.

It follows that perhaps no discussion or analysis of all these areas of law can really be complete or comprehensive. There certainly is not scope in this short study to do more than touch on some of them. For a fuller understanding, readers should also look at other leading publications on this subject.[1] We therefore concentrate in this chapter on aspects of the subject where we feel the most helpful guidance can be offered, clearly and simply, in the context of the wider objectives of the EBRD publication of which it forms part. We hope this will help policymakers and legislators understand the salient features of a clear, robust legislative/regulatory framework for PPPs, and the changes to their legal systems that might be necessary to create one. It may also help sponsors, investors, lenders and contractors to learn more about the thinking behind such changes. Above all, we discuss in this chapter the challenge of structuring and drafting a modern, comprehensive PPP law, which countries considering launching wide-ranging PPP programmes for the first time may find necessary or appropriate to put in place.

The reader should keep in mind one important caveat when reviewing these pages, however. The Covid-19 pandemic and the economic crisis that has resulted from it have had a devastating impact on many PPPs around the world, while at the same time accelerating others as part of the emergency response. This has had – and will continue to have – major consequences for the frameworks (legal and non-legal) in place for PPPs in many countries in the short, medium and long term. It may change those frameworks in ways that are partly predictable and partly unforeseeable at this point. Chapter 5 considers this subject in greater detail (taking account of some of the voluminous materials already published about it).

This chapter is divided into five main sections: (B) a discussion of some of the general legal issues raised by the wider legal framework; (C) a review of some of the principal sources of published guidance and precedent in this area, and the sources of law that drafters may need to consider; (D) this section – the centrepiece of the chapter – contains detailed guidance on how to structure and draft a new PPP law; (E) some views on how supporting regulations and guidelines might be used in this context; and (F) a conclusion summarising our main points and recommendations.

(B) Assessing the wider legal framework

1. The need for a PPP framework

What do we mean by a PPP framework? PPPs can be undertaken as isolated, ad hoc projects, without any clear, pre-existing "scaffolding". Indeed, countries often use them for the first time on that basis, perhaps to experiment with the structure, deal with an emergency or urgent need, or establish the viability of this form of infrastructure procurement. Most countries, however, quickly find that if they are looking for something more systematic and seeking to implement a long-term, wide-ranging PPP programme successfully, a well-defined PPP framework will be necessary. A great deal of precedent and guidance is

[1] Such as the United Nation Committee on International Trade Law's (UNCITRAL) Legislative PPP Guide and its accompanying Model Legislative Provisions (referred to in this chapter as the UNCITRAL Guides or just UNCITRAL), which perhaps comes closest to a comprehensive examination of it, or the materials listed in the EBRD, the World Bank's Public-Private Infrastructure Advisory Facility and the European Expertise Centre (EPEC) databases. See Section (C) below.

available about how to achieve this (see below).[2] Each country will need to develop its own framework, adapted to its particular needs, norms and traditions, and this framework will inevitably need to be modified and refined over time, as its PPP system evolves.

The phrase PPP framework covers a range of matters affecting the implementation of PPPs, some of which are beyond the scope of this chapter and Guide. It encompasses the policies underlying them, the institutions that give effect to them, the laws and regulations that bind them, and the values, tests, rules and procedures that apply to them. The framework covers every stage of the process, from initial project conception and selection, to design, assessment, structuring, approval, award and final implementation. A well-designed framework will facilitate the efficiency and sustainability of the PPP system. It will promote effective project design and selection, fair and competitive procurement, the better realisation of the system's aims and objectives, and overall transparency and accountability. It will also help generate private-sector interest in the opportunities on offer, as well as its acceptance by the general public. Conversely, a poorly designed PPP framework is likely to encounter systemic difficulties or blockages at many levels, which can all too easily turn into fatal flaws.

In other words, it is all about the good governance of a PPP system. A range of publications have captured the key principles over the past few years. The United Nations Economic Commission to Europe's (UNECE) Guidebook on Promoting Good Governance in PPPs (2008), for example, identifies six core principles: efficiency, accountability, transparency, decency, fairness and participation. More recently, it published its 10 Guiding Principles for PPPs for the SDGs (Sustainable Development Goals). The Organisation for Economic Co-operation and Development (OECD) has also published a set of Recommendations on Public Governance of PPPs (OECD 2012). These fall into three main groupings: (1) the need for clear and transparent institutional arrangements and well-trained and resourced authorities; (2) putting value for money at the heart of the selection process and (3) ensuring that the selection of PPPs is properly integrated with the wider budget process to minimise fiscal risks.

To work well, the PPP framework must be designed in a holistic manner, so its component parts are all consistent with each other and fit seamlessly into the country's wider strategy for economic and infrastructure development. It should form an integral part of the broader picture, fully integrated with planning, procurement, investment promotion and fiscal management processes.[3] PPPs should not be used as a furtive method of avoiding regulatory or fiscal constraints. The framework also needs to be well understood; governments typically find that they need to publish guidance materials about the workings of their PPP systems at an early stage to help civil servants, developers, investors and even the general public understand and work with them. These can take the form of policy statements, manuals, guidelines and other tools, clarifying rules and procedures and codifying best practice.

A PPP framework's main elements are likely to include the following:

- **Policy framework** – a policy paper or statement explaining the government's thinking in making use of PPPs to develop its infrastructure, its objectives and priorities in doing so, and their scope and core principles.
- **Legal framework** – the laws and regulations that govern PPPs and their selection, structuring, award and implementation, as well as other aspects of the PPP programme. These will include relevant aspects of the country's wider legal regime, any PPP-specific legislation and applicable sector-specific rules and regulations.
- **Processes and procedures** – the various stages in the selection, design, review, approval, award and management of PPPs, and the responsibilities of the different public authorities and bodies involved in each.
- **Values, tests and criteria** – the critical values and tests to be applied at each stage of the process by the responsible bodies involved, including the principles and objectives contained in the policy framework, the main design, approval and tendering criteria, key performance indicators (KPIs), the principles and provisions reflected in the PPP contracts, and key considerations governing the implementation and monitoring of PPPs. Value for money, social benefit, affordability and ESG (environmental, social and governance) values are likely to feature prominently.

[2] The World Bank's PPP Reference Guide is particularly helpful on this subject. In 2022, it published a new study entitled Guidance on PPP Legal Frameworks.

[3] Unfortunately, this is still all too often not the case, especially in emerging market and developing economies (EMDEs). This simply reflects the sophistication needed at a governance level to make these systems work, and the capacity building still needed in many EMDEs before they can achieve it, which is a well-recognised problem. Many countries still have much to learn, and to teach their civil servants, about them.

- **Integration with wider development strategy** – the integration of the PPP programme with the country's wider policies and plans for infrastructure and economic development and investment. How well do they all mesh? Are their different elements truly consistent and symbiotic?

- **Budgetary and fiscal management** – the process by which the government's actual and contingent liabilities under its PPP projects are managed, reported, limited and budgeted for, to ensure that PPPs are being appropriately evaluated, their fiscal risks limited and accounted for, and that no undue burden is placed on future generations.

- **Transparency, accountability and engagement** – the steps taken to ensure that all these elements are sufficiently clear, transparent and well-understood, that stakeholders are properly engaged and that government (or quasi-governmental) bodies taking decisions at each stage are held responsible for their decisions and actions. This extends to publicity requirements, reporting, monitoring, record-keeping and public consultation.

All these elements need to form integral parts of a coherent whole. In practice, they all overlap. There is an arbitrary element to their categorisation, which could be organised rather differently if one chose. Each could also be the subject of a detailed discussion, and a different chapter of this Guide, although many raise issues that are not primarily legal at all, but economic, financial, practical and ethical. Nevertheless, most of them have a legal dimension of some kind, as the following pages will show – especially those dealing with a PPP law, which will typically touch on many of them. The legal framework will determine the legally binding aspects of each.

The subject of the policy framework is discussed further in Chapter 17 (Vol I) and PPP contracts in Chapter 3 (Vol III). The remainder of this chapter examines the legal framework – that is, the laws and regulations governing PPPs.

2. Some relevant areas of law (general)

Does a country need a PPP law? It may not. Some countries do not have a recognised legal concept of PPP or "concession"[4] at all. Many common law countries do not, but treat them as just another form of commercial contract – notably the United Kingdom, which for a time developed and managed the largest PPP system in the world.[5] Where this is the case, and the country's legal system already contains adequate provision for all aspects of commercial contracts of that kind, it may be unnecessary to introduce further legislation to give effect to them.[6]

Other countries, particularly civil law ones, with their comparatively greater reliance on statute, tend to give PPPs clear statutory recognition. France is a leading example. In many ways, France pioneered their use in the modern world generations ago[7] and has a well-developed administrative law concept of "concession", with an accompanying body of case law, principles and rules that prescribe their application in practice. Countries that are constrained by their jurisprudence or legal philosophies to take the same approach as France (and many other civil law jurisdictions) may already have similar principles enshrined in their administrative laws, or may need to give full legal effect to their PPP systems in their legislation. This is the norm, in fact, among civil law countries,[8] where the operations of government are often codified in their systems of administrative law. Many of the rights, obligations and procedures that apply to PPPs will be set out in administrative laws, rather than simply in contracts, as they tend to be in common law jurisdictions. Those laws can even modify the provisions of PPP contracts, primarily to ensure continuity of provision of the public services involved and maintain a project's financial equilibrium.

Some civil law countries (including France)[9] also make a formal, legal distinction between concession and non-concession PPPs, categorising the former as projects where the private partner is extensively exposed to demand (and perhaps supply) risk, typically where it relies on direct user charges for its revenue stream, while the latter involves a government revenue stream and little or no demand or market risk. If a formal, legal distinction between the two of this kind is made,[10] it may be reflected in somewhat differing rules and procedures, or occasionally even different laws, applicable to each (at least at the procurement level). Countries that do not need to make such a distinction tend to prefer to avoid it altogether in their legal frameworks, in the interests of simplicity and flexibility. For many such countries, PPPs are all essentially members of the same "species" and can be made subject to the same legal regime and rules.[11]

There can, however, be a clear case for drawing up a PPP law even where it may not be strictly necessary in a technical sense to do so. Some countries take the view that their legal systems already permit PPPs to be used (especially if there have been isolated examples of PPP projects in the past), but that having a new law in place will generate a helpful degree of clarity and certainty, which makes it worth doing.[12] There could otherwise be many questions about authority, scope, content and procedure, which the country's lawyers may not be able to answer clearly and precisely in the absence of a new law. This is, in fact, a very cogent reason to have one. Introducing piecemeal, scattered rules and decrees over time, to address specific aspects of PPPs as need arises – as numerous countries have done in the past[13] – can be messy and confusing. Instead, it is likely to be more helpful and efficient from everyone's perspective to draw up a comprehensive new statute covering the ground in clear, coherent terms that ideally reflect international best practice. This is the position in many civil law countries, but also in some common law ones as well.

To do that, however, and design a suitable legislative and regulatory framework for PPPs, host countries need to think carefully about the wider aspects of their existing legal system. As already mentioned, there are potentially many areas of law that must be considered. These may impinge on PPPs in one way or another, and may need to be taken into account or modified as the new framework is designed. These will typically include laws on commercial contracts, companies and partnerships, taxation, procurement, competition, finance and security, insolvency, specific sectors, property, compulsory purchase, the environment, investment protection and intellectual property, and – depending on their scope and purpose – a range of others. All these laws will need to be compatible with the new PPP structures as the host country is proposing to award and implement them. At the same time, they will need to represent a sufficiently stable, robust and commercial legal environment to attract private-sector participants and investors to the new system. Serious deficiencies in any of them could potentially represent serious obstacles to its implementation. Some of their provisions may have to be amended or repealed in consequence.

It would go beyond the scope of this paper to discuss all the aspects in which these diverse areas of law might prove deficient, or what might have to be done to modify them to make them more conducive to implementing PPPs.[14] Nevertheless, there are some central features to many of these areas of law, which are of more self-evident relevance to governments seeking to inaugurate PPP programmes or others considering investing in them. Some of these are discussed below. One fundamental area, for example, concerns the rule of law and the reliability and impartiality of the country's courts and judicial system (even where international arbitration is specified in the PPP contract). An adequate legal framework is of little use if no proper mechanism exists to implement and enforce the country's laws, or if there is insufficient judicial reliability to enforce legal proceedings and contracts, pursue remedies and recognise and execute court and arbitration decisions. Some of these issues touch on fundamental country risk issues of this kind, which any investor considering a large capital outlay in a challenging country may have to consider.

[9] However, France has always treated concessions as being governed by administrative law, while other forms of PPP are categorised as regulated civil-code contracts. These distinctions involve some difficult areas of legal theory. Where a country is not clearly obliged to make them, it is hard to see any benefit in doing so. The distinction is also reflected in European Union (EU) law.

[10] As it is now under EU law.

[11] Or essentially the same; certain differences of approach to different types of PPP can, of course, be allowed within the same legislation if necessary.

[12] This was the case with Georgia's recent new PPP law, for example.

[13] See, for example, the way the law in this area has evolved in Türkiye.

[14] As we have said, the UNCITRAL guides and the World Bank sources are particularly informative on this subject.

Appendix 1 of this Chapter contains a pro forma questionnaire that is designed to help legislators and investors to make judgements about some of the main areas of law relevant to PPPs. It is broken down into around 100 specific questions, categorised under the following headings

General legislative/ institutional framework	Scope of authority to award PPPs	Administrative coordination	Regulatory authority
Government support	Selection of private partner	Project agreement	Project site/assets/rights
Finance and security	Construction works	Operation of the facility	Ancillary contractual arrangements
Risk allocation	Duration and termination of PPP and project agreement	Settlement of disputes	Miscellaneous

3. Some relevant areas of law (specific)

The issues raised by the questionnaire in Appendix 1 are reviewed in more detail in Section D, dealing with the content of PPP laws. A brief discussion of some of the main background areas of law relevant to PPPs follows below. These will all need to be considered as the legal framework for PPPs is designed, and in many cases as individual projects under it are structured or reviewed.

(i) Commercial contract/civil code
(ii) Company and tax
(iii) Procurement
(iv) Property
(v) Environment and ESG
(vi) Public international law and investment protection
(vii) Intellectual property
(viii) Anti-corruption
(ix) Banking and finance
(x) Security
(xi) Insolvency
(xii) Dispute resolution
(xiii) Institutional processes and procedures
(xiv) Public financial management
(xv) Transparency, accountability and engagement

(i) Commercial contract law/civil code

The host country's commercial contract laws must be sufficiently robust, flexible and reliable to cater for the full range of commercial contract requirements of the various parties involved in a PPP, including the project company, its contractors, subcontractors, suppliers, lenders and investors (whether domestic or international). Any PPP (like any project financing) will be structured, defined and implemented through a complex matrix of contracts. A reliable and sophisticated system of contract law to allow for all their terms is therefore essential for a successful PPP programme. The domestic law of the host country will often govern the terms. If there is any material doubt about its efficacy, the project may not succeed. In practice, this is not an issue in most jurisdictions; it is rare for contract law (the civil or commercial code) to have to be amended to allow for PPPs. But careful thought should still be given to what it permits and whether this is sufficient for the purposes of the PPP contract and other local law agreements.

(ii) Company and tax law

In PPP projects involving the development of new infrastructure, project promoters will usually establish the project company as a separate legal entity in the host country.[15] The detailed structure, powers and obligations of project companies may vary considerably from jurisdiction to jurisdiction. The company (and partnership) laws in the host country must contain clear, reliable and practical provisions governing essential corporate matters such as establishment procedures, corporate governance, issuance of shares (or ownership interests) and their sale or transfer, the ability to borrow and grant security, accounting and financial statements, protection of minority shareholders and so on. These may also contain certain licensing requirements which need to be considered, including specific ones

[15] Occasionally, it will be incorporated in another jurisdiction, perhaps for tax reasons. Even then, it will usually be helpful and perhaps necessary to incorporate a domestic subsidiary in the host country.

for foreign investors. Perhaps the most fundamental requirement for private-sector participants, however, will be an available corporate investment vehicle with independent legal capacity, the liabilities of which are limited to its own assets and property, where its owners or shareholders are generally shielded from those liabilities,[16] and which will enable them to realise their equity returns from the project efficiently over time. They will want the standard benefits offered by limited liability companies (or occasionally partnerships), in other words.

Tax law also tends to feature prominently in the wider assessment of a country's corporate laws. The private sector will usually assess the transparency of the domestic taxation system at an early stage, including the nature and extent of any discretions exercisable by the taxation authorities, the clarity of guidelines and instructions issued to taxpayers, and the objectivity of criteria used to calculate tax liabilities. There will have to be sufficient confidence in the transparency and stability of the system, and the investors' scope to manage their fiscal liabilities at the applicable taxation levels. Appropriate tax incentives and relief may also be important to the financial viability of individual projects. These may include such matters as the right to deduct certain construction and maintenance expenses, adequate double taxation treaties with investor countries, the absence of withholding tax on interest or dividend payments, corporation tax exemptions for a given period, reductions in real estate tax, exemption from import duties on equipment and raw materials, and tax concessions on royalties. If so, their availability under the host country's taxation system will need to be examined.

(iii) Procurement law

A country's procurement laws will always constitute an essential part of the legal and regulatory framework for PPPs. A PPP is first and foremost a procurement tool. One of the first questions to address in designing that framework will therefore be the adequacy of those laws for PPP purposes. PPPs are typically large, complex, innovative projects that are best awarded on the basis of competitive tenders. The tenders concerned often call for bespoke planning and structuring, to allow for the unusual and sophisticated appraisal, evaluation and approval mechanisms involved (including the criteria applied and the interaction with bidders typically required).

A county's procurement regime may be perfectly adequate for that purpose, at least at a fundamental level, even if some minor, focused amendments must be made to it to allow for these matters. (This has generally been the position across the European Union, for example, at least for countries already subject to the EU acquis.) On the other hand, it may not. Not infrequently, especially in jurisdictions that have no or only limited experience with PPPs, countries find that their existing procurement regimes simply cannot cater to the demands of the PPP award process. They then choose to disapply that regime altogether in this area and to set out a complete and exclusive procurement regime for PPPs in a new law instead.

The critical questions are therefore:
(a) how applicable is the host country's procurement laws to PPPs?
(b) does it need to be amended to allow for them?
(c) should a comprehensive new procurement regime for them be set out in a separate PPP law?

These questions are discussed further in the next two sections.

(iii) Property law

Security of property rights is obviously essential to foster private investment in any country. Ideally, there should be no restrictions on foreign or private ownership of domestic assets of a kind which could be prejudicial to private-sector or cross-border investment. Property laws should contain adequate provision and clarity relating to the ownership and/or use or possession of land and buildings, their leasing and/or licensing, access rights (easements, and so on), chattels and movable and intangible property. These should ensure the private partner's ability to use, occupy, develop and modify the site and other assets in the PPP in full accordance with the requirements of the PPP contract, to sublease or sublet them to third parties (especially its subcontractors) and to exercise such rights as it may be given to purchase, sell and/or transfer such property.[17]

Both the private partner and its lenders will need a high degree of confidence that title to the land and the assets (whether based on ownership, lease or licence) will not be subject to dispute or challenge by third parties. There should be effective mechanisms to enforce property rights granted to the private partner against violations by third

[16] This is now common all over the world, but there are exceptions (for instance, Saudi Arabia). Even common law permits the "piercing of the corporate veil" in exceptional circumstances.

[17] Ownership of the site itself is usually not a critical factor. Many jurisdictions impose restrictions on ownership of government property and some on the foreign ownership of land. The critical thing is for the private partner to have sufficient control and flexibility over the occupation and use of the site, which in many ways is the equivalent of ownership, and can usually be granted by a full lease or licence.

parties. Sufficient confidence will also need to be placed in the planning and permitting process to the extent it will affect the private partner's design and construction works. Excessive restrictions or complex procedures governing such matters as the rights of adjoining property owners, archaeological finds, site contamination or local authority consents could also be problematic.

In addition, it may be necessary to review the host country's legislation governing compulsory acquisition of land, with a view to ascertaining its compatibility with the needs of large infrastructure projects. All countries reserve the right to expropriate property for public purposes, and sponsors and investors may need to understand the conditions applicable to expropriation – for instance, how any compensation payable is determined (to the extent it may be passed through to the project), whether expropriation powers are limited in scope or subject to judicial review, their timing, efficacy and so on. Conversely, many sponsors and lenders these days will also want to verify that the exercise of such powers will be compatible with the international human rights obligations of the host country.

(iv) Environmental laws and ESG values

Environmental laws are often relevant to PPPs. They may play a part in shaping the design of the whole facility[18] and will almost certainly impinge on any construction works. Obligations arising from the host country's environmental laws must be sufficiently clear and precise for their impact on PPP investors and lenders to be properly assessed, including the conditions under which licences are to be issued and the circumstances justifying their refusal or withdrawal.

A country's environmental laws should suit its wider infrastructure development plans. Effective procedural coordination at an administrative level is important from this perspective. This is particularly true for some types of infrastructure, such as roads, power-generation projects, water-treatment plants, and railways, where the environmental authorities' authorisation may be required for a project to go ahead in the first place.[19] The legislation should also be clear on the penalties (if any) that may be imposed on parties that may be held responsible for any damage. Investors will need to know if the law requires detailed environmental impact studies to be carried out (as it usually will these days). Any potential liabilities for past and future environmental damage also need to be clearly defined and understood. Strict liability often plays a part in environmental law, potentially giving rise to severe consequences, which must be adequately gauged by PPP stakeholders as part of the wider risk analysis.

Another challenge here is the speed at which environmental obligations are changing, as regulatory systems all over the world are modified to allow for the urgent transition to a decarbonised economy and far stricter protections for the global ecosystem. (Among other things, this reinforces the importance of having reliable change-in-law provisions in PPP contracts, and PPP laws that permit them.) It may also be necessary in this context to consider the host country's international obligations under treaties and multilateral agreements.[20] This area is now moving to the top of the priority list for many developers and investors, as climate change and other ESG considerations and values acquire ever greater importance in financial markets and shareholder expectations.

The speed at which the ESG agenda has taken centre stage has been striking. The acronym only surfaced in recent years, but now plays a critical part in the thinking, policymaking and deal-making activities of governments, corporates, lenders, contractors and advisers at every level. It is informing regulatory changes, affecting investment decisions and portfolio composition, reshaping priorities and driving new developments. Some of it will already be enshrined in a host country's laws and regulations, especially those dealing with the environment, health and safety and planning; more will follow in future, as laws and policies change. But the concept goes beyond legally binding provisions, to embrace notions of ethics, responsibility and principle that can determine policies and priorities just as powerfully as laws. It extends to resilience and sustainability, climate change, human rights, poverty alleviation, equality and other forms of environmental and social impact.[21]

These principles and values can impinge on PPPs at many levels. PPPs often involve those very areas of activity with which ESG values are most concerned – the environment, economic growth, public services, social impact and development, inclusivity, knowledge

[18] Especially in the areas of transport, water and power.

[19] UNCITRAL Legislative Guide to Privately Financed Infrastructure Projects.

[20] For example, the Paris Agreement on Climate Change or the UN Charter and the various conventions it has drawn up on the environment and biodiversity in recent years.

[21] See also Section D of Chapter 3 on PPP contracts on this subject.

transfer and so on. PPPs can therefore play a positive part in advancing these principles and values in constructive and innovative ways. Their size and long-term nature also mean they can represent considerable sustainability challenges, which need to be suitably addressed. In any event, ESG values can now influence every stage of a PPP's life: the wider procurement strategy and project pipeline; the choice of structure for the PPP; the output expectations and technical specifications set out in tender documents and the criteria used to evaluate them; the performance standards and risk allocation set out in the PPP contracts; the manner of the PPP's implementation; and the management, monitoring and information supply arrangements which apply throughout. As such, they are potentially relevant to every aspect of the legal framework for PPPs.

A key touchstone of compliance in this field is the United Nations (UN) body of principles in this area: the Sustainable Development Goals (SDGs). These enshrine a set of 17 specific targets that seek to give greater scope for those values in virtually all important areas of economic activity and social and political arrangement. The SDGs constitute a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity by 2030. They include explicit support for PPPs in Goal 17, which seeks to "encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships". All members of the United Nations – which today includes nearly all the world's nations – are now formally committed to the SDGs by virtue of their membership. Many PPP developers and investors[22] are beginning consciously to evaluate their projects against the SDGs, to verify their compliance with them. Other examples of influential documents issued by governments and multilateral organisations which embody ESG values and principles are the G20 Principles for Quality Infrastructure Investment (attached as Appendix 5), the Equator Principles and the EBRD's operating guidelines and Environmental and Social Policy.

The UNECE[23] Working Party on PPPs, the UN body dedicated to promoting PPPs around the world and helping emerging market governments understand and apply them, has promulgated the new concept of "PPPs for the SDGs" – encouraging countries to ensure their PPPs are as compliant as possible with the SDGs and so represent greater value for people and the planet. It has done this by issuing 10 core principles governing their different aspects.[24] This United Nations group has now formally and very visibly adopted this concept of PPPs for the SDGs which is likely to have growing influence on UN member states.[25] The group has also developed and published a detailed and wide-ranging evaluation methodology – the PPP and Infrastructure Evaluation and Rating System – to measure and score projects, qualitatively and quantitatively, in terms of their compliance with the SDGs and the extent to which they give effect to them. This system is a digital tool, available online. It focuses on the five core outcomes set out in the Guiding Principles, namely (1) access and equity; (2) economic effectiveness and fiscal sustainability; (3) environmental protection and resilience; (4) replicability and (5) stakeholder engagement. It then subdivides these into a group of key criteria and relevant indicators and provides a methodology to apply and score them.

A further important international initiative, directed at urgently closing the annual US$ 3 trillion sustainable infrastructure investment gap, was launched early in 2020 by a group of institutions led by Climate Policy Initiative, HSBC Holdings, the International Finance Corporation (IFC), the OECD and the Global Infrastructure Facility, under the auspices of French President Emmanuel Macron's One Planet Lab. Dubbed the finance to accelerate the sustainable transition (FAST) infrastructure initiative, its method is to transform sustainable infrastructure into a mainstream, liquid asset class.[26] More than 50 global entities representing governments at all levels, the financial sector, investors, development finance institutions, insurers, rating agencies and non-governmental organisations now actively participate in developing the FAST-Infra initiative, which has the EBRD's strong support.

The initiative's premise is that to meet decarbonisation targets, it is essential to develop a new generation of sustainable (as opposed to carbon-intensive) infrastructure, to satisfy the world's demand

[22] For example, Meridiam Infrastructure, which now does so annually.

[23] UNECE, based in Geneva, Switzerland (one of the authors of this paper is a vice-chairman of UNECE).

[24] Attached in summary form in Appendix 5 Part B. See the UNECE website and the various papers published there on PPPs for the SDGs.

[25] See, for example, the references to it in the joint EBRD/United Nations Model PPP Law, discussed in Chapter 2 (Vol I of the PPP Regulatory Guidelines Collection).

[26] See the Climate Policy Initiative website for a fuller description.

for energy, transport, water, sanitation, schools and hospitals, especially in emerging economies. Progress is being steadily made with green (that is, sustainable) infrastructure, but it is far too slow. To accelerate the process and close the funding gap, especially from private sources and the private sector, investors must be able to verify quickly which assets are truly sustainable.

The FAST-Infra solution is to establish a “consistent, globally applicable labelling system for sustainable infrastructure assets”[27] while developing financial mechanisms to mobilise private investment at scale to fund the labelled projects. It is hoped that this will allow the market to signal the sustainability of assets quickly and efficiently, allowing investors to feel confident that their money is going to projects that meet environmental, social, resilience and governance needs and contribute to the SDGs, giving rise to a more liquid asset class. A sustainable infrastructure label will “ensure that governments and project developers embed high environmental, social, governance and resilience standards into new infrastructure at the design and pre-construction phases, on the grounds that only assets incorporating such standards will obtain the label”.[28] The system will thus help to attract private finance both during and after construction.

(v) Public international law and investment treaty protection

At first sight, a host country’s obligations under public international law may not seem of great relevance to its PPPs. This area of law is primarily concerned with relations between states, and between states and certain international or multinational organisations – such as the UN, the World Trade Organization (WTO), the World Health Organization and the EU – the treaties between them and the principles of (largely customary) international law that can bind them. However, it can also regulate certain aspects of the relationship between individuals or corporates and the state, such as in the area of human or economic rights, and above all international investment protection. And as we have seen, many PPPs have a cross-border dimension, either because they involve foreign investors or because the project itself crosses national boundaries (such as a pipeline, energy transmission or international transport or transit project). Where this is the case, a project-specific treaty may also have been put in place to underpin it.[29]

In addition, when structuring (or restructuring) an investment – especially a high-value one – in a foreign country, it is important to consider whether and to what extent it may be covered by the protections offered by bilateral investment treaties (BITs) or multilateral investment treaties (MITs) such as the Energy Charter Treaty. When properly planned and executed, these can be highly effective in safeguarding investments, including in the case of a PPP that involves foreign direct investment, as so many will. As the safeguards in question will in effect represent supplementary public law defences largely outside the terms of the various project contracts, they will offer an additional tier of protection for sponsors and investors, which can strengthen a project’s appeal and bankability. A review of a country’s laws from a PPP perspective should therefore also take account of this dimension. Equally, a host country defining its legal framework for PPPs must do the same, as the framework will need to be compatible with it. Some countries are signatories to a range of BITs and MITs, others to very few.

A BIT is essentially an agreement between two states providing a range of substantive rights for the investors of each country when investing in the economy of the other that they can enforce themselves, if necessary through international arbitration. Its priority is to eliminate the political risk of interference by government in businesses or of discriminatory behaviour which unfairly favours local competitors. BITs have increased in number strikingly in recent years. While their provisions vary somewhat, they all tend to cover much the same ground: promotion of investment; fair and equitable treatment; rights to repatriate investments and returns; protection against physical violence; protection against expropriation without compensation and certain political force majeure events; respect for contractual undertakings; assurances against unfair competition; and dispute resolution procedures. These disputes procedures often extend to the use of arbitration under the International Centre for the Settlement of Investment Disputes (ICSID), managed by the World Bank. MITs perform a similar function, but on a somewhat more complex basis, as they involve multi-partite treaties. The Energy Charter Treaty has 53 signatories, of which 48 have ratified it. It may come to have particular importance in the PPP context, as renewable energy projects continue to grow exponentially and to be treated as PPPs by host countries as part of the drive to tackle climate change.

[27] B. Buchner et al. (2021). FAST-Infra. Available at: https://www.climatepolicyinitiative.org/fast-infra/.

[28] ibid

[29] See in particular the discussion of this subject in the textbook Project Finance (4th edition) by Graham Vinter et al.

The principal steps for parties to a PPP involved in structuring a project for treaty protection of this kind are to (1) consider carefully the project's central investment objectives that may benefit from treaty protection, (2) research any available BITs and MITs into which the host country may have entered that may offer such protection, (3) take account of any other legal advantages (for instance, tax) which may flow from holding the proposed investment through an entity in another jurisdiction where the host country has entered into such a BIT or MIT, (4) analyse any other international law protections that may be relevant (for example, ratification of the ICSID Convention)[30] and (5) review any international case law that may be relevant (such as prior international investment treaty arbitration awards) and bear on how the investment is structured.[31] Being able to carry out these steps successfully in relation to a given jurisdiction plays an increasingly important part in the thinking of sponsor organisations and financial institutions involved in PPPs.

(vi) Intellectual property law

PPP projects frequently involve the use of new or advanced technology, as well as sophisticated and complex designs, processes and patented inventions. Private investors will need to be reassured that the intellectual property laws of the host country contain adequate provisions to protect and enforce the intellectual property interests in the assets involved. In addition, the wider legal framework should ideally contain suitable provisions addressing possible concerns in the areas of privacy, security of information, confidentiality, data protection, piracy, industrial espionage and (conversely) freedom of information, all of which can otherwise represent potential obstacles to economic and technological advancement. At least to some extent, the host country may be able to provide the necessary legal framework for the protection of such rights by adherence to international agreements and treaties.[32]

(vii) Anti-corruption

Corruption hampers and pollutes the business climate and distorts fair competition, which as a result can deter private-sector involvement and investment or seriously compromise the quality of implemented projects, to the detriment of the public they are meant to serve. A project that turns out to be tainted with illegality is also at risk of suspension or cancellation and, of course, immense reputational damage. The host country should have a viable anti-corruption strategy in place and take effective and concrete action to combat illicit practices. A good step for countries in transition is to incorporate international agreements and standards on integrity in the conduct of public business, of which there are many.[33] In the fight against corruption, the host country's legal framework should (among other things) provide for the criminal and civil liability of those guilty of corrupt acts, allow the freezing, seizure and confiscation of assets, protect witnesses, experts and victims, tackle the consequences of acts of corruption, ensure that entities or people who have suffered damage as a result of an act of corruption have an enforceable right to compensation, and establish a body or bodies or persons specialised in combating corruption through law enforcement.[34]

[30] The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

[31] States faced with international investment treaty arbitration claims have not infrequently tried to argue that the BIT jurisdiction being invoked under the claim has been artificially "manufactured". While these arguments have largely been unsuccessful, it is important to bear them in mind when structuring the investment and documenting the reasons why the investment located in the host state can be held indirectly through particular entities with which the host state has a BIT or MIT.

[32] The relevant international agreements to consider include: the Agreement on Trade Related Aspects of Intellectual Property Rights (1994), the Paris Convention for the Protection of Industrial Property (1883) as revised and amended, the UNCITRAL Convention on Assignment of Receivables in International Trade (2001), the International Institute for the Unification of Private Law Convention on International Interests in Mobile Equipment (2001), the Patent Cooperation Treaty (1970), the Madrid Agreement Concerning the International Registration of Marks (1891) as revised, the Protocol Relating to the Madrid Agreement of 1989 and the Common Regulations under the Madrid Agreement and the Protocol Relating thereto (1998), the Trademark Law Treaty (1994) and the Hague Agreement Concerning the International Deposit of Industrial Designs (1925).

[33] International agreements and conventions on anti-corruption include: Convention on the Protection of the European Communities' Financial Interests of 1995, Resolutions of the United Nations General Assembly: resolution 51/59 of 12 December 1996, by which the Assembly adopted the International Code of Conduct for Public Officials, Resolution 51/191 of 16 December 1996, by which the Assembly adopted the United Nations Declaration against Corruption and Bribery in International Commercial Transactions, Convention Against Corruption Involving Officials of the European Communities 1997, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, the Criminal Law Convention on Corruption of the Council of Europe 1999, Additional Protocol to the Criminal Law Convention on Corruption of the Council of Europe 2003, the Civil Law Convention on Corruption of the Council of Europe 1999, Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee – On a comprehensive EU policy against corruption (COM(2003) 317), Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention against Corruption (COM(2006) 82). UNECE has also drawn up a standard on this subject for use in the PPP context, called zero tolerance of corruption.

[34] See www.europa.eu.

It is also worth bearing in mind that many OECD countries impose much more stringent anti-corruption standards than in the past on the activities of their nationals abroad. It is becoming increasingly easy to infringe those standards inadvertently or ignorantly. The US Foreign Corrupt Practices Act and the UK Bribery Act are two of the best-known examples, potentially imposing liabilities for infringement which can inflict major financial and reputational damage on the companies and directors found liable (consciously or otherwise), as well as triggering defaults under commercial and financing agreements which could ultimately lead to the unravelling of an entire project. Many other countries have adopted similar provisions in recent years.

(viii) Banking and finance

A country's financial laws will have to be compatible with the use of private finance to fund PPPs, including from the international banking markets and on a project-finance basis. Most are privately financed. The first question that development banks and commercial lenders based in the world's financial centres will ask themselves when considering a lending proposition for a PPP project is whether a country is "open" to the international financial markets. If it is not – and there are always certain "fragile" countries devastated by war, political upheaval or economic collapse which are not – then the use of international project finance will be out of the question. PPPs are usually also project-financed, in view of their size and long-term nature, meaning that lenders provide most (often the great majority) of the funding required and rely primarily on the future cash flows it is expected to generate for repayment of their loans. If a country is already using project finance and the international capital markets, it is likely to be a safe assumption that its financial laws will be generally compatible with PPPs. Nevertheless, there may still be some questions about (for example) currency exchange controls, the availability of hard currency, the right to repatriate profits and various other matters, all of which need careful examination. The country's legal framework for PPPs will need to be fundamentally bankable, which means that it must be regarded by lenders as a viable basis for their loans and investments.[35]

(ix) Security: Pledges, assignments and collateral

The wider legal framework should allow and encourage structures that provide for adequate protection of the rights of lenders under the project's security documents, especially in the event of a default or a threatened termination of a PPP. The fundamental question is whether the lenders will be able to take sufficiently broad and effective security over the assets of the private partner to meet their usual expectations and lending assumptions. Such security usually extends to real property, buildings, equipment, insurance proceeds, bank accounts, receivables and an assignment of the benefit of the project contracts. Lenders also require security that is readily realisable and expect local security laws to provide for its effective enforcement. Security over PPP property that remains public property – sometimes referred to as conceded assets – may not in fact be permissible at all, however (see below).

In addition, lenders' "step-in rights" usually must be feasible under the host country's laws. When PPPs involve project finance, the lenders will take the most wide-ranging package of security measures available over the project assets. This may be virtually worthless to them, however, if the PPP contract is no longer in place. If the agreement is terminated, the ability and right of the sponsors and the private partner to generate the cash flow on which the lenders will depend for repayment will be lost; the collapse of the other project contracts is likely to be triggered as well. This is why the lenders will regard it as essential to keep the PPP alive, as it were, and give the project company (or a substitute entity) an opportunity to cure the default.

Step-in rights are designed to achieve this. Although they often prove highly controversial in countries which have had little experience of them, their feasibility in the host country will usually be fundamental to the success of PPPs. In some jurisdictions, they may not be permissible at all, at least in relation to certain types of project. Although, technically speaking, step-in rights are not actually security documents, they are typically regarded as an essential part of the lenders' wider security package. (They are discussed in more detail in Chapter 3 on PPP contracts). If they are not viable under a host country's PPP legal framework, financing the project with project financing is likely to be far more difficult than it otherwise would be.

More specifically, for project finance lenders, a host country's wider legal framework should, ideally, allow for the following security interests (or their equivalent under local law):

- Assignment of benefit of project contracts: The lenders will expect to have assignments of the benefit of all the project company's (material) project contracts, giving them control and priority rights over these agreements, the right to bring proceedings under them and allowing them to be transferred to a new project vehicle if necessary.

[35] See the discussion of bankability in Chapter 3 on PPP contracts.

• Assignment of receivables: The lenders normally take security over all receivables arising from agreements into which the project company enters with strategic business partners, such as suppliers, contractors, transporters, off-takers, and so on. This gives them priority rights to the benefit of those receivables.

• Accounts pledge: The lenders will expect to take pledges over the borrower's bank accounts and will need to ensure that the banks in the host countries acknowledge such pledges. These should allow them to take full control of the operation of those accounts, including sums paid into and out of them.

• Mortgages and charges: The lenders should be in a position to obtain a mortgage over land, buildings and other fixed assets, together with floating charges (or equivalent, if available) over movable assets, including project inventory and receivables, production/work in progress, intangibles and other personal property and interests. This can include what is called in some jurisdictions an enterprise mortgage – in effect, a mortgage or charge over a borrower's entire business, including its fixed, current and liquid assets, but which does not interfere with their use and replacement in the course of business.

• Share pledge and assignment: The lenders will require pledges on shareholders' equity participation in the borrower, giving them effective (temporary) ownership of those shares.

Not all of these may be available. But the more, the better. As already mentioned, security over property which remains public property (for instance, conceded assets) may not be permissible in some countries. Under the Russian PPP law, for example, a concessionaire's public assets and associated rights cannot be pledged as security. In addition, its rights cannot be transferred to another entity before the assets are put into operation and, even then, approval of the grantor would be required.[36] This is not necessarily problematic. No one else will be able to take security over that property either, which means it is shielded by law from competing claims. The critical thing is for lenders to have security over all assets that are the property of the borrower, coupled with lender step-in rights, so they have full control. In that case, the questions that always arise are: Does any limitation in this area represent an insuperable obstacle to funding, or can an acceptable compromise be found? Does the law need to be changed as a result, either by amendment or through the terms of the PPP law?

(x) **Insolvency law**

A host country's insolvency laws may need to be considered or examined from the perspective of the lenders' usual security package and expectations. Issues such as the ability of secured creditors to foreclose on security despite the opening of bankruptcy proceedings, whether secured creditors are given priority for payments made from the proceeds of the security and how claims of secured creditors are ranked may all need to be considered. In practice, this may not amount to more than a relatively straightforward checking exercise, to make sure that local law does not contain insolvency rules or procedures which are inconsistent with lenders' expectations. After all, if a project company is allowed to slide into insolvency at all, it may be too late for the project participants to salvage much from the project.

(xi) **Dispute resolution**

The dispute resolution laws and procedures of the host country always need careful analysis. Sponsors, investors and lenders must get a clear understanding of the mechanisms that will (or may not) be available to them for protection and enforcement of their rights in the event of a dispute. They are usually not comfortable with being obliged to submit disputes under the PPP agreement exclusively to the courts of the host country, given their typical complexity and the risks of political bias. In most cases, they require that such disputes are resolved in accordance with a reputable international arbitration system, established in a neutral jurisdiction.

Local law will usually be chosen as the governing law of the PPP/concession agreement, and logically so (see Section D). The more contentious question tends to be what dispute resolution forum should be adopted to hear proceedings. Even where international arbitration is permitted, however, there will still need to be sufficient confidence in the ability of the successful party to enforce a favourable award against the host country. If it cannot be reliably enforced, it will have little value. The lenders' security interests may also need to be enforced through the courts. This may all necessitate due diligence on the local courts (and perhaps arbitral) system, and the host country's position under relevant investment and arbitration[37] treaties, such as ICSID and the New York Convention on the Recognition of Foreign Arbitral Awards. To attract cross-border investment on a large scale, the country will have to be perceived as an "investible proposition" from the dispute-resolution as well as economic and financial perspective.

[36] However, the law does enable the private partner, such as a special-purpose vehicle, to be a foreign legal entity, which allows the major part of the transaction to be structured in an offshore environment.

[37] See further above.

(xii) Institutional processes and procedures

Many governments describe in their PPP laws at least some of the institutional processes and procedures governing the design and implementation of PPPs. This refers to the various stages involved and the authorities or bodies responsible for them. To do so can help advance the system's efficiency and smooth functioning. To some extent, a country's existing laws may already cover these processes and responsibilities – particularly its procurement laws, constitutional and administrative laws, and rules dealing with financial management (Germany, for example, relies heavily on its budget law for this purpose). They will be addressed to some extent in bureaucratic structures and procedures, rather than laws. The more clarity and certainty there is in this area, the more successful the PPP system is likely to be. This means those designing or reviewing a PPP framework need to consider carefully whether gaps need to be plugged in this area or existing laws modified. Some PPP laws address this subject specifically – as we shall in Section D.

The relevant processes will include project selection, preliminary design, appraisal, procurement, implementation and monitoring. Depending on the experience of the government in using PPPs, certain reviews, formalities and approvals may be required at each stage (sometimes called gateways) to ensure that system requirements and the applicable criteria are being met. The powers and responsibilities of contracting authorities will need to be clear at each stage, as will those of any other agencies involved (such as PPP units or authorities with high-level approval powers, like a cabinet commission or public oversight body). These tend to vary widely from country to country. For instance, some countries require final approval of high-value PPPs by the cabinet, president and/or legislature, for reasons of both legality and fiscal prudence. In the end, though, these steps have much the same underlying purpose, as every government wants to be as confident as it can that each PPP represents a good investment decision and that the system is functioning as intended.

(xiii) Public financial management laws

The laws and regulations that govern the host country's management of its finances and fiscal responsibilities will need careful review as PPP frameworks are developed and individual projects designed. These may include approvals, fiscal limits, budgeting processes and reporting requirements. They will control the country's public investment planning and selection processes, under which a PPP is just one form of procurement project. Again, some of them may be more a matter of codified practice than binding laws, but these will still operate within a set of legal norms. Every PPP will have to be compatible with them, as they will (in part) determine what commitments can be taken on by contracting authorities (or the wider state) under PPP contracts-whether in the form of asset contributions, payments obligations, contingent liabilities, guarantees or other forms of government support – and how their actual and potential liabilities are to be accounted for. The PPP will often need to fit into a medium-term expenditure framework and/or a medium-term fiscal framework, or equivalent. Suitable approvals will therefore be required from the government agency or agencies responsible for public financial management and planning – often the ministry of finance and/or ministry of economy. Some governments split these functions. Others also use independent audit bodies. Ultimately, in this context, there will be two critical questions: will the project be affordable, and will it represent value for money?[38]

This subject has come to represent a significant issue in recent years, as attention has focused on the accounting treatment of PPPs, which are usually project-financed and so may be "off balance-sheet" for the governments using them. In the past, this has sometimes allowed them to bypass government spending limits. It can be perfectly legitimate to take this approach, but it should depend on the contractual structure involved and should not be used to push governments into using PPPs for accounting reasons when other criteria, such as affordability and value for money, do not justify it. Payment obligations under PPPs are long term, while some of the contingent liabilities involved depend on risk (for example, termination payments), which can be hard to judge up front. Public financial management tools, by contrast, are generally based on annual spending appropriations. The contingent liabilities may be very large, and will also tend to accumulate over time as the system develops and expands. From both a budgetary limit and balance-sheet perspective, then, PPPs represent a challenge for public financial management. If not rigorously managed and monitored, their potential exposures can threaten fiscal sustainability.[39] PPP-specific accounting and budgeting methodologies have developed in consequence, which can be built into the PPP system.[40] It can be good practice, for example, to maintain a central, up-to-date register of PPP

[38] See the detailed discussion of this subject in the World Bank's PPP Reference Guide.

[39] This eventually became a major political issue in the United Kingdom, for example, and played a leading part in the decision by the UK government in 2018 to put an end to PFI.

commitments, perhaps at the ministry of finance. This aspect of a country's legal framework always needs careful consideration.

(xiv) Transparency, accountability and engagement

Finally, there will also be a legal dimension to the processes by which the workings of the PPP system are made transparent and well-understood, stakeholders engaged and the various government agencies involved made accountable for their decisions and actions. This is all about transparency, clarity and the interface between the PPP system and third parties – those seeking to understand it, work within it and give effect to it, as well as those who stand to be affected by it. It is therefore very much about good governance and the ESG values mentioned above. This is likely to touch on a number of the host country's laws.

Governments are usually well advised to aim for a high degree of information disclosure about their PPP system. Disclosure should usually be proactive rather than reactive disclosure (that is, telling people in advance, rather than waiting to be asked). This will enhance its effective functioning and efficiency. Information about the workings should be rigorously collated and recorded, kept up-to-date and comprehensively disclosed wherever possible. Many governments publish guidance notes, manuals, handbooks and model clauses to promote a full understanding of PPPs and different aspects of their systems. There should be a general presumption of publicity of system data. A central register or database of relevant information often makes sense, together with a precedent library, covering all PPPs that are implemented. Contracting authorities and other government bodies should have clear duties to maintain and update records of their PPP-related activities, including tendering procedures, tender results and contract terms, as well as subsequent monitoring activities and conclusions reached at different stages of evaluation and consultation. In principle, these should all be copied to the central database and made generally available publicly (subject only to any carefully defined confidentiality restrictions).

Accurate records and transparency of decision-making will also be key to the accountability of the different public bodies involved in making PPP decisions. It should always be clear why and on what basis those decisions have been made. This will usually improve the quality of decision-making and so strengthen the system's functioning, but also allow appropriate action to be taken where responsibilities have been neglected or breached. That accountability should be protected by law and subject to challenge through appropriate grievance procedures and judicial review (or equivalent). It may also be reinforced, in certain areas, by high-level audit bodies and procedures, applicable to both specific projects (for example, very high-value ones) or the PPP system as a whole.

Similarly, broad stakeholder engagement and communication are likely to produce the best results. This applies at all stages of project implementation, from initial design to feasibility studies and environmental impact assessments, market soundings, construction and the operational phase. In the words of the PPP Reference Guide: "Stakeholder engagement is an inexpensive and efficient way of creating a better operational environment for a project." Stakeholders refers to anyone likely to be materially involved with or affected by a project, from other government bodies to contractors and suppliers, landowners, local communities, users of the infrastructure or public service in question, and the general public. Appropriate consultations with them at each relevant stage, to elicit their views and reactions and so help shape constructive decisions and pre-empt disagreements, are usually advisable. They reduce risk and improve the prospects of success. For that reason, stakeholder engagement is one of the 10 Equator Principles.[41] It also features prominently in the People-First PPP Principles drawn up by the United Nations.

[40] For example, the 2016 Eurostat Guide to the Statistical Treatment of PPPs (EPEC), International Public Sector Accounting Standards 32 (2011) and the International Monetary Fund's (IMF) Government Finance Statistics Manual and Fiscal Transparency Code (2014c).

[41] See https://equator-principles.com/about-the-equator-principles/.

(C) Guidance, published materials and precedents

Aside from PPP laws themselves, of which there exist an increasing number around the world,[42] there are many helpful precedents and sources of guidance to which governments can turn to help them review and develop their PPP legal frameworks. These include the materials listed in Appendix 2 of this Chapter. Some of the principal sources are discussed below.

1. Institutional databases and sources of material. Many international organisations and institutions maintain and publish articles, studies and guidance materials on the subject of PPPs, including their statutory and legal frameworks. Some of the best-known include:

• The **EBRD**. The EBRD, which has structured and funded hundreds of PPPs in its economies over more than three decades, maintains an extensive library of materials and precedents of various kinds on the subject. Some of them are available on its website, in the section marked 'Public-private partnerships'.[43]

• The **World Bank (International Bank for Reconstruction and Development, or IBRD)**. The World Bank Group (including IFC) has created a range of different resources in this area, including its PPP infrastructure resource centre, a knowledge lab, a legal resource centre, a PPP library, a PPP reference guide and the public-private infrastructure advisory facility. It also co-manages a training programme with other development banks called the APMG PPP Certification Program Guide.

• The **United Nations.** The United Nations has long been a source of guidance and expertise in the PPP area. **UNECE** includes a PPP working group, led and run in Geneva, which helps emerging-market governments understand and implement PPPs. **UNCITRAL** has published several leading texts in this field.[44] The **United Nations Development Programme** has also carried out and published extensive work in the PPP area, in particular reviews of national policy for the establishment of municipal PPPs for public service delivery and local development in Europe and the Commonwealth of Independent States (CIS) region (especially the accession countries then joining the EU).

• The **European Union**. The European Union has a disparate body of law, regulations, published guidance and precedent which either must (in the case of accession countries) or helpfully can (in the case of others) be taken into account by governments forming their PPP legislative structures (see below). Its statistical centre of expertise, EUROSTAT, focuses on the statistical and fiscal aspects of PPPs.

• The **EIB/EPEC**. The European Investment Bank (EIB) has established a European expertise centre (EPEC) and library.

• The **Global Infrastructure Facility**, also chaired by the World Bank, is a joint venture among a group of leading development banks, governments and the private sector.

• The **Global Infrastructure Hub.** This is a (relatively new) knowledge and expertise centre based in Australia, which is steadily expanding its database of instructive materials.

• The **Asian Development Bank** (ADB) has also published an extensive body of articles and studies in this field.

• **Government resources.** Some of the countries with the most advanced and wide-ranging PPP programmes have drawn up and published extensive guidance on the operation of their systems which can be invaluable both to domestic users and (by analogy) in other jurisdictions. They include Australia, Canada, France, the Netherlands, South Africa and the United Kingdom.[45] Many other countries have now embarked on similar exercises.[46]

Some of these sources and guidance are discussed below.

2. The EBRD tools for assessing and promoting sound legal frameworks for PPPs.

An invaluable source of guidance and assistance in this area is the EBRD's Legal Transition Programme, which helps countries in transition to create transparent and predictable legal environments, and has collated many of the most relevant precedents, guidelines and standards recently developed by international organisations (cited in Appendix 2 and stored in a more detailed form at the Bank). In

[42] A list of the principal sources we have considered in preparing this chapter is set out in Appendix 3.

[43] https://www.ebrd.com/infrastructure/infrastructure-ppp.html

[44] See paragraph 3(a) below.

[45] Although the UK system of PPPs, the PFI and subsequently the PF2, have now been wound up.

[46] To take just one example, see for instance the Ukraine PPP Manual, drawn up with the help of the World Bank and its team of consultants, published in 2021. It is an admirably detailed guide to selecting, structuring, awarding and implementing PPPs.

the infrastructure area, the programme focuses on PPP arrangements and does not generally address privatisation or procurement contracts. It looks at further standard-setting, reviews of existing laws and practices and the need for technical assistance. In the words of one EBRD report: "Enabling fair and transparent concession [PPP] legislation is vital to the development of a market economy and as such this sector is recognised by the EBRD as a 'core area' of its Legal Transition Programme." For the past 20 years, under the leadership of Alexei Zverev,[47] the Bank has pioneered the work of helping governments in EBRD economies to put modern and effective legal frameworks in place for PPPs.

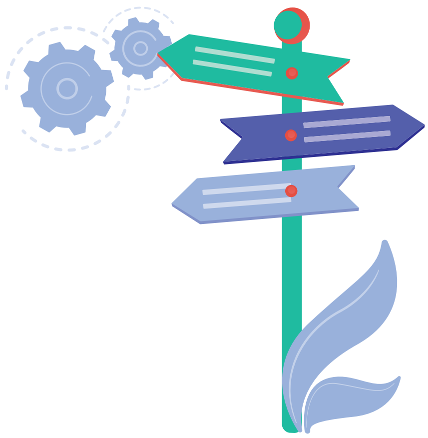
The Bank has carried out periodic reviews and assessments of those PPP legal frameworks (every 3-7 years). It has used a number of different tools for this purpose over the years, including the following:

(i) LIS. The annual Legal Indicator Survey (LIS) formerly[48] allowed the EBRD to give existing PPP laws a range of classifications in the context of a wider analysis of the legal systems of the countries concerned. This survey was carried out roughly every five years, making possible a long-term understanding of how laws in this area were evolving and improving. It focused on the effectiveness of the PPP laws examined (that is, their theoretical adequacy). For example, the EBRD's 2006 LIS measured effectiveness on a comparative basis, as shown in the table below. While a few countries fell into the "highly effective" category, including Bulgaria, the Czech Republic, Lithuania, Romania and Slovenia, others received a "very low" effectiveness rating. The remaining transition countries fell into a middle category. The LIS review concluded that the PPP legal environment in many transition countries had much scope for improvement.

(ii) PPP Law Assessment. The PPP Law Assessment and checklist originally gauged the extensiveness of a country's PPP law, but has since been broadened to include its effectiveness as well (that is, how well it works in practice), thus replacing the LIS. Specific country assessments were carried out in 2004-05, 2007-08, 2011-12 and 2017-18. The questionnaire used for the exercise is divided into several different chapters: policy framework, general PPP legal framework, definitions and scope of the PPP law, selection of the concessionaire, the project agreement, availability of security instruments and state support, and settlement of disputes and applicable law. While it takes into account the laws already on the statute books of the country in question, the results of the assessment are designed to assist potential investors who already have substantial knowledge about the laws of that country to make their PPP-related investment decisions.

Since 2005, when the first assessment results were published, there have been many important developments in the region relating to both PPP policy and legislative initiatives that have changed the overall picture dramatically. The 2007-08 assessment found that the average compliance for all relevant countries still fell within the medium compliance category, although many had improved their legal frameworks very significantly. A comprehensive PPP Law Assessment carried out in 2011-12 showed very different results, as did the following one in 2017-18 (see tables below). Progress was perhaps attributable above all to the need of EU accession countries to comply with the relevant EU requirements in this area,[49] but there can be no doubt that the efforts in this field made by the EBRD and other international financial institutions (IFIs) across the region also greatly facilitated it.

By 2018, the number of countries with higher levels of compliance had increased significantly and included Albania, Egypt, Latvia, Mongolia, North Macedonia and Slovenia among the leading jurisdictions. The tone of these two later assessments was different to that of their predecessors. The Bank referred to the "tremendous level" of legislative activity that had taken place during the intervening years, pointing out that, in just 3 years, no fewer than 17 of the EBRD's economies had introduced new or modified PPP laws. This signals impressive progress and indicates how eager these countries are to adopt effective PPP systems.



[47] Senior Counsel, Legal Transition team.

[48] The LIS ended in 2006.

[49] See below for more information on EU procurement and PPP laws.

2011-12 PPP law assessment

Very high compliance	High compliance	Medium compliance	Low compliance	Very low compliance
Mongolia	Albania	Bosnia and Herzegovina	Armenia	
	Bulgaria	Czech Republic	Azerbaijan	
	Croatia	Jordan	Belarus	
	Egypt	Morocco	Georgia	
	Estonia	Kazakhstan	Tajikistan	
	Hungary	Kyrgyz Republic	Turkmenistan	
	Lithuania	Poland	Uzbekistan	
	Latvia	Romania		
	Moldova	Türkiye		
	Montenegro			
	North Macedonia			
	Russia			
	Serbia			
	Slovak Republic			
	Slovenia			
	Tunisia			
	Ukraine			

This is also illustrated by the following compliance charts from the 2017-18 assessment. As the report points out, the average compliance status for all relevant countries falls between high compliance and medium compliance, with the larger category now being high compliance (11 countries). However, four countries are still classified as having low or very low compliance, which suggests that they were still thought to have considerable room for improvement when the survey was carried out. The EBRD has since been assisting three of them to put new PPP laws in place. Among the high-compliance countries, most have adopted a new PPP law in recent years (many of them sponsored by the EBRD).

2017-18 PPP law assessment

Very high compliance	High compliance	Medium compliance		Low compliance	Very low compliance
	Croatia	Albania	Kazakhstan	Georgia	Turkmenistan
	Greece	Armenia	Kyrgyz Republic	Ukraine	
	Kosovo	Azerbaijan	Latvia	Uzbekistan	
	Lithuania	Belarus	Lebanon		
	Mongolia	Bosnia and Herzegovina	Moldova		
	Montenegro	Bulgaria	Morocco		
	North Macedonia	Cyprus	Romania		
	Poland	Egypt	Russia		
	Serbia	Estonia	Slovak Republic		
	Slovenia	Hungary	Tajikistan		
	Türkiye	Jordan	Tunisia		

(iii) Best practice. In addition to the assessments and surveys mentioned above, in November 2005 the EBRD published a document called Update on Best International Practices in Public Private Partnerships with Regards to Regional Policy Issues. This document summarised global best practice common to countries with successfully implemented PPP transactions, with a primary focus on fiscal policies and the sharing of responsibilities between central and local governments. It also provided recommendations as to the consequences of application of those policies. It has now been partly superseded by a paper describing the fundamentals and challenges of drawing up a policy paper on PPPs, which is discussed in Volume II of this collection.

(iv) Core principles for a modern concessions law. Lastly, in August 2006 the EBRD published Core Principles for a Modern Concessions Law ("the Core Principles"). Their purpose was, in the EBRD's words, to identify and promote sound modern principles of concessions laws in the Bank's economies. They have now been revised to take account of the many changes in this field since they were first published, including the use of the term PPP rather than concessions. A copy of the Core Principles is attached as Appendix 4, Part A.

3. Model PPP laws and clauses

(i) UNCITRAL. One of the most authoritative sources of guidance in this area for the past 20 years has been UNCITRAL. Its legislative guide and legislative provisions for privately financed infrastructure, originally published in 2000 and 2003, respectively, were revised and updated in 2019 and are now called the Legislative Guide and Model Legislative Provisions on Public-Private Partnerships. They remain an invaluable resource for governments and practitioners in this area.

(ii) CIS Model PPP Law. In 2014, the EBRD started providing technical assistance to the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States (CIS IPA)[50] with the development of a model law on PPPs for CIS member countries (the CIS model PPP law) and some supporting legislative materials, including a sample policy paper, memoranda summarising state support measures for PPPs and practical lessons in the sector from some CIS countries, together with a formal commentary on the CIS model PPP law. The project aimed to create legislative instruments that would help CIS states modernise the legislative frameworks in their PPP sectors in accordance with the latest standards and practices, while learning lessons from the implementation of PPP projects in past years. It is now substantially complete. The CIS model PPP law takes on board a range of progressive concepts from today's PPP market, designed to ensure the effectiveness of PPP frameworks and achieve an appropriate balance of risk among private and public partners. The CIS IPA has recommended that member states adopt the law into national legislation.

(iii) EBRD/UNECE Model Law for Public-Private Partnerships/Concessions in support of the SDGs, and accompanying commentary. In 2017, the United Nations UNECE PPP Working Group and the EBRD launched a joint project to draft a new model PPP/concessions[51] law as one of their available guidance documents for governments and practitioners, with the help of a global legal team of experts.[52] It has benefited from the full support and involvement of the EBRD[53] throughout. It aimed to produce a complete model PPP law – a comprehensive precedent for a legal framework for PPPs – which reflects international best practice and the latest thinking in this field, taking account of some of the leading legislative acts of this kind in force around the world, together with a detailed explanatory commentary. It also incorporates and gives effect to the Guiding Principles for PPPs for the SDGs, adopted by the United Nations in 2019[54] (as the People-first Principles) and further modified in 2021. The project was substantially completed in 2021 and formally adopted by the United Nations and the EBRD in 2022. The document is available on the websites of both institutions.

[50] The CIS IPA, created on 27 March 1992, is an interstate body of the Commonwealth of Independent States consisting of national parliamentary delegations of the member states. The CIS IPA is vested by its mandate with the task of harmonising commercial legislation in its member states and has been carrying out this task by drafting and enacting model legislative acts and other instruments, including in various commercial law sectors, taking into account national and international experience, and recommending their implementation in the national legislation of member states.

[51] These PPP regulatory guidelines do not make a firm or jurisprudential distinction between PPPs and concessions. Some do, however. This became a major issue as the Model Law was being developed. For that reason, both terms are used in the title.

[52] Consisting of some 60 members from different jurisdictions and a subgroup of 15 leading practitioners, led by Christopher Clement-Davies.

[53] In particular, Alexei Zverev and colleagues.

[54] See section (B)3(iv) above and Appendix 5 (Part B).

4. Procurement: laws, rules and guidance

Readers should also be aware of some of the other main internationally recognised sources of procurement law, because, as we have seen, procurement is a central element of most PPP laws and international standards and practices in this area, as well as the host country's existing procedures, often need to be taken into account in framing them. A formal basis for awarding PPPs will always be necessary, and competitive tendering is now widely considered the most advisable general approach, as it promotes transparency, fairness, market activity and efficient pricing, and reduces the risk of corruption. It is also often a requirement of the funding sources likely to be deployed to finance PPPs; development banks such as the EBRD will typically insist on it.

PPP laws, then, need to be consistent with a country's existing procurement rules, or perhaps go beyond them. If the former already represent an adequate framework for awarding PPPs, they can simply be used for that purpose – as in many common law and EU countries. If they do not, they may need to be amended or – more often – a complete, self-standing procurement regime must be built into the PPP law. Knowing which route to take can be challenging. Confusion can result from overlapping or conflicting provisions between the two systems. Not infrequently, a decision is made to make the procurement provisions in the PPP law comprehensive and self-standing and not to apply the wider procurement laws at all.

The two best-known and far-reaching sources of prescriptive provision in this area are the WTO and the EU. Perhaps the most important international agreement of its kind in operation is the plurilateral Government Procurement Agreement (GPA) drawn up by the WTO, while the most wide-ranging set of supranational laws are the body of rules contained in EU's Procurement Directives. The host country is also likely to have in place domestic laws governing the award of contracts for works, supplies or services by government bodies, state agencies, state-owned enterprises and, in some cases, the private sector. Domestic legislation may also give effect to the requirements of the GPA or, in the case of an EU member state, the EU's directives.

(i) The World Trade Organization

WTO members have for many years been seeking ways to address the issue of government procurement in multilateral trading systems. This has resulted in three main areas of work, shown in the table below.

The three main areas of work on government procurement in the WTO

	Plurilateral Agreement on Government Procurement	General Agreement on Trade in Services	Working Group on Transparency in Government Procurement
Type of work	Administration of WTO agreement	Negotiations based on Article XIII:2 of GATS	Study and elaboration of elements for inclusion in an appropriate agreement
Main principles	Transparency and non-discrimination	Transparency and possibly non-discrimination	Only transparency (preferences not affected)
Scope of work	Goods and services, including construction services	Only services	Government procurement practices
Participation	Plurilateral (not all WTO members are parties)	Multilateral (all WTO members involved)	Multilateral (all WTO members involved)

Source: World Trade Organization.

The GPA is the only legally binding agreement in the WTO focusing on government procurement. It is a plurilateral treaty, administered by a Committee on Government Procurement, which includes the WTO members that are party to the GPA and thus have rights and obligations under the agreement. Not all the members are party to the agreement, and those that are can have differing rights and obligations in certain areas. Originally introduced in 1981, and subsequently renegotiated and redrafted in 1994 and 2012, the current version was adopted in 2012 and came into force in 2014. It replaced the 1994 version on 1 January 2021.

The rationale for the GPA is simple. In most economies, the government and its agencies are the largest buyers of goods of all kinds. The temptation to favour domestic suppliers can be very strong. The GPA seeks to open up as much of this business as possible to international competition. It is designed to make government procurement laws, regulations, procedures and practices more transparent and ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers. The agreement covers 48 WTO members,[55] of which some are in the process of acceding to the GPA (including Albania, Brazil, China, Georgia, North Macedonia and Russia). It has two elements: general rules and obligations, and schedules of national entities in each member economy whose procurement is subject to the agreement. A large part of the general rules and obligations concern tendering procedures. The GPA's provisions may be relevant to any public law analysis that needs to be carried for PPP purposes, by the host economy or investors, as described in section (B)3(vi) above.

(ii) EU legislative framework

Introduction

The EU legislative framework contains numerous regulations and directives specifically concerning PPPs. Until 2014, it included some procurement directives with which those PPPs that qualify as "public contracts" had to comply. On the other hand, PPPs qualifying as "works concessions" were covered only by a few provisions of secondary legislation, while no EU directives covered those qualifying as "service concessions".[56] However, concession contracts were also subject to the general principles of the European Union, according to which any act whereby a public entity transfers the provision of economic activity to a private party must also be examined against the rules and principles of the EC Treaty and the Treaty on the Functioning of the European Union 2010 (TFEU). In the field of public procurement and concessions, TFEU Articles 49 (on freedom of establishment) and 56 (on freedom to provide services) are especially important. In addition, the principles of equal treatment – such as prohibition against discrimination on grounds of nationality, transparency, mutual recognition and proportionality – must be considered.

EU public procurement legislative framework

After a lengthy legislative process, the Council of the European Union adopted three new procurement directives in February 2014. They were published on 28 March 2014 in the Official Journal of the European Union and came into force in April. They consist of the Concession Contracts Directive 2014/23/EU, the Public Contracts Directive 2014/24/EU and the Utility Contracts Directive 2014/25/EU (together, the Procurement Directives). They replaced the earlier 2004 Public Contracts and Utility Contracts Directives. Consideration must also be given to Directive 2007/66/EC (the Remedies Directive) and the new thresholds under Commission Regulation (EU) No 2017/2365 of 18 December 2017.

The Procurement Directives represent the most significant reform of procurement law in the EU since 2004. They aim to modify the existing regime, rather than transform it, by introducing changes to meet criticisms of and perceived weaknesses in the law. In particular, they aim to ameliorate the position of small and medium-sized enterprises, which had often complained about the difficulty of meeting the onerous requirements of public tendering procedures, and to introduce greater flexibility in those procedures, widening the scope for negotiation, and allowing the use of tailor-made processes and the procurement of creative solutions. Of most significance to PPPs, there is now a new directive in place that deals specifically with the award of concession agreements, removing much of the uncertainty that surrounded the pre-amendment legislation.

[55] WTO members covered by the agreement: Armenia, Australia, Canada, the European Union (which covers its 27 member states), Hong Kong China, China, Iceland, Israel, Japan, South Korea, Liechtenstein, Moldova, Montenegro, the Netherlands with respect to Aruba, New Zealand, Norway, Singapore, Switzerland, Taipei China, Ukraine, the United Kingdom and the United States of America.

[56] Public contract: Contract for pecuniary interest concluded in writing between a contracting body and an economic operator, which has as its object the execution of works, the supply of products or the provision of services.
(Works or service) concession: A contract which differs from a public contract in that the source of revenue for the economic operator consists either solely in the right of exploitation or in this right together with payment. Source: www.europa.eu.

EU PPPs and concessions

In line with Directive 2004/18, under current Directive 2014/23, concession contracts are less tightly regulated than public works contracts, but bound by rules on valuation, advertising, time limits for application, additional works to concessionaires, subcontracting and rules for when the concessionaire lets contracts to third parties. Service concessions are excluded from the scope of Directive 2004/18 (Article 17) but fall with the remit of the Procurement Directives nevertheless, and are dealt with directly in Directive 2014/23. At the same time, of course, all transactions subject to EU law are bound to respect general treaty principles (for example, freedom to provide services, free movement of goods, freedom of establishment, mutual recognition, proportionality, non-discrimination and equal treatment).

The Procurement Directives have maintained considerable flexibility relating to the procedure to be used for the award of PPPs. There is a free choice between the open or restricted procedure, the negotiated procedure with prior publication of a notice, or the competitive dialogue procedure. An obligation is obviously imposed to specify the award criteria that will be used; these may focus on price and technical specifications, but may also include environmental, social or innovation-related criteria.

EU institutional framework – conclusion

The goals of the EU public procurement framework have evolved considerably in the last 20 years, reflecting the challenges of their times and the maturity of the member states in their use of public procurement instruments. The main objectives of the 2004 Procurement Directives were to promote and develop a transparent, non-discriminatory and integrated procurement market across the EU, while ensuring European citizens a fair return on their taxes. The declared aim of the 2014 Procurement Directives, on the other hand, is to use public procurement as a strategic tool to implement public policies, in particular with respect to fighting corruption, but also with a view to promoting innovation and tackling global challenges such as climate change or the scarcity of natural resources and public money.[57] In that vein, the European Parliament published a note in April 2020 on the contribution of EU public procurement to the achievement of the objectives of the Paris Agreement and the circular economy strategy, urging the European Commission to create "off the shelf" tools available to member states to promote strategic public procurement and, in particular, green public procurement requiring low carbon, life-cycle and circular approaches in public purchases.[58]

(iii) Procurement model laws and IFI standards

A leading source of guidance on procurement standards and requirements is, again, UNCITRAL. The UNCITRAL Model Law on Procurement of Goods, Construction and Services, adopted by the UN on 16 July 1993, and the UNCITRAL Model Law on Public Procurement, adopted on 28 June 2012, are designed to help states reform and modernise their laws on procurement procedures. These model laws contain procedures designed to achieve competition, transparency, fairness and objectivity in their procurement processes, thereby increasing economy and efficiency in procurement. The former model law is available for use by states that wish to enact procurement legislation with a scope limited to procurement of goods and construction. The latter has a rather wider ambit.

In addition, as already mentioned, countries that seek financing from multilateral lending agencies[59] should be aware of their standard procurement policies.[60] Complying with those policies may be necessary to access this type of funding and perhaps to attract private-sector funding from commercial or investment banks that may need to collaborate with them in difficult markets, especially where a full co-financing structure is involved. Failure to do so may mean that funding from these sources is unavailable. They should therefore be taken carefully into account when revising the host country's procurement laws and the procurement aspects of a PPP law.

[57] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Making Public Procurement work in and for Europe, Com (2017)-572, October 2017.

[58] European Parliament, briefing requested by the Committee on the Internal Market and Consumer Protection (IMCO), The EU's Public Procurement Framework, How is the EU's Public Procurement Framework contributing to the achievement of the objectives of the Paris Agreement and the Circular Economy Strategy?, April 2020.

[59] That is, multilateral development banks such as the EBRD, the IBRD, IFC, the EIB and the ADB, and similar public sector-controlled financial institutions (such as the World Bank's Multilateral Investment and Guarantee Agency and export credit agencies).

[60] EBRD Procurement Policies and Rules, accessible at https://www.ebrd.com/work-with-us/procurement/policies-and-rules.html

World Bank policies in this area can be found on its website and are detailed in Guidelines: Procurement under IBRD Loans and IDA Credits and the Guidelines: Selection and Employment of Consultants by World Bank Borrowers. In addition, the World Bank provides a diagnostic tool called the Country Procurement Assessment Report that can assist with an assessment of a country's procurement system and plans to improve it. The World Bank is also updating its public procurement guidelines. The EBRD has published its Procurement Policies and Rules on its website, along with a paper[61] on the EBRD Financing of Private Parties to Concessions, which discusses the Bank's approach to PPP financing. The European Investment Bank also publishes its policies, which are detailed in its Guide for Procurement of Services, Supplies and Works by the EIB for its Own Account and the Guide to Procurement. Finally, the relevant agencies in developing countries can consult the Joint Venture for Procurement, an international forum for procurement specialists representing multilateral lending agencies and developing countries engaged in procurement reform.

(iv) Procurement impact of the Covid-19 pandemic and economic crisis

Many countries modified or qualified their normal procurement arrangements for PPPs to deal with the impact of the Covid-19 pandemic and the devastating economic crisis it triggered. Sometimes, they bypassed those arrangements altogether. As already noted, there will be short-, medium- and long-term consequences for PPPs and the frameworks for them, including at a procurement level, as a result. This subject is discussed in more detail in Chapter 5.

(D) Content of PPP laws

Preamble. The next section summarises the provisions often found in PPP laws and discusses some of the issues typically encountered as they are drawn up. This is done in some detail, as the legal framework for a PPP regime will be primarily set out in such a law where the country concerned requires or decides to use one (see section B above).

Purpose and objectives. PPP laws may start with a preamble or preface of some kind, designed as a simple introduction to the law. This allows the host country to summarise the purpose of the law and to capture some of its main policy objectives and priorities in making use of PPPs. Some countries feel it is more appropriate to do this in a preamble, which can be written in non-legal language, than in the more precise and binding legislative language of the statute's provisions.[62] Other countries prefer to work these statements into a "scope" provision in the main text, or simply not to include them.

Policy paper. It is common these days for governments to put a detailed policy statement in place before (or at the same time as) the PPP law is enacted.[63] The policy statement can set out all the relevant policy priorities and objectives that are thought to be important or relevant, leaving the law to set forth the PPP system's legally binding provisions. Either way, guidance notes or explanatory documents of some kind are likely to be invaluable to all those working under the new system.

Distinguish PPPs and other government contracts. A preamble may be a useful place to make it clear that the law is limited to the PPPs defined in its terms, and not to other types of commercial or contractual arrangements between public and private sectors (this is another aspect for the law's clarificatory function). There may be many of these other arrangements in the relevant jurisdiction which should not be subject to the PPP law; these may include simple outsourcing contracts, design and construction contracts under traditional procurements mechanisms, certain types of franchise, consulting contracts, other standard commercial agreements and perhaps even natural resource concessions to the extent they are carved out of the PPP regime (see below).

[61] Now somewhat dated.

[62] A country's jurisprudential traditions will also be important here. It may nevertheless be necessary to set out every "object" and rule in the law itself.

[63] See Chapter 17 (Vol I of the PPP Regulatory Guidelines Collection) for an example of how this is done.

Chapter I. General provisions

The initial chapter of the law typically deals with the more general aspects of PPPs and the new PPP system that need to be addressed for the law to be understood and applied clearly, such as definitions, the use of regulations and guidelines, preliminary criteria and requirements, the authority to award PPPs, applicable sectors and some of the basic elements of a PPP contract (such as its parties and term).

1. Scope

General scope. A general scope provision is sometimes included, summarising the range of activities the law is intended to cover[64] and the general principles which may apply to those activities. These general principles are becoming increasingly familiar and standardised at the level of international law (although the exact meaning and application of some of them can be debated) and may include any or all of the following:[65] transparency, fairness, stability, proper management, integrity, completion, economy and long-term sustainability.

Range of PPP structures. One way or another, the law and any scope provision must clarify the range of PPP structures to which it applies. As explained in section B, some countries distinguish formally and as a matter of jurisprudence/legal theory between different types of PPPs, in particular between concession and non-concession PPPs, not infrequently limiting the latter to structures involving government revenue streams and the former to those based on direct user charges and exposure to demand risk.[66] This can sometimes lead to the adoption of two different laws or areas of law dealing, respectively, with each (as in China and Serbia, for example, and of course France, which first made this distinction). EU law also makes a formal distinction along these lines, where the critical criterion is whether the nature of the payments to the private partner (from whatever source) involves a transfer to it of non-negligible operating risk, in which case the PPP is categorised as a concession.[67]

One law for all? Many countries, however (including common law ones), tend to prefer to lump them all together conceptually, so to speak, and subject them to essentially the same statutory provisions and principles. To do so offers the advantages of simplicity, consistency and comprehensiveness. It will usually be more straightforward, both conceptually and practically, to treat all types of PPP as essentially the same, as points on a spectrum, as it were, unless there is a clear and compelling reason to make formal legal distinctions between different varieties. Allowance can still be made for specific variations in treatment between the different forms, if that is thought helpful, while avoiding a categorical distinction between the two different basic types (government-pay and concessions). A county which sees a need to draw up different rules or procedures for different types of PPP structure, however, should make that very clear in the scope provision and the relevant clauses of the PPP law (or laws).

Government levels. The scope provision should also address the question of the governmental level at which the law applies – that is, national, federal, regional and/or municipal, or all of them. It will usually make sense for a country to have a single legislative act governing all its PPPs, no matter which level of government or administrative structure is involved. This will help to achieve coherence, clarity and consistency, and avoid the pitfalls and surprises that can result from having to deal with several different laws. There may be exceptions, however. In a truly federal structure, it may be necessary for each member state to enact its own law on this subject; the most obvious instance of this is the United States of America.

2. Key terms and definitions

It is generally desirable to try not to use too many defined terms, so each provision can be readily understood on its own terms. Most of the defined terms should be straightforward and self-explanatory. One or two may be more problematic, including:

- **Government.** This term is often used loosely and widely in PPP laws, as referring to any part of the legislative, administrative or executive branches of government legally entitled to exercise powers or perform functions under them. Careful thought needs to be given to the inter-relationship between these categories, however, and any possible conflict between them. It may not be appropriate for the

[64] If not covered solely in a preamble or foreword.

[65] See for example the UNCITRAL model provisions.

[66] At least, these days. Common "business speak" today often reflects this distinction. Historically, however, other factors were at least as important, such as scope and sector. In many countries in the past, the term concession was synonymous with PPP (or pre-dated it).

[67] See further in section B.

executive branch to exercise some powers. Greater precision may therefore be needed in the use of the term. Indeed, some statutes allow for this, using the word "government" to refer to the executive only (and even specifically the cabinet or council of ministers). The problem is sometimes finessed by simply using the generic expression "competent body". But if clarity is needed in terms of which branch of government is being referred to in a PPP law, then precision is needed in the terminology used.

There can also be uncertainties about the extent to which local or regional bodies are being empowered under the PPP law, especially where combinations of different government bodies are involved simultaneously in the exercise of certain functions (as contracting authorities under the same project, for example). This, too, may need to be addressed expressly in the host country's PPP law.

- **Institutional private partner/institutional PPP.** A PPP law may or may not include provisions dealing with institutional private partners and institutional PPPs, as a distinct, defined concept.[68] EU law makes allowance for the concept, for example (although somewhat inconclusively), as do the laws of some other countries around the world. Many others do not. Host countries may or may not wish to do so. If they do, it should be well thought-through and well-defined.

In essence, the term usually refers to PPPs where the contracting authority (or perhaps another public body, such as its affiliate or a state-owned enterprise) and the private partner form a joint entity (institutional private partner) to perform some or all of the tasks under the PPP contract. Although the private-sector participant would usually retain a majority and controlling interest, even that is not always clear. For the project to be a PPP in any meaningful sense, the private sector should still logically assume the main responsibility for implementing it. It should be borne in mind, however, that is far from uncommon for contracting authorities to take minority shareholdings in PPP companies in any event. In many jurisdictions, that will make these defined terms pointless. A separate formal category of institutional PPP may be unnecessary.

- **PPP guidelines/PPP regulations.** The host country should decide whether it wishes to allow for both of these concepts in its PPP law. Sometimes both will be used, with the regulations containing legally binding secondary legislation filling out the details of many of the articles, and the guidelines consisting of non-binding guidance documents designed to facilitate an understanding of the workings of the PPP law and regime. Some countries may prefer to allow for only one or the other, or even to combine them in a looser, joint term (such as a PPP enabling framework).

- **Public infrastructure.** The host country should give thought to the breadth and scope of this definition, to tailor it to its expectations for the range of PPPs it plans to use. For example, does it wish to include intangible assets (such as intellectual property) and other types of assets and their operation which may be only indirectly related to infrastructure service provision (such as information technology systems)? This is likely to make sense. It is usually helpful to define the term broadly, to avoid any potentially awkward or unintentional restrictions on its scope and build in the flexibility to allow for future developments.

- **PPP.** The term is not always as straightforward to define as one might expect. It is perhaps best not to attempt to make a definition more accurate or perfect than it needs to be, however. The critical thing is to use a short, simple, clear definition that captures the essentials and is reasonably robust and workable at a practical level, and above all is fully consistent with any other critical elements of PPPs set out in the law, rather than one that is conceptually flawless. An example[69] would be "an undertaking meeting the criteria and requirements set out in [the PPP law], involving a long-term, cooperative relationship between a public and private partner, on the basis of a PPP contract, with shared risks and responsibilities throughout its term, for the design, development, construction, reconstruction, rehabilitation, operation and/or maintenance of public infrastructure (whether new or existing) and/or the provision of public services or services of general interest".

- **Value for money/value for people.** The term "value for money" also needs careful consideration. The PPP world has been subject to years of difficult debate about how it should be defined and interpreted. This is intensifying, as ever greater attention is given to ESG values and criteria. A convincing modern definition would stress the need for a wide perspective, looking at the value of a PPP in terms of its broad impact on the economy, society, the environment and the government's finances over its life, and the net benefits it stands to generate. A new term, value for people (meaning people and the planet), is now surfacing to express this. This may be treated as an

[68] The terminology, which derives from EU provisions, is somewhat unfortunate. There is nothing particularly or clearly "institutional" about these arrangements.

[69] Taken from the Model Law.

essential aspect of value for money or distinct from it. In any event, host countries should reflect carefully on the meaning they wish to give the words, in terms of the key tests to be taken into account when they are applied. They may even wish to provide for a detailed methodology for such tests to be set out in their PPP regulations or guidelines. A narrow definition (for instance, lowest price) is not likely to be appropriate.

3. PPP regulations and guidelines

Either or both. As explained above, the host country should decide whether it wants (or is legally obliged) to refer formally to both PPP regulations and guidelines in its PPP law. The former will often be necessary to complete the PPP legal regime, and so their compilation – and revision (updating) over time – made an obligatory aspect of the law. The latter may or may not be, at least at a formal level, and so may be referred to in more permissive language.

Lead authority. Many governments around the world prefer to put a single policymaking body in place for PPPs – often the ministry of finance or economy – with authority to make and revise PPP policy and take charge of the implementation of the system. Any such body is likely to have ultimate responsibility for the regulations and guidelines issued. If so, this may also need to be addressed in the chapter dealing with generalities.

4. PPP criteria and fundamental requirements

Criteria. Many PPP laws seek to lay down the essential features and characteristics (criteria) of PPPs, reinforcing the basic definition. This clarifies which types of project are to be treated as PPPs, and so must comply with and be undertaken in accordance with all the law's requirements, which in turn helps to create coherence and certainty under the law. The criteria may include some or all of the following:

- **Long-term contract.** PPPs need to be long-term in nature (perhaps subject to a minimum term established in accordance with the law (see below) and implemented on the basis of a PPP contract that accords with the requirements of the PPP law.

- **Minimum value.** A minimum or threshold (estimated) value may be required for any PPP. In essence, this is because of the complex nature of PPPs and the time and resources necessary to make them work. It can be difficult to establish what exactly any minimum value should be as a matter of law, however, especially in the case of projects with little or no capital expenditure (capex) involved, and how it should be calculated. Some countries may therefore treat the requirement as a matter of detail to be dealt with in the regulations (that is, state in the law that a monetary threshold must be exceeded, but leaving its value and the method of calculation to the regulations), or simply not include any such requirement at all.

- **Range of activities.** It can be helpful to restate the full range of activities which a PPP can cover (such as design, construction, management, rehabilitation, maintenance and/or operation of public infrastructure). A PPP is not the same as a construction contract or simple contract for services. It needs to contain an appropriate element of long-term responsibility for the public infrastructure and/or public services;

- **Risk allocation.** There should be a clear element of risk-sharing between the parties throughout the life of any PPP.

- **Private finance.** A PPP usually includes the use of private finance, but – at least in theory – may not do. Private finance may have to be used, or there may be a clear wish on the part of the contracting authority to see it used. But occasionally the public sector may choose to provide the funding itself. A PPP law may or may not include it as a requirement.

Link to policy objectives? Some laws will also include a link back to the public interest goals and objectives summarised in the preamble. (If these have been carried over into the law itself, the cross-reference should be to the relevant article.) Some may also provide for an order of priority between the different criteria.

Special provision for small projects. Some host countries may decide to create some flexibility in the treatment of smaller projects by their legal and regulatory PPP framework, including those falling below any threshold value specified in the law (see above). They may make special provision for them in the regulations, perhaps by way of abbreviated and simplified procedures (for example, providing for simplified studies and evaluations, making them subject to direct negotiation, rather than full public tendering, or allowing for the bundling together of smaller projects and their implementation in a group as a full-blown PPP subject to the law's requirements).

Institutional PPPs. If the PPP law allows formally for institutional PPPs, it will need to complete the picture by making it clear whether and to what extent its provisions apply to them. Typically, all or nearly all of them should apply. Any specific exceptions should be carefully thought through and closely identified.

5. Authority to award and enter into PPPs

A necessary provision. There is sometimes considerable uncertainty about which government bodies actually have the legal power and authority to award PPPs. In others, there may be no doubt about this at all, in which case nothing may need to be said about it in the PPP law. Many PPP laws do not provide for it. But where doubt or uncertainty exists, it will be helpful for the PPP law to address the subject head on, ideally in simple, clear terms.

Options. One approach is for the law to say that any public authority which already has the right to develop projects involving assets and/or services of the kind comprised in PPPs (as most ministries and many municipalities will usually do), together with the right to enter into commercial contracts with the private sector, shall be deemed to have the right to award and enter into PPPs (except where a specific law provides otherwise). Alternatively, it may simply list those public authorities that are allowed to award and implement PPPs.[70] The two approaches can always be combined.

Fallback mechanism. It may also be helpful to include a fallback mechanism, giving the government the specific power (in paragraph 2) to vest the necessary authority in individual bodies where necessary or appropriate (and subsequently revoke it). Some governments may also find it necessary to include a specific prohibition against regulatory bodies acting as contracting authorities, in view of the conflicts involved. That would be unusual, however. Occasionally, public authorities with regulatory powers do indeed have to act as PPP contracting authorities, pending the creation of an independent national regulator.

6. Applicable sectors and activities for PPPs

Inclusions. PPP laws typically prescribe the range of sectors and economic/commercial activity to which PPPs can apply. It is usually desirable to make any such provision broad and flexible, and any list it contains inexhaustive, since formal legal restrictions or exclusions are often, in the end, simply unnecessary. (Governments can always then make impromptu decisions about whether to use of a PPP in a particular area). For example, it may say that PPPs can be used in any sector or area of activity not specifically excluded by this or any other law, perhaps setting out an illustrative list of the most obvious ones, which can be expanded or reduced as appropriate. Alternatively, the host country may prefer the list to be specific and exhaustive.

Exclusions. It may then be appropriate for certain sectors or areas to be specifically excluded from the application of PPPs, if that is considered necessary. Some countries prefer to exclude certain areas of defence activity and contracting, for example, or prisons. Another example might be certain types of agricultural activity which are controversial at an environmental or health-protection level.

Natural resources. The natural resource/extractive industries sector sometimes proves problematic in this context. This sector is often distinguished and excluded from the scope of PPPs and a PPP Laws, although concessions may already have been in use in the sector for many years. That is because (a) the sector is often already the subject of well-developed laws and procedures which have been in place for a long period, representing a self-standing and comprehensive body of applicable rules and regulations, and (b) PPPs are essentially about or related to public services and public infrastructure, which many extractive industries are obviously not (at least not directly). In that case, it may be better to carve out the relevant sector and industry from the scope of the new PPP Law, even though the concessions in use there may be conceptually very similar to PPPs and subject to many of the same principles. This is an analysis each host country should carry out. On the other hand, other forms of energy such as the power sector, which embraces essential public services and public infrastructure, are usually included in the list of eligible sectors.

7. Parties to a PPP contract

Main parties and flexibility. There will often be only two parties to a typical PPP contract – the contracting authority and the private partner (as we call them here, for the sake of consistency. The terms "conceding authority" and "concessionaire" are often also used, at least in concessions laws). It is worth noting, though, that, on the one hand, there may occasionally be more than one public authority participating as contracting authority,[71] such as where several municipalities are involved, for example, or a state-owned enterprise teams up with a line ministry, while, on the other, the private partner will often consist of a consortium of companies that become shareholders in the special-purpose vehicle company incorporated to fulfil this role under the

[70] UNCITRAL takes this approach.

[71] Where this happens, it may still be helpful to give one of these authorities a clear leading role in interfacing with the private partner under the PPP contract, to promote a "one-stop shop" effect.

contract. The two principal parties may also agree to bring in additional third parties to the PPP contract (such as a guarantor), where the project's particular circumstances or needs call for it. The law may need to make provision for this.

8. PPP term

Minimum term. A PPP law will sometimes prescribe a statutory minimum term for all PPPs. A host country tempted to do so should think carefully about what this might be and how it should be calculated. A specific minimum period might be inserted, for example. A term of at least five years is likely to make sense, given that PPPs are inherently complex, long-term structures, with sophisticated risk-sharing elements between the parties and subject to important review and approval requirements (which simply would not be practical in the case of simpler, short-term contracts). Because there is no commonly recognised methodology for establishing a minimum term, however, any detailed basis for doing so can always be set out and refined in an ancillary document, such as the guideline regulations (if this is thought to be necessary at all). Any minimum term should of course be consistent with any minimum value prescribed by the law.

Maximum term. It is more common for the PPP law to lay down a maximum term for PPP projects and contracts, or a set of principles for determining the term of each (which is much the same thing). This is because it is important not to allow such contracts to lock up assets and activities for too long, potentially creating long-term, anti-competitive monopolies, but also to mitigate the risk of corrupt practices. Many commentators argue that the temptations to do very long-term deals can simply be too strong for government departments to resist, and that a clear limit in the PPP law can therefore be helpful. There is much debate about what an appropriate term should be. Some take the view that very few PPPs need be longer than 25 or 30 years, or the useful life of the asset involved, as this should always be sufficient to make a project financeable and investible. Others believe that much longer periods (50 or even 75 years) can make sense; there are indeed many examples of them in practice.

Applicable principles. This is why it can be difficult for the law to provide for a specific maximum period, even though quite a few do. Instead, it may be sufficient to set out the basic principles to be taken into account in framing any maximum term, leaving the term itself to be specified in the PPP contract (which will always have a term clause anyway).[72] These principles may say, for example, that the term of the project must be no longer than that period of time necessary:

- to achieve the project's approved public-service objectives and meet the contracting authority's requirements
- to allow any debt to be repaid and investors to achieve a suitable return
- to allow the physical assets involved to be properly depreciated/amortised
- to make proper allowance for any relevant market and sector policy requirements.

Precise, flexible wording. Any such principles will need to be very carefully worded in the PPP law. As each factor amounts to a complex variable, it may make sense to leave their detailed definition and wording to the regulations or guidelines, where they can be refined with relative ease over time. (What, for example, is a suitable return on investment and how long should it take to achieve it?) In practice, it should be possible in many cases to leave the precise application of these principles to the contracting authorities deciding on each project's duration. Nevertheless, the principles applicable need to be worded in the law with sufficient care and flexibility to enable that to happen, while detailed guidance about their use can be set out in the regulations and/or guidelines.

Allow for extensions of term. It must be remembered that PPP contracts often – even typically – contain mechanisms that allow their term to be extended in exceptional circumstances described in their provisions.[73] This may occur, for example, where force majeure or other exceptional events seriously delay progress or interrupt operations, or a change in law necessitates major changes to aspects of the design and construction works.[74] Any maximum term laid down by the law should allow for this, while if necessary making it subject at the same time to any limits or conditions considered appropriate (and perhaps set out in the regulations) to prevent the extension mechanism being abused.

[72] UNCITRAL takes this approach.

[73] These are not discretionary remedies available at the private partner's option. They typically represent objective grounds for modifying the contract in the specified circumstances, in a way which is arbitrable and legally enforceable.

[74] Note that this can effectively benefit both parties. For the contracting authority, extending the term to compensate the private partner for its resulting losses (by allowing it to earn revenues for longer) may be preferable to paying it cash compensation.

Chapter II.
Institutional arrangements and roles

General. It may be necessary in a PPP law to include provisions dealing with the inter-relationship between different government bodies and ministries in the PPP context, and the ways in which their respective powers and functions may affect or impinge on each other. The decision-making processes behind the different stages of a PPP's preparation, approval, award and implementation certainly need to be properly accountable. It can also be helpful, in the interests of clarity, for the various stages – from initial inception to final monitoring and termination – to be identified and described, with the responsibilities of different government bodies for each spelled out. Those procedures and processes will, of course, be addressed in any case in many of the law's provisions. However, some aspects may need further precision or amplification in certain specific areas. This chapter is designed to allow for them. The wider aim here is to achieve the necessary administrative clarity in relation to all aspects of the implementation of PPPs.

No standard requirements. It is difficult, though, to generalise about what exactly such provisions should say. This will depend very much on the particular administrative structures and procedures in operation in each country, and the challenges and problems (if any) to which the relevant "interfaces" may give rise, and the extent to which other laws and codes already address them. There are few examples of such provisions in PPP laws actually in force which amount to helpful precedents.

Possible areas affected. In theory, there are many possibilities. Cross-referring to the wider public investment process is one, integration with long-term infrastructure development planning another (including any SDG strategy), the application of budgetary and fiscal rules and procedures a third, the powers of sector regulators a fourth. Other examples might include the role of a PPP commission, the role of the ministry of finance or economy and its risk management unit,[75] a revolving fund to aid the use of PPPs by local authorities, contingency funds to support some or all contracting authorities and their potential liabilities, and additional tiers of approval or control where the exceptions to normal procedures come into play under the PPP law (as in the case of unsolicited proposals or direct negotiations).

The long-term fiscal impact of PPPs may need to be specifically addressed. Flow charts drawing together the relevant strands of decision-making may be helpful (although one would not expect these to be reflected in the law itself). One needs to tread carefully, however. Some of the processes and constraints relevant to these areas may already be in place in the existing administrative and constitutional structures and rules (as already noted). To that extent, it may be unnecessary or inappropriate to reproduce them in a PPP law. Where they are not, it may make sense to address them.

9. PPP unit and administrative coordination

Purpose. One such provision which is commonly included, is that dealing with the establishment of a PPP unit. Many governments create PPP units as part of their new PPP systems. These are essentially administrative support functions, designed to help implement and refine the new system and to disseminate a proper understanding of it, in both the public and private sectors. However, the structure, responsibilities and powers of PPP units vary widely from country to country, depending on governmental preferences and the evolutionary stage reached by the country's PPP system. In some cases, they have a limited advisory role. In others, they can have a much more central and executive role, with extensive powers to help shape the new PPP system, including wide rights of approval over aspects of the implementation of individual projects.

Structure and organisation. Each host country should think carefully about how it wants to structure, organise, staff and empower its PPP unit, and provide for this adequately in its PPP law.[76] The articles may, for instance, address how the unit is to be staffed, identifying a suitable spread of skills and backgrounds; whether a controlling ministry and director should be identified (for instance, the ministry/minister of finance or economy); and how its governing procedures and record-keeping are to be provided for. Many countries put in place a single, centralised body to provide technical assistance and capacity building to all contracting authorities in PPP-related matters. Individual contracting authorities may then wish to create their own specialist PPP office or department within their organisation, to spearhead PPP activities going forward.

[75] Unsurprisingly, the finance ministry frequently has a leading part to play in the decision-making behind a country's PPP system, as the ways PPP projects may impinge (or not) on a government's finances are usually a prime consideration in their application.

[76] There may also be certain concerns about potential corruption here, which should be kept in mind as the PPP unit is being structured (see the UNECE ZTC Standard on this subject).

List of functions and responsibilities. The PPP law will often include a list of the PPP unit's functions and responsibilities.[77] Functions should be chosen and allocated in ways that avoid potential conflicts of interest with respective ministerial duties or conflicts between different responsibilities in the PPP unit.

Administrative coordination. "One-stop shop". It may be appropriate add in this chapter a mechanism designed to coordinate the issue of relevant licences and permits for PPPs between the different ministries and public authorities responsible for them. This one-stop-shop arrangement is often referred to in discussions of institutional arrangements, as it self-evidently seems a helpful step to take, especially in light of the large number of permits that can sometimes be required. The idea is that the processes involved would be streamlined and made faster and more efficient, to the benefit of the whole system. Actual examples of such mechanisms in practice are hard to find, however. Licences and permits are the responsibility of individual authorities and ministries, and their issue is a function of the statutory duties and prerogatives they have. These cannot easily be transferred to a different centralised body. The concept may be something of an elusive ideal.[78]

10. Information about PPPs

Need for data and transparency. The transparency of a PPP system is critical to its success (as the SDGs recognise). The more fully both public and private sectors understand all its technical, procedural, commercial and operational aspects, the better. PPPs are complex, sophisticated vehicles that often take years to be fully understood. A steady flow of helpful, accurate information about them in any country seeking to implement them systematically will therefore be vital. A well-drafted PPP law should thus impose wide-ranging duties on government – that is, on the various government bodies involved with PPPs – to prepare, collate, develop, maintain and publish the relevant information about them and the operation of its PPP system, so that contracting authorities, participants, stakeholders and the general public can all benefit.

Wide disclosure. Such information should ideally be subject to a presumption of transparency and disclosure. It may include information about PPP policy papers, regulations and guidelines, appraisal and evaluation criteria, procedures in use under the PPP law, the progress of individual projects and those being planned, tender results and material terms,[79] recommended or standard contractual terms, the "pipeline" of future projects, studies and reports, and perhaps even information showing how PPPs fit into the context of the government's broader plans for infrastructure procurement and economic development. To satisfy ESG requirements, it should include information that local communities may need to exercise the rights of protection they may enjoy under applicable law.

Tenders and related matters. The need to publish relevant information about competitive PPP tenders and their results, on websites and/or official publications, should also be addressed. So should the need to maintain access to it for a sufficient period of time. Host countries should consider any other specific requirements of this kind which they would like to see included in their PPP laws, such as mechanisms for independent audits of aspects of the published information, and procedures for public reviews or hearings where appropriate.[80] Private partners should also have a general duty to maintain and provide information about their projects, which can be elaborated in the PPP contracts.

Chapter III. Initiation and preparation of PPPs

The central chapters of a PPP law will usually deal with the all-important subject of the selection, preparation and award of individual PPP projects. They should aim to set out a clear, robust framework for the procedures and principles involved, leaving much of the relevant detail (such as timescales, deadlines, precise formalities, definitive rules and methodologies) to be addressed in the regulations and the tender documents themselves. Chapter III of this outline deals with the early stages of a project's initiation, preparation and approval, Chapter IV with its award and implementation.

11. Initiating and preparing PPPs

Need for clarity. Ideally, the law should summarise the steps and procedures that must be followed as a PPP is defined, initiated, appraised and approved. It is all too easy for a project to be mishandled in the initial stage, with flaws in its structure or critical steps missed in its approval by the relevant oversight

[77] The Model Law contains a very comprehensive "wish-list" of them.

[78] Note that the EU is currently devising some helpful provisions long these lines, at least for cross-border projects.

[79] Subject to any carefully circumscribed confidentiality restrictions.

[80] It is not just the transparency of the available information that is important, but the right to take appropriate action where it reveals deficiencies or abuses.

bodies. This can be fatal, either at this stage or later as it is fully implemented.[81] A well-drafted law will help to avoid this by defining the preliminary steps and requirements in sufficient detail.

Initiation and preparation. It should be possible for PPPs to be formally initiated (set in motion) by either the relevant contracting authority or a private initiator in the case of unsolicited proposals (if they are permitted – see below). In both cases, however, the contracting authority will usually carry out, or at least manage, the detailed work of preparing the PPP, as this will allow it to retain a suitable degree of control over its contents (subject always to appropriate exceptions, such as for jurisdictions with very limited relevant experience of PPPs or relatively constrained government resources, where it may be necessary to delegate more of this work to the private sector).[82] Moreover, many unsolicited proposals will end up in competitive tenders in any case, which reinforces the need for the public sector to lead the preparation process.

Meaning of preparation. Preparation in this context refers to the detailed early-stage work of defining, describing and specifying the PPP, setting out its main scope and features, so the requisite internal approvals can be obtained and it can be made the subject of an effective tender process or other award to the private sector.[83] It does not, of course, extend to any of the more detailed design and engineering work that may be left to the private sector once the project has been awarded.

Scope. The preparation work should ideally include a comprehensive feasibility study[84] and cost-benefit analysis, showing how the applicable appraisal criteria will be met, together with (or covering) a strategic impact and value for people/ESG assessment (reviewing its social and environmental impact and sustainability), together with reports on any other fundamental matters that should be examined and confirmed before the PPP can go ahead. These studies may be carried out in stages. They may include an initial risk allocation pattern, fiscal sustainability test, an assessment of the contracting authority's capacity to launch and carry through a PPP, an assessment of relevant private-sector strengths and appetite, an indication of likely government support and proposals for the best basis for awarding the project. KPIs, and at least indicative payment terms, should also, if practicable, be identified at this stage. All these reports should then be reviewed and approved (perhaps certified) as compliant with the requisite standards and procedures, by whichever competent body is empowered to do this (such as the PPP unit or perhaps a PPP commission). The private partner (or tenderers) may then need to do further commercial and technical feasibility studies of their own, to validate individual proposals, but this is consistent with the contracting authority's own preliminary one, the purpose of which is to establish the project's basic viability as a PPP and some of its key features.

Detail in regulations. Host countries will probably want eventually to reduce the processes involved to a more detailed set of procedures in the PPP regulations, allowing for differing requirements to be met at different stages of a project's preparation. Ideally. the preparation work should allow at a suitable point any public and stakeholder consultations and hearings, structured to allow issues to be properly aired and ideas for improvements to be put forward. The processes involved should be transparent and participatory.[85] It must also be possible to change any PPP proposals during their preparation to ensure they are fully complaint with all the law's requirements. The structure should not be "set in stone" at too early a stage.

Cost considerations. The cost of all this preparation work can prove challenging, especially for governments in lower-income countries. This is something governments should consider in advance as they structure and define their PPP systems. A mechanism to pass some of these costs on the private sector as part of the award of the PPP contract may also make sense.

[81] The EBRD has done a great deal of helpful work in recent years in this area, developing special procedures (project preparation framework contracts) designed to assist governments with the definition of their early-stage PPPs, with the help of teams of pre-qualified specialists.

[82] When this happens, the contracting authority must be in a position to carry out a thorough review and assessment of the private partner's preparatory work in all its aspects – technical, financial, legal, environmental, social, and so on. It may need to hire independent expert advisers for this purpose.

[83] A great deal of helpful information is also available from published sources about the process of preparing and structuring PPPs, including the UNECE Standards and, of course, UNCITRAL. Contracting authorities can consult it whenever they need to.

[84] Sometimes called a pre-feasibility study.

[85] And ideally be in accord with the Aarhus Convention on the subject. The Aarhus Convention is created to empower the role of citizens and civil society organisations in environmental matters and is founded on the principles of participative democracy. This may (or may not) have been incorporated into the host country's legal system.

12. Appraisal and approval procedures

Purpose. Once a PPP project has been prepared, it should be appraised and formally approved before it can be implemented, and the private partner for it chosen, in accordance with any procedures laid down for this purpose in the law (and/or the regulations). This is essentially a checking exercise, a failsafe mechanism, to ensure that each project is meeting all the law's applicable requirements and that the relevant contracting authority has the capacity to award and implement it successfully.

Scope and powers. The contracting authority should submit the PPP preparation work it has carried out (or managed) to the competent body tasked with reviewing it. The scope and nature of that review, and the powers and responsibilities of the competent body, should be clearly and precisely defined in the PPP law. Enacting states should decide how rigorous a supervisory role they actually want to put in place over the preparatory work of contracting authorities, and whether these should include formal powers of approval (as opposed to simple review). The better-established the PPP system, and the more experienced and sophisticated the contracting authorities involved, arguably the less the need for detailed and rigorous reviews. The inter-relationship between national and subnational government bodies may also complicate this process, requiring different bodies to give different approvals of various kinds, depending on the nature of the project and its fiscal implications (for instance, local or national). The problem of potential conflicts of interest should also be considered and addressed in the way approvals are structured.[86]

Both review and approval? Some states may wish to split the review and approval functions, perhaps giving the first to an administrative body (such as the PPP unit) and the latter to a higher level one (such as a PPP commission). Some may want it to extend to approval of PPP tender documents; others may regard this as unnecessary. Allowance may also need to be made for the fact that, over time, these functions may have to be loosened somewhat as the PPP system becomes larger and more evolved. Eventually, many contracting authorities may be capable of at least an element of self-regulation in this context (although they may choose to allocate different teams to different tasks, to preserve impartiality).

Applicable criteria. The applicable appraisal criteria should then be identified clearly and comprehensively. They should include compliance with the fundamental requirements for PPPs set out in the law (discussed under paragraph 4 above). Affordability, commercial and financial viability, long-term sustainability and the project's potential to enhance public services and achieve socio-economic benefits/value for people (including inclusivity and accessibility) will also be critical. Host countries should consider which others to include in any definitive list(s) of their own. These may include market demand for the service, technical strengths, alignment with the host country's wider strategic plans, the need for and amount of any public sector payments or other forms of public-sector support, cost-efficiency, value-for-money criteria, and the appropriateness of the project risk profile.

Priorities and flexibility. While many of these criteria are likely to be relevant to any PPP assessment, they will not necessarily all be, at least not in all circumstances. Their relative importance or weighting will also vary from context to context, although certain matters – such as affordability and public service efficiency – will always count as key criteria. Lawmakers should therefore give careful thought to the question of which criteria should always be applicable (mandatory) and which will only sometimes come into play. PPP laws should contain an element of flexibility about them, as they are likely to differ depending on the type of project being considered.[87] Some governments may wish to specify the relative priority or weighting of different criteria in the law or regulations. The law should also build in flexibility to refine the criteria over time and include new ones in future.

Risk allocation. Finally, in this context, it should be emphasised that a PPP law should not attempt to allocate PPP risk with any specificity, or indeed at all, except in very general terms. Some of its articles will be based on assumptions about how certain risks are to be borne, and may even address them as a matter of principle. The important word here, however, is specificity. The subject of risk allocation is, of course, critical to successful PPP structuring, but is not really susceptible to legal prescription, as it always comes down to matters of detail and judgement, and the exact details will vary considerably from project to project. It is therefore a matter for the contracts (and

[86] Some commentators become concerned about a potential conflict of interest or bias here, where a PPP unit may have already been involved in helping with the preparation work and is then responsible for formal review. Others – including the authors – take the view that, as the unit's objectives will be consistent throughout, there is no real conflict at work. A concern about bias can always be addressed by splitting the review and approval functions between different bodies.

[87] For example, a PPP procurement will not always be the most cost-effective and efficient basis for tendering a project. Indeed, it will often not be. The value for money test, however, may still justify approaching a project as a PPP rather than a conventional procurement, as other long-term benefits can accrue that mean it nevertheless represents optimum value for money for the country, considered in the round over time. This will involve judgements about the applicable criteria and their relative importance as decisions are made.

related documents), not the legislation. PPPs are all about long-term risk sharing and allocation, and the famous mantra is that risks should be borne by the parties best placed to manage them. That is simply a truism and a conceptual starting point, however. It would not be appropriate to say it in a law, let alone try to define how exactly it should be applied. Even a legal provision requiring an "suitable" allocation of risks between the parties could be unhelpfully ambivalent and open to abuse.

13. PPP implementation resolutions

Rationale. Once a PPP project has been prepared, appraised and selected, it is helpful to confirm this in a public document with a proper degree of formality, finality and transparency. This often takes the form of a published implementation resolution. Its main purpose, aside from marking an important milestone in the implementation process, is to make relevant date publicly available. A document of this kind can summarise all those critical aspects of the project which need to be described in its contents, to ensure they are visible to the public and the market and readily understood, and demonstrate the project's compliance with the law's essential requirements and approval criteria. A summary of the results of the public consultation process should also be included, together with an indication of how objections or grievances can be addressed. Host countries may wish to make the publication of an implementation resolution the start of any formal tendering process.

14. Unsolicited proposals

Permitted or not? Host countries need to work out how they wish to address the subject of unsolicited proposals in their PPP laws. Unsolicited proposals can be controversial, with many commentators regarding them as unnecessary and open to corruption and abuse. Others see them as essential in emerging-market countries with little experience of PPPs. The host country needs to decide whether and to what extent to permit them. Where they are permitted, the provisions and procedures applicable to their use, and the award of the resulting PPPs, should be as clear, transparent, fair and competitive as possible, as well as consistent with those applied to PPPs initiated by contracting authorities.

Initial submission. The law should clarify the initial steps involved in submitting an unsolicited proposal. For example, the private initiator should have to submit its preliminary proposal for the proposed project in the required form, to the relevant contracting authority (and any other competent body authorised to receive it. Host countries may provide for this to reduce the risk of any system abuse). The latter may have discretion, or an obligation, to review it and make a preliminary decision about moving to the next stage. The rationale for making this step discretionary is that the relevant contracting authority may not have the time, resources or inclination to review every unsolicited proposal presented to it, especially if many of them are coming forward or they are clearly incompatible with its wider strategic or policy priorities. The host country may still prefer to turn this into an obligation to review each proposal nevertheless, together with a duty to give reasons for the conclusion reached.

Review and preparation. Only unsolicited proposals unrelated to projects which have already been officially lined up should be considered. The contracting authority can require the private initiator to provide as much information as is needed to make its preliminary assessment, including impact studies (for instance, technical and commercial feasibility) and information as to its own qualifications for the task. The law should respect any exclusive rights of the private initiator in relation to the project (such as intellectual property). If the contracting authority decides formally to review the PPP and move forward, the provisions described above, covering the project's detailed preparation, appraisal and formal approval, would then come into play. If an implementation resolution to proceed with it is then passed, the relevant provisions of the next chapter, dealing with selection of the private partner, would govern the next stage.

Chapter IV. Selection of private partner

15. Procedures to select the private partner

Competitive tendering the norm. The starting point in this chapter of most modern PPP laws is to require competitive tendering to be used to select the private partner, save only where exceptions are expressly permitted, such as in the case of direct negotiations. It is widely recognised today that competitive tendering is generally the most efficient, effective, transparent and fair basis for awarding major contracts, and the best way to mitigate any risk of local corruption. It is also often an explicit requirement of IFIs,[88] such as the EBRD, and a condition of their financing for particular projects (albeit not an invariable one).

Inter-relationship with existing procurement laws? The question always arises with PPP laws as to what extent a country's existing procurement regime should apply to the award of PPP projects? This is something each country needs to consider carefully. Most countries will already have such a regime in place. It may be a sophisticated one which already caters specifically or by implication for PPPs (as in the EU, for example). Where it has been drawn up before the country has started to use PPPs, extensively or at all, however, the regime will often not apply to the very large, complex, high-value structures that PPPs typically represent. Its concepts, procedures and applicable tests may simply not be appropriate to them.

Exclude or amend existing rules? It may be possible to amend or modify the existing procurement regime to accommodate PPPs, or to say that it applies save to the extent expressly excluded or modified by the PPP law (a sort of halfway house; after all, there may be a large body of regulations and/or case law which it would be time-consuming and cumbersome to try to reproduce). On the other hand, this may be difficult to do and may also give rise to considerable confusion about how exactly the revised or reserved provisions will apply to PPPs. For that reason, host countries often prefer to create a comprehensive, self-standing procurement regime under the PPP law which will apply specifically to all PPP projects, and to disapply the existing regime substantially or completely from their award.[89] This is the approach reflected in many PPP laws (and the one suggested by UNCITRAL and the Model Law). If the host country decides to amend its existing procurement regime, or concludes that it can be used without amendment, the provisions of this chapter of its PPP law may look rather different to those explained below. They will either need to cross-refer explicitly to the relevant requirements of the former, or invoke them as a whole, disapplying specific provisions that do not work in this context.

Principles and detail. The regulations are likely to set out the more detailed aspects of the applicable tendering procedures – such as time periods, notice requirements, the forms used (paper or electronic), other formalities and the contents of tender documents. The PPP law may specify the general principles by which they must be governed, such as the need to promote fair and effective competition, transparency, equal treatment, non-discrimination and the efficient use of resources (and perhaps proportionality).

Precise criteria. In the case of each tender, the exact criteria and evaluation methodology for choosing successful bidders and any prequalification process will have to be selected by the contracting authority and set out in the tender documents. These will need to be suitable for the relevant PPP and tender structure being used. The PPP law can set out a "shopping list" of potentially available ones, on which each contracting authority can draw,[90] refining, making them more precise and weighting them as necessary. The selected criteria should always be consistent with those used to approve the PPP at preparation stage and the implementation resolution adopted for it.

16. Tender structures and procedures: general

Choice of tender structure. The exact tender structure used for the award of any PPP will be determined by the contracting authority, in accordance with the requirements of the PPP law and regulations. Its detailed aspects will be set out in the tender documents (and summarised in the public announcement). The PPP law can include a range of helpful general provisions relating to all these structures and application, which clarify their main parameters.

[88] Such as development banks and similar international funding organisations, as opposed to private-sector banks and investors. They include the World Bank (IBRD), IFC, the EBRD, the ADB, the African Development Bank, the Asian Infrastructure Investment Bank and others.

[89] If the host country is an EU accession country or even a member state, it would have to ensure that any bespoke procurement procedures for PPPs were fully consistent with EU law on procurement and state aid.

[90] Please see the Model Law for a comprehensive list of options.

Open and closed tenders. As explained above, the law is likely to provide that an open public tender shall normally be used (where potentially any interested bidders can respond to the published invitation), with flexibility as to the use of prequalification and a one- or two-stage process. Closed tenders – where the contracting authority specifically selects bidders without a public advertisement – should only be permitted in very limited circumstances described in the law. Each host country should decide on the scope of these exceptions. They are often limited to defence, national security or other exceptional circumstances of national interest, where a public tender would give rise to serious concerns about government confidentiality and therefore would not be feasible. Specifying the exceptions with precision in the law is recommended and considered common best practice.[92] Where closed tenders are used, the contracting authority should still try to maximise any available element of competition involved, for instance, by inviting offers from as many sources as practicable.

Eligible participants. The law should be clear about eligible participants in a tender. Usually, any person or groups of people with legal capacity (companies, partnerships, natural persons, and so on) can participate in a tender, subject to any applicable legal restrictions, in particular resulting from rules excluding people who may have been convicted of relevant offences, such as corruption, illicit employment practices (such as using child or slave labour) or similar prohibited acts. National security considerations may also come into play in this context. Where consortia are involved (as they usually will be), their joint qualifications to perform their responsibilities, as well as those of individual members, must be assessed.

Compliant decisions. The law should state that all decisions during the tender process, concerning prequalification, selection (short-listing), rejection and final contract award, must be made only on the basis of the criteria, requirements and procedures set out in the tender documents. This guarantees the integrity and transparency of the process and its efficiency for bidders (so they know what they are dealing with).

Miscellaneous. This part of the law can provide for other matters, including the need for transparent communication processes and methods with bidders (allowing for suitable bidder input in the tender documents and final project definition), the use of tender security (such as bid bonds), restrictions on multiple or joint bids, and the consequences of receiving only one tender. The scope for a final clarification or negotiation stage may also need to be specifically provided for; this represents a potentially awkward area which should be carefully handled in the regulations and tender documents. The nature and extent of any tender confidentiality restrictions, as between competing bidders, should also be covered, together with the contracting authority's need to keep appropriate records of tender proceedings.

Article 17. Tender documents and criteria

Contents of tender documents. The law can usefully lay down general requirements for any set of tender documents drawn up by contracting authorities. These should ensure that the documents are sufficiently complete and transparent to enable bidders to participate effectively on a level playing field. For example, they should describe the project in sufficient detail, identify the essential elements of the PPP to be addressed in the bid, include the main specifications and KPIs, include the draft PPP contract, describe the tender procedures and clarify the applicable criteria and methodology for selection. The underlying principle is to maintain an adequate and healthy level of competition throughout the process.

Full data. It is helpful to oblige the contracting authority to provide all information it possesses about the proposed PPP as may be necessary to promote the efficacy of the tender, either in the tender documents themselves or in a data room. This is designed to impart an additional element of rigour and transparency to the process.

Amendments. It should be possible to amend tender documents during a tender, before the applicable deadline(s), either on the contracting authority's initiative or in response to bidders' comments (subject, of course, to the usual transparency principles). Deadlines must be extended as necessary to allow for this, and appropriate records kept of the rationale for the changes.

[91] Not to be confused with the EU term "open procedure", which has a more specific meaning, excluding a prequalification stage.

[92] Host countries that are EU member states or accession countries must also take the possible exceptions under EU law into account, in particular under Art 10-17 of the EU Directive 2014/23 on the award of concession contracts; under Art 7-17 and Art 32 of the EU Procurement Directive 2014/24 as well as under Art 18- 35 and Art 50 of the Sector Procurement Directive 2014/25.

Article 18. Tender committee

The law may provide for a tender committee to manage each PPP tender. The detailed requirements of its structure, composition and operation should be decided by each host country and set out in the regulations. Some structural flexibility is advisable, allowing committees to be formed which are best suited to the needs of individual projects. It would be fitting to require minutes to be kept and reasons given for key decisions, to promote the legitimacy and transparency of the processes involved.

19. Tender stages

Framework. The law should then outline a framework for the principal stages of a PPP tender, from announcement to contract signature, that will vary depending on which structure is used: open or closed or two-stage, with or without prequalification. Certain aspects of each can then be provided for. These may include the essentials of a tender announcement, the possibility of a single-stage tender, the use of closed tenders (in the limited circumstances permitted – see above), the basic requirements of a prequalification process, the main elements of a subsequent request for proposals and, finally, the contracting authority's obligations in comparing and evaluating proposals on a fair, objective basis in accordance with the tender documents.

More detail in regulations. Note, though, that these provisions usually do not amount to a complete picture, a comprehensive set of procedures. It will be for the PPP regulations – or perhaps the country's existing procurement rules, where they apply – to contain the fuller story, including all the necessary details required (such as formalities, timescales and deadlines, applicable criteria and methodologies) for each tender structure. Even then, many precise details will only be set out in the tender documents themselves. The PPP law aims to define the main pillars of the system, its overarching framework. UNCITRAL[93] takes a very similar approach.

Special provision. PPP laws often need to deal expressly with certain specific aspects of the tender process that may be not permitted, adequately or at all, in more general procurement regimes. These can be essential for PPPs, which typically need longer and more tiered procedures than smaller, simpler projects.

Two-stage procedure. One is a so-called two-stage procedure (confusingly, this is not to be confused with a prequalification step followed by a bid, which is very common). Here, the proposal submission phase, following prequalification, is itself divided into two. It is used when the contracting authority needs to refine certain aspects of the project so proposals for it can be finalised. It is often deployed in the PPP context. In the first stage, bidders are asked for their preliminary proposals (usually excluding financial proposals) and comments on the main project elements: specs, KPIs, financing needs, available contractual terms, and so on. The contracting authority can then refine and modify all these elements in discussion with bidders. In the second stage, bidders submit firm proposals, which can be negotiated, in order of their evaluated rankings, until a conclusion is reached.

Competitive dialogue. The second is more unusual. Known as the competitive dialogue procedure, it originally evolved in the EU procurement context. It can be used when it is not feasible for the contracting authority to specify a PPP project at all in sufficient detail for a routine tender process to be followed. In essence, it allows the definitive aspects of the project to emerge from a constructive dialogue with a group of bidders, so a straightforward competitive tender can be deployed in the concluding phase. Only certain aspects of the tender should be opened to dialogue in this way – that is, those that require greater clarity and specificity which can only properly be achieved with input from bidders. The process should not be used to throw open the whole tender to speculative discussion. Once all the details have been settled, the short-listed bidders are invited to submit their "best and final offers", from which a winner is selected. The idea here is usually to avoid any final negotiation.

Conceptually, the competitive dialogue is similar to a two-stage tender. The main difference is the level of uncertainty about fundamental project features, which can only be defined in dialogue with bidders. The two-stage procedure is more about simply refining, or fine-tuning, certain aspects of a project. In practice, however, the use of the competitive dialogue procedure is relatively limited, as it calls for a certain level of capacity, competence and sophistication on the part of contracting authorities and bidders for it to work, which may only be found in the more established PPP markets.[94] It can also carry a risk of collusion or corruption if not properly handled; its use may therefore also need to be sanctioned by appropriate approvals from a separate competent body (such as the PPP unit following presentation of a report), for which the PPP regulations can provide.

[93] UNCITRAL does not cross-refer to PPP regulations, but to a country's existing procurements rules and laws, in many of its provisions. The equivalent UNCITRAL clauses are also somewhat more detailed.

[94] In some of them – such as France – it has indeed become the norm.

20. Conclusion of the PPP contract

Final stage of award process. To close the procedural loop, so to speak, the law should also provide for the final stage of the award process. It should state that a PPP contract shall be concluded with the winning bidder, as identified by the tender committee on the basis of the relevant evaluation criteria and methodology, or (more usually) with a special purpose vehicle incorporated by it. Any requirements (if any)[95] to capitalise the special purpose vehicle, and subsequent changes to its corporate structure, may be allowed for here, as may requirements for public statements about the contract award (for instance, to post a formal notice on the contracting authority's website and publish it through the official channels).

Public disclosure. The law may allow for the public disclosure of PPP contracts (subject to applicable confidentiality restrictions) where this is thought appropriate. Note that governments may be hesitant about publishing all their contracts as their new PPP systems are taking shape, but that this may in time come to be perceived as advantageous to all, and so be provided for in the law or PPP regulations.

21. Conclusion of PPP contract for unsolicited proposals

Testing competition. The final stages of the award of a PPP project based on an unsolicited proposal will usually need specific provision. The law should seek to bring competitive pressures to bear in this context, notwithstanding the project's initiation by a single private-sector source who may hope to be awarded it without the need for a tender. Where the PPP is based on certain exclusive rights of the private initiator, such as protected intellectual property, and/or its concepts and technology are truly unique or new, fostering competition may simply not be feasible. Subject to this caveat, however, it is advisable for the law to prescribe a framework for attracting competitors. It might say that, once a final decision to proceed with the unsolicited proposal has been made, the implementation resolution for it should be passed and published on the contracting authority's website and the relevant official channels, inviting third parties to compete for the project. If no third parties come forward, or if the caveat referred to above applies, the contracting authority can go ahead and award the project to the private initiator (subject to any final direct negotiations permitted under the law and regulations).

Tenders and compensation. If third-party expressions of interest are received, tender proceedings should be organised in accordance with the law's procedures. PPP laws sometimes provide for incentives or compensation to be offered to the private initiator in these circumstances, in view of the effort and resources already invested by it in the project. Host countries should think carefully about whether they wish to include such a mechanism and how exactly it would work. Cost compensation payments and adjustments to bidding scores are popular examples. Compensation for pre-tender costs incurred (up to a maximum amount) should be relatively straightforward. Finding a suitable basis for adjusting tender evaluation scores can be far more difficult. Some countries prefer not to provide for this at all; others may already address them in other procurement regulations.

22. Direct negotiations

Exceptions to tendering procedures. The somewhat contentious subject of awarding a PPP project on the basis of direct negotiations, without holding a competitive tender, usually needs to be covered in a PPP law. Host countries should think carefully about the exact circumstances in which they wish to permit this and define them closely. The reason for caution is that these situations are widely recognised as being vulnerable to corruption, as well as creating logjams in a country's pipeline of potential PPP projects. Strong competitive bidding also tends to elicit the best price.

Specific instances. The exceptions might include:
(a) when only a single compliant bidder has surfaced in the context of a tender process (subject to the relevant qualifications);
(b) when the unsolicited proposal provisions allow it;
(c) perhaps, when there is an urgent need to maintain public services and holding a tender would be impractical (although some experts caution against this exception);
(d) in the case of small, short-lived projects that do not meet the usual statutory thresholds;
(e) when the state's vital security interests do not permit tendering and, lastly
(f) when it has been clearly established, based on an independent expert report, that there is only one source actually capable of implementing the project (for example, in the case of unique patented technology or intellectual property).

[95] There is no obvious reason why this subject should need to be treated as a matter of binding legal requirement. Many countries would be content to leave it to the PPP contracts. But countries wishing to make their PPP legal and regulatory frameworks complete may wish to touch on it. Care should be taken, however, not to make any provisions too restrictive.

Caveats. The detailed procedures governing any such direct negotiation can be set out in the regulations. Close monitoring of the PPP implemented as a result of the procedures, including its standards of performance, is encouraged. Even where an exception applies, it may be appropriate to oblige the contracting authority to try to introduce an element of competition into at least aspects of the procedure if it believes it can.

23. Review and challenge procedures

Recognition of principle. It is usually appropriate to permit bidders who feel they have suffered (or may suffer) loss or injury as a result of a contravention of the law by a government body in connection with a PPP's award or implementation to bring proceedings through any available legal channels in the host country. It is difficult to generalise about what exactly such channels or proceedings might consist of, as they can vary widely from jurisdiction to jurisdiction. Many countries have established grounds for bringing judicial review and similar challenges to government decisions improperly taken. The host country should consider whether the established channels are adequate for this purpose.

Detailed provision in regulations? Any established channels and mechanisms may need to be reinforced or supplemented in the regulations.[96] Careful thought should be given to the question of the speed and efficiency, as well as efficacy, of any such channels, and the availability of suitable interim measures. It is much better to solve a problem caused by an abuse of process at an early stage than to have to wait until it has damaged the project at a later stage; prevention is better than cure. Where the PPP regulations provide for such procedures, the law should require them to operate quickly and efficiently, using interim or interlocutory measures and powers, so that defective or unlawful decisions and actions can be challenged and overturned at speed, ideally before they are actually implemented in the context of a PPP project. Broad powers to open up, review and revise decisions and documents, and to suspend or overturn actions being taken, should be allowed for, together with a power to award compensation for losses incurred and even to cancel an entire project in appropriate circumstances. Host countries should take care in framing any such powers, however, as they would be invasive and sweeping, and may overlap with similar powers and mechanisms under other branches of law (such as procurement laws, judicial review or the laws of tort or contract).

Chapter V.
PPP contracts

24. Main terms and conditions of PPP contracts

Contractual framework. Nearly all PPP laws will contain provisions governing the agreements that give effect to the PPPs – the PPP contracts. These are addressed in this chapter, together with other fundamental aspects of those agreements. PPPs are fundamentally creatures of contract, and so, from the regulatory perspective, have to be set in the context of the nature and workings of the host country's wider law of contract. This, in turn, raises the question of how much freedom of contract can and should be permitted in the law for the parties to any PPP contract to agree and shape its contents. Many countries will be content to allow wide latitude. Others may have a more prescriptive approach to it, especially in view of the importance and visible nature of the public services and/or public infrastructure assets involved.

Freedom of contract. The most advisable – and most favoured – approach is to provide in the law that an overriding principle of freedom of contract shall govern the drafting and negotiation of the contents of a PPP contract. The parties can agree essentially whatever provisions they choose, in other words, subject to any requirements or constraints in the wider legal system. Host countries should give careful consideration to what these constraints might be. There will always be some, ranging from unfair contract terms, for example, to unenforceable provisions (such as the exclusion of certain forms of liability) to terms required or implied in certain circumstances, sectors or industries (especially extensively regulated ones). In reality, many other laws will also apply to the assets, services and responsibilities involved, putting effective limits on what can be permitted under the contract.

Broad latitude advisable. Within those constraints, however, most PPP laws today envisage that it will be most productive to allow the parties to have wide latitude in settling the terms and contents of the PPP contract, to reduce the risk of clauses which they consider appropriate being treated as unavailable or challenged as illegal. PPP contracts are long, complex documents, often heavily negotiated by the parties to them. The parties usually need the help of sophisticated professional advisers to get them right. When those advisers are available, it tends to make most sense for the law to trust the parties, so to

[96] In many cases they will need to be, as the complexity of PPPs means they often have to be subject to bespoke procedures and mechanisms at almost every level.

speak, to reach appropriate conclusions about their terms, with the freedom to agree the clauses they consider appropriate. Even where they are not, it can be unduly restrictive or unhelpful for a PPP law to attempt to prescribe individual clauses, and very challenging even to word them.

Alternatives. PPP laws will often then set out a "wish list" of the main provisions typically found in agreements of this kind. This helps focus minds on them and removes possible doubts about their legitimacy, while leaving it to the parties to make the final decisions about which to use and how exactly to word them. The underlying assumption behind this approach is that the host country will welcome and accommodate it. Countries that take a more prescriptive approach to commercial agreements with government, or which see a need for a higher degree of regulation of the whole PPP sector, as we have said, may wish to include tighter controls over the contents of PPP contracts. That is their prerogative. Great care does need to be taken, though, in the way such clauses are worded in the law, as awkward wording may make the provision unworkable or unbankable.

Model clauses. The freedom of contract approach is perfectly consistent with the drawing up and publication of model clauses for PPP contracts. Most countries find it helpful to do this, as it sets standards, promotes an understanding of the system and reduces the scope for unnecessary negotiation and wasted resource. Model clauses should usually not be made legally binding or compulsory, however. Their role is to furnish constructive guidance, not to remove or constrict the valuable freedom of contract discussed above. They may otherwise prove counterproductive and an obstruction to the rapid evolution of the system.

Available PPP structures. This can be a logical place in the law to address the subject of the PPP structures available to the parties, as these[97] are all essentially contractual arrangements. The industry has evolved a wide range of possible structures over the past few decades, and an even wider range of familiar (and sometimes confusing) acronyms used to describe them, such as BOT, BOOT, BOO, DBFO and BLT.[98] It is again usually desirable for the law to provide that all of them will be available, in principle, and that the parties will have maximum freedom to use the structure which seems to them most suitable for the project in question. If host countries have any serious reservations about any of them, they should modify the provision accordingly.

25. Conclusion, amendment and termination of PPP contracts

Parties' rights to extend and amend contract. The law will state that the PPP contract is to be entered into by the contracting authority and the private partner selected in accordance with the previous chapter (and any other persons whom they agree should be parties). It will terminate on the expiry of its term, which may be extended in accordance with its provisions. It can be amended or terminated by mutual agreement, but subject to any relevant restrictions in the contract, the regulations or otherwise at law. Some countries may wish to specify applicable conditions and criteria for contract amendments with precision in the PPP regulations. Others, particularly those from a common law tradition, may prefer to leave a wide discretion on the subject to the parties. Obviously, any elements of the PPP contract which require the initial approval of any competent bodies or relevant authorities besides the contracting authority will need further such approval before they can be amended.

Constraints. Some laws therefore impose clear constraints to the parties' freedom to agree on amendments to the PPP contract. The concern here is the risk of contracts being abused and clauses changed in ways which might suit the parties, but may not be appropriate for the project or the country. For example, some laws will require a separate tier of approval of any amendments to the essential or fundamental aspects of a PPP, especially aspects which weighed heavily in the application of the original approval criteria or the competitive tendering process for selection of the private partner. Some countries may wish to translate these (somewhat imprecise) terms into percentage figures or monetary amounts. Others may wish to specify the applicable approval mechanisms in detail.[99]

Some amendments are inevitable. It should be remembered, though, that most PPPs will be subject to a large number of amendments during their life – as will any major project – and putting ponderous obstacles in the way of the parties' freedom to agree them may be pointless or counterproductive. The underlying commercial and political reality is that, if major changes need to be made to a PPP, let alone any fundamental restructuring, other government bodies will almost certainly be drawn into the process, thus providing another safeguard against abuse.

[97] Perhaps apart from institutional PPPs. See above.

[98] Build, operate, transfer; build, own, operate, transfer; build, own, operate; design, build, finance, operate; and build, lease, transfer. There are many others. The standard texts on PPPs should be consulted for fuller explanations.

[99] See the alternatives suggested in the Model Law or the provisions of the UNCITRAL model clauses.

Early termination and compensation. Early termination of the PPP contract can also happen unilaterally in the circumstances specified in the agreement, subject again to the relevant conditions and procedures, such as the lapse of time or (where the law requires it) the confirmatory decision of a court or tribunal. It may also be appropriate for the law to say something about the payment of compensation on an early termination of a PPP contract. This is because the subject almost invariably proves highly challenging and contentious when these contracts are being negotiated, with the potential payment of very large amounts "on the table". All the detail will be set out in the PPP contract, distinguishing between debt and equity payments, and between the different grounds of termination. The law can help clarify what is feasible and appropriate, however, at least in general terms.

It may say, for example, that either party may be entitled to compensation on an early termination of the contract for any reason, in accordance with its terms (and those of any direct agreement). This would be separate from the usual compensation payments one would expect to be payable on a contracting authority default. The notion that a defaulting party may be entitled to compensation when it is itself at fault can often meet with great scepticism on the part of government bodies attempting PPPs for the first time. It may therefore be helpful for the law to spell out that this may, indeed, be the case. The basic rationale for it is that the assets transferred to the contracting authority on an early termination will usually have a long-term value that far exceeds the amount of any losses it suffered as a result of any default. Moreover, they will usually have been funded largely or wholly by the private partner. All that funding will be lost and written off in the absence of any compensation.[100]

Best international practice therefore usually entails the payment of at least some compensation for those assets and costs. This approach is reinforced by the fact that project finance lenders will nearly always insist on being paid down in these circumstances. This is also consistent with the relevant legal principles of many jurisdictions (for example, rules against unjust enrichment). The law should not specifically require such compensation to be payable, however. The final decision about that question should, again, be left to the parties negotiating the PPP contract. But it may make sense for the law to oblige them to give due consideration to the principles governing any such compensation when they are concluding it, while itemising some of these factors. The applicable details will still have to be worked out and settled in the contract.

Other termination matters. The law may also refer to some of the other matters that may need to be specifically addressed or provided for in connection with a termination of the agreement, such as transfer or purchase of certain assets (such as technology), training of government personnel, residual support services (such as spare parts) and decommissioning. These should be covered as appropriate in the PPP contract.

26. Property and related matters

Property required for the project. It may be necessary or helpful for the PPP law to address some of the main property (real estate) issues likely to arise as a PPP is being structured and negotiated. For example, the contracting authority will probably be given general responsibility for ensuring that the physical real estate (typically, the site) and associated rights (such as easements and rights of access) and assets needed for the PPP are provided to the private partner, in accordance with the terms of the PPP contract (where the relevant details will be set out). No additional public tender[101] needs to take place. This can apply both to property in the contracting authority's ownership or control, and that of third parties. In the latter case, the contracting authority may be obliged to acquire it, if necessary using available compulsory purchase powers, together with the necessary legal rights and interests. It will nearly always be more sensible and efficient to leave the management of these property risks and responsibilities to the public partner, rather than trying to transfer them to the private one. Investors and bidders for projects will expect this. Any doubts or uncertainties on this point can be fatal to the success of a PPP.

Contractual rights and interests. The PPP law can then confirm the rights of the parties to the PPP contract to grant each other whatever property-related rights or interests are needed for the purposes of the project, in relation to the property comprised in the PPP, in accordance with the terms of the contract. These may include outright ownership, leases, licences, rights of use and so on. The private partner's rights and interests should be able to be passed on (subject to their terms) to its third-party contractors. Some PPP laws also acknowledge that the parties may decide in the PPP contract to identify and list different classes of asset by reference to their treatment on

[100] This subject is discussed in more detail in the chapter on PPP contracts.

[101] Additional to the PPP tender, that is.

termination (for example, some assets which are to be transferred or sold to the contracting authority). This approach may be customary or obligatory in certain (civil law) jurisdictions

27. Types of payment under PPP contracts

It can be helpful for the law to confirm that the PPP contract may contain such forms, conditions and amounts of payment for the proper performance of the private partner's responsibilities as the parties may agree. Local law may impose certain constraints in this area – such as regulatory requirements – which can be allowed for. The law can set out a broad, illustrative list of the types of payment that may be used, including both direct user charges (typical of a concession structure) and payment streams from the contracting authority (such as shadow tolls and availability payments), making it clear that any available forms of permissible payment not specifically prohibited by local law may be used. Payments to the contracting authority from the private partner may also be included, such as PPP fees, royalty payments or profit shares. It is generally advisable for the provision to cast a wide net on this subject, with a view to eliminating any unnecessary restrictions or doubts on the forms and types of payment that can be made.

28. Liability of parties to the PPP contract

Some laws – by no means all – may contain provisions on the liabilities and remedies of the parties if the terms of a PPP contract are breached. The terms of the contract and the rights provided by a country's wider legal system should normally apply anyway, without the need for further legislative detail. Host countries should consider whether the law contains any unusual or problematic restrictions in this context which need to be amended or overridden in the PPP law, or gaps that need to be specifically provided for.

29. Step-in rights and substitution of parties to the PPP contract

Meaning. Step-in rights are a common feature of PPPs, especially those funded by project finance. They can either work in favour of the contracting authority, allowing it to assume temporary control and operation of a project in defined circumstances, such as when an emergency endangering the public or public services occurs. Alternatively, they can operate in favour of the lenders, allowing them to pre-empt a threatened termination of a PPP contract by the contracting authority, temporarily assume control of the project, put right a default and perhaps restructure or replace the private partner, to keep the project functioning and its revenues flowing. Such rights can be surprising and contentious from the perspective of either party to a PPP contract. They can also be vitally important, however.

Summaries in PPP law. It is therefore commonplace for PPP laws to address step-in rights expressly. The provision may allow the parties to include step-in rights in the PPP contract (and in a direct agreement with the lenders), although without imposing any obligation to do so. The relevant details, procedures and conditions will be agreed and set out in the contracts. (A very "ESG-conscious" law – to coin a phrase – might also require those procedures and conditions to be drawn up and specified in a way that is unlikely to adversely affect the project's provision of public services to end-users).[102] Because the nature and effect of lenders' step-in rights can be startling to contracting authorities negotiating PPPs, it can be helpful for the law to summarise the main powers they typically bestow on those lenders.)

Covid-19 considerations. There is much talk about the ways government powers and commercial contracts may need to be modified to allow more effectively in future for the impact of global pandemics on the scale of Covid-19. Many possibilities are being discussed but details have yet to be worked out.[103] One likely possibility, however, is to strengthen public-sector step-in rights by according greater latitude to take over projects (in whole or part, temporarily or even permanently) to deal with crises of this nature. Host countries may wish to allow for this as appropriate in the provisions of their laws dealing with step-in rights. It should always be borne in mind, though, that, as step-in rights are primarily matters of contract, the key provisions will be found in PPP contracts and direct agreements with lenders, rather than in statutes. There is no simple statutory solution to this problem, and respecting the sanctity of commercial contracts will remain a fundamental principle of free-market economies.

[102] See the article on this subject in the Model Law, for example. This is a very novel requirement, however, reflecting the innovative nature of some of the People-First PPP Principles. It is worded as simply a qualified aspiration, as it were, for the relevant contractual provisions (aim to ensure…), as step-in rights are often considered fundamental components of PPP contracts, by both contracting authorities and project-finance lenders. Both might consider a more restrictive, unqualified obligation along these lines to be unacceptable.

[103] As at the time of writing.

Chapter VI.
Support, protections and guarantees

This chapter seeks to confirm the viability of certain types of clauses in PPP contracts that can be problematic or uncertain when they are being structured or negotiated, and to clarify certain general responsibilities. The less uncertainty there is about the feasibility of such provisions, the less the need for the chapter. Provisions can be scaled back or deleted as appropriate.

30. Protection of parties' interests under the PPP contract; miscellaneous

Exclusivity. It can be helpful to confirm that exclusive rights can be granted in a PPP contract. This could be in the best interests of the project and the public, as well as (more obviously) the private partner. Whether this is appropriate in individual cases, or will tie up competition unnecessarily, is something the relevant contracting authorities will need to decide.

Licences and permits. PPP laws will usually give the private partner primary responsibility for obtaining the permits and consents needed for the project, while obliging the contracting authority to provide all appropriate assistance in this context, as well as granting any for which it is itself responsible. This risk is effectively a shared one, in other words, but with the private partner taking the lead role, as it will be primarily responsible for satisfying conditions attached to permits and consents.

No undue interference. The law can prohibit the contracting authority from taking steps which may unduly interfere with or obstruct the private partner's rights and obligations under the contract, including its management autonomy – subject, of course, to any specific rights of intervention the former may have under the contract (such as certain approval rights) or at law (such as step-in rights). This is designed to overcome the temptation many contracting authorities often feel, at least in the early days, to try to micromanage PPP projects and to help them make the cultural shift from traditional procurement methods to the much more "hands off" approach needed in the case of PPPs. Care should be taken, though, not to impose too sweeping a restriction on the contracting authority's actions. The public sector has a legitimate right to monitor and supervise the project and to assist in addressing major difficulties.

Adequate level of payments to private partner. In many PPPs, provisions of the PPP contract determine the payments to be made to the private partner (regulation by contract). In some cases, however, a regulatory body of some kind sets or adjusts the tariffs charged to users or other payments to be made to the private partner. If the regulatory environment in the country is new and untested, or believed to be unreliable, investors and lenders may be reluctant to subject themselves to decisions made by the regulator. In some circumstances, if permitted under law, it may be appropriate for the parties to agree in the PPP contract the formulas and algorithms for the adjustment of tariffs or other payments, and to specify the procedures by which any such adjustment will take place, as an exception to normal regulatory practice. An important caveat is that this method is not likely to work well if the tariffs in question are for a complex utility system (such as electricity or water distribution), except as a short-term, transitional arrangement.

Exceptional events. It probably makes sense to allow exceptional or special event provisions to be included in a PPP contract, offering protections against – and compensation for – the impact of certain major events beyond a party's control, such as force majeure or material change of law, and to insert an illustrative list of the sort of consequences that may be specified in the contract. These may include, for example, relief from liability for breach, amendments to the contract's terms, payment adjustments, cash compensation or early termination. These clauses again tend to feature among the more difficult and challenging ones in negotiation. It can therefore be important to highlight their availability in principle in the law.

Essential shareholders. It may also be helpful to protect the position of the contracting authority – and therefore the public interest – by requiring its consent for any disposal of a controlling or essential interest in the private partner, at least for a certain period of time and subject to appropriate conditions. The public sector sometimes misses this possibility in negotiation, and the private partner is not likely to volunteer it!

31. Forms of public support for PPPs

Another helpful "avoidance of doubt" provision might make it clear that the full range of the various forms of government support, assets or commitments which the host country government is entitled to provide under applicable law shall also be available to PPPs. These will, of course, also be subject to any relevant constraints under applicable law.[105] If necessary, these can also be provided for or refined specifically and in more detail in the PPP regulations and

[105] For example, EU member states and accession countries will be subject to EU state aid rules. Many other countries will have equivalent restrictions.

explained in the guidelines. Examples – which can be set out in the article – would include payments, grants, asset contributions, property, subsidies, guarantees of different kinds, loans, investments, tax breaks and incentives. The terms and conditions applicable to them would be set out in the PPP contract. Host countries should add references to any other specific forms they think need to be included (if any) or qualify or remove any they regard as inappropriate.

32. Protection of lenders' and investors' rights and interests

General. A further avoidance-of-doubt provision might specifically allow the parties to a PPP contract to include such protections in favour of lenders, either in the PPP contract or in the direct agreement, as they may agree they are necessary to secure the successful financing of the PPP. These can include step-in rights and their associated powers in direct agreements (see above). But it should also be remembered that the credit agreements with lenders will also contain numerous clauses requiring the lenders' approval to exercise specific rights and powers under the PPP contract, and preventing the taking of certain steps without their consent. Lenders' interests are usually well-protected anyway, in other words. There is not usually any pressing need for further statutory protection. In addition, however, this provision can also confirm that the private partner and its investors are able to grant to lenders the full range of financial security interests available at law over the assets and rights comprised in a PPP, giving helpful examples.[106]

Justification. The rationale for such a provision is that doubts and uncertainty are often voiced in countries first attempting PPPs about the extent to which the rights and powers of commercial lenders can or should be protected or prioritised, either contractually or through security interests, where public infrastructure, publicly owned assets and public services are involved. The article acknowledges the possible need to do so, and the parties' rights to provide for them appropriately. This can help remove doubt and send positive signals to the financial markets. Step-in rights, in particular, can prove problematic. As we have seen, it is usually helpful to spell out their availability.

No replacement of private partner without consent. As a caveat or contrast to the security rights recognised above, however, some PPP laws provide (as does UNCITRAL) that any transfer of the private partner's rights and obligations will require the consent of the contracting authority, as provided for under the PPP contract. Care needs to be taken with this provision. It should not stand in the way of what is known in common law countries as assignments by way of security (that is, lenders can enforce the private partner's rights under its contracts, without having to perform its obligations). It is designed to prevent a full transfer of those obligations, as well as rights, which would mean in effect substituting another party for the private partner. This should always need the contracting authority's consent, even when that consent is automatically provided for, as in a direct agreement. Subcontracts and subleases of part of those obligations are also, of course, allowed.

33. Protecting end-users and the general public

Procedures to safeguard the interests of end-users and the general public. ESG thinking these days might call for a law to include a provision to alert governments to the importance of ensuring adequate protection for the general public and end-users of public services as PPPs are implemented. This might seem obvious, but in reality, is too often and easily forgotten or downplayed by the parties. (It is a fundamental aspect of the People-First PPP Principles.) A provision of this kind might, for example,[107] oblige governments, in drawing up their detailed procedures for implementing PPPs in the PPP regulations, to take due account of the needs and best interest of members of the general public and end-users who stand to be affected by such implementation, as well as those of the parties to the PPP contract and its main stakeholders. Alternatively, or in addition, it could be included in the one of the more general provisions of the law, such as the preamble or criteria and general requirements article (see paragraph 4 above).

Grievance and complaints procedure. The obligation referred to in the preceding paragraph might require a suitable mechanism to be put in place for lodging and addressing complaints, grievances and objections, including where appropriate a regulatory or parliamentary ombudsman. Any such procedures will always need careful thought, however. The legal systems of most countries will already contain a range of procedures, rights and remedies designed to achieve a similar objective. If so, there may still be no harm in creating additional mechanisms

[106] For instance, property mortgage, pledge, enterprise mortgage, assignment, fixed and floating charges (or their equivalent), share and account pledges, assignments of receivables.

[107] See the Model Law for an example. There are still few examples in enacted laws of this kind, though.

specifically directed at PPPs, in the procedures. Such mechanisms should never oust or limit other existing rights and remedies, however, including the despite resolution mechanisms of the parties set out in the PPP contract.

Operational-level grievance mechanism. A provision of this kind might allow the contracting authority to require the private partner to put in place an operational-level grievance mechanism, which would be designed to facilitate the efficient handling of complaints and claims by the public. This would need to be provided for specifically in the PPP contract to be enforceable.

Service adjustments. When the PPP involves services to the public, it may make sense to allow certain adjustments to be made to those services over time as circumstances dictate, together with (if necessary) non-discriminatory third-party access to any related infrastructure network or system.[108] How exactly any such adjustments are made, and with what consequences for other provisions of the contract (especially those determining the private partner's remuneration), will need careful consideration. It may be by simple agreement between the parties, in which case-specific provision may not be called for. Or it may be subject to the agreement's |change of circumstances" clauses, and third-party resolution in the event of a dispute. Many civil law countries vest the power to insist on such changes in the contracting authority.

Chapter VII. Governing law and dispute resolution

34. Governing law

Governing law of PPP contract. There is considerable debate about what PPP laws should say about the governing law of PPP contracts. Many will say that local law must apply. It is questionable whether an automatic presumption of this kind is the most constructive provision for a PPP law to contain, however. In the end, a more convincing approach is perhaps to allow the parties to a PPP contract to choose and agree on the system of law which governs it, but subject to a presumption that local law will be applied save in exceptional circumstances.

Departing from local law. Many legal systems apply local law anyway to their government agreements. Occasionally, this can be problematic or even fatal for PPP projects, if the perception of international investors and financial markets is that the host country's legal regime is not compatible with a project's "bankability". Very innovative contractual structures sometimes need to be deployed as a result. In addition, where the PPP project is a cross-border one, with assets straddling different jurisdictions, under the terms of a single unitary PPP contract, a neutral system of law may have to be applied to the contract, by agreement among all the parties, which (by definition) is not that of one or more of the jurisdictions involved.[109] It can therefore be appropriate to allow the parties at least the possibility of choosing a different system of governing law other than that of the host country.

Local law is often the inevitable choice. The choice of a foreign system of governing law is a somewhat theoretical possibility all the same. PPP contracts are almost invariably governed by local law, for a range of cogent reasons (especially at the sub-sovereign level). Most of the underlying assets will be governed by it anyway, especially the real property involved. The public infrastructure and public services involved will also be subject to local law. Moreover, it would often be very difficult politically for a government to accept the use of foreign law on a large-scale, high-profile infrastructure project. Host countries should therefore keep in mind that local law will nearly always apply to the PPP contract in practice in any event.

Governing law of other agreements. Other agreements and documents relating to the PPP (there will always be a plethora of them) are unlikely to be subject to quite the same sensitivities as the PPP contract. It is usual to allow the parties to choose the law governing them, subject to any applicable legal restrictions. These are likely to be local law for the security documents and purely domestic commercial subcontracts, and an internationally recognised system of foreign law for the credit agreements and the other major commercial contracts.

35. Dispute resolution

Freedom of contract. The subject of the dispute resolution mechanisms to be used in the PPP contract is more straightforward. Here, the principle of freedom of contract should apply. The parties should be able to choose the mechanisms they think most appropriate. The law can mention a range of possibilities – such as mediation, binding and non-binding expert adjudication, national or international arbitration (commercial and/or investment) or the

[108] See the UNCITRAL model clauses.

[109] The best-known example is the Channel Tunnel, the concession agreement for which was made subject to (in crude terms) common principles under both British and French law, with specific provision for resolving inconsistencies between them.

local courts where appropriate. At least in the case of larger PPP projects, there is a common perception that international arbitration, under a well-recognised system or set of rules (for example, ICC/UNCITRAL, ICSID or the London Court of International Arbitration), is the only way to be confident of obtaining a fair and unbiased result, and that international lenders will not finance the project without it. It is therefore important for the law to enable its use if possible.

Special provision? Some legal systems will prescribe specific procedures in this context nevertheless (for example, those that treat PPPs as a branch of administrative law and accordingly make them subject to the local constitutional courts). If they do so, in ways which are perceived as problematic, the relevant legislation may have to be amended to permit a different approach in the case of PPPs – assuming this is legally and politically feasible. It may also be helpful for this provision of the PPP law to confirm the efficacy of any waivers of sovereign immunity included in the contract; these will usually be essential for legal proceedings to be successfully brought against the contracting authority or other sovereign body.

Chapter VIII. Implementation and monitoring of PPPs

This area is often somewhat neglected in PPP laws. The accurate compilation of full, detailed information about the implementation and operation of PPPs, including the challenges they face during their life, is essential to the successful development of the wider PPP system. PPP systems must be constantly reviewed and assessed by the governments advancing them. A well-drafted PPP law should provide for this.

36. Monitoring and reporting on the implementation of PPPs

Monitoring and supervision. The law should confirm the contracting authority's right, under the PPP contracts, to exercise such powers of supervision and monitoring of its PPPs as may be necessary to satisfy itself that they are being implemented in accordance with their terms. Reports, documentation and physical access to the site should be allowed. The detailed requirements and procedures will all have to be set out in the PPP contracts themselves, as these powers must be exercised in ways which do not interfere with the efficient implementation and management of the projects. But the law can encourage the parties to make proper provision for them.

Each contracting authority should then be subject to an obligation in the law to provide regular reports about its PPPs to central government, copies of which should generally be publicly available, as well as any specific information requested from time to time. This is designed to help promote that central store of useful information mentioned above.

Contracting authorities should also be required to keep accurate and complete records of the decisions made and procedures followed by them in connection with all aspects of PPP implementation under the PPP law. This is considered important from the perspectives of both transparency and accountability.[110]

37. PPP database

The PPP law can also mandate the creation and maintenance of a central database of PPPs in the host country, containing information that is reasonably comprehensive, up-to-date and clear, as well as generally publicly available. This helps to promote the transparency of the whole system, which is likely to be in the best interests of all involved. The detailed workings of the database can be set out in the regulations.

Chapter IX. Transitional and final provisions

The final chapter of the PPP law would deal with the formalities of its entry into force, including the cancellation or amendment of relevant existing laws and perhaps a deadline for making other consequential amendments.

[110] Both of which constitute important ESG and People-First PPP Principles.

(E) Supporting regulations – some observations

The question sometimes arises as to whether and to what extent aspects of a PPP law should be contained in separate or supporting regulations, as opposed to being set out in the primary legislation itself. There is no simple or generally applicable answer to this. Much will depend on the legislative practices and traditions of the country concerned, and the content of its other relevant laws.

Ideally, in our view, the primary PPP law should be as comprehensive and self-contained as possible. If everything can be set out clearly and effectively in a single legislative act, so much the better. After all, PPP laws are generally not very lengthy or complex documents. It is also important for legislators to think carefully about which aspects of the new PPP regime genuinely need the force of law and which do not, or which need relative flexibility. Subordinate regulations can sometimes be treated as a form of "half-way house," giving provisions a degree of legal significance (and making them part of the law) while treating them as less strictly prescriptive than primary legislation.

That said, separate regulations can certainly play an important role in creating or developing an effective legal regime for PPPs. They may have to be introduced at a later stage following enactment of the main PPP law, for example, to "plug a gap", fill in details or deal with unforeseen circumstances. Exceptions may have to be made to the general provisions of the law (without, of course, modifying its principles) to allow for sector-specific needs, perhaps, or those of particular geographical areas. Other examples of where they might be used include:

- identifying eligible contracting authorities for certain types of project, where the PPP law may be unclear
- prescribing elements of the critical project selection and preparation phase(the difficulty, complexity, time and resources needed for this phase often mean that civil servants value relatively detailed provisions telling them only what has to be done as a project is identified, selected and prepared, so that the requisite formal approvals can be obtained)
- developing aspects of the tendering procedure that could not be entirely settled at the time the primary legislation was drawn up (for example, tender qualifications or the content of documents or specifications)
- laying down definitive criteria for contracting authorities relating, for example, to the structure or appraisal of PPPs (such as value for money or other fiscal tests) or aspects of the decision-making process
- dealing with detailed regulatory issues (such as pricing structures or service standards)
- providing for aspects of model contractual provisions, such as conditions for termination or amendment (but subject always to the need for flexibility discussed in the previous section).

Perhaps the simplest way to answer this question is to see the PPP law as the overarching structure or skeleton of the legal framework, the provisions, principles and elements of which are regarded as fixed, and the regulations as providing the supporting detail – the bricks-and-mortar, so to speak – which can be modified or replaced without difficulty. Matters of detail that should be subject to change can go in the latter. This is the way much utilities regulation works.

Regulations may have special relevance in countries with a PPP unit involved in vetting and making sure that contracting authorities adhere to required procedures and methods. The PPP unit will soon come to interpret primary legislation in certain ways, to resolve uncertainties and ambiguities, based on its experience of operations in the "real world" and the detailed application of the law's provisions. It may be helpful for the PPP law to bestow a formal function on the PPP unit of this kind – that is, to propose regulations to the entity authorised to issue them.

It is also important to distinguish between elements or aspects of the PPP regime which are intended to have the force of law and those which are not. Guidance, practice notes, templates and so on are usually not.

(F) Conclusions and recommendations

The landscape in the field of the legislative and regulatory framework for PPPs around the world has changed and advanced dramatically in the past 20 years. Many countries have made impressive progress in this area. They have learned from each other, and from the expertise of international bodies able to offer sophisticated guidance on the subject, such as the EBRD, the EU, the United Nations and the World Bank. Some valuable precedents have been created. These were in notably short supply at the start of the 21st century.

As a result, crafting new laws in this area, or otherwise refining their legal frameworks for PPPs, need not hold any particular terrors for host countries. PPP laws can be – indeed, usually are – relatively short and straightforward documents. They should address key definitions, applicable sectors, the power and authority of conceding bodies, if necessary tendering and selection procedures and criteria, and usually the central components of a PPP contract. It may be helpful to touch on a few other fundamental areas as well, such as finance and security, step-in rights, administrative coordination, the range of available PPP structures and perhaps certain sector-specific features of the law that need to be addressed. They are unlikely to need to go much further than that. Thought also needs to be given to the question of which provisions are appropriate for the statute and which for any supporting regulations. The key to drafting these laws well is often to see them as essentially clarificatory and permissive documents, as enabling legislation which makes certain types of arrangement and agreement feasible and practicable, rather than as restrictive or heavily prescriptive ones that seek to cover every conceivable aspect of a PPP system. Governments seeking to introduce a programme of PPPs – as so many are and have been for the past 20 years – will have their work cut out anyway, as they rise to the many challenges of in-depth understanding and successful implementation. A clear, coherent, well-conceived and flexible legislative framework will simply provide a solid cornerstone for that endeavour.

Drawing together the threads of advice in this chapter, governments thinking about drawing up new PPP laws for the first time to underpin their PPP systems could consider some of the following steps to create a comprehensive legal framework in accordance with international standards and best practices:

- Start with a wide-ranging review and analysis of the country's existing laws that may impinge directly on PPPs, so a list can be prepared of constraints or deficiencies that must be addressed as the PPP law is drawn up.
- Collate the most helpful precedents, guidance and published materials on the subject of PPP laws available at an international level.
- Examine the structure of public procurement rules (at a national and if applicable international level) and determine the extent to which (if at all) they must be modified or supplemented to cover the award of PPPs.
- Define the suitable scope of the new PPP law in light of the above and the government's policy preferences/any policy statement on the subject.
- Include appropriate provisions as required, covering (among other things) the areas discussed in this chapter (and summarised in the preceding paragraph).
- Start preparing and collating a precedent library of model clauses for PPP contracts, but without making these automatically binding as a matter of law.
- Start preparing and issuing regulations and/or guidelines about the workings of the new PPP system and the application of the law. These are likely to need extensive and repeated refinement over time.

How exactly the PPP law then takes shape and evolves will depend on many factors, reflecting the country's wider legal system, the needs of the programme and the policy decisions made by government about its contents. There are no rigid and invariable rules. Where the subject is approached with relevant knowledge, understanding, balance and flexibility, however, it should not prove too great a challenge to draw up an appropriate statute.

Appendix 1

PPP laws and legal assessment: diagnostic questionnaire

1. General legislative and institutional framework

(i) Does the constitutional, legislative and institutional framework for the implementation of privately financed infrastructure projects ensure transparency, fairness, efficiency and the long-term sustainability of projects?

(ii) Are there undesirable restrictions within that framework on private-sector participation in infrastructure development and operation?

(iii) If so, how can they best be eliminated?

2. Scope of authority to award projects

(i) Does the law clearly identify the public authorities of the host country (including, as appropriate, national, provincial and local authorities) that are empowered to award public-private partnership projects ("PPPs") and contracts for their implementation.

(ii) Is there a clear allocation of such powers as between national and local authorities?

(iii) Is it clear that these powers extend both to the construction and operation of new infrastructure facilities and the maintenance, modernisation, expansion and operation of existing facilities?

(iv) Does the law identify with sufficient clarity the sectors or types of infrastructure or public-service activity in respect of which PPPs may be granted?

(v) Does the law address questions of geographical extent and exclusivity relating to the jurisdiction of the relevant authorities with sufficient clarity, and the resolution of overlapping jurisdictions?

3. Administrative coordination

(i) Have adequate institutional mechanisms been established to coordinate the activities of the public authorities responsible for issuing approvals, permits, licences and consents needed to implement the infrastructure project?

4. Regulatory authority

(i) Is there a clear separation of authority between the regulator and the entity providing the infrastructure services?

(ii) Has regulatory competence been entrusted to functionally independent bodies sufficiently autonomous to ensure their decisions are taken without political interference or inappropriate pressures from operators and service providers?

(iii) Are the rules governing regulatory procedures publicly available?

(iv) Is there an obligation to provide reasons for regulatory decisions, with sufficient access for interested parties?

(v) Are there transparent procedures whereby regulatory decisions can be appealed to – and reviewed by – an independent and impartial body, and clear criteria applicable thereto?

(vi) Are special procedures necessary for handling disputes between service providers concerning alleged violations of laws and regulations in their sector, and are they in place?

5. Risk allocation

(i) Are there any unnecessary statutory or regulatory limitations on the ability of the contracting authority and the private partner to agree on an allocation of risks in the project agreement that is best suited to the project?

6. Government support

(i) Does the law make it clear which public authorities may provide financial or economic support to the implementation of the project (where needed) and what types of support they are authorised to provide?

7. Selection of the private partner

(i) General: Are the law's procurement procedures sufficiently comprehensive, transparent and efficient, and well-adapted to the particular needs of PPPs (given their value, complexity, evaluation challenges and lengthy bidding requirements)?

(ii) In particular, are there clear and well-structured procedures relating to:

- pre-selection
- single and two-stage procedures (as appropriate) for requesting proposals from pre-selected bidders?
- allowance for a "negotiated procedure" and "competitive dialogue procedure" (or equivalent) where appropriate?
- the content of final proposals?
- requests for clarification and modification?
- appropriate evaluation criteria?
- accepting and evaluating proposals?
- final negotiation and project award?
- award of the project without using competitive procedures (and the circumstances in which this can be done)?
- the treatment of unsolicited proposals?
- confidentiality of submissions and negotiation?
- publication of final award?
- maintenance of records of selection and award proceedings and scope of public access to them?
- the right to appeal against or seek review of the contracting authority's acts?

8. Project agreement

[NB: The contents of a typical concession or project agreement are addressed in a separate chapter.]

(i) Does the law allow sufficient scope and flexibility for the parties to agree on the contents of the project agreement as best suited to the needs of the project?

(ii) Does it provide any helpful guidance as to the possible contents of the agreement, including provisions which may be unfamiliar or challenging to the contracting authority or of uncertain validity in the host jurisdiction?

(iii) Does it contain any unnecessary constraints in this context, such as mandatory terms which may be over-prescriptive?

9. Project aite, assets and easements

(i) Is the law sufficiently clear and flexible in terms of the controls it permits to be vested in the private partner over the possession, use (and where relevant ownership) of the site and the assets comprised in the project? For example, can clear distinctions be made (if necessary) between public assets and private property? Can the private partner be obliged to transfer some assets and retain others at the end of the project?

(ii) In particular, does the law allow the private partner to enjoy sufficient access to and occupation and use of the site as necessary for the purposes of the project?

(iii) Does the law make it possible for the private partner to obtain/enjoy ancillary property rights (easements, rights of way etc.) related to the project as necessary to perform its obligations – for example, to enter upon/transit through property of third parties?

(iii) How satisfactorily will any compulsory purchase powers work in connection with the site?

- are they available to the contracting (or other) authority?
- are the relevant powers sufficiently clear and reliable?
- will they operate efficiently enough and in time?
- will the project be adequately insulated from third party claims?
- can acquisition costs be properly allocated (including recovery from the private partner where appropriate)?

10. Tariffs

(i) Does the law enable/allow the private partner where necessary to collect tariffs or user fees for its services directly from customers?

(ii) Conversely, does it allow the contracting authority (or other government body) to pay the private partner for its services where appropriate?

(iii) Where needed, does the law contain adequate regulatory controls over the private partner's charges and tariffs? Are any such controls consistent with the proposed terms of the project agreement?

11. Finance and security

(i) Does the law allow the private partner to raise and structure the finance it needs for the project (with sufficient flexibility in terms of sources, mixture, use and application)?

(ii) Does the law enable the private partner and its investors to grant adequate security over the project assets for the purposes of raising such finance, including:

- mortgage/charge over its property (immoveable and moveable)
- pledges of shares in the project company
- a charge over proceeds and receivables from the PPP
- an assignment of the private partner's contractual rights and claims
- any other suitable security?

(iii) Are there restrictions in the law relating to the grant of security over any public assets comprised in the PPP? How significant are any such restrictions? Are they prejudicial to the private partner's ability to finance the project?

(iv) Does the law allow for the creation of appropriate "step-in rights" in favour of lenders where required, including:

- the right to direct the activities of the project company
- the right to enforce a share pledge and restructure the project company
- the right to use alternative/substitute project companies
- the right to transfer the PPP to a new entity?

(v) Does the law make it possible for a controlling interest in the project company to be transferred to a third party where appropriate? Conversely, what restrictions (if any) does it impose?

12. Construction works

(i) Does the law contain any unnecessary restrictions relating to the parties' ability to agree on suitable provisions for the design and construction of the project works, including (a) the drawing up, review and approval of construction plans and specifications; (b) preparation of the design; (c) the contracting authority's right to monitor construction; (d) the contracting authority's power to order variations where appropriate; (e) procedures for testing, inspection, approval and acceptance of the facility; (f) latent defects and liability?

13. Operation of the facility

(i) Does the law contain any (unnecessary) restrictions or unacceptable constraints relating to operation of the completed facility and the parties' ability to agree on suitable provisions relating thereto, including, for example:

- continuity of service provision
- non-discriminatory access and availability

- provision of information and progress reports
- the contracting authority's right to monitor performance
- the contracting authority's right to exercise appropriate emergency step-in and operational powers
- the making (and publication) of rules governing use and operation?

14. Ancillary contractual arrangements

(i) Does the law contain any (unnecessary) restrictions on the private partner's freedom to agree the terms of the various project and other contracts with third parties necessary to give effect to the project (for example, construction/operation and maintenance/shareholder agreements)? Are there (unnecessary) requirements to obtain government approvals, apply local law, restrictions on "delegation", etc.?

(ii) Does the law contain other (unnecessary) restrictions relating to the parties' freedom to agree on other fundamental provisions of the project agreement such as:

- suitable performance guarantees
- suitable insurance arrangements
- modifications for events of force majeure/changes in law/stabilisation provisions and the payment of compensation where appropriate
- extensions of time for completion/extension of the term of the concession
- remedies for default?

(iii) Does the law contain any unnecessary restrictions on the private partner's freedom to develop commercial operations and services ancillary to the main project, or the parties' ability to agree them in the terms of the project contract?

14. Duration, extension and termination of project agreement

(i) Does the law prescribe a (maximum) duration for the project agreement? If so, is it sufficiently long, taking account of the various relevant criteria?

(ii) Does it allow the contracting authority sufficient flexibility to agree an appropriate term?

(iii) Does it permit the term to be extended in appropriate circumstances (for instance, completion delay due to force majeure/government suspension of the project/compensation for change in law)? What if any constraints does it impose on any such extensions?

15. Termination of project agreement

(i) Does the law contain any (unnecessary or inappropriate) restrictions on the parties' freedom to agree on termination rights and procedures that are best suited to the project. The law will often provide for termination rights, of course. But are these:

- sufficiently flexible to be developed/modified in the agreement as appropriate?
- sufficiently clear and balanced (and fair to the private partner)?
- subject to a "public interest" termination right? If so, will this be acceptable to the private partner and its lenders (this will often come down to the payment of adequate compensation)?
- sufficiently broad to allow for force majeure/change of law/suspension/frustration terminations?

(ii) Does the law allow adequate step-in rights to be granted to lenders (see above)?

(iii) Does the law contain any (unnecessary or inappropriate) constraints on the making of compensation payments to the private partner on termination? In particular:

- will the parties have sufficient flexibility to provide for this in detail in the project agreement?
- is it possible to deal appropriately with the full range of termination events and categories of loss (including the fair value of works performed/lost return to shareholders/payment out of debt)?
- are any restrictions consistent with "international norms" and the expectations of lenders?

(iv) Does the law provide with sufficient clarity for the transfer of identified (public) assets to the government, and the retention of other (private) assets by the concessionaire?

(v) Does the law contain any (unnecessary) restrictions relating to:

- the transfer of technology required for operation of the facility
- the training of the contracting authority's personnel
- the provision of operation and maintenance services and spare parts by the private partner, if required, for a limited period after termination?

16. Settlement of disputes

(i) Does the law allow the parties to the project agreement sufficient freedom/flexibility to agree on dispute-resolution mechanisms which are best suited to the needs of the project (including choice of law/ international arbitration/mediation and "panel" mechanisms, etc.)?

(ii) If not, how prejudicial could any restrictions be modified or overcome?

(iii) Does the law contain any unnecessary restrictions on the private partner's freedom to agree on the most suitable dispute-resolution mechanisms with its third-party contractors (including shareholders, lenders, contractors, operators and suppliers)?

(iv) Are "special dispute resolution" mechanisms needed/allowed in relation to disputes with customers/members of the public in connection with use of the facility?

17. Miscellaneous

(i) Do any sector-specific laws need to be modified to give effect to the PPP law or project? Which ones and how?

Appendix 2

Published materials relevant to the legal framework for PPPs

Section 1. EBRD PPP reference materials

1. EBRD (2017-2018) PPP Laws Assessment

2. EBRD/UNECE (2020) People-First PPP Model Law

3. EBRD (2021) Core Principles for a Modern PPP Law

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Appendix 3

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(a) EBRD economies

Armenia

Azerbaijan

Czech Republic

Egypt

Estonia

Hungary

Georgia

Kazakhstan

Kyrgyz Republic

Lithuania

Mongolia

Poland

Romania

Russia[111]

Serbia

Slovenia

Türkiye

Ukraine

Uzbekistan

(b) Others

China

Egypt

France

[111] The EBRD has made no new investments in Russia since 2014. In April 2022, the EBRD Board of Governors decided to suspend Russia's access to EBRD resources in response to the invasion of Ukraine. The Bank has closed its offices in Moscow. Russia remains a shareholder of the EBRD.

Portugal

India (Gujarat)

Kenya

Namibia

The Netherlands

South Africa

Spain

United Kingdom (hybrid bills)

United States of America (various states)

Appendix 4

Core principles

Part (A) EBRD: Revised core principles for a modern PPP law

A modern PPP law should:

1. be based on a clear concept of and policy for public-private partnerships, consistent with the government's wider infrastructure development goals

2. create a stable and predictable legal framework for PPPs, with a sound and coherent legislative foundation

3. provide clarity and certainty of rules and procedures

4. promote fairness, transparency, efficiency and accessibility in its application

5. ensure the proper oversight and accountability of decision-makers and the engagement of the various stakeholders

6. be consistent with the country's wider legal and regulatory system, including its investment protection and fiscal management laws

7. be consistent (where feasible) with best international practice

8. reflect appropriate ESG values and the UN's Sustainable Development Goals, including affordability, value for money/people and the importance of resilient and sustainable infrastructure

9. provide for robust procurement processes, which benefit where appropriate from competitive pressures and meet investor expectations

10. allow for a flexible and appropriate allocation of risks within projects

11. permit suitable flexibility and negotiability of PPP contracts

12. enable bankable projects and accommodate lender and investor security interests

13. allow for the use of available forms of state support, including payments, investments, asset contributions, undertakings and guarantees, and

14. allow for an appropriate range of dispute resolution procedures, including enforceable and impartial court or arbitral awards.

PART (B) United Nations Guiding Principles in support of People-First PPPs

- Projects and action plans
- Capacity building
- Improving legal frameworks for people-first PPPs
- Transparency and accountability
- Risk and de-risking
- Procurement: Promoting, value for people
- Resilience and climate change
- Innovative financing: Impact investing

PART (C) United Nations Guiding Principles for PPPs for the SDGs

Principle 1: Make sure that people' needs are listened to and their needs are addressed.

Principle 2: Deliver **more, better, simpler projects** by joining up government and allowing cities and other local levels to develop projects themselves.

Principle 3: Increase **skills in delivering projects**, to better empower women in projects, encourage the private sector to contribute to the necessary transfer of skills.

Principle 4: Establish more inclusive **policy and legal frameworks** that allow for active engagement of communities and focus as well on a zero-tolerance approach to corruption.

Principle 5: Disclose **more information** about projects to society especially on the commitments made to various partners in the project.

Principle 6: De-risk projects by providing more **predictability in the enabling environment.**

Principle 7: Set out clearly the projects' **selection criteria to promote "value for people"** so that the best projects can be selected.

Principle 8: Make **environmental sustainability a key**

component of evaluating, awarding and implementing PPP projects.

Principle 9: Ensure that **blended financing** catalyses private partners to invest in projects.

Principle 10: Avoid dept traps by ensuring the **fiscal sustainability** of projects and the transparency of fiscal policies.

Appendix 5

G20 principles for quality infrastructure investment

Preamble

Infrastructure is a driver of economic prosperity and provides a solid basis for strong, sustainable, balanced and inclusive growth and sustainable development, which are the key goals of the G20 and critical for promoting global, national and local development priorities. Nonetheless, the world still faces a massive gap in financing for investment in new and existing infrastructure, which could generate a serious bottleneck to economic growth and development or provision of secure and reliable public services. In this vein, the G20 has stressed the need to scale up infrastructure investment. Efforts have been made to find concrete ways to mobilise more private capital, such as the Roadmap to Infrastructure as an Asset Class ("Roadmap") endorsed by Leaders in 2018.

The G20 has also highlighted the importance of the quality of infrastructure investment, including in the Leaders' Communiqué at the 2016 Hangzhou Summit, and in the Roadmap. In infrastructure, quantity and quality can be complementary. A renewed emphasis on quality infrastructure investment will build on the past G20 presidencies' efforts to mobilise financing from various sources, particularly the private sector and institutional sources including multilateral development banks, thereby contribute to closing the infrastructure gap, develop infrastructure as an asset class, and maximising the positive impacts of infrastructure investment according to country conditions.

Principles for promoting quality infrastructure investment

This document sets out a set of voluntary, non-binding principles that reflect our common strategic direction and aspiration for quality infrastructure investment.

Principle 1: Maximising the positive impact of infrastructure to achieve sustainable growth and development

1.1 The aim of pursuing quality infrastructure investment is to maximise the positive economic, environmental, social, and development impact of infrastructure and create a virtuous circle of economic activities, while ensuring sound public finances.

1.2 This virtuous circle can take various forms. New jobs are created during construction, operation and maintenance of infrastructure, while positive spillover effects of infrastructure stimulate the economy and lead to more demand for jobs. Advanced technology and know-how may be transferred voluntarily and on mutually agreed-upon terms. This can result in better allocation of resources, enhanced capacities, skills upgrade and improvement of productivity for local economies. This impetus would improve the potential for economic growth, leading to widening of the investor base, crowding-in more private investment, and resulting in further improvement in economic fundamentals. This would facilitate trade, investment, and economic development. All these expected outcomes of the investment should be considered in the project design and planning.

1.3 Infrastructure investment should take into account economic, environmental and social, and governance aspects, and be guided by a sense of shared, long-term responsibility for the planet consistent with the 2030 Agenda for Sustainable Development, national and local development strategies, and relevant international commitments, and in the spirit of extensive consultation, joint efforts and shared benefits. The facilities and services of infrastructure should have sustainable development at their core and need to be broadly available, accessible, inclusive and beneficial to all. A virtuous circle of economic activities would be further secured through enhancing accessibility to, and national, regional, and global connectivity of, infrastructure, based on consensus among countries. Domestic resource mobilisation is critical to addressing the infrastructure financing gap. Assistance for capacity building, including for project preparation, should be provided to developing countries with the participation of international organisations. Quality infrastructure investment also needs to be tailored to individual country conditions and consistent with local laws and regulations.

Principle 2: Raising economic efficiency in view of life-cycle cost

2.1 Quality infrastructure investment should attain value for money and remain affordable with respect to life-cycle costs, by taking into account the total cost over its life-cycle (planning, design, finance, construction, operation and maintenance, and possible disposal), compared to the value of the asset as well as its economic, environmental and social benefits. Using this approach helps choose between repairing or upgrading an existing infrastructure or launching a new project. Project preparation, as set out in the G20 Principles for the Infrastructure Project Preparation Phase is crucial in this regard.

2.2 The life-cycle costs and benefits of infrastructure investments should be taken into consideration in ensuring efficiency. Construction, operation and maintenance and possible disposal costs should 3 be estimated from the onset of the project preparation stage. The identification of mechanisms to address cost overruns and cover ongoing operation and maintenance costs is critical to ensure financial sustainability at project level. Cost-benefit analysis should be used over the life-cycle of infrastructure projects.

2.3 Infrastructure projects should include strategies to mitigate the risks of delays and cost overrun, and those in post-delivery phases. Necessary elements to achieve this objective can include: (i) broad stakeholder engagement throughout the project; (ii) expertise in planning, operations and risk allocation/mitigation; and (iii) application of appropriate safeguards and instruments. 2.3 Innovative technologies should be leveraged through the life-cycle of infrastructure projects, where appropriate, to raise economic efficiency for existing and new infrastructure. Advanced technologies are an important component for new and existing assets and can help to improve data availability to monitor infrastructure use, performance and safety.

Principle 3: Integrating environmental considerations in infrastructure investments

3.1 Both positive and negative impacts of infrastructure projects on ecosystems, biodiversity, climate, weather and the use of resources should be internalised by incorporating these environmental considerations over the entire process of infrastructure investment, including by improving disclosure of these environment related information, and thereby enabling the use of green finance instruments. Infrastructure projects should align with national strategies and nationally determined contributions for those countries determined to implement them, and with transitioning to long-term low emissions strategies, while being mindful of country circumstances.

3.2 These environmental considerations should be entrenched in the entire life-cycle of infrastructure projects. The impact on the environment of the development, operation and maintenance, and possible disposal of the infrastructure project should be continuously assessed. Ecosystem-based adaptation should be considered.

3.3 The environmental impact of infrastructure investment should be made transparent to all stakeholders. This will enhance the appreciation of sustainable infrastructure projects and increase awareness of related risks.

Principle 4: Building resilience against natural disasters and other risks

4.1 Given the increasing number and heightened magnitude of natural disasters and slow onset of environmental changes, we face the urgent need to ensure long-term adaptability and build resilience of infrastructure against these risks. Infrastructure should also be resilient against human-made risks.

4.2 Sound disaster risk management should be factored in when designing infrastructure. A comprehensive disaster risk management plan should influence the design of infrastructure, the ongoing maintenance and consider the re-establishment of essential services.

4.3 Well-designed disaster risk finance and insurance mechanisms may also help incentivise resilient infrastructure through the financing of preventive measures.

Principle 5: Integrating social considerations in infrastructure investment

5.1 Infrastructure should be inclusive, enabling the economic participation and social inclusion of all. Economic and social impacts should be considered as an important component when assessing the quality of infrastructure investment, and should be managed systematically throughout the project life-cycle.

5.2 Open access to infrastructure services should be secured in a non-discriminatory manner for society. This is best achieved though meaningful consultation and inclusive decision-making with affected communities throughout the project life cycle, with a view to securing non-discriminatory access to users.

5.3 Practices of inclusiveness should be mainstreamed throughout the project life cycle. Design, delivery and management of infrastructure should respect human rights and the needs of all people, especially those who may experience particular vulnerabilities, including women, children, displaced communities or individuals, those with disabilities, indigenous groups and poor and marginalised populations.

5.4 All workers should have equal opportunity to access jobs created by infrastructure investments, develop skills, be able to work in safe and healthy conditions, be compensated and treated fairly, with dignity and without discrimination. Particular consideration should be given to how infrastructure facilitates women's economic empowerment through equal access to jobs, including well-paying jobs, and opportunities created by infrastructure investments. Women's rights should be respected in labour market participation and workplace requirements, including skills training and occupational safety and health policies.

5.5 Safe and healthy occupational conditions should be put in place, both at the infrastructure site and in the surrounding communities. Maintaining occupational safety and health conditions would also present a huge economic advantage worldwide.

Principle 6: strengthening infrastructure governance

6.1 Sound infrastructure governance over the life cycle of the project is a key factor to ensure long-term cost-effectiveness, accountability, transparency, and integrity of infrastructure investment. Countries should put in place clear rules, robust institutions, and good governance in the public and the private sector, reflecting countries' relevant international commitments, which will mitigate various risks related to investment decision-making, thus encouraging private-sector participation. Coordination across different levels of governments is needed. Capacity building is also key in ensuring informed decision-making and effectiveness of anti-corruption efforts. In addition, improved governance can be supported by good private-sector practices, including responsible business conduct practices.

6.2 Openness and transparency of procurement should be secured to ensure that infrastructure projects are value for money, safe and effective and so that investment is not diverted from its intended use. Transparent, fair, informed and inclusive decision-making, bidding and execution processes are the cornerstone of good infrastructure governance. Greater transparency, including on terms of financing and official support will help ensure equal footing in the procurement process. A wide range of stakeholders such as users, local population, civil society organisations and private sector, should be involved.

6.3 Well-designed and well-functioning governance institutions should be in place to assess financial sustainability of individual projects and prioritise among potential infrastructure projects subject to available overall financing. In addition to project-level financial sustainability, the impact of publicly funded infrastructure projects, and of possible contingent liabilities, on macro-level debt sustainability, needs to be considered and transparent, given that infrastructure investment can have significant impact on public finance. This will contribute to attaining value for money that considers life-cycle cost, promoting fiscal sustainability, saving fiscal space for future potential projects, and crowding in more private investments. A functionally integrated and transparent decision-making framework for infrastructure investments that considers both operation and maintenance and new investments to ensure efficient resource allocation. Contingent liabilities, as defined by the IMF 2019 revised Fiscal Transparency Code, are payment obligations whose timing and amount are contingent on the occurrence of a particular discrete/uncertain future event or series of future events.

6.4 Anti-corruption efforts combined with enhanced transparency should continue to safeguard the integrity of infrastructure investments, which are potentially large-scale, complex, long-term, and with a wide range of stakeholders. Infrastructure projects should have measures in place to mitigate corruption risks at all project stages.

6.5 Access to adequate information and data is an enabling factor to support investment decision-making, project management and evaluation. Access to information and data needs to be available in-country to help undertake cost and benefit analyses, supports government decision-making and policy monitoring, and facilitates project preparation processes and management.

EBRD regulatory guidelines collection

Chapter 3.
Structuring and negotiating PPP contracts

Contents

Appendices

This report has been produced with the assistance of the EBRD. The contents of this report are the sole responsibility of the authors and do not necessarily reflect the views of the EBRD.

(A) Introduction: public-private partnerships and PPP contracts

The subject of this chapter is the structuring, drafting and negotiation of public-private partnership (PPP) contracts. Along with the other chapters in Volume III of the EBRD PPP Regulatory Guidelines Collection, it is hoped that this, too, will help to facilitate the development and management of infrastructure and public service projects with the commercial and financial participation of the private sector. The focus is principally on assisting emerging markets (and especially EBRD economies) in their first approaches to structuring and negotiating PPPs and PPP contracts, typically in the context of project financed transactions.[1] The practices of developed economies are discussed when relevant, as they can provide useful insights into many of the issues at stake. Possible responses to those issues are suggested, in particular with respect to the crafting of frequently recurring provisions at a practical and commercial level, and the protections, undertakings and guarantees needed to promote a project's "bankability".

The chapter also draws on recommendations and policy papers on this subject developed by international organisations active in this area, including the United Nations, the Organisation for Economic Co-operation and Development (OECD), the EBRD and the World Bank as well as the European Union (EU) and various government agencies, and some of the leading textbooks on the subject.[2] It is not primarily an academic exercise, however. It has been written by practicing lawyers with wide experience (30 years and more) advising real participants in real PPP projects all over the world, and so is designed to offer practical, realistic guidance.

It is beyond the scope of the chapter to discuss the meaning of PPPs in any detail. (This has been done at length in other chapters of the PPP Regulatory Guidelines Collection and in many other publications.) Nevertheless, it might be worth briefly reminding the reader of some of their salient features. PPP is essentially just a procurement tool; it is one of a number of different methods available in a government's "toolkit" to procure infrastructure assets and/or related services. Many more or less similar definitions are available these days. For example, the EBRD-United Nations Economic Commission for Europe (UNECE) Model Law (discussed in Chapter 2, Volume I) defines them as "an undertaking … involving a long-term, cooperative relationship between a public and private partner, on the basis of a PPP contract, with shared risks and responsibilities throughout its term, for the design, development, construction, reconstruction, rehabilitation, operation and/or maintenance of public infrastructure (whether new or existing) and/or the provision of public services or services of general interest".

The United Nations Commission on International Trade Law (UNCITRAL), the World Bank Guide to PPP Contracts and various UNECE documents[3] use very similar language. Key characteristics of its life are (a) its long-term nature; (b) genuine risk-sharing between public and private sectors throughout its life; (c) the public infrastructure/public service element and (d) usually, but not always, the use of private finance. The private sector brings to bear its capital, professional skills, capacity for innovation and ability to deliver projects on time and within budget. The public sector retains its underlying responsibility to ensure that services of the requisite standard and quality are delivered to the public, in ways that offer genuine benefits and contribute to economic growth and an improved quality of life. Each is doing what it does best, in other words, under the umbrella of a long-term partnership.

Whatever exact definition one adopts, and whatever the idiosyncrasies of individual project structures, PPPs are almost invariably creatures of contract. They are created by a contract between the public authority (called the "contracting authority" in this chapter) and the private sector entity – usually a company – participating in the partnership (called the "private partner" in this chapter). This contract could then be defined as the long-term agreement between

[1] The focus of this study is "emerging market" projects. It is by no means easy, however, to make hard and fast distinctions between practice in this area in emerging markets, on the one hand, and the so-called developed economies, on the other. Differences of approach will obviously be found. They will differ from place to place and time to time, however. It is notoriously difficult to generalise at any level about emerging markets as a whole, let alone the precise ways in which they differ from their OECD neighbours. Many, if not most, of the issues discussed here apply equally to the latter as the former. Where the authors believe there is a clear difference in approach between the two, they bring this out in the text. The text also contains references to practice in developed countries, primarily by way of contrast.

[2] It is based on two previous studies commissioned by the EBRD in the past 10 years and an article originally published by Christopher Clement-Davies in the Journal of the IBA in 2006, updated to take account of the huge increase in available know-how in this area in recent years, including in particular the World Bank Guide to PPP Contracts (rev.2019) and the textbook Project Finance by Graham Vinter & colleagues (4th edition, 2014). See also Chapter 2, discussing the legal framework for PPPs and the list of sources it contains.

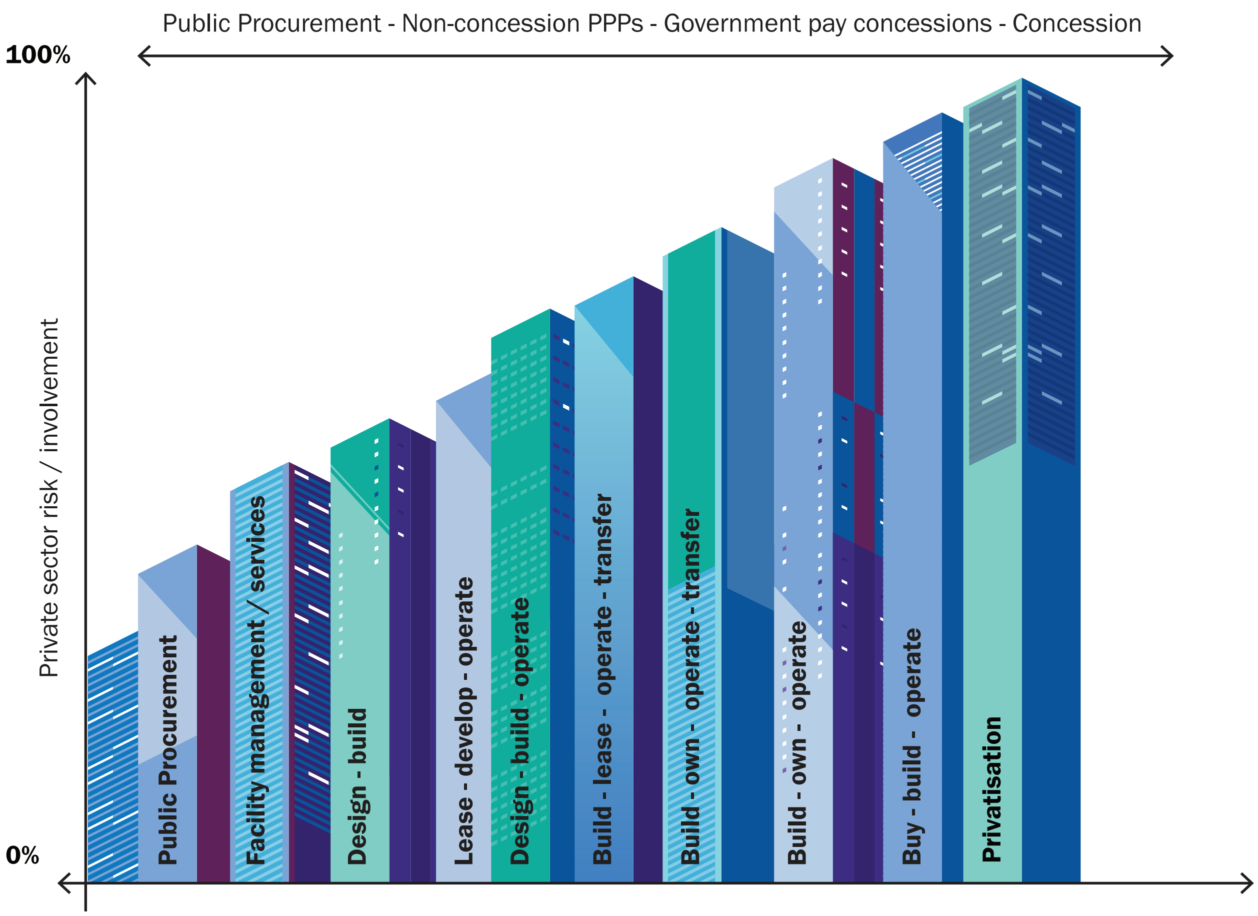
[3] Such as the Guidebook on Promoting Good Governance in Public-Private Partnerships, 2008.

the contracting authority and the private partner for providing an infrastructure-related asset or public service in which the private partner bears significant risk and management responsibility throughout, with its remuneration being linked to its performance.

Once relatively simple and straightforward documents, especially in (mainly civil law) countries with well-defined concepts of “concession”, PPP contracts have become far more complicated, as the markets for them have evolved. The explosion of PPP activity around the world in the past 20 years has changed and developed their terms, so they can now represent among the most lengthy and intricate forms of commercial agreement that one can encounter – as well as the most heavily negotiated. “Best international practice” now has clear connotations in terms of the sorts of provision they need to contain, the ways project risks are addressed and allocated, and the requirements of international financial markets if they are to be “bankable”.

The range of sectors and jurisdictions where they are used and the wide disparities between different forms of PPP project, however, mean that standardised PPP contracts are still an elusive concept.[4] There is just so much variety. Nevertheless, it is becoming steadily easier to recognise the types of provision which parties and markets will or will not accept, as a broad understanding of market norms in this field steadily gains ground. It is therefore perfectly feasible to describe and discuss the central clauses they typically contain, and the issues to which they frequently give rise, as we seek to do in this chapter.[5]

PPPs have come to embrace a wide variety of contractual structures and arrangements over the many years that they have been used. A plethora of acronyms and industry terms has grown up to describe them (not always reflecting clear conceptual differences between them). They include BOO (build-own-operate), BBO (buy-build-operate), BOT (build-operate-transfer), BOOT (build-own-operate-transfer),



[4] Although several countries have effectively standardised the agreements used within their PPP industries, at least for certain sectors and types of project, including the United Kingdom (before the formal cancellation of the PFI in 2018), the Netherlands, Australia, South Africa and Portugal.

[5] As the World Bank has done in its 2019 Guide to PPP Contracts.

BOLT (build-operate-lease-transfer), DBFO (design-build-finance-operate), operational licence, franchise and others. Traditionally, they would typically involve a relatively wholesale assumption of cost and risk by the private sector, with user charges levied directly on the public, as in the French model developed generations ago for highway and similar projects and widely imitated since in many other civil law jurisdictions. More recently, risks have at times come to be more narrowly and closely defined, especially in the government revenue stream style of PPP project, pioneered by the British government under the aegis of its Private Finance Initiative (PFI) programme, adopted in 1992 and since emulated in numerous other countries around the world.

The degree of risk and responsibility transferred to the private sector where it participates in infrastructure development can vary widely from one contractual structure to another. It can range from the simple, traditional form of public procurement, on the one hand (which may not involve a PPP in a true sense at all), to a full-blown "concession" on the other, where the private sector takes extensive responsibility for most risks over the life of the contract, to an outright privatisation, where the assets are simply transferred to the private sector, which then becomes fully responsible for them. The table below, created by the EBRD, illustrates this spectrum in summary (and inevitably a somewhat imprecise) form. PPPs cover most of the structures mentioned.

The table is imprecise, as the categories of project structure to which it refers are not really susceptible to very exact or consistent definition, and their characteristics, attendant risks and responsibilities are more fluid and shifting in practice than it suggests. It should be seen as illustrative rather than definitive. It is also worth remembering that the terms PPP or concession have a wide range of meanings in practice (as we explain in more detail below). In the practical PPP universe and business environment in which we all operate – as opposed to the jurisdiction-specific area of legal technicalities – the terms PPP and concession are often treated as largely interchangeable and can be used to connote the whole gamut of project structures of this kind. Too many business executives, on the other hand, in particular in the French and civil law context, they tend to imply sharply distinct structures. Some jurisdictions (EU countries, for example) make formal, technical distinctions between them. These distinctions are often not entirely consistent across or even within different jurisdictions, however, and sometimes have as much to do with legal traditions as logic.

Whatever the distinctions made between different types of PPP, it is usually helpful to remember the importance of long-term collaboration between public and private partners to manage assets on a risk-sharing basis as being central to any PPP (as the name suggests). While allowing for a degree of "shade" at the edges of these somewhat imprecise categories, PPPs in the end are not the same as the simple contracting out of certain services by the government, as in a consultancy agreement or design and/or build contract, at one end of the spectrum, or a full-scale transfer (usually sale) of assets and associated responsibilities to the private sector, as in a privatisation, at the other. There must be a real element of long-term partnership involved.

We do not make clear-cut distinctions between the different forms of PPP in this chapter. Whichever structure is used, the PPP contract will typically underpin it,[6] as we have said, defining the relationship between public and private sectors, allocating risks and responsibilities, and representing a vital part of the lenders' security package. Several other contracts or sets of agreements will, of course, also form important parts of the wider structure. These may include a shareholders' agreement, construction contract, supply agreements, perhaps a separate off-take contract, lending and security documents, and often a direct agreement. (A simplified diagram showing these arrangements is set out in Appendix II). Nearly all of them will include the project company – the private partner as a party, making it in every sense the centrepiece of the whole contractual matrix. The PPP contract will typically constitute the "cornerstone" document of this matrix, its terms setting out the core commercial components of the deal and therefore determining much of the contents of the remainder.

What follows in this chapter is a brief description of the typical contents of a PPP contract, followed by a discussion of what the authors see as some of the main legal and practical issues to which these agreements can give rise as they are structured and negotiated. Contrasts in approach between common law and civil law jurisdictions, where they exist, are brought out (drawing in particular on UK and French law). We also offer some preliminary thoughts on the meaning of the legal concept "concession", on the legislative framework for PPPs, and the differing purposes and objectives these agreements serve, which the parties to them should keep in mind as they are negotiated. It is hoped that this will contribute to an understanding of the broader challenges involved in implementing PPPs.

[6] Except in those civil law countries where a separate formal contract is unnecessary, as its contents are prescribed by statute. See further below.

(B) Classifying a PPP and PPP contract

In conceptual legal terms, PPPs, concessions and the contracts for them can be a little tricky to classify. One of the first tasks for a lawyer advising on a PPP project is to establish whether the local jurisdiction has a recognised jurisprudential concept and definition of concession or PPP, and to ascertain any rules and restrictions that apply specifically to them as a matter of law.

Many civil law jurisdictions place concessions in legal categories of their own, often within the area of public administrative law, which governs the provision of public services by the government, with clear statutory definitions (see further below). Common law, on the other hand, does not treat them as a separate species of contract distinct from ordinary commercial agreements. The Oxford Companion to Law describes a concession as the "grant by a public authority to a person of authority to do something, such as to work the land, extract minerals, operate an industry, or the like". But this is not a case law or statutory definition. Under UK law, a concession is essentially a contractual licence.[7] It will entitle the private partner to make use of certain facilities (often including real property) and to develop and implement a project during the life of the PPP. It may or may not be formally linked to a separate interest in land (such as a site lease or outright title to the land). It can be granted by either public or private bodies. In many civil law jurisdictions, on the other hand,[8] particularly France (and countries with legal systems derived from it) the term tends to connote the provision of services to the public which have typically or historically been provided by the public sector. In a concession, those services are then formally delegated to the private partner on a substantial risk-bearing basis. A public sector entity will therefore usually be a party to it.

Apart from the jurisprudential classification of concessions, some civil law countries (such as France and Brazil, the EU at the procurement level and the countries that have acceded to it) then apply slightly differing rules and principles to the different forms of contract that can be used in a PPP, distinguishing, for example, between public works or services procurement, concessions involving public user charges and PFI-style government revenue stream contracts (sometimes called PPPs just to distinguish them from concessions), and subjecting them to different legal treatment. Where this is the case, understanding the full ramifications of the legal category into which the project agreement falls will be a vital aspect of the preliminary structuring or due diligence work.

One clear difference in the approach of civil and common law jurisdictions (respectively) to PPPs can readily be discerned in relation to risk sharing between the parties to a PPP contract. In many civil law countries that follow the French model, risk allocation tends to flow to a greater extent from the application of a number of legal and regulatory rules and principles to the PPP, enshrined in statute or administrative case law, whereas in common law countries it is essentially a matter of drafting and negotiating the terms of the contract. In the former, there tends to be less scope for negotiation and "departures from the norm". Their status as PPP public law contracts which may involve public service activities means that, in those jurisdictions, concession contracts usually must comply with a range of general rules from which the parties cannot derogate in the terms of the contract. Examples of such rules include the following:[9] (i) the contracting entity should always be entitled to amend or terminate the contract for public interest reasons, (ii) the contract assets necessary for the performance of the public service activities are deemed to be public property as soon as they are built or bought by the private partner and (iii) the compensation to which the private party may be entitled for the assets necessary for the performance of the public service activities on a termination of the contract shall not exceed the net book value of those assets at the termination date. It is therefore crucial to verify, in drafting or reviewing a PPP contract, whether and to what extent the parties are free to derogate from these general rules.

This disparity in legal classification partly explains why there are now so many different labels for what is fundamentally the same form of agreement; "concession contract", "project agreement", "development agreement", "implementation agreement" (at least in certain respects), "franchise", "affermage" and "licence" are all in many ways largely interchangeable terms. Their use is sometimes preferred to avoid the confusion "concession" can give rise to, given its specific meaning and categorisation

[7] The Channel Tunnel PPP contract, signed in the late 1980s, was one of the first, well-known examples in the United Kingdom of a PPP contract for a major project. (There have since been hundreds, of course, in the PFI field and around the world.) If the agreement ever has to be litigated (at least to a judicial conclusion), it will be interesting to see what consequences flow from the differing legal classification of concessions under UK and French law, given that both systems of law seem to apply to it.

[8] At least those that follow the French model, where this jurisprudence is most highly developed

[9] Except as otherwise expressly provided under applicable law

in certain jurisdictions. However, in substance, the agreements to which these labels refer are often very similar, in terms of the legal, commercial and practical issues to which they give rise. For the purposes of this paper, they will all be referred to as “PPP contracts”.

(C) Legislative background

An established legislative framework for PPP contracts, and the projects to which they relate, may be in place in jurisdictions where PPPs are being implemented.[10] The contents of any PPP contract must always be viewed firmly in that context. It may be necessary for constitutional or public law reasons for enabling legislation to be introduced to allow the private sector to develop major infrastructure projects in the first place and to transfer what would otherwise be governmental powers and responsibilities to it. (Local legislation may have previously limited the right to develop certain types of infrastructure to the public sector.) In many jurisdictions, especially civil law ones, the scope and fundamentals of PPPs may be established, and their principal terms and conditions allowed for, in a PPP law. Even where this is not the case, legislation may have to be brought into effect to underpin individual projects – to update applicable laws, for example, or clarify aspects of the contracting authority’s capacity or legal powers. PPP legislation, where it exists, can create a clear framework for PPPs, providing ready-made solutions for what could otherwise prove difficult questions of scope and structure, or it can be unhelpfully limited and inflexible.[11] Indeed, as Chapter 2 explains, the wider regulatory environment is often critical to a successful, wide-ranging PPP programme. Ideally, a clear and transparent legal and administrative regime needs to be in place and conducive to PPPs in all their aspects, from design and procurement to contractual award and implementation. It is often set out these days in a comprehensive PPP law.

There are certain differences in approach to the statutory and regulatory framework for PPPs, however, as between common law and civil law systems, respectively, which can impinge on the structure and content of PPP contracts. In many of the former (such as the United Kingdom), it has generally not been necessary to bring special legislation into effect, although there are examples of “hybrid bills” being introduced in relation to individual projects.[12] The latter, on the other hand, usually need to introduce PPP laws, regulating the structure and scope of PPPs and their award, and the contracts that underpin them. Some civil law jurisdictions will simply list in their PPP laws the provisions that need to be addressed in a detailed agreement, leaving the parties free to settle their exact terms. Sometimes, however, their actual content or language is prescribed, which may leave too little or even no room for adaptability or negotiation.[13] PPP contracts may therefore be short and incomplete in these jurisdictions, perhaps containing cross-references to a specific statute that directly applies to the project in hand.[14]

In France, concessions historically were not governed by a specific law, but by the case law of the Conseil d’Etat (French administrative supreme court), except for the rules of the bidding process involved, which were the subject of a focused piece of legislation passed in 1993 (the Loi Sapin). No other statute was formerly thought to be necessary to implement the traditional concession model in France.

However, to widen the scope of PPPs in France and deploy some of the newer concession forms and structures being successfully used elsewhere,[15] and to maximise the use of private finance without necessarily delegating the full management of the public service itself (which would be the case with the country’s traditional concession form), a new body of PPP legislation was then put in place.[16]

[10] This subject is discussed in detail in the Legislative and Regulatory Framework Chapter (Chapter 2). The remarks contained in this section should therefore be seen as introductory only.

[11] See further in Chapters 1 and 2 (Volume III of the PPP Regulatory Guidelines Collection).

[12] In relation to the Skye Bridge and the Channel Tunnel Rail Link projects, for example. In addition, very specific legislation had to be introduced in the PFI context to address concerns about local authority powers.

[13] A well-known example of this problem until recently was the concessions law in force in Türkiye, which classified BOT and concession projects as a dimension of public administrative law and therefore (according to the Constitutional Court) subject to Turkish administrative jurisdiction, rendering their international arbitration clauses invalid. International lenders frequently expressed the view that this made them unfinanceable. After several years of lobbying and debate, the law was eventually modified.

[14] For example, in Portugal, when the government plans to develop PPP projects in a certain sector, it first establishes sector-specific PPP legislation and then specific regulations for the individual project.

[15] Such as under the United Kingdom’s PFI system.

[16] For a time, this allowed authorities to choose between a variety of contractual forms, depending on the sector and type of PPP in question: for instance, the “affermage” (roughly equivalent to a lease), “contrat de partenariat” (partnership agreement), “bail emphyteotique” (long-term lease) and so on. However, the 2003 legislation only concerned marchés de partenariat. Bail emphytéotique contracts may no longer be used as a substitute for PPP contracts and affermage contracts have not been the subject of any specific legislation.

This made possible "deferred payments" for infrastructure, linked to performance; these were not permissible under French administrative law, which prohibits shifting the burden of public investment onto future generations. The new PPP contractual structures introduced as a result, unlike traditional concessions, allow the private partner's revenues to be received in the form of "rents" from the public authority, without an accompanying transfer of full operational risk to the private partner. This would not have been possible under the traditional concession structure in France and would have led to the project's disqualification as a concession and its reclassification as public works or services under French public procurement rules.

In addition, where intergovernmental arrangements are involved, a PPP may also be the subject of a specific treaty, which may shape some of the contractual terms (for example, the Channel Tunnel project). This is often the case with pipeline or large energy projects that cross national boundaries (for example, the Nam Theun II hydropower project in Laos, which provides electricity to Thailand, or the Manantali joint-venture project between Mali, Senegal and Mauritania). International conventions of this kind must be reviewed with special care, as they typically prevail over any national laws, including PPP laws.

The question sometimes arises whether a separate agreement is needed at all where the PPP has a clear statutory framework? The answer is usually yes.[17] The PPP law will tend to establish the conceptual viability of PPPs, some of the main parameters of the projects, the basis on which they are awarded and perhaps some of their central terms. The project-specific details can then be left to the parties to agree among themselves. These will be set out in a separate PPP contract. Apart from questions of detail, there will be considerations of certainty and privity. The sponsors (and their lenders) will want a stable and reliable legal document which sets out their rights and remedies. A PPP law can always be amended without the project's participants being consulted. And while the relevant legislation may provide for compensation to be paid to the private sector in certain circumstances where it is deprived of the benefit of the PPP (for example, in the case of a "convenience" termination), the sponsors and their lenders will usually regard this as insufficient, preferring to set out their remedies more exhaustively in a contract on which they can sue.[18]

A PPP contract will also represent a more flexible instrument for coping with changes in the project's circumstances during its life, and will contain a number of provisions designed to achieve this (see further below). This is why it is rare to come across a PPP law that represents a sufficient legal document for the purpose of giving effect to PPP projects; a separate agreement is almost always needed.

(D) Functions and objectives

PPP contracts tend to be heavily negotiated documents. This is largely because they reflect several distinct (if closely related) objectives and purposes which the parties to them will be seeking to achieve. The interplay between these objectives and functions creates a complex dynamic as these agreements are being structured. It is important for lawyers and other professionals advising on them to appreciate the significance of each of them. These include:

- **Project development and implementation – basic rights and obligations:** The project sponsors will need clear, reliable rights and obligations to implement and manage the project on the basis envisaged – to finance, develop, build, operate and maintain it (for example) and, of course, to be paid for these services. This will have to constitute a robust entitlement and duty throughout the life of the PPP, and their exact meaning, in terms of the powers and responsibilities they bestow, as well as their limits and parameters, will have to be spelled out in detail.

Conversely, the contracting authority will want assurances from the private partner, in exchange for the relinquishment of public-sector operation and (in part) control, that the project will achieve the expected results – that design and construction standards will be met, that the completed facility operated and maintained to the agreed standards, and so on. In the event of a failure to achieve these objectives, it may ultimately want to be in a position to take the project back into public hands and terminate the PPP.

- **Commercial incentives**: The public partner will also need to offer commercial incentives to developers to attract investment in the project. The PPP contract will provide for them. In addition to a government revenue stream or right to levy user charges, constituting the private partner's basic income for due performance of its services, these may include property development rights, retail facilities, additional government funding,

[17] But not always. Solar independent power projects (IPPs) in Spain, for example, signed in the early 2000s, relied simply on the new feed-in tariff and statutory framework for them. The large-scale arbitration claims which were brought a few years later when the Spanish government unilaterally changed the tariff structure were based on the Energy Charter Treaty.

[18] The lenders will typically take an assignment of the benefit of the PPP contract as part of their security package. Restrictions or prohibitions on such assignments, which are not infrequently encountered in some jurisdictions, may prove an impediment to the financeability of a project.

subsidies or even guaranteed rates of return or levels of demand. Tax exemptions or "holidays" and the preferential treatment of certain customs duties are another common example. Conversely, the public partner will sometimes demand the payment of a "concession fee'" (or equivalent) itself from the private partner. In any event, the agreement will establish all the principal commercial terms of the PPP, as between the public and private sectors, including in particular the basis on which the private partner will charge for its services.

- **Risk allocation:** Any public-private partnership will involve a pattern of risk allocation between the public and private sectors (and, of course, between the various private sector participants), with specific responsibilities and powers being identified and shared among them. The risk-allocation profile adopted on each deal will depend on its particular features and idiosyncrasies, and will vary widely from project to project. The famous formula for both project finance and PPPs is that risks should be allocated to the party best able to manage them – or best incentivised to bear them. This means both managing the likelihood of their occurrence and their impact if they do occur.

The PPP contract is the primary vehicle for achieving this risk allocation. There is, of course, no simple test to determine how exactly that is achieved contractually. Some risks will need to be addressed in much more detail than others, depending on their nature, importance, complexity and potential impact.[19] A combination of the terms and conditions of contract and the technical and supporting schedules will accomplish it, with lawyers, financial advisers and technical consultants working together to complete them. The end result will need to be sufficiently clear, precise, consistent and legally robust for all its provisions to be treated as "valid, binding and enforceable",[20] bankable and – increasingly – consistent with international best practice (including environmental, social and governance [ESG] norms).

- **Public sector support:** As part of the process of risk allocation, there will always be certain undertakings which the government will be willing (or may need) to give, and therefore risks it is willing to take on, to enable the successful implementation of the project. These will be set out in the agreement in the form of "government support" provisions. Examples may include the issue of a range of subsidiary licences, authorisations and consents needed in connection with the project's implementation, the provision of a project site, perhaps the underwriting of certain fundamental project risks (for example, demand risk or public protest risk) or even (where municipal or local governments are involved) a government guarantee. "Investment protection" rights may also need to be set out or reinforced in the agreement, depending on how effectively the country's existing legal framework protects them, although this area is becoming of more questionable importance as governments around the world build up a network of bilateral investment treaties and multilateral investment treaties (such as the Energy Charter Treaty) and adhere to international conventions (such as the 1958 New York Convention on Arbitral Awards and the 1965 Washington Convention creating the International Centre for Settlement of Investment Disputes [ICSID]).[21]

- **Funding:** The PPP contract will also play a critical part in promoting the successful financing of the project, whatever its financing structure. This will be true for equity investors, commercial lenders, multilaterals and political risk guarantors alike. The (anticipated) sources and structure of the project's funding will therefore have to be taken into account as the agreement's terms are negotiated. Its duration is the best known example of this; it will have to be sufficiently long to allow lenders to be repaid and investors to earn an acceptable return before the facility is returned to the government (if that is part of its structure). There are many other instances, however. Provisions may be included relating to (for example) the right to maintain onshore and offshore foreign currency accounts, convertibility of revenues, availability of foreign exchange, repatriation of profits, the use of insurance proceeds, protection against political risks or governmental interference, and the ability to pledge and transfer shares in the project company. If the financing is "multi-sourced", the task of making the agreement bankable can be complex, as the particular (and in many ways differing) requirements of each source of finance are met.

- **Regulatory mechanism:** The regulatory regime in the host country may be underdeveloped or evolving. There may not yet be an independent regulator of any kind in the relevant sector. When this is the case,

[19] The technical standards to be met by the design and construction process, for example, or the key performance indicators (KPIs) applicable to operational performance, will need pages of detail in the "output specification" schedules, while responsibility for (for example) third-party claims against the site may need no more than a paragraph or sentence in the terms and conditions.

[20] The lenders will require confirmation of this from local counsel in a formal legal opinion.

[21] For more on ICSID, which is under the supervision of the World Bank, see the Law and disputes section below.

the PPP contract can "plug the gap", providing a mechanism for economic regulation of the completed facility by the government.[22] This would usually be regarded as a temporary and contingent arrangement only, however, with allowances being made for the full incorporation of a proper regulatory structure in the future.[23]

Bankability. Although a full definition of "bankability" is beyond the scope of this chapter (discussions of it can be found in some of the leading textbooks on project finance),[24] it must always be kept in mind that the finalised PPP contract will also need to be "bankable" at every level. In simple terms, this means that its provisions will need to be entirely acceptable to the banks funding it, whether commercial, investment or development banks, or a combination of them. The lenders will need to be confident that the private partner will be able to service the debt raised to carry out the project.

PPPs are usually project-financed, which means the great majority of the funding will come from bank lenders on a limited-recourse basis (that is, essentially dependent on the cash flows to be generated by the project). Making an agreement bankable in the end means little more than ensuring that its terms are sufficiently clear, transparent and consistent, and structured in a way which lenders and their advisers will recognise as being an adequate basis for financing, consistent with international norms. Above all, they will need to reflect a pattern of risk allocation that banks know they can live with as the project is implemented, with as many key risks as possible being parcelled out and allocated to the parties best able to manage and control them (see further under 'Issues' below).

There is no magic formula for achieving this. The concept of bankability is a fluid one, its precise implications changing in line with market sentiment and norms. It is also fairly project-specific, with differing requirements for different structures, sectors, markets and jurisdictions. The sponsors will need to be confident that their professional advisers (financial and legal) understand exactly how to satisfy these expectations and have the requisite experience and judgement to know which clauses will be acceptable to the lenders and their credit committees, and which will not. A decision is sometimes made to bring in the lenders and their advisers at an early stage of a project, to express their own views on this question. But this can lead to a tripartite negotiation process, which other parties may see as both too slow and too expensive. The preferred route is usually to keep the banks at one remove until the parties are ready to embark in earnest on the funding process, often after the PPP contract has been signed. That leaves the onus firmly on the sponsors' shoulders to get these judgements right at the outset, although it is also the responsibility of contracting authorities to be mindful of bankability requirements during procurement and negotiation of PPP contracts. Failure to do so adequately may make the projects they award unfinanceable, or undermine the tendering process from the outset.

The wider context: ESG and sustainability. To meet these objectives successfully, the contracting authority will need to place the proposed PPP and its contract squarely in the context of the broader considerations which will apply to any form of infrastructure procurement. A truly "holistic" approach is necessary. These considerations will include the host country's wider strategy for economic growth, investment and infrastructure development, taking account of applicable budgetary and fiscal constraints.[25] But they are also likely to take in the policy goals and ethical standards grouped together these days under the broad rubric of ESG and sustainability. These represent the principles, values and objectives relating to the environment, society and governance, which have grown dramatically in importance in recent years in many different contexts (reinforced by popular sentiment) and are increasingly at the forefront of much financial, commercial and regulatory thinking

[22] Examples include the water treatment concessions for Sofia, Bulgaria, and Bucharest, Romania, signed in the early 2000s.

[23] It should be noted, though, that in countries lacking an established culture of independent regulation, sponsors and lenders may actually prefer contractual regulation through the PPP contract to institutional regulation, where the independence of the regulators may be questionable.

[24] In particular, Graham Vinter and colleagues, Project Finance, 4th edition (2013), which devotes a chapter to its meaning.

[25] Once upon a time, governments tended to jump at PPPs for the off balance sheet advantages they offered. It was thought that both the debt and contingent liabilities involved could be left off the public sector balance sheet. Lately, this approach has met with growing scepticism, with accounting bodies concerned about the inappropriate by-passing of government spending controls, notwithstanding the considerable risks and potential liabilities involved. Eurostat, the International Monetary Fund and some national accounting bodies have devised new accounting standards for PPPs (such as ESA 2010) that make this more difficult, at least for government-pay projects. User-charge concessions still tend to be treated as off balance sheet. Governments generally now treat the crucial quality offered by PPPs as value for money, not their accounting implications. Under the influence of ESG values, this is in turn segueing into "value for people".

and decision-making, including in the infrastructure field. They have mounting profitability and reputational significance for businesses. Increasingly, governments aim to give effect to them at a policy level, corporates to be compliant with them, investors to insist on them and lenders to translate them into their investment criteria and loan covenants.[26] All PPP participants are therefore likely to need to take account of them, to a greater or lesser extent, as they go about or negotiate their involvement in projects. This includes contracting authorities, private partners, sponsors, lenders, contractors and other relevant authorities.

Numerous influential public documents with “global reach” capture the principles. The United Nations Sustainable Development Goals (SDGs), to which all member states are now in theory committed, to an extent defined and laid the foundations for them. The SGDs explicitly endorse PPPs: SDG 17 seeks to “encourage and promote effective public, public-private and civil society partnerships, building on the experience and resourcing strategies of partnerships”. The G20 Principles for Quality Infrastructure Investment set out in the communiqué of the 2019 G20 Summit in Japan also reflects many ESG values.[27] They are also very much at the heart of the documents Guiding Principles on People-First Public-Private Partnerships (PPPs) for the United Nations Sustainable Development Goals and Women’s Empowerment in PPPs, published by UNECE.[28]

These principles and values impinge closely on PPPs, as PPPs often directly affect those areas of activity with which they are most concerned – the environment, economic growth, public services, social impact and development, inclusivity, local communities, knowledge transfer and so on. PPPs can play a positive part in advancing them in constructive and innovative ways: upgrading deficient infrastructure, building new assets, providing new services, creating jobs, teaching skills, stimulating businesses and linking local communities.[29] In this way, they can help to reduce poverty, advance equality and promote integration – all fundamental aims of the SDGs. The size and long-term nature of PPPs also mean they can involve major sustainability challenges that need to be suitably addressed. In any event, these ESG values can now influence every stage of a PPP’s life: the wider procurement strategy and project pipeline; the choice of structure for the PPP; the output expectations and technical specifications set out in tender documents, and the criteria used to evaluate them; the performance standards and risk allocation set out in the PPP contracts; the manner of the PPP’s implementation; and the management, monitoring and information supply arrangements which apply throughout its life. One way or another, they are likely to inform many of the contract terms under discussion in this chapter.

Some of these principles will already have been translated into the domestic laws of host countries, or may soon be. If so, they will bind PPPs in any case where they affect them, as PPP contracts invariably oblige private partners to comply with domestic law at all times. Others have not, however, and may never be, as they simply amount to values and priorities which are exerting increasing influence across the political, commercial and financial worlds. The picture is also a fluid and fast-changing one.

The expectations and demands to which they give rise will keep changing in an ever-faster changing world, as thinking evolves. For that reason, it is not possible to be narrowly prescriptive about the ways they can impinge on the structural or contractual requirements for PPPs. Nevertheless, it is worth highlighting a few that are perhaps most relevant:

- **Human rights.** Businesses generally have wide-ranging responsibilities these days to avoid human rights abuses in their activities and to mitigate and overcome any affecting them when they occur. These include PPP project companies and their contractors. The United Nations Guiding Principles on Business and Human Rights (2011) cogently describes the expectations.

- **Social and environmental impact.** Particular care needs to be taken when PPPs are being designed and prepared to assess their potential impacts at a social and environmental level, to review these impacts in feasibility studies and then to address them appropriately in tender requirements, output specifications and the applicable evaluation and weighting criteria. The most efficacious and innovative

[26] See, for example, the Equator Principles (4th edition, 2020) incorporating the International Finance Corporation’s (IFC) Performance Standards. See, European Bank of Reconstruction and Development, Environmental and Social Policy (April 2019)

[27] A copy is attached to the chapter on the statutory and regulatory framework for PPPs

[28] Guiding Principles on People-First Public-Private Partnerships (PPPs) for the United Nations Sustainable Development Goals (UN SDGs), UNECE (2018); Women’s Empowerment in People-First Public-Private Partnerships, UNECE (2020). See the further discussion of this subject in Chapter 1.

[29] As the World Bank has emphasised in its contractual guide.

tender proposals in response are likely to attract higher marks.

- **Climate change.** Climate change represents a steadily growing risk, attended by mounting uncertainties about both its impact and the remedial measures that may be necessary to mitigate it. This represents a clear challenge for the sustainability of PPP projects, especially in those regions most vulnerable to extreme weather or the degradation of their natural habitat. How could climate change and the innovations in law and practice which might result from it affect a PPP project over its life? What resilience to this risk can be built into the contract's change-management clauses and how can the parties be best incentivised to take appropriate steps in mitigation? These measures may lead to higher up-front costs, but those costs should hopefully convert into greater value for money over the project's life cycle. All the same, if the problems prove too intractable, a PPP with a long-term contract may not in the end be the most suitable procurement option for the project in question.

- **Sustainability and value.** Sustainability has become a critical test of major development projects and investments. In practice, that means not just long-lasting, but also giving effect to ESG values in the long term. As the World Bank states in its PPP contractual guidance, "Investment in quality infrastructure is crucial to achieving sustainable development and empowering communities around the world." Value for money over a project's life cycle has been an acid test of PPP viability for many governments for years, but this is now being given an increasingly explicit sustainability interpretation, with an ESG dimension. The recent UNECE papers (mentioned above) argue for a "value for people [and the planet]" test to be applied, rather than "value for money". This thinking will probably feature ever more prominently in the design, evaluation and award of PPPs, as well as their contractual terms. The importance of PPPs to infrastructure development as an engine of recovery from the impact of the Covid-19 pandemic and economic crisis is likely to reinforce this.[30]

As can be seen, then, a broad range of differing objectives must be satisfied as the PPP contract is structured. The tensions between them can make the process of negotiating and finalising the document a protracted one, and go far to explain the lack of standardisation to these agreements from project to project.

(E) Principal terms of a PPP contract

For the benefit of readers who are not familiar with this form of agreement, it might help to summarise some of the provisions typically found in a PPP contract.[31] A list of the main clauses often included is attached as Appendix II.

Parties

There will usually be only two parties to the agreement: the public-sector entity awarding or granting the PPP, and the private-sector one developing and operating it.[32] The former may be a government department, a ministry or minister acting on behalf of a ministry (such as a secretary of state in the United Kingdom) or a local authority or municipality. The latter will usually be a special purpose vehicle, typically incorporated in the jurisdiction where the project is being developed, in which the sponsors and investors will become shareholders and which will constitute the borrower for the purposes of any limited-recourse finance. Occasionally, however, the PPP contract will also create step-in rights in favour of the lenders, who will not be parties to it, but will usually take an assignment of its provisions. A more appropriate vehicle for step-in rights is, of course, a direct agreement between the lenders and the host government, but direct agreements can sometimes be extremely difficult to negotiate with governments (as we explain in more detail below). If the PPP contract contain any step-in rights, the lenders may be able to place at least some reliance on them by virtue of their security package.[33]

The project sponsors will, of course, usually not be party to the PPP contract either, although there are examples of them taking on certain limited obligations

[30] See Chapter 5 for a detailed discussion of this subject.

[31] Readers should also look at the two chapters in Volume I of the PPP Regulatory Guidelines Collection that summarise two typical forms of PPP contract as heads of terms, namely Chapters 14-15, and the accompanying commentaries. Detailed guidance on these agreements is also available from a number of other sources, such as the World Bank, the UK Treasury and other PPP units around the world, including in Australia, Canada, the Netherlands and South Africa.

[32] In this chapter, the public sector entity is referred to as "government (entity)", "public sector (entity)" or "contracting authority", the private sector participant as the "private partner" or "project company".

[33] An example of this was the Second Stage Bangkok Expressway project in Thailand, where the lenders' step-in rights were created – not just referred to – in the PPP contract. For this to be feasible, local law will have to permit contracts to which the third parties are not signatories to create enforceable third-party rights (as can now be done in the United Kingdom).

(especially in the early, development phase). They will almost certainly be shareholders in the special purpose vehicle, which enters into it as private partner. However, the contracting authority (and the lenders, for that matter) will normally want to ensure that they – or at least the leading "shareholder of reference", with its proven expertise in the operation of projects of the same kind – are bound into it for a sufficient period to provide comfort and confidence that the contracted performance levels and standards will be met. The sponsor(s) in question may seek direct undertakings to that effect.

Definitions and interpretation

The defined terms will be exhaustive and often voluminous, given the usual complexity of this type of agreement. Most will be self-explanatory and straightforward, though some may need careful thought – such as "project", definitions relating to debt and equity, and those governing the calculation of any termination payments (especially if they are tied to the project financial model). The permanent assets of which the PPP consists also frequently need to be defined (for example, contracted assets) and listed.[34] The project may also be divided into different phases needing definition.

Conditions precedent

Conditions precedent (CPs) to the agreement's effectiveness (in whole or part) will usually be necessary in some form – frequently extensive ones. A PPP contract is typically signed before the other project contracts or financing agreements have been settled. A broad range of governmental consents and approvals may have to be obtained following signature, for example. Enabling legislation may have to be enacted. Finance will have to be raised. The site may have to be cleared and connecting infrastructure put in place. (The agreement may provide for a distinct development phase as well as construction and operational phases to deal with this, perhaps necessitating different CPs to each.) Both parties will typically take on an obligation to use reasonable endeavours to satisfy the conditions precedent (and, individually, the conditions for which each is responsible) by an agreed "drop dead" date. The question arises as to whether the sponsors (or even the contracting authority) should be entitled to recover any of their development costs where the agreement never becomes unconditional and has to be terminated, especially where this is attributable to the actions or inactions of the contracting authority or public sector it represents.[35]

That can sometimes place the PPP contract, at a conceptual level, in a somewhat ambivalent or uncertain position. It may have been signed and entered into, but it will only become fully effective once the conditions precedent have been satisfied. Where exactly does this leave any obligations and liabilities of the parties until they are met, or if they are never met? To what extent can they be enforced? A poorly drafted agreement may give rise to certain doubts in this context (even though the principle of the autonomy of an arbitration provision is widely accepted in most legal systems, thus usually vitiating concerns that it may not be enforceable if other parts of the agreement are not yet in effect). This could lead to arguments about its interpretation and application that may only be resolved in full-blown legal proceedings. A well-drafted and structured agreement will circumvent such uncertainties, however, making it perfectly clear which obligations become immediately binding and effective and on whom (such as the obligation to use reasonable endeavours in good faith to satisfy the CPs), and which are subject to the agreement's wider effectiveness (such as the obligation to design and build the works).

"Grant of concession"/PPP scope

There is often a general scoping or "grant of concession" provision (to use somewhat old-fashioned terminology). This will describe the basic elements of the PPP in summary terms (such as the right and obligation to "develop, finance, design, construct, complete, operate and maintain" the project, hand it back to the contracting authority at the end of the term (where is a "T" (transfer) obligation is involved), and saying this must all be "at the private party's own cost and risk", save where otherwise expressly provided in the agreement. This kind of headline provision is perhaps more unusual these days in PPP contracts, especially where there is no single defined term "concession" – or even a legal concept of one – which needs to be reflected in their terms.[36] Nevertheless, the basic assumption will still

[34] See, for example, the Equator Principles (4th edition, 2020) incorporating the International Finance Corporation's (IFC) Performance Standards. See, European Bank of Reconstruction and Development, Environmental and Social Policy (April 2019)

[35] The sponsors will usually aim to recover at least some of these costs if early termination is attributable to government failures tosatisfy the CPs, although this can be difficult to achieve in practice. The contracting authority, on the other hand, will often be in a position to call a bid bond in these circumstances (whether fairly or not).

[36] It perhaps springs from the civil law tradition of moving in contracts from general principles to specific provisions, an approach that is not always followed in common law countries.

be a transfer of project-related risks to the project company, except to the extent specifically retained by the contracting authority, or otherwise excluded.

Term and development phase

Like most commercial contracts, a PPP contract will normally be expressed to remain in force for a specified term, at the end of which it will expire automatically. Project economics will largely drive the agreement's duration. It needs to be long enough for the lenders to be paid out, the investment assets amortised (or depreciated) and a reasonable return made by the sponsors. The term may be either fixed or variable. A long-term fixed duration (anything between, say, 15- and 30 years – and occasionally significantly longer) is much the most common arrangement, although there may be a mechanism for extending it for a still longer period, to compensate the private partner for the impact of risks it is not prepared or able to bear. The parties (or one of them) may also have an option to extend the agreement for a limited additional period, on certain conditions (for instance, effecting further improvements or revising the financing terms). Some jurisdictions put legal qualifications on any such extensions to prevent their abuse.

There are isolated examples of agreements whose term is left open at the outset, their duration determined over time by reference to the date of recovery by the lenders of their principal and interest, and by the investors of a certain level of return (subject to the agreed pattern of risk allocation and perhaps also to a "long-stop" date). A variable term model of this kind is more likely to be encountered where the project company has a "pinpoint" equity structure (that is, little real substance), but the uncertainty and complexity it involves are likely to limit its appeal for all concerned. Many PPP laws in any case provide for a maximum term for any PPP, including any renewals. The term may be calculated from the date of effectiveness of the agreement or from the start of operation (thus avoiding the impact of any construction delays).[37]

A separate "development period" is often included to deal with the phase before financial completion when the parties are clearing and handing over the site and lining up all the CPs. This can last from a few months to a year or two. The sponsors may have to spend significant sums during this phase, especially in finalising their due diligence, carrying out further environmental and feasibility studies, completing their financial model and negotiating and signing all the other project contracts and financing documents. If financial close has still not been achieved at the end of that period, by any specified drop dead date, and the agreement is terminated as a result, the sponsors may seek recovery of at least some of those costs from the public partner where they are not themselves at fault. If they are at fault, they are not likely to recover anything.

General obligations

The contract will often contain some general obligations with which each of the main parties will (respectively)[38] need to comply. These may include such matters as compliance with applicable law, the private partner's duty to carry out its activities in accordance with good industry practice or GIP (as defined – usually in terms of the equivalent of recognised best international practice),[39] responsibility for permits and consents, a duty on the contracting authority to use all reasonable endeavours to assist the private partner to perform (certain of) its responsibilities and not to interfere unduly with its activities, phasing arrangements, subsidies, tax and duty exemptions, and so on.[40] There may also be certain local content requirements requiring the private partner to use local materials and labour where feasible.

Exclusivity

The private partner will often try to obtain a certain level of protection from competition by third parties in the agreement. A project finance structure may reinforce the importance of protections of this kind. Their exact basis and scope can be difficult to define, as they may impose constraints on the contracting authority's wider statutory powers. On the other hand, there is also likely to be at least some risk of disruptive interference in the private partner's activities by third-party "competent authorities" with powers and responsibilities relevant to the project under construction or operation. This, too, is likely to be provided for, largely to protect the private partner's position.

[37] See also article 8 of Chapter 3 (Volume I of the PPP Regulatory Guidelines Collection) on the Model PPP Law, where the calculation of statutory maximum terms is discussed in more detail.

[38] Most of them will not, of course, be the same for both.

[39] And the skill, care and diligence to be expected of an experienced international developer discharging similar responsibilities.

[40] Some of these may call for agreements with other government agencies, as well as or instead of the contracting authority.

Corporate structure

If the private partner takes the form of a special purpose vehicle, as it almost invariably does, the contract is likely to contain certain provisions relating to its existence and ownership. The extent to which, and time for which, some or all of the sponsors are bound into it will be a matter for negotiation, as will the freedom to admit or dispose of other shareholdings. The project company would usually be precluded from engaging in any activities outside the scope of the PPP except with the contracting authority's consent. If it has been incorporated offshore, as it occasionally is, it is likely to have to establish a subsidiary in the host country jurisdiction as well; relations between parent and subsidiary will need to be carefully provided for.

The site

The parties' respective responsibilities for the acquisition, condition and development of the project site will need to be addressed. Typically, its acquisition will be the responsibility of the public-sector entity, which is likely to be better placed to exercise any compulsory purchase powers than the project company. Occasionally, however, the private partner will be constituted as the government's agent for this purpose, charged (for example) with the task of handling certain potential and administrative aspects of the exercise of these powers.[41] These days, lenders – at least in the case of international financial institutions – are also likely to have tough ESG requirements, affecting the ways that land is compulsorily acquired and conserved, and local communities affected by the process. These requirements may be stricter than local law in this context.

A lease of the site may (or may not) be granted to the private partner in addition to the PPP contract.[42] If the project is to be transferred back to the public sector at the end of the term, the private partner's right to occupy it will by definition be temporary, with suitable contractual limits. If not, the private partner may be granted permanent ownership of it, as in a BOO (build-own-operate) structure.[43] Note that, in many civil law jurisdictions, if the PPP contract relates to the operation of a public service activity, the site as well as the other contracts assets necessary for the performance of the service will be considered public property ("domaine public" in France) and subject to specific rules. In each case, the private partner would usually expect the contracting authority to warrant title to the site and deliver it with "vacant possession", for instance, free and clear of any liens or competing or third-party claims which may interfere with the private partner's right and ability to use it for the intended purpose. Undertakings as to its physical condition can be more problematic.

An environmental due diligence report is also usually recommended to assess the state of contamination (if any) of the site. This is often the responsibility of the contracting authority, but may give rise to clean-up obligations on the private partner at both the inception and close of the PPP, coupled with a duty to return the facility and the site to the public sector in no worse a condition than that in which it had enjoyed it throughout. Again, lenders are likely to look closely at this report, the conclusions of which will need to comply with their ESG standards.

Design and construction

Where the project involves a large initial capital outlay (for instance, a greenfield project), the project company will be obliged to design and construct the project facilities by a specified date, in accordance with specified standards. A technical specification setting these standards will be attached to the document. The private partner may be liable to pay liquidated damages if the works are not completed on time.[44] There may also be a "backstop" date (for example, perhaps 12 months from the target completion date) on which the contracting authority will be entitled to terminate the agreement if completion has not been achieved. An extension of the time mechanism will obviously need to be included in relation to a completion obligation. A large, complex PPP may also be divided into distinct phases, some of which may be contingent, their implementation subject to satisfying certain conditions (for instance, a level of throughput and further government approvals).

[41] This was the case with the Channel Tunnel Rail Link project, for example. In emerging markets, the exercise of these powers can be politically very sensitive. A fully developed procedural mechanism for questioning or challenging them will not always be available. An "agency" arrangement of the kind referred to is therefore fairly unusual.

[42] The grant of a lease is rarely more than a legal formality which may be required as a concomitant to the PPP contract. Any lease of this kind should ideally be as simple as possible, as all the relevant commercial provisions should be set out in the PPP contract. The two documents will, of course, need to be fully consistent.

[43] These structures seem to be increasingly rare these days.

[44] Arguably a pointless provision, at least where the private partner has project-financed the PPP and so has a very clear incentive and need to start generating revenue as soon as it can to repay the debt.

The nature and scope of the works and services to be provided will, of course, be specific to the project, but defined in terms of "outputs" rather than "inputs". In other words, the PPP contract will establish the obligations of the private partner very much on the basis of the end results to be achieved and the works and services to be delivered, as opposed to the detailed aspects of how that is to be achieved. (See below, in Section (F), under Public sector control.)

Where the PPP is purely operational (as in the case of a lease or affermage, to use the French term), however, design and construction obligations may not be capable of such clear-cut definition. They may be altogether more contingent in nature, their scope and timing dependent on rehabilitation needs identified over time, and revenues generated by user charges. The boundaries between the respective responsibilities of the parties, or the basis for defining them, will nevertheless need to be specified as clearly as possible. Where the contracting authority, for example, takes on primary responsibility for heavy maintenance or repair works, any delay or default in their discharge will impinge, potentially very seriously, on the private partner's operational performance. This will need to be equitably addressed.

French concession law traditionally classifies délégation de service public into three categories: (i) concessions (that is, contracts whereby the private partner is responsible for building the facility and operating the service), (ii) affermages (that is, contracts whereby the private partner is solely responsible for operation and maintenance of the service, as the facility is made available by the contracting authority to which a rent is paid),[45] and (iii) régies intéressées (that is, contracts whereby the private partner is only responsible for operating the services and is paid a variable price directly by the contracting authority, depending on the nature and scope of the services).

Public sector monitoring and supervision

The PPP contract will create certain rights in favour of the contracting authority to monitor and inspect the design and construction works, and perhaps to approve certain elements of them, as they progress. It will want rights of access to the site, perhaps a site office of its own, the right to attend certain inspections and to receive various categories of document and information. The exact scope of any such powers often can prove a difficult area in negotiation (see below). Appropriate procedures and mechanisms will also need to be in place during the operational phase to ensure that the contracting authority is kept fully informed about the discharge of the private partner's duties during that period, and its compliance with the agreed levels and standards of service. The satisfaction of key performance indicators (KPIs) will be vital. Precise tests and procedures are often put in place to verify them.

Change orders

The contracting authority may insist on a right to issue variation or change orders, giving it the power to modify the specification, design and/or scope of the works if it chooses (although it is not unusual for the public sector to decide to dispense with this right). A power to modify the operational regime may also be sought, although this is perhaps rarer.[46] In each case, the private partner will seek the usual entitlements to adjustments to the programme and to compensation for its additional costs if these powers come to be exercised.

The more contentious areas in this context relate to the raising of the additional funding likely to be necessary to finance the variation, and the exact form that any such compensation takes. The private partner may sometimes be asked to absorb a proportion of the cost of a variation, until a specified threshold has been reached. The private partner may need to be in a position to refuse a variation which cannot be funded on a basis consistent with the agreement's wider terms. It is also likely to insist on a right of refusal where a variation would be inimical to the project's wider design or standards (such as GIP) or otherwise incompatible with the contract's requirements.

Utilities and supporting infrastructure

Various supporting facilities and infrastructure may have to be put in place for the project to be successfully implemented. Essential utilities, such as water and electricity, may have to be supplied, for example, or connecting roads or transportation links constructed. The site may have to be cleared as it is acquired, or a connection point or transmission line built between a power plant and the national grid. These responsibilities not unusually fall outside

[45] Affermage contracts were particularly common in the water distribution sector. The term has never been precisely defined, however. In line with EU directives, it is now generally accepted that such contracts should be referred to as service concession contracts. Nevertheless, in many civil law countries, local PPP laws still refer to this traditional classification. We believe such a reference is not relevant and may be misleading in a modern PPP law where PPP/concession contracts are being broadly defined.

[46] This perhaps highlights a contrast between emerging markets and the advanced economy contexts. In the latter, it is not unusual for the granting authority to be empowered to impose modifications to operational levels and standards. This is still rare in the former.

the scope of the PPP (in whole or in part), with the contracting authority taking on responsibility for procuring some or all of them, or at least assisting in their procurement. The consequences of its failure to do so may need to be explicitly addressed in the agreement. Timing will obviously be a critical consideration in this context. The contracting authority's obligations will have to be discharged in time for the private partner to start construction or operation of the facility when envisaged.

Ancillary facilities

A PPP will often give rise to incidental commercial opportunities outside the scope of the main infrastructure project, such as the right to develop unused land or put in place subsidiary retail facilities (shops, restaurants, hotels, etc.). The PPP contract may need to address each party's respective rights to initiate and benefit from developments (often referred to as "ancillary facilities") of this kind.

Financing and security agreements

Responsibility for raising the necessary finance for the project will have to be addressed, primarily or entirely by the private partner in most cases. The contracting authority will want to ensure that this has been satisfactorily achieved. It will often try to reserve at least certain rights to approve financing documents (both debt and equity) as they are entered into by the private partner, and subsequent modifications to them. The extent of any such rights can, again, be a contentious issue (discussed below). A balance needs to be struck between the government's right to ensure that the project company is adequately capitalised and funded, and the private partner's need for flexibility and control over its own financial arrangements (for which it will be fully responsible. Typically, the lenders will have no direct financial recourse at all to the government, unless, of course, a government guarantee is required, which is unusual (as it would undermine one of the principal purposes of a PPP). The right and power to grant security over the PPP assets and rights in favour of the lenders is typically addressed as well.

Operation

The PPP contract will address the private partner's operational powers and responsibilities in relation to the completed project. The range or scope of the tasks it is expected to perform will be described, and applicable standards specified. The extent to which the contracting authority will be entitled to approve, modify or even participate in those responsibilities will be a matter for discussion (see Public sector control in Section (F) below). The agreement may set out minimum resources required, performance levels and objectives, KPIs and penalties for substandard performance.

Maintenance standards

Similarly, the agreement will lay down certain maintenance standards and requirements for the completed project, which the private partner will be expected to satisfy during the life of the PPP. The contracting authority will retain certain rights of access and inspection. A question that often arises in this context is how the parties should allow for the project's diminishing design life and asset value, and the maintenance implications of having to hand over the assets in a particular condition (with a remaining useful life) on transfer, at the end of the PPP.

Tariffs, tolls and charges

The private partner's rights to charge for its services will, of course, need to be addressed – whether by way of tariffs payable by the contracting authority,[47] in the case of a "government revenue stream" PPP, or charges or tolls levied directly on users or beneficiaries of the facility, in the case of "user-charge" concessions. Sometimes, there will be a combination of the two, where, for example, the government subsidises the private partner's user charges. User-charge structures are adopted where it makes sense for the project company to bear at least an element of demand risk, and their use is considered politically acceptable (such as a toll road), government-pay ones where that is not the case (as in a prison or hospital, for example) or the demand involved is too unpredictable to estimate long-term revenue with confidence, and the contracting authority is able to stand behind its commitments for the life of the project. (The private partner and its lenders will be exposed to its credit risk, which they will need to assess carefully.) In the latter case, the private partner is paid for making the facility or service available for use, regardless of actual usage levels. The tariffs are accordingly termed availability payments. In each case, however, there will usually be at least an element of linkage to performance involved – either in practice, where the project company takes demand risk and its revenues depend on the numbers of users using the facility or service, or contractual, where the tariffs or subsidies payable are conditional on the quality of performance.

[47] Often called shadow tolls and/or availability payments.

If a separate off-take contract is involved – as, say, in the case of a power project with a separate power purchase agreement – this may be done in the off-take agreement.[48] Usually, however, the PPP contract will provide for the calculation of tariffs and the private partner's ability to revise them during the life of the PPP, or may simply confirm that the private partner is free to determine them, either at its discretion (if that is the position) or subject to certain constraints. If a government revenue stream is involved, provision will often be made for deductions from it as a performance penalty, where the private partner is failing to meet its KPIs. If operation or maintenance standards are not being met, for example, the availability payments or shadow tolls otherwise payable may be reduced.[49]

Open-ended discretion on the part of the private partner to determine and revise its charges would be unusual,[50] the assumption being that the government is content to allow market forces alone to constrain them. Typically, especially where services to the general public are involved, a combination of caution, political sensitivity and the need for consistency between different projects means the contracting authority will insist on appropriate conditions and rights of approval in the contract – at the very least, a reasonableness test.[51] And in the case of government-pay PPPs, the charges will, of course, be prescribed by the contract and any revisions subject to it terms.

Civil law can be rather more prescriptive here than common law. In some civil law countries, tariffs must usually, as a matter of law, be expressly determined in the PPP contract, any modifications to them requiring the approval of the contracting authority (or deemed approval, where they are determined in accordance with the contract's express conditions). When related to a public service, tariffs must also be determined on a non-discriminatory basis and based on the actual costs incurred by the private partner for the service provision, plus a fair level of remuneration or return. (Case law tends to allow slightly more flexibility in this context, however, and regularly focuses on the broader concept of the value of the services rather than costs.)

The agreement may also provide for payment by the private partner of a PPP or concession fee of some kind. This can take a variety of forms. It may be a lump sum up front, an annual fee or rent, or even a profit-sharing mechanism.

Force majeure, change in law and exceptional events

As with many long-term commercial agreement, the parties will need relief from potential liability when they are prevented from performing by unforeseeable events beyond their control. This is, of course, the basic function of any force majeure provision. Sometimes there will be a separate subcategory of force majeure circumstances (perhaps called risk events or compensation events in the PFI context), in relation to which the private partner may be entitled to compensation as well as relief from liability. This is likely to be combined with the "exceptional events" clause summarised below.

Given the long-term nature of a PPP contract and the restrictions on the project company's activities that it may contain, there will frequently also be a need for a "change of circumstance" or "stabilisation" clause of some kind, allowing the agreement to be modified when significant changes in circumstances occur that affect the project in unexpected ways. The changes in circumstance can range from changes in law, to modifications to licences and permits, to social or economic disruption or the loss of basic investment protection rights, affecting the economic balance of the agreement. (This is why these provisions are sometimes also called "financial balance" clauses). Various forms of government action or interference are also often included. They may make the performance of certain obligations more difficult, onerous or expensive, or obstruct or prevent it altogether. When the PPP is project-financed, the precise and highly structured assumptions and allocations of risk that underpin this financing methodology will tend to reinforce the need for a provision of this kind. Lenders will therefore also attach great importance to these provisions (and in a civil law context insist on protections that go beyond the narrow definitions of force majeure typically provided by statute or administrative case law).

Whether one labels them exceptional events, force majeure events, financial balance provisions or something else (such as in PFI documents), the clauses addressing them will always call for careful and detailed provision, covering the broad range of events of this kind that can occur and making appropriate allowance for the different ways they can impinge on the agreement and the project, sometimes triggering compensation. There will be

[48] Some independent power projects will effectively split the PPP contract between a purchase power agreement with the off-taker and an implementation agreement with central government. An example would be the IPPs in Pakistan signed in the early 1990s.

[49] See, for example, the sophisticated mechanisms of this kind which evolved in the British PFI context.

[50] Although there are examples, such as certain types of port or rail project.

[51] For example, revisions subject to the approval of the contracting authority, not to be unreasonably withheld.

questions about whether the provisions are limited or open-ended in scope, the risks identified in any list of events forming part of them, the nature of any exclusions and the ways any compensation is calculated and paid. Treatment is likely to differ depending on whether the relevant events occur during the construction or operation phase, whether physical damage is involved, whether political or natural events are at work, whether insurance is available and so on. The structuring of these clauses is therefore rarely straightforward and is discussed in more detail in Section (F) (Force majeure and financial balance provisions).

Once again, the approach may be slightly different in some civil law countries, at least under administrative law in the French tradition. If the contracts are classified as PPP contracts rather than concessions, the analysis may be much the same as that described above. If they are concessions and classified as public law contracts, on the other hand, administrative case law often applies a number of different concepts to unforeseeable events. Under French law, for example, it may treat them as:

- **Force majeure:** Any external, unforeseeable and irresistible event. In this case, the private partner is excused from performing its obligations and entitled to compensation for the extra-contractual costs it incurs as a result.

- **Imprévision:** Any unforeseeable event that distorts the economic balance of the contract – that is, a party's obligations can continue to be performed, but only at significantly higher cost than originally envisaged. In this case, the private partner must continue to perform the contract, but is entitled to compensation for up to 95 per cent of the extra-contractual costs incurred as a result.

- **Fait du Prince:** This applies to any unforeseeable, material adverse action taken by a relevant authority, other than the contracting authority. (In the latter case, the imprévision theory applies, in addition to any available remedies for breach of contract). In this case, the private partner is entitled to full compensation.

The scope of these theories, and the compensation to which they may give rise, are not always precisely defined by case-law, nor necessarily in line with international best practice. They consist of principles of law, which give rise to certain entitlements. As such, particular attention should be paid at the structuring/due diligence stage to (i) verifying whether and to what extent they may be derogated from under local law and (ii) if so, setting out a precise definition of compensation events and the related compensation in the PPP contract. In other words, in many cases, the parties may end up in much the same position as in common-law jurisdictions – setting out comprehensive, detailed mechanisms and their consequences in the PPP contract.

The impact of the Covid-19 pandemic in 2020 and the extraordinary restrictions imposed by governments all over the world in response to it, with their devastating repercussions for ordinary commercial and economic activity in many countries, have added a new dimension to the importance of force majeure, change in law and exceptional event clause, and a new urgency to the attention they receive. Chapter 2 on the legislative and regulatory framework for PPPs and Chapter 5 (on the impact of Covid-19) contain further discussion of this subject and the steps that the parties to PPP contracts should consider taking to allow for similar events in the future.

Termination

The agreement will almost invariably contain a termination clause. There is sometimes a suggestion that sponsors and lenders on a project financing may be prepared to do without such a clause on the basis that they would want to avoid termination of the project at all costs or that the host country legal system provides for termination rights anyway (as most will do in certain circumstances, particularly civil law countries). A comprehensive termination clause will offer certainty and therefore stability, however, and this is likely to benefit of all parties, especially in light of the huge sums of money involved in PPP projects. There may well be circumstances in which the private partner is left with no option but to terminate, reluctant though it may be to do so (and its lenders to allow it), in which case its position and interest, including those of its lenders, will have to be clearly and adequately protected.

Unremedied material breach of contract (as defined) by either party will typically be one ground of termination, the project company's insolvency another. Other – and more precise – grounds will be a matter for discussion. In reality, the termination clause is an important dimension of the agreement's risk allocation. The project's lenders will also closely scrutinise the scope of any termination rights, as they will underpin the financing arrangements; on project financing, the early termination of the PPP contract will also put an end to their ability to recover their debt and interest from the project's future cash-flows. Mainly for this reason, the principal issue in the negotiation of any termination clause is usually the compensation payable to the private partner and its lenders if it comes to be exercised (see more below).

Lender's step-in rights

As mentioned above, the PPP contract is likely to acknowledge or even create lenders' step-in rights. Their purpose will be to forestall a possible termination of the agreement by the contracting authority and to allow the lenders to keep the project alive for enough time to cure any default and restore normal operation.

Public sector step-in rights

The contracting authority may also insist on retaining certain powers to take over the operation of the completed project temporarily in defined circumstances. (Local law may give this power to a number of relevant authorities, in fact.) National security, suitably defined, may be one such ground, the need to respond quickly to emergencies potentially affecting the public another. The private partner will naturally be concerned to place suitable limits on any powers of this kind.

Sharing refinancing gains

It is increasingly common these days for PPPs in emerging markets to provide for the sharing of some of the gains accruing to the project on a refinancing of the PPP during its life. This is perhaps another example of a device pioneered during the explosive growth of PPPs in Europe and other developed economies that has been emulated elsewhere. A project's initial financial structure will often be designed to incentivise and prompt a refinancing during the operational phase once the relatively high-risk design and construction phase are successfully behind it.[52] At that stage, if its cost of debt or cost of capital can be significantly reduced, it will often make sense to allow the contracting authority to share in the gains. The more difficult question is how exactly and to what extent?

Retransfer of project

If the project is being developed on a BOT/BOOT or similar basis, the agreement will contain a provision setting out the private partner's obligations to retransfer it, and the completed assets, to the contracting authority as the agreement expires. The private partner's potential liabilities for the condition of the assets over their remaining useful life at the time of transfer can be a difficult question. There is often also a set of "ramp-up" obligations and procedures which apply immediately before expiry of the PPP to cover this, perhaps during its final year. Inspections, training of public officials and staff, data provision and other matters may be allowed for.

Insurance

The project company will usually have to take out insurance policies and maintain them throughout the term of the PPP. The contracting authority's main concern will be to protect the physical assets which the PPP comprises and ensure that the project company will be in a position to continue operating and providing any public services following an insured event. In practice, this usually boils down to a group of policies recommended by GIP, where they are available in the market on reasonable commercial terms.

Law and disputes

The agreement will usually contain a governing law provision and an appropriate dispute resolution clause. The system of law applicable, the dispute-resolution mechanism adopted and the application of jurisdiction provisions can be complex questions (see the Dispute Resolution section below).

Miscellaneous

Finally, there will be the usual tail-end provisions and boilerplate clauses, such as confidentiality, notices, mutual indemnities, amendment and waiver, assignment and so on. Certain representations and warranties will always be included and need careful thought; the enforceability of the agreement's clauses under applicable law and waiver of sovereign immunity will usually be critical.

[52] As, for example, where so-called mini-perm structures have been used.

(F) Principal issues

Bespoke contracts – precedents and standard forms

Various issues can arise as PPP contracts are negotiated. That is not surprising, given the significance of this type of agreement to any PPP, its complexity and range of objectives, and the extent to which infrastructure projects differ from another. It can often take six months or more for the document to be finalised (although in theory it should be possible to sign one within a much tighter time frame). There have been repeated requests for standardised PPP contracts to be adopted internationally, but real progress on this front has been limited.[53]

PPP contracts are therefore often viewed as documents that need to be tailor-made for the project in question, in contrast with, say, construction contracts for which international organisations such as the International Federation of Consulting Engineers, the International Chamber of Commerce, the Joint Contracts Tribunal and the Institution of Chemical Engineers long ago evolved widely accepted standard forms. The absence of internationally recognised model contracts for PPPs tends to reinforce that perception. Nevertheless, experience shows that appropriate precedents can quickly establish themselves as unofficial standard or model forms in a given jurisdiction for what is basically the same type of project.

Examples of this would include, in the United Kingdom, the DBFO road contracts and the project agreements developed for hospitals, prisons or the water sector (respectively), the contracts drawn up in France for the road and prison sectors, and the implementation agreements and power purchase agreements used for the independent power project (IPP) programme in Pakistan. Similarly, the forms inspired by the United Nations Industrial Development Organization (UNIDO) for the first BOT power plant in China (Laibin B) were adopted for several subsequent Chinese power projects, but then also adapted for some road and water projects as well (such as Chengdu). UNIDO then exported the same skeleton concession provisions to Africa for use on the first BOT satellite project, RASKOM. The explosion of PPP activity around the world in the past 20 years has inevitably led to a great deal of imitation and repetition of clauses, giving practitioners a clear sense of what amounts to international best practice and market standard these days.

Contracting authorities should be mindful of the vital importance of using contract forms that are thought to be acceptable to the (relatively small) universe of established sponsors and the international financing community, including commercial lenders, investment banks, international financial institutions, export credit agencies and political risk insurers. In the absence of established standard forms, it will obviously make sense to use the most relevant available precedents signed for similar projects in similar jurisdictions and which have already been tested by the financial community on deals that have reached financial close. This applies to developed economies as much as emerging markets. Extensive use was made a few years ago in France, for example, of precedent provisions from Hungary and the Czech Republic for the purposes of France's project-financed highway concessions (including the north Lyon Périphérique and the A28 extension), in place of the old concession forms, which consisted of little more than 10 pages, developed by the French school of Ponts et Chaussées and used on earlier highway concessions for decades.

Helpful precedents and standard or model form contracts are one thing, however, mandatory contractual provisions another. As mentioned in Section (C) above, attempts to prescribe the exact contents of clauses in PPP contracts by law are usually counterproductive and can even be disastrous. The parties must always be free to adjust provisions to the needs and characteristics of a specific project as appropriate. The more constructive guidance that can be made available to them by the market and by know-how centres within particular jurisdictions, the better. Well-established and familiar precedents will always help to shape a deal, put helpful parameters on the negotiation process, and reduce costs. Even where they are not formally binding, their status as widely accepted norms, or perhaps government-endorsed model clauses, can still be very persuasive.

Development and transaction costs

It is worth saying a word in this context about cost control. The development and transaction costs associated with successfully concluding PPPs can obviously be very high, especially in the early stages of a country's PPP programme, before structures, documents and processes have been well thought through and streamlined, and relevant experience collated and focused. Indeed, finding ways to mitigate and reduce these costs is usually one of the main preoccupations of the governments attempting PPPs.

[53] In the British domestic context, the Treasury Taskforce made a sustained attempt over a long period to standardise most of the provisions of PFI contracts. This eventually made great headway. See the Treasury publication Standardising PFI Contracts, issued early in 2000, and subsequent editions. Where clauses cannot be fully standardised, the taskforce's published guidelines have still led to much greater consistency of approach in agreements. Many other countries have also published model clauses of one kind or another for their PPP systems. The World Bank has published an extensive set of model clauses (World Bank Guide to PPP Contractual Provisions, revised in 2019).

This can represent a particular challenge for emerging-market economies, which often have far fewer resources to spare for expenses of this kind and where other factors may compound any in-built inefficiencies already affecting the system. In fact, it would not be an exaggeration to say that these costs can represent a major potential impediment to any PPP programme. Governments need to be properly advised, but may be reluctant to commit to the fee levels demanded by top-tier, suitably experienced international advisers (of the kind they should always aim to use, if possible). Equally, sponsors may hesitate to incur the huge advisory fees – technical, legal, financial, ultimately including the lenders' costs – that are often necessary to take a major project through to financial close (especially a project-financed one), unless they have a high degree of confidence in its ultimate success and fair treatment of their proposal by the government.

This, of course, greatly reinforces the case for standardisation. A PPP contract that is well-drafted, balanced, robust and based on appropriate, bankable precedents will greatly accelerate the negotiation process and thus reduce transaction costs. Similarly, efficient processes can mitigate development costs. These costs will also be held down by ready access to local experience and expertise in this field. Enhancing the available expertise and capacity in government should be an ongoing exercise, as it takes years to develop it. Indeed, capacity-building is now widely recognised as one of the most urgent priorities for governments in emerging markets and developing economies. Many countries implementing PPP programmes have therefore set up "expertise centres" (along the lines of the UK Treasury's teams in this field, such as Infrastructure UK, Partnerships UK and, formerly, the Treasury Taskforce), where precedents, know-how, expertise and experience can be marshalled and organised, and then quickly made available to help contracting authorities and their counterparties structure and negotiate PPP projects. Similar steps have been taken by international bodies, including the EU, the EBRD, UNIDO, the World Bank and, of course, the UNECE Group.[54]

The EBRD's Project Preparation Facility is a case in point. It seeks to assist governments with the early stages of project selection and preparation, with the aim of ensuring that only viable, well-conceived projects are taken to the next stage of implementation and that costs are not wasted on projects that are likely to go nowhere. The EBRD has a panel of outside advisers committed to this programme who it brings in and funds as necessary to help with this initial phase.

The following section summarises some of the major issues typically encountered in negotiation, focusing on themes that are specific to PPPs.

Public sector control

One area that can be highly contentious in negotiation is the degree of control exercised by the public sector over the private partner during implementation of the project, whether before or after completion. The private partner will usually try to obtain as much autonomy as it can over its activities. Obviously, the PPP contract will contain undertakings detailing the standards applicable to the project. There is likely to be a "minimum requirements" document, or specification, setting out the basic parameters for design, construction and operation. Certain rights of access and supervision will be given to the contracting authority. It will usually be entitled to copies of design and construction documents for its review. It may even have a seat at board level in the project company. There will also be extensive reporting requirements.

The private partner will often regard these protections as sufficient. Yet the public sector will frequently demand a greater degree of control than this. It may insist on a right to approve any change or modification to the private partner's equity structure, for example. It will often expect to have broad rights of approval over the design documents as they are produced. It may demand the power to supervise and certify (or even direct) the construction works on site. It may seek to participate in the negotiation of the project documents and approve their final terms. It is also likely to want a significant say in the contents of the private partner's operational activities.

The private partner will usually try to resist or limit these demands. It will argue that to discharge its fundamental undertakings to government and manage the risks impinging on his activities, it will need a high degree of freedom from interference. Excessive government control may prevent the private partner from performing as well as it otherwise might. After all, the government is transferring the project to the private sector to benefit from its managerial and creative skills. Flexibility and the ability to innovate will be important to its ability to do so. If additional finance has to be obtained because the project is not going according to plan, it will be up to the private partner to find it, and its equity investments that will stand to lose most up front as a result. The private partner's lenders will also be very concerned about the possibility of too much government interference. In the end, the public sector will be protected by its rights to sue under the contract and eventually to terminate it if the private partner fails to deliver.

[54] See also the longer discussion of this subject in the chapter on legal frameworks for PPPs.

The contracting authority, however, may feel that it has a residual role to discharge as guardian of the public interest, perhaps together with certain continuing statutory duties (to the extent these have not been delegated to the private partner). Public sector bodies can sometimes find it hard to adapt to the cultural changes and differences of approach that a PPP project entails (especially where one is dealing with local government or municipal bodies which may not have had exposure to a structure of this kind before). They may view a PPP as just another form of public procurement; they will often have been used to close and detailed management in the past of a contractor's activities as the employer under an EPC (engineering, procurement and construction) contract, and it may take time to understand all the subtleties of the very different role that a contracting authority enjoys under a PPP contract. Moreover, the political sensitivities often associated with high-profile projects can increase the temptation to micromanage.

The private partner's human and financial resources will obviously play a central part in this discussion. Where the private partner has extensive resources available (including considerable equity and a sophisticated management team), there will be less scope for argument about its ability to perform autonomously. Conversely, it may have a "pinpoint" equity structure, where only minimal equity is contributed, and an almost nominal management team,[55] in which case it could actually be in the best interests of all concerned (including the lenders) for the government representative to take a more extensive and active role in obtaining approvals and monitoring and supplementing the private partner's activities.

The outcome is often a heavily negotiated compromise. There are legitimate concerns on both sides. The objective should be to strike a suitable balance that reconciles the private partner's need for autonomy and managerial freedom with the government's desire for an adequate degree of supervision and involvement. One general rule should always be kept in mind, however: the more control the contracting authority asserts over the private partner's activities and third-party agreements, the more it qualifies or even undermines the risk transfer that justifies the PPP in the first place, and the less scope it leaves for the project to benefit from the innovation and managerial skill which the private sector is bringing to bear.

Some examples of the specific areas on which this discussion tends to centre include the following:

(i) Standards and objectives

The government entity should focus on the results to be achieved and standards to be met by the private partner, rather than how the private partner achieves them (on the "output specification" rather than the private partner's "input" methods, in the language of PFI; the "what" rather than the "how"). In practice, this means drawing up a detailed technical specification and set of operational standards setting out the relevant objectives. It may make use of relevant KPIs to do this. In most cases, it will be inappropriate for the government to approve the detail of the project contracts (other than the PPP contract itself and, of course, any other agreements to which it is a party) or the operational regime. These are generally best left to the private partner's judgement. They effectively represent a form of subcontract of the private partner's responsibilities in the PPP contract, and it is the private partner who takes the risk of performance during both the construction and operational phases.

(ii) Approval of design and construction

It should usually be sufficient for the contracting authority to receive copies of design documents as they are produced and to have discretionary rights of inspection over the works as they progress. There is often an obligation on the private partner to produce progress reports during construction. The contracting authority will also usually be entitled to attend the commissioning tests and certify (or counter-certify, or confirm) completion. It would be unusual for the public-sector to need more than this. Detailed rights of approval can be difficult to operate and even counterproductive in practice (although see comments in the introductory paragraphs to this subsection in relation to private partners with limited resources). Lenders will also require a clear and robust commissioning process, ensuring that the private partner will be granted the right to start operation forthwith upon satisfactory completion of the relevant tests, with the risk of delay attributable to undue interference by the contracting authority (or other authorities) minimised or nullified.

(iii) Identity of shareholders

Having selected and negotiated with a group of shareholders, it would be surprising if the contracting authority did not want to place at least some limit on subsequent shareholder changes. Those restrictions are likely to have more significance during the comparatively high-risk, pre-completion phase, than after it, however. Once a stable operational level has been reached (perhaps a year or two after completion)

[55] As was the case with the Skye Bridge project in the United Kingdom, for example.

and a successful track record established, it may not matter if a shareholder wishes to sell down its interest, as this may not lower confidence that the performance standards can still be met. The government will continue to have the benefit of its contractual rights. Any need for services or resources from individual sponsors can be addressed in other project contracts. A more liquid equity market in infrastructure projects may actually be in everyone's interest. Finally, flexibility in the financing arrangements may make it easier for the sponsors to offer attractive commercial terms in the first place. In each case, however, both parties need to decide which key sponsors can and should remain locked into the project company and for how long.

(iv) Identity of lenders

The identity of the lenders should not usually be a matter of great concern to the government entity. There may be occasional political concerns (relating to national security, for example), in which case narrowly drafted provisions dealing with them may be appropriate. The government may also wish to specify minimum criteria for credit standing or infrastructure-finance experience. It should normally be possible to address confidentiality concerns with suitable confidentiality clauses. In any case, the contracting authority will usually know precisely who the lenders are from the outset and be aware of any proposed change to them, which gives it a considerable degree of de facto control in practice. Formal de jure control may be unnecessary.

The terms of the financing documents, however, may be a different matter. The government entity will want to satisfy itself that the private partner has obtained the necessary finance to perform its obligations before the agreement is entered into, or at least becomes unconditional. The terms of the senior debt finance are likely to be relevant to its potential liability on a termination. For these reasons, at least certain rights of approval of the initial funding agreements may be unavoidable. The more difficult question relates to refinancing. The private partner's ability to refinance may, in the end, be in both parties' interests. What formal limits should be placed upon it, if any? How should any refinancing gains be shared?

(v) Insurance

The contracting authority should not usually try to prescribe the private partner's entire insurance programme. This is an aspect of management of the private partner's business and risks. It makes sense for it to seek assurances as to certain categories and perhaps minimum amounts of insurance relating to areas which impinge directly on its interest (for example, physical damage, third-party claims or employer's liability). Other areas (for instance, business interruption, latent defects) should be at the private partner's discretion. An obligation to insure in accordance with good industry practice can be a helpful test. Requirements as to the application of insurance proceeds, to reinstate damaged works, may have to be subject to a project economic test, allowing the lenders to be paid out as a priority in exceptional circumstances (the lenders usually have tight restrictions on the use of insurance proceeds).

Risk allocation

To a large extent, the underlying theme throughout the negotiation of the agreement will be the question of risk allocation. As mentioned above, one of the functions of a PPP contract is to allocate the project risks between private and public sectors. Yet the starting point of many PPP projects in emerging markets will be a wide-ranging assumption of risk by the private sector, especially if a full-blown concession is involved. The private partner will obviously have to bear and manage the risks that, in general terms, are central to its activities: design, construction, funding, performance, operation, maintenance, perhaps market or revenue risk, and so on. The agreement will often have a clause providing that the private partner undertake to "finance, design, construct, complete, operate and maintain [the facility] at its own cost and risk, without recourse to government funds or guarantees". However, it will inevitably be qualified by the words "save where otherwise provided in this agreement". The real question, then, is what risks will the contracting authority shoulder or retain and what protections will it offer the private partner against them?

The answers to this question will vary widely from project to project and depend on many factors. Government risks may include some or all of the following:

- vires and legislative authority
- site acquisition and delivery/basic rights of access
- unforeseen/unforeseeable site conditions such as pre-existing contamination or archaeological finds
- (certain) fundamental licences and permits
- timely provision of utilities (such as water and electricity) and connecting infrastructure
- certain general financial safeguards (such as investment protection rights, currency convertibility)
- political events/government disruption
- nationalisation/expropriation

- certain strikes/protester/trespass (squatter) risk
- change of law/fiscal regime (in part)
- (possibly) inflation, exchange-rate risk and major economic disruption
- competition from other facilities
- variation orders (cost and economic consequences)
- force majeure (in part)
- other exceptional events (if any).

In each case, there may be ways to share the risk between government and private partner so that incentives to find constructive solutions to unforeseen circumstances are maximised. The consequences for the agreement of any risk will obviously depend on precisely how it arises and affects either side's performance of its responsibilities. Its insurability, or otherwise, will be a vital consideration, as will the ability to pass it on to third parties (such as an off-taker, users or taxpayers). For that reason, it can be unhelpful to discuss the subject of risk allocation outside the context of specific clauses. Most of the remaining issues elaborated below involve some element of risk allocation.

A detailed discussion of the process of risk allocation is beyond the scope of this study, though the subject is discussed at length in other parts of. There has been a marked increase in recent years in the sophistication of the methodologies used by both public and private sectors in their approach to it in the context of PPPs. (See, for example, the many papers published on the subject by government bodies in a range of jurisdictions. Indeed, guidance on risk allocation has perhaps been one of the central themes of published advice of this kind to date.)[56]
It is now a truism of project finance that the party best able to manage risks should bear them. As a risk allocation tool, however, this principle does little more than provide general guidance. Governments, sponsors and lenders all have their own methods of identifying, measuring and allocating project risks. Lenders, in particular, will take a rigorous, systematic approach to satisfy themselves that the pattern of allocation makes sense and does not leave the project (and therefore their loans) unduly exposed. Unfortunately, at an international level, there is still perhaps less consistency of approach than might be wished. This seems to be especially true of emerging-market projects, where the need to "reinvent the wheel" arises just a little too often.

One of the central objectives in structuring a PPP contract should always be to strike a suitable balance in terms of risk allocation.[57] The truth is, the final pattern of risk allocation adopted will be driven as much by the dynamics of negotiation, with its patterns of compromise and "horse trading", as by any scientific or impartial process. There is often a temptation for each party to try to induce the other to shoulder as much risk as it possibly can. For example, the contracting authority will sometimes try to back away from taking on obligations which no other party should rationally accept (the authors have seen unsuccessful attempts to draft PPP contracts without any clear-cut government obligations at all), while the private partner may ask for protection against unforeseen developments of almost any kind (for example, any material adverse event beyond its control).

The question of the private partner's control over its charges or tariffs should play a prominent part in determining the pattern of risk allocation. Where the private partner is free to set and revise its tariffs at its discretion, charging the public directly for use of the completed facility, it will often be in a somewhat better position to absorb and manage the impact of events beyond its control than would otherwise be the case. Its position will in some respects resemble that of any other entity doing business in a particular country. This contrasts with many PPPs based on government revenue streams, where tariffs will be determined from the outset by agreement with the public sector and cannot be revised except in closely defined circumstances (subject to any "market-testing" mechanisms). Emerging-market projects often (arguably) tend towards the former model, partly because there is often less government inclination – or ability – to pay the private partner directly for its services, although even then, government is likely to seek tight controls over steep tariff rises given the sensitivity of public service provision and the issue of affordability. The difference between the two can lead to very different approaches towards risk allocation in the agreement.

In many ways, it is in this context that the contrasts between PPP projects in developed economies and emerging markets are most striking. Sponsors and their lenders will often be in a stronger position to seek broader protections in emerging markets,

[56] See the list of papers on this subject published some years ago by the UK Treasury. In particular, the Guidance Note on Public-Sector Comparators explains the more technical aspects of the British government's approach to risk transfer and value for money.

[57] An interesting illustration of this was the shift of language in official PFI guidance in the United Kingdom away from the principle of risk transfer and towards risk allocation. The UK government's initial assumption when PFI got underway seemed to be that the private sector could absorb almost any risk provided the price was right. That is not the case, and is not helpful to the public-sector position.

given the very different risk profiles to which they are likely to be subject, at both a micro and a macro level. That broad basket of risks and considerations, sometimes referred to as country risk, will be more of a challenge in emerging markets. A country's political and economic stability, the quality of its wider legal system, the maturity of its markets, the nature of international investment protections, its currency strength, its investment grade status and so on will all affect the approach of sponsors and lenders to the subject – and the protections they seek in the PPP contract. Indeed, if a country is perceived as being too risky, neither PPPs nor project finance lending may be feasible at all. Its projects may not have appeal compared with more attractive lending and investment opportunities elsewhere. A sufficiently stable political, economic and legal regime is necessary. Developed economies with large-scale foreign direct investment, by contrast, will raise fewer concerns of this kind. Many countries with evolved PPP systems have also published detailed guidance as to what allocation is appropriate for their PPP schemes.

Nevertheless, it is important to avoid the temptation to ask for too much in emerging-market deals. The danger is that, if either side pushes too hard in negotiation, the project stands to suffer as a result. Prices may rise excessively, for example, if sponsors have to factor excessive contingency into them, or the private partner is left without redress in a situation where the public sector could easily have permitted an adjustment to the agreement. Conversely, the government may be asked in effect to indemnify the private partner against any force majeure event, or to make compensation payments on a termination which effectively guarantees the sponsors a healthy investment return, no matter how badly they perform, or what sort of state the project assets may be in. (Again, the authors have seen attempts to adopt this position in negotiation). Provisions of this kind can risk precipitating a collapse of relations between the parties, or at least a continuing pattern of tension and confrontation. They are also likely to lead to poor value for money for the public sector (not to mention overly protracted negotiations).

Ultimately, the most constructive approach is to adopt a flexible and reasonable attitude towards risk allocation, leaving risks where they can be managed and controlled most effectively. If the agreement is structured with fairness and flexibility, in a way which fosters a spirit of partnership and cooperation, the project stands a greater chance of succeeding. This applies at the tender stage as well as during any contract negotiations: a rational, constructive approach will attract higher-quality bids, willing lenders and more competition, probably leading to more competitive bids and pricing, which will create better value for money. The opposite will put off experienced sponsors and may deter lenders. Equally, a well-conceived pattern will produce a more sustainable project, as it will need to apply for the life of the project. The parties will, by definition, be "in for the long haul".[58] Unanticipated difficulties are bound to occur over the life of the project. If the agreement encourages "win-win" solutions to problem solving, allowing both parties to benefit where possible, the project as a whole will be strengthened. How exactly this is achieved in each PPP contract will be a matter of detailed structuring of the clauses.

Remember that both works and services are closely interrelated under a PPP, with long-term operation and performance being fundamental. Repayment of the investment only starts when the facility is put into operation. Payment levels will depend on the availability of the assets, the services supplied and the levels of performance achieved. This is, of course, not the case with traditional public works or services, where payment for construction works is made on an interim basis as the works proceed and the "concrete is poured", so to speak. These are much more short-term arrangements. The sponsors and their lenders under a PPP, by contrast, will have essentially long-term interests, as does the contracting authority, and must rely on the long-term operation of the facility for the revenue stream and dividends. In that sense, the interests of the main participants are very much aligned.

Involvement of lenders

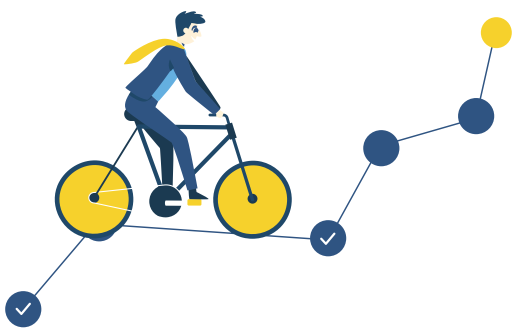
Another difference compared to traditional government procurement projects, and which can strain negotiations, is the need to involve the lenders (to a greater or lesser extent) from the early stages of a PPP project. The sponsors must be very confident of a project's bankability from the outset, and will not waste time and money on complex and protracted negotiations unless they are. This inevitably means they must be mindful of (and well-informed about) lenders' anticipated requirements throughout the process. This can often be achieved by using the right financial and legal advisers to the sponsors, but sometimes it necessitates the active involvement of the banks and their advisers from an early stage. This can be contentious for contracting authorities, however, who may not have had to deal directly with international lenders in the past and may be reluctant to do so now. They may regard the lenders' requirements as a matter for the sponsors, not for them, and resist arguments based on the legitimate

[58] See the remarks about the meaning of PPP above.

expectations of the financial community. Contracting authorities will usually accept that achieving financial close has to be made one of the conditions precedent to the PPP contract's wider effectiveness. Sometimes, however, they do not, insisting that it is simply the project company's problem and risk and that if it fails to achieve it, the authority should be entitled to call a default, draw on the bid bond and terminate the project.

This again highlights the need for rational balance. If the private partner fails to achieve financial close and the PPP contract is terminated, the project will either collapse or be delayed for years and the contracting authority will not get the new infrastructure and services it needs so badly, with all the attendant political and social sensitivities that such a failure would entail. Everyone stands to lose as a result. The vast majority of PPPs over the past 20 years have been project-financed, and where this is the case (or indeed, where a simpler financing structure is involved), the legitimate requirements and expectations of lenders obviously must be recognised and met. The sooner they are factored into the negotiation process, the better, especially where they include potentially contentious components, such as limited government guarantees, direct agreements and robust comfort letters. If the lenders and their advisers play at least some part in the negotiation of the PPP terms, or approve those terms as they are being finalised, it is much less likely that they will attempt to renegotiate or reopen issues afterwards as the financial documents are drawn up.

Again, it is helpful to think in terms of a long-term alignment of interests. In the end, all the principal participants in a PPP – contracting authority, project company, sponsors, lenders and financial guarantors – will depend on the project's long-term success, as will its ultimate beneficiaries, the public. (With a project-finance structure, the lenders will generally not, of course, have recourse to the balance sheet of either the government or the sponsors if things go wrong). Their interests should be reconciled and balanced fairly and transparently from the beginning.



Change orders

A PPP contract may or may not contain a variation mechanism. The contracting authority may not be interested in including one, and the private partner may prefer it not to have one. In some cases, however, it will probably be sensible to include one.[59] Major alterations to the scope of the construction works or services to be provided are very possible over the term of the PPP in response to technological changes (for example) or changes in demand for the services on offer. If the parties are going to have to agree each time about how they are introduced, there may be too great a risk of major disputes in the absence of a clear framework for effecting them.

Where a variation clause is to be included, the main questions tend to relate to (a) what parameters or limits are placed on each party's power to effect variations (for instance, does it apply during both the construction and operational phases, or just the former? Should the private partner have the right to refuse a variation where warranties or permits would be adversely affected?) and (b) how the costs (or savings) associated with them are allocated – both capital and resulting operational costs and savings.

The subject is complicated by the fact that (in contrast with conventional construction contracts) the private partner will usually have primary responsibility for raising the additional finance needed to give effect to a variation. This may not be possible, however. It may not be available on reasonable terms or acceptable to the existing lenders, for example. The parties will sometimes agree to make termination rights available when extra funding cannot be found (unless the government entity can act as lender of last resort). The interrelationship of any such new finance with the private partner's existing funding arrangements will have to be considered. If the project is being project-financed, the variation may have to lead to the generation of additional revenues if it is to be feasible. The parties will need to work out how any adjustments to the tariffs are made to recover the cost of the variation. It is likely to be in the interests of both to agree in advance on a clear methodology for doing this (for instance, so rates of return or financial ratios are protected). The same methodology may apply to the financial balance and change-of-law clauses (see below under the subsections with these headings). For these reasons, a variation mechanism in a PPP contract will likely have to be subject to much greater conditions and qualifications in favour of the private partner than is the case with simple construction contracts (where the employer automatically picks up the bill for one).

[59] UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects also recommends using one.

Note that, in many civil law countries, at least where administrative law concessions are involved, the public partner has an automatic legal right (which it is not allowed to waive) to modify certain terms of the PPP contract unilaterally – namely, those relating to the conditions of performance of the relevant public service (if there is one). If it does so, the private partner is entitled to be fully compensated for the costs it incurs because of the amendment. Where this principle applies, the parties often prefer (and would be well advised) to set out in the contract the exact basis on which this right might be exercised and the way compensation is calculated to avoid uncertainty and minimise the scope for dispute.

Tariff structure

One area where the subject of the public sector's control over the private partner's activities can become particularly sensitive relates to the private partner's tariffs or charges for the services it provides. The initial charges the private partner levies can be contentious enough in themselves; they may involve charges to the public for services that previously were free. Even where this is not the case, a sizeable increase in charges may be necessary so new facilities to be financed and built.[60]

The more difficult area, however, concerns tariff increases over the life of the PPP. In what circumstances should this be allowed to happen, and within what parameters? Where the public sector provides the revenue stream (which is only rarely the case with PPPs in emerging markets, in contrast with many PPP projects in Europe, where it arguably has become the norm), the government entity will by definition have considerable control over any increases. The more problematic situation is where the private partner directly charges third-party users of the facility (the general public, for instance) – such as tolls on a motorway or charges for clean water. Here, the private partner will often seek at least some discretion to make increases over time which it regards as necessary.

The government, however, may see it as critical to prevent undue tariff rises, especially given their political sensitivity. If a well-developed regulatory system is in place, this may be the mechanism by which any increases are controlled, making it perhaps unnecessary for the PPP contract to address the subject. There are many examples, however, of PPPs being awarded in countries where a regulatory regime is underdeveloped or even non-existent. In that case (as mentioned above), the PPP contract may itself represent the government's regulatory tool (which, as we have noted, may actually be preferable to sponsors and lenders if they lack confidence in the host country's regulatory regime).[61] This can lead the parties to draw up regulatory principles applicable to tariff setting and any revisions. Either way, the private partner and its lenders will often seek adequate scope to pass additional costs on to customers in response to given events – for example, resulting from economic dislocation, inflation, changes in law, requirements for additional investment and other exceptional events.

Structuring a mutually acceptable tariff will obviously raise much broader issues than ones of control. It will be fundamental to the agreed pattern of risk allocation.[62] For example, how exactly will the tariff be structured in a mechanical sense (as a series of discreet charges or a single charge)? How can a practical, meaningful link be established between the tariff and the private partner's performance? To what extent will the tariff be a fixed price one, and to what extent will the private partner simply be allowed to pass on certain costs? (It is rare for the private partner to be able to pass its final construction costs on to the contracting authority, for example. Any pass-through would usually to be on a fixed-price basis, agreed at the outset). Is the private partner taking demand risk? To what extent? Is it being paid for "availability" as well as operational performance?[63] How exactly will any performance penalty regime work? How will any indexation provisions work, and so on? The private partner's financing structure will play a prominent part in these discussions. If the private partner's entitlement to its revenues is too conditional and, therefore, too uncertain, the bankability of the project may be prejudiced. The riskier the emerging market, the greater this concern will be.[64]

[60] For example, the M1 road project in Hungary or the Second Stage Bangkok Expressway in Thailand.

[61] The operational concessions signed in the water sector in Romania a few years ago are examples of this.

[62] As the Treasury Taskforce emphasised in relation to PFI projects. See above for more.

[63] The tariff for the recently completed Maribor project in Slovenia, for example, had both an availability and a take-or-pay element.

[64] Performance penalty regimes have been designed to a high level of sophistication on many government-pay PPP projects, such as in the PFI context. They were used less extensively in the past in emerging-market concessions, where patterns of risk allocation tended to be simpler and more general. That is now changing. Effective monitoring of KPIs is perhaps a more familiar problem now.

It is worth saying a brief word about benchmarking and market testing in this context. Put simply, these are mechanisms[65] for periodically testing and re-establishing the consistency of the private partner's tariffs, and the assumptions of risk they represent, against the market norms for similar services being offered in the same sector or industry at a particular time. They are a device limit the impact on both parties of excessive risks and returns. They raise complex questions about timing, practicality and risk management, however. As far as the authors are aware, few examples of provisions of this kind are being adopted on PPP projects in emerging markets. That is perhaps not surprising, in that they presuppose a relatively high degree of stability in the risks to which a project may be exposed over the life of the concession if they are to be workable, as well as a market against which the private partner's services and prices can be tested. This will often not be the case in some emerging-market countries, which may have only started to use PPP structures recently.

Penalties for late completion

Structuring penalties for late completion and any supporting guarantees can be something of a challenge. The contracting authority may insist on liquidated damages in the PPP contract. The private partner will certainly include them in the EPC contract. Typically, the contractor must issue a performance bond in favour of the private partner. The contracting authority may also seek one of its own under the PPP contract, or try to take the benefit of the private partner's. Yet the lenders will insist on an assignment of the benefit of all the private partner's agreements and instruments as part of their security package. In any event, how is the quantum of any penalties for late completion to be calculated? Should the EPC contractor have to cover all the lost revenues of the private partner, together with any additional interest payable under the loan facility? Will this be commercially feasible, and subject to what caps? What about the contracting authority's losses in the event of delay, if there are any? How exactly are these determined?

The relationship between the penalties for late completion under the different agreements and the instruments securing them (bonds) always needs careful thought. Contracting authorities should be mindful of the fact that appropriate incentives to complete on time (such as a right to early or higher revenues) can operate just as powerfully as disincentives for failing to do so in the form of penalties. Late completion will delay the private partner's cash flow and expose it to potentially disastrous consequences. Conversely, completion on time will generate revenue and signal the project's progress and success. A contracting authority may not need more than this.

Quality of service/performance standards

The subject of the private partner's quality and level of service during the operational phase has attracted more attention in PPP contract discussions in recent years than in the past. There used to be a tendency to express standard of service goals in relatively summary and general terms. Attention tended to be focused much more on the specification for the physical assets to be built. That has changed in many ways, however, particularly in the context of European government revenue-stream projects, where sophisticated penalty regimes (for instance, based on performance point systems and deductions) can apply. Standard of service requirements tend to be defined more precisely and may be coupled with performance or availability penalty regimes. Questions include:

- How is "availability" defined?
- How exactly are any penalties structured (for example, how are they weighted between the private partner's different responsibilities?) How exactly will any deductions be applied?
- What are the quantitative and qualitative service level objectives?
- What is the distinction between wholly unavailable and merely substandard service levels?
- What are the monitoring and measuring arrangements (such as objectivity/self-monitoring mechanisms)?
- What are the tolerance levels and cure periods?

This area will likely need fuller development in the case of a PPP involving a government-sourced revenue stream than one where the facility users are being charged directly. With the latter, at least where a thoroughgoing free-market approach has been adopted, the private partner's revenues will be partly self-policing. Revenues should to some extent rise and fall with levels and quality of service. A performance penalty regime may be unnecessary or unworkable. In the former, however, the public sector will be paying the private partner to provide a service. The payment mechanism may therefore be conditional on the private partner attaining stipulated performance

[65] Originally developed in the context of PFI projects in the United Kingdom.

criteria. As already noted, PFI-type projects tend to involve the former model,[66] projects in emerging markets the latter.

Force majeure and financial balance provisions

A PPP contract will usually contain different clauses and provisions designed to protect the private partner (principally) and the contracting authority (secondarily) against the impact of unforeseen risks. They are designed to protect the private partner because it bears most of the project risks under the agreement terms and therefore needs more protection. Variation clauses, extension of time provisions, indemnities and indexation clauses all have this effect to some extent, reflecting the private partner's exposure to different risks and the most appropriate response to them. It can help, however, to draw at least some of these threads together in the same provision, often referred to as a financial balance, change of circumstance or exceptional event clause. To the extent they may give rise to the same consequences under the agreement, and the application of the same change-management provisions, it can make sense at a drafting level to include them all in a single extended clause.[67] They tend to be among the most difficult and contentious of the agreement's provisions to structure and negotiate.

In broad terms, this kind of clause aims to put the private partner (typically) or both parties (more unusually), as far as practicable, in the same net position as before the relevant event occurred[68] – to restore the financial balance of the agreement, in other words.[69] Put more crudely, its main objective will usually be to protect against risks that the private partner cannot absorb. It will do this by setting out a basis for modifying or adjusting the agreement terms to allow for the impact of these events[70] – for instance, by increasing tariffs or extending deadlines for the performance of certain tasks (a force majeure clause may also do the latter, of course). Hence the contentiousness of these provisions in negotiation.

The public sector may initially assume that, as the private partner is agreeing to perform its role essentially "at its own cost and risk", there should not be any scope to change the agreement as a consequence of any risks. And as the clause will be directed at events many of which will be beyond either party's control, the idea of having to pay the private partner compensation for any of them can be highly controversial. It can take time for the rationale for a clause of this kind to be fully appreciated.

The need for it arises from the very long-term nature of a PPP contract, coupled with the fact that certain objectives and standards will need to be met, while tariffs may be fixed or regulated under the agreement's term. This may leave the private partner far less able than parties to many other types of commercial contracts to manage risks beyond its control, for example, by transferring their economic impact to third parties. This in-built rigidity in PPP contracts has recently become the subject of much debate, intensified by the impact of the Covid-19 pandemic and economic crisis. Conversely, where the private partner has full and discretionary control over its tariffs and can modify its services as it thinks best, the need for such a provision diminishes. This question about control over tariffs and services should therefore be the starting point of any discussion of provisions of this kind (see tariff structure section above).

There is obviously a considerable degree of overlap between a financial balance clause and a force majeure provision. The two are often combined, at least in some respects, particularly in the ways their consequences are provided for. Traditionally, a force majeure clause would relieve a party from liability for (certain) events beyond its control, but would not entitle it to compensation. A financial balance clause will also do the latter. In fact, in the PFI context in the United Kingdom, a distinction tended to be made between three different kinds of "relief event":

[66] "The negotiated performance regime will form a key element of the risk transfer mechanism." (UK HM Treasury, Standardisation of PFI Contracts, 2007). The structuring of performance penalties was, indeed, a central part of the negotiation of most PFI projects, it seems.

[67] Many PPP contracts use different clauses for force majeure, material adverse government action and change of law. But the overlap between these provisions means it may be more convenient to group them together.

[68] The contracting authority may also seek tariff reductions or a shortening of the concession period for events which operate to the private partner's benefit. While this may be "symmetrical", it is often staunchly resisted. Is there much point? How exactly, and to what extent, will it be achieved?

[69] Note that restore does mean restore in this context, but rather restoring the private partner to its net financial position before the impact of the event, not restoring it to a state of overall financial health. If it was struggling financially before the event occurred, the clause cannot be used to turn its fortunes around – an argument which is still not infrequently run by sponsors in this situation.

[70] It will not necessarily formally amend the contract, at least not the terms and conditions, inasmuch as the change is made under and in accordance with its terms, although the net result will obviously be an alteration to certain of the contract's provisions (such as design/time/cost/charges).

(a) **Compensation events:** Events (occurring mainly during the construction phase) that are clearly at the public sector's risk and for which the private partner should be entitled to compensation (basically, variation orders, breach of contract and certain changes of law).

(b) **Relief events:** Events arising at any time during the contract term that should entitle the private partner to relief from liability for failure to perform and which the private partner should manage at its own financial risk, but which should not give rise to any compensation or rights of termination.

(c) **Force majeure events:** Events arising at any stage of the contract that are best managed by the private partner, but in respect of which rights of termination can arise (for example, truly cataclysmic events, which are either wholly uninsurable or uninsurable on normal commercial terms).[71]

This (somewhat cumbersome) methodology does not yet seem to have been widely adopted outside the United Kingdom. A simpler, more integrated approach is generally preferred these days, in both common law and civil law jurisdictions. In principle, there is no overriding, cogent reason why force majeure events should not entitle a private partner to compensation as well as relief from potential liability in appropriate circumstances.

To some extent, financial balance clauses are already enshrined in many civil law systems, at least those influenced by the French tradition, particularly where administrative law requires the preservation of an agreement's economic balance.[72] Indeed, the very concept of financial balance almost certainly originates in French jurisprudence. In countries where the law already provides for it (such as France), it may not be necessary to include it in the agreement, although modern financing structures and expectations are likely to prompt its explicit treatment anyway. In common law jurisdictions, where it does not, it would be considered vital to set out the mechanisms concerned clearly, precisely and comprehensively in the PPP contract to make them workable, so that all project participants (including the lenders) know exactly where they stand. To avoid uncertainty and ensure compliance with best international practice and lenders' expectations, the parties in civil law countries may take much the same approach in the end.

Under French administrative law and many other civil jurisdictions influenced by it, the concept of financial balance is an old and well-respected principle.[73] It has been invoked primarily to provide a rationale for the compensation payable to the private partner when the contracting authority (or the public sector it represents) modifies or "tilts" that balance. Examples are the fait du prince theory and the right to compensation in the event of a unilateral change to the contract imposed by the contracting authority. In both cases, the private partner is entitled to full compensation. Administrative case law refers extensively to the concept of distortion of the economic balance of the contract (bouleversement de l'équilibre économique du contrat). The concept derives from the general rule (the imprévision theory) according to which public services must be performed continuously, with the consequence that, in the event of a distortion of the contract's economic balance, the private partner is entitled to compensation – although only to the extent strictly required to ensure the continued performance of the public service activities.

There are really three distinct, if overlapping, areas that a financial balance clause should therefore address, each of which can be difficult to finalise and agree: (a) which events should lead to an adjustment? (b) how should the impact of these events be measured? (c) what form should any adjustment or compensation take?

The subject of which events should trigger the provision, potentially giving rise to an adjustment, is clearly a question of risk allocation.[74] Certain events, such as political force majeure[75] and change of law, are certain to feature (at least in some form). A separate clause may sometimes cover natural events of force majeure, in that they involve relief from liability, but not necessarily compensation. The private partner and its lenders will need some protection against the risk of political interference with the project—for instance, nationalisation, expropriation, loss of key permits and consents, or policy changes affecting the operational regime. Change of law will

[71] For example, nuclear explosion and contamination, pressure waves caused by aircraft acts of terrorism, war and hostilities.

[72] See below.

[73] Although its implications and consequences at a practical level have not been extensively examined in case law.

[74] The private partner's ability to insure these events will obviously be a relevant factor. The discussion may be complicated by the possibility of insurable events becoming uninsurable at some stage during the term of the agreement, or vice-versa. This is likely to become a very real question in the context of Covid-19-type pandemics and their impact, as many insurers are likely to exclude it from their policies.

[75] Sometimes referred to instead as material adverse government action.

generally need to be addressed as well, especially in relation to new legal requirements involving the private partner in additional capital expenditure or a drastically modified operational regime. Variation or change orders and breaches of contract by the contracting authority are also commonly included (as the same methodology can apply to them).

The clause will be more contentious in relation to risks going beyond this relatively narrow scope – non-political events of force majeure, for example, such as severe economic dislocation, the effect of competing facilities, failures of raw material supplies, interruptions in other necessary supplies and utilities, or changes in the fiscal regime. There is much discussion in today's market about the extent to which climate change and Covid-19-related events should be expressly addressed and how. (There are many possibilities, depending on the nature of the project and the precise occurrence.)[76] If the PPP is essentially an operational one (that is, the private partner is taking over and developing an existing facility), there may be great uncertainty at the outset about the real nature of the system's existing deficiencies and where capital improvements should be focused. This can reinforce the importance of this clause.

Again, the scope of financial balance clauses tends to differ sharply between emerging-market projects, where risks may be much harder to predict, quantify and manage, and developed economies, with their more stable and familiar business environments. In emerging markets, the private partner will usually press for the broadest possible protection against unforeseen risks. Sometimes, it will even be entitled to seek an adjustment for any material adverse event beyond its control. PFI projects in the United Kingdom, by contrast, often gave the private partner only very limited protection of this nature (limiting change of law to discriminatory and specific changes, for example). In the end, the critical factors will be the perception of risk in a particular environment and the private partner's ability to manage and absorb it (taking account of the lenders' expectations) within the commercial framework it controls.

The second question is about the basis on which the impact of these events is measured and quantified. What criteria should be applied – reduction in cash flow, effect on the private partner's "net financial position" (which may need to be defined) or some other basis? The public sector will justifiably be concerned about any basis which allows the private partner to claim losses too readily or too subjectively. It is common (as it is with PPPs in the United Kingdom) to oblige the private partner to absorb certain losses up to a given threshold, a certain amount per event and/or per annum, for example. This would represent a risk-sharing approach between the parties, which in some ways is the fairest way to deal with events beyond the control of both. It is common practice to link these calculations to the project's financial model (or one of them), and its assumed rates of return, to determine both losses and the necessary compensation.[77] In addition, what, if any, allowance should be made for windfall benefits derived by the private partner from unforeseen events? How should these be netted off against any adverse consequences? Any insurance proceeds available to the private partner in relation to the event in question should also, of course, be factored in to these assessments.[78]

Finally, there is the question of how the private partner should be compensated and its financial balance restored. How, exactly, are any remedies to be applied? Commonly, the agreement should leave considerable flexibility as to how this is done, as an overly prescriptive approach may be difficult to apply. The private partner will often be entitled to an increase in tariffs, an extension of the term of the PPP contract, an alteration to completion milestones or capital expenditure requirements, a cash payment or a combination of all these. When it comes to applying these remedies, the clause will often leave scope for the parties to determine and apply them by agreement, if possible.

This may not be forthcoming, however. The agreement's dispute-resolution mechanisms will be of vital importance in this context. The agreement

[76] See Chapter 5 on the impacts of Covid-19 on the legal framework for PPPs.

[77] Using the financial model to calculate the private partner's compensation is not always straightforward, however. The formulae used in the model may be opaque, which can obscure the process followed in achieving the end result. There is likely to be contention about how exactly certain events are modelled. The process may call for access to more confidential data than the private partner is willing to provide. And, in any event, if two of the main parameters of the exercise are preserving the loan life cover ratios and equity returns of the project, there may be several different ways to achieve this. In general, there is much to be said for simplicity of approach.

[78] There was a tendency for a while in the PFI context in the United Kingdom to try to carve out insurable events altogether from the scope of these provisions. That approach came to be regarded as too crude and impractical, however, and has not gained much wider currency. In most cases, an explicit carve-out should be unnecessary. If an event was actually foreseen and insured against, it should not be possible to invoke the clause and the private partner should not need any compensation if it has not suffered any loss. It should still need relief from potential liability, though, under force majeure, if it has been prevented from performing a material obligation by the event.

should ideally lay down an agreed, objective basis for determining how any adjustments are to be made, with remedies listed as a series of options, which the dispute-resolution procedures can give effect to, in the absence of agreement. The more precision that can be applied to the methodologies and procedures involved, the better the chances of an acceptable solution being found, which avoids a wider dispute; the parties should give careful thought to this when the contract is being structured. As an alternative, however, the parties may simply prefer to retain a right to terminate when agreement on the subject cannot be reached and the procedures do not produce an acceptable solution.

The question sometimes arises whether there are ever circumstances in which the contracting authority should actually pay the private partner compensation, rather than just extend the concession term. After all, extending the term should always put it in a position to recover losses eventually by earning additional revenue. The answer is, almost certainly, yes. (This is likely to be so in most cases, in fact). First, there are at least certain circumstances in which delay in recovering losses may be unacceptable to lenders and equity investors. Loan life cover ratios and rates of return over assumed time periods would otherwise be prejudiced. The lenders' expectations in this context will always have to be taken into account. They will attach great importance to the clause and would usually insist on the private partner continuing to receive sufficient revenue at least to cover debt service during any period of operational force majeure.

Secondly, there is the advantage of simplicity. Working out exactly how to adjust a concession period to compensate the private partner for losses can be far from straightforward. The project company's financial computer model is often worked into the contractual mechanisms, simplifying the process of calculating the impact of certain additional costs and providing a fair, objective basis for doing so, which can reduce the scope for disagreement. Finally, there is the matter of incentives. The contracting authority should try to manage and overcome certain risks as quickly as possible. There may be some indifference towards events that trigger an extension of a 30-year concession period.[79]

When should cash compensation be paid, and when should the private partner have an adjustment to its charges? Practicality and judgement are likely to be key tests here. What cash resources and credit standing does the contracting authority actually have? Is the private partner's loss a "one-off", or recurring? Is a tariff increase viable in the circumstances? It often makes most sense for the form of compensation to match the form of additional cost or loss incurred as closely as possible – for instance, cash compensation for up-front capital cost, adjustment to tariffs for operational costs. If the contracting authority asks the private partner to raise the necessary finance for a major capital investment, a further tier of complexity can be added to the discussion. If the private partner cannot so on acceptable terms, it may need to be able to terminate the agreement. A right to terminate is also commonly included for events which cannot be adequately remedied or compensated, such as a prolonged or cataclysmic, unremedied event of force majeure or a change in law which renders performance illegal and the project unviable.

Change of law

It is worth briefly looking at the questions raised by the structure of a change-of-law clause, which usually represents an important category of the change management and exceptional event provisions described above.[80] They illustrate several of the points made in the preceding paragraphs. The private sector tends to assume almost instinctively that the contracting authority should bear the risks associated with changes to them because a country's laws are a matter of government control. The government entity will respond that, as a mere government department or even local authority, it may have limited control over such changes and that all companies doing business in the country in question face this risk, usually without any recourse to the public sector. The reality, though, is that PPP contracts are unlike most other forms of large-scale commercial contracts in that they are very long term and structured on the basis of risk allocation and pricing assumptions that have been agreed with the public partner at the outset. The private partner often has limited ability to revise these terms unilaterally if changes of law occur which have cost or performance implications. If it is forced to bear that risk and price it into its charges up front, the result may be excessive expense and lower value for money. In the end, both parties will, in reality, be signing up in the contract to a value for money

[79] To paraphrase John Maynard Keynes, in the end, we are all retired. To borrow from Samuel Johnson, in contrast, a potential liability to make cash contributions "concentrates the mind wonderfully".

[80] At a drafting level, a change of law provision will usually be drafted as a separate clause for the purposes of its definition and scope, but the mechanism used to address any consequential changes to the agreement and compensation arrangements is likely to be the same as for force majeure and other exceptional events.

concept over the project's life cycle that the lenders will also need to regard as bankable. This means that some protection against unforeseeable changes in law make sense.

The definition and scope of the clause will need careful thought. It usually starts with broad definitions of applicable law and change in law, followed by a narrower one of those types of change in law which may trigger the adjustment mechanisms. In nearly all cases, there will need to be at least some limits on the private partner's ability to seek redress. A distinction usually has to be made between the more general changes of law in the country, potentially affecting anyone, and the more specific ones that are likely to have a direct impact on the concession project in question or PPPs as a whole. Only material changes which the private partner cannot readily absorb above a certain threshold are likely to be included. (The agreement should not seek to impose an effective freeze on the country's legal regime at the date of signature for the private partner's benefit, even though the attempt sometimes seems to have been made.)

Which changes of law, then, should entitle the private partner to relief and/or compensation? In the British context, as we have said, compensation was typically restricted to a narrow range (discriminatory and specific changes of law, for example). In a rapidly changing emerging-market country, however, this is unlikely to be sufficient for the private partner. The legal system in the jurisdiction in question may be subject to numerous uncertainties. It may be undergoing rapid, radical transformation (as in most countries of Central and Eastern Europe, for example, at least over the last quarter-century). How reliable are foreign investment-protection laws? How well-defined are the country's security laws (from the lenders' perspective, in particular)? Are radical changes in environmental protection laws likely? Will changes in tax law be covered? Will a new regulatory regime be introduced, and with what effect on the PPP, and so on? Because changes in law may also benefit the private partner and the project, the clause is sometimes also structured as a reciprocal one, allowing the contracting authority to share in some of the benefits (for instance, cost savings that make a reduction in tariffs possible).

Certain provisions of the PPP contract are likely to give the private partner at least some de facto protection against changes in law in any event. The private partner may be able to insist on a variation order for design changes required during the construction phase, for example. A tariff index will represent a certain ability to pass through higher costs attributable to changes in law, although this will not cover the cost of any major capital expenditure. Grandfathering provisions (assuming they are feasible under the wider legal system) may also be included to protect aspects of the project or operational regime against subsequent changes in regulation. The private partner will also typically be given an obligation to take all reasonable steps to mitigate the impact of the relevant change of law.

Having decided which categories of change in law will entitle the private partner (or the parties) to some form of redress, the parties will need to agree on how any losses, savings and adjustments are to be determined. If the private partner is free to set its own tariffs, perhaps without restriction, what sort of protection, if any, does it really need? Will it be in a position to pass on all or part of its additional costs to end users? If not, should there be a threshold amount which the private partner must absorb before it can seek redress – thus building an element of risk-sharing into the clause?[81] Should changes of law requiring capital expenditure be treated differently from operational costs? Who should be responsible for obtaining any additional finance needed for the former? What if it cannot be obtained? What, if any, changes of law will entitle either party to terminate the agreement? There are no ready-made answers to these questions. Mutually acceptable solutions will have to be found in negotiation.

Maintenances

Closely related to the operational requirements are the maintenance standards. In general terms, it will be up to the private partner to define, plan and cost its own maintenance programme, working within the broad parameters laid down by the public sector. (For example, "all maintenance to be carried out in accordance with applicable laws and good industry practice", so standards of service can be met and the assets' useful economic life preserved.) However, it may be necessary to negotiate and agree the duration and timing of any maintenance "outages" or reduced service levels. The more problematic areas relate to the following:

- The definition and application of major maintenance obligations, which should not, of course, amount to a forced outage (or equivalent) provision, potentially exempting the private partner from performance penalties.

[81] The preferred approach on PFI projects was for any entitlement to compensation to be subject to a "stepped" or "banded" series of thresholds, so the recourse available depends on which "band" the additional cost falls into. This is a good example of a risk sharing mechanism. The idea is to maximise the private partner's incentives to manage this risk.

• Maintenance requirements towards the end of the project's life. The risks and responsibilities taken on by the private partner may need closer definition in relation to this phase, when the project assets may be approaching the end of their useful life.

• In particular, will the private partner have restoration and rebuild obligations, to ensure that the project still satisfies certain standards and quality tests as it is handed over? How will the costs of this be borne?

• Pre-transfer surveys. Will there be a mechanism for carrying out detailed, formal inspections and surveys of the project, either just before handover or at regular intervals? If so, when and in what depth? What consequences will they have in terms of any rebuild responsibilities of the private partner? Will a third-party expert or group of experts be used for this purpose and, if so, what powers will it have?

The nature and extent of any residual value risk assumed by the private partner will affect these questions. Special payment provisions may also come into play towards the end of the term to address them. Occasionally, the agreement may provide for a "balloon payment" by the granting authority at the end of the term, or conversely, for the build-up of a retention to guard against defects.

Termination and compensation

A PPP contract will typically contain a termination clause. Some of its contents can prove highly contentious. If exercised, it would trigger the unravelling of the matrix of agreements underpinning the whole project and put the project assets (on which tens or hundreds of millions of dollars may have been spent), if they survive at all, back into government hands.

Grounds and procedures. The exact grounds on which termination rights can be exercised, and the procedures involved, may be one area of disagreement. They are often somewhat broader and more easily invoked in emerging markets than developed ones. Some will be almost unavoidable. From the public sector's perspective, they are likely to include the insolvency of the private partner, abandonment of the project and prolonged material breach of contract (which often has to be defined). Equally, the private partner will need the protection of rights of termination based on effective annulment of the PPP (expropriation of essential assets, for example, or withdrawal of certain permits and consents) or, again, unremedied breach of contract.[82] Rather than – or perhaps in addition to – having an open-ended, general ground based on unremedied breach of contract, the agreement may spell out which breaches are to be treated as events of default; they may extend to breach of any of the contract's clauses which are considered of critical importance to the project and its standing.

Other grounds of termination will be more debatable. Persistent or repeated breach may be specified (and defined), for example, or accumulated penalty points for poor performance over a certain threshold and period of time. Occasionally, a right of termination at will or for convenience is sought; this will only be acceptable (if at all) against the payment of full compensation to the private partner, its lenders and investors. The private partner may want to use the clause to reinforce the agreement's protections against political and country risk, or changes of law for which the private partner cannot be adequately compensated. Prolonged or devastating force majeure is likely to feature as well, if the parties can agree about the applicable tests. Local law may also give the public sector a right of termination on grounds of[83] public interest (which may be the same as a right to terminate at will) or otherwise impose restrictions or conditions on the applicable grounds for termination and procedures involved, which will need to be carefully examined as part of the due diligence exercise (it may not be possible to derogate from them).

The procedures applicable on a termination of a PPP contract tend to be lengthy and precisely defined. There is often a need for a warning of intent to terminate, followed by a first termination notice, a long rectification period during which the default can be put right (which would cancel the right to terminate), and then a final termination notice if it is not. The lenders' step-in rights under their direct agreement must be factored into these procedures and fully integrated with them. The agreement's handover and training procedures also need to be considered

[82] In some civil law countries, it is mandatory to lodge a claim before a court of justice to terminate a PPP contract in the event of a contracting authority's event of default. This can be very problematic for the private partner and its lenders if they are trying to contract out of the jurisdiction of the local courts. It should always be checked at due diligence stage.[80] At a drafting level, a change of law provision will usually be drafted as a separate clause for the purposes of its definition and scope, but the mechanism used to address any consequential changes to the agreement and compensation arrangements is likely to be the same as for force majeure and other exceptional events.

[83] Not uncommonly, government-owned utilities which are subject to privatisation or restructuring plans themselves at a later date enter into PPPs. The private partner may feel certain aspects of these plans should also trigger termination rights.

(see below on both subjects). The whole process may take six months to a year, or even longer. This may seem excessive, but sufficient time should always be permitted to correct a default or breach that can be remedied, incentivise the parties to try to negotiate mutually acceptable solutions, to give the lenders a real opportunity to protect their position, and to allow for the practical realities of a final termination which takes effect. PPPs are large and complex projects, often involving important public services, which demand continuity. It may also make sense to oblige both parties to act reasonably in relation to the exercise of their termination rights.

Termination payments. The question of the termination payments payable in these circumstances tends to be the subject of greatest contention in this area. This raises issues about incentives as well as payment for assets transferred (assuming they are transferred. If the private partner can retain them following termination, the discussion will take a very different course. It is unlikely to be able to do so, however). The private partner and its lenders and investors will expect as much compensation as possible when the government entity is in default or a political risk event, change of law or public interest/convenience termination is involved; they would expect this to be sufficient to cover the private partner's senior and junior debt and to allow the investors an adequate return. Market practice in these cases tends towards the position that the payments should be made on the same basis as if the project had been fully performed. They are therefore likely to allow for the full value of assets transferred back to the government, as well as at least a proportion of revenues foregone, together with unwinding costs. Calculations may be based on an accounting valuation of those assets (such as book value or replacement value) or on the cost of paying out senior and subordinated debt and third-party creditors, followed by equity at the assumed internal rate of return or market value (as defined). Alternatively, the net present value of the envisaged future revenue stream (minus operational costs) may be used as a basis. The project base case financial model with its assumed rates of return is often made part of the determination. A calculation based on financing arrangements rather than asset valuations is generally considered more certain and reliable.

Many agreements will put compensation payments following natural (that is, non-political) force majeure in a different category. By definition, neither party will be at fault in this situation. It would be hard to argue against some compensation for assets installed and investments made. The usefulness or otherwise of any assets transferred to the public sector will be very relevant. Yet full compensation may be hard to justify, as its effect would be to transfer much of that force majeure risk to the public sector.

The more challenging question relates to a termination where the private partner is at fault. The contracting authority will usually hold that the private partner should get no compensation in such circumstances. This argument may be reinforced if the government has agreed to step-in rights and termination has proceeded after an unsuccessful attempt to exercise them. The project company's shareholders may be prepared to live with this approach and to forgo any return on equity (or other compensation) in this event.

The lenders will be reluctant to do so, however. They are likely to have provided most of the project's finance (perhaps 70-80 per cent or more). They will usually oppose the idea that most of this funding should simply be written off and the public-sector receive a large windfall benefit (that is, the completed infrastructure) as a result of a default which they may not have been in a position to address. Their aversion to risk, reinforced when they are lending to an emerging-market project, will make it difficult for their credit committees to approve a project which incorporates this feature.[84] The aggregate value of the project assets handed back to the public sector on termination may exceed any losses actually suffered by it as a result of the private partner's default – by a large margin. Yet the lenders will have financed the bulk of those assets and will recover only a small proportion of their funding unless compensation is paid. This is why the private partner may be in a position to mount a legal challenge to the provisions on the basis that it constitutes a penalty clause (where a common law system is involved) or an inequitable or unconscionable one (where a civil law system applies), unjust enrichment or expropriation without compensation. The sponsors and lenders are unlikely to be satisfied with these highly arguable and uncertain remedies, however.

The outcome of these discussions will not be easy to predict. The issue tends to be highly emotive. The public sector may find the notion of compensation on default deeply unacceptable.[85] At the very least, it will want to ensure that the private partner has

[84] Although international financial institutions' development banks seem to be more willing than commercial banks to accept a "haircut" in this situation

[85] There have been examples in the United Kingdom of projects being financed without it, although they appear to be rare.There seem to be very few examples in emerging-market countries. .

appropriate incentives to perform and it stands to suffer substantial losses if it fails to do so. A compromise solution that has been applied on a number of projects in emerging markets is to provide for full compensation for transferred assets to be paid as a starting point in these circumstances, but to allow the public sector to deduct its actual losses (such as rectification costs or the additional cost of hiring in another operator) attributable to the private partner's default from any equity payments. (There are likely to be deductions anyway for credits available to the private partner, such as amounts standing to the credit of its project accounts and available insurance proceeds.) Alternatively, assets taken back into public hands may be valued on a different basis than where the government is at fault (such as a proportion of historic cost, as opposed to a depreciated replacement value).

Lenders, however, will often refuse to finance the project unless they are assured of being paid out, to a large extent at least, no matter what the reasons for termination.[86] They usually insist on a finance-based approach to termination payments, with its clarity and precision, as opposed to an asset valuation-based one, with its attendant uncertainties. The ability of the government to re-tender the project following a termination (and to factor any termination payments into the purchase price) can be a relevant factor in this discussion, as should its ability to continue to operate the project to generate revenues. Yet rational analysis will only take the discussion so far. The conclusion will ultimately depend on the give-and-take of commercial negotiation.

There was a trend in the PFI market in the United Kingdom a few years ago towards a more open-market-based approach.[87] Essentially, this involves paying the private partner the market value of the unexpired term of the project agreement, where a termination follows from a private partner default. In theory, this has the appeal of fairness to both sides and avoids the almost arbitrary discrimination between debt and equity funding structures of a senior debt-based approach. It remains to be seen whether this approach will gain much ground in emerging markets (or the United Kingdom, for that matter). It presupposes an available market for the distressed project, which may simply not be the position in a newer PPP market. Lenders may also simply refuse to tolerate it if there are wider concerns about the bankability of the project.

There may also be greater concerns in an emerging-market context about the contracting authority's ability to stand behind its potential liabilities for termination payments, which, as we have seen, could be very large. Its credit standing may need to be reinforced, perhaps by a central government guarantee (if it is not automatically backed by the government's balance sheet, as it often will be) or some form of multilateral support. In some jurisdictions, the contingent liabilities and their budgetary implications may also need parliamentary approval. Ideally, both the government and private-sector participants should think these questions through early in the project's planning, as bidders and lenders may be deterred if they look too intractable. Credit risk concerns may also lead to a right to make any termination payments over a period of time, rather than in one instalment, although the private partner and its lenders will inevitably prefer a single lump-sum payment.

Whichever solutions are adopted, it is likely to be helpful to all concerned to provide for termination payments and liabilities precisely and simply in the PPP contract, to minimise the scope for uncertainty and dispute. Simple and objective calculation methods should be the aim. References to other agreements, such as the credit documents, equity subscription agreements and/or financial models, should be appropriate and exact, bearing in mind that the contracting authority will probably insist on approving the documents being referred to, and any subsequent amendment to them, or at least those provisions which affect its potential liability.

Step-in rights

Lenders' step-in rights. When a PPP project is project-financed, the lenders are likely to insist that step-in rights be granted to them in relation to it. These will allow them, in effect, to take over the project and, if necessary, bring in a substitute private partner to forestall a termination of the PPP contract following the private partner's default. They will suspend the operation of any termination procedures and ultimately allow a novation to the project contracts to a third party to take place. The PPP contract will normally acknowledge rights of this kind, although they are likely to be set out in detail in a direct agreement between the lenders and the host government (to which the private partner will usually also be a party). For all intents and purposes, however, they will effectively form part of the PPP contract.[88]

[86] This will, in turn, lead to discussion of the definition of senior or recoverable debt in these circumstances. Subordinated sponsor debt – or quasi-equity (if that is what it is) – is likely to be excluded, for example. Rights of set-off may also have to be negotiated.

[87] See the recommendations in the UK Treasury publication Standardising PFI Contracts.

[88] See also Chapter 2, which explains them in more detail.

Their rationale is, put simply, to provide a form of substitute security to the lenders. Project finance lenders will take the most wide-ranging package of security measures they can over the project assets.[89] Yet this will be virtually worthless if the PPP contract is no longer in place. The sale of the project assets to third parties on a break-up basis will have very little value. If the agreement is terminated, the ability and right of the sponsors and the private partner to generate the cash flow on which the lenders will depend for repayment will be lost; the collapse of the other project contracts is likely to be triggered as well. This is why the lenders will regard it as essential to keep the PPP alive, as it were, and give the project company (or a substitute entity) an opportunity to cure the default and so continue generating revenues. Step-in rights are designed to achieve this.

Almost invariably, however, at least in emerging markets, these rights prove controversial. For government bodies which have not encountered them before, the underlying principle can require a great deal of explaining and justification. They may feel that, because the private partner will have failed to perform (or become insolvent) when these rights come into play, there is little logic or equity to the suggestion that they should relinquish their resulting termination rights just because the private partner has chosen to use extensive debt finance to fund the project.

In addition, the lenders will often need a power to modify or replace any of the project contracts if their step-in rights are to be meaningful, as well as to replace the private partner's shareholders (and will therefore also enter into similar agreements with the parties to the other principal contracts). This, too, can seem a bizarre requirement in relation to a project that the government may have spent months or years developing and which has then been awarded perhaps after an intense competitive tender. The political dimension adds still further to the concerns. Consequently, negotiating such rights can be difficult and time-consuming.[90] Mutually acceptable conditions will have to apply to them. In the end, though, the contracting authority is likely to prefer to see a project saved than collapse. To that extent, it aligns the public sector's interest with that of the lenders. The more awkward questions include the following:

(a) **Trigger events.** In what circumstances, exactly, should these rights be allowed to come into play? The issue of a termination notice under the PPP contract, or an event of default under the financing documents, are typically specified. Will any kinds of default be exempt from them?

(b) **Cure periods and procedures.** For how long will the government's termination rights be held in suspense as the lenders attempt to cure a default and/or find a substitute private partner? What procedures will have to be followed as step-in rights are exercised? How long should step-in periods be allowed to last? (Periods of six months to a year are not unusual.)

(c) **Project restructuring.** How extensive should the lenders' rights be to restructure the project, replace the shareholders, modify the project contracts and change the parties to them? (The lenders will also have to negotiate such rights directly with the contract counterparties, of course.) When should they be entitled to use a substitute entity? What approval rights should the government have in relation to any new participants in the project?

(d) **Limitation of liability.** What responsibility should the lenders (or their step-in vehicle) have for the existing liabilities of the private partner – full, limited or none? How should liabilities incurred during the step-in period be treated? Will the contracting authority require a step-in undertaking from the lenders and, if so, containing what assurances?

(e) **Step-out.** Apart from the time limits mentioned in (b) above, in what circumstances should the lenders be allowed or obliged to abandon their attempt to step in to the project? For example, should a further default have this effect?

(f) **Insurance proceeds.** What obligations should the lenders have to apply insurance proceeds to rebuild, repair or replace defective works? In what circumstances can they simply apply them to reduce outstanding debt? The contracting authority will obviously expect the proceeds of physical damage insurance to be used to reinstate damage and maintain the project's viability. The lenders, however, may insist that, notwithstanding such use, the project may no longer be viable from the perspective of security for their finance. How is project viability defined and measured in these circumstances? A detailed test related to certain financial ratios may be provided for.

[89] Lenders will also take an assignment of the PPP contract and other project contracts as part of their security package. On the one hand, this will give them no better claims than the private partner under those agreements. On the other, it may have little real value following a termination. Hence, the importance of a direct agreement giving them distinct contractual rights and remedies in addition to their security.

[90] One of the authors recently advised on a BOT project in Eastern Europe where financial close was delayed for a year by discussions between the lenders and the contracting authority on this subject.

(g) Interrelationship with termination payments. If the lenders have negotiated extensive termination payments on a private partner default, do they also need step-in rights, and vice versa?

Step-in rights are now a well-recognised and understood mechanism under British law and other common law jurisdictions. Perhaps first devised for the Channel Tunnel project, they have since come to be regarded as an almost invariable component of a project finance structure on a PPP in most jurisdictions. (Although the authors are unaware of any instances where they have actually had to be used, their very inclusion in the project documentation can play a significant part in keeping a project alive and incentivising the resolution of disputes.)

The direct agreement setting them out will, in theory, be subject to the same system of law as the other financing documents (although governments may insist on local law, which can make sense, as it is effectively a form of extended qualification to the PPP contract). However, the viability of such rights in the host country always must be thought through carefully. There may be aspects of local law or legislation which vitiate or qualify them and obstruct the contracting authority from signing up to them. If so, this may ultimately prejudice the bankability of the project. This is why PPP laws often confirm the viability of step-in rights.

Contracting authority step-in rights. The contracting authority may insist on step-in rights of its own in the agreement. This often makes sense. These rights may already be provided for by statute. The PPP may cover an essential public service for which the authority is ultimately responsible, both as a political imperative and a matter of legal duty. If the private partner is failing to perform or prevented by circumstances from doing so (as in the case of an emergency of some kind, threatening public health or safety or the continuity of service provision, which the private partner cannot deal with satisfactorily), the authority may have no alternative but to step in itself for a limited period and take over management of the facility (in whole or part) to overcome the problem and ensure the continued provision of services to the public to the requisite standard.

There is often a fierce debate between the parties in negotiation about when these powers can be exercised, for how long and subject to what obligations in favour of the private partner. If they are abused, the private partner and its lenders risk losing everything. The conditions of exercise, the standards applicable to their exercise, the obligation to hand the facility back to the private partner once the crisis is over and the (perhaps limited) cost and loss protections given to the private partner while these powers are in play will all need to be closely defined, both to protect the sponsors and make the powers acceptable to lenders. There should be a clear obligation to step out once the problem has been resolved and normality returns, failing which the private partner should have a right of termination. In principle, the latter should be compensated for any resulting (direct) costs or losses it incurs, to the extent it is not itself at fault, as a result of the public sector step-in. If its breach has necessitated the step-in, on the other hand, it should not receive any compensation.

Refinancing

PPPs in developed markets often provide for an element of sharing of any financial gains flowing from a refinancing of a PPP during its life. There can be numerous reasons for a refinancing. The project may have been structured in the first place with one in mind-as when bridge financing or a “mini-perm” has been used; the market itself may have shifted – either the PPP market, the commercial environment in which the project operates (that is, with higher or lower demand) or the financial markets, perhaps making debt less expensive; or the project may have become a distressed one, necessitating a restructuring of its financing arrangements. In any case, the term usually refers to the reworking of a PPP’s debt finance, which may result in higher equity gains for the sponsors. In advanced PPP markets, this has led to widespread demand for those equity gains to be accompanied by the passing back of some of the benefits to the public sector, particularly in relation to the very precisely structured documents used for government-pay PPPs, where the private partner has very little scope to modify its revenue stream. If it is used, there will be detailed questions to answer about what amounts to a refinancing, how any gain is measured, what proportion is shared with the contracting authority, what form its share takes (such as a lump sum payment, periodic payment, reduction in availability payment or user charge) and over what period.

The mechanism is far more unusual in emerging markets,[91] where user-pay PPPs are more common, market risks are generally higher and the project as a whole is likely to be attended by considerably more uncertainty. This makes contracting authorities more reluctant to pursue refinancing gains and private partners more reluctant to agree to them. If the latter take demand risk and the contracting authority has certain regulatory or contractual controls over toll revisions anyway, the logic of allowing the sponsors to retain any gains they may make from renegotiating the

[91] Although arguably becoming less so.

project's debt is fairly compelling. They would argue that this is just one aspect of the broader project risk they are taking. A compromise alternative is perhaps to give the contracting authority a simple power to approve any changes to the financing documents which will have a material impact on its potential liability for termination payments and the private partner's revenues, subject to a reasonableness test. The other questions can then be left to impromptu negotiation.

Retransfer provisions

Common sense might suggest that a PPP contract needs to contain only a short and simple clause dealing with the obligation to transfer the facility back to the contracting authority on its expiry or termination, in good condition and free of any liens or encumbrances. The picture is rarely quite so simple, however. After all, important public infrastructure and/or public services will usually be involved. The private partner will have been allowed to earn a significant return from the project during its control of it, and the contracting authority is entitled to be in a suitable, functioning, lasting condition when it is handed back. Thought will have to be given to a number of questions this generates.

It is not unusual to need a page or two to cover the ground in the contract. The exact assets to be transferred (contracted assets) will need to be identified, leaving the private partner free to retain and remove others. The remaining useful life of those assets will need to be specified with precision, as they will dictate the life-cycle maintenance sums that must be spent during the agreement's term. The meaning of "good condition" on handover will accordingly need some precision. A joint inspection by the parties of the facility, and/or a condition survey by an independent surveyor, is often provided for well in advance of the transfer date, with the private partner obliged to correct any deficiencies from the agreed standard before termination. A maintenance fund or performance bond to secure these obligations may also be required. A defects liability or warranty period for the transferred assets may also be imposed on the private partner, obliging it to return to site following termination and put right any defects which do appear during that period.

The records and documents to be provided with the transferred assets should be listed, including as-built drawings, repair schedules, detailed operating manuals and the benefit of any extant contractor warranties. Assets should be transferred free of any right, title or interest claims (such as intellectual property) and any security charges or liens. The private partner may have to train the contracting authority's staff for a given period before transfer, so that a fully functioning team is ready to take over operation immediately. At the very least, there should be arrangements for meetings and exchanges of information between the parties in the closing stages of the project, and a general duty of cooperation and transparency. Some of the private partner's staff and personnel may also need to transfer to the contracting authority. Taken together, the importance and logistical implications of all these requirements mean they need to take place over a lengthy period before termination – perhaps two or three years. The extent to which they can all be made to work on an early termination of the agreement is another difficult question.

Law and disputes

The structuring of dispute resolution mechanisms in PPP contracts needs careful thought – more so, in some respects, than in many other forms of commercial agreement. This stems partly from the long-term nature of these agreements, partly from the importance of the interrelationship between the PPP contract and the other project and financing documents, and partly from the complexity of the patterns of risk allocation reflected in the agreement. In fact, three different forms of dispute resolution mechanism will usually be needed, relating to:

(a) disputes about the interpretation and application of the agreement's provisions, where a breach of contract is alleged. Which system of law will apply? Should proceedings be litigated or arbitrated, and in what form?

(b) questions about minor adjustments to the agreement (such as replacement of the component of an index) where expert determination can be used.

(c) disputes about modifications to the agreement, in connection with the operation of a "change of circumstance" provision (for instance, modifying deadlines or adjusting tariffs), where a mechanism for effecting significant alterations to a contract is needed.

There is frequently fierce disagreement between the parties to emerging-market projects about whether local law, the local court system or local arbitration should be used. Governments will often push strongly for the use of indigenous law and court systems. They may see a high-profile PPP as an opportunity to foster recognition of these systems, and may find it difficult for policy reasons to agree to anything else. Investors and lenders, on the other hand, may regard this as unacceptable. They may have concerns about the impartiality of local systems where a major government body is concerned, and may try to impose a foreign system of law with which they are familiar and comfortable (British, US, French or even Swiss law, for example).

International arbitration, in a neutral location and under one of the more familiar international systems (for example, UNCITRAL, the International Criminal Court [ICC] and/or the ICSID) often becomes the compromise solution as a disputes procedure. In most cases, however, sponsors and lenders alike will eventually accept the choice of local law to govern the agreement. Not unusually, the relevant legislation will, in fact, require it. Even if it does not, local enforcement considerations, public law issues and security considerations may make this a perfectly rational end result.[92] After all, local law will usually govern the public responsibilities, property, assets and many personnel contained in the PPP anyway.

International arbitration, then, is usually the choice of sponsors and their lenders as a disputes procedure under a PPP contract. In its absence, a project may be regarded as unfinanceable. Largely for that reason, contracting authorities can often be persuaded to sign up to it. However, it is not always that straightforward. Sometimes (as we have seen) they are precluded from doing so by local law. This has been a particular issue for civil law countries which deem concessions and PPPs to be subject to administrative law, and therefore subject to the jurisdiction of the administrative courts. If this is the case, a formal derogation or new legislation may have to be introduced to overcome it. For example, the Euro-Disney Park project outside Paris had to be the subject of a special law providing for a derogation from French administrative law and permitting the use of international arbitration. If it had not been, the project may have had to have been sited outside France. As we have seen, a similar issue obstructed Türkiye's BOT programme for years.

Fortunately, many countries are now also signatory to the 1965 Washington Convention creating the ICSID under the auspices of the World Bank, the rights and protections under which normally override any conflicting requirements of local law. This contains an international arbitration procedure, based in Washington, DC, where it is managed and maintained. It can apply even between two locally established legal entities in the same state (for instance, contracting authority and private partner) to the extent that foreign ownership of one of them, in whole or part, allows the system's mechanisms to be brought into play.

Occasionally, a further compromise position may be taken. The parties may decide to use international arbitration only for major, unresolved disputes that potentially have a serious impact on the investment, leaving more minor ones concerning the project's day-to-day business to mediation or even the local courts. Besides keeping legal costs down, this will help avoid the political fallout sometimes associated with a major claim in an international forum, which can have a damaging or even paralysing effect on the project (some African water concession projects took this approach, for example). Some of the leading international arbitration systems also contain mechanisms for dealing with these less material disputes (for instance, the ICC International Centre for Expertise or its pre-arbitration referee procedure).

This is only part of the picture, however. There will always be ready-made mechanisms, as it were, to resolve disputes about breach of contract, whether through the courts or in the tried-and-tested arbitral systems in the international community. Essentially, it is simply a matter of choosing between them. Disputes about how to make fundamental revisions to the PPP contract, on the other hand, to give effect to "exceptional event" or financial balance provisions, will be less susceptible to resolution in this way. It is a fundamental principle of British contract law, for example, that courts will not rewrite the parties' agreement for them. Similarly, French law prohibits judges and arbitrators from "filling in the gaps" and substituting themselves for the parties to a contract. An arbitration forum would need to be specifically empowered to do so, and its powers may anyway be limited. In any case, the parties will be reluctant to go through full-blown legal proceedings to address the consequences of a force majeure event or a change of law (for example) if they can avoid it. They will want an efficient, impartial mechanism for reaching a fair commercial result, based on a firm grasp of the "exceptional events" in question and the intent of the agreement.

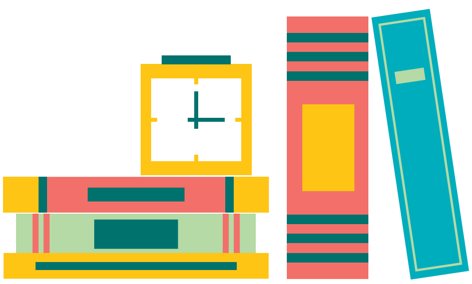
How exactly the parties will allow the PPP contract to be altered to give effect to clauses of this kind, in the absence of agreement between them, is likely to vary from project to project. In general terms, however, the mechanism chosen tends to involve a form of refined expert determination mechanism, with more extensive powers than an expert would usually have. For example, the PPP contract may provide for a panel of three experts, with appropriate experience and qualifications, to be constituted at signature, with power to apply the financial balance provisions

[92] The project company's lawyers may have to do exhaustive due diligence on the local courts and arbitral systems, as well as on all aspects of local law relevant to the PPP.

when they arise. It is always possible, of course, for experts of this kind to be selected on an impromptu basis as and when disputes occur, or by reference to an available procedure offered by the wider arbitration system selected (such as the ICC).

The advantage of having a standing (or at least rapidly available) body of experts or panel, however, is that the individuals chosen can spend as long as they need familiarising themselves with the agreement and its provisions at the outset (in particular, the financial balance clause) as well as providing continuity and consistency in relation to the decisions they make. The main disadvantage, on the other hand, is likely to be the cost of maintaining it, which may well be seen as prohibitive. Some agreements will also provide in detail for the procedure applicable to a submission of a dispute to a panel.[93] A panel may also be used in the first instance as a form of alternative dispute resolution, or mediation, before any final action is brought in the courts or arbitration forum.

PPP contracts are anyway likely to contain a number of the recognised mechanisms for dealing with certain questions of fact, minor amendments to the contract or a decisions about specific issues, even if they do not adopt a full-blown panel system. These include expert determination (for instance, to apply an index or a new technical standard), independent engineers to certify progress and milestones (such as completion or the achievement of certain KPIs) and independent auditors (for example, to value assets or calculate termination payments). Again, all these devices are designed to avoid disputes, achieve fair results and keep things going under the contract, so to speak. Arbitration or litigation should be seen as the “nuclear option” – a last resort used to resolve major disputes about legal remedies, where the parties cannot agree and third-party determination is not appropriate.



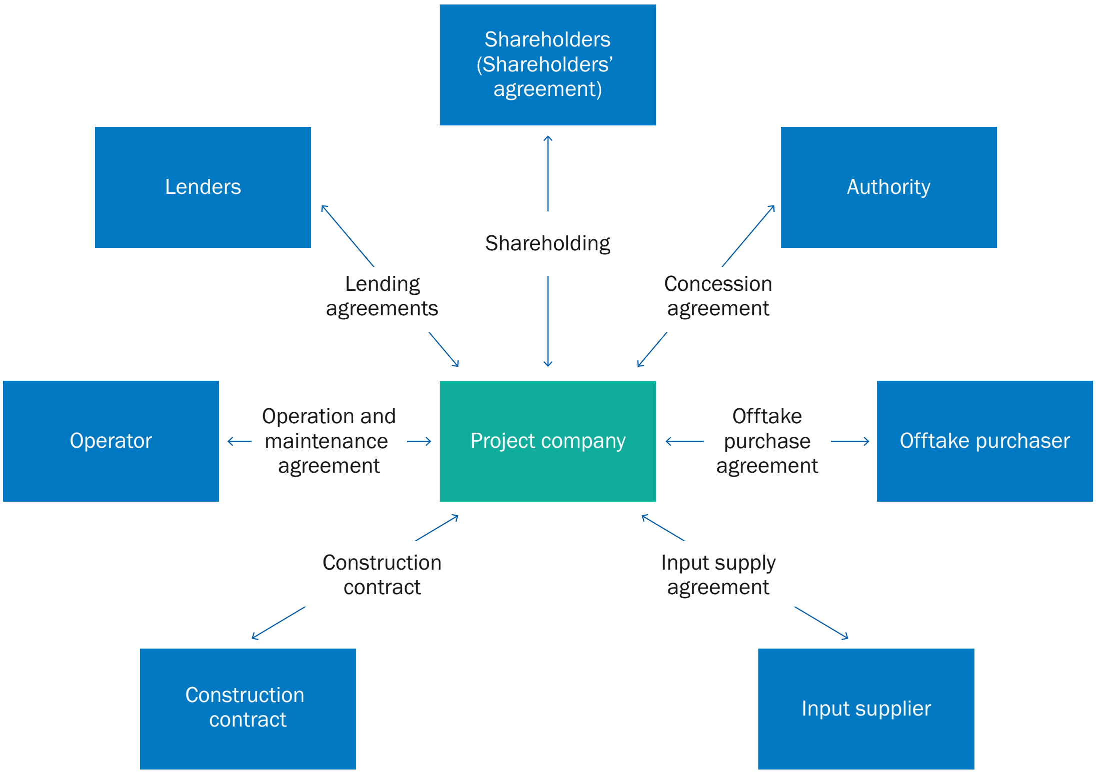
(G) Conclusion

As this study has tried to suggest, the issues thrown up by the structuring and negotiating of PPP contracts for emerging-market projects can be as broad and diverse as the projects themselves. There is remarkably little consistency. For lawyers and others working on these agreements, and of course principals negotiating them, this reinforces the need to be flexible and creative. Innovative solutions frequently have to be found which take account of the idiosyncrasies of the particular project and the differing expectations of its participants. Precedents and guidance materials can be helpful, but should not be used thoughtlessly. In the words of the old PFI mantra, the emphasis should be on deals, not rules. As familiarity with this type of agreement grows in the international legal and financial community, however, greater consistency and predictability of approach are bound to follow. It remains to be seen whether international organisations will make further attempts to standardise PPP contracts or clauses. The authors strongly support and encourage any attempt to do so (UNECE or UNCITRAL might be an appropriate body for this). In the meantime, much can be gained by simply disseminating information about these agreements and the issues that typically affect them.

The exponential growth of PPPs around the world over the past 30 years has inevitably led to far greater awareness of PPP contracts and the issues affecting them than was the case even a few years ago. Many countries have now embraced them, growing indigenous professional industries in this field, developing knowledge centres and expertise, and evolving model forms and precedents of their own. This will continue to happen, in the authors’ view. Some regions – Africa, China, parts of Central Asia, eastern Europe and the Caucasus , the Middle East and even some countries in Latin America – have only started to use them recently and are likely to embrace them on a far larger scale in the years to come. As they do so, new and different issues to the ones discussed in this paper will come to light, calling for new and different solutions. In the meantime, we hope this paper (and of course the PPP Regulatory Guidelines Collection as a whole) will serve to make a significant contribution to a better understanding of PPP contracts, and how to structure and negotiate them.

[93] This was done on the Second Severn project in the United Kingdom, for example. The expertise needed for each member of the panel is likely to be specified. It would usually consist of a combination of legal, financial, technical and accounting skills.

Appendix I – simplified PPP contractual structure



This diagram presents a very simplified depiction of the contractual matrix on a typical PPP project. Many of the contractual arrangements concerned can become extremely complex, especially when subcontracts, security documents and direct agreements are factored in. As a starting point, however, this gives a helpful introduction to the main participants and legal documents involved

Source: World Bank, PPP in Infrastructure Resource Centre for Contracts, Laws and Regulation (PPP IRC).

Appendix II – sample index of PPP contract terms

1. Parties
2. Recitals
3. Definitions and interpretation (including document precedence)
4. Conditions precedent
5. Scope of PPP/Grant of "concession"
6. Term and development period
7. The project company and shareholders
8. General provisions (exclusivity/compliance with law/ reasonable assistance/permits and consents/phasing/ local content requirements/ tax concessions, etc.)
9. The site
10. Design and construction (including warranties of quality/KPIs)
11. Phasing
12. Monitoring and supervision
13. Change orders
14. Utilities and supporting infrastructure
15. Ancillary facilities
16. Financing, credit agreements and security (incl. direct agreement)
17. Operation and maintenance
18. Tariffs/charges (incl. any concession fee)
19. Performance penalty regime
20. Contracting authority's step-in rights
21. Force majeure
22. Change of law
23. Change of circumstances/exceptional events – "financial balance" provision
24. Sharing of refinancing gains
25. Termination rights and procedures
26. Lenders' step-in rights
27. Termination payments
28. Transfer procedures
29. Insurance
30. Law and disputes
31. Liability
32. Miscellaneous (including confidentiality/ assignment/reps and warranties)

EBRD PPP regulatory guidelines collection

Chapter 4.
Regional study on financing models for public-private partnerships in EBRD economies

I. Background

In the context of global, financial and economic instability, many countries struggle to finance large-scale projects. International practice illustrates that the use of public-private partnerships (PPPs) could be effective for raising much-needed funding and attracting private investment, managerial experience and know-how.

Under a typical PPP structure, the private party to the PPP is primarily responsible for mobilising finance by identifying investors and developing the finance structure for the project. In most instances, a specific project company is formed – called a special purpose vehicle (SPV) – which is financed through a combination of equity and debt. The project company's shareholders provide equity, and debt (most often) is provided by banks or through bonds or other financial instruments. Typically, bank lending comprises 70-80 per cent of the total financing while shareholders/sponsors contribute the remaining 20-30 per cent.

Looking beyond traditional bank lending, there is room to explore alternative ways to carry out PPP projects. Global awareness of sustainable PPP projects has increased among institutional investors, especially since governments have been trying to scale up investments to meet the United Nations Sustainable Development Goals (SDGs). Similarly, the introduction of innovative ways of financing and new forms of PPP structures could offer a broader range of PPP financing mechanisms.

PPPs encompass large infrastructure projects as well as relatively small but numerous projects (often at the municipal level) carried out in the interest of the public using private-sector financing. As PPP projects are long or medium term and may require significant financing, the choice of finance sources and financial mechanisms needs to be precisely adapted. There are interesting ways to finance projects (discussed below) that may be a better fit for their intended purpose and capable of replacing the conventional project finance structure when it appears that the project would not be "bankable" under a conventional financing structure, or to optimise such financing with the ultimate goal (from the public sector's point of view) to increase net economic (social) benefits and, in some cases, to protect taxpayers' investments in PPP projects.

The financing of PPP projects applies to both concession and non-concession (government-pay PPPs). These mainly differ as to the source of funding for remuneration of the private partner (user or government payment) but not on the up-front participation of private financing to construct and set up the project facilities.

Through this regional study, the legal consultant, at the request of the European Bank for Reconstruction and Development (EBRD), aims to help governments in EBRD economies gain a better understanding of potential financing alternatives for PPPs beyond traditional bank lending and to explore how to increase the financing available for PPPs via such alternatives and innovative mechanisms. It remains a study of existing and potential ways of alternative financing and in no way pretends to be exhaustive or a guide on any recommended mode of PPP financing, which will require further study – for each project individually – of traditional and alternative available sources of finance and PPP project structuring.

This study deals only with the initial, up-front financing of PPPs. Additional financing may be needed later in connection with heavy capital maintenance activities (for example, renewals of plant and equipment). This can raise special issues in the context of a fixed-term PPP arrangement, as there are fewer years over which capital recovery can take place. This study does not address these issues or the refinancing of SPV debt during the term of the PPP contract.

II. PPP finance structure

Different structures can be used for PPP financing depending on the level of recourse offered by the sponsors and shareholders of the project company: either non-recourse or limited recourse for project finance, or full recourse for corporate finance. The choice of financing method will depend in particular on the project size, the level of development of the local capital market, the bank's appetite for project finance in the country and the possibility to mix project and corporate financing to form an alternative PPP financing structure.

2.1 Project finance versus corporate finance

2.1.1 Project finance

Project finance refers to a specialised form of financing in which the lenders rely primarily on the cash flow generated by a specific project as the source of repayment, rather than the creditworthiness of the project sponsors. It involves the structured financing of large-scale, long-term projects, such as infrastructure developments, power plants, water treatment plants, mining operations, public buildings, hospitals, prisons or other facilities that traditionally used to be public assets. In project finance, the lenders assess the risks and viability of the project itself, evaluating factors such as revenue generation, cost structure and potential cash flows to determine whether it can generate sufficient returns to repay the debt. This approach allows projects with substantial capital requirements and inherent risks to attract private financing while minimising the exposure of the sponsors or developers.

Project finance is one of the most popular arrangements for large infrastructure PPP projects. Initiated in the context of PPPs in the United Kingdom in the 1990s following its use in developing the North Sea oil fields in the 1970s and 1980s, it is now commonly used all over the world, including in developing countries. Not only banks can act as financiers in project finance; a wide range of investors can use this scheme, such as pension funds, investment companies, international financing institutions and even private or public entities contributing to the financing of PPP projects as equity partner, lender or guarantor.

In project finance, an SPV is created to hold the assets of the project. The SPV is owned by the infrastructure company and other equity investors, either passive investors, financiers or development finance institutions (DFIs)[1] or, as is most often the case, contractors, suppliers and service providers participating in the construction and/or operation of the future project. Lenders provide loans to the SPV. Their recourse in case of default is limited to the cash flows generated by the assets of the SPV, but not to the balance sheet of the equity investors. On the other hand, lenders will typically have security over the assets of the SPV.

The essence of this type of financing relates to the provision or the borrowing of money in favour of an SPV for implementation of the project. It usually involves the use of special bank accounts: escrow, nominee and security deposits. The main securities in this kind of financing are future assets to be created during the implementation of the PPP project (real estate, equipment, technologies, intellectual property and so on), the assignment of contracts and the project's cash flow (on which repayment of the debt will be based). Furthermore, this structure often requires the engagement of the independent creditor's agent who administers the security over the project. Risks in this scheme are usually allocated at the level of the SPV, but investors and other stakeholders can agree to bear a part of them. A set of contracts (including direct agreement, inter-creditor agreements and shareholder agreements) regulate the responsibilities and risks between project finance participants.

2.1.2 Corporate finance

Traditionally, before the development of project finance techniques in the infrastructure field, concessionaires financed PPP projects such as concessions on their own balance sheet, like any other company investment – a financing technique referred to as "corporate finance". Corporate finance involves proper budgeting, raising capital to meet company needs and objectives with debt or equity, and the efficient management of a company's current assets and liabilities. A company may borrow from commercial banks and other financial institutions or issue debt securities or bonds in the capital markets through investment banks. The full backup of an SPV by its shareholders providing a corporate guarantee to the lenders for repayment of all or part of the SPV's debt is also considered as corporate finance.

While helpful for raising finance for large, highly leveraged investments, project finance comes at a great cost. Development costs – including due diligence required by lenders and investors as a result of limited recourse and the absence of recourse other than the SPV asset, along with the creation of complex contractual and financial structures – substantially increase the transaction costs. In addition, interest rates for project finance debt are more expensive than government borrowing and often more costly than borrowing for established companies.[2] Lenders' requirement of large insurance coverage, including for delays in construction completion and for a broad range of force majeure events (including during operation), further boosts the cost of project finance and can make it unattractive or unaffordable for smaller deals. This is why many smaller PPP projects do not adopt non-recourse project finance structures; they wish to achieve greater contractual flexibility or lower the financing costs. Furthermore, commercial banks and DFIs do not even consider any project finance file below a certain threshold, which used to sit at around US$ 100 million but now tends to be closer to US$ 10 million to US$ 20 million, which in some cases requires the bundling of projects to reach this minimum figure. For very small local projects, the necessity to create an SPV is itself an obstacle.

[1] See Section 5.2 below.

[2] A deeper comparison of the cost of corporate finance and project finance would look at the weighted average cost of capital in both cases, not just the loan interest rate (less equity is used in a project finance structure). Moreover, the comparison would need to take into account the future increase in corporate loan interest rates as the company takes more debt on its balance sheet.

2.1.3 Mixed financing as an alternative form of PPP financing structure

Non-recourse or limited recourse project finance and full recourse corporate finance are not the only financing structures available. The PPP financing structure is actually quite diversified.

In some countries with less developed financial institutions and capital markets, where project finance is not common but contracting authorities wish to design good PPP arrangements, investors must create a PPP company (the SPV) which then obtains loans with guarantees from the SPV company shareholders as a sort of corporate financing.[3]

In countries with more developed financial markets, large investors finance PPP projects with their own resources (obtained through full recourse corporate finance) and later, after construction is completed and construction risk disappears (a risk with which long-term investors, especially pension funds, are not comfortable), they issue project bonds in the financial markets.[4]

Another alternative to non-recourse or limited recourse project finance and full recourse corporate finance is forfaiting and receivables financing. Under such schemes, a private party that is undertaking a project either sells its payment receivables to a bank, which is then paid by a public authority, or delegates all receivables under the project to a bank, which is then paid directly by the public contracting authority. As part of the deal, the public authority waives any objections to repay the lender in accordance with the payment schedule, despite any potential additional costs incurred due to deficiencies in the works constructed by the private party.

This type of financing structure for the construction of a facility transfers significant risk from the bank to the public authority and means the public authority can deduct payments to the private partner only from the (smaller) part of the service fee relating to operations. The part relating to construction is protected.

Receivables are usually part of the bank securities on the project proceeds for traditional PPP financing and not a PPP financing method per se. The delegation of availability payments (délégation de payment) or rents due by the contracting authority is, however, used for the financing of most if not all non-concession PPP agreements in France. It is the main security and the repayment mechanism against which financing is granted. However, the rationale of partnership contracts (marchés de partenariat) in France applying to non-concession PPPs is based on a performance approach, in which remuneration is "linked to performance targets assigned to the contractor for each phase of the contract".[5] In addition, the partnership contract "sets out the conditions under which risks are shared between the purchaser and the contractor".[6] The use of receivables and their delegation for the financing of a PPP project are likely to eliminate this sharing-of-risk objective as their financing is often based on unconditional acceptance of an assignment of receivables. Naturally, to keep the holder of the partnership contract at risk, it is always possible to adapt the system by limiting the proportion of receivables that can be assigned. This is precisely what the legislator in France did through the Dailly Law, which regulates the receivables attached to the partnership contract so that "the total commitment of the public entity in respect of such acceptance(s) may not exceed 80% of the remuneration due in respect of investment costs and financing costs".[7]

Nevertheless, financing PPPs by selling or delegating payments on account receivables would be more of an exception rather than the norm, at least as far as concession PPP projects are concerned. This is because they usually have complex contractual arrangements and financial structures that may not align well with the features of receivables financing. Additionally, receivables financing may not provide sufficient funds to cover the large capital requirements often associated with PPP projects. Still, it remains a type of financing through bank loans guaranteed by the project proceeds, but without supporting many of the project risks. Instead, it is based on the creditworthiness of the public authority and its unconditional undertaking to pay regular rents or availability payments due under the PPP contract, which is more fit for the financing of non-concession PPPs with limited performance-based payments than for concessions.

[3] A World Bank report on PPP financing in Latin America (WB 2017b) describes some of these financing arrangements.

[4] It should be noted, however, that construction risk can be transferred back-to-back to contractors.

[5] Article L2213-8 of the French Public Procurement Code.

[6] Article L2213-1 of the French Public Procurement Code.

[7] Article L313-29-2 of the French Monetary and Financial Code.

III. Classification and rating of PPP projects

As project finance techniques related to infrastructure projects matured following their experimentation in the early 1990s, it was observed that the qualification of infrastructure as a distinct new "asset class" as well as the rating of PPP projects by credit rating agencies could boost the financing for such projects.

3.1 Infrastructure as a separate asset class

The argument has been made that the amount of private financing going to infrastructure-related PPPs could be increased if pension funds, insurance companies, sovereign wealth funds, private equity funds and similar (together, "investors") considered infrastructure as a distinct asset class. They would then be likely to allocate more of their funds to infrastructure, and specifically more to infrastructure PPPs.

The term "asset class" is a fundamental concept in investing. It refers to a group of investments that have similar financial characteristics, behave comparably in the marketplace and are subject to the same kinds of laws and regulations. Essentially, an asset class is a broad category that encompasses a range of investments offering a certain risk and return profile. The categorisation provides a framework for investors to strategise their portfolio by diversifying across various asset classes, mitigating risk and aiming for returns aligned with their investment goals.

The conventional asset classes most investors use today are equities (shares in companies), bonds, cash or cash equivalents, and real estate. Few pension funds and insurance companies commonly treat infrastructure as a distinct asset class. While these institutional investors have increasingly incorporated infrastructure into their portfolios, it is typically seen as a subset of "alternative investments" or "real estate". The lack of standardisation, complex risk-return profiles and investment illiquidity are among the reasons for this. However, as data become more robust and the benefits of infrastructure investment become clearer, the trend to consider it a distinct asset class is gaining momentum.

As a separate class, infrastructure could provide a new avenue for capital allocation. Investors would set a target percentage of their portfolios to be allocated to infrastructure investment, and this would likely result in more funds being allocated to infrastructure than at present, where infrastructure investments are subsumed under other classes.

Certain risk-return characteristics could prompt analysts to view infrastructure investments as a separate asset class. Infrastructure investments are characterised by long-term, stable cash flows often regulated by governments or underpinned by long-term contracts, making them unique. Their returns are often independent of traditional market cycles, adding a degree of stability to portfolios. Moreover, infrastructure investments have relatively high barriers to entry due to the capital-intensive nature and complex regulatory environment, reducing competitive pressures. Such unique risk-return characteristics, differing markedly from traditional asset classes, bolster the argument for considering infrastructure as a separate asset class.

In addition, infrastructure investments can offer more inflation protection than investments in other classes. Contracts for these assets or rules set by utility regulators typically include inflation-linked pricing mechanisms, allowing returns to adjust with inflation. Hence, in an environment of rising inflation, infrastructure investments can add value to an investment portfolio.

In the past, some investors put infrastructure investments in the real estate asset class. While both real estate and infrastructure involve investments in tangible assets, they differ considerably. Infrastructure investments are often linked to essential services such as utilities, transportation and communication, which are less sensitive to economic cycles than real estate. Regulated or contractual revenues, often indexed to inflation, typically drive the return on infrastructure. In contrast, real estate returns are largely driven by property prices and rental income, which are more sensitive to market demand and supply dynamics.

Infrastructure investments generally exhibit low correlation with traditional asset classes such as equities and bonds. As this affects the overall volatility and risk-return profile of the investment portfolio, this low correlation often makes infrastructure an effective tool for diversification and risk management.

Some people argue that different infrastructure subsectors, such as utilities, transportation, energy and telecommunications, exhibit distinct risk-return profiles and market dynamics, suggesting they should not be lumped together. For instance, utilities often offer more predictable returns due to regulated rates, whereas transportation infrastructure may be more cyclical and influenced by economic conditions. Hence, treating all infrastructure as a homogenous asset class could oversimplify its complex nature and overlook these nuances.

There are also arguments against treating infrastructure as a separate asset class. Critics often point to the lack of standardisation, liquidity constraints and high entry barriers as reasons against treating infrastructure as a separate asset class. Infrastructure projects are often unique, making performance comparison and benchmarking challenging. Additionally, simply looking at risk and return in a portfolio optimisation exercise may neglect other important factors. For example, infrastructure investments can be illiquid and challenging to exit, given the long-term nature of projects.

From a technical point of view, the discussion about whether infrastructure should be treated as a separate asset class continues, highlighting the complex and dynamic nature of investment classification. As investors' interest in infrastructure grows, catalysed by demand for new investment avenues and a shifting global focus on sustainable and social infrastructure, the question of whether infrastructure should be considered as a separate class (or classes) for the purpose of allocating funds may be influenced as much by broader social and political concerns as by narrow financial analysis.

3.2 Credit rating

Credit rating agencies often rate PPP bonds issued in international markets, generally by SPVs. These bonds usually target sophisticated institutional investors: asset managers, specialised infrastructure investment funds, insurance companies, pension funds and other large money managers.

These agencies – the main ones being Standard & Poor's, Moody's and Fitch (the Big Three) – provide bond issuers and investors with an independent analysis of a bond's creditworthiness, defined as the willingness and capacity to repay the debt. Given the very large investments in PPP bonds by pension funds and some insurance companies (in both advanced and emerging market countries), these investors welcome rating agency verification of the risks associated with a PPP bond, in addition to their own analyses.

Rating agencies have had to adapt their rating methodologies (originally designed for corporate finance) to PPPs' project finance capital structures. Their goal is that the specific rating given to a PPP bond (say, BBB) implies the same probability of default as would the same rating given to any other kind of bond, regardless of sector, bond structure and currency, and whether international or domestic.

The incentives for issuers and lenders to have a rated PPP bond is well entrenched in international markets and is becoming increasingly important in emerging market economies.

For pension funds and insurance companies, the credit rating of their investments – specifically by the Big Three – can be important as a downgrade in these ratings, especially if an investment falls below "investment-grade" status (below BBB-), can sometimes lead to a re-evaluation of the regulatory risk-based capital requirements of a company or pension fund. As a consequence of this re-evaluation, to ensure regulatory compliance, the company or pension fund may be required to allocate additional capital to cover potential risks.

Domestic PPP bonds have not been a consistent source of capital for PPPs in emerging markets, largely due to relatively immature bond markets that do not have sufficient demand for PPP bonds. But this is changing as wealthier middle- and high middle-income countries grow economically and seek to diversify their domestic sources of capital for PPP projects to include both domestic and international bank loans and bond investments.

Rating agencies have followed the growth of these bond markets, including PPP bonds. As the global financial markets become increasingly integrated, domestic PPP bonds are included in more rated PPP bond issues, and this has expanded the market for rating agencies.

Credit rating agencies, principally the Big Three, have successfully expanded both their international and domestic bond rating market footprint by creating or purchasing fledging rating companies in emerging markets. These began to appear in developing countries in the 1990s, and they mimicked the Big Three's business model to provide independent analysis of the creditworthiness of bond issues and issuers in their local capital markets.

International and domestic credit rating agencies have expanded the types of PPP bonds and structures that they rate and have continually upgraded their rating methodologies to keep pace with the growing complexity of PPP bond structures that have emerged in the global and domestic capital markets. Part of the increasing complexity has arisen from sovereign and sub-sovereign governments greater financial support for PPPs in ways that significantly change the debt risk profile. This requires more sophisticated rating methodologies and specialised expertise.

One aspect of the growing complexity involves large PPP project sponsors putting their operating cash flows from their PPPs into trusts that then issue asset-backed securities, an arrangement that enables SPVs to recycle their cash flow from their operating PPP assets to fund new PPP projects for their portfolio. Rating agencies play a key role in facilitating this process by upgrading their PPP methodologies to keep up with the rapidly evolving PPP structures.

IV. Instruments for financing PPP projects

Irrespective of the corporate or project finance structure used to finance a PPP, the main types of financing instruments for PPPs can be broadly broken down into different categories (described below): senior debt, subordinated debt, equity and investment grants. Each category contains subcategories. Mixed types of financing also exist (for example, subordinated debt can be combined with a right to purchase equity shares or benefit from profits). All such diversification and combination of the available instruments creates new financing opportunities.

4.1 Equity

Equity financing is the process of raising capital through the sale of company shares in return for cash. Equity financing comes from many sources. The primary source is the successful bidder (often a consortium), covering the mandatory portion of the financing required by the SPV's shareholders (usually 10-30 per cent) as stipulated by the tender rules or financiers. Other investors, including international finance institutions, may provide additional funding, as outlined in the proposed financing plan of the successful bidder.

This minimum compulsory equity financing by the sponsors can be provided through an initial public offering (IPO). An IPO is a process that private companies undergo to offer shares of their business to the public in a new stock issuance and raise capital from public investors in capital markets.

Many governments finance infrastructure projects via capital markets. While this arrangement could be more widely used to raise equity for PPPs in the future, some governments are hesitant due to the painful experience of the Channel Tunnel, which experimented with this technique.[8]

Providers of equity financing have no legal right to the return of or on the capital they invest. They will not invest unless they anticipate making at least a market rate of return, although they may eventually make less than that (and they can also make more than the market rate of return). Their return is risky (in both directions), which is why equity financing is more expensive than debt.

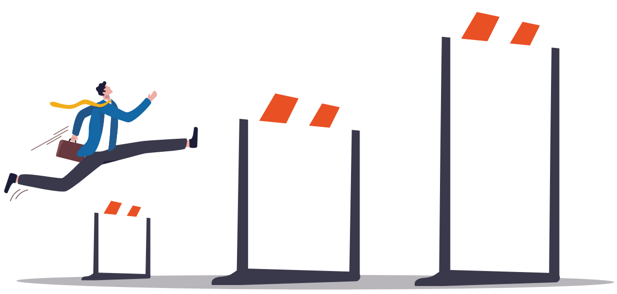
Some providers of equity care about achieving environmental, social and corporate governance goals as well as the financial return.

At first glance, the problem with equity financing appears to be that the cost – which depends on the return on investment or the internal rate of return expected by the market – is usually higher in PPP projects than the cost of debt, which implies higher tariffs or availability payments. Debt leverage provides efficiency to the financial structure (decreasing the weighted average cost of capital). Therefore, it increases affordability or decreases the payments that must be made by the authority (in government-pay PPPs) or users (in user-pay PPPs).

However, a closer look suggests that the underlying problem for the private partner is the project risks – especially the construction risk – and with respect to concessions, the commercial risk that falls on the SPV. In general, riskier projects require a higher return to compensate investors for taking on that risk, leading to a higher cost of capital. The risk profile of a project affects both the cost of debt and the cost of equity.

The more project risk that the SPV must bear, the more equity will be required by lenders to serve as a cushion against the risk. If ways can be found to reduce the risk affecting the SPV's cash flows, less equity will be needed and the weighted average cost of capital will be lower.

The public sector also has an interest in reducing project risk. However, if the SPV's risk is lowered by shifting risk to the public sector, then from the public sector's point of view, the extra costs – including contingent fiscal liabilities – related to that new risk must be taken into account.



[8] The private financing of the Channel Tunnel was provided though a loan by more than 220 banks, from equity raised via an IPO, with shares listed throughout the construction phase. This was the first time such a method had been used since the late 19th century. The evolution of the share price has been particularly erratic, reflecting the successive problems faced by the project since its inception, during construction (delays, extra cost) and operation (overestimation of traffic, underestimation of competition). During construction, the average share price remained sufficient but was highly volatile, illustrating in hindsight the mistake of turning to the stock markets for this type of project. After construction, it was apparent within the first decade of operation that the project was unprofitable, leading to a collapse in the share price until the 2007 restructuring.

4.2 Senior debt

Senior debt and creditor interest payments have first priority in the order of repayments of, and return on, capital provided to the SPV by all forms of financing. Because it is subject to the lowest risk, it is the least expensive way to finance a project (except, of course, for grants, which are by definition non-repayable). But because providers of senior debt require a very high probability of repayment, they will normally not agree to finance the project fully (and in some cases not even provide 100 per cent of the project's debt financing) unless almost all risk of loan default has been removed.

4.3 Subordinated debt or mezzanine financing

There are many subordinated debt or mezzanine financing instruments. Subordinated debt (often referred to as sub-debt) is debt that falls between senior debt and equity in terms of priority of repayment. It is debt that is subordinated to senior debt in its rights to cash flow and physical assets in a worst-case scenario. It can be structured in different ways; often it has some of the characteristics of equity. Subordinated debt typically has higher interest rates and more flexible terms than senior debt, but lower rates than pure equity financing. One advantage for shareholders is that obtaining mezzanine debt does not dilute the shareholders' ownership stakes, as would issuing more equity shares.

Shareholders of the SPV sometimes prefer to provide a large part of their financing in the form of shareholder sub-debt rather than equity. One advantage, compared with equity and dividends, is that interest payments made by the SPV to holders of subordinated debt will often be tax deductible.

Many other features of mezzanine financing can be appealing to investors. For example, it can reduce exit risk since there is a built-in exit through amortisation of the underlying principal – not true for equity.

The term "mezzanine financing" is often used. For some people, it is simply an alternative term to "subordinated debt", but it often implies that the instrument includes equity-type features that permit the investor to share gains realised by the SPV, such as by way of warrants, convertibility rights or profit participation rights. These mechanisms are sometimes referred to as "equity kickers".

Mezzanine finance is usually high-value unsecured (without pledge or other security) or with a deeply subordinated structure of security (for example, a pledge of specified low-priority assets without any recourse to the borrower's other assets). It often involves the purchase of shares of the SPV by an investor and the conclusion of a corporate agreement to ensure the protection of the investor's rights. Like senior debt, mezzanine finance is typically long tenor, usually more than five years. For external investors (that is, not core shareholders), the typical tenor is five to eight years.

When PPP developers face high capital expenditures, as is common in infrastructure projects, mezzanine financing can be a way for them to bridge the gap between equity and senior debt projects, providing enough capital to cover a developer's requirements when equity and senior debt cannot do so on their own. It also increases a project's debt-to-equity ratio, improving equity's rate of return to a level that equity investors are seeking. In so doing, mezzanine financing can also free up equity for other projects.

4.4 Project bonds

Project bonds offer an opportunity for institutional or private investors to participate in infrastructure projects through listed, tradable securities that can offer superior risk-adjusted returns.

Project bonds are debt instruments issued to finance infrastructure projects such as highways, bridges, airports and power plants. Unlike traditional corporate bonds, which are backed by the corporate issuer's creditworthiness, project bonds are backed by the future cash flows of the project they are financing. Project bonds are typically issued by the SPV.

Project bonds can be issued for 20 to 30 years, or even longer in some cases, to match the expected life of the infrastructure project they are financing. This is longer than the tenor of a typical project finance loan from a bank. This long tenor is attractive to investors such as pension funds and insurance companies that are looking for stable, predictable returns and long-term investments that match their long-term liabilities. Project bonds may also be attractive to investors because they offer higher yields than traditional bonds.

Possible disadvantages are that project bonds are generally used only for very large projects and they tend to be less flexible than bank loans. Unless the deal is very large, the transaction costs for project bonds are likely to be higher than bank loans. This is because project bonds often require a more complex and time-consuming process for issuance and involve a larger number of actors, such as underwriters, lawyers, rating agencies and trustees.

The qualification of infrastructure as a distinct new asset class, as well as the rating of PPP projects by credit rating agencies, could boost the financing of PPP projects through the issuance of project bonds.

This is explored in more detail in Chapter III, which is devoted to the classification and rating of PPP projects.

4.5 Capital-investment grants or subsidies

Capital-investment grants (or subsidies) are a form of non-repayable financing. This distinguishes them from both debt and equity. A wide range of multilateral, bilateral and other donor organisations – as well as regional institutions, such as the European Union – provide grants for infrastructure projects including PPPs. In addition, local sovereign and sub-sovereign governments may also consider non-reimbursable PPP grants. The PPP project costs, risk profile, the proposed financing structure and the grantor's funding policies determine the type of PPP and grant fund amount these donors may consider. Increasingly important for international donors is the project's compliance with the Sustainable Development Goals and environmental, social and corporate governance goals.

Grants and subsidies are usually combined with other financial instruments to create what is known as blended finance. Blended finance, which involves combining private and public financing/funding, is discussed in greater detail in Chapter VI.

V. Sources of PPP financing

5.1 Commercial and investment/merchant banks

Commercial banks play an important role in providing loans for PPPs. They may also participate in syndicated loans, where a group of banks pool their resources to provide financing for a project.

In some emerging markets and many developing countries, local commercial banks lack the financial capacity or the structuring capacity to provide the entire senior debt needed for a large PPP. Therefore, international banks and international financing institutions generally play an important role. Local banks may play a key role with respect to the mitigation of currency exchange rates, and in some cases can be assisted by loans in local currency provided to them by international financing institutions.

Investment banks can play various roles in financing PPPs, depending on the specific structure of the deal and the needs of the parties involved. In some cases, these banks may raise funds on the capital market to finance PPP projects directly. Alternatively, they may serve as intermediaries and help to structure the deal, although the actual financing may come from commercial banks or other investors. Investment banks may also help market the deal to potential investors and negotiate the financing terms.

The terms "investment bank" and "merchant bank" are often used interchangeably, but the two can differ. Traditionally, a merchant bank is a financial institution that primarily provides financing and advisory services, and it can invest its own capital in the deals it finances. Investment banks generally do not invest their own capital in the deals they finance.

Over time, however, the distinctions between the two types of banks have become blurred, and many financial institutions now offer a range of services that fall under both the investment and merchant banking umbrella.

5.2 Development finance institutions

Multinational, bilateral, regional and national development banks and agencies play a major role in providing financing for all types for PPPs in emerging markets and developing countries. Contracting authorities would be well advised to contact relevant DFIs at an early stage to explore how they might become involved in financing a prospective PPP, either working principally with the private partner (for instance, as lender to the SPV) or with the contracting authority (for instance, as guarantor or viability gap funding contributor in some way).

Multilateral development banks and donors have sometimes collaborated to set up specialised DFIs. An example is the Private Investment Development Group, a DFI that complements private investment financing sources for PPPs in sub-Saharan Africa and South and South East Asia. Bilateral and multilateral donors – six governments and the International Finance Corporation (IFC) – own the group, which selects financing mechanisms for projects based on its goals: "to combat poverty and deliver high development impact". One of the Private Investment Development Group's principal financing mechanisms is a "viability gap" grant to leverage other private debt and equity investment funding sources. It also provides debt and equity to mobilise additional financing – an excellent example of "blended finance".[9]

5.3 Project sponsors

The sponsors of the PPP are the entities that promote the project and set up the SPV. They are usually,

[9] See Chapter VI below.

directly or indirectly, the majority shareholders of the SPV and take the lead role in the project. As such, they conventionally provide most of the equity and often subordinated debt (quasi-equity).

From the public sector perspective, the provision of equity financing by the sponsor can be crucial to the success of the PPP. It generally provides a strong incentive for the sponsor to ensure that the project performs adequately as the return on equity depends on how well the project performs financially. The project sponsors, however, usually have a conflicting interest as shareholder on one side and as contractor, supplier or provider of services ensuring a short-term profitability on the other, and may consider dividends as a bonus rather than their main objective. This is precisely the reason for the efforts made in Australia to develop the "inverted bid model" or superannuation SP3 to deprive the sponsors cumulating the role of contractor and main shareholders of their privileged position in a traditional PPP contracting and tendering structure.[10]

5.4 Capital market and bond issuance

Sourcing financing from the capital market refers to the process of raising funds by issuing securities such as stocks or bonds to investors through a public offering or private placement. In the context of PPPs, the main focus is on bond issuance, not public offerings of equity shares. Many of the financing instruments described in Chapter IV can, in principle, be accessed from the capital market.

A corporate bond is a type of debt security issued by a firm and sold to investors. The company gets the capital it needs and, in return, the investor is paid a pre-established number of interest payments at either a fixed or variable interest rate. When the bond expires, or reaches maturity, the payments cease and the original investment is returned. Investors building balanced portfolios often add bonds to offset riskier investments such as growth stocks. Over a lifetime, these investors tend to add more bonds and fewer risky investments to safeguard their accumulated capital. The SPV that is implementing the infrastructure project would issue corporate bonds.

There is also a special type of bond – an infrastructure bond – that is issued by private companies or state-owned enterprises for the financing of infrastructure projects. Quite often, the government provides guarantees for the issued bonds, which makes them attractive to a larger number of market participants, as doing so reduces the risk. Due to the long payback period of infrastructure facilities, the bond circulation period is also quite long. Therefore, such bonds will mainly target institutional investors, including insurance companies and pension funds.

Project bonds offer an opportunity for institutional investors to participate in infrastructure projects through listed, tradable securities that can provide superior risk-adjusted returns.

To date, project bonds have been successfully used in Europe and the Americas to fund infrastructure projects. In Europe, corporate bond markets continue to grow despite the increase in market volatility, and it is anticipated that the use of corporate bonds to fund infrastructure projects in Europe will play a significant role in boosting the economy.

Other bond types, including impact bonds, are arrangements in which investors purchase bonds from the state to fund development projects. The government repays the investors if the projects have achieved certain outcomes or the state guarantees the obligations of the issuing authority, which raises private capital to fund infrastructure projects.

5.5 Impact investors

Impact investors provide financing (loans or equity) to reach certain social or environmental objectives. As such, impact investors (sometimes providing funds through social impact bonds or development impact bonds) are repaid only to the extent that pre-agreed outcomes have been achieved. Because they aim to meet social and environmental objectives, the transaction documents require detailed quantitative measures of success on these dimensions. The relevant outcomes are generally more fundamental than the more proximate outputs used for purposes of remuneration in conventional PPPs. For example, in a primary school project, an outcome could be the progress in the literacy level of the children. Thus, while impact investors expect to receive at least a return of their capital and generally some financial return on their investment, they may be satisfied with a return that is below the market rate as long as their desired objectives are met.

5.6 Mutual funds

Institutional investors such as investment funds, insurance companies, mutual funds or pension funds typically have large sums available for long-term investment and could represent an important source of funding for infrastructure projects either through private placement or via bond purchases.

[10] See Section 7.4 below.

A mutual fund is a type of financial vehicle made up of a pool of money collected from a large number of private investors to invest in securities including stocks, bonds, money market instruments and other assets. It is a set of properties attracted and managed by a company that could be used to implement a PPP project.

Shares of the mutual fund are generally bought and sold on the market. Sometimes, however, they can be bought back by the fund after a specific period required to implement the project.

The average mutual fund holds more than 100 different securities, which means mutual fund shareholders gain important diversification at a low price. At the same time, specialised mutual funds invest only in companies in one sphere of business, for example, in infrastructure or real estate. They generally do not invest directly in the target companies, the way a private equity fund does. Thus, the mutual fund solution builds on the capital market solutions that the SPV may adopt.

Mutual funds may buy shares, bonds or other assets of the companies in which they are investing, but most of the time they buy and sell publicly traded securities, sometimes participating in IPOs. In principle, then, mutual funds could be created for investing in PPP projects. Investors who buy shares of the mutual fund will get a share in the profit of the project. Each shareholder therefore participates proportionally in the gains or losses of the fund.

5.7 Private equity funds

A private equity fund is a type of investment fund that invests in privately held companies or buys out publicly traded companies, making them private. These funds typically raise capital from institutional and high net worth investors, pool the capital and then invest in companies with the aim of generating high returns for their investors.

A private equity fund is typically set up as a limited partnership. In this structure, the private equity fund entity acts as the general partner while the investors (known as limited partners) provide most of the capital for the fund. The general partner manages the day-to-day operations of the fund, makes investment decisions and is responsible for generating returns for the investors. The limited partners receive a share of the profits based on their initial investment.

Private equity funds typically have a fixed term, usually around 10 years, during which they actively invest in companies and then exit their investments through a sale or IPO to generate returns for their investors. The funds may invest in a range of industries and use a variety of investment strategies.

Investing in private equity funds can be attractive to investors seeking higher returns than traditional investments, such as stocks and bonds, as well as portfolio diversification. However, private equity investments are typically illiquid and require a longer investment horizon than other asset classes. Additionally, private equity investments can be riskier than publicly traded stocks due to the lack of public information and transparency about the underlying companies.

Some private equity funds focus on PPP investment, providing equity or mezzanine debt. Some also are established specifically to invest in infrastructure in emerging markets and developing countries, including PPPs, often with significant funding from DFIs. These would fall under strategic investment funds and infrastructure funds.

5.8 Strategic investment funds and infrastructure funds

Strategic investment funds (SIFs) are investment funds or corporations established by governments or DFIs, primarily to provide equity to projects with both policy and commercial objectives, in partnership with private capital.

Over the past 15 years, there has been a marked increase in the number of government-sponsored SIFs across countries at all national income levels. However, these funds struggle to achieve economic policy goals while also ensuring commercial financial returns – what is commonly known as the "double bottom line". Thus, while well-structured and well-managed SIFs can attract private investors to prioritise PPP investments, thereby maximising the impact of public capital, their success depends on the fund's ability to navigate the double bottom line, identify investment opportunities and secure the right fund management capacity.

Successful implementation of SIFs can create opportunities that attract private investment, strengthen domestic capital markets and enable governments to become professional long-term investors. This is partly due to the specialised expertise in the structuring and financing of investment projects, alongside the implicit political and regulatory risk insurance for private investors (particularly for infrastructure projects more exposed to sovereign risk), that SIFs provide as co-investors.

The structure of SIFs can vary across a spectrum from private management of public capital to fully state-owned direct investment funds, with hybrid funds in between. The choice of structure depends on the relative importance of market validation versus policy objectives. Private management of public capital occurs when a government invests in a private fund that reflects policy priorities, or when a public entity shares risk as a limited partner in a hybrid fund. The private-sector general partner or an independent investment committee that may include government representatives independently make investment decisions, while the fund's board, usually controlled by limited partners, sets the investment policy. The fund manager and general partner may be required to invest a portion of the total capital. This was the approach taken for the Philippine Investment Alliance for Infrastructure Fund, for instance.

In fully government-owned or operated funds, market validation may come from constraints on the ownership share in each investment, limiting the SIF's investments to minority participation of a certain size. Except in the case of hybrid funds, a government-owned fund management entity that operates independently of the government usually manages the fund. Generally, the more private capital that participates in the fund's structure, the greater the market validation of the investments.

There is also a category of privately run infrastructure investment funds that specialise in financing, developing and managing long-term infrastructure projects across various sectors, such as transportation, energy and social infrastructure. These funds primarily invest in projects through PPPs and focus on delivering sustainable and long-term value to their investors and stakeholders. As private infrastructure funds focus on long-term investment horizons, they typically provide more stable cash flows than traditional private equity funds. Additionally, unlike SIFs, which are government-owned and pursue nationally strategic objectives, infrastructure investment funds are privately owned and primarily aim to generate returns for their investors while also creating a positive impact on society and the environment.

A good example is Meridiam, a global PPP fund manager formed in 2005 that has invested in more than 100 projects worldwide.[11] Meridiam focuses on PPP projects in transportation, social infrastructure and sustainable energy, and it generally invests in equity and mezzanine debt. DFIs such as the European Investment Bank, the IFC, the French Development Agency and the German Investment Corporation have participated in funds managed by Meridiam or co-invested alongside Meridiam in specific projects. These partnerships help to mobilise additional financing, share risk and provide expertise in structuring and implementing projects.

Another fund manager is the Macquarie Group, an Australian multinational financial services company that, through its Macquarie Infrastructure and Real Assets division, invests in PPPs in toll roads, utilities and renewable energy projects (among others) in emerging markets and developing countries.

Source: The World Bank, Strategic Investment Funds Opportunities and Challenges (2016).[12]

[11] Meridiam is incorporated in France as a société à mission.
[12] Strategic Investment Funds: Opportunities and Challenges (2016), Policy Research Working Paper No. 7851, written by Håvard Halland, Michel Noël Silvana Tordo, Jacob J. Kloper-Owens, published by the World Bank.

5.9 Sovereign wealth funds

A sovereign wealth fund is a state-owned investment fund that holds and invests a country's surplus wealth. These funds are typically created by countries with large foreign exchange reserves or substantial trade surpluses.

The main objective of a sovereign wealth fund is to maximise returns on the invested capital while preserving the long-term value of the fund. The fund may invest in various asset classes, such as stocks, bonds, real estate and alternative investments including private equity, hedge funds and infrastructure projects.

Sovereign wealth funds are generally funded by a country's budget surplus, the proceeds of privatisations or revenue from natural resource exports. They can be used to diversify a country's assets, stabilise its economy and provide a source of funding for social welfare programmes.

Examples of sovereign wealth funds include the Government Pension Fund of Norway, the Abu Dhabi Investment Authority, the Public Investment Fund in Saudi Arabia and the China Investment Corporation.

Sovereign wealth funds may invest in PPP projects directly or indirectly through partnerships with infrastructure funds or other institutional investors. Investing in PPP projects can provide sovereign wealth funds with a stable source of income, as these projects typically involve long-term contracts with government entities. Additionally, investing in PPP projects can help to support economic development and improve the quality of life for residents of the country – an objective that aligns with the broader goals of many sovereign wealth funds.

5.10 State-owned non-bank finance companies

A state-owned non-bank finance company is a financial institution owned by the government and operating outside the traditional banking system. They offer banking services, but do not hold a banking licence, and focus on providing loans, advances, leasing, hire purchase, insurance and investment products. These institutions are often created to provide financial services to specific sectors of the economy, such as agriculture, small and medium-sized enterprises, or housing.

State-owned non-bank finance companies raise low-cost debt on domestic and international markets, backed by their government's sovereign guarantees. They then offer that debt to PPP projects that would otherwise struggle to access long-tenor debt.

This is typically the role of the French model of Caisse des Dépôts et Consignation (CDC) (Deposits and Consignments Fund), a public financial institution running a special protection fund for deposits and life insurance and helping the state develop its infrastructure projects. Its primary initial purpose was to manage the various deposits entrusted to it before reimbursing them to the rightful claimants at the end of the process, but it now plays a leading role in many infrastructure development projects in France, such as for broadband development in remote areas.

Such CDC mechanisms exist in many French-speaking countries, such as Belgium, Morocco, Tunisia and Quebec in Canada, and some others including Mexico and the Philippines.

Morocco's Caisse de Dépôt et de Gestion, the equivalent to the CDC, is a state-owned financial institution that manages long-term savings in the country. Given its substantial assets, it also acts as a large investor in Morocco, especially in the tourism sector. It has many subsidiaries operating in various sectors of the economy.

Such institutions may also operate internationally. An example is Quebec's Caisse de dépôt et placement du Québec, which has reached an agreement with the Australian leader Plenary Group for the CDP to participate in five investments in PPP projects in Australia, including the Melbourne convention centre (AU$ 139.2 million, or about €84 million, total).

PT Sarana Multi Infrastruktur, a state-owned enterprise established in 2009 by the Indonesian government, offers financing for infrastructure projects, including PPPs, in sectors such as transportation, energy, water and telecommunications. It operates as a special purpose company, focusing on infrastructure financing and development, rather than as a traditional bank with a broad range of banking services. PT Sarana Multi Infrastruktur raises funds from government equity, debt issuance (including Islamic bonds or sukuk) and multilateral and bilateral institutions.

5.11 Export credit agencies

An export credit agency (ECA) is a government or quasi-governmental agency that provides financial support to companies in their country to facilitate and promote international trade. ECAs typically offer various forms of financing, guarantees, insurance and other forms of credit enhancement to domestic companies that export goods or services.

ECAs often play a role in financing PPPs, providing credit enhancement to private-sector participants in the PPP project by offering guarantees or insurance to lenders or equity investors. By providing this credit enhancement, ECAs make it easier and more appealing for private sector investors to participate in PPP projects, which in turn helps attract more private sector investment.

ECAs also offer financing directly to PPP projects in certain cases. For example, they may give loans or other forms of financing to support the export of goods and services that are used in PPP projects.

5.12 Insurance companies

Insurance companies can be involved in PPPs as equity investors, lenders or providers of risk management services. PPPs across a range of sectors are potentially attractive as they offer long-term, stable and predictable returns on investment and are often backed by government guarantees. The transportation sector (roads and bridges) has been a particular focus, but healthcare (hospitals) and energy (for example, wind farms) have also been targeted. Insurance companies can invest in PPP projects directly, or indirectly through private equity funds or infrastructure funds.

Insurance companies can also offer risk management services to PPP projects, such as supplying insurance coverage for construction and operational risks. This helps to mitigate risks for other project participants in a much more extended way than for traditional public procurement projects, and possibly covers many risks that lenders do not want to assume and that the parties are not used to covering in non-PPP projects.

5.13 Pension funds

Public pension funds derive at least part of their resources from contributions made by employees, and their fiduciary responsibility is towards their contributors. Specifically, for a defined contribution scheme, the fiduciary obligation is to maximise the replacement value of pensions given to members when they retire and at the same time to secure long-term regular income at the lowest possible risk.

Some pension funds are interested in investing in PPPs because they can provide stable, long-term returns that match their long-term liabilities. Additionally, infrastructure is sometimes considered as a separate asset class (as previously mentioned),[13] so PPPs may offer a source of diversification for the pension fund's portfolio.

However, PPP projects require specialised expertise to analyse and monitor them properly, and they can be highly idiosyncratic. Due to the complexity, uncertainty and political risk associated with many PPPs in emerging markets, interest by pension funds has been limited. Regulatory requirements can also curb the interest of pension funds in PPPs: some countries restrict the types of assets in which pension funds are allowed to invest. When pension funds do invest, it is often only after the construction phase is completed, through a refinancing. This helps reduce risk.

Canadian and Australian pension funds have played a noteworthy role in investing in PPPs, primarily in Western and high-middle income developing countries. Some Canadian and Australian pension funds have allocated more than 10 per cent of their investment portfolios to infrastructure, treating it as a separate asset class.

In emerging markets, pension funds in Brazil, Colombia, India, Mexico and South Africa, among others, have invested (directly or indirectly) in PPPs. Investing in PPPs by pension funds is sometimes done indirectly through other investment funds – for example, through one of the funds managed by Meridiam.[14]

5.14 Investment platforms (crowdfunding)

Crowdfunding, a way to attract financing for small PPP projects or projects with high social significance, is growing in popularity. Crowdfunding is the use of small amounts of capital from a large number of individuals to finance a new investment project. It uses the easy accessibility of vast networks of people through social media and crowdfunding websites to bring investors and entrepreneurs together, with the potential to increase entrepreneurship by expanding the pool of investors beyond the traditional circle of owners, relatives and venture capitalists.

The investment platform is a special system on the internet that can be used by parties involved in implementing projects to conclude investment agreements with a large number of users of such platforms. The investor provides money for the chosen project and receives a digital right certificate that certifies his/her right to return on the investment, if and as appropriate.

In donation-based crowdfunding, contributors receive no financial reward in return for their financial support. In equity-based crowdfunding, investors receive financial returns on their investment to the degree that the venture is profitable, similar to conventional equity investors in a PPP. Finally, in debt-based crowdfunding (or crowdlending), supporters function as lenders and receive a previously defined interest rate and return of their loan within a certain period. Debt-based

[13] See Section 3.1.

[14] See Section 5.8, Strategic investment funds and infrastructure funds.

crowdfunding is the most popular form of crowdfunding in terms of global funding volume.

5.15 Philanthropic financing sources

Traditionally, governments or development finance institutions have provided the subsidised component of blended finance for PPPs. DFIs, such as the World Bank and regional development banks, typically use their resources, through a range of financial instruments, to de-risk investment opportunities and make them more attractive for private-sector involvement.

An evolving trend in blended finance is the active role of private, not-for-profit philanthropic entities in providing the subsidised component of the financing or in funding-related facilities and activities. These entities, including foundations, non-profit organisations and impact investors, have an interest in social and environmental outcomes. Their funding often comes with fewer bureaucratic hurdles and can be more flexible in terms of the sectors and regions it targets, making it an increasingly valuable part of the blended finance ecosystem. The term "public-private-philanthropy partnerships" has been growing in popularity.

Private philanthropic entities can provide subsidies in various forms. They may offer grants, which are often used to fund feasibility studies, capacity building and technical assistance. These grants can play a critical role in enabling PPPs to reach financial close and become operational, thereby attracting additional commercial finance. Philanthropic entities may also provide capital at below-market rates in the form of low-interest loans or equity investments (including first-loss equity participation), which can be used to leverage additional private sector investment. Philanthropic organisations have been repurposing traditional grant instruments into concessional investment instruments – for example, structuring grants as zero-interest loans.

Moreover, the role of these philanthropic entities extends beyond merely providing funds. They also play a crucial part in bridging the gap between public and private interests, offering valuable expertise and knowledge, and bringing innovative ideas and solutions to the table. They are often closer to the communities and understand the local context better than many government agencies and private corporations, which can lead to more effective and sustainable outcomes.

Some of the better-known philanthropic entities that have provided funds for PPPs include:

- The Aga Khan Foundation (head office, Switzerland): the Aga Khan Foundation, part of the Aga Khan Development Network, focuses on health, education, rural development and building civil society institutions in the poorest parts of South and Central Asia, Eastern and Western Africa, and the Middle East. It has been involved in various blended finance initiatives, leveraging private sector funds for the sustainable development of underserved communities.

- Shell Foundation (United Kingdom): Shell Foundation is a British-registered charity that uses a blend of grant capital, business support and market-enabling activities to co-create social enterprises in sectors including energy (for example, mini-grids) and sustainable mobility. It works extensively with public and private partners to drive inclusive market growth and poverty reduction.

- The IKEA Foundation (the Netherlands): the IKEA Foundation is committed to improving opportunities for children and their families in some of the world's poorest communities. The foundation funds programmes that support sustainable livelihoods and promote renewable energy, often using blended finance mechanisms to mobilise private sector engagement.

- The Bill and Melinda Gates Foundation (United States of America): as one of the largest private foundations in the world, the Bill and Melinda Gates Foundation has pioneered the use of innovative financing models to tackle global challenges, particularly in the fields of health and education.

- The Omidyar Network (United States of America): the Omidyar Network is a self-styled "philanthropic investment firm" composed of a charitable foundation and an impact investment firm. The Omidyar Network funds and supports initiatives that bring together public, private and non-profit sectors to solve complex socio-economic challenges in the areas of emerging technologies, education and digital financial services.

- The Rockefeller Foundation (United States of America): the Rockefeller Foundation, one of the oldest and most influential philanthropic organisations in the world, has a long history of leveraging its resources to catalyse private and public sector investment in key areas such as health, food, power and jobs. It has been a pioneer in using innovative financing tools such as first-loss capital.

VI. Blended finance

Blended finance can be used across a range of structures, geographies and sectors using a variety of instruments including project finance and PPP. Deals bring together different stakeholders that partner in a fund or transaction, with a mixture of development funding and private investors or funds for specific project preparation activities. This helps to offset high upfront costs and improve the financial viability of infrastructure projects. This makes investments in infrastructure projects in developing areas more attractive to long-term private investors and makes viable philanthropic projects with social benefit – both of which increase efficiencies for investors – and creates alternative ways of financing PPPs.

The non-private-sector financing in blended finance is either in the form of grants (or subsidies) or is provided at below-market (concessional) rates. The public sector financing in blended finance includes a subsidy component.

6.1 The definition and characteristics of blended finance

The definition adopted in this study is that of the DFI Working Group on Blended Concessional Finance for Private Sector Projects:[15] "Combining concessional finance from donors or third parties alongside DFIs' normal own-account finance and/or commercial finance from other investors, to develop private sector markets, address the Sustainable Development Goals (SDGs), and mobilize private resources."

The World Economic Forum and the Organisation for Economic Co-operation and Development (OECD) take a slightly different approach. They define blended finance as "the strategic use of development finance and philanthropic funds to mobilize private capital flows to emerging and frontier markets".[16] Blended finance deliberately channels private investment to sectors of high development or social impact while at the same time delivering satisfactory risk-adjusted returns.[17]

Blended finance has three key characteristics:

– **Leverage:** use of concessional development finance and philanthropic funds to attract private or public capital into deals.
– **Impact:** investments that drive social, environmental and economic progress.
– **Returns:** financial returns for private investors in line with market expectations, based on real and perceived risks.

Blended finance is an approach to structured finance that enables development and philanthropic funding to mobilise private capital into a project or company that promotes development outcomes, by mitigating risk and ensuring commercial risk-adjusted returns. Blended finance attempts to achieve similar goals to affect investing (intentional approach to create societal and financial impacts) by using a structuring approach to blend a range of investor motivations to achieve these development objectives at scale.

6.2 Examples of blended finance

Blended finance is widely used for many kinds of PPPs where private financing is closely associated with public financing or other sources of financing, either upfront or during the development or the operation of the project, namely through viability gap funding. Building on evidence from a survey done on behalf of the World Economic Forum, the OECD released recent findings that identified 180 blended finance funds and facilities, with US$ 60.2 billion in assets invested across 111 developing countries, affecting more than 177 million lives. These figures illustrate the tremendous potential of blended finance to close the funding gap required to finance the ambitious SDG agenda and deliver development outcomes.

In addition, blended finance can generate public support for private investors in sectors where societal support is lacking (for instance, mining or manufacturing) or where the activity is not profitable enough, but is required for the socio-economic benefits (for instance, broadband and hospitals). Blended finance projects can take different forms that may not be recognised as PPPs, for instance, the recent rollout of broadband. Rolling out broadband infrastructure, especially in rural and remote areas (excluding purely private projects for densely populated areas) tends to rely on grants and subsidies that ease financing constraints for governments in an effort to narrow the digital divide.

Broadband rollout is on the agenda of most countries, including emerging economies. It has become a political priority around the world following the Covid-19 pandemic. Various PPP contractual forms are used in international broadband rollouts, and PPP financing

[15] DFI Working Group, Joint Report, March 2023 update.
[16] According to the OECD's use of the term, blended finance does not necessarily require a subsidy component (see OECD DAC Blended Finance Principles for Unlocking Commercial Finance for the Sustainable Development Goals [2018].) The present study believes it is useful to include the subsidy aspect in the definition, as in the DFI Working Group definition. Otherwise, senior debt provided by, for example, the EBRD or the IFC would, by itself, be considered to make the financing structure blended financing. This is too broad a scope to be useful, given how many PPP deals in the EBRD regions receive senior debt from DFIs at non-concessional rates.
[17] The term "risk-adjusted return" takes into account the idea that a high return is not worth as much if the riskiness (volatility) of the asset value or return is also high. So a high-risk, high-return investment might have the same "risk-adjusted return" as a low-risk, low-return investment. To compare the returns of two investments, it is important to focus on the risk-adjusted returns.

agreements largely rely on government grants and public subsidies at different administrative levels of concerned authorities. These financing agreements start with EU funds (where eligible) and national, regional and local financial aid, with all sorts of SPV structures. These SPVs typically involve a mix of relevant local public entities, state-owned, non-bank finance companies and private information technology operation entities. This is often under a private management, irrespective of the public majority of the share capital.

France has ESPICs (Etablissement de Santé Privé d'Intérêt Collectif – Private Health Institutions of Collective Interest) – non-profit establishments including large/middle-size hospitals, retirement homes and residences for the disabled, which combine a mission of general interest with a private mode of management. ESPICs are private institutions (association, foundation, congregation or mutual) that participate in public health services, meaning they are subject to the same obligations as the public sector under the Ministry of Health. Remuneration for medical acts and social assistance comes mostly from the social security regime as well as various grants and subsidies, often corresponding to performance incentives under government health policy. The initial investment comes from charitable organisations' private donations and assets, grants from public authorities (state, region, municipalities) or bank financing, with the investment potentially backed by the public authorities' repayment guarantee.

VII. Alternative PPP structures

This section explores how to use innovative, alternative PPP structures to increase the financing available for PPPs, with hopes of helping the governments of EBRD economies gain a better understanding of potential financing alternatives for PPPs beyond the traditional financing structure.

7.1 Investment partnership

Another type of joint finance structure for PPP projects is an investment partnership. Depending on the legislative framework of a particular country, this could be in the form of a legal entity or a contractual arrangement. The main goal of this agreement is to establish the mechanism of how the parties should invest, manage deals and distribute profit within the scope of the project. This scheme is especially useful if one party is ready to provide financial resources and another has the necessary skills and knowledge required to implement a PPP project effectively, but lacks finance. This mechanism allows them to unite their resources and agree on terms of their participation in the project and in the SPV (or institutionalised PPP company), with the respective obligations of the partners to be set in a shareholder agreement. This may be a good alternative for wealthy countries where the technology or local capacity is not sufficiently developed, like some economies in the Middle East.

7.2 Financing as part of a PPP contractual package (stapled financing)

Another alternative PPP structure to facilitate finance, used in less developed countries, is for DFIs to make available to the winning bidder the financing for the PPP project under the same conditions for all candidates, as in the Scaling Solar World Bank programme.

Scaling Solar is a World Bank Group initiative that enables governments in developing countries to rapidly acquire and scale large solar projects with private financing. It includes a set of advisory services, technical assistance, standard contracts and documents, pre-approved financing and insurance/guarantee products developed by various components of the World Bank, relying on modelling and standard procedure. This initiative should enable states and companies to provide solar energy transparently and at the lowest possible cost, as evidenced by the recent experience of Senegal, which under this Scaling Solar programme reached a record price for sub-Saharan Africa of €3.80 and €3.90/kWh for two solar power plants with a capacity of 30 MW. This Scaling Solar programme is similar to the one previously executed successfully in Zambia (75 MW), while other applications of Scaling Solar projects are underway or have been achieved – for instance, in Ethiopia, Madagascar and Côte d'Ivoire (60 MW) and Togo (60-90 MW).

The standard documents for these projects come from the advisers of the World Bank Group in Washington and, more specifically, from IFC Advisory advisers who have worked on the Scaling Solar project since its inception. These contracts may be in line with the usual US contract standards for this type of transaction but are highly complex and the length of the texts, the power purchase agreement in particular, is better suited to the common law system than to civil law countries, especially considering the relatively modest size of the contracts envisaged (around 25 MW each) and the level of development of the concerned countries. Furthermore, these model contracts – particularly the power purchase agreement and the so-called concession agreement, exclusively containing the contracting authority obligations – may be viewed as unbalanced in favour of potential investors. This makes them riskier for the off-taker and the state, which must support, for instance, the consequences of non-delivered production in any event that is not the direct consequence of producer failure. Obviously, this "all inclusive" type of contract is drafted in such a way to attract private sector investors and secure the financing of projects in countries where electricity is desperately needed and there is limited or no room for any negotiation as the entire deal is pre-set with the acceptance of all concerned IFIs, entities and advisers.

Countries contemplating the use of this kind of stapled financing – in which the same group of DFIs proposes the financing framework (including risk allocation) and then provides the financing and credit enhancement – should engage independent consultants to assist them and to seek alternative DFI financing, if more advantageous, under the Scaling Solar project scheme. This will help them avoid the risk of potential conflict of interest among the DFIs.

It should be noted that the various potential non-bank-lending financing, innovative financing and alternative models for PPPs can combine in infinite ways. For example, looking at the Scaling Solar project in Senegal, we can notice that the French industrialist Engie and the investor Meridiam won two photovoltaic solar energy projects in April 2018. Although Engie was to lead and carry out the construction and operation of the two solar photovoltaic power plants, a project company was set up that allocated 40 per cent of the capital shares each to Engie and Meridiam, while the Senegalese sovereign wealth fund FONSIS was to hold the remaining 20 per cent.

7.3 The flexible bid model

The flexible bid model is an innovative PPP structure that goes beyond traditional bank lending and allows for the competitive procurement of different types of finance, such as equity and debt. The concept of "superannuation public-private partnerships",[18] originally developed by the Dombkins brothers in 2013, proposed using Australian superannuation (pension) funds as the sole source of equity. In 2014 the concept evolved into the inverted bid model,[19] which focused on the reverse auction process for selecting the best financing option. After consulting with industry experts in 2015, the concept evolved into a more refined and comprehensive version called "the flexible bid model", which incorporated "equity (of all types) as well as debt, and clearly explained how these different finance types will be competitively procured".[20] Despite the lack of concrete realisation of the flexible bid model in practice (to the authors' knowledge), its conceptual elements provide useful insights into potential alternative PPP financing structures.

The flexible bid model, "led by investors, introduces a performance-based contract for the SPV manager, and unbundles the PPP components".[21] Under this model, superannuation funds and/or other equity/debt sources, seeking lower-risk investments, directly invest equity in national infrastructure. These funds act as the main investors in the project, instead of traditional sponsors, and hire a professional project manager to manage the SPV though tender. The SPV hires contractors and operators and procures lenders through a competitive bidding process, with the help of the relevant public authorities. In return, the public authority agrees to share some of the risks that are usually borne by the private sector in a traditional PPP by either guaranteeing the fund a minimum return on that investment or accepting the limitation of risks for the private investors – or both. Under this model, the traditional bidding process is reversed by fixing the terms of project financing through a funding competition prior to the construction, operation and maintenance tender or raising of any additional debt. In other words, the government tenders initially for the long-term owner-operator, followed by separate bids for construction, operation and maintenance and residual debt, unbundling the PPP components.

For the reasons stated below, the initiators of the flexible bid model believe it to be a better procurement process for PPPs than the traditional one, meeting both governments' need for a competitive process and investors' risk-return appetite, ultimately providing certainty and value for money for governments, patrons and investors.

The key elements of the flexible bid model PPP are as follows.

- **An unbundled procurement model and phased business planning process.** The government first selects the main provider of equity (the fund) following a direct negotiation or tender process. The fund will then incorporate the SPV and select a manager for the SPV, followed by the selection of the construction contractor and operator and finally the additional financing, if required. This allows the government to minimise the risk of choosing the wrong partner or solution, and to reduce the time and cost of tendering. It also allows the government to monitor the quality of each stage and to adjust the scope and specifications of the project as needed.
- **A competitive financing strategy that incorporates both equity and debt finance.** This means the government and the SPV, in close cooperation and in

[18] Dombkins, D. (2014). The Inverted Bid Model. Industry Super Australia, Complex Program Group, and IFM Investors.
[19] Dombkins, D., & Dombkins, P. (2013). Superannuation public private partnerships: SP3: a new financing and delivery model for Australian PPPs. Report to Industry Super Australia. November 2013.
[20] Complex Programmes Group. (2015). The Role of the Private Sector in Promoting Economic Growth and Reducing Poverty in the Indo-Pacific Region. Submission 154.
[21] UAE Public Policy Forum. (2019). Proceedings Report.

parallel with the above planning process, can seek and secure the best possible financing options for the project, from both public and private sources, such as grants, loans, bonds or equity. The government can also provide guarantees, subsidies or incentives to attract and retain investors and lenders. The fund will be the owner (sole owner or together with government bodies, international finance institutions and/or non-governmental organisations) of the SPV, providing the equity, with a limited or no banking loan. The financing strategy can also be flexible and adaptable, to reflect the changing risk profile and cash flow of the project.

• **A performance-based contractual model that aligns parties and reduces contract management costs.** The government first selects the main provider of equity (the fund), with which it signs a performance-based main PPP contract. The fund will then incorporate the SPV as per existing local corporate legislation and select a manager for the SPV who will be competitively tendered for a fixed period using a performance-based governance contract. The SPV manager will then select the construction contractor and operator following the same performance bases and, finally, the additional financing if required. The SPV manager will report to the SPV board, which consists of representatives from the fund and other shareholders. A performance-based contract means the government and the SPV can agree on clear and measurable performance indicators and targets for each stage of the project, linking the payments and penalties to the achievement of these outcomes. This ensures that the parties are motivated and rewarded for delivering high-quality services and products, and that the government can monitor and enforce the PPP contract efficiently.

The governance structure used in the flexible bid model creates transparency and reduces the risk of sponsors and lenders making excessive profits and imposing development charges, offering a win-win solution. The model has reasonable risk to be supported by the SPV in exchange for a reasonable profit, dealt with in a transparent way. There is no reason to reduce the efficiency, as in such cases it still generates additional transparent profit even if not as excessive as it could be with some sponsors' financial black box models, where the only fixed figure is a very high return on investment.

Additionally, under the flexible bid model, the government and the SPV can adopt progressively incorporated, expanded, value-capture strategies that support long-term funding, such as user fees, tolls, taxes, levies, land value uplift or asset recycling. These strategies can help to fund the project and create positive social and economic impacts for the community. In essence, the fund can give the government the funds needed for green or other specific development projects, while also offering the funds' subscribers a reasonable return without excessive risks. In return, the government may take a large share of the risk, with a very reasonable financing return going to the SPV, sufficient to satisfy shareholders and their subscribers (retirement funds or public institutions) eager to invest long-term without excessive risk and a specific objective in conformity with the SDGs.

A flexible bid model could enable a genuine partnership approach between the public and private sectors, with reduced risks for the private side and reasonable costs for the government. This model could attract institutional investors, such as life insurance companies and pension funds, which seek regular but reasonable returns on their investments, while also delivering social, economic or environmental benefits that align with the objectives of the fund and the government.

The problem with these flexible bid models and innovative PPP structures is that they may generate strong opposition from pension funds, as they may be unwilling or legally/contractually unable to take on greenfield project construction and commercial risks. They may also not be willing or able to assume direct responsibility for managing project development and operation, even at the SPV board level. Other opposition may come from sponsors and financiers, who may fear losing their usual dominant role and profits in the traditional PPP project framework.

7.4 The mutual investment model

The mutual investment model (MIM), developed in Wales, is an innovative way to invest in public infrastructure. The Welsh government designed this model to finance major capital projects amid a scarcity of capital funding.

The MIM supports additional investment in social and economic infrastructure projects and helps to improve public services in Wales. Under MIM schemes, private partners build and maintain public assets. In return, the Welsh government pays a fee to the private partner, which covers the construction, maintenance and financing of the project. At the end of the contract, the asset is transferred into public ownership.

During the construction phases of projects, private partners help the Welsh government create apprenticeships and traineeships to benefit local communities.

Current MIM schemes include:
- redevelopment of Velindre Cancer Centre, Cardiff
- work to complete the dualling of the A465 from Dowlais Top to Hirwaun
- additional investment in Band B of the 21st Century Schools Programme.

Annex 1.
Building a PPP financing model

This bundle has been designed as a practical tool to complement the Regional Study on Financing Models for Public-Private Partnerships in the EBRD's economies. By detailing the benefits and limitations of the financing structures and instruments available to create a PPP financing model and outlining the financing sources available, this guide allows a promoter to quickly build a tailored PPP model. The relevant pages will be linked to the corresponding sections in the chapter, where more details are provided.

A typical PPP financing structure involves the formation of a special purpose vehicle (SPV), with banks contributing roughly 75 per cent of financing (via debt) and shareholders/sponsors providing the remaining 25 per cent (via equity). The aim of this guide and its corresponding chapter is to improve the capacity of relevant public and private bodies to finance PPP infrastructure projects by drawing attention to alternative and innovative ways of financing and structuring PPP projects, beyond traditional bank lending.

Choosing a financing structure

To be considered:

- The size of the project
- The level of development of the local capital market
- The bank's appetite for project finance in the country
- The possibility to mix financing types as an alternative form of PPP financing structure
- Management

Finance structure	Benefits	Limitations
Non-recourse or limited recourse project finance and full recourse corporate finance (2.1.1-2)	Allows projects with substantial capital requirements and inherent risks to attract private financing while minimising the exposure of the sponsors or developers. Helpful for raising finance for large, highly leveraged investments.	High costs: development cost, interest rates (project finance debt generally more expensive), large insurance coverage by lenders. Commercial banks and development finance institutions do not tend to consider any project finance project below a certain threshold (US$ 10 million to US$ 20 million). Thus, for very small local projects, the sole necessity to create an SPV is itself an obstacle.
Forfaiting and receivables financing (2.1.3)	A type of financing through bank loans, guaranteed by the project proceeds, without supporting many project risks. Transfers significant risk from the bank to the public authority.	Concession PPP projects usually have complex contractual arrangements and financial structures that may not align with features of receivables financing. Receivables financing may not provide sufficient funds to cover the large capital requirements often associated with PPP projects.
Investment partnership (7.1)	A good alternative for rich countries where the technology or local capacity is not adequately developed.	
Financing as part of a PPP contractual package (stapled financing) (7.2)	Attractive to investors and good to secure the financing for a project in countries in desperate need of that infrastructure and where limited or no need for any negotiation is seen.	Pre-set agreements can be unbalanced in favour of the potential investors and lenders, risky for the off-taker and the state.
Flexible bid model (7.3)	Meets both governments' need for a competitive process and investors' risk-return appetite, ultimately providing certainty and value for money for governments, patrons and investors.	Flexible bid models can face opposition from pension funds, which may be unwilling to accept direct responsibility for projects.

Choosing a financing instrument

To be considered:

- Risk appetite and distribution (for example, liabilities, loan defaults, construction delays)
- Cost of loans and equity and the debt-equity ratio.
- Probability of returns and repayments
- Ownership (for example, dilution)

Instruments for financing PPP projects	Benefits	Limitations
Equity (4.1)	Risk is shared; equity investors have no legal right to the return of or a return on the capital they invest. Reduces the contingent fiscal liabilities (for instance, material construction risks).	Return is risky (in both directions), so equity financing is more expensive than debt. The risk profile affects both the cost of debt and the cost of equity. Increases the weighted average cost of capital.
Senior debt (4.2)	Lowest risk – thus, it is the least expensive way to finance a project (except for grants).	Requires a very high probability of repayment, providers of senior debt will normally not accept to finance the project fully unless almost all risk of loan default has been removed.
Subordinated debt (4.3)	More flexible terms than senior debt. Lower interest rates than pure equity financing. Interest payments made by the SPV to holders of subordinated debt are often tax deductible.	Typically has higher interest rates than senior debt.
Mezzanine financing (4.3)	Reduces exit risk. Can bridge gaps between equity and senior debt. Increases a project's debt-to-equity ratio, improving equity's rate of return. Frees up equity for other projects. Equity-type features allow investors to share gains realized by the SPV.	While less expensive than equity financing, it is still more costly than traditional debt financing.
Project bonds (4.4)	The long tenor is attractive to investors looking for stable, predictable returns and long-term investments that match their long-term liabilities. Offer higher yields than traditional bonds.	Generally, less flexible than bank loans. Unless the deal is exceptionally large, the transaction costs for project bonds are likely to be higher compared to bank loans.
Capital investment grants or subsidies (4.5)	Cost-free – a form of non-repayable financing.	

Choosing a financing source

To be considered:

- Bankability of the project – can it borrow the amount of debt required?
- Do both lenders and shareholders have incentives that reduce their risks and maximise their returns?
- How developed are capital markets?
- Is there a risk of excessive renumeration on the private side?

Sources of PPP Financing		
Commercial and investment/merchant banks (5.1)	**Development finance institutions (5.2)**	**Project sponsors (5.3)**
Capital market and bond issuance (5.4)	**Impact investors (5.5)**	**Mutual funds (5.6)**
Private equity funds (5.7)	**Strategic investment and infrastructure funds (5.8)**	**Sovereign wealth funds (5.9)**
State-owned non-bank finance companies (5.10)	**Export credit agencies (5.11)**	**Insurance companies (5.12)**
Pension funds (5.13)	**Investment platforms (crowdfunding) (5.14)**	**Philanthropic financing sources (5.15)**

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.

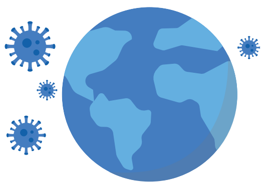
phases of a Covid-19-type pandemic – namely, prior preparedness, response to the acute pandemic phase and post-pandemic recovery. For example:

(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.