



# Guidance on PPP Contractual Provisions

2017 EDITION

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The World Bank

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## ACKNOWLEDGEMENTS

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With the support of Allen & Overy LLP, the various comments and suggestions from all of the above sources were edited by Christina Paul and Susanne Foerster, lawyers within the World Bank's Public-Private Partnerships Group.



## INTRODUCTION

Public-Private Partnerships (PPPs) are now being used in many countries to develop infrastructure projects. While PPP transactions in this context typically are based on a network of complex legal agreements, there is normally a PPP Contract at the center of each such transaction, in the form of a concession agreement or similar document, between a public authority (the "Contracting Authority") and a private company (the "Private Partner").

The complexity and sophistication of PPP transactions, and the fact that they are often heavily negotiated to reflect the characteristics of a given infrastructure project, frequently means that considerable time and expense is involved in preparing and finalizing PPP Contracts. This has led many commentators to ask if it is possible to reduce costs, and shorten the time involved in such processes, by standardizing the provisions found in concession agreements or other PPP Contracts between the Contracting Authority and the Private Partner. In a number of countries efforts have been made to develop complete standardized PPP Contracts for different types of infrastructure projects, such as roads, railways, ports or power generation. To date, however, there is no universally accepted language for such agreements on an international basis.

Given the variety of PPP transactions carried out globally; the different legal systems existing in various countries; and the need to have 'tailor-made' provisions to deal with the individual characteristics of specific projects, the development of complete PPP Contracts on an international basis is likely an unrealistic goal. Nevertheless, there may be merit in focusing on certain contractual provisions dealing with particular legal issues encountered in virtually every PPP Contract/structure, such as, for example, the issues of force majeure, termination rights or dispute resolution.

Against this background, the World Bank Group developed the Report on Recommended PPP Contractual Provisions, 2015 Edition (the "2015 Report") which presented the first attempt by a Multilateral Development Bank to prepare a compilation of "recommended" language in respect of a selection of these typically encountered provisions. Following internal and external consultations on the contents of the 2015 Report, it is in response to the industry feedback received during those discussions that this new edition has been developed. In this respect, its objective is to assist its target audience, namely Contracting Authorities – and particularly those in emerging PPP markets –, with obtaining a better and more comprehensive understanding of the contractual provisions as outlined in the 2015 Report. Accordingly, this current edition includes, inter alia, detailed commentaries in regard to key considerations relevant for Contracting Authorities due to different levels of PPP transactional experience in a given country or due to the characteristics of different legal systems in order to help them to carefully assess the issues specific to their own PPP project and jurisdiction in developing contractual provisions. With the support of the Global Infrastructure Facility (GIF), this edition also comprises two additional chapters that address contractual considerations related specifically to bond financed and corporately financed PPP transactions.

In regard to the sample drafting contained in this document, the authors would like to emphasize that it is neither intended to be exhaustive nor prescriptive – specifically, it is not meant to be mandatory for use in all PPP transactions which the World Bank Group financially supports. Instead, the objective of the Guidance is to set out and analyse contractual language that has formed the basis of many successfully procured PPP transactions, and to describe the rationale for these provisions. In doing so, the authors of the Guidance hope to foster discussion and consensus-building around these provisions and of appropriate contractual language in PPP transactions generally, with a view to helping to reduce the aforementioned time and expense associated with PPP Contract development.

As in any document of this type, some cautionary notes should be emphasized. As indicated, PPP transactions are usually very complex, and extensive due diligence – with the assistance of qualified legal, financial and technical specialists – needs to be undertaken by both Contracting Authorities and private parties before concluding a PPP Contract and related agreements. In this regard, the contents of this Guidance should simply be regarded as a suggested starting point and one of many inputs for the contracting parties to consider.

Also, many of the provisions set out in the Guidance will affect the allocation of risks in a PPP transaction – and the fairness of the overall risk allocation in a transaction can only be assessed by consideration of the entirety of the PPP Contract and related agreements. Where appropriate, suggested contractual language has been linked to the sample matrices showing the allocation of risks between public and private sectors in typical PPP transactions as contained in the Report on Allocating Risks in Public-Private Partnership Contracts, 2016 edition, developed by the Global Infrastructure Hub. It should likewise be noted that this Guidance primarily focuses on PPP transactions on a project finance basis, as reflected by the attention given to the protection of lenders' rights and the sharing of the benefits of refinancing.

This being the second edition, the authors would finally like to stress that this publication is seen as an evolving process. The intention is to develop further iterations of the Guidance once further industry feedback has been collected and as and when new consensus develops around the provisions considered in the document or in connection with an analysis of other contractual language typical of successful PPP transactions.

Christina Paul  
Washington, DC  
June 2017

## DEFINED TERMS

Capitalized terms in this Guidance have the meanings set out below and additional capitalized terms used in the Sample Drafting sections are defined in those sections.

<b>Base Case Equity IRR Investors</b>	has the meaning set out in <a href="#">Section 5, Refinancing Equity</a>
<b>Contracting Authority</b>	means the public authority that enters into the PPP Contract with the Private Partner.
<b>Dutch Model</b>	means Version 4.3 of the Netherlands Standard PPP Contract published in April (accommodation) and June (infrastructure) 2016. <a href="#">See links in Appendix, Additional PPP Resources.</a>
	means, at anytime, the Shareholders and/or their parent companies, as the context requires.
<b>Estimated Change</b>	in has the meaning set out in <a href="#">has meaning set out in Section 3, Change in Law: Project Costs</a>
<b>Infra Australia PPP Guidelines</b>	means the National Public Private Partnership Guidelines, Volume 3: National Commercial Principles for Social Infrastructure (December 2008) and/or the National Public Private Partnership Guidelines, Volume 7: National Commercial Principles for Economic Infrastructure (February 2011) published by the Australian Government Department of Infrastructure and Regional Development. <a href="#">See links in Appendix, Additional PPP Resources.</a>
<b>Lenders</b>	means the finance parties under the Senior Finance Documents providing senior debt to the Private Partner [and/or the Issuer – <a href="#">see Section 9, Bond Financing</a> ] for the purpose of the PPP Project (excluding the Shareholders and their affiliates, as providers of equity or subordinated debt).
<b>MAGA</b>	means Material Adverse Government Action as further described in Section 2, Material Adverse Government Action.
<b>Original Base Case</b>	has the meaning set out in <a href="#">Section 4, Termination Payments.</a>
<b>Party or Parties</b>	means the Contracting Authority and/or the Private Partner, as the context requires.
<b>PPP</b>	means Public-Private Partnership. <a href="#">See also definition of "PPP Contract".</a>

<b>PPP Contract</b>	means the long-term agreement between the Contracting Authority and the Private Partner, for providing a public asset or service, in which the Private Partner bears significant risk and management responsibility, and remuneration is linked to performance. <sup>1</sup>
<b>PPP Project</b>	means the underlying project which is the subject of the PPP Contract.
<b>Private Partner</b>	means the private company that enters into the PPP Contract with the Contracting Authority. The Private Partner often takes the form of a special purpose company.
<b>Project Agreements</b>	means the [any offtake agreement, construction contract, the operating and maintenance agreement, the land lease agreement] <sup>2</sup> .
<b>Senior Finance Documents</b>	has the meaning set out in <a href="#">Section 4, Termination Payments</a> .
<b>Shareholders</b>	means, at any time, any person holding share capital in the Private Partner <i>[adapt as appropriate to reflect financing and holding structure]</i> .
<b>South Africa Guidelines</b>	PPP means South Africa's National Treasury Standardised PPP Provisions: First Issue, published 11 March 2004. <a href="#">See</a>
<b>UK PF2 Guidance</b>	means the Standardisation of PF2 Contracts (Draft) guidance issued by HM Treasury in the United Kingdom, launched on 5 December 2012. <a href="#">See link in Appendix, Additional PPP Resources</a> .

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- 1 There is no single, internationally accepted, definition of Public-Private Partnership. This definition is the definition provided in the PPP Reference Guide Version 3.0, dated April 2017. [See link in Appendix, Additional PPP Resources](#).
- 2 To be tailored on a project-by-project basis to refer to the material contracts entered into by the Private Partner in connection with and relevant for the PPP Project.

# PPP CONTRACTS IN CONTEXT

## AIM OF GUIDANCE

This Guidance is intended to provide Contracting Authorities with an analysis of, and drafting guidance for, specific provisions that are typically included in a PPP Contract and/or its related agreements in order to achieve a successfully financed PPP Project that will deliver the service or asset desired by the Contracting Authority. The Guidance draws on over 20 years' PPP market practice internationally, including guidance published by governmental bodies for Contracting Authorities, as well as the extensive experience of legal advisers supporting Contracting Authorities, Private Partners and different types of funders on PPP Projects, in both developed and emerging markets. This unique and comprehensive perspective enables the Guidance to present a real-world view of contractual issues and outcomes to help Contracting Authorities manage the private sector's expectations, as well as their own, when they have selected PPP as a method of infrastructure procurement.<sup>3</sup>

Prior to reviewing the detailed analysis and contractual provisions provided in this Guidance, it is key for Contracting Authorities to first understand the overall context in which a PPP Project is being developed. This is because the circumstances of each individual PPP Project will shape and determine the drafting of its PPP Contract and related agreements.

To that end, set out below is a brief overview of why governments establish PPP programmes, what a PPP involves, key aspects of risk allocation between the Parties and approaches to ensure "bankability", as well as an overview of variations in approach that may be encountered in different legal systems, sectors and countries. It is important to take these factors into account in formulating and negotiating the terms of a PPP Contract.

Also included in this Guidance are links to more detailed sources of information on these areas, all of which will inform the Contracting Authority's approach towards developing the specific terms of a PPP Contract for its particular PPP project. [See Appendix, Additional PPP Resources.](#)

### A. Overview of infrastructure development utilizing PPPs

Increasingly, PPP programmes are being established by governments across the world as a means to deliver and maintain infrastructure, as well as to deliver other assets and services. Common themes encountered include:

- the need for the public sector to reduce the cost of building and maintaining infrastructure assets without negatively impacting on the quality of public sector services;

<sup>3</sup> A tool aimed at assessing fiscal costs and risks associated with an envisioned PPP Project, and therefore designed to help governments to make informed decisions as to whether to procure a project as a PPP or not, is the PPP-Fiscal Risks Assessment Model (PFRAM) as developed by the International Monetary Fund and the World Bank in 2016. [See link in Appendix, Additional PPP Resources.](#)

- the need to accelerate delivery of both greenfield and rehabilitation infrastructure and the expansion of brownfield infrastructure; and
- the ability to benefit from private sector expertise in delivering innovative technologies and services.

### *B. What does a PPP involve?*

While there is no single, internationally accepted, definition of PPP, the essentials of a PPP arrangement which are encapsulated in a PPP Contract are:

- a long-term contract between a private party (the Private Partner) and a government entity (the Contracting Authority);
- for providing a new or existing public asset or service;
- under which the Private Partner bears significant risk and management responsibility; and
- where payments received by the Private Partner are linked to performance.<sup>4</sup>

The PPP Project functions transferred to the Private Partner – such as design, construction, financing, operation and maintenance – may vary from PPP Contract to PPP Contract<sup>5</sup> but the inclusion of privately raised finance is key to ensuring that the Private Partner is financially exposed and therefore incentivised to perform.

### *C. Finance structures for PPPs*

The Private Partner in most PPP Contracts is a project company specifically formed for that purpose – often called a “special purpose company” or “special purpose vehicle” (abbreviated to “SPV”). The SPV commonly finances the cost of a PPP Project through a combination of equity– provided by its Shareholders – and third party debt provided by its Lenders (who may be commercial banks, bond investors or other finance providers). The choice of third party funder and the cost of such funds will be carefully considered by the Private Partner in its bid preparation.

Any PPP Project losses suffered by the Private Partner are borne first by its Shareholders, and Lenders are adversely affected only if the equity investment is lost. This means Equity Investors accept a higher risk than debt providers and require a higher return on their investment. As equity is typically more expensive than debt, the aim in

<sup>4</sup> See “PPP Contract” definition in [Defined Terms Section](#) and associated footnote.

<sup>5</sup> In this report, for example, a PPP Contract for a hospital may involve the Private Partner designing, building, financing and maintaining the hospital, but only providing certain operational services (such as cleaning, catering etc) and not clinical services which may continue to be provided by the Contracting Authority. Other types of PPP Contract (e.g. the design, construction, management and financing of a university accommodation block or a tolled highway) may involve more comprehensive operational services.

reducing the overall weighted average cost of capital of a PPP Project is to use as high a proportion of debt as possible to finance the PPP Project (typically 70 to 95 per cent of total project cost), which in turn should result in a lower priced facility and service for the Contracting Authority. The level of expected equity return will depend on the particular PPP Project's circumstances, but one of the advantages of a competitive bidding process is that bidders will be aiming to find a funding solution which delivers the best value for money for the Contracting Authority.

From the Equity Investors' perspective, limiting their exposure to a single PPP Project in this way makes it possible to undertake much larger (and potentially more) projects than would otherwise be the case.

PPP Project financings are typically structured as "non recourse" or "limited recourse" financings. In non recourse PPP Projects<sup>6</sup>, Lenders can be paid only from the Private Partner's revenues, without recourse to the Equity Investors. In the context of limited recourse PPP Projects, Lenders rely primarily on the Private Partner's revenues to repay their loans but have certain additional limited recourse to the Equity Investors.

There have been examples of state/procuring entities taking equity stakes in project vehicles, for example, the Building Schools for the Future programme in the UK, the Non-Profit Distributing programme in Scotland and certain Belgian PPPs. Equity interests held by public and private sectors can serve to align incentives and promote co-operation at an operational level, while also giving the public sector a direct stake in the financial success of the PPP Project. However, it is important to design the framework to avoid conflicts of interest and to ensure that decisions necessary for the implementation of the PPP Project can be taken effectively and quickly and free from political influence. A public-private equity structure is therefore likely to be less suitable for PPP Projects in emerging PPP markets, particularly where there is a less stable legal and political environment, as Equity Investors may feel the structure holds too much uncertainty for them.

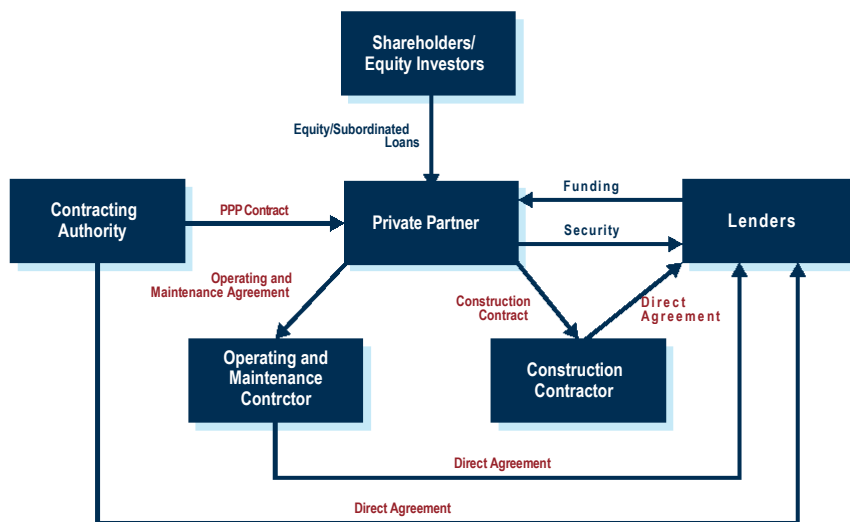
#### *D. Structure diagram*

This diagram shows the key parties and contracts involved in a typical PPP Project. The Contracting Authority contracts with the Private Partner through the PPP Contract and also enters into a separate "Direct Agreement" with the Lenders ([see Section 6, Lenders' Step-in Rights](#)). The Lenders provide funding to the Private Partner and take security over the Private Partner's assets for the repayment of such funding. The Lenders also enter into Direct Agreements with the Construction Contractor and Operating and Maintenance Contractor typically retained by the Private Partner to build and operate the project as required under the PPP Contract. The Shareholders/Equity Investors own the Private Partner, providing funding to it by means of equity and shareholder loans (the repayment of which is subordinated to the Lenders' funding).

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<sup>6</sup> See [Sections 9 and 10](#) for alternative modes of financing for a PPP Project by means of bond or corporate financing and their implications for the considerations for Contracting Authorities as detailed in [Sections 1 to 8](#) of this Guidance.

### TYPICAL PPP STRUCTURE



#### *E. “Bankability” considerations for Contracting Authorities*

Due to the high proportion of debt and the limited recourse available outside the PPP Project for debt repayment, third party Lenders undertake rigorous due diligence upfront, prior to funding, to assess whether a PPP Project is “bankable”. For a PPP Project to be bankable, Lenders need to be confident that the Private Partner can service the debt raised to carry out the PPP Project.

In practice, this means that the Private Partner’s operating cash flows need to be high enough to cover debt service plus an acceptable margin to cover the risk of variation to the cash flows. Lenders will therefore focus on the payment mechanic and any risks which could adversely affect the expected revenue stream. In doing so, they will assess the technical and financial viability of the PPP Project, taking into account all material project risks and how these are allocated between, and managed by, the Parties.

These matters are also key to Equity Investors who are looking to protect their investment and ensure the Private Partner will be able to generate high enough revenues not only to service debt but also to meet their expected equity return.



From the Contracting Authority's perspective, the bankability of a PPP Project is key to whether or not it can succeed with its ambitions to procure infrastructure through PPP.<sup>7</sup> As risk allocation is so crucial to bankability, the Contracting Authority undertakes a difficult balancing act in structuring a PPP Project – ensuring it is bankable, while resisting pressure to accept more risk than is necessary or appropriate. This is the key consideration underpinning the drafting and negotiation of PPP Contract provisions. The involvement of Lenders from an early stage of the procurement process, particularly while competitive tension between bidders exists, will enable the Contracting Authority to inform itself of, and take into account, bankability issues before the PPP Contract is signed.

#### *F. Risk allocation*

The underlying principle of a PPP arrangement is that the risks associated with carrying out a PPP Project are allocated to the Party best able to manage – or most incentivized to bear – them. This involves identifying which Party is best able to manage the likelihood that such risks will occur, as well as to manage the impact if they do actually occur. In assessing the likely cost impact, the Parties will look at each other's ability to bear such cost and the related impact on price, as well as whether and how the cost impact could be offset or passed on (e.g. via insurance, increasing the price of the service to the end user (e.g. in a toll road) and/or by spreading the cost across tax payers).<sup>8</sup> As mentioned in [Section E](#), above Lenders will be closely involved in this analysis and the procurement process should be designed so that Lenders' bankability issues are required to be reflected in bid proposals (potentially resulting in modification of the terms), so that these can be evaluated by the Contracting Authority during the competitive process and prior to signing the PPP Contract.

If risks are carefully assessed and transferred to the Party best able to control or mitigate them, this should result in a reduction of overall PPP Project cost and thereby improve value for money for the Contracting Authority. Contracting Authorities should therefore consider retaining those risks that are not conducive to pricing or assessment by a Private Partner and which the Contracting Authority is best placed to manage. By doing so, the Contracting Authority avoids having to pay the risk premium that will be charged by the Private Partner if it is required to assume such risks.

Most importantly, the Parties should strive to achieve a balanced and reasonable risk allocation in the PPP arrangements that will provide an appropriate basis for a long term partnership. This is key because in order to deliver value-for-money, most PPP Contracts need to run for a significant period of time, typically between 15 and 30 years. Because of their long-term and usually complex nature, PPP Contracts cannot specifically provide for the entire range of events that might potentially arise during their lifetime. All

<sup>7</sup> See footnote 3.

<sup>8</sup> For further insight into how and why risks are allocated to particular Parties, see the Risk Matrices in the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition. [See link in Appendix, Additional PPP Resources.](#)

stakeholders in a PPP Project will need comfort that situations which are beyond their immediate control and which affect contractual performance will be dealt with in a way that allows them to arrive at a mutually acceptable solution. Reducing uncertainty should also ensure greater value-for-money is achieved as uncertainty typically attracts a risk premium (i.e. the Private Partner will expect a higher price/return). As a result, PPP Contracts need to have flexibility built in to enable changing circumstances to be dealt with as far as possible within an agreed contractual framework.

As risk allocation is achieved primarily through the contractual structure, it is essential for a Contracting Authority to understand not only how the PPP Contract works, but also its relationship with the related Project Agreements and any other documents to which the Contracting Authority is party (such as the Lenders' Direct Agreement - [see Section 6, Lenders' Step-in Rights](#)), or which affect its obligations and liabilities (such as the Private Partner's debt and equity finance documents). As regards the PPP Contract itself, the interplay between the contractual provisions is so carefully balanced that they cannot be considered in isolation of each other – the PPP Contract must be looked at in its entirety.

It is important to note that risk allocation is influenced by various factors, including the maturity of the market, the experience of the participants and the level of competition between bidders. Emerging market governments and Contracting Authorities may therefore be able to transfer more risk to Private Partners once they establish successful track records in national/sectoral PPP markets, as these markets become increasingly attractive to Equity Investors and Lenders, and therefore more competitive.

#### *G. Alternative PPP payment mechanisms and risk allocation*

As mentioned in [Section E above](#), the payment mechanism and how payments under it may be affected is key to bankability. The model adopted may also influence how certain risks are agreed by the Parties to be managed. There are three main ways the Private Partner can be paid - by collecting fees from service users, by being paid by the Contracting Authority, or by a combination of the two. The common defining characteristic between these approaches is that payment is contingent on performance.

**“User pays” model** –In PPP Projects using this payment mechanism, the Private Partner provides a service to users and generates revenue by charging users for that service (e.g. some toll roads). These fees (or tariffs or tolls) can be supplemented by subsidies paid by the Contracting Authority, which may be performance-based (for example, conditional on the availability of the service at a particular quality standard), or output-based (for example, payments per user).<sup>9</sup> Under this approach, the Private Partner and its Lenders bear the “demand risk” associated with the PPP Project, namely, how many users will pay to use the asset. There may also be some scope for the Parties to agree that costs associated with the occurrence of certain risks may be managed by increasing the user fee commensurately and/or extending the term of the PPP Contract.

9. In some jurisdictions, fees (or tariffs or tolls) under a “user pays” model may also be supplemented by a minimum revenue guarantee provided by the Contracting Authority to make the project commercially viable and bankable.

**“Government pays” model** – In PPP Projects using this payment mechanism, the Contracting Authority is the sole source of revenue for the Private Partner. This is more usual in PPP Projects where the Private Partner has no influence over user demand (e.g. in the case of a hospital or prison) or where user demand will be too low or uncertain to generate sufficient revenue for the PPP Project to be bankable. Contracting Authority payments are usually conditional on the asset or service being available at a contractually-defined quality regardless of the level of use, and are often termed “availability payments”. In this approach, the Private Partner and its Lenders are exposed to the Contracting Authority’s credit risk and will assess it carefully.

#### *H. Accounting treatment considerations*

An additional factor for governments procuring PPP Contracts has been the availability of advantageous accounting treatment, in particular the perceived ability to treat such investments as “off balance sheet”. However, this has attracted increasing scrutiny from accounting bodies around the globe due to a concern that governments may use PPPs to bypass spending controls (by taking public investment out of the budget and debt off the balance sheet), although they are still bearing substantial risk and significant contingent liabilities. This has resulted in bodies such as Eurostat, the International Monetary Fund and national accounting boards (e.g. in Australia) embarking on measures focusing on the overall risk/reward balance under PPP Contracts for the purposes of determining whether they should be classified as on or off government balance sheets.

In the EU, for example, Eurostat currently requires EU governments to follow certain accounting rules for the debt and deficit treatment of PPP Projects (ESA10). These focus on how construction risk, availability risk and demand risk are allocated between the Contracting Authority and the Private Partner to determine the accounting treatment that must be applied. Under these rules (which themselves have given rise to some debate), “user pays” PPP Contracts are by default off balance sheet due to the risk/ reward balance, whereas “government pays” PPP Contracts may not be, depending on the risk allocation. While accounting treatment is not a factor which should drive negotiating approach, it is something Contracting Authorities should be aware of.

#### *I. Country and sector-specific differences*

As the above highlights, the PPP model is becoming an increasingly global contracting approach for governments. It is important to remember, however, that PPP Project risks vary depending on the country where the PPP Project is located, the nature of the PPP Project and the assets and services involved.<sup>10</sup>

<sup>10</sup> For example, environmental and social risks (such as the risk of damage to the environment and/or local communities due to existing latent environmental conditions) will vary depending on the specific nature of the PPP Project as well as the assets and services it involves. Accordingly, such risks and their impacts may need to be particularly identified and assessed as part of the Parties’ due diligence. For specific examples of risk allocation, see the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition, e.g. the Environmental and Social risk entries in Risk Matrix 1: Toll Road (DBFO) and Risk Matrix 2: Airport (DBFO). [See link in Appendix, Additional PPP Resources.](#)

A road PPP Project, for example, is very different from a hospital PPP Project which in turn has some very different features to an airport PPP Project. Similarly, a defense PPP Project is likely to involve issues of national security which do not affect other sectors in the same way. The key is to understand where these differences lie and to apply the same principle of allocating each risk to the Party best able to manage it consistently with a view to maximising the value received by the Contracting Authority (measured by overall cost as well as quality of service provided by the PPP Project).

Many resources provide “standard” risk matrices and sample risk allocations, in some cases for specific project types. These can be useful when identifying project risks for a particular PPP Project. However, PPP Projects usually have unique features or circumstances – for example, the particular geological conditions on the route of a proposed road. Moreover, the typical risk allocation position in a developed PPP market in an established jurisdiction may not be appropriate in an emerging PPP market. This means that Contracting Authorities should ensure that experienced advisors identify a comprehensive list of project risks and analyse carefully how such risks should be allocated in the context of each individual PPP Project.<sup>11</sup>

#### *J. PPP Contracts in different legal systems*

Common law and civil law are the two main types of legal systems adopted by countries nowadays and some countries have adopted features from both into their legal systems. While the approach to allocating risk under a PPP Contract should be fundamentally the same in both civil law and common law jurisdictions, how such risk allocation is drafted and the extent to which it is negotiable may differ according to the level of freedom the Parties have to enter into bespoke contractual arrangements.

An overarching consideration in relation to freedom to negotiate under both systems is whether the applicable procurement processes and rules limit the ability of the Parties to negotiate and amend the terms of a PPP Contract issued as part of a tender process, and whether any changes might give rise to procurement challenges or allegations of corruption. The Contracting Authority should take this into account when formulating the terms of the PPP Contract which will form part of its tender documentation to avoid tendering an unnegotiable, unbankable, PPP Contract.

Aside from potential procurement law restrictions, underlying general laws may affect or apply to PPP contractual relationships without express inclusion in the relevant PPP Contract. In jurisdictions where this is the case, the Parties will need to verify whether and to what extent it is legally possible to amend or waive rights and obligations under such laws (taking into account how this may also affect third parties, such as users). Depending on the result of such analysis, the Parties may want to expressly spell out the underlying legal position in the PPP Contract for the sake of certainty. How such issues are addressed

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<sup>11</sup> For sector specific risk matrices, see the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition. [See link in Appendix, Additional PPP Resources.](#)

will depend entirely on the jurisdiction and Parties concerned and professional legal advice must be sought. Lenders will be equally concerned with this aspect.

**Common Law System** – In a common law system parties typically enjoy extensive freedom of contract and few provisions are implied into a contract by law. Judicial decisions set precedents which will be followed in the determination of contractual disputes and therefore influence contractual drafting. A consequence of this freedom is that the terms of any contractual arrangements should be expressly set out in the relevant contract. In a PPP context, all arrangements governing the relationship between the Parties therefore need to be expressly set out in the PPP Contract itself.

Generally speaking, everything is permitted that is not expressly prohibited by law or by contract. If a government is embarking on a PPP programme, it may therefore wish to ensure that certain protections are enshrined in applicable legislation and/or built into PPP Contracts for public policy reasons. For example, it may wish to expressly prohibit the service provider from cutting off the water or electricity supply of delinquent payers, or limit the toll or tariff a Private Partner can charge users, to reflect governmental obligations under relevant international treaties. It may also wish to expressly require that certain documents related to the transaction be disclosed under freedom of information legislation.

**Civil Law System** – A civil law system is a codified system of law which is generally more prescriptive than a common law system. Basic rights and duties are enshrined in an overarching constitution under which specific legal codes are promulgated (such as administrative and commercial legal codes). In addition, in many civil law jurisdictions, underlying principles of good governance and other administrative law rules affect public sector parties, and broad obligations such as “good faith” have an important impact on contract performance. Broadly speaking, legislative enactments are considered binding for all, as opposed to judicial decisions as in common law jurisdictions (although case law may be relevant, for example with regard to financial hardship concepts and force majeure). Codified provisions and underlying principles may be implied into civil law contracts without being expressly included. As a result, less importance is generally placed on expressly setting out all the terms governing contractual parties’ relationships because gaps or ambiguities can be remedied or resolved by operation of law. Accordingly, a civil law contract is often less detailed than an equivalent common law contract.

As in any jurisdiction, it is key for all Parties to understand how the underlying civil law operates and how it potentially affects the Parties’ risk allocation negotiations. PPP Contracts typically fall under the administrative law umbrella and the Parties will have to take into account underlying administrative law principles which apply to contractual relationships (e.g. in the context of force majeure rights or rights of the Contracting Authority to voluntarily terminate a contract or rights to “economic rebalancing” or compensation for a Private Partner suffering financial hardship as a result of certain changes in circumstance).

Changing or overriding an administrative law principle by contract may or may not be legally possible and this will need to be confirmed on a case by case basis. Some civil law jurisdictions enjoy extensive freedom to contract (e.g. the Netherlands). However, in other jurisdictions, it may not be possible to derogate from certain principles or to completely waive certain rights, so the Parties will need to take this into account in their negotiations. A related issue for the Parties is what to include in the PPP Contract if underlying legal principles apply. Generally speaking, there is an increasing preference in civil law jurisdictions to expressly set out the position so that the PPP Contract is clear on its face and is not relying on implied terms from underlying law. This is partly because this approach will be more familiar to parties from common law jurisdictions, but also because relying on underlying law can be problematic as the meaning of certain terms and rules may not be clear. An alternative, which may also be effective, is to set out expressly in the PPP Contract how an underlying administrative law principle it is to be applied.

#### *K. Foundations for a successful PPP Contract*

The existence of a legal and administrative regime which permits PPPs and provides for a clear and transparent procurement process is essential. Without this, private sector parties are unlikely to invest time and resources (both financial and personnel), in participating in a PPP Project procurement process which may be lengthy and ultimately fail. Before any procurement process begins, governments in both civil and common law jurisdictions need to consider what additional legislation may be required in order to facilitate and permit PPP arrangements – this will include ensuring Contracting Authorities have the legal capacity and authority to enter into PPP Contracts (i.e. that they will not be acting “ultra vires” - beyond their powers) and that PPP arrangements in their desired form are legally permitted. Governments will also need to consider whether specific legislation is required to facilitate PPP Projects in a particular sector or (particularly in the case of civil law jurisdictions) is needed to limit the scope of an underlying law restriction which may be preventing or impeding the successful procurement of a PPP Project. This includes assessing any implications as regards potential financing, tax and security arrangements.<sup>12</sup>

A stable political, economic and legal regime and environment is also desirable. While certain associated risks can be managed under the PPP Contract, ultimately the risk of investing in and lending to a PPP Project where these conditions do not exist may be too high for some private parties, particularly when compared with alternative investment or lending opportunities. The involvement of export credit agencies and multilateral and development finance institutions can give Equity Investors and Lenders greater confidence in certain jurisdictions. This is due not only to their ability

<sup>12</sup> For an overview of as well as specifics on PPP legal frameworks, see the PPP Reference Guide Version 3.0, dated April 2017. [See link in Appendix, Additional PPP Resources.](#)

to offer more favourable financing terms or products such as political risk insurance in respect of commercial loans and equity, but also because of the relationships they enjoy at government level. Similarly, the existence of bilateral investment treaties between governments may play a part in the private sector's decision to invest in some jurisdictions. These elements are additional factors in the negotiation of a well-balanced PPP Contract in such jurisdictions, but are not a substitute for a PPP Contract.

#### *L. Conclusion: the importance of a project-specific approach*

As highlighted at the outset, understanding the whole context of a PPP Project is critical for Contracting Authorities when devising and negotiating the terms of a PPP Contract. Risk allocation has a direct impact on bankability and pricing, which determines whether a PPP Project will be affordable for a Contracting Authority or users and financeable by a Private Partner – and ultimately whether the asset and/ or service will be provided at all by means of a PPP. There is no "one size fits all" PPP Contract and contractual provisions cannot be looked at in isolation due to their close interplay.

This Guidance is intended to help Contracting Authorities carefully assess the issues specific to their own PPP Project and jurisdiction in developing contractual provisions. It explains the rationale for the drafting of certain material provisions that have formed the basis of many successfully procured PPP transactions around the globe and which have been developed through detailed risk allocation assessment and negotiation between Contracting Authorities, Private Partners and Lenders. Its goal is to help Contracting Authorities negotiate key aspects of PPP Projects confidently and efficiently and to reduce the time and money being spent negotiating contractual terms which may ultimately result in an unaffordable or unbankable PPP Contract.

A person wearing a blue shirt is shown from the side, working in a field. The background features a line of trees under a clear sky. The entire image has a blue color overlay.

1

## FORCE MAJEURE



## 1.1 KEY ASPECTS

### 1.1.1 The concept of Force Majeure

“Force Majeure” was originally a civil law concept, but it is now widely used in commercial contracts, including those governed by the laws of common law jurisdictions.

Force Majeure essentially refers to events or circumstances which:

- (a) are beyond the [ability of the contracting Parties to control through the exercise of due diligence of the contracting Parties](#); and
- (b) are unforeseeable at the time the agreement is entered into; and
- (c) make it [definitively/absolutely/materially](#) impossible for one Party to fulfil all or a material part of its contractual obligations (i.e. they are prohibitive in nature as far as contractual performance is concerned).

### 1.1.2 Why do PPP Contracts contain Force Majeure provisions?

The aim of Force Majeure provisions in a PPP Contract is to allocate the financial and timing consequences of Force Majeure events between the Contracting Authority and its Private Partner<sup>13</sup>. The starting assumption for both Parties should be that the risk of a Force Majeure event occurring is shared because it is outside both Parties’ [ability to control through the exercise of due diligence](#) and neither is better placed than the other to manage the risk of such occurrence or its consequences.

While the provisions are typically drafted mutually, the affected party is most likely to be the Private Partner and this raises some important issues for the Contracting Authority which are the focus of this [Section 1](#):

- (1) what events qualify as Force Majeure events;
- (2) whether and how the Private Partner should be compensated as a result of a Force Majeure event (e.g. for increased costs and/or loss of revenue);
- (3) whether and for how long key milestones under the PPP Contract should be deferred as a result of a Force Majeure event;
- (4) whether the Private Partner or the Contracting Authority should be relieved from its obligations to perform under the PPP Contract and from the related consequences (e.g. the risk of termination due to default); and
- (5) whether the PPP Contract should be terminated if a Force Majeure event persists for a significant period of time and what termination compensation should be paid, if any.

<sup>13</sup> See the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition, e.g. the Force Majeure risk entries in Risk Matrix 1: Toll Road (DBFO) and Risk Matrix 2: Airport (DBFO)). [See link in Appendix, Additional PPP Resources.](#)

**Commented [A1]:** This alleviates the flexibility of the original formulation. The addition of the term “definitively” or “absolutely” or “materially” would further ensure that the clause would not be invoked upon occurrence of a circumstance rendering performance more difficult or burdensome. Moreover, it is in line with international case law; see, e.g., *Philips Petroleum Company Iran v. The Islamic Republic of Iran*, Award of 29 June 1989, 21 ISCTR 79; *Rainbow Warrior (New Zealand/France)*, XX RIAA 217 (1990); and many other cases.

**Commented [A2]:** Our edits here are inspired by the general description of the concept by the tribunal in *National Oil Corporation (Libya) vs. Libyan Sun Oil Company (USA)*, Case No. 4462/A5, First Award of 31 May 1985, 29 I.L.M. 565. More generally, the element of (un-)foreseeability is also enshrined in Article 7.1.7 of the 2010 UNIDROIT Principles of International Commercial Contracts, French law, as footnote 8 of the present commentary states, as well as subsequent sections of this commentary (see Section 1.2.1.3). Adding this condition is therefore in line with the general understanding of the concept as well as the policy goal of avoiding invocations of the concept upon the occurrence of the slightest difficulty.

## CIVIL AND COMMON LAW DIFFERENCES

Many jurisdictions have a concept of Force Majeure under general law<sup>12</sup>. In some cases, this can limit the freedom of the Parties to agree alternatives in a PPP Contract as it may not be possible to derogate from the scope of the legal concept, especially where force majeure provisions are considered public order provisions. This is particularly the case in civil law jurisdictions. ~~However, most~~ Where this is not the case, however, PPP contracts may include specific Force Majeure provisions, ~~whether they are civil law or common law governed~~, as this provides contractual certainty for the Parties and avoids delay in addressing the consequences if Force Majeure occurs. This is essential to make the PPP Project bankable for Lenders and Equity Investors alike and is the recommended approach for all Contracting Authorities, subject to the requirements of their domestic laws. ~~However, the Parties' ability to derogate from the legal definition of Force Majeure should not prevent the State's legitimate exercise of police powers~~

### 1.1.3 Relationship to other types of event

In a traditional commercial contract, for example between two private sector entities, shared Force Majeure risk would typically include "acts of God" such as natural disasters and epidemics (often referred to as "natural Force Majeure"), as well as "political" events such as general strikes, nationalisation and a public sector refusal to grant licenses (often referred to as "political Force Majeure").

In a long-term PPP Contract, where one of the parties is a public sector entity, there is close scrutiny of the type of political force majeure events which may arise during the life of the PPP Contract and how each risk should be allocated. Deciding whether the risk should be borne by the Contracting Authority alone, shared by the Parties, or borne by the Private Partner as a commercial risk may in practice be difficult. It will inevitably depend on the situation in the relevant jurisdiction, the type of event being considered and the level of contingency that the Private Partner would price into its bid to cover the risk if allocated to it. For example, while it is usually accepted that the type of political risk which should lie wholly with the Contracting Authority includes deliberate acts of state such as outright nationalisation of the PPP Project, war events, civil strife, and associated strikes and riots typically classify as force majeure, the position as regards war events will depend on the jurisdiction concerned. ~~If any kind of civil or external war event is highly unlikely, the Private Partner may be comfortable with the risk being treated as a shared Force Majeure risk and any contingency it prices into its bid will be relatively low. In more volatile jurisdictions where the war risk is high, however, the Private Partner may not be prepared to bear any risk at all (or alternatively would price such a high contingency into its bid that the PPP Contract may prove very expensive or even unaffordable). In this instance, such events may be more appropriately treated as Contracting Authority risk, or looked at more individually so that, for example, civil war may be classed as Contracting Authority risk, but external war events classed as shared Force Majeure risk.~~

If there are political risk events to be allocated solely to the Contracting Authority, it is likely that these events will require separate treatment in bespoke provisions. In this Guidance, events in this category are treated as "Material Adverse Government Action" ("MAGA") events. They are given separate treatment in their own contractual provision and are in discussed in more detail in [Section 2, Material Adverse Government Action](#). The same type of approach is seen, for example, in recent PPP Contracts in the Philippines and also in certain

14 \_\_\_\_ In France, for example, the affected party is relieved from its obligations if Force Majeure prevents performance. French jurisprudence has defined the characteristics of a Force Majeure event as (i) beyond the control of the parties, (ii) unforeseeable and (iii) impossible to overcome.

**Commented [A3]:** It is not uncommon, in case of disputes, that the express inclusion of a force majeure provision be taken by the tribunal to signal an intent to derogate from the provisions of general law and their interpretation by domestic courts. For such derogation to be avoided, provided of course that that is desirable, the parties are advised to expressly provide in their contract that the force majeure provision is not intended to derogate from the provisions of the general law.

**Commented [A4]:** This view is not shared in international law jurisprudence: see *Gould Marketing, Inc. v. Minister of National Defense of Iran*, Interlocutory Award No. 24-49-2, 3 IUSCTR 147; *Amoco International Finance Corporation v. Iran*, Award, 15 IUSCTR 189; *Philips Petroleum Company Iran v. The Islamic Republic of Iran*, Award of 29 June 1989, 21 ISCTR 79; International Law Commission, Draft Articles on State Responsibility with commentaries, Article 23 and commentary, para. 7. We have therefore edited accordingly.

African power projects (such as the International Finance Corporation's Zambia Scaling Solar Programme). See [Section 2, Material Adverse Government Action](#).

In some jurisdictions (such as Australia and the UK), there is no need for a specific MAGA provision as Private Partners accept that the type of political risks likely to arise are limited and can be dealt with through the Force Majeure shared risk provisions, together with separate provisions dealing with specific events for which risk is allocated either to the Contracting Authority (such as Contracting Authority breach of contract and Change in Law) or to the Private Partner.<sup>15</sup> See also [Section 2.1.3, Material Adverse Government Action](#) and [Section 3.1.3, Change in Law](#).

There is no right or wrong approach and the fundamental principle remains the same – risks should be allocated to the party best able to control and/or manage them and the PPP Contract should address them in the clearest way possible.

#### CIVIL AND COMMON LAW DIFFERENCES

Contracting Authorities should, however, distinguish Force Majeure provisions from so-called "hardship clauses" which deal with unexpected circumstances where performance becomes more onerous for a Party without being impossible. These stem from underlying statutory legal concepts in certain jurisdictions (e.g. France<sup>16</sup>) and are not usually found in common law contracts.

Notably, PPP Contracts in civil law countries often derogate from underlying statutory legal hardship provisions in favour of an agreed contractual risk allocation where this is legally effective. This is to provide certainty for the Parties and is the recommended approach for Contracting Authorities where possible under the applicable governing law. See Section 1 PPP Contracts in Context

#### CIVIL AND COMMON LAW DIFFERENCES

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### 1.1.4 Force Majeure and related Project Agreements

The Private Partner and its Lenders will review Force Majeure provisions in detail and will want to ensure that the Force Majeure provisions in the Project Agreements mirror those under the PPP Contract (both in terms of definition and consequences). The Project Agreements should provide the sub-contractors with no greater protection against the risk of Force Majeure than the Private Partner enjoys under the PPP Contract (so that there is "equivalent project relief"). This is to ensure that the Private Partner does not find itself in a position where it is obliged to give a sub-contractor Force Majeure relief to which it is not itself entitled under the PPP Contract.

<sup>15</sup> This is part of an approach which typically distinguishes between (a) events which entitle the Private Partner to the same type of full relief (namely both cost reimbursement and extensions of time) and sometimes termed "Compensation Events"; (b) events which only entitle the Private Partner to extensions of time (known as "Relief Events"); and (c) "Force Majeure Events" (which are a shared risk but usually have a narrow scope as some political and natural force majeure risks are instead treated as Relief or Compensation Events). See the *Infra Australia PPP Guidelines* and the *UK PF2 Guidance*.

<sup>16</sup> In France, administrative courts will enforce the doctrine of hardship (*imprévision*), which allows a party to claim compensation through an increase in the contract price where the circumstances of the contract have changed in a manner which could not have been foreseen by the parties (i.e. by events that are unforeseeable, beyond the control of the parties and have a fundamental impact on the economic balance of the contract). Unlike Force Majeure, however, performance is not impossible. French PPP Contracts may provide that *imprévision* can be invoked in accordance with case law or may define expressly the financial threshold deemed to trigger the Private Partner's right to claim compensation.

Similarly, when the PPP Contract sets out conditions precedent to the Private Partner's entitlement to any Force Majeure protection (e.g. notice requirements and the obligation to supply supporting information), these conditions need to be reflected in the Project Agreements. While this is primarily an issue for the Private Partner and its Lenders, it is in the Contracting Authority's interests to ensure requirements for this flow down are in place to ensure there is no negative impact on the PPP Contract. [See also Section 2.1.4, Material Adverse Government Action and Section 3.1.4, Change in Law.](#)

While following the Force Majeure approach in internationally recognized forms of construction contract<sup>17</sup> may be appropriate for some PPP Contracts, the starting point for a Contracting Authority should always be to consider what the appropriate risk allocation position is for its PPP Contract and for this position to then flow down into (as opposed to up from) the Project Agreements. This may well result in a different approach to construction industry standard forms and mean that the construction sub-contract will be a form of contract that reflects the approach in the PPP Contract and is therefore specific to the relevant project. This is usually the right approach in PPP Projects where financing is on a limited recourse basis and the SPV needs to transfer the risks assumed under the PPP Contract to its subcontractors under the Project Agreements resulting in a construction contract and operation and maintenance agreement that are "back-to-back" with the PPP Contract. Such flow down structures are likely to be critical to the bankability of the PPP Project.

## 1.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY

### 1.2.1 Defining the events or circumstances that qualify as "Force Majeure"

1.2.1.1 Freedom to contract – Before drafting and negotiating Force Majeure provisions, the Contracting Authority needs advice from its legal advisers about how much contractual freedom the Parties have under the PPP Contract's governing law to (i) define the concept of Force Majeure in the PPP Contract and (ii) specify its consequences. [Indeed, in some jurisdictions, provisions on force majeure have a public order character and cannot be derogated from in contracts.](#)

#### CIVIL AND COMMON LAW DIFFERENCES

In jurisdictions which have an underlying legal concept of Force Majeure (typically civil law jurisdictions), the Parties' ability to derogate from the legal definition of Force Majeure and amend or create their own definition of Force Majeure and its effects may be limited and must be verified on a case-by-case basis. [In France, for example, Force Majeure is defined by French jurisprudence as an event beyond the control of the parties, unforeseeable and impossible to overcome.](#)

In other jurisdictions (typically common law jurisdictions, but also, for example, the Netherlands<sup>18</sup>), the Parties will have no restriction on their ability to mutually agree on the scope of Force Majeure and the consequences of an event occurring. [That said, exceptions to the jurisdictions' general provisions on force majeure must be expressly provided for;](#)

**Commented [A5]:** This comes straight from the jurisprudence, *National Oil Corporation (Libya) vs. Libyan Sun Oil Company (USA)*, Case No. 4462/A5, First Award of 31 May 1985, 29 I.L.M. 565.

17 For example, the forms of construction contract produced by FIDIC (The International Federation of Consulting Engineers).

18 In the Netherlands, the PPP Contract may typically include wording waiving statutory rights in respect of "unforeseen events" – this type of express approach may be persuasive if such derogation were to be tested in court.

### 1.2.1.2 Different approaches

There are broadly two main approaches to defining Force Majeure:

- (a) Approach 1: an open-ended catch-all definition including all events beyond the reasonable control of the affected party which satisfy certain criteria such as foreseeability and avoidability and prevent the affected party performing. Despite such a general approach, it is also common to list specific events considered to be Force Majeure under this definition, recognising that any such list is only illustrative and is not exhaustive.<sup>19</sup> This can be advisable in jurisdictions where the courts are unlikely to expand upon the contractual definition given by the Parties, to ensure such events are included. *See Section 1.2.1.3 and Section 1.4, Sample Drafting 1, Clause (1).*

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

This catch-all approach is often seen in civil law governed contracts and may be more appropriate in emerging and less stable PPP markets where it may be more challenging to expect a Private Partner to manage the consequences of the type of events which meet the definition criteria. ~~For example, if there are limited available resources in the country itself, more dependence may have to be placed on an external supply chain than in a resource-rich country.~~

- (b) Approach 2: an exhaustive list of specific events or circumstances which are (expressly or inherently) beyond the control of the affected party and prevent it from performing. These typically include political events (e.g. wars, acts of terrorism, strikes and protests) ~~to the extent treating them as a shared risk is agreed appropriate~~, natural disaster events (e.g. earthquakes, landslides, floods)<sup>20</sup> and events such as nuclear explosions. An example of this is the Dutch Model which sets out a very limited list of Force Majeure events, as do the UK PF2 Guidance (under which the events listed are essentially uninsurable) and the Infra Australia PPP Guidelines. *See Section 1.5, Sample Drafting 1A, Definition of "Force Majeure Event".*

<sup>19</sup> For example, the Parties may want to specify certain types of severe and extreme weather conditions in order to address risks relating to climate change (as they relate to their specific project), recognizing that, while the impacts of climate change may have become increasingly foreseeable, it would likely not be in the Affected Party's power to prevent, avoid or overcome those on its own in most cases. Nonetheless, it should be noted that there currently is no standardized approach for allocating responsibility in PPP Projects to manage Force Majeure versus severe and extreme weather risks. Equally, the Parties should carefully assess whether the legal system in the country, in which their PPP Project is located, allows for inclusion of such events under Force Majeure, and if not, whether these may be covered by the Private Partner by taking out respective insurance. *See also Section 1.2.1.4.*

<sup>20</sup> This may also include other types of severe and extreme weather conditions. In specifying such further events, the Parties may want to particularly address risks relating to climate change (as they relate to their specific project). Nonetheless, see the caveat as noted in footnote 19.

<sup>21</sup> This is part of the approach described in the footnote to *Section 1.1.3 Force Majeure*.

## EMERGING AND DEVELOPED MARKET DIFFERENCES

Some types of event which might be treated as Force Majeure in emerging markets may be treated in developed markets as "Relief Events" which are at the Private Partner's risk and if they occur only entitle the Private Partner to relief from breach of contract to the extent they cause it to miss a key performance date under the PPP Contract (i.e. "time" relief). The Private Partner has been prepared to take a view on such risks and how best to manage them where markets are developed and predictable.<sup>17</sup>

- (c) **Exclusions and qualifications:** in relation to both Approach 1 and Approach 2, it is not uncommon to specify events which are specifically excluded from the definition of Force Majeure or which only qualify if they occur to a sufficient degree. In this case, the drafting focus will shift to what is not Force Majeure as opposed to what is. For example, in countries where certain natural events regularly occur (such as seasonal rains resulting in floods) and which should have formed part of the Private Partner's due diligence when formulating its proposed price, the degree of such events should be specified so that only "exceptional" occurrences qualify as Force Majeure (e.g. floods of a scale that occur not more frequently than once in every [100] years). It may be helpful in certain civil jurisdictions to set out the rationale for excluding certain events, as the courts may have the power to consider them as Force Majeure even though expressly excluded by the Parties.

Particular sectors may have specific requirements as well – for example, defense PPP Projects might exclude certain events if the PPP Contract is intended to operate during times of war; and environmental PPP Projects or PPP Projects involving chemical treatment may also need to have a narrower definition if the Private Partner is intended to deal with a certain degree of chemical contamination (such as a hospital or defense project).

Other exclusions and qualifications may also be included. For example, neither Party should be allowed to invoke force majeure if it has directly caused or produced the situation in question. This exclusion would not cover situations where the party may have unwittingly contributed to the occurrence of material impossibility by undertaking an action or refraining from action in good faith.

**Commented [A6]:** This is in line with international jurisprudence; see, e.g., *Libyan Arab Foreign Investment Company v. Republic of Burundi*, (1994) I.L.R., vol. 96;

Whichever drafting approach is selected, above all, the Contracting Authority and its advisers must carefully consider the specific nature and individual circumstances of the PPP Project in question to ensure that the definition is appropriate for that PPP Project (and not simply adopted from a previous PPP Project or another sector or jurisdiction). This is particularly the case bearing in mind the consequences of a Force Majeure event and the Contracting Authority's potential liability (e.g. if ongoing payments are required or termination results).

**1.2.1.3 Foreseeability and avoidability** – To qualify as a Force Majeure event, the definition may also require that an event was not foreseeable, or if it was foreseeable that it could not reasonably have been avoided. Practice varies between jurisdictions and may depend on underlying legal concepts or the nature and extent of the agreed list of Force Majeure events.

<sup>22</sup> For example, see the *Infra Australia PPP Guidelines*.

## CIVIL AND COMMON LAW DIFFERENCES

In many civil law jurisdictions, the legal definition of Force Majeure requires that the event is unforeseeable and unavoidable from the point of view of the party whose obligations are affected. Contracting Authorities in these jurisdictions therefore often want to include these requirements in the contractual Force Majeure definition, coupled with a reasonableness test as regards a party's inability to control and/or prevent an event, even if it is in fact foreseeable. See Section 1.4, Sample Drafting 1, Clause (1)(b).

While Section 1.4, Sample Drafting 1 illustrates this civil law approach, PPP Contracts in common law jurisdictions would not typically include this concept of foreseeability, nor would they in some civil law jurisdictions (e.g. the Netherlands). See Section 1.5, Sample Drafting 1A. However, in some cases the extent to which the impact of the Force Majeure Event could have been reasonably prevented/mitigated may be key in determining entitlement to relief from breach of contract<sup>23</sup>.

**1.2.1.4 Insurance** – Contracting Authorities typically require the Private Partner to insure material project risks (e.g. accidental damage, third party liabilities). In the early days of PPPs, the definition of Force Majeure was often based on whether a particular event could be insured against. If there was insurance for a specific political or natural event, it could not be regarded as Force Majeure. Conversely, “uninsurable” events tended to be treated as Force Majeure. Currently, the relationship between insurability and Force Majeure is less straightforward, although the ability of the Parties to insure against certain risks, and to bear the relevant insurance premium costs, must be considered when defining Force Majeure events and related compensation provisions. It may be appropriate to exclude certain insurable events from the Force Majeure definition as the Private Partner is able to manage the risk thorough insurance (and will have factored the premium cost into its pricing). Equally, if the insurable event is agreed to be a Force Majeure event, this will influence any additional relief that may be agreed by the Contracting Authority. Insurance proceeds paid<sup>23</sup> (other than to compensate third parties) may also be deducted from any termination amount payable. The Contracting Authority should also expect that the costs of insurance will be reflected in pricing – either ultimately being passed on to third party users via the approved tariff or fee (under the “user pays” model) or to the Contracting Authority itself (under the “government pays” model).

Generally, uninsurability is addressed in separate provisions, although some jurisdictions may not recognize the concept of uninsurability or may not typically address it contractually due to the existence of general law provisions. *For further detail see Section 1.3 and definition of “Uninsurability”.*

## 1.2.2 Relief for Private Partner non-performance

Contracting Authorities are likely to be asked to consider whether the Private Partner should be entitled to any relief if a Force Majeure event occurs preventing it from performing. Apart from being unable to meet its contractual obligations, the Private Partner may incur additional costs and suffer loss of revenue to the extent it is unable to commence or continue to provide the service. In the construction phase, a delay

<sup>23</sup> \_Or, depending on the jurisdiction, and timing of actual payment by the insurers, payable.

to completion may also cause the Private Partner to incur additional financing costs (e.g. additional interest during construction) or if it has to reschedule its repayment obligations). In the operating period it is likely to still be incurring fixed costs (in particular debt service costs), which it may be unable to meet and its financial position may be materially affected. This applies whether the “user pays” or “government pays” payment model is being used (see [Section G, PPP Contracts in Context](#)).

While the underlying principle of Force Majeure is that losses lie where they fall and Parties should bear their own costs and damages, different approaches can be taken. For example, the Contracting Authority should assess the extent to which it is prepared to pay compensation to the Private Partner to prevent a payment default under its project or financing agreements while a Force Majeure event subsists (e.g. by continuing to pay an availability payment or other compensation) and/or to enable it to make up lost revenues and costs incurred if the PPP Contract is to resume (e.g. via an extension of the operating period or increased tariff).

Although it is typical for a PPP Contract to expressly include some additional relief (particularly in respect of Force Majeure events occurring during the construction phase), it is impossible to know in advance what will be appropriate following every Force Majeure occurrence as the effects may vary greatly (some may have a greater or longer term impact than others). In practice, if a Force Majeure event occurs, the Parties will be discussing how to facilitate continued performance of the PPP Contract (including agreeing at the time on any additional relief) and a contractual provision reflecting this is often included. See [Section 7.5, Sample Drafting 7A, Clause \(4\)](#).

The availability of insurance will be relevant to the determination of relief (see [Section 7.2.7.4 and Section 7.3](#)), as will the period of time that a Force Majeure event must subsist before either Party may be entitled to terminate the PPP Contract. Not surprisingly, the period of time that must elapse before termination rights arise tends to be shorter in PPP Contracts where no financial compensation is expressed to be payable to the Private Partner during the subsistence of a Force Majeure event.

It is worth noting in this context that if termination ultimately occurs, the Contracting Authority will most likely pay compensation to the Private Partner (e.g. at a minimum in an amount equal to of outstanding senior debt). See [Section 4, Termination Payments](#).

Typically, the Party claiming relief for a Force Majeure event will be obliged to take reasonable action to mitigate its effects and provide a mitigation strategy to the other Party. Failure to do so may affect its rights to relief. In some cases, the Parties may agree to exclude certain measures from the mitigation requirement.

Types of relief are discussed in [Sections 7.2.2.7–7.2.2.8](#).

**1.2.2.1 Relief from breach of contract**—The occurrence of a Force Majeure event affecting the Private Partner’s ability to fulfil its contractual obligations will generally allow it relief from its obligations under the PPP Contract so that it is not in breach of contract, but the Contracting Authority should ensure that relief is given only to the extent that the Private Partner’s inability to perform its obligations is directly caused by the Force Majeure event. See [Section 7.4, Sample Drafting 7, Clauses \(3\) and \(5\) and Section 7.5, Sample Drafting 7A, Clause \(7\)](#).

It is also typically accepted that the Private Partner is excused from further performance of its affected obligations under the PPP Contract while the Force Majeure Event is

**Commented [A7]:** This looks to us as unduly favoring the private party, which is presumed to have factored in its pricing any losses attributable to force majeure events. It is one thing to make provision for relief from liquidated damages and quite another to provide for compensation of lost revenues and costs, etc. After all, as the opening sentence of this paragraph admits, the underlying principle of force majeure is that “losses lie where they fall and Parties should bear their own costs and damages.” We have therefore edited accordingly.



continuing. See [Section 7.4, Sample Drafting 7, Clauses \(3\) and \(5\)](#) and [Section 7.5, Sample Drafting 7A, Clause \(7\)](#).

1.2.2.2 [Liquidated damages relief](#) – If the Private Partner is liable to pay liquidated damages to the Contracting Authority if it fails to meet certain construction phase milestones (such as the scheduled date for commencing operations), it will typically want to be expressly relieved from such requirement to the extent these relate to the obligations it is unable to fulfil due to the Force Majeure event. Market practice is to expressly provide for such relief upfront in the PPP Contract.

1.2.2.3 [Extension of time for performance](#) – The Contracting Authority usually expressly grants the Private Partner an extension of time in respect of delays to the commencement of operations that are attributable to Force Majeure events during the construction phase. This will include postponing the date on which the construction of the PPP Project should have been completed by the Private Partner (the mechanic for doing this may be set out in another clause dealing more generally with extensions of time).

1.2.2.4 [Increased finance costs pre-completion](#) – If Force Majeure delays completion of the PPP Project asset, the Private Partner will not be able to commence service operations and start earning revenue to meet its debt service obligations. It may incur additional interest and commitment fees and costs of rescheduling its repayment obligations. If the Private Partner adds in some contingency pricing against this risk, this will have value for money implications for the Contracting Authority. In recent years, PPP Contracts in some jurisdictions (e.g. the Netherlands) have expressly provided for certain compensation in this regard, with mechanics distinguishing between different types of debt and lengths of delay.

1.2.2.5 [Continued availability payment](#) – Under the “government pays” model ([see Section G, PPP Contracts in Context](#)), it may be appropriate risk sharing for the Private Partner to (a) continue to be paid as if it is performing in full, (b) to be paid an adjusted amount to cover debt service costs (but not the operation and maintenance cost savings that may arise from not performing or lost profit), or (c) not to be paid at all. This will in part depend on the availability of insurance (such as business interruption insurance). Another possibility is to adjust the performance regime in respect of any part of the service that is able to be provided in order to reduce any payment deductions.

#### [EMERGING AND DEVELOPED MARKET DIFFERENCES](#)

[The extent to which compensation is paid \(or relief from deductions under the payment mechanism is granted\) during the continuation of a Force Majeure event can vary according to jurisdiction. It is less common in some emerging markets for a Contracting Authority to make additional payments during a Force Majeure Event unless it is a political risk event considered within its control \(i.e. a type of MAGA event as described in Section 2.2.7\).](#)

[In developed markets \(particularly some civil law jurisdictions\), Contracting Authorities may be more willing to make payments. However, in some jurisdictions, such as the UK, it is more common for the PPP Contract to identify specific risks that the Private Partner cannot bear \(such as a volatile raw materials price\) and provide expressly for financial relief on their occurrence.](#)

**1.2.2.6 Tariff increases** – Where the PPP Contract has a “user pays” model ([see Section G, PPP Contracts in Context](#)), the Contracting Authority may allow the Private Partner to be compensated for increased costs and lost revenues by increasing the relevant toll payments or tariffs (for example the tariffs in a concession for a water or waste water network) if the PPP Contract resumes. The Contracting Authority will need to consider any social and political ramifications of this approach in particular in emerging markets where the economic situation may not be stable, as well as if it is legally possible to increase the relevant toll payments or tariffs.<sup>24</sup> The PPP Contract may provide upfront that any restrictions on the Private Partner’s ability to set the relevant tolls or tariffs are to be lifted as necessary to take account of relevant costs arising from Force Majeure events. However, where tariff increases are subject to an overarching regulatory regime or where such measures would imply a high political risk, it may not always be possible to achieve an increase even if justifiable under the PPP Contract. In this instance the Contracting Authority would have to effect the compensation due by some other means. It should also be noted that Lenders may consider any compensation mechanism involving increased tariffs as increasing the overall risk profile (e.g. if user demand may then decrease) and may accordingly prefer upfront payment by the Contracting Authority.

**1.2.2.7 Extension to the operating period** – The Contracting Authority may also grant an extension to the operating period if it considers it appropriate to compensate the Private Partner in this way in respect of lost revenues (or costs incurred) due to Force Majeure.

**1.2.2.8 Interim costs compensation** – Despite compensation being granted through one or more of the above means (such as by way of an extension to the operating period or increased tariffs), additional costs (e.g. for capital works), may nevertheless need to be incurred by the Private Partner before any actual compensation from the Contracting Authority is received. One way for Contracting Authorities to address this, which is not uncommon in certain developed jurisdictions, is for the Private Partner to have an obligation to seek financing for such additional costs on the best possible terms. If such financing is not available or the Contracting Authority rejects the terms, the Contracting Authority either becomes the lender of last resort or is required to make an upfront payment.

### 1.2.3 Termination

In many PPP Contracts, a prolonged Force Majeure event (typically in excess of six to twelve consecutive months) will trigger a right for either Party to [seek to terminate](#) the PPP Contract if it is unlikely that circumstances will return to normal and the Parties cannot agree a solution within the specified period.

As mentioned in [Section 1.2.2](#), where no financial compensation is payable to the Private Partner during the subsistence of a Force Majeure event, the termination right tends to arise sooner - typically when the Force Majeure event has subsisted for 180 days (six months) or more. [See Section 1.4, Sample Drafting 1, Clause \(8\) and Section 1.5, Sample Drafting 1A, Clause \(5\)](#).

<sup>24</sup> Higher user fees may be commercially viable, but discriminatory under international agreements to which the Contracting Authority/government is party (e.g. International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child).

Some jurisdictions may distinguish between types of Force Majeure event in determining rights to terminate. For example, under the Infra Australia PPP Guidelines the Contracting Authority may terminate at any time following the occurrence of an “Uninsurable Force Majeure” event (for which it is insurer of last resort). See [Section 1.3.4](#).

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

If the Private Partner has the ability to terminate the PPP Contract on the basis of a prolonged Force Majeure event, the Contracting Authority may want to include an option to require the PPP Contract to continue, provided that the Private Partner is adequately compensated, [or that the PPP Contract be extended by a corresponding period of time](#). Under the Infra Australia PPP Guidelines and the UK PF2 Guidance, for example, the Contracting Authority has the right to prevent termination by the Private Partner after the end of the specified period by paying the Private Partner as if the service was being fully provided (subject to applicable mitigation obligations). This approach is more likely to be encountered in a more established PPP market. See [Section 1.5, Sample Drafting 1A, Clause \(7\)](#).

#### 1.2.4 Determining the amount of a Force Majeure termination payment

If the PPP Contract allows for termination for prolonged Force Majeure, it typically provides that the Contracting Authority pays compensation to the Private Partner reflecting the principle that Force Majeure is neither Party’s fault and the financial consequences should be shared. This does not mean that the Contracting Authority should pay “full” compensation (i.e. repayment of all debt, equity and break costs) as this would result in the Contracting Authority bearing all the financial pain. The usual payment amount results in the Private Partner losing all its forecast equity return (i.e. its profit) but being able to repay all of its outstanding senior debt which is sufficient to address bankability concerns. See [Section 4.5, Termination Payments](#) and [Section 4.7, Sample Drafting 4, Schedule, Clause \(3\)](#).

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Where certain natural risks are insurable (and would reasonably be expected to be insured against as good operating practice), the Contracting Authority may succeed in negotiating paying no termination compensation in respect of such events (or a reduced amount reflecting insurance payments received (or receivable – see [Section 1.2.1.4](#)) by the Private Partner). This to some extent reflects the practice in more developed markets mentioned in [Section 1.2.1.2\(b\)](#) where these type of events may instead be classified as “Relief Events” which are at the Private Partner’s risk and entitle it to time relief only (but no ultimate right of termination). This will of course depend on the risk assessment by the Private Partner and its Lenders. Any differing treatment agreed upfront for different types of Force Majeure event should be clearly expressed in the PPP Contract.

## 1.3 UNINSURABILITY

### 1.3.1 Why do PPP Contracts contain uninsurability provisions?

As mentioned in [Section 1.2.1.4](#), the Contracting Authority should consider what insurances the Private Partner is required to have under the PPP Contract. The availability and cost of, and the obligation to take out, relevant insurances will be relevant to how the risk of certain events is allocated (such as Force Majeure events), as well as to what deductions may be applied to termination payments in respect of insurance proceeds receivable.

Equity Investors and Lenders may seek protection in the PPP Contract for the Private Partner in case required insurance cover becomes unavailable, less extensive or more costly. Without express contractual protection, uninsurability risk will typically lie with the Private Partner (who will also be in breach of its obligations to maintain the unavailable insurance). This is likely to attract a pricing premium (if indeed it is bankable), depending on the circumstances of the PPP Project and the risk assessment conducted by the Private Partner and its Lenders. Some jurisdictions may address uninsurability through general law provisions, or may not recognize the concept of uninsurability<sup>25</sup>. The Contracting Authority should therefore take specialist advice on how relevant contractual provisions may interplay with general law.

Where there is a known risk of uninsurability in respect of a particular required insurance at the time the PPP Contract is being negotiated (for example, insurance against terrorism or vandalism), this may be addressed through bespoke contractual provisions.

### 1.3.2 Definition of “Uninsurability”

Uninsurability is therefore a somewhat misleading term as it typically does not mean that insurance is not available at all. The usual definition of uninsurability in respect of a particular risk covers:

- (a) the unavailability of insurance on the international insurance market by insurers of an adequate credit rating/reputable insurers of good standing; and
- (b) where insurance premiums are prohibitively high (not merely more expensive) – for example, at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the relevant country.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Wider reference criteria may be required in certain emerging markets in respect of limb (b) of the definition above – for example, if there is not a sufficient pool of contractors in the relevant country to draw a meaningful market practice comparison.

<sup>25</sup> See reference to Bulgaria in Termination and Force Majeure Provisions in PPP Contracts - Review of current European practice and guidance (March 2013) - EPEC/Allen & Overy LLP. [See link in Appendix, Additional PPP Resources.](#)

### 1.3.3 Consequences of uninsurability

**Negotiating a solution** – The effect of uninsurability provisions are typically that, if a particular risk becomes uninsurable in accordance with the agreed contractual definition (and not as a result of the Private Partner's actions), the Parties will negotiate a mutually satisfactory solution for managing the risk, failing which the Contracting Authority will become the insurer of last resort. Any availability payment will then be reduced accordingly to reflect the premium no longer being paid by the Private Partner. The position as regards third party liability insurance is slightly different because clear responsibility is needed in order for the Private Partner and its employees to continue to operate - the Contracting Authority should have the option to accept the risk itself or to terminate the PPP Contract (on a Force Majeure termination compensation basis).

**Relief from breach** – The Contracting Authority usually grants relief to the Private Partner from the obligation to insure, but only to the extent the Private Partner's own acts or omission have not caused the insurance to become unavailable. If it has caused the unavailability, the Private Partner will be in breach of the PPP Contract which is likely to give the Contracting Authority a right to terminate for Private Partner default (see [Section 4, Termination Payments](#)).

**Insurer of last resort** – If the Contracting Authority accepts becoming insurer of last resort, it will be liable for the consequences of the occurrence of the uninsurable risk. It is therefore important that the Contracting Authority is able to manage the risk transferred to it (for example by taking out insurance policies itself or being otherwise able to manage the potential cost impact). The Private Partner should also be required to periodically approach the insurance market (e.g. once every three months) to see if the risk can be insured again.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

In negotiating an insurer of last resort option, the Private Partner and its Lenders will carefully assess the credit of the Contracting Authority. This type of provision is therefore likely to be seen more in established jurisdictions. In less established jurisdictions there may be more negotiation over whether taking out a particular insurance should be an obligation in the first place, and/or the risk of the event occurring may instead be managed through the Force Majeure provisions.

### 1.3.4 Termination

If the Contracting Authority is insurer of last resort and the uninsurable risk occurs, the PPP Contract should provide that the Contracting Authority may either terminate (on a Force Majeure termination compensation basis plus, if applicable, the amount of any third party liability claims) or pay the Private Partner an amount equivalent to the insurance proceeds that would have been payable and continue the PPP Contract. Under the Infra Australia PPP Guidelines, the Contracting Authority's right to terminate only arises if the uninsurable risk occurs and is also a Force Majeure event (but it can then be exercised at any time). Given that uninsurability is beyond both Parties' control, it is generally accepted that if termination occurs the Contracting Authority should pay the Private Partner some level of termination compensation, usually calculated on the same basis as Force Majeure termination compensation.<sup>26</sup>

<sup>26</sup> For more detail on Uninsurability in a developed market and sample drafting, please see the Infra Australia PPP Guidelines, South Africa PPP Guidelines and the UK PF2 Guidance.

## 1.4 SAMPLE DRAFTING 1

(open-ended catch-all definition, including concept of foreseeability)

### Definition of Force Majeure Event

(1) In this PPP Contract, a “**Force Majeure Event**” means any event or circumstance or combination of events or circumstances:

- (a) beyond the reasonable control of the Party affected by such event, circumstance or combination of events or circumstances (the “**Affected Party**”);
- (b) which was not foreseeable or, if foreseeable, could not have been prevented or avoided or overcome by the Affected Party having taken all reasonable precautions and due care;
- (c) which directly causes the Affected Party to be definitively/absolutely unable to comply with all or a material part of its obligations under this PPP Contract; and
- (d) which is not the direct result of a breach by the Affected Party of its obligations under this PPP Contract or, in respect of the Private Partner, under any other Project Agreement, or of any other situation caused or produced by the affected Party. [obligations should include compliance with Applicable Law]

(2) Force Majeure Events include but are not limited to the following circumstances, provided that they meet the criteria set forth in Clause (1) above:

- (a) plague, epidemic and natural disaster, such as but not limited to, storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tsunami, flood, lightning, and drought;
- (b) fire, explosion, or nuclear, biological or chemical contamination (other than caused by the negligence of the Private Partner, its contractors, or any subcontractor, supplier or vendor);
- (c) war (whether declared or not), armed conflict (including but not limited to hostile attack, blockade, military embargo or revolution), hostilities, invasion, act of a foreign enemy, act of terrorism, sabotage or piracy [, in each case occurring outside the Country];
- (d) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience [, in each case occurring outside the Country];
- (e) radioactive contamination or ionising radiation [, occurring outside the Country]; or
- (f) general labor disturbance such as boycotts, strikes and lock-out, go-slow, work-to-rule, occupation of factories and premises, excluding similar events which are unique to the PPP Project and specific to the Private Partner or to its sub-contractors [, and occurring outside the Country].

**Commented [A8]:** the Parties may want to specify certain types of severe and extreme weather conditions in order to address risks relating to climate change

**Commented [A9]:** As highlighted in the FM section of the commentary and as will be highlighted in the MAGA section, international law jurisprudence supports the view that war related events, invasion, armed conflict, blockade, riots, terrorism and strikes should be classified as force majeure events and not as MAGA events.

List of events to be negotiated for the specific Project circumstances, taking into account also whether certain political risks should be treated separately as Material Adverse Government Action or not.

### Consequences of Force Majeure Event

- (3) If a Force Majeure Event has occurred, the Affected Party shall be entitled to relief from its obligations under the PPP Contract if it meets the requirements of Clause (4) below.
- (4) To obtain relief under Clause (3) above, the Affected Party must:
- (a) as soon as practicable, and in any event within [ ] (•) business] days after it became aware that the Force Majeure Event has caused or is likely to cause breach of an obligation under this PPP Contract, give to the other Party a notice of its claim for relief from its obligations under the PPP Contract, including (i) satisfactory evidence of the existence of the Force Majeure Event, including an analysis of how it definitely/absolutely bars performance under the PPP Contract, (ii) full details of the nature of the Force Majeure Event, (iii) the date of occurrence; (iv) its likely duration; and (v) details of the measures taken to mitigate the effect of the Force Majeure Event.
  - (b) within [ ] (•) business] days of receipt of the notice referred to in clause (a) above, give to the other Party full details of the relief claimed, as well as information on all actions being taken by the Affected Party to mitigate the consequences of the Force Majeure Event;
  - (c) demonstrate to the other Party that:
    - (i) the Affected Party, and its contractors, could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material cost;
    - (ii) the Force Majeure Event directly caused the need for the relief claimed;
    - (iii) the relief claimed could not reasonably be expected to be mitigated by the Affected Party, including recourse to alternate sources of services, equipment and materials and construction equipment, without incurring material cost; and
    - (iii) the Affected Party is using all reasonable endeavors to perform its affected obligations under this PPP Contract.
  - (5) If the Affected Party has complied with its obligations under Clause (4) above, then it shall be excused from the performance of its obligations under this PPP Contract to the extent it is definitely/absolutely prevented, hindered or delayed in such performance by reason of the Force Majeure Event.
  - (5) [If information required under Clause (4) above is provided after the dates referred to in that clause, then the Affected Party shall not be entitled to any relief during the period for which the information is delayed].
  - (6) The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with the applicable obligations under this PPP Contract. Following such notification this PPP Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

This period of time needs careful consideration – notice should be timely but allow the affected party a reasonable time to fully develop a mitigation strategy.

*Termination due to Prolonged Force Majeure*

If a Force Majeure Event subsists for a continuous period of more than *[180-360 calendar]* days, the parties shall, if practicable, consult as to the best means of overcoming the applicable event of force majeure, but if they shall fail to achieve a solution within \_\_\_\_\_ calendar days or if consultation shall be impracticable, then either Party may ~~in its discretion~~ terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect *[thirty (30) calendar]* days after its receipt. If, at the end of this *[thirty (30)]*-day period, the Force Majeure Event continues, the PPP Contract shall be terminated pursuant to clause *[insert reference to the clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to Compensation on Termination for Force Majeure clause]*.

**Commented [A10]:** This addition is in line with the general notion that the occurrence of a force majeure event does not terminate automatically the contract; even if the situation of force majeure extends the designated period, there is no right to terminate prior to the parties consulting on how to save the contract.



## 1.5 SAMPLE DRAFTING 1 A

(Exhaustive list of specific events, no concept of foreseeability)

### *Required Definition*

“**Force Majeure Event**” means the occurrence after the date of the PPP Contract of:

- (a) war, civil war, invasion, armed conflict, terrorism or sabotage; or
- (b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Private Partner or its sub-contractors; or
- (c) pressure waves caused by devices travelling at supersonic speeds,

which directly causes either Party (the “Affected Party”) to be unable to comply with all or a material part of its obligations under this PPP Contract.

**Commented [A11]:** the Parties may want to specify certain types of severe and extreme weather conditions in order to address risks relating to climate change

### *Consequences of Force Majeure*

(1) No Party shall be entitled to bring a claim for a breach of obligations under the PPP Contract by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to Clauses (5) or (7)) below, the Contracting Authority shall not be entitled to terminate this PPP Contract for a *[insert defined term for Private Partner Default]* if such *[Private Partner Default]* arises from a Force Majeure Event.

(2) Nothing in Clause (1) above shall affect any entitlement to make deductions or any deductions made as a result of *[insert reference to clauses addressing pricing and payment mechanism]* in the period during which the Force Majeure Event is subsisting.

(3) On the occurrence of a Force Majeure Event, the Affected Party shall notify the other party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect.

(4) As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavors to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the PPP Contract.

(5) If no such terms are agreed on or before the date falling *[120]* days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this PPP Contract for a period of more than *[180]* days, then, subject to Clause (6) below, either Party may terminate the PPP Contract by giving *[30]* days’ written notice to the other Party.

- (6) If the PPP Contract is terminated under Clause (5) above or Clause (7) below:
- (a) compensation shall be payable by the Contracting Authority in accordance with *[insert reference to Compensation on Termination for Force Majeure clause]*; and
  - (b) the Contracting Authority may require the Private Partner to transfer its title, interest and rights in and to any *[insert defined term of relevant Project assets]* to the Contracting Authority.
- (7) If the Private Partner gives notice to the Contracting Authority under Clause (5) above that it wishes to terminate the PPP Contract, then the Contracting Authority has the option either to accept such notice or to respond in writing on or before the date falling [10] days after the date of its receipt stating that it requires the PPP Contract to continue. If the Contracting Authority gives the Private Partner such notice, then:
- (a) the Contracting Authority shall pay to the Private Partner the *[insert defined term for availability payment]* from the day after the date on which the PPP Contract would have terminated under Clause (5) above as if the *[insert defined term for the service]* was being fully provided; and
  - (b) the PPP Contract will not terminate until expiry of written notice (of at least [30] days) from the Contracting Authority to the Private Partner that it wishes the PPP Contract to terminate.
- (8) The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavors to prevent and mitigate the effects of any delay and the Affected Party shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with industry good practice to overcome or minimize the consequences of the Force Majeure Event.
- (9) The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with the applicable obligations under this PPP Contract. Following such notification, the PPP Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.





# 2

## MATERIAL ADVERSE GOVERNMENT ACTION

## 2.1 KEY ASPECTS

### 2.1.1 The concept of MAGA

The concept of "Material Adverse Government Action" (or "MAGA"), is applicable to contracts, such as PPP Contracts, where one of the parties is a public sector entity, or government. MAGA events typically:

- (a) delay or prevent the private sector party from performing its contractual obligations; and/or
- (b) have a material adverse financial impact on the private sector party; and
- (c) are within the public sector entity/government's control or are best managed by the public sector entity/government as compared to the private party,

and therefore the risks associated with such events are [in principle allocated](#) to the public sector entity/government.

MAGA events are also referred to as "political risk" or "political force majeure". As described in [Section 1, Force Majeure](#), depending on the specific PPP Project circumstances, some forms of political force majeure may be treated as shared Force Majeure risk (or in some cases even a Private Partner risk). In this Guidance, MAGA events can be clearly contrasted with Force Majeure events as the risk of their occurrence is allocated entirely to the Contracting Authority and they are given separate treatment in their own contractual provision.

### 2.1.2 Why do PPP Contracts contain MAGA provisions?

MAGA risks are not within the Private Partner's control but the Private Partner can be adversely affected by their occurrence. Because of the potential impact of MAGA events on the Private Partner's ability to perform its contractual obligations and be paid, the Private Partner and its Lenders will carefully assess the risk of such events occurring and will expect any significant MAGA risks to be identified and allocated to the Contracting Authority under the PPP Contract. [See Section 2.2.1.](#)

Transferring [all](#) MAGA risks to the Private Partner is likely to have two consequences because of the Private Partner's lack of control over the occurrence or management of such events: (i) at a minimum, to attract a high pricing premium (which could render the PPP Project unaffordable), or (ii) simply to make the Project unbankable. [That said, MAGA risks associated with the Contracting Authority's legitimate exercise of police powers or entitlement to vitiate benefits under the contract on grounds of underlying corruption, fraud, etc., should remain with the Private Partner, which will, presumably, have already factored them in its pricing](#)

The purpose of a MAGA clause is therefore to allocate certain agreed types of political risk to the Contracting Authority, address the consequences of such risks occurring and provide the Private Partner with appropriate relief and compensation.

[At the same time, such allocation cannot be at the expense of the Contracting Authority's legitimate exercise of police powers or the entitlement to deny performance of the contract on grounds of underlying bribery, fraud or corruption.](#)

**Commented [A12]:** A "material adverse government action" may in fact be a legitimate exercise of the Government or the administration's police powers. Indeed, many jurisdictions' public policy provides for a sovereign right to regulate the environmental or health impact of industrial activities. For example, in the US: *New Jersey v. Delaware*, 552 U.S. 597, 623 (2008) (upholding Delaware's decision to deny permission for construction and operation of an industrial facility on grounds of the state's police power allowing it to regulate for the protection of its environment); *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519 (2007) (noting that a State's measures to reduce emissions would be an exercise of police power); *Williamson v. Lee Optical*, 348 U.S. 483, 489-91 (1955) (holding that the State's police power also includes the authority to regulate to protect public health).

The position is largely similar under international law. For example: *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), ¶ 262 ("In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are 'commonly accepted as within the police power of States' forms part of customary international law today."); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011), ¶ 663; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), ¶ 119 (recognizing as "undisputable" that "the State's exercise of its sovereign powers within the ... [1]

**Commented [A13]:** Corruption "is an international evil; it is contrary to good morals and to an international public policy common to the community of nations" (*World Duty Free Co. Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, Award (4 Oct. 2006), ¶ 148). This commentary and draft articles cannot overlook the situation whereby the "material adverse government action" is in fact a response to pre-existing corruption, fraud, etc. in the formation of the contract or the fulfillment of obligations thereunder. Indeed, the laws of nearly every State make bribery and corruption a crime and numerous international conventions call for its prohibition. Numerous international tribunals have disallowed claims of breach on grounds of underlying corruption or fraud. For example: *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award (4 Oct. 2013), ¶ 389 (finding that all of the claimant's claims were "barred as a result of corruption," and even though this consequence might seem "to give an unfair advantage to the defendant party," it was indeed necessary "to ensure the promotion of the rule of law, which entails that a court or tribunal cannot grant assistance to a party that has engaged in a corrupt act"; *World Duty Free v. Kenya*, Award, ¶ 157 ("In light of domestic laws and international conventions relating to corruption, and in light of the decisions taken in this matter by courts and arbitral tribunals, this Tribunal is convinced that bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to transnational public policy. Thus, claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal").

A “material adverse government action” may in fact be a legitimate exercise of the Government or the administration’s police powers. Indeed, many jurisdictions’ public policy provides for a sovereign right to regulate the environmental or health impact of industrial activities. For example, in the US:

*New Jersey v. Delaware*, 552 U.S. 597, 623 (2008) (upholding Delaware’s decision to deny permission for construction and operation of an industrial facility on grounds of the state’s police power allowing it to regulate for the protection of its environment); *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 519 (2007) (noting that a State’s measures to reduce emissions would be an exercise of police power); *Williamson v. Lee Optical*, 348 U.S. 483, 489-91 (1955) (holding that the State’s police power also includes the authority to regulate to protect public health).

The position is largely similar under international law. For example: *Saluka Investments BV (The Netherlands) v. Czech Republic*, UNCITRAL, Partial Award (17 Mar. 2006), ¶ 262 (“In the opinion of the Tribunal, the principle that a State does not commit an expropriation and is thus not liable to pay compensation to a dispossessed alien investor when it adopts general regulations that are ‘commonly accepted as within the police power of States’ forms part of customary international law today.”); *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 Dec. 2011), ¶ 663; *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award (29 May 2003), ¶ 119 (recognizing as “undisputable” that “the State’s exercise of its sovereign powers within the framework of its police power may cause economic damage to those subject to its powers as administrator without entitling them to any compensation whatsoever ....”); *Sedco, Inc., et al. v. National Iranian Oil Co., et al.*, Award No. ITL 55-129-3 (28 Oct. 1985), 9 IUSCTR 248 (1985), p. 275 (“It is also an accepted principle of international law that a State is not liable for economic injury which is a consequence of *bona fide* “regulation” within the accepted police power of states.”).

### 2.1.3 Relationship to other types of event

All PPP Contracts will contain provisions addressing circumstances for which the Contracting Authority is responsible, but these provisions vary depending on the specific PPP Contract and jurisdiction.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

In some established, stable, markets, there is typically no need for a specific MAGA provision as Private Partners accept that the type of MAGA risks likely to arise are limited and can be dealt with through the Force Majeure shared risk provisions, together with separate provisions dealing with specific events for which risk is allocated to the Contracting Authority (such as Contracting Authority breach of contract and Change in Law)<sup>23</sup>. In Australia, however, the Contracting Authority accepts certain risks in relation to environmental/indigenous rights through a MAGA-style regime.

Contracting Authorities in other, typically less established, PPP jurisdictions may find it expedient if the PPP Contract includes MAGA provisions as well as Force Majeure provisions to ensure the PPP Project is viable for the Private Partner (this has been the case in recent PPP Projects in the Philippines). The inclusion of specific MAGA provisions in such jurisdictions may be because of an actual or perceived increased likelihood of certain MAGA events, or be due to a lack of track record in administering successful PPP Contracts over very long periods of time and across political cycles free from political interference.

Even where included, MAGA provisions may be structured differently as political risks will vary between jurisdictions. Some Contracting Authorities will also choose to address events such as Change in Law and Contracting Authority default in separate provisions, while others will include them in the MAGA provisions. The South Africa PPP Guidelines, for example, have a MAGA-type provision entitled “Unforeseeable Conduct” which addresses a material effect on the Private Partner’s finances of any unforeseeable discriminatory Contracting Authority action, including Change in Law. (Contracting Authority default is more usually dealt with in a separate provision and this Guidance treats Change in Law separately).

As a result, while not all PPP Contracts will include MAGA provisions in the precise form set out in [Section 2.3, Sample Drafting 2](#), the key is to ensure that the concepts are included, the risks allocated and the consequences made clear in the PPP Contract to ensure clarity and bankability. *See also Section 1.1.3, Force Majeure and Section 3.1.3, Change in Law.*

### 2.1.4 MAGA and related Project Agreements

As with Force Majeure, the Parties will need to consider how MAGA provisions flow down to other Project Agreements so that the Private Partner is not left with mismatching contractual positions. *See also Section 1.1.4, Force Majeure and Section 3.1.4, Change in Law.*

<sup>23</sup> This is part of the approach described in the footnote to [Section 1.1.3, Force Majeure](#).



## 2.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 2.2.1

### *Defining the events or circumstances that qualify as MAGA*

2.2.1.1 Defined List – The consequences of a MAGA event occurring are borne by the Contracting Authority, so it is vital that the Contracting Authority considers carefully what events qualify and how it can minimize the risk of any occurrence. It is recommended that an exhaustive list of clearly defined events is agreed, with the common factor being that their occurrence has a material adverse effect on the Private Partner's ability to perform its obligations, or on its rights under the PPP Contract, or on its financial status<sup>28</sup>. At the same time, it is recommended that any such defined list is made subject to the understanding that any MAGA-type events that are in fact legitimate exercises of the Contracting Authority's police powers or entitlement to vitiate benefits owed under the PPP contract on grounds of underlying bribery, corruption, or fraud, are excluded from the defined list. However, as far as possible such materiality should be clearly defined to avoid the risk of disputes. See further Section 2.2.1.3 and Section 2.3, Sample Drafting 2, Clauses (1) and (2).

2.2.1.2 Events – As mentioned in [Section 1, Force Majeure](#), the dividing line between political risk (which is allocated to the Contracting Authority) and certain commercial risks (which the Private Partner is expected to take or share) is, in practice, likely to be a difficult one to draw. It is usually accepted that MAGA events include war-related events within the relevant country, as well as deliberate acts of state such as outright nationalisation or expropriation of the PPP Project (including creeping expropriation, which is often carried out indirectly and over a period of time) and a declaration of a moratorium on international payments and restrictions on currency conversions into foreign exchange. MAGA may also include unjustified failures by the Contracting Authority or other public entity to grant licenses or comply with certain obligations.<sup>29</sup>

Apart from these more obviously political events, there may be certain risks which result in increased costs and are outside the control of the Private Partner and could have a political aspect to them. For instance, there could be a politically inspired strike, which could force up the price of key raw materials which are obliged to be purchased locally or a dock strike could prevent the importation of materials.

It is worth noting that some MAGA risks will seem more clearly within the Contracting Authority's control than others (e.g. where the event is controlled by it or occurs as a clear result of its actions, as opposed to happening through a higher or more distant arm of government). However, as the nature of these risks is such that they cannot or will not be borne by the Private Partner (or will result in unaffordable pricing), market practice is that these risks are typically accepted by the Contracting Authority. One approach which the Contracting Authority may find helpful is to sub-categorise MAGA events into "fault" and "no fault" events, even though they are both still at its risk. Some other MAGA risks may in fact stem from legitimate exercises of the Contracting Authority's police powers or entitlement to vitiate benefits owed under the contract on grounds of underlying bribery, corruption, or fraud, and as such, cannot be shifted back to the Contracting Authority.

The individual circumstances of the PPP Project, government action, and jurisdiction will inevitably need to be taken into account. e.g. the risk of upstream water pollution in a water-sector PPP Project or the building of a competing road (especially a free road), port or airport within a certain distance from the tolled highway, port or airport to be operated under the PPP Contract concerned.

**Commented [A14]:** These events are typical force majeure events and it is proposed that they be treated in the previous clause.

<sup>28</sup> A reciprocal position is sometimes seen – for example, the "Unforeseeable Conduct" provisions in the South Africa PPP Guidelines also address cases where there is a beneficial effect on the Private Partner's finances.

<sup>29</sup> MAGA should not include failure by the Contracting Authority/government to enact laws crucial for the implementation of the relevant PPP Project. If the legal framework is not in place, the PPP Project is unlikely to be bankable and the private sector will be reluctant to spend time and resources bidding. If necessary, this type of issue should be dealt with as a condition precedent to be satisfied before the PPP Contract is effective.



## EMERGING AND DEVELOPED MARKET DIFFERENCES

Some jurisdictions are more politically volatile than others. If a political event (such as war) is highly unlikely, the Private Partner may be comfortable with the risk being treated as a shared Force Majeure risk. In more volatile jurisdictions, however, certain events may be more appropriately treated as Contracting Authority risk under MAGA provisions. Alternatively, it may be appropriate to differentiate between certain political risks so that they are classified as Force Majeure Events if they occur outside the relevant country and as MAGA events if they occur within the relevant country. The Contracting Authority must consider carefully what distinctions, if any, are appropriate for its jurisdiction and PPP Project. See Section 2.3, Sample Drafting 2, Clause (2).

2.2.1.3 [Nature and Materiality of MAGA Events](#) – In defining MAGA events, the Contracting Authority must also consider whether or not all occurrences of the relevant type of events should qualify as MAGA and trigger the contractual consequences. [For example, as discussed above, legitimate exercises of the Contracting Authority's police powers or entitlement to vitiate benefits owed under the contract on grounds of underlying bribery, corruption, or fraud, cannot constitute MAGA events within the meaning of these draft articles. Moreover, the](#) Contracting Authority may be able to agree certain criteria which an event has to satisfy in order for the Private Partner to be entitled to relief—this could, for example, include [the requirement that the event be discriminatory at to the Private Partner and/or](#) a “materiality” threshold related to the effect of the event on the Private Partner. However, the Contracting Authority is strongly advised to define, to the extent possible, any threshold clearly (e.g. by reference to a specific monetary value established by reference to the PPP Project financial model), as any undefined reference to materiality will immediately give rise to a debate over its meaning. The same applies wherever any similar term is used in the PPP Contract. See [Section 2.3, Sample Drafting 2, Clause \(1\)](#).

### 2.2.2 Relief for Private Partner non-performance

As with Force Majeure, the Private Partner will be concerned about both its inability to meet its contractual obligations as a result of a MAGA event and its resulting loss of revenue. ~~The factors mentioned in Section 1.2.2, Force Majeure will be relevant in determining the Private Partner's entitlement to relief. However, because~~ MAGA risk is allocated to the Contracting Authority, market practice is that the Private Partner should be kept in the position it would have been in had the MAGA event not occurred.

The PPP Contract typically provides that the Private Partner is granted relief from breach of contract and from its obligations to perform under the PPP Contract to the extent it is affected by the MAGA event (including from the requirement to pay delay liquidated damages). If the event occurs in the construction phase, the Private Partner will usually be contractually entitled to an extension of time for meeting key dates such as the scheduled date for commencing operations. See [Section 2.3, Sample Drafting 2, Clauses \(3\)-\(5\)](#).

The PPP Contract also often expressly provides that the Private Partner will continue to receive payment from the Contracting Authority under the PPP Contract as if it were still performing, and related deductions under the payment mechanism will be suspended.

The Contracting Authority will typically accept an obligation to compensate the Private Partner for losses and additional costs incurred as a result of a MAGA event. These will include any loss of revenue to the extent the Contracting Authority may not have continued payment since the MAGA event (and financing costs incurred due to any

inability to meet payments as a consequence), as well as costs to mitigate and rectify the effects of the MAGA event (i.e. increased PPP Project costs). The Private Partner should still be obliged to mitigate its loss and, as with Force Majeure, its right to relief will be subject to its compliance with its notice and mitigation obligations. [See Section 2.3, Sample Drafting 2, Clauses \(5\) and \(6\).](#)

If the PPP Contract is able to continue, the Contracting Authority may be able to negotiate compensating the Private Partner through tariff increases and/or an extension of the operating period. [See Section 2.3, Sample Drafting 2, Clause \(5\).](#)

The procedures to be followed when a MAGA event occurs are similar to a Force Majeure situation. [See Section 2.3, Sample Drafting 2, Clause \(4\).](#)

### 2.2.3 Termination

Similar to the prolonged Force Majeure position, both Parties typically have the right to terminate the PPP Contract if a MAGA event lasts longer than a certain period of time (generally between 6 to 12 months). [See Section 2.3, Sample Drafting 2, Clause \(8\).](#) How this is expressed in the PPP Contract may vary between jurisdictions. In recent PPP Contracts in the Philippines, termination rights are achieved by defining protracted MAGA as a Contracting Authority default. In some jurisdictions, the Contracting Authority may only be entitled to terminate following MAGA-style events by implementing a voluntary termination.

### 2.2.4 Determining the amount of a MAGA termination payment

Consistent with the allocation of risk for MAGA events to the Contracting Authority, the amount payable to the Private Partner on a MAGA termination is typically similar to the termination payment for Contracting Authority default. [See Section 4.3, Termination Payments and Section 4.7, Sample Drafting 4, Schedule, Clause \(1\).](#)

It may be possible for the Contracting Authority to negotiate differing levels of compensation according to the particular MAGA event. For example, it may be possible to agree to pay the Contracting Authority Default termination amount for events where there is clear fault (such as outright expropriation or [unjustified](#) failure to grant a permit), while agreeing on a lesser amount (for example, still covering at least outstanding debt and contributed equity) for events less obviously within its direct sphere of control and influence. This will depend entirely on the circumstances applicable to the individual PPP Project.

## 2.3 SAMPLE DRAFTING 2

### Definition of Material Adverse Government Action

(1) For the purposes of this PPP Contract, "Material Adverse Government Action" means any act or omission by the Contracting Authority or any relevant public authority [define if necessary] or event set out in Clause (2) below, which occurs during the term of this PPP Contract and which (i) directly causes the Private Partner to be unable to comply with all or some of its obligations under the PPP Contract and/or (ii) has a [Material] Adverse Effect] on its [costs or revenues] [insert defined terms] Legitimate exercises by the Contracting Authority or any relevant public authority of police powers or of the entitlement to vitiate benefits owed under the PPP Contract on grounds of public policy do not constitute Material Adverse Government Action" within the meaning of this clause.

Where possible, undefined materiality qualifications should be avoided to minimize the risk of dispute.

If "material adverse effect" drafting is used it is advisable to define it by reference to a specified monetary impact.

(2) For the purposes of Clause (1) above any act or omission shall mean and be limited to the following circumstances:

Define Applicable Law with care if also used in other contexts such as Change in Law—see Section 3.3.

(a) failure of any relevant public authority to grant to the Private Partner or renew any permit or approval that is required for the purposes of the Private Partner's proper performance of its obligations and/or enforcement of its rights under this PPP Contract, in each case within the required timeframe under [Applicable Law], except where such failure results from the Private Partner's non-compliance with [Applicable Law];

~~(d) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution, [occurring inside [name of country]];~~

~~(e) radioactive contamination or ionising radiation, [originating from a source in [name of country]];~~

~~(f) any riot, insurrection, civil commotion, act or campaign of terrorism, [occurring inside [name of country]];~~

~~(g) any strike, work to rule, or go slow which is not primarily motivated by a desire to influence the actions of the Affected Party so as to preserve or improve conditions of employment by the Affected Party, [occurring inside [name of country]];~~

Drafting subject to the position adopted in this respect in the Force Majeure provisions. See Sections 1.4 and 1.5.

(b) expropriation, compulsory acquisition or nationalization by any relevant authority of any asset or right of the Private Partner, including any of the shares in the Private Partner;

(c) any act or omission of any relevant authority adversely affecting the legality, validity, binding nature or enforceability of this PPP Contract; and

(d) [add any event specific to the PPP Project such as the unjustified government authorization of the construction and operation of certain competing infrastructure (e.g. a free road adjacent to the PPP tolled road) or a pollution event materially caused by the Contracting Authority or other government entity].

### Consequences of Material Adverse Government Action

(3) If a Material Adverse Government Action occurs, the Private Partner (i) shall be excused from the performance of its obligations under the PPP Contract to the extent that it is prevented, hindered or delayed in such performance by reason of the Material Adverse Government Action and (ii) shall be entitled to compensation under this PPP Contract, in each case subject to and in accordance with the provisions of this Clause [whole clause].

(4) To obtain relief pursuant to Clause (5) below, the Private Partner must:

(a) as soon as practicable [and in any event within [•] business days] after the Private Partner becomes aware that the Material Adverse Government Action has occurred, give to the Contracting Authority a notice of its claim for payment of compensation and/or relief from its obligations under the PPP Contract, following which the Parties shall consider in good faith any option to mitigate the impact of the Material Adverse Government Action;

Insert reasonable time period, e.g. seven business days.

(b) within [•] business days of receipt by the Contracting Authority of the notice referred in Clause (4)(a) above, give full details of (i) the Material Adverse Government Action and (ii) any Estimated Change in Project Costs and/or loss of revenue claimed and/or delay and/or any breach of the Private Partner's obligations under this PPP Contract,

Insert reasonable time period given the level of detail required to be specified in full.

(c) demonstrate to the Contracting Authority that:

(i) the Private Partner could not avoid such occurrence or consequences by actions which it might reasonably be expected to have taken without incurring [material] costs;

(ii) the Material Adverse Government Action was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or delay and/or breach of the Private Partner's obligations under this PPP Contract;

(iii) time lost and/or relief from the obligations under the PPP Contract claimed, could not be mitigated or recovered by the Private Partner; and

(iv) the Private Partner is using reasonable endeavors to perform its affected obligations under the PPP Contract.

(5) If the Private Partner has complied with its obligations under Clause (3) above, then the Contracting Authority shall:

(a) compensate the Private Partner for the Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred [and loss of revenue];

(b) give the Private Partner such relief from its obligations under this PPP Contract as is reasonable for such Material Adverse Government Action; and

Drafting to reflect whether the Contracting Authority has continued paying the Private Partner through this process.

(c) if the Material Adverse Government Action occurs during the *[insert defined term for Construction Period]* and causes a delay in achieving the *[insert defined term for scheduled services commencement date]*, such date shall be postponed by such time as is reasonable.

(6) [In the event that information is provided after the dates referred to in Clause (34) above, then the Private Partner shall not be entitled to any extension of time, compensation or relief from its obligations under this PPP Contract in respect of the period for which the information is delayed].

(7) If the Contracting Authority and the Private Partner cannot agree on the extent of any compensation, delay incurred, or relief from the Private Partner's obligations under this PPP Contract, as applicable, or the Contracting Authority disagrees that a Material Adverse Government Action has occurred, the Parties shall resolve the matter in accordance with Clause *[insert reference to dispute resolution clause]*.

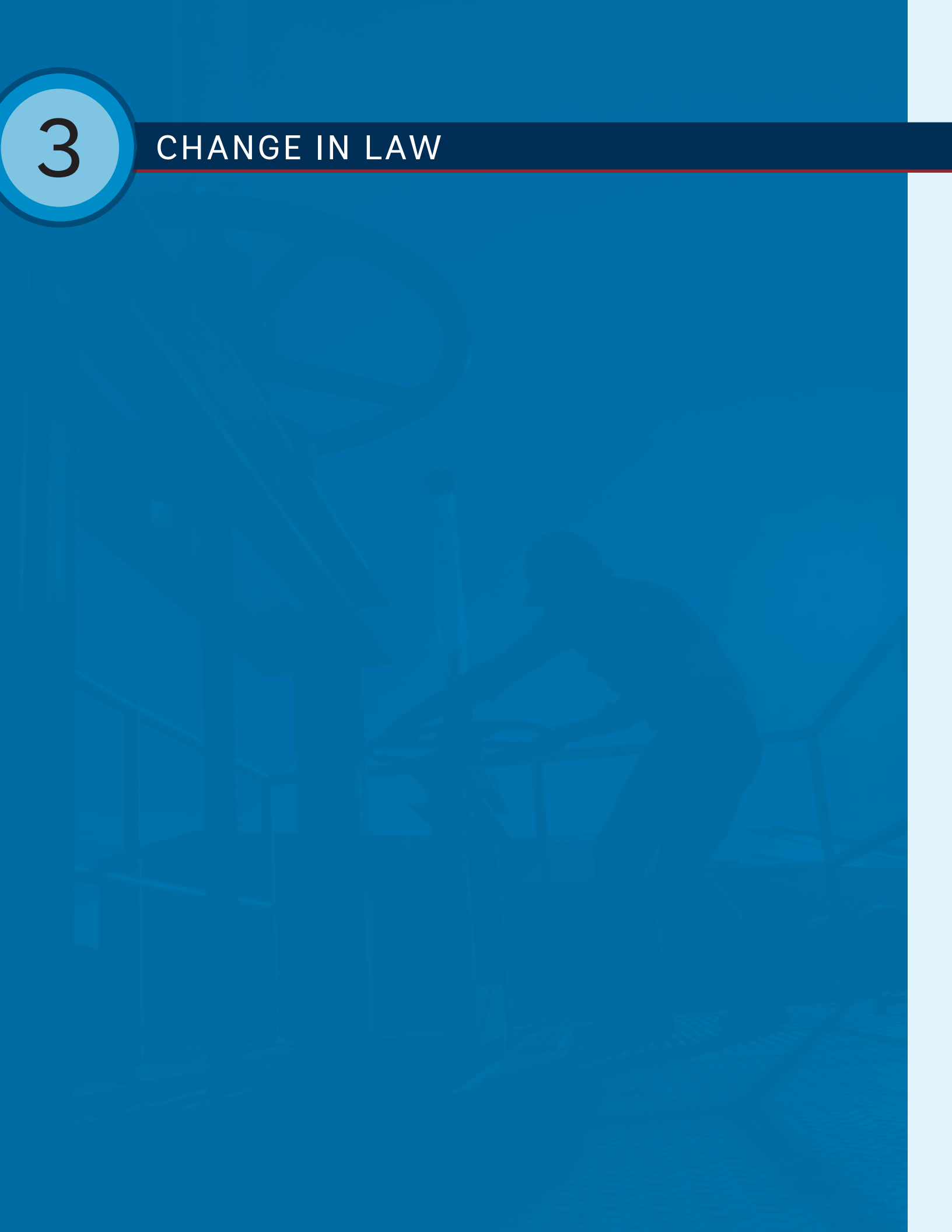
#### *Termination due to Prolonged Material Adverse Government Action*

(8) If a Material Adverse Government Action subsists for a continuous period of more than [180-360 calendar] days, a Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect [thirty (30) calendar] days after its receipt. [If, at the end of this [thirty (30) calendar]-day period, the Material Adverse Government Action continues,] the PPP Contract shall be terminated pursuant to Clause *[insert reference to clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to Compensation on MAGA termination clause]*.



# 3

## CHANGE IN LAW



## 3.1 KEY ASPECTS

### 3.1.1 *The concept of change in law*

All contracting parties must operate within the law and so must factor the cost, time and any other implications of complying with applicable law into the performance of their contractual obligations. Over a long term contract changes in law may be introduced which were unanticipated at the outset of the contract. These changes may take different forms, such as the implementation of new or amended statutes or the introduction of mandatory codes of practice or new binding case law, and will vary across jurisdictions according to the applicable legislative framework.

### 3.1.2 *Why do PPP Contracts contain change in law provisions?*

The Private Partner will typically be expressly obliged under the PPP Contract to comply with all applicable law. It assesses how it will carry out its obligations and what price it will charge based on detailed due diligence of the circumstances known to it at the time of bidding, including the existing legal environment. Any risks or uncertainties will attract an appropriate level of contingency pricing.

An unexpected change in law may make the Private Partner's performance of its contractual obligations wholly or partially impossible, delayed or more expensive. Through no fault of its own it may find itself in breach of contract, as well as being unable to earn its expected income and also required to incur additional costs to comply with the change. Some changes in law could, for example, entail significant expenditure if additional capital works are required (e.g. to meet new safety or environmental standards or to provide mandatory disabled access) and may also reduce full performance of the service while implemented. Similarly, additional taxes may be levied.

## CIVIL AND COMMON LAW DIFFERENCES

Without specific contractual provisions, in common law jurisdictions change in law risk would lie entirely with the Private Partner because it has contracted to provide a specified service at a specified price, and the scope of its obligations and its pricing can only be changed in accordance with the PPP Contract.

In civil law jurisdictions, Private Partners may sometimes rely on underlying legal principles such as hardship provisions which give relief from adverse financial consequences of certain circumstances (see Section 1.1.3, *Force Majeure*). However, widespread market practice across civil and common law jurisdictions has shown that the private sector is unwilling to enter into PPP Contracts on such a basis as both Lenders and Equity Investors require express contractual certainty in relation to the potentially significant impact of changes in law.



It is market practice for PPP Contracts in both civil and common law jurisdictions to contain provisions expressly allocating the risk of certain changes in law which occur after a specified date (typically linked to when the Private Partner's pricing is set) and which satisfy certain criteria as regards foreseeability. They also address how the consequences of changes in law are to be managed. They do not (and cannot) prevent changes in law, enactment of which is the prerogative of the relevant governing entity. Change in law provisions generally provide the Private Partner with relief from contractual breach to the extent compliance with the new law affects the Private Partner's ability to perform its obligations and also set out how any resulting costs of compliance or necessary changes to the PPP Contract scope are treated. Treatment may vary depending on the type of change in law and the PPP Project circumstances.

At the same time, change in law provisions cannot and should not seek to restrain the Contracting Authority's police powers, such as in matters of public health, safety and the environment. Doing so would negatively impact implementation by the host State of overriding human rights and environmental obligations and would, therefore, not only be counter-productive to the project in the long run, but also inevitably lead to disputes.

### 3.1.3 Relationship to other types of event

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

As mentioned in *Section 2.1.3, Material Adverse Government Action*, some PPP Contracts include change in law as a MAGA event (as is the case in recent PPP Contracts in the Philippines). This may be appropriate if the treatment agreed for this form of political risk is the same as for other MAGA events, as may be more common in less established markets where legislative change may be a real risk factor. However, it is generally recommended that change in law is addressed in a separate provision, particularly in jurisdictions where the consequences are unlikely to lead to termination or where the provisions involve a detailed approach to risk allocation (e.g. in established markets). In any event, there should be no duplication of treatment under different clauses for the same type of event.

Another approach is to have a separate change in law clause, but to have the associated compensation/relief provisions in another clause which provides a single mechanic applicable to various risks for which the Contracting Authority is responsible. This approach is seen, for example, in Australia, the Netherlands and in certain United States markets where change in law and certain other defined events (sometimes called "Compensation Events") typically entitle the Private Partner to the same type of relief (namely both cost reimbursement and extensions of time)<sup>30</sup>. See also *Section 1.1.3, Force Majeure* and *Section 2.1.3, Material Adverse Government Action*.

As change in law may also affect the scope of the service provided, it is advisable for the PPP Contract to contain a mechanism by which the Parties can discuss and negotiate such matters and implement such variations as are necessary. To avoid duplication, this is typically achieved by using the variation procedure usually included to cater for changes in scope which may be proposed by the Parties during the ordinary course of the PPP Contract.

### 3.1.4 Change in law and related Project Agreements

As with other provisions in the PPP Contract, the treatment of change in law under the Project Agreements should ensure the Private Partner is not obliged to give its sub-contractors more protection than the Private Partner is entitled to under the PPP Contract. See *Sections 1.1.4, Force Majeure* and *2.1.4, Material Adverse Government Action*.

**Commented [A15]:** See, in this regard, *Renée Rose Levy de Levi v. Republic of Peru*, ICSID Case No. ARB/10/17, Award (26 Feb. 2014), ¶ 319 ("stability does not mean a freezing of the legal system or making it impossible for the State to reform laws and other regulations in force at the time the investor made the investment"); *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Award (22 May 2007), ¶ 261 ("the stabilisation requirement does not mean the freezing of the legal system or the disappearance of the regulatory power of the State").

<sup>30</sup> This is part of the approach described in the footnote to *Section 1.1.3, Force Majeure*.

## 3.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY

There are a number of factors to take into account for any Contracting Authority negotiating change in law provisions:

### 3.2.1 Understanding market practice

Contracting Authorities may at first resist the idea of granting change in law protection to Private Partners which is unavailable to other businesses and investors in the same country on the basis that it seems preferential and those other parties appear to accept and manage the risk. However, as described above and set out in more detail below, there are a number of reasons why such protection is justifiable in PPP procurement where the key aim is to procure long term private sector financing for infrastructure, including from international participants.

3.2.1.1 Lack of pricing flexibility – Unlike other businesses which can pass on increased costs to their customers or can take a view on the risk because their contracts are usually much shorter term, the Private Partner will not typically have the same flexibility. It will have priced its proposal to perform the PPP Contract on the basis of the legal framework in effect at the time of pricing and the PPP Contract will typically contain an agreed pricing formula in both the “user pays” and “government pays” payment models ([see Section G, PPP Contracts in Context](#)) which will limit the ability to increase pricing. Although these formulae will typically incorporate some form of indexation which will reflect general cost inflation, indexation will not compensate for significant costs (such as capital expenditure) arising from changes in law. The Private Partner will therefore be unable to recover these unless they are expressly addressed under the PPP Contract.

Even if the payment mechanism is a “user pays” toll or tariff where arguably costs could be passed on to the users of the facility, as highlighted in [Section 1, Force Majeure](#), the Contracting Authority is likely to want to place contractual constraints on any price increases for public policy (and customer protection) reasons. Another factor against simply increasing the toll or tariff is that significant price increases could undermine users’ desire for the service and result in lower PPP Project revenues than forecast by the Private Partner in its Original Base Case.

3.2.1.2 Bankability – The starting point for the Private Partner and its Lenders will be that change in law is a form of political risk that it cannot control or manage and should therefore be expressly allocated to the Contracting Authority under the PPP Contract. Even if the Contracting Authority is not directly responsible for the change in law, the Private Partner will argue (with some justification) that as an arm of government it is fair and more appropriate for the Contracting Authority to bear the risk<sup>21</sup>. [At the same time, the Private Party must take into account the fact that the host State cannot be reasonably deemed to have relinquished its own regulatory powers merely by concluding a private contract with it. Simply put, the Contracting Authority “could not possibly have contemplated all the possible changes to the surrounding circumstances of the contract affecting the](#)

public interest and excluded the application of its police powers in response to such situations" (Sornarajah (2015), p. 110). In addition, where the governing law of the contract is the law of the Contracting Authority, for a stabilization clause to have legal effect, it must be valid under that legal system, and it is very doubtful that such legal system will recognize the effect of such clauses to the detriment of the State's police powers. A stabilisation clause can therefore "neither restrict the constitutional prerogatives of a state nor legislative powers of its legislature for making new laws" (Walde (1994), pp. 29-30). In order to avoid having a source of conflict in the stabilization clause, any change in law clause should exclude from its ambit changes in law reasonably required for the host State in the legitimate exercise of its police powers

31 See the Global Infrastructure Hub Report: Allocating Risks in Public/Private Partnership Contracts, 2016 edition – e.g., the Regulatory/Change in Law entries in Risk Matrix 2: Airport (DBFO) and Risk Matrix 3: Light Rail (DBFOM). [See link in Appendix, Additional PPP Resources.](#)

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

The allocation of change in law risk is a key bankability point and will be particularly relevant in jurisdictions where changes in law are less predictable or more likely due to underdeveloped or less stable legal or regulatory frameworks.

3.2.1.3 Cost to the Contracting Authority – Even if the Private Partner and its Lenders are willing to accept the risk of adverse changes in law over the long life of the PPP Contract, this risk will need to be priced into the contractual price (or tariff). Not only is pricing this risk likely to be a difficult exercise, but the Contracting Authority (or users) may then end up with an unnecessarily expensive PPP Contract if the risk never materializes.

From the Contracting Authority's perspective, it should be able to obtain a lower priced service from the Private Partner the more change in law risk it accepts as the Private Partner in turn should be able to reduce its contingency pricing. This needs to be weighed against any perceived benefit of transferring change in law risk to the Private Partner – which should include assessing the risk that a drastic change in law may leave the Private Partner financially unable to continue to provide the relevant infrastructure in accordance with the PPP Contract or even unable to obtain financing and sign the PPP Contract at all.

The Contracting Authority should also bear in mind that change in law provisions may also address circumstances where a change in law has a beneficial effect on the Private Partner's ability to perform and/or its costs, in which case the Contracting Authority should also benefit (for example, if a costly health and safety legal requirement is reduced or lifted).

#### 3.2.2 Defining what qualifies as "Change in Law"

Although a degree of change in law protection will almost always be required, Contracting Authorities should carefully consider the scope of change in law provisions. The starting point is to define "Change in Law" by agreeing (a) what is law (often termed "Applicable Law"), (b) what constitutes a change in that law, (c) the qualifying date after which such change must have occurred, and (d) foreseeability criteria before that date (i.e. if it was "in the public domain"). These elements are discussed below.

3.2.2.1 Applicable Law – The Contracting Authority and its legal advisers will need to carefully consider the definition of "Applicable Law" and how it ties in with other definitions in which it is incorporated (in particular the definition of "Change in Law"). The definition will depend on the relevant country as the way laws are implemented varies across jurisdictions. The key principle is that it should be limited to obligations with which the Private Partner must legally comply, including:

- legislation (which must itself be clearly defined);
- case law to the extent that it constitutes binding precedent (for example in some common law jurisdictions);

- binding judicial or administrative orders or decrees;
- international human rights or environmental treaties that are directly applicable in the respective jurisdiction or have been incorporated into its national law;<sup>32</sup>
- mandatory industry guidelines with which the Private Partner is bound to comply under the PPP Contract; and
- international conventions (for example, in sectors heavily regulated by international treaties, such as airports). The Contracting Authority will need to consider whether it is appropriate for these to qualify, as well as the likely impact of change on the Private Partner. *See Section 3.3, Sample Drafting 3, Required Definitions, “Applicable Law” definition.*

The definition of Applicable Law typically encompasses tax law although this is sometimes included as a separate limb in its own right. The definition should not include governmental approvals or permits which should be treated separately in the PPP Contract. *See Section 2.2.1.2.*

**3.2.2.2 Change in Applicable Law** – Changes will be defined by reference to the qualifying elements of Applicable Law. In some jurisdictions, a change in interpretation of Applicable Law could also have a major impact on the Private Partner’s ability to deliver and operate a PPP Project even though the Applicable Law itself has not changed, so the definition of a change should take this into account.

#### CIVIL AND COMMON LAW DIFFERENCES

Depending on the jurisdiction, it may be appropriate for the definition of change in law also to include any modification in the interpretation or application of any Applicable Law. This is particularly likely in common law jurisdictions. *See Section 3.3, Sample Drafting 3, Required Definitions, “Change in Law” definition.*

**3.2.2.3 Qualifying Date**—The Private Partner is expected to have conducted thorough due diligence of the legal framework in determining its pricing and ability to perform its obligations under the PPP Contract. Accordingly, change in law should only include changes which were not “in the public domain” during the period when the pricing was developed and then submitted. This date is key and will usually be no later than the bid submission date. However, a later date may be appropriate if the Private Partner has had the opportunity to amend its pricing before signing the PPP Contract to take into account any changes in law in the interim period. This will be particularly relevant where there is a long period between bid submission and contract signature. In the absence of a bidding process, an appropriate date will similarly need to be identified (and may be the date final pricing is submitted or the date of contract signature). As pricing is not developed overnight, it is customary in some jurisdictions for this date to be set at six weeks prior to submission of pricing so as to permit pricing to be determined on a clear basis. *See Section 3.3, Sample Drafting 3, Required Definitions, “Change in Law” definition, reference to “Setting Date”.*

32. If the Parties agree the Private Partner should comply with institutional or industry standards or principles which are not legally binding, the PPP Contract would typically specify the relevant version to be complied with, e.g. the version in effect at the bid submission (or contract signature) date. Any changes would not usually fall under Change in Law or be required to be complied with.

3.2.2.4 Awareness of change – Classifying what changes in law are “in the public domain” at the relevant time will need to be looked at on a case by case basis because the legislative process varies from one jurisdiction to another. The basic principle as regards legislation is that anything enacted in draft form as at the relevant pricing date qualifies as being in the public domain, so would not constitute a change in law under the PPP Contract once enacted. It may in some circumstances be appropriate to use other “foreseeability” criteria – these should be as objectively ascertainable as possible. If there is a particular concern or uncertainty in relation to the effect of a proposed change in law on the Private Partner’s obligations under the PPP Contract (e.g. in relation to its timing of enactment or actual scope), this can be addressed specifically in the PPP Contract. Given the duration of most PPP projects, changes in law in the exercise of a host State’s police powers are generally foreseeable. The Contracting Authority should consider carefully the extent to which it can afford to compensate Private Partners for changes in law concerning the environment, human rights, and other social matters that might be expected to require new regulation through the course of the life of a PPP project.

See Section 3.3, Sample Drafting 3, Required Definitions, “Change in Law” definition, limb (b).

### 3.2.3 Different risk allocation approaches

There are several approaches to allocating change in law risk but the ability for a Contracting Authority to share change in law risk with the Private Partner will depend on the risk of legislative or regulatory volatility in the jurisdiction and sector concerned, as well as the maturity of the market. The extent to which any resulting increased costs can be passed on to third party users will also be relevant. See Section 3.2.3.4.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

In some emerging markets, the Private Partner may expect the Contracting Authority to bear all forms of change in law risk, while in others the Private Partner may accept a certain monetary threshold up to which it accepts any change in law risk.

In more mature markets, the Private Partner is able to accept greater general change in law risk but is likely to expect the Contracting Authority to bear the risk of general changes requiring capital expenditure once the asset is built and operational, as well as the risk of changes which are discriminatory against the Private Partner or the PPP Project or the type of services being provided. Contracting Authorities will need to consider what approach will provide the optimum balance between affordability, bankability and risk transfer.

3.2.3.1 Approach (a): All risk borne by the Contracting Authority – In some markets the Contracting Authority typically may be asked by the Private Partner and/or its Lenders to bear all the risk of change in law and to provide full relief to the Private Partner. This may be the only way that private finance can be raised in its jurisdiction for the bankability reasons mentioned above. As mentioned in Section 3.2.1.3, this risk allocation should also enable the Private Partner to offer a more competitive price without the need for contingency pricing. Nevertheless, the Contracting Authority should carefully consider the dangers of compensating the Private Partner for all the risk of change in law. Doing so may inadvisably restrain the Contracting Authority’s police powers and ability to meet its international legal obligations concerning the environment and human rights. Such language could also infringe upon governments’ right to regulate to mitigate and adapt to climate change or make it prohibitively costly for governments to regulate appropriate with regard to important environmental and human rights concerns.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Although a Contracting Authority may bear all change in law risk at the start of a PPP programme, once a track record and/or legal environment is established in its jurisdiction which gives the private sector greater confidence in the stability and predictability of the regime, Contracting Authorities procuring new PPP Projects may be able to explore some risk transfer to the Private Partner. See *Section 3.3, Sample Drafting 3*.

3.2.3.2 Approach (b): Basic risk sharing by the Private Partner – One way in which change in law risk can be allocated between the Private Partner and the Contracting Authority is by setting a minimum cost threshold, generally on a yearly basis, below which the Private Partner will not be compensated. In other words, the Private Partner will only be entitled to compensation to the extent that it is able to demonstrate that the aggregate costs incurred as a result of a change in law exceed the agreed threshold during a specified period in time, e.g. per calendar year. Subject to an appropriate threshold being set, this approach will generally be acceptable to Lenders as it makes the risk quantifiable. Unlike Approach (c) below, there is no distinction between general and discriminatory changes (although changes in tax legislation may have to be discriminatory to qualify). This approach has been seen in recent PPP Contracts in the Philippines and an example is set out in [Section 3.3, Sample Drafting 3](#).

[Another way, which could be complementary to the aforementioned one, is to exclude from the scope of the clause changes in law seeking to effectuate the host State's police powers, such as in matters of public health, safety, and environmental protection.](#)

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Contracting Authorities will need to consider whether, depending on their jurisdiction, this basic risk-sharing approach constitutes good value for money as it is likely to attract some contingency pricing.

Setting a clear monetary threshold is preferable to the approach seen in some PPP Contracts where "materiality" criteria are included in defining a qualifying change in law but no clear monetary threshold. This does not provide any certainty for the Parties (or the Lenders) and disputes are likely unless it is clearly defined. A sample of this approach is given in [Section 3.3, Sample Drafting 3, Clause \(3\)\(c\)](#) and [Section 3.4, Sample Drafting 3A, Clause \(3\)\(c\)](#).

3.2.3.3 Approach (c): More developed risk sharing – Over the last two decades, a more developed approach to sharing change in law risk has been seen in some jurisdictions and has become part of standardised contract templates<sup>33</sup>. A version of this approach is set out in [Section 3.3, Sample Drafting 3A](#), and is based on the following risk allocation:

- Discriminatory Changes in Law—these are changes in law which are discriminatory because they apply to the PPP Project and not to similar projects, or to the Private Partner and not to other persons, or to PPP operators and not to other parties.
- Specific Changes in Law – these are changes in law specifically impacting the provision of services the same as or similar to the PPP Project services or the shareholders of businesses providing such services (the Contracting Authority will want to clearly define the nature of the services).

Discriminatory and Specific Change in Law risk is allocated to the Contracting Authority to address the Private Partner's concern that laws may be passed that have the effect of singling out itself or private operators of infrastructure in a manner that has an adverse impact on expected equity return. For example, this could be the introduction of a tax or surcharge which only applies to its Project or that is only applicable to its business because it is being operated by the private sector, or the implementation of more significant environmental regulations that are not being imposed on public sector operators of similar assets.

<sup>33</sup> See the Infra Australia PPP Guidelines and the UK PF2 Guidance and the definition of "Relevant Change in Law" in the Dutch Model.



- General Changes in Law requiring capital expenditure in operating period – these are general changes in law (i.e. excluding Discriminatory Changes in Law and Specific Changes in Law, [as well as legitimate exercises of the host State's police powers](#)) which require the Private Partner to incur capital expenditure after construction completion during the operating period. The risk of these changes is also allocated to the Contracting Authority as the Private Partner has no means of absorbing potentially significant costs once the PPP Project is operational and the relevant asset built.
- Any other Changes in Law – these are all other changes in law including those which trigger capital expenditure during the construction period (but excluding the categories above). The risk of these changes is allocated to the Private Partner throughout the duration of the PPP Contract on the basis that the Private Partner is able to manage and absorb any price implications. The ability to pass the risk of changes requiring capital expenditure in the construction phase will, however, depend on the length of the construction period and the predictability of the legal regime. A particularly long period and/or less stable regime may make this unbankable and a different risk allocation might be needed.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Under this more developed risk sharing approach the Private Partner will bear some of the general business risk that applies to all businesses. It is considered generally more beneficial to the Contracting Authority, but this approach may not be bankable in every jurisdiction and should be contemplated on a case by case basis.

Even in markets using this approach there will be instances where this risk allocation is not fully achievable due to the nature of the PPP Project and the extent to which the applicable legal and regulatory regime is settled.

3.2.3.4 Approach (d): All risk borne by the Private Partner – This is highly unusual and likely to be achievable only in very established legally stable markets where the Private Partner is legally able to pass on any increased costs to third party users via a toll or tariff (i.e. under the “user pays” model – [see Section G, PPP Contracts in Context and Section 1.2.2.6](#)) and without adverse impact on user demand. Even so, certain events with a change in law effect are nonetheless likely to be dealt with specifically elsewhere in the PPP Contract (e.g. discriminatory actions such as expropriation and other MAGA types of event).

If the PPP Project does allow the Private Partner to transfer the costs of a change in law to its end-users, the protection which the Contracting Authority gives the Private Partner should be more limited.

#### 3.2.4 Relief and Compensation

*Relief from breach* – The Private Partner should be protected from breach of contract to the extent (a) its performance is prevented or delayed by a change in law it does not bear the risk of and (b) a variation in PPP Project scope is required in order to comply with a change in law (in which case the PPP Contract should include a mechanism

for implementing such variation, for example by means of a Contracting Authority requested variation)<sup>34</sup>. See [Section 3.3, Sample Drafting 3, Clauses \(1\), \(2\) and \(3\)](#).

*Cost compensation* – The PPP Contract will need to set out how any compensation to which the Private Partner is entitled is implemented. This will depend on the payment model, but could include:

- (a) an increase in the availability payment paid by the Contracting Authority;
- (b) a permitted increase in the toll or tariff paid by the end users;
- (c) reducing any fees payable by the Private Partner (as applicable);
- (d) a lump sum payment by the Contracting Authority to the Private Partner; or
- (e) an extension to the term of the PPP Contract.

*Extension of time for performance* – If the event occurs in the construction phase, the Private Partner will usually be contractually entitled to an extension of time for meeting key dates such as the scheduled date for commencing operations, to the extent any delay is attributable to the change in law.

For background to the above see [Section 1.2.2, Force Majeure](#) and [Section 3.3, Sample Drafting 3, Clause \(3\)](#) and [Section 3.3, Sample Drafting 3A, Clause \(3\)](#). As mentioned above, change in law relief and compensation may also be addressed under separate Compensation Event clauses (with their own applicable thresholds and caps).

*Mitigation* – The Private Partner should be required to mitigate any costs or delays it incurs associated with the change in law. See [Section 3.3, Sample Drafting 3, Clauses \(2\) and \(3\)](#).

#### CIVIL AND COMMON LAW DIFFERENCES

In civil law jurisdictions it is common to have a specific termination event where performance of the PPP Contract would entail a breach of law that cannot be remedied by a Contracting Authority variation.

This is not usually seen in common law jurisdictions with established legal frameworks as the Private Partner and its lenders are able to take a view that it is highly unlikely that a change in law would result in such drastic consequences without means of holding the government accountable.

If termination provisions are considered necessary, similar reasoning applies as for Contracting Authority default and MAGA, resulting in the same compensation scheme. See [Section 3.3, Sample Drafting 3, Clause \(5\)](#) and [Section 3.4, Sample Drafting 3A, Clause \(5\)](#) and [Section 4, Termination Payments](#) and [Section 4.7, Sample Drafting 4, Schedule, Clause \(1\)](#).

<sup>34</sup> In some jurisdictions, due to the type of service involved, the Private Partner may be subject to "public service obligations" under general law which require continuity of service (e.g. in France). Where applicable, the Parties should bear this in mind when drafting/negotiating relief provisions.

"Estimated Change in Project Costs"

means the aggregate of any estimated increase in construction costs, operating costs and financing costs less the aggregate of any estimated reduction in construction costs, operating costs and financing costs.

### 3.3 SAMPLE DRAFTING 3

**Commented [A16]:** Inadvisable option for the reasons explained above

#### OPTION 1: Protection Against All Changes in Law

##### Required Definitions

"Applicable Law"

means any [decree, resolution, law, statute, act, decision, ordinance, rule, directive (to the extent having the force of law), order, treaty, code or regulation or any interpretation of the foregoing by a relevant authority having jurisdiction over the matter in question, as enacted, issued or promulgated by any relevant authority, in each case applicable in [insert jurisdiction in which the PPP Project is located]; [Drafting to be adapted for the relevant jurisdiction – any reference to amendments, modifications, extensions, replacements or re-enactments must not cut across Change in Law definition].

"Change in Law"

means, after the [Setting Date,] any of the following events:

- (a) the enactment of any new Applicable Law;
- (b) the repeal, modification or re-enactment of any existing Applicable Law; and/or
- (c) a change in the interpretation or application of any Applicable Law,

which

- (i) adversely affects (i) the ability of a Party to comply with its obligations under the PPP Contract or (ii) [the Base Case Equity IRR]; and
- (ii) was not [published as a draft law] in the [insert applicable publication source for legislation] or in effect

at the Setting Date. [Adapt as appropriate for "in the public

time  
state could be a period of time before bid submissions but is usually no later than the bid date. See discussion under Section 3.2.2.3.

Definition and limbs (i) – (i) and (b) will need to tie in with the definition of Applicable Law to avoid argument or circularity and will also need to reflect the law making process in the relevant jurisdiction.

##### Occurrence of a Change in Law

(1) If a Change in Law occurs or is shortly to occur, then any Party may, within [thirty (30) business] days starting from the day it was aware (or should have been aware) of the Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:

- (a) any necessary change to the terms of this PPP Contract including any necessary Contracting Authority variation;
- (b) whether relief from compliance with obligations is required;
- (c) whether any deadline under the PPP Contract should be postponed;
- (d) any (positive or negative) estimated change of revenue that will directly result from the relevant Change in Law;
- (e) any (positive or negative) estimated change in the costs of the PPP Project that will directly result from the Change in Law; or

The variations process will be dealt with under a different clause.

- (f) any capital expenditure that is required or no longer required as a result of a Change in Law.
- (2) As soon as practicable and in any event within *[thirty (30) business]* days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the matters referred to in Clause (1) above and any ways in which either Party can, if applicable, mitigate the effect of the Change in Law, including, in relation to the Private Partner:
  - (a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimize any increase in costs and maximise any reduction in costs;
  - (b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Private Partner;
  - (c) giving evidence as to how the Change in Law has affected prices charged by any similar businesses to the PPP Project; and
  - (d) demonstrating that any expenditure that has been avoided on account of the Change in Law has been taken into account in the amount which in its opinion has resulted or is required under Clauses (1)(e) or (1)(f) above, provided that if the Parties cannot agree on the effects of the Change in Law, the matter shall be referred for determination in accordance with clause *[insert reference to the dispute resolution clause]*.

#### Consequences of a Change in Law

- (3) If the Parties have followed the procedure set out under Clauses (1) and (2) above, then:
  - (a) the affected Party shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Change in Law;
  - (b) if the Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Change in Law; and
  - (c) the Parties shall agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs as adjusted to take into account the actual increase or reduction in costs reasonably incurred as a result of the Change in Law, [provided that no compensation shall be made in relation to a Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Changes in Law that have occurred during *[insert relevant period in time, e.g. calendar year]* exceeds *[insert amount]*].

Delete proviso if no materiality threshold is to be included.

- (4) If the notice and relevant information are not provided within the period referred to under Clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

#### *Termination due to a Change in Law*

- (4) If a Change in Law:

- (a) results in the Private Partner not being able to achieve the *[insert defined term for services commencement date]* within [**•**] months after the *[insert defined term for scheduled services commencement date]*; or
- (b) prevents a Party from performing its material obligations under this PPP Contract for a period of [**•**] consecutive days; or
- (c) results in performance of the PPP Contract being illegal and such illegality cannot be remedied by a Contracting Authority variation,

either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect *[thirty (30) calendar]* days after receipt of such termination notice. If, at the end of this *[thirty (30)]* day period, the Change in Law continues, the PPP Contract shall be terminated pursuant to clause *[insert reference to the clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to Change in Law termination payments clause]*.

### 3.3 SAMPLE DRAFTING 3A

#### OPTION 2: Protection against Discriminatory and Specific Changes in Law and Changes in Law in the operating period requiring capital expenditure

*Required Definitions (see also definitions in Section 3.3, Sample Drafting 3)*

"Capital Expenditure"		means any expenditure which is treated as capital expenditure in accordance with generally accepted accounting principles in <i>[insert Country]</i> from time to time.
"Discriminatory Change in Law"		means a Change in Law, the terms of which expressly [affect][apply to]: (a) the PPP Project and not to similar projects; and/or (b) the Private Partner [or its sub-contractors in their capacity as such] and not to other persons; and/or (c) parties undertaking PPP Projects and not other persons.
"General in Law"	Change	means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law, <u>excluding legitimate exercises of the</u>
"Qualifying in Law"	Change	means: (a) a Discriminatory Change in Law; (b) a Specific Change in Law; or (c) a General Change in Law which comes into effect during the <i>[insert defined term for operating period]</i> and which involves additional capital expenditure for the PPP Project.
"Specific Change in Law"		means any Change in Law which specifically refers to (i) the provision of <i>[services the same as or similar to the services provided under the PPP Contract - define]</i> and/or (ii) the holding of shares in companies whose main business is providing <i>[services the same as or similar to those provided under the PPP Contract - define]</i> .

#### *Qualifying Change in Law*

(1) If a Qualifying Change in Law occurs or is shortly to occur, then either Party may, within *[thirty (30) business]* days starting from the day it was aware (or should have been aware) of the Qualifying Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:

- (a) any necessary change in the obligations of the Private Partner;
- (b) whether any changes are required to the terms of this PPP Contract to deal with the Qualifying Change in Law including any necessary Contracting Authority variation;
- (c) whether relief from compliance with obligations is required, including the obligation of the Private Partner to achieve any contractual deadline and/or meet any contractual performance requirement during the implementation of any relevant Qualifying Change in Law;

The variations process will be dealt with under a different clause.

- (d) any (positive or negative) change of revenue that will directly result from the relevant Qualifying Change in Law;
- (d) any (positive or negative) estimated change in the costs of the PPP Project that will directly result from the Qualifying Change in Law; or
- (e) any capital expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the operation period of this PPP Contract.

(2) As soon as practicable and in any event within *[thirty (30) business]* days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the issues referred to in Clause (1) above and any ways in which either Party can, if applicable, mitigate the effect of the Qualifying Change in Law, including, in relation to the Private Partner:

- (a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimize any increase in costs and maximise any reduction in costs;
- (b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, Changes in Law at that time have been taken into account by the Private Partner;
- (c) giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the PPP Project; and
- (d) demonstrating that any expenditure that has been avoided on account of the Qualifying Change in Law has been taken into account in the amount which in its opinion has resulted or is required under Clauses (1)(e) or (1)(f) above, provided that if the Parties cannot agree on the effects of the Qualifying Change in Law, the matter shall be referred for determination in accordance with clause *[insert reference to the dispute resolution clause]*.

#### *Consequences of a Qualifying Change in Law*

- (3) If the Parties have followed the procedure set out under Clauses (1) and (2) above, then:
- (a) the affected Party *[i.e. the Private Partner]* shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Qualifying Change in Law;
  - (b) if the Qualifying Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Qualifying Change in Law; and
  - (c) the Parties shall agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs as adjusted to take into

account the actual increase or reduction in costs reasonably incurred or obtained as a result of the Qualifying Change in Law, *[provided that no compensation shall be made in relation to a Qualifying Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Qualifying Changes in Law that have occurred during [insert relevant period in time, e.g., calendar year] exceeds [insert amount]].*

Delete proviso if no materiality threshold is to be included.

- (4) In the event that the notice and relevant information are not provided within the periods referred to under Clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

#### *Termination due to a Qualifying Change in Law*

- (1) If a Qualifying Change in Law:

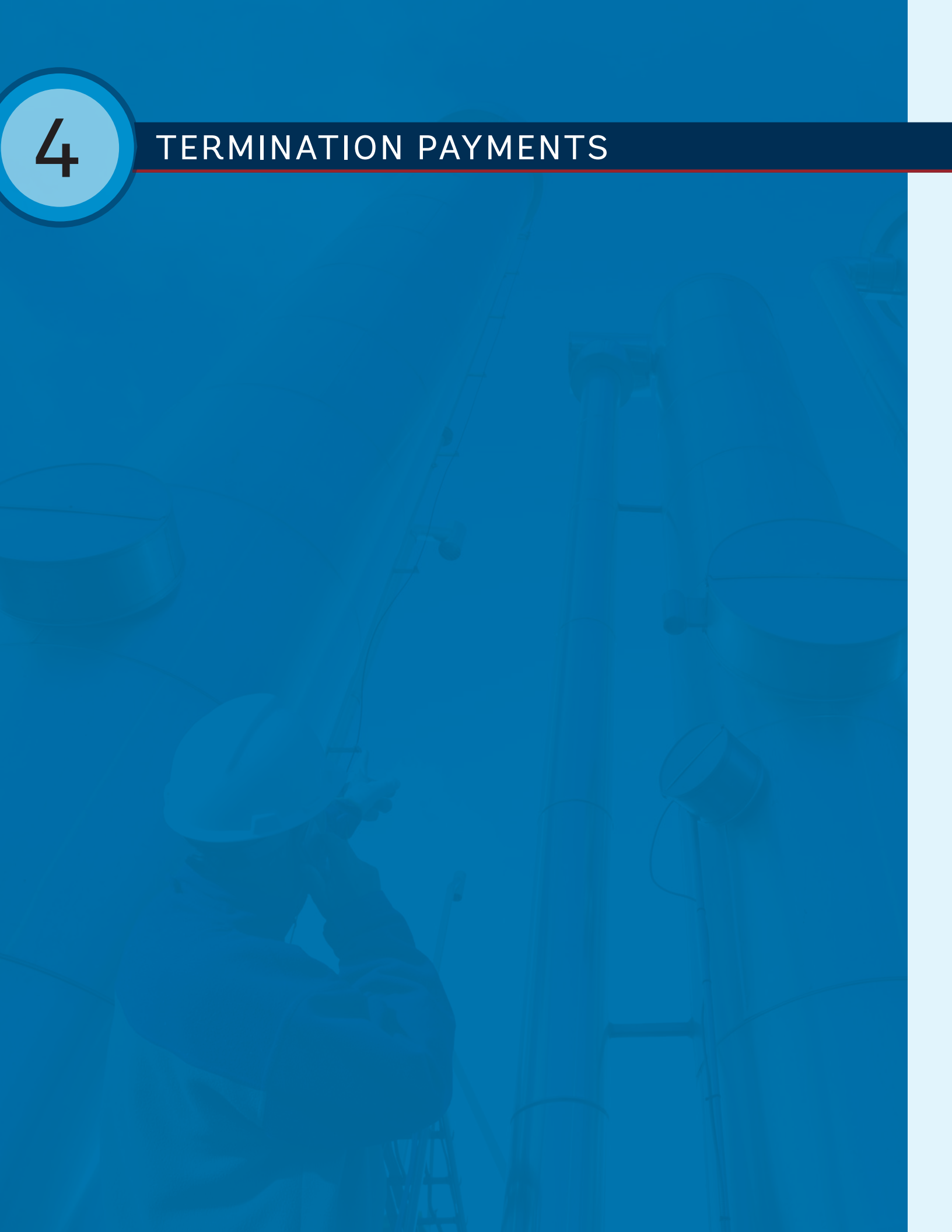
- (a) results in the Private Partner not being able to achieve the [insert defined term for services commencement date] within [•] months after the [insert defined term for scheduled services commencement date]; or
- (b) prevents a Party from performing its material obligations under this PPP Contract for a period of [•] consecutive days;
- (c) results in performance of the PPP Contract being illegal and such illegality cannot be remedied by [a Contracting Authority] variation,

either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect *[thirty (30) calendar]* days after receipt of such termination notice. If, at the end of this *[thirty (30)]* day period, the Qualifying Change in Law continues, the PPP Contract shall be terminated pursuant to clause *[insert reference to the clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to Change in Law termination payments clause]*.



# 4

## TERMINATION PAYMENTS



## 4.1 KEY ASPECTS

### 4.1.1 The concept of a termination payment

In commercial contracts where compensation on termination for specific reasons is not addressed specifically, the parties will rely on the chosen dispute resolution method for determining the amount of any damages should termination occur. This may involve bringing a court action or an arbitration, depending upon the contract's dispute resolution provisions. Generally speaking, ~~where there is an innocent party, they~~ the non-defaulting party will be the party seeking damages. However, even a defaulting party may be entitled to compensation under general law to fairly reflect the value of any works or services it has carried out. In certain contracts, rather than relying exclusively on general law, there may be a need to agree upfront the level of compensation payable if termination events occur for specific reasons.

### 4.1.2 Why do PPP Contracts contain termination payment provisions?

Market practice has shown that Lenders are not prepared to lend to PPP Projects without reasonable assurance that they will be repaid. In carrying out their detailed due diligence, Lenders are keen to ensure that their debt is protected on any early termination of the PPP Contract, regardless of fault and without having to rely on lengthy and potentially uncertain legal proceedings to determine the level of compensation. Equity Investors, similarly, will want to expressly protect their equity investment in circumstances where termination occurs through no fault of their own or of the Private Partner.

Although legal proceedings may ultimately result in termination compensation being payable by the Contracting Authority, it is the level of certainty provided by express contractual provisions which is key for Lenders in agreeing to commit funding to the PPP Project. Termination payments are therefore a key element of the risk allocation in a PPP Contract and are essential in achieving a bankable PPP Project. This applies across both established and less established PPP markets in both common and civil law jurisdictions, although the precise terms will vary according to the particular PPP Project circumstances.<sup>35</sup>

The grounds for termination and the consequent payments can be complex. They are included in the PPP Contract to give both Parties certainty as to the mechanics and effects of termination. This in turn enables the Lenders to price their debt based on a lower risk profile as regards repayment risk, which in turn feeds through into the price bid by the Private Partner for the PPP Contract.

<sup>35</sup> See the Global Infrastructure Hub Report: Allocating Risks in Public/Private Partnership Contracts, 2016 edition – e.g. the Early Termination (including any compensation) entries in Risk Matrix 4: Heavy Rail (ROT) and Risk Matrix 5: Port (DBFO). [See link in Appendix, Additional PPP Resources.](#)

**Commented [A17]:** The entire tenor of this Draft Report is that the project company, termed the “Private Partner,” would be wholly owned by the private sector. While that is one model for PPPs, developing and emerging economy governments should have the option, and may prefer, to participate in the ownership of the project company. To exclude that possibility is to deny governments the potential benefits of equity ownership, while putting more onerous financial commitments on governments than they would be required to undertake as under the Bank’s current configuration, which appears to benefit pension funds, hedge funds, and other investors from developed countries more than developing or emerging economy countries. In addition, a wholly-privately-owned project company format is not necessary to provide the project company with significant benefits, such as (without exclusion) concomitant government risk as an equity owner and government tax concessions, currency exchange guarantees and guarantees of the ability of the Private Partner to bring in personnel to manage and operate the PPP Project. In fact, the wholly privately-owned project company appears designed to place the maximum risk on the host government and remove any significant risk from the private participants in PPPs.

The absence of any accommodation for a PPP in which both the private sector and the Contracting Authority (or other governmental entity) are shareholders is particularly acute in this Section’s commentary and sample drafting language regarding termination payments, which would be formulated in a significantly different manner in instances in which there is a governmental shareholder. We strongly recommend that the World Bank include in its final report alternative sample drafting language and commentary in the event of a governmental equity position in the project company. If the World Bank remains resistant to including such alternative draft language and commentary for this Termination Payments and numerous other sections of this “Guidance,” the absence of such alternate language should be prominently noted in this and other relevant Sections of these Guidelines, with a commentary on how the sample drafting language would need to be adapted for PPPs in which the host government would participate as a shareholder.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Underlying the Lenders' analysis of their likely debt repayment will be an assessment of the strength of the Contracting Authority's covenant to pay (i.e. its ability to pay any termination payment). In cases of weak or uncertain Contracting Authority credit, additional credit support may be sought by the Private Partner and its Lenders. This may be the case, for example, in less stable regimes or emerging markets or where the Contracting Authority is not part of central government. Support may be available via multilateral, [bilateral or unilateral insurance organizations](#) or export credit agencies or central government.

#### 4.1.3 Types of termination events

The list of events which can lead to termination will vary from one PPP Contract to another and should be tailored to take account of the specific risks and obligations involved in the relevant PPP Project.

#### CIVIL AND COMMON LAW DIFFERENCES

Each Party should make sure it understands how underlying law may affect certain termination scenarios under the PPP Contract. For instance, in some jurisdictions (more typically civil law) the Contracting Authority may be entitled to terminate the PPP Contract for convenience or on the grounds of public interest even without an express contractual right. Similarly, the Private Partner may be expected to rely on its rights at general law to terminate for Contracting Authority default instead of having an express right (as has been the case in some PPP Projects in civil law France<sup>32</sup> and is also usual in common law Australia).

Early termination events which may be expected to lead to termination compensation include:

- (a) Private Partner default termination – by the Contracting Authority where the Private Partner fails to comply with its material obligations;
- (b) Voluntary termination – by the Contracting Authority at its discretion for convenience or for public policy reasons (also known as termination for public policy);
- (c) Contracting Authority default termination – by the Private Partner where the Contracting Authority fails to comply with its material obligations (which are primarily payment obligations if under the availability payment model); and
- (d) Prolonged Force Majeure, MAGA or [Qualifying Change in Law](#) – by either Party where no solution has been agreed to continue with the PPP Contract. *See Section 1, Force Majeure, Section 2, Material Adverse Government Action and Section 3, Change in Law.*

<sup>32</sup> In France, where the PPP Contract is silent, the Private Partner would typically be expected to apply to court for the right to terminate the PPP Contract.

## 4.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 4.2.1

### *Certainty*

Simple and objective calculation methods will provide greater certainty for all Parties, minimising the risk of disputes and enabling less risk premium to be costed into the Private Partner's price. Equity and debt elements to be compensated must be clearly defined and understood by all Parties, including any financing breakage costs (e.g. under interest rate hedging arrangements), any "make-whole" payments (e.g. in respect of fixed rate loans<sup>37</sup> or bonds) and any default interest. As mentioned above, the inclusion of an express termination payment provision will not necessarily result in any greater liability on the Contracting Authority than would be the case at general law, but the certainty provided is key to bankability.

### *4.2.2 Understanding relevant agreements*

Where termination compensation provisions are defined by reference to Lenders' financing agreements (including any hedging arrangements), equity agreements (e.g. subordinated loan documents) or the Project Agreements, the Contracting Authority and its advisers must review and approve the agreements involved. The Contracting Authority should also require approval rights in relation to changes to such agreements which could affect its liability (or the PPP Contract must be clear that any unapproved adverse changes will not be taken into account in calculating the Contracting Authority's liability).

### *4.2.3 Deductions*

The Private Partner may have cash standing in certain bank accounts (e.g. its current account, debt service reserve account, maintenance reserve account or any collateral account into which e.g. bond proceeds are drawn). The Contracting Authority should consider how these cash balances should be treated and whether they should be set off against any compensation due to the party which ultimately receives such cash. Consideration also needs to be given to how to treat insurance proceeds ([see Section 1.2.1.4](#)) and any net payments the Private Partner might receive as a result of closing hedging arrangements early, as well as any outstanding claims against, or amounts owed to it by, its counterparties under the Project Agreements. [See Section 4.7, Sample Drafting 4, Schedule, definition of "Outstanding Senior Debt"](#).

### *4.2.4 Framework for negotiation*

It is important to note that, in practice, termination provisions provide a backdrop for the Parties (and the Lenders) to initiate discussions about how to continue the PPP Contract where there is a risk of termination. It is usually in all parties' interests to find a way to continue the PPP Project and avoid termination and from the Contracting Authority's perspective, although it needs to protect the use of public funds, it also has a duty to provide public services. Negotiating a way to continue the PPP Contract which works for all parties may be the best way to achieve this and avoids triggering a termination payment liability.

<sup>37</sup> Fixed rate debt provided by institutional and non-institutional lenders has become increasingly common over the past five years in developed PPP markets such as the Netherlands.

#### 4.2.5 Other termination consequences

In addition to the termination payment itself, the Contracting Authority will want to ensure the PPP Contract contains adequate provisions addressing other consequences of termination, such as transfer by the Private Partner of the PPP Project asset, handover arrangements and access to information necessary for continuing to operate or construct the PPP Project.<sup>38</sup> [The Contracting Authority will also want to ensure that the PPP Contract provides that any termination payments that it is required to make to third parties are payable by it directly to the relevant third party \(e.g., Lenders, redundant employees\).](#)

#### 4.2.6 Principles for the calculation of termination payments

The amount payable to the Private Partner upon early termination of the PPP Contract will depend on the grounds on which the PPP Contract is terminated, so it is important for the Contracting Authority to understand the different rationale in each case. [Section 4.7, Sample Drafting 4](#) is based on the principles set out below in [Sections 4.3–4.6](#).

### 4.3 COMPENSATION ON CONTRACTING AUTHORITY DEFAULT, MAGA, QUALIFYING CHANGE IN LAW OR VOLUNTARY TERMINATION

#### 4.3.1 Market practice

If the PPP Contract is terminated on the grounds of Contracting Authority Default, MAGA, [Qualifying Change in Law](#) or Voluntary Termination, market practice is that the Private Partner should be fully compensated by the Contracting Authority as if the PPP Contract had run its full course. This reflects the principle that these categories of termination event are considered a Contracting Authority risk and responsibility. It also reflects the likely position should the Private Partner instead have to sue for damages on these grounds under general law.

In these circumstances, the Private Partner will expect an amount which repays the sums used to finance the Project (equity and debt), as well as compensates for the equity return it had forecast (for a specified number of years to be negotiated between the Parties but typically for (and limited to) the remaining term of the PPP Contract). In order to be left in the same position as if the PPP Contract had not been terminated, the Private Partner will also expect the amount to include compensation for costs payable as a result of the early termination of specified financing agreements and Project Agreements, as well as related employee redundancy payments incurred. If the PPP Project has been funded in the bond markets or by fixed rate loans [and early termination due to Contracting Authority default, MAGA, Qualifying Change in Law, or Voluntary Termination results in the redemption of bonds and/or acceleration of fixed rate loans](#), a “make-whole” payment may be payable to the bondholders or relevant fixed rate lenders in these circumstances to compensate them for the early repayment of their investment. [See Section 9.4.2, Bond Financing.](#)

As mentioned in [Section 2, Material Adverse Government Action](#), there may be scope for the Contracting Authority to negotiate a slightly reduced level of termination compensation for MAGA events which are less directly within its control (this payment would still cover at least outstanding debt and contributed equity).

<sup>38</sup> These aspects are not covered in this Report. For further information, see the Infra Australia PPP Guidelines and the UK PF2 Guidance.

#### CIVIL AND COMMON LAW DIFFERENCES

The Contracting Authority should not be “unjustly enriched” by receiving an asset for which it has not paid the expected contractual price. Some jurisdictions (typically civil law) have an underlying unjust enrichment principle and the Contracting Authority should make sure it understands how this might affect the drafting of any termination provisions in its PPP Contract.

#### 4.3.2 Compensation approach

There are two “full” compensation methods which the Contracting Authority will need to consider:

- (a) Book value compensation: this is based on the investment costs the Private Partner incurs in building the PPP Project. Third party costs would be added on top in appropriate circumstances. This method is not as commonly used and although it is relatively clear and simple, it is generally ~~not recommended~~ disfavored by private parties as it is not guaranteed to compensate the Private Partner fairly. There is a risk of underpayment (which would create bankability issues for Lenders) or overpayment (which may wrongly incentivise the Private Partner). There may also be problems if accounting rules change during the life of the PPP Contract. It should be noted that the book value of the PPP Project assets is unlikely to take into account their physical state.<sup>39</sup>
- (b) Financing-based compensation: this is based on the financing for the PPP Project (e.g. senior debt (whether in the form of bank or bond finance), subordinated debt and equity), again with third party costs on top in appropriate circumstances. This approach is more common across the PPP market and is the recommended approach in this Guidance. *See further detail in Section 4.3.3 and Section 4.7, Sample Drafting 4, Schedule, Clause (1).*

#### 4.3.3 Components of financing-based compensation

As mentioned in [Section 4.3.2](#), this type of termination payment is made up of compensation in respect of senior debt ([see Section 4.3.3.1](#)), equity ([see Section 4.3.3.2](#)) and third party costs ([see Section 4.3.3.3](#)). These components are explained more fully below.

##### 4.3.3.1 Compensation in respect of outstanding senior debt

This payment will typically consist of:

- (i) principal outstanding under the senior finance documents (whether bank or bond financing) (which may be capped by reference to forecast amounts in the Original Base Case); plus
- (ii) interest, penalties and fees (and make-whole payments on any forced redemption of bonds or acceleration of fixed rate loans); plus
- (iii) breakage costs arising under applicable hedging agreements or floating rate loans.

<sup>39</sup> This approach is not in [Section 4.7, Sample Drafting 4](#).

LESS certain amounts, such as:

- (a) amounts credited to the bank accounts of the Private Partner (which are secured to the benefit of the Lenders);
- (b) net payments received as a result of the termination of the hedging agreements and, in some cases, profits from pre-paying fixed rate loans;
- (c) insurance proceeds received or due to be received before or after the termination payment date; and
- (d) generally any other sums recovered by the Lenders before the termination payment date.

*See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(a) and relevant*

*definitions.* 4.3.3.2 Compensation in respect of equity

There are essentially three different options the Contracting Authority should consider in respect of equity compensation. These are all likely to lead to different outcomes so the Contracting Authority should be guided by the key considerations in *Section 4.2*, as well as by the circumstances of the PPP Project. *See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(d).*

- (a) Original Base Case Approach (Option 1(a)): in this approach, the amount payable is determined by reference to the Original Base Case. The Contracting Authority pays a sum which, when taken together with all amounts already paid to the Equity Investors before the date on which the PPP Contract is terminated, will ensure that the Equity Investors recover Base Case Equity IRR.

The key benefit of this approach lies in its easy implementation and certainty and the fact that it leaves less room for dispute than other approaches.

A material drawback, however, is that this option assumes that the Private Partner has been performing as planned in the Original Base Case - it does not take into account the actual performance of the Private Partner under the PPP Contract. From the Contracting Authority's perspective, this may over-compensate the Private Partner if it has been performing worse than expected in the Original Base Case and arguably there may be a stronger incentive on the Private Partner to ensure the PPP Project is terminated. Conversely, if the Private Partner has been performing better than expected it will be undercompensated and arguably may be concerned that this might incentivise, or result in political pressure on, the Contracting Authority to terminate the PPP Contract early. *See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(d), Option 1(a).*

- (b) Market Value Approach (Option 1(b)): in this approach, the amount payable is determined by assessing the price which third party investors would be willing to pay for (i) the shares in the Private Partner and (ii) the receivables arising under subordinated debt, subject to certain assumptions (including that the event giving rise to the early termination had not occurred).

Compared to the Original Base Case Approach (Option 1(a)), this option takes full account of the actual performance of the Private Partner under the PPP Contract so is fairer on that front.

However, this method is complex to implement in practice and the result could be undesirable on both sides - the Contracting Authority could pay more than expected under the Original Base Case and the Private Partner's Equity Investors may feel their interests are not sufficiently protected in circumstances that are largely beyond their control. It may be difficult to establish a market value (particularly if no market exists) and this could lead to disputes. [See Section 4.7, Sample Drafting 4, Schedule, Clause \(1\)\(d\), Option 1\(b\).](#)

- (c) Adjusted Base Case Approach (Option 1(c)): under this approach, the amount payable is determined by reference to the distributions which Equity Investors would have expected to receive under the Original Base Case, but only from the termination date [and taking into account the Private Partner's performance prior to the termination date](#). The amount payable will be the aggregate amount of distributions forecast in the Original Base Case to be made after the termination date, discounted using the Base Case Equity IRR.

This approach takes into account the performance of the Private Partner under the PPP Contract up to the termination date. It also provides greater certainty as it does not require a market valuation mechanism and is easier to implement.

However, it does not take into account likely actual performance in respect of the period after the termination date, so (as highlighted under the Original Base Case Approach (Option 1(a)) the Contracting Authority may be over or under-compensating the Private Partner for that period. This will have a greater impact the earlier termination occurs. [See Section 4.7, Sample Drafting 4, Schedule, Clause \(1\) \(d\), Option 1\(c\).](#)

#### 4.3.3.3 Compensation in respect of third party costs

The Private Partner is likely to incur certain other costs as a result of early termination of the PPP Contract, including employee redundancy costs, as well as other costs payable to its sub-contractors in accordance with the terms of the relevant Project Agreements. The general principle is that the Private Partner and its sub-contractors should be no worse nor better off as a result of the early termination. While market practice is for these costs to be included in the compensation payment for this category of termination, the scope may vary depending on the jurisdiction [and whether the Contracting Authority or its designee take over any of those costs](#). Key points for the Contracting Authority to bear in mind include:

- Reviewing the Project Agreements – as with the financing agreements, before PPP Contract signature the Contracting Authority and its advisers should review the Project Agreements to assess any early termination provisions which may give rise to third party cost compensation. In particular, the Contracting Authority will want to ensure there are no excessive termination payments included in contracts with parties who hold shares in the Private Partner and are sub-contracted to it. [The Contracting Authority should also ensure that it has review and approval authority over termination payments in any Project Agreements entered into after signing of the PPP Contract and that have termination payments in them.](#)
- Defining and capping liabilities – as far as possible the PPP Contract should set out the precise scope of compensation for third party costs. As third party costs can be significant and fluctuate over time, the Contracting Authority may wish to seek to cap its liability in this respect, although typically this is achieved by defining the eligible items as opposed to setting a monetary cap. The Contracting Authority should also oblige the Private Partner to mitigate costs. Both liability caps and mitigation obligations should be reflected in the Project Agreements themselves.



- Compensating for loss of profit – one of the key commercial issues the Contracting Authority will also need to address is the extent (if any) to which compensation should cover the loss of future profits for the sub-contractors – if such compensation is provided for, this may be achieved by limiting the number of years.
- Redundancy costs – careful consideration needs to be given to compensation for redundancy of staff employed by the Private Partner and/or its sub-contractors. Such compensation will likely depend on applicable law and the ability to redeploy affected staff.

See Section 4.7, Sample Drafting 4, Schedule, Clauses (1)(b) and (c).

## 4.4 COMPENSATION ON PRIVATE PARTNER DEFAULT TERMINATION

### 4.4.1 Market Practice

In the case of termination by the Contracting Authority on the grounds of Private Partner default, market practice is that the PPP Contract should expressly provide for some amount of compensation. While this may at first seem at odds with the reason for termination, there is in fact some strong justification:

(a) the Contracting Authority could otherwise benefit from a Private Partner default by unjust enrichment (e.g. taking a built asset without having paid for it) and could in theory be incentivised to terminate the PPP Contract. This could result in legal proceedings being brought by the Private Partner which may ultimately result in the Contracting Authority being liable to pay compensation, as well as legal costs incurred;

(b) without the certainty of an express provision, the Private Partner will likely have to price more risk into its bid and therefore the Contracting Authority will be paying more in the ordinary course of the PPP Contract even though termination on these grounds may never happen;

(c) market practice shows that Lenders are typically reluctant to agree to finance a PPP Project constructed and operated by an SPV where no compensation is expressly payable to them in these circumstances (i.e. the PPP Project will not be bankable). While there is an argument that the risk of no compensation will encourage Lenders to step in and rescue a troubled PPP Project (and there have been some examples of this contractual approach in some early PPP Contracts in the UK, for example), the market has in general moved away from this for the reasons above; and

(d) the Private Partner still usually loses its equity investment and the return on its equity which is its main driver for undertaking the PPP Project in the first place. See Section 4.7, Sample Drafting 4, Schedule, Clause (2).

The Contracting Authority will want to weigh up the likelihood of the termination payment arising against the benefit of procuring private finance. In doing so, the following factors are some of the relevant factors:

- (i) the Contracting Authority has control over serving the termination notice that triggers such payment- this will also be a factor in its favour in bringing all parties to the negotiating table in a potential termination scenario; and

- (ii) the Contracting Authority has the ability to mitigate against the risk of Private Partner default even before the PPP Contract is signed, by selecting the Private Partner after a thorough and fair procurement process and evaluation of the soundness of all elements of its bid.

#### 4.4.2 Compensation approach

Although market practice is to pay compensation on Private Partner default termination, the Contracting Authority needs to choose a method which does not result in overly generous compensation. This would not properly incentivise the Private Partner to perform (nor its Lenders to due diligence the PPP Project thoroughly or exercise their rights to monitor and step into the PPP Project); it would also raise value-for-money concerns. The options are outlined below.

- (a) Debt-based compensation: under this approach, the Private Partner (or in reality the Lenders) is compensated based on the amounts payable under the senior finance documents bank or bond (i.e. an amount based on the formula under [Section 4.3.3.1](#)). The PPP Contract must clearly define [the circumstances in which such compensation would be payable](#), the debt elements to be compensated and also applicable deductions of amounts available to Lenders (such as proceeds received on close-out of the hedging arrangements, insurance proceeds and amounts in bank accounts which may include e.g. bond proceeds held in a collateral account).

##### EMERGING AND DEVELOPED MARKET DIFFERENCES

This debt-based compensation method is the most common approach in emerging markets and “government pays” PPP Projects in France and is also seen in Germany.

As the main or only beneficiary of compensation upon termination for Private Partner default, Lenders will tend to look for the highest possible recovery rate for their loan and the simplest/most objective solution possible. As a result, debt-driven approaches are likely to be more satisfactory to them. Whether the amount reflects the value of the PPP Project is less clear and the Contracting Authority will need to consider this in its value-for-money analysis.

One major drawback of this method is that Lenders have limited incentive to ensure that the Project performs or to step in to save it. To counter this risk and ensure Lenders have an incentive to conduct proper due diligence and exercise their monitoring and step in rights, in addition to the relevant deductions, the level of compensation usually is a percentage of the total outstanding debt (and not the full amount). This is commonly referred to as a “haircut”, though it should be noted that taking the risk of a haircut may not be acceptable to Lenders in all circumstances and will depend on a variety of factors (such as the specific country and sector, in which the PPP Project is conducted). The exact percentage of a haircut (if any) should be assessed on a project-by-project basis. In addition, in the context of a bond financing, consideration should be given as to whether make-whole payments should be included. [See Section 4.7, Sample Drafting 4, Schedule, Clause \(2\).](#)

An alternative (or addition) could be to refer to an amount of outstanding senior debt minus unfunded equity contributions if these are required under the relevant financing documents – the Lenders would then look to recover that amount from the Private Partner/Equity Investors.

- (b) Market value: where the PPP market is sufficiently liquid and there is a reasonable prospect of the PPP Contract being retendered, the fairest approach is to calculate the compensation payable to the Private Partner by reference to the market value of the PPP Contract, as determined by a tendering procedure. This ensures, in theory, that the Contracting Authority will not pay the Private Partner more than the remaining value of the PPP Contract. As a result, this calculation protects the Contracting Authority's interests while ensuring that the Contracting Authority does not unfairly benefit from the Private Partner's default.

The fall-back position if there is no liquid market, or if the [Contracting](#) Authority chooses not to go down [this retendering](#) route for any reason, is that the compensation payment is calculated on the basis of the [estimated](#) value that would have been obtained in a retendering, as determined by an independent, third-party appraiser. While seemingly straightforward to implement, setting the parameters may require some negotiation, and it may not reflect the true market value of the PPP Contract. This approach is seen in countries with mature PPP markets (such as Belgium, Australia<sup>40</sup>, the Netherlands and also South Africa).

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

The market value approach is likely to be more suitable for a developed less volatile PPP market where there are likely to be a number of potentially interested purchasers in the relevant sector. Lenders to PPP Projects in certain jurisdictions or in relation to certain assets may be reluctant to rely on a market-based valuation method for fear of undervaluation or underpayment. This is particularly likely to be the case in emerging markets where there is a limited PPP track record and a limited market. The South Africa PPP Guidelines acknowledge this and provide for an additional payment to be made by the Contracting Authority to the extent the market value approach does not yield a certain percentage of outstanding debt.

[The](#) Contracting Authorities should take a view as to whether market-based termination compensation is a viable option on a project-by-project basis.<sup>41</sup>

- (c) Book Value: although seen in some European jurisdictions, the calculation of compensation payments based on book value is not the recommended approach in this Guidance as the result may not accurately reflect the reality of the sums owed.<sup>42</sup> [See discussion under Section 4.3.2\(a\).](#)

<sup>40</sup> See the Infra Australia PPP Guidelines (for Social Infrastructure).

<sup>41</sup> This option is not in [Section 4.7, Sample Drafting 4](#) – for more detail see the South Africa PPP Guidelines, Infra Australia PPP Guidelines (for Social Infrastructure) and the UK PF2 Guidance.

<sup>42</sup> A "hybrid" approach may also be considered in some cases e.g. where termination compensation is equal to the lesser of the appraised market value and outstanding senior debt. This approach has been taken by some State authorities in the United States.

## 4.5 COMPENSATION ON FORCE MAJEURE TERMINATION

As discussed in [Section 1, Force Majeure](#), each Party should have the right to terminate the PPP Contract as a result of prolonged Force Majeure and compensation is calculated to reflect the principle that Force Majeure is considered a shared risk. In this case, the risk is shared by virtue of the Contracting Authority being liable for a less than full compensation payment and having the right to take over the relevant asset, while the Private Partner loses any return on its equity investment (i.e. the profit element which will have been at the heart of its decision to bid for and undertake the PPP Project in the first place) and possibly some of its invested equity. The potential consequences will incentivise both Parties to find a solution to a prolonged Force Majeure before termination occurs.

Subject to adjustments on a case by case basis, the principle is that the Private Partner is paid an amount representing:

- (i) the amount of outstanding senior debt (based on the formula in [Section 4.3.3.1](#) but probably not including a make-whole payment on any bonds), payable directly to the relevant Lender(s); plus
- (ii) the amount of equity invested (taking into account any distributions already paid and any insurance payments received or to be received by the Private Partner), but not loss of profit (in some cases, for example in Australia, a haircut may also be applied to further reflect the shared risk principle); plus
- (iii) an amount in respect of redundancy and sub-contractor break costs (based on the principles set out in [Section 4.3.3.3](#))

A similar approach is usually followed in any termination for uninsurability. [See Section 4.7, Sample Drafting 4, Schedule, Clause \(3\)](#). It may also be possible for the Contracting Authority to negotiate no or reduced compensation in specific circumstances. [See Section 1.2.4, Force Majeure](#).

While it may seem that the Lenders' exposure is more limited, this comes back to the issue of bankability, and the decision facing Lenders as to where to put their funds to best advantage. The Contracting Authority will want to weigh up the risk of a Force Majeure termination occurring (again why close attention to the definition of Force Majeure is so important) against the benefit of achieving the private finance it wants, at a reasonable price, having chosen PPP as its procurement method.

## 4.6 METHOD AND TIMING OF PAYMENT

The method of payment of the termination compensation will also need to be considered by the Contracting Authority. Generally speaking, providing for payment by lump sum in the PPP Contract seems more typical market practice, but there are a number of factors to take into account, including the grounds for termination:<sup>43</sup>

- Payment capacity – the Contracting Authority will need to assess whether it will be able to pay a lump sum if such a large payment may not be budgeted for or have backing from its government treasury department. Payment over time may be preferable.

<sup>43</sup> These elements are not included in [Section 4.7, Sample Drafting 4](#).

- Private Partner/Lender perspective – it is likely that the Private Partner and its Lenders will favour a lump sum payment. This is particularly the case on Contracting Authority default termination as the most likely cause is failure to pay. The Private Partner and its Lenders will typically want to close off their exposure to a terminated PPP Project and avoid Contracting Authority credit risk as soon as possible. The Contracting Authority should in any event try to negotiate a reasonable period of grace long enough to raise the necessary funds.

On Private Partner default termination Lenders are again likely to resist payments over time (and are likely to be the only party receiving compensation). They are also likely to resist payments over a period longer than the remaining life of the loan or bond, especially if to receive such payments on a longer schedule would cause additional break costs (as it might to non-bank funders).

- Interest – payment over time will incur interest costs for the Contracting Authority, usually from the date the payment is recognized as due until the final payment. If the Contracting Authority does select this method, it will need to consider an appropriate interest rate.
- Asset transfer – Lenders may be reluctant to release their security interests on PPP Project assets until compensation payments have been made in full. This may make the transfer of relevant assets back to the Contracting Authority difficult. In certain circumstances, the Contracting Authority may be able to negotiate an interim solution at the time of the termination, such as an arrangement pursuant to which the Contracting Authority has a right to access the PPP Project assets during the period from the termination date until all termination compensation is paid, so long as the Contracting Authority complies with the payment terms with respect to such compensation. This approach is unlikely to be agreed at contract signature and certain issues will need to be clearly addressed (such as liability for damage to the asset while in the Contracting Authority's use).
- Set-off rights – the Contracting Authority should try to negotiate the right to set off any amounts due to it from the Private Partner under the PPP Contract against any compensation it pays (unless these are already taken into account in the relevant formula). Lenders, however, will in general be reluctant to give the Contracting Authority any set-off rights, particularly where compensation is debt-based.

## 4.7 SAMPLE DRAFTING 4

The provisions relating to the calculation of termination payments are generally set out in a Schedule to the PPP Contract.

### Schedule [insert number] – Termination Payments

#### Required Definitions

"Bonds"	means the [•] bonds due [•] of the Issuer, issued at [Financial Close], in the aggregate principal amount of [•].
"Distribution"	means: <ul style="list-style-type: none"> <li>(a) the payment of a distribution by the Private Partner (whether directly or indirectly) to its Shareholders;</li> <li>(b) any dividend, charge, fee or other distribution (or interest on any unpaid dividend, charge, fee or other distribution) (whether in cash or in kind) declared, paid or made on or in respect of share capital (or any class of share capital) in the Private Partner;</li> <li>(c) the redemption, repurchase, defeasance, retirement or repayment of any share capital of the Private Partner, including in connection with any merger or consolidation, or any resolution to do so.</li> </ul>
"Initial Equity"	means, as at the Termination Date, the initial equity investment disbursed by the Shareholders plus any such other equity contributions approved by the Contracting Authority, less the Distributions paid by the [Private Partner] to its Shareholders as at the Termination Date.
"Issuer"	means [insert company name, registered number and country of registration]. [assuming Issuer is different entity to Private Partner].
"IRR"	means internal rate of return.
"Losses"	means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or otherwise, internal costs or demands.
"Make-Whole Payment"	means: <ul style="list-style-type: none"> <li>(a) in relation to termination of the PPP Contract under Clause [•] (Termination on Contracting Authority Default) [Change in Law] [MAGA], the Make-Whole Payment to be made pursuant to and in accordance with Condition [•] of the Bonds;</li> <li>(b) in relation to termination of the PPP Contract under Clause [•] (Voluntary Termination), the modified Make-Whole Payment to be made pursuant to and in accordance with Condition [•] of the Bonds; and</li> <li>(c) in relation to termination of the PPP Contract in any other circumstances, zero.</li> </ul>
"NPV"	means net present value.

NB see Section 9.4.2 in respect of emerging markets

"Original Base Case"

means the financial model agreed between the Parties dated [ ] for the purpose of amongst other things calculating *[insert defined term of availability payment in a "user pays" model /Equity IRR etc]* [as attached at [Schedule [ ]], as updated from time to time in accordance with the terms of this PPP Contract.

"Outstanding Debt"

Senior

means the sum of: [\[See Section 4.4.3\]](#)

(a) the total amount outstanding at the Termination Date to the Lenders under any Senior Finance Documents and accrued but unpaid interest and including default interest; plus

(b) any winding-up costs, prepayment charges [(including any Make-Whole Payments)] [except on termination for Force Majeure or Private Partner Default], costs of terminating any hedging arrangements or other breakage costs, payable by the Private Partner [or the Issuer] to the Lenders as a result of a prepayment of sums due under the Senior Finance Documents, or, in the case of early termination of interest rate hedging arrangement, as a result of termination of the PPP Contract, subject to the Private Partner[, the Issuer] and the Lenders mitigating all such costs [unless the amount, or the formula for determining the amount of such costs is fixed in advance under the terms of the relevant Senior Finance Documents];

less (without double counting):

- (i) all credit balances held on any bank accounts held by or on behalf of the Private Partner [and/or the Issuer] on the Termination Date;
- (ii) all amounts (including net hedge termination payments) payable by the Lenders to the Private Partner as a result of a prepayment of amounts outstanding under the Senior Finance Documents or termination of the PPP Contract; and
- (iii) all other amounts received or due to be received by the Lenders on or after the Termination Date and before the date on which compensation is payable by the Contracting Authority to the Private Partner as a result of enforcing any other rights that they may have.

This may include, inter alia, insurance proceeds pledged or assigned to the Lenders.

"Senior Documents"

Finance

means the finance documents entered into between the Lenders and the Private Partner for the purpose of financing the PPP Project, including *[insert defined terms for relevant [loan agreements] [bond financing documents to include bond trust deed, subscription agreement (terms and conditions of the bond) and security documents].*

"Sub-Contractor  
"Breakage Costs"

means the value of Losses that have been or will be reasonably and properly incurred by the Private Partner as a direct result of the termination of the PPP Contract, but only to the extent that:

- (a) the Losses are incurred in connection with the PPP Project and in respect of the provision of services or the completion of works, including:
  - (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred;
  - (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
  - (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the PPP Project; and
  - (iv) redundancy payments;
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, excluding loss of profits calculated over a period which is longer than [one (1) year] after the Termination Date; and
- (c) the Private Partner and the relevant sub-contractor have each used their reasonable endeavors to mitigate the Losses.

**Commented [A18]:** Add following "terms": "and such arrangements and/or agreements have been approved by the Contracting Authority,"

"Subordinated Finance  
Documents"

means any agreements under which the Shareholders make subordinated debt available to the Private Partner. *[See Section 4.2.2]*

"Termination Date"

means the date on which the PPP Contract terminates in accordance with Clause *[insert relevant clause number]*.

#### *Compensation on Contracting Authority Default, Material Adverse Government Action, Qualifying Change in Law or Voluntary Termination*

- (1) If this PPP Contract is terminated for (i) Contracting Authority Default in accordance with Clause *[insert]*, (ii) Material Adverse Government Action in accordance with Clause *[insert]*, (iii) Qualifying Change in Law in accordance with Clause *[insert]* or (iv) Voluntary Termination in accordance with Clause *[insert]*, the Contracting Authority shall pay ~~the Private Partner~~ an amount equal to the sum of:

Delete (iii) and (iv) if not contemplated in the PPP Contract.

- (a) to the Lender, Outstanding Senior Debt; plus
- (b) to the relevant employees, redundancy payments for employees of the Private Partner that have been or will be reasonably incurred by the Private Partner as a direct result of termination of this PPP Contract; plus
- (c) to the Private Partner, any Sub-Contractor Breakage Costs that the Private Partner and/or the relevant sub-contractor could not have mitigated through reasonable efforts; plus



(d) [select from Option (1)(a), (1)(b), or (1)(c) below depending on the required valuation method for the payments due to the equity party] [whichever option is chosen, insurance proceeds received or to be received by the Private Partner and the other factors discussed in Section 4.3.3 should be deducted from amounts payable]

- Option 1(a): an amount which, when taken together with any Distributions paid, interest paid and principal repaid under the Subordinated Finance Documents on or before the Termination Date, taking account of the actual timing of such payments, results in a real IRR on the share capital subscribed and amounts advanced to the Private Partner under the Subordinated Finance Documents equal to the Base Case Equity IRR; or
- Option 1(b): the aggregate amount for which the share capital of the Private Partner and the receivables arising under Subordinated Finance Documents could have been sold on an open market basis, under the assumption that there is no default by the Contracting Authority, that no Material Adverse Government Action or Qualifying Change in Law has occurred, that the sale is on a going concern basis and that no restrictions exist on the transfer of the share capital; or
- Option 1(c): the NPV of forecast Distributions and interest to be paid and principal to be repaid under the Subordinated Finance Documents as at the Termination Date, based on the Original Base Case, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Original Base Case to the Termination Date].

#### Compensation on Private Partner Default Termination

- (2) If the Contracting Authority terminates this PPP Contract for Private Partner Default in accordance with Clause [ ], the Contracting Authority shall pay to the Private Partner Lender, in full satisfaction of the Private Partner's Outstanding Senior Debt obligation to the Lender, a compensation amount equal to [ ] % of Outstanding Senior Debt.

#### Compensation on Force Majeure Termination [Subject to the Contracting Authority's ability to negotiate no or reduced compensation for force majeure termination]

- (3) If this PPP Contract is terminated for Force Majeure in accordance with Clause [ ], the Contracting Authority shall pay the Private Partner an amount equal to the sum of:

- (a) to the Lender(s), Outstanding Senior Debt, if any, less (i) any amounts credited to the bank accounts of the Private Partner and secured to the benefit of the relevant Lender and (ii) any other sums recovered by the relevant Lender before the termination payment date; plus
- (b) to the Private Partner, Initial Equity and any outstanding principal under the Subordinated Finance Documents as at the Termination Date [less any Distributions or subordinated debt interest payments already made and any insurance proceeds received or to be received by the Private Partner]; plus
- (c) to the relevant employees, redundancy payments for employees of the Private Partner that have been or will be reasonably incurred by the Private Partner as a direct result of termination of this PPP Contract, plus
- (d) to the Private Partner, any Sub-Contractor Breakage Costs that the Private Partner and/or the relevant sub-contractor could not have mitigated through reasonable effort

The background of the entire page is a blue-tinted photograph of construction workers silhouetted against a bright sky as they work on a complex steel framework. The workers are positioned at various heights, with one prominently in the upper right and others further down the structure. The steel beams create a dense, geometric pattern of lines across the frame.

# 5

## REFINANCING

## KEY ASPECTS

### 5.1.1 The concept of refinancing

Refinancing means changing or replacing the existing terms on which debt obligations have been incurred. Borrowers may refinance existing debt obligations for a number of reasons and in a variety of ways.

### 5.1.2 Why do PPP Contracts contain refinancing provisions?

Financial terms are agreed between the Lenders, Equity Investors and the Private Partner prior to the PPP Contract becoming effective and will take into account market conditions at the time, as well as the risk profile of the Project and applicable jurisdiction. The cost of financing the PPP Project will be passed directly through to the pricing offered to the Contracting Authority under the PPP Contract or the rates charged to users. Given the long term nature of PPP Contracts, over time there will be changes in market conditions, as well as developments in the Project itself, which will affect its risk profile, and the Private Partner may want to change the terms of or replace its financing accordingly. In some jurisdictions it may not even be feasible to put in place long term financing at the outset and refinancing is therefore a necessity for the Private Partner after the initial funding period.

The result of a refinancing may be that the Private Partner's debt costs are reduced, resulting in greater revenue and in turn a higher equity return – this is typically called “refinancing gain”. The PPP market has increasingly acknowledged that it would not be fair for the Private Partner to enjoy the entire benefit of refinancing gain where it is not entirely responsible for the availability of the improved financing terms. This is particularly important from the Contracting Authority's perspective given the use of public funds to pay for PPP Projects, [and the Contracting Authority may take the position that it \(and where applicable, users\) should share in financing gains even in instances in which the Private Partner is entirely responsible for the availability of improved financing terms](#). Any change in financing terms may also impact other provisions in the PPP Contract that reference the financing terms, such as termination payments for which the Contracting Authority may be liable.

Without specific provisions in the PPP Contract, the Contracting Authority will have limited or no ability to share in any refinancing gain received by the Private Partner and the position as regards other contractual terms (such as termination payments) may be unclear. Not all refinancings lead to gains that should be shared, however, and refinancing provisions also typically clarify the circumstances which are exempt.

### 5.1.3 Refinancing grounds

The circumstances in which a refinancing of the PPP Project may be sought by the Private Partner are described below and the differing grounds are likely to necessitate different treatment under the PPP Contract.

*Rescue Refinancing* – In adverse circumstances a refinancing may be sought to rescue the PPP Project from default. The Private Partner may be in a distressed situation requiring

an increase and/or a rescheduling of their debt repayment obligations. Generally, it will be in the Contracting Authority's and the Private Partner's interests for this form of refinancing to be implemented so that service provision under the PPP Contract can continue and default termination consequences avoided. The Contracting Authority will want to ensure any changes to the financing terms do not adversely affect its contractual position but it should not ~~anticipate any~~[assume that there will be](#) immediate financial benefit.

*Mini perm refinancing* – In markets where it is not possible (or desirable) to obtain long term financing, the Private Partner may put in place what is sometimes known as a "mini perm" financing. The loan will have a short tenor (e.g. five or seven years), and there is an incentive on the Private Partner and its Shareholders to refinance because the loan terms may provide that the Lenders will sweep all available cash (after reserve account funding) if no refinancing has occurred by the relevant maturity date (and the Lenders may require gradually increasing cost sweeps (e.g. 25%, 50%, 75%) in the years prior to maturity), or (in the case of a "hard" mini perm) that there will be an event of default<sup>44</sup>. The market standard position in Australia, for example, is to put in place five to seven-year debt funding, with assumed refinancings every five years thorough the life of the PPP Project. Given the nature of this financing and that replacement will be a necessity envisaged at the start of the PPP Contract, it will be in both Parties' interests to facilitate a refinancing on acceptable terms and it is unlikely to be driven by or to deliver any significant additional financial benefit.

*Bridge to bond financing* – Where it is envisaged that initial bank debt financing will be replaced by bond finance, normally after completion of the construction or development phase, this is known as 'bridge to bond' financing. Generally, the bridge financing will contain incentives to refinance, such as progressive increases to the margin and a relatively short tenor. [See Section 9 Bond Financing.](#)

*Realising Value Refinancing* – In other circumstances (which are the focus of this [Section 5](#)), the effect of changed market conditions and PPP Project developments may be positive and the Private Partner may seek to obtain more favourable financing terms to realise more equity return for its Shareholders. Such terms may be available for a number of reasons, such as:

- the market may have greater liquidity and the price of debt may have declined (e.g. after a period of financial crisis or where new lenders want to enter the PPP market);
- as significant risks are considered to arise during the construction period, once the income-generating asset is built and the PPP Project is successfully operational, the risk profile is reduced and the corresponding risk of inability to service debt repayment obligation is perceived to be lower;
- general market conditions have improved (e.g. the jurisdiction concerned may have established a good track record in successful PPP Projects and/or the regulatory and political framework may be considered more stable); and
- for "user pays" PPP Projects ([see Section G, PPP Contracts in Context](#)), demand may be stronger than anticipated and revenues therefore higher, resulting in an opportunity to increase leverage.

<sup>44</sup> "Hard" mini perm financing structures are not permitted by Contracting Authorities in the Netherlands on the basis that they effectively introduce refinancing risk

It is this type of refinancing which is more likely to yield a financial benefit for the Contracting Authority if the PPP Contract is correctly drafted and the Contracting Authority will also want to ensure any changes to the documentation do not adversely affect its contractual position.<sup>45</sup> [Because the sample drafting language below only takes into account instances in which financial gains would be realized through refinancing, different PPP Contract language than that provided below, including a revised financial allocation that takes into account a Party's fault \(if any\) for changed financing provisions, would be needed in a rescue or other negative-impact financing situation.](#)

## 5.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY

Refinancing provisions can be complex and will differ between PPP projects, according to the different financing structures used. Some PPP Contracts will contain detailed drafting (particularly in developed markets), whereas others include a much shorter provision designed to bring the Parties together to discuss the implications of a refinancing. In either case, [some](#) key points to bear in mind are set out below.

### 5.2.1 Defining "Refinancing"

Establishing a definition which captures all types of potential refinancing can be difficult and the Contracting Authority should aim for a definition which minimizes the potential for circumvention through sophisticated structurings. The recommended approach is to be as generic as possible by reference to the senior finance documents, with a catch-all provision. [See Section 5.3, Sample Drafting 5, Required Definitions, definition of "Refinancing".](#)

A definition of "Exempt Refinancing" is sometimes requested by the Private Partner to clarify that certain dealings are not intended to be caught by the relevant refinancing provisions. Again, the Contracting Authority should carefully consider what might be included on a case by case basis. For example, in the case of a mini perm financing and a bridge to bond financing, Contracting Authorities should recognize that refinancing is virtually a given so the PPP Contract should envisage this occurrence.

### 5.2.2 Refinancing gain

The question for the Contracting Authority is what qualifies as refinancing gain and whether all refinancing gain should be shared. As with defining "Refinancing", care needs to be taken in drafting gain calculation and sharing provisions to minimize the Private Partner's ability to circumvent the provisions. It is increasingly common, particularly in developed PPP markets, for a Private Partner to factor in the benefit of a future refinancing into its Original Base Case so that it can offer a more competitive price to the Contracting Authority in its bid. In this instance, the Private Partner would argue that the Contracting Authority is already benefiting from any potential refinancing gain and should therefore not be entitled to a further share of such gain when the refinancing actually happens. While this argument has some merit, the precise basis of any refinancing envisaged by the Original Base Case would need to be clearly agreed upfront to limit the risk of disputes. [See Section 5.3, Sample Drafting 5, Required Definitions, definition of "Refinancing Gain".](#)

Similarly, in a rescue or mini perm refinancing the overall effect may not lead to any increase in equity return compared to the Base Case Equity IRR. [The Private Partner and its Shareholders should bear that risk.](#)

<sup>45</sup> It is also possible to include a provision entitling the Contracting Authority to request the Private Partner to seek terms for a potential refinancing if it feels better financing terms are available (see the *Infra Australia Guidelines*).

~~In all cases,~~ it is generally considered to be fair for the Contracting Authority only to share in gain over and above the Original Base Case. The rationale in a rescue refinancing is that due to the distressed scenario, Lenders are unlikely to agree to any refinancing debt being paid to the Contracting Authority. However, this may not always be justifiable where the Contracting Authority has concerns that the Base Case Equity IRR may have been artificially inflated (e.g. due to weak competition during the bidding process).

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

In emerging markets, particularly for “user pays” PPP Projects (see Section G, *PPP Contracts in Context*), there may be limited scope for the Contracting Authority to negotiate refinancing gain sharing if such gain is a key incentive for potential bidders. This dynamic is currently evident in the Philippines, for example, where refinancing provisions are not typically included in the PPP Contract. A Contracting Authority will want to examine its policy on

**Commented [A1]:** Continue with the words: “gain sharing in user pays situations, however, because political problems can arise, to the detriment of both the Private Partner and the Contracting Authority if users are denied any, or any significant, benefits from refinancing gains.”

**Commented [A2R1]:**

#### 5.2.3 Right to consent

The Contracting Authority’s right to consent is important as it is what will bring the Private Partner to the negotiating table. As mentioned above, if a particular refinancing is already factored into, or is as contemplated by, the Original Base Case, then it is may be reasonable for Contracting Authority consent not to be required or to be subject to fewer constraints than other refinancings.<sup>46</sup> However, its right to consent should be exercised reasonably. The Contracting Authority should bear in mind that a refinancing resulting in gain is likely to benefit it (and in users pay PPPs, users) financially and even a rescue refinancing will help save the PPP Project. Nevertheless, the Contracting Authority should only consent if it is confident that the refinancing will not have a negative impact on the PPP Project or on its own liabilities without providing it (and/or users) with sufficient commensurate benefit. This will include assessing any increase in any termination payments for which it is liable as described in *Section 4, Termination Payments*. See *Section 5.3, Sample Drafting 5, Clause (3)*.

#### 5.2.4 Calculating refinancing gain

A full understanding and sight of existing and proposed financing structures and documentation is needed for the Contracting Authority to be in a position to calculate any refinancing gain and enforce its rights effectively. Expert legal and financial advice should be obtained (to match the advice the Private Partner is likely to be receiving) to ensure the Contracting Authority is not at any disadvantage in analysing the effect of any refinancing proposal. External expenses incurred by the Contracting Authority when considering a refinancing proposal should be borne by the Private Partner and if the refinancing is implemented they should be equitably deducted from the total refinancing gain amount prior to sharing. See *Section 5.3, Sample Drafting 5, Clause (7)*.

<sup>46</sup> In some markets in the United States, rescue refinancings that do not result in an increase in the Private Partner’s outstanding debt above a certain percentage threshold may be permitted without the consent of the Contracting Authority, as may refinancings where the Private Partner provides satisfactory evidence that its aggregate debt is no less than a specified percentage of the fair market value of the PPP Contract.

### 5.2.5 Share of refinancing gain

The Contracting Authority should consider what an appropriate sharing mechanism is. Equal sharing is one option, or staged sharing depending on the amount of the gain and/or how it arises. The basic premise under the Infra Australia PPP Guidelines is a 50% sharing (as it is in the South Africa PPP Guidelines), but recognising that more detailed arrangements and greater proportions may be appropriate.<sup>47</sup> *See Section 5.3, Sample Drafting 5, Clause (4).*

### 5.2.6 Method of payment

The Contracting Authority should typically have the right to choose the method of payment of its share of the refinancing gain and this will depend on the nature of the refinancing and discussions at the time. Options include the Contracting Authority being paid (a) in a lump sum upon the refinancing to the extent the Private Partner receives such amounts at the time of the refinancing, (b) in a lump sum or periodically at the time of receipt of the relevant payments, or the receipt of the projected benefit (in the case of the “user pays” model), (c) via a reduced availability payment (in the case of the “government pays” model) or (d) by a combination of the above. *See Section 5.3, Sample Drafting 5, Clause (6).*

**Commented [A3]:** The term “availability payment” is unclear and should be clarified.

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<sup>47</sup> The UK PF2 Guidance draw a distinction between gains arising from a reduction in margin under the senior finance documents (where the Contracting Authority expects 90% of the gain) and other gains (where the Contracting Authority shares on a staged basis between 50 – 70% according to the size of the gain). A staged sharing percentage of 50 – 70% has also become the norm in the Netherlands

### 5.3 SAMPLE DRAFTING 5

The principle of sharing refinancing gain has developed over time out of the experience of early PPP markets such as the UK. For a detailed approach see the UK PF2 Guidance and the Infra Australia PPP Guidelines. Sample Drafting 5 is broadly based on concepts they define.

#### Required Definitions

"Base Case Equity IRR"	means the Equity IRR set out in the Original Base Case.
"Distribution"	means whether in cash or in kind, any: <ul style="list-style-type: none"> <li>(a) dividend or other distribution in respect of share capital;</li> <li>(b) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital;</li> <li>(c) payments under any Subordinated Finance Documents; and</li> <li>(d) the receipt of any payment, contractual arrangement, transfer of asset and other benefit which is not received in the ordinary course of business and on reasonable commercial terms.</li> </ul>
"Equity IRR"	means the projected blended internal rate of return to the Shareholders and any of their affiliates over the entire PPP Contract period, having regard to Distributions made and projected to be made.
"Exempt Refinancing"	<ul style="list-style-type: none"> <li>(a) any Refinancing fully contemplated in the Original Base Case;</li> <li>(b) a change in taxation or in accounting treatment;</li> <li>(c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of: <ul style="list-style-type: none"> <li>(i) breach of representations and warranties or undertakings;</li> <li>(ii) movement of monies between the project accounts in accordance with the terms of the Senior Finance Documents;</li> <li>(iii) late or non-provision of information, consents or licenses;</li> <li>(iv) approval of revised technical and economic assumptions in relation to the Financial Model;</li> <li>(v) failure by the Private Partner to obtain any consent by statutory bodies required by the Senior Finance Documents; or</li> <li>(vi) voting by the Lenders and the voting arrangements between the Lenders in respect of the levels of approval required by them under the Senior Finance Documents;</li> </ul> </li> <li>(d) any sale of shares in the Private Partner by the Shareholders.</li> <li>(e) [any ordinary market dealings in bonds.]</li> </ul>
"Financial Model"	means the financial model [provided by the Private Partner as part of its bid/agreed between the Parties prior the date of the PPP Contract] and as amended from time to time, <u>and as to any such financial model, a</u>

The Private Partner may wish to extend this definition to clarify that changes to certain documents or other types of circumstance will be exempt (e.g. a mini perm refinancing scenario). This should be considered on a case-by-case basis to reflect the particular circumstances of the PPP Project.



**"Net Present Value"** means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Base Case Equity IRR.

**"Pre-Refinancing Equity IRR"** means the Equity IRR calculated immediately prior to any Refinancing, but without taking into account the effect of such Refinancing and using the Financial Model as updated (including as to the performance of the PPP Project).

**"Qualifying Refinancing"** means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing.

**"Refinancing"** means:

- (a) any amendment, variation, novation, supplement or replacement of any Senior Finance Documents;
- (b) the grant of any waiver or consent, or the exercise of any similar right under any Senior Finance Documents;
- (c) the creation of or granting of any form of benefit or interest in the Senior Finance Documents, or the creation or granting of any rights or interest in any contracts, revenues or assets of the Private Partner whether by way of security or otherwise; and
- (d) any other arrangement having been put in place by any person which has an effect similar to any of (a) to (c) above or which has the effect of limiting the Private Partner's ability to carry out any of (a) to (c) above.

**"Refinancing Gain"** means a positive amount equal to  $(A-B) - C$ , where:

A = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (taking account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the PPP Project) so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of the PPP Contract following the Refinancing;

B = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the PPP Project) so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of this PPP Contract following the Refinancing; and

C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Base Case Equity IRR.

Delete "C" if there are reasons not to agree this - see Section 5.2.2.

**"Subordinated Finance Documents"** means any agreements under which the Private Partner's Shareholders make subordinated debt available to the Private Partner.

## Refinancing

- (1) The Private Partner shall promptly provide the Contracting Authority with full details in relation to any contemplated Refinancing, which shall include the proposed changes to the Financial Model, a justification of the assumptions on which it is based, the proposed contractual documentation and any other information that the Contracting Authority may reasonably request in relation to that Refinancing.
- (2) The Contracting Authority shall, at all time, have unrestricted rights to (a) request that the Private Partner explore Refinancing, and the Private Partner shall promptly and diligently act on such a request in good faith, and (b) approve and audit the Financial Model used (or proposed to be used) in relation to a Refinancing.
- (3) The Private Partner shall obtain the Contracting Authority's prior written consent in relation to any Qualifying Refinancing.
- (4) The Contracting Authority shall be entitled to receive a [fifty per cent (50%)] share of any Refinancing Gain in a Qualifying Refinancing. *[Adapt in accordance with agreed sharing mechanism and adapt as necessary for user pays PPP Projects]*.
- (5) *[The Parties shall act in good faith in relation to any Refinancing or proposed Refinancing (including the manner of calculation of the Refinancing Gain and of payment of the Contracting Authority's share of the Refinancing Gain in a Qualifying Refinancing)]*.
- (6) The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain in a Qualifying Refinancing as: **[this provision may need to be revised to provide for the allocation of gains in user pays PPP Projects]**
  - (a) a lump-sum payment which amount shall not exceed the relevant Distribution made on or about the date of the Refinancing and shall be due on the date immediately after the date of the relevant Distribution;
  - (b) *[an increase of any fee payable by the Private Partner to the Contracting Authority over the remaining PPP Contract period / or a reduction of the availability payment to be paid by the Contracting Authority to the Private Partner over the remaining PPP Contract period; or*
  - (a) *a combination of both*.
- (7) The Private Partner shall pay, on behalf of the Contracting Authority, all reasonable costs of external advisors appointed by the Contracting Authority in relation to a Refinancing or potential refinancing and the calculation of a Refinancing Gain *[drafting also to reflect deduction of costs from any Refinancing Gain prior to calculating the amount to be shared if not already factored into the Refinancing Gain formula]*.

The Contracting Authority should approve these agreements as a condition precedent to the entry into effect of the PPP Contract and any subsequent amendment and/ or additional document which would fall under this definition.

This will not be required in most civil law governed PPP Contracts as good faith obligations are implied.

Drafting to be adjusted to fit the payment structure. See also Section 5.2.6.

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# 6

## LENDERS' STEP-IN RIGHTS



## 6.1 KEY ASPECTS

### 6.1.1 *The concept of step-in*

In a contractual context, “step in” means the ability of a third party who is not party to the relevant contract to step into the shoes of a defaulting party under the contract. This is usually for a limited timeframe and the aim is to give the party stepping in the opportunity to rectify the default and prevent termination of the contract.

### 6.1.2 *Why do Lenders have step in rights in respect of PPP Contracts?*

Most PPP Projects are financed on a “limited recourse” basis ([see Section C, PPP Contracts in Context](#)) under which third party lenders loan funds to the Private Partner based on an analysis of the projected cash flows generated under the PPP Contract.

As the PPP Contract is usually the sole source of revenue (or basis for revenue in the case of “user pay” PPP Contracts) for debt repayment, the prospect of the Contracting Authority terminating for Private Partner default is of significant concern for Lenders, particularly if the termination occurs before the asset has been completed and the service commenced. This is because even where a termination payment will be made by the Contracting Authority, the amount may not cover the entire debt amount and so Lenders are incentivised to get the PPP Contract back on track so that debt can be repaid as scheduled and in full.

One way Lenders seek to protect themselves against termination of the PPP Contract following Private Partner default is to negotiate step in rights. While their validity and enforceability have rarely (if ever) been properly tested in court in any jurisdiction, the formal existence of step in rights gives Lenders comfort in terms of bankability and provides a framework within which the Parties can come together to negotiate solutions in a default/termination scenario, subject to the impact of mandatory law (for example with regard to receivership, bankruptcy and public procurement rules). Step in rights are typically enshrined in an agreement between the Lenders and the Contracting Authority, often called a “Direct Agreement” or, in some jurisdictions, a “Consent Agreement.” The Direct Agreement will entitle the Lenders to be alerted to a potential termination and to take steps to prevent it by rectifying the problem. From the Contracting Authority’s perspective, its interest in completing the infrastructure and ensuring adequate service provision and the Lenders’ interests in achieving the same outcome are aligned. Direct Agreements enable Lenders to engage directly to try to save the PPP Contract before the Contracting Authority has to deal with termination and its consequences.

In a PPP context, direct agreements are executed not only in relation to the PPP Contract but also in relation to the Project Agreements. In the latter case, both the Lenders and the Contracting Authority may have separate direct agreements with the Private Partner’s Project Agreement counterparties (i.e. its main sub-contractors) to ensure that the counterparties grant them similar opportunities to rectify defaults

by the Private Partner under the Project Agreements before the counterparties may terminate and also to ensure the counterparties' continued performance.<sup>48</sup> This [Section 6](#) focuses on Lenders' step in rights in respect of the PPP Contract.

## 6.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 6.2.1

### *Authority to execute Direct Agreement*

In certain jurisdictions, there may be mandatory laws preventing the granting or enforcement of Lender step-in rights (in particular, under public policy rules applicable to insolvency procedures and/or public procurement regulations applicable to Contracting Authorities that have not been tailored to PPP Projects). Well-drafted PPP laws typically authorise entry by a Contracting Authority into both PPP Contracts and the Direct Agreements that usually accompany them. Accordingly, this should be carefully analysed and addressed by Contracting Authorities before commencing the procurement of its PPP Contract.

### *6.2.2 Form of Direct Agreement*

Some jurisdictions have developed standard template provisions which must be used by Contracting Authorities and Lenders (e.g. the Dutch Model, the South Africa PPP Guidelines and the UK PF2 Guidance). The Direct Agreement is usually executed on the same date as the PPP Contract. In some instances, it may be signed at a later date on financial close (as is the case in the Netherlands or the United States). Where this is the case, the Direct Agreement will have been virtually finalised at the time the PPP Contract was signed and such agreed form will be attached as an exhibit to the PPP Contract. Lenders typically will require an executed Direct Agreement as a condition precedent to drawdown under the Senior Finance Documents. From the Contracting Authority's perspective, it is preferable to have agreed on the form of the Direct Agreement in advance at the time of bid and under competitive tension, so that it is not introduced or re-negotiated post award of the PPP Contract. [Contracting Authorities should take precautions to ensure that a Lender cannot demand changes to the agreed-upon Direct Agreement post award of the PPP Contract.](#)

### *6.2.3 Scope of Direct Agreement/governing law*

The Contracting Authority should recognize that the Direct Agreement may be used as a vehicle for the Lenders to alter, clarify or add provisions which go beyond step-in arrangements. While it may in limited circumstances be helpful to include other provisions, the Contracting Authority should beware that this does not undermine the underlying risk transfer position agreed in the PPP Contract unless this is specifically agreed.

Given that the operation of the Direct Agreement can affect the Private Partner's rights and obligations under the PPP Contract as well as the Contracting Authority's, it is recommended that the Private Partner should also be party to the Direct Agreement to acknowledge and consent to its terms. It is also advisable for the governing law of the Direct Agreement and the PPP Contract to be consistent.

<sup>48</sup> In terms of order of exercise, the Lenders' rights under their Direct Agreement with a sub-contractor will typically take priority over the Contracting Authority's rights under its Direct Agreement with the same sub-contractor.

#### 6.2.4 Main issues

*Timing and duration of step-in* – When the Contracting Authority serves a termination notice on the Private Partner it typically agrees to serve the same on the Lenders who then have a certain period to decide whether or not to step in. Lenders will also request this right when they have called a default under their financing agreements and accelerated their debt (in this circumstance the Private Partner will have to be replaced if the PPP Contract is to continue). The step-in period is usually agreed to be a reasonable length of time for the Lenders to try to rectify the problem or find a new Private Partner and will end when the agreed step-in period expires, the Lenders formally step out, a new Private Partner is appointed or termination occurs due to new default events. The Contracting Authority and its advisers should ensure that the time periods under the relevant agreements are correctly aligned so that the whole process can work effectively, [including taking into account user concerns in user pays situations](#).

*Assumption of liabilities* – The Contracting Authority should consider the extent to which it will require the Lenders to assume any liabilities which the Private Partner has already incurred or will incur in return for their step-in right.

It is generally accepted market practice that Lenders are required to pay any known liabilities outstanding at step-in, but the position as regards ongoing liabilities can vary. Where Lenders are required to agree to meet future liabilities in order to step in, they will want a capped amount so that they can quantify their exposure. This approach is seen in some jurisdictions (particularly in earlier PPP Projects in the UK) but there has been some movement away from this requirement in recent years (e.g. because the termination amount may in any event take account of liabilities owed to the Contracting Authority and if, conversely, the PPP Contract is not terminated, such liabilities will still be payable). One approach is that the Contracting Authority can notify the Lenders of subsequent liabilities and if the Lenders choose not to meet them then the Contracting Authority can proceed to terminate the PPP Contract (and the liabilities will again be taken into account in the termination payment).

*Rectification rights* – It is in the Contracting Authority's interests for breaches to be rectified but it also needs to protect itself against failures to remedy and new breaches by ensuring it still has a right to terminate in respect of these new failures that arise during the step-in period.

*Other protections* – The Contracting Authority may want to try to include certain provisions which restrict the Lenders' exercise of certain rights under the financing documents (e.g. in relation to set off) and to regulate priority of security enforcement between the Contracting Authority and the Lenders (this is the case for example, in Australia).

### 6.3 SUMMARY OF MAIN PROVISIONS

A Direct Agreement should typically include the following main provisions (or their equivalent under the laws of the relevant jurisdiction):

- mutual obligations on the parties to notify each other, respectively, of (a) a Private Partner default under the PPP Contract which could allow the Contracting Authority to terminate the PPP Contract and (b) key events under the senior finance documents which could impact the Contracting Authority (e.g. such as an event of default or acceleration of debt);

- a standstill period, pursuant to which the Contracting Authority will undertake to notify the Lenders of its intention to terminate the PPP Contract, and will commit not to terminate the PPP Contract for a given period of time (nor to terminate any related agreements);
- appointment of the Lenders' nominee to "step in" and become jointly liable with the Private Partner to perform the PPP Contract and cure any breaches which gave rise to the Contracting Authority's right to terminate (and to "step out"); in the Direct Agreement the Contracting Authority and the Lender may wish to agree on the entity that will serve as the Lender's nominee, and a mechanism for appointment of the nominee if the contractually agreed-upon nominee is not available or is no longer willing when "step in" would occur;
- consent to the assignment of the PPP Contract and related receivables to the Lenders, as well as consent to assignments to insurers and guarantors upon payment of claims; ~~and~~
- Lenders' right to novate the Private Partner's rights and obligations under the PPP Contract to a substitute private partner of their choice (subject to the consent of the Contracting Authority and/or to any reasonable and objective criteria); a requirement that the Lender's nominee and the substitute Private Partner agree in writing to perform the PPP Contract; and the Contracting Authority's obligation to enter into a new direct agreement with the Lenders to the new Private Partner on substantially equivalent terms.
- A right for the Contracting Authority to step into the Lender's (or its nominee's) place, and the Lender's (and Lender's nominee's) obligation to exit, under defined timing and circumstances.

#### 6.4 SAMPLE DRAFTING

As indicated above, the terms of the Direct Agreement are normally not outlined in the PPP Contract (although the agreed form may be appended to the PPP Contract) which is why this Guidance does not include proposed drafting.<sup>49</sup>

<sup>49</sup> For further information and sample drafting from a more established PPP market, please see the South Africa PPP Guidelines and the UK PF2 Guidance.





# 7

## CONFIDENTIALITY AND TRANSPARENCY



## 7.1 KEY ASPECTS

### 7.1.1 *The concepts of confidentiality and transparency*

Most commercial contracts contain provisions by which the parties agree to protect the confidentiality of the contract terms as well as each other's commercially sensitive information (such as pricing and intellectual property) received in connection with the contract. When one of the parties is a public sector entity the interest of the parties in keeping certain information confidential needs to be weighed against the necessity for transparency and disclosure. While both private and public sector parties may want to keep certain information confidential the promotion of transparency and disclosure has increasingly been acknowledged by international<sup>50</sup> and national law and become a key consideration for governments, non-governmental organizations and international organizations in their activities. The underlying objectives can be multiple, including reducing the level of corruption (as well as complaints of corruption, secrecy or unfairness in procurement processes), reassuring the general public in regard to probity, service standards and costs of public contracts, encouraging competition and facilitating a better informed market.

### 7.1.2 *Why do PPP Contracts contain confidentiality and transparency provisions?*

Transparency and disclosure is a high priority for PPP Projects as the Contracting Authority is a public sector entity or agency. It has become increasingly common for Contracting Authorities<sup>51</sup> to require a presumption in favor of transparency and disclosure in PPP Contracts to ensure that information on PPP Projects, PPP Contracts and related documents can be shared by them, to the fullest extent possible, with the public at large. Multiple factors have influenced this development. The main drivers in the PPP context are to reduce the risk of corruption, increase private sector involvement in infrastructure investment, increase public confidence and awareness and achieve value for money. As with any infrastructure project, PPP Projects may also involve social and environmental, public interest and human rights considerations, and these are additional factors in favour of enhanced transparency and disclosure.

Given commercial sensitivities as well as public interest-related limitations, however, transparency and disclosure obligations in a PPP Contract are typically subject to a number of exceptions in order to protect commercially or otherwise sensitive information relating to the Parties, the PPP Contract and the PPP Project. In most cases it is the Private Partner who has the most information to protect as it will not want its competitors to gain access to information which could give them a commercial advantage. However, the Contracting Authority may also wish to keep certain

<sup>50</sup> The right to freedom of information is e.g. enshrined in Article 19 of the International Covenant on Civil and Political Rights as interpreted in paras 18 – 19 of the General Comment no. 34 of the Human Rights Committee, CCPR/C/GC/34 of Sept. 12, 2011.

<sup>51</sup> See A Framework for Disclosure in Public-Private Partnerships, World Bank 2016. [See link in Appendix, Additional PPP Resources.](#)

information confidential, for example if the PPP Contract is in the defense sector. In some highly sensitive projects, the Contracting Authority may require the Private Partner and other parties and individuals directly involved in delivering the service to sign a written undertaking to be bound by national security legislation. In some jurisdictions (e.g. in the EU), there are also data protection obligations which apply to the Parties and which are likely to be addressed in a specific clause.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

While the maturity of a jurisdiction's PPP market may be a factor in the level of transparency and disclosure sought under PPP Contracts, the World Bank's Framework for Disclosure in Public-Private Partnerships 2016 ("WB Disclosure Framework 2016") also suggests that practice relating to PPP disclosure may have developed more rapidly in emerging markets, perhaps due to the pressing need for new infrastructure. An additional relevant factor to such development may be if the PPP Contract has to satisfy the disclosure policy requirements of other relevant bodies (such as multilateral agencies) in order for those bodies to support the PPP Project.

**Commented [A4]:** As we stated in our comments on the previous draft, it may be unhelpful to distinguish between transparency and disclosure in emerging and developed market differences, since as you say progress in transparency and disclosure is developing rapidly in emerging markets. We suggest deleting this box and simply highlighting the WB Disclosure Framework 2016 in the main text instead. This could also be an appropriate point to emphasize that in general, the transparency and confidentiality provisions of the contract should favor the publication and disclosure of information, and transparency more generally, except for where limited confidential information is concerned

## 7.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY

### 7.2.1 Duty of disclosure

For public policy reasons, many jurisdictions have policies, laws or regulations imposing disclosure obligations on Contracting Authorities and/or ensuring the public have access to public procurement information. Mandated proactive disclosure can either be incorporated into the country's freedom of information (FOI) legislation<sup>52</sup>, PPP policies, laws and regulations<sup>53</sup>, procurement legislation, public financial management (PFM) legislation<sup>54</sup>, sector-specific legislation as well as legislation relating to budget transparency. Some jurisdictions have even developed standard clauses related to transparency and confidentiality in PPP Contracts.<sup>55</sup> A comprehensive overview of existing frameworks, good practice cases and jurisdictional studies is given by the WB Disclosure Framework 2016 and the companion jurisdictional and case study volumes<sup>56</sup>. Clauses dealing with transparency, disclosure and confidentiality should always be drafted following an analysis of the legal and policy framework, and it is for the Contracting Authority to decide whether contractual obligations should go beyond what is legally required. It is usual to include specific reference to any such laws and regulations.

As mentioned above, there may also be international financial institutions and multilateral agencies supporting the PPP Project which, as a condition of their support,

<sup>52</sup> For example, Chile's Access to Public Information Law (2008), India/Karnataka's Right to Information Act (2005) and New South Wales' Government Information (Public Access) Act (2009).

<sup>53</sup> For example, Kenya's PPP Act (2013); Brazil, Minas Gerais PPP Law (2003), India Draft PPP Policy (2012), UKPF2: for details and further information see Table 3 PPP Legislation and Transparency Elements in: WB Disclosure Framework 2016. [See link in Appendix, Additional PPP Resources.](#)

<sup>54</sup> For details see Table 3 PPP Legislation and Transparency Elements in: WB Disclosure Framework 2016. [See link in Appendix, Additional PPP Resources.](#)

<sup>55</sup> Examples with short summaries are provided in Table 11 of the WB Disclosure Framework 2016. [See link in Appendix, Additional PPP Resources.](#)

<sup>56</sup> Disclosure in Public-Private Partnerships: Jurisdictional Studies, World Bank 2016 and Disclosure in Public-Private Partnerships: Good Practice Cases, World Bank 2016. [See link in Appendix, Additional PPP Resources.](#)

require Contracting Authorities to comply with their own policies on transparency. The information required to be disclosed under such policies does not, however, usually include disclosure of commercially sensitive or proprietary information.

### 7.2.2 Scope of the transparency and disclosure undertaking

Although transparency is recommended at the pre-procurement stage in order to allow public consultation and to build support and trust prior to the decision to undertake a project through a PPP, a disclosure and transparency provision would typically deal with how all announcements relating to the PPP Contract and the PPP Project are to be managed, and transparency and disclosure matters during the life of the contract. The Contracting Authority will want to control how all information relating to the PPP Project is publicly communicated and will require prior approval of any media announcements and communications. See Section 7.3, Sample Drafting 7, Clauses (1) and (2).

Some jurisdictions (for example, Belgium) may not address public communications in the way outlined in Section 7.3, Sample Drafting 7 and may simply treat the information as confidential and require the Contracting Authority's prior consent to press releases and other public announcements by the Private Partner.

In jurisdictions with disclosure frameworks it has also become best practice to require the posting of important project and contract information in the public domain. The Contracting Authority may therefore also want to ensure that it has the right under the PPP Contract to make public the terms of the PPP Contract as well as related information (subject to applicable confidentiality restrictions) by its preferred means. This may include publishing on the internet. The level of information available for it to disclose regarding the progress of the PPP Project will be dependent upon the Private Partner's compliance with reporting provisions elsewhere in the PPP Contract which oblige the Private Partner to disclose certain information (such as performance data) to the Contracting Authority. See Section 7.3, Sample Drafting 7, Clauses (3)-(5).

While some Contracting Authorities may not specifically be required to publish the PPP Contract by legislation, in both common and civil law jurisdictions the public are increasingly using FOI legislation to gain insight into the terms of PPP Contracts. Specific provision can be made in the PPP Contract in this regard although some Contracting Authorities use less extensive clauses than Section 7.3, Sample Drafting 7, and, for example, may rely on the carve out under Section 7.3, Sample Drafting 7, Clause (9)(d) so far as it relates to responding to requests under freedom of information legislation and other statutory disclosure obligations.

### 7.2.3 Scope of the confidentiality undertaking

The need for transparency and disclosure should be balanced against the legitimate interests of the Private Partner and the Contracting Authority in keeping certain information related to a PPP Project confidential.

In the context of a PPP Project, confidential information is typically information the disclosure of which would be likely to prejudice a party's commercial interests. This will include information contained in the PPP Contract terms or supporting documents, such as trade secrets, commercially sensitive intellectual property rights and know-how and personal data. Key financial information, such as pricing elements and methodology and the Private Partner's financial model, including details of the costs of financing through debt and equity and other aspects, are also typically treated as confidential information. See Section 7.3, Sample Drafting 7, Clause (6). From the

**Commented [A5]:** This section should clarify that transparency and disclosure is not solely about transparency in making announcements; it is also about access to information, dialogue, and engagement with stakeholders.

**Commented [A6]:** Best practice would suggest specifying that this information will be made public in the contract. The contract should also specify that information related to the evaluation and mitigation of social and environmental impacts will be made public. The disclosure of this kind of information will add legitimacy to the Contracting Authority decision to conduct the PPP project and improve the monitoring of environmental and social impacts.

**Commented [A7]:** The contract could require publication, which would encourage greater transparency in general.

**Commented [A8]:** Most information should presumptively be publicly available. The fact that a document contains confidential information should not be a justification for treating the entire document as confidential; rather, the document should be made public with confidential information redacted, unless there are serious reasons not to. We note, in particular, the importance of disclosing financial information such as the cost/benefit analysis of the PPP over the lifetime of the project, contingent liabilities, and other information that would enable the public to understand the full fiscal implications over the long-term and the risk comparison of different financing mechanisms, particularly with regard to the debt sustainability of the contracting state.

Contracting Authority's perspective, confidential information will include information which it is not in the public or national interest to disclose (e.g. defense, national security and custodial matters).

Confidential information in the context of a PPP Project should be the exception rather than the rule and should be justified by reference to principles of confidentiality in applicable underlying transparency and disclosure policies and legislation. Concerns relating to particular information should be addressed specifically in the drafting. Any disclosure of such information should be clearly justified and made in accordance with the terms of the confidentiality provisions in the PPP Contract. Certain categories of information are typically excluded from confidentiality undertakings, such as information already in the public domain or received legitimately from another source. Confidentiality undertakings also do not usually apply where a Party is obliged to disclose information, for example as part of a legal, regulatory or judicial process.

#### 7.2.4 Approach

*Section 7.3, Sample Drafting 7*, which is based on the UK PF2 Guidance model, can be viewed as representing a good balance between protecting the Private Partner's commercially sensitive information and complying with the Contracting Authority's legal obligations (and policy aspirations) as regards greater public transparency. A similar approach is followed in the Infra Australia PPP Guidelines and the South Africa PPP Guidelines.

##### **EMERGING AND DEVELOPED MARKET DIFFERENCES**

While the approach to drafting taken in this Guidance is representative of an established market, it would also be appropriate for emerging market PPP Contracts, particularly in jurisdictions where governments may wish to implement transparency measures during the life of the PPP Contract (or have already done so). The terms will also be familiar to international private sector parties.

## 7.3 SAMPLE DRAFTING 7

### *Public Relations and Publicity*

- (1) The Private Partner shall not by its directors, officers, employees or agents, and shall procure that its sub-contractors shall not, communicate with representatives of the press, television, radio or other communications media on any matter concerning the PPP Contract without the prior written approval of the Contracting Authority.
- (2) The Private Partner may not represent the views of the Contracting Authority on any matter, or use the name of the Contracting Authority in any written material provided to third parties, without the prior written consent of the Contracting Authority.

### *Publication of the PPP Contract in the public domain*

- (3) The Parties agree that the provisions of this PPP Contract *[and insert any other relevant documents defined as the Project Agreements]* shall, subject to Clause (7) below, not be treated as Confidential Information and may be disclosed without restriction and the Private Partner acknowledges that the Contracting Authority, subject to Clause (7) below, is entitled to:
  - (e) publish this PPP Contract *[and some of the Project Agreements]* on a website; and
  - (f) publish (on the internet or otherwise) a summary of the PPP Contract *[and the Project Agreements and any associated transaction document]* which shall include (i) the terms and conditions of the PPP Contract *[and the Project Agreements and any associated transaction document]* and (ii) any document or information arising out of or connected to the PPP Contract *[and the Project Agreements and any associated transaction document]*, including performance of the PPP Contract *[and the Project Agreements and any associated transaction document]*.
- (4) The Parties agree that Base Case Equity IRR information shall not be treated as Confidential Information and the Private Partner acknowledges that the Contracting Authority intends to publish such information on a website.
- (5) The Parties agree that information in respect of any direct or indirect change in ownership which has actually taken place shall not be treated as Confidential Information.

See Section 7.2.2 regarding the effectiveness of limb (ii).

### *Confidentiality*

- (6) For purposes of this PPP Contract, Confidential Information means:
  - (a) information (however it is conveyed or on whatever media it is stored) the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, including all personal data and sensitive personal data as listed on Schedule [ ]. The Confidential Information shall be kept confidential for the periods specified in Schedule [ ]. ~~and~~

~~(b) the sub-set of Confidential Information listed in Column 1 of Part I—Commercially Sensitive Contractual Provisions and Column 1 of Part II—Commercially Sensitive Material of Schedule [insert reference to the Commercially Sensitive Information Schedule] in each case for the period specified in Column 2 of Parts I and II of such Schedule (“Commercially Sensitive Information”).~~

~~(7) Clause (3) above shall not apply to Confidential Information which shall, subject to Clause (9) below, be kept confidential for the periods specified in Schedule [insert reference to the Commercially Sensitive Information Schedule].~~

(1) The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this PPP Contract [and any Project Agreements] or the PPP Project and shall use all reasonable endeavors to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

(2) Clauses (7) ~~and (8)~~ above shall not apply to:

(g) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the PPP Contract for the performance of those obligations;

(h) any matter which a Party can demonstrate is already, or becomes, generally available and in the public domain otherwise than as a result of a breach of this Clause [Confidentiality];

(i) any disclosure to enable a determination to be made under Clause [insert reference to Dispute Resolution clause] or in connection with a dispute between the Private Partner and any of its sub-contractors;

(j) any disclosure which is required pursuant to [insert reference to legislation containing public disclosure obligations] as well as any other statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority concerned, or to the Freedom of Information Act, the Public Private Partnership Act and the Public Financial Management Act;

(k) any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;

(l) any provision of information to:

- (i) the Parties’ own professional advisers or insurance advisers; and/or
- (ii) the Lenders or the Lenders’ professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Private Partner to enable it to carry out its obligations under the PPP Contract, or may wish to acquire shares in the Private Partner in accordance with the provisions of this PPP Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal; and/or
- (iii) international or bilateral financial institutions involved in the PPP Project as Lenders, political risk insurers or guarantors.

Consideration should also be given to having a general provision for the disclosure of information that is ‘required in the public interest’. See also Clause (9)(j)(ii).



- (iv) any rating agency which may be engaged to provide a rating or rating assessment in relation to any Senior Debt.
- (g) any disclosure by the Contracting Authority of information relating to the design, construction, operation and maintenance of the PPP Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new private partner, its advisers and Lenders, should the Contracting Authority decide to retender the PPP Contract or undertake any market testing;
- (m) any registration or recording of the required permits and property registration required;
- (n) any disclosure of information by the Contracting Authority to any other relevant authority or their respective advisers or to any person engaged in providing services to the Contracting Authority for any purpose related to or ancillary to the PPP Contract; or
- (o) any disclosure for the purpose of:
  - (iv) the examination and certification of the Contracting Authority's or the Private Partner's accounts;
  - (v) any examination pursuant to *[insert reference to any auditing obligations for public contracts]* of the economy, efficiency and effectiveness with which the Contracting Authority has used its resources;
  - (vi) complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or
  - (vii) (without prejudice to the generality of Clause (d) above) compliance with *[insert reference to any laws requiring disclosure (e.g. environmental laws)]*.
- (10) When disclosure is permitted under Clause (9) above, other than Clauses (9)(b), (d), (e), (h) and (j), the Party providing the information shall ensure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this PPP Contract. [The Private Partner shall expressly inform any person to whom it discloses any information under this Clause *[Confidentiality]* of the confidentiality restrictions set out in this Clause *[Confidentiality]* and shall procure its compliance with the terms of this Clause *[Confidentiality]* as if it were party to this PPP Contract and the Private Partner shall be responsible for any breach by any such person of the provisions of this Clause *[Confidentiality]*.]
- (12) Where the Private Partner, in carrying out its obligations under the PPP Contract, is provided with information relating to *[end users]*, the Private Partner shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Private Partner has obtained the prior written consent of that *[end user]* and has obtained the prior written consent of the Contracting Authority.

Many jurisdictions require audit reports to be prepared in respect of transactions to which a Contracting Authority is a party. Where applicable, this provision should also address the issue of public disclosure of these audit reports. See also Clause (9)(d).

(13) On or before the expiry date, the Private Partner shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to *[end users]* including any documents in the possession, custody or control of a sub-contractor, are delivered up to the Contracting Authority.

(14) The provisions of this Clause *[Confidentiality]* are without prejudice to the application of *[insert any relevant law governing official secrets or national security information]*. Freedom of Information Act, Public Private Partnership Act, or the Public Financial Management Act. The Private Partner hereby agrees to comply, and not to dispute the Contracting Authority's compliance with such acts.

SCHEDULE [●]

Commercially Sensitive Information  
Confidential Information

*Part I – Commercially Sensitive Contractual Provisions*

COLUMN 2

COLUMN 1

For a period ending on date below

Commercially Sensitive Contractual Provisions  
Confidential Information


*Part II – Commercially Sensitive Material*

COLUMN 2

COLUMN 1

For a period ending on date below  
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Commercially Sensitive Material


# 8

## GOVERNING LAW AND DISPUTE RESOLUTION

## 8.1 KEY ASPECTS

### 8.1.1 Overview

This [Section 8](#) discusses the importance of governing law and dispute resolution considerations and provisions in PPP Contracts. As explained further below, the choice of governing law determines the substantive law that will be applied to determine the rights and obligations of the Parties under the PPP Contract. This includes resolution of disputes arising out of the PPP Contract. However, the choice of governing law does not determine the means by which any dispute will be resolved; for example, whether this is by a court of a particular country, or by arbitration. This must be specified in the dispute resolution clause in the PPP Contract. For example, the Parties might select English law as the governing law of the PPP contract, and international arbitration as the means of dispute resolution. This would mean that any dispute arising out of the PPP Contract would be resolved by an arbitral tribunal applying English law.

This [Section 8](#) first explains the concepts of governing law and dispute resolution provisions and then explains some key considerations for Contracting Authorities, including how Parties might select a dispute resolution provision, and what the key elements of such a provision are. Particular guidance is given on important considerations where arbitration is selected as the dispute resolution mechanism. Finally, some guidance on alternative dispute resolution and the use of independent experts for technical disputes is provided.

### 8.1.2 The concept of a governing law provision

All PPP Contracts should contain an express choice of governing law. The system of law specified in the governing law provision governs most aspects of the PPP Contract, e.g. its interpretation and validity. The objective of a governing law clause is to achieve certainty (insofar as it is possible to do so) between contracting parties as to the nature and scope of their respective rights and obligations. If the governing law is not expressly chosen, a court will decide it, with consequent possible unpredictability.

The Contracting Authority typically wishes to choose the domestic law of its own jurisdiction as the governing law of the PPP Contract, but the Parties should be aware of the factors which typically influence choice of governing law, including:

- non-legal preferences, such as market acceptability<sup>57</sup>, familiarity and convenience, relative cost;
- avoidance of a detailed investigation into an unfamiliar system of law;
- commercial orientation, stability and predictability of the chosen legal system;

<sup>57</sup> This may include whether the respective choice of governing law would affect the Lenders' ability to obtain political risk insurance from multilateral or bilateral development agencies (or private insurers), which would be particularly important for PPP Projects reliant on this type of support to be bankable.

**Commented [A9]:** As we stated in our comments to the 2016 Guidance, local law and local forums should be the default option (as explained below). Therefore, perhaps this example should be clarified or deleted.

**Commented [A10]:** Because PPP contracts concern a government's legal obligations and implicate important public policy issues, there should be a strong presumption that the contract will be governed by local law. Moreover, licenses issued by the contracting authority for the project are almost certainly governed by local law, buttressing the argument in favor of the entire relationship being governed by local law.

- insulation of the contract from legal changes in a counterparty's country (e.g. local legislation imposing a moratorium on foreign obligations, reduction of the interest rate by legislation, the imposition of a requirement that repayment must be made in local currency to a local custodian and/or exchange controls). This is often one of the most important reasons for the choice of an external (foreign) system of law for investors. Investors in certain jurisdictions may be concerned that if the governing law is the local law of the contracting government entity, it may subsequently pass legislation which adversely impacts the contract. In PPP Contracts, however, this is typically addressed through change in law or MAGA provisions; [See Section 3, Change in Law and Section 2, Material Adverse Government Action](#).
- a desire to coincide the governing law with the dispute resolution forum (i.e. the courts which will hear any dispute arising in connection with the contract). Legal unpredictability may result if the court is called upon to apply a foreign law with which it is not familiar;
- the ability to use lawyers who have special experience in the type of contract concerned;
- language;
- the desire for a single body of law to apply to the PPP Contract and each of the Project Agreements (which will facilitate consolidation in a single forum); and
- local law may prohibit or restrict a government entity from contracting under an external (foreign) law. Local law advice may need to be sought to clarify the position if a Contracting Authority is considering this approach.

Governing law clauses are generally straightforward to draft. The selection should be clearly specified in the PPP Contract, usually next to, or as part of, the Dispute Resolution provision (see below). The governing law specified should be the system of law of a country, not to a collection of principles or general concepts. Split governing law clauses and conditional governing law provisions should be avoided, as they add undesirable complexities.

Many PPP Contracts now also include a choice of governing law in respect of "non-contractual obligations". This term, found in EU legislation, is understood to include torts such as negligence or pre-contractual misrepresentations. If the Contracting Authority or Private Partner were to bring a tortious claim that they were induced to enter into the PPP Contract by a misrepresentation made by the other Party, a choice of non-contractual governing law should indicate to the relevant court that this claim should be determined under the chosen governing law. Such a provision in commercial contracts would be generally effective in EU Member State courts under European legislation (EU Regulation, Rome II) but the position may vary in other jurisdictions. However, over the last five years, the trend in many international commercial contracts across global markets is to include a governing law choice for non-contractual obligations to add certainty. There is little or no downside in doing so. It makes sense for all obligations relating to the PPP Contract to be governed by the same law. Any other approach would introduce unnecessary complexities. Accordingly, the choice of governing law for non-contractual obligations should match the choice for contractual obligations.

**Commented [A11]:** Contracting authorities are likely to have important public policy reasons for making these types of changes that would impact performance under the contract. The PPP partner should not be able to contract out of local regulatory regimes.

**Commented [A12]:** Unless there are significant countervailing reasons, this should be the same as the law of the contract, and should ideally be the law of the contracting authority.

[Section 8.3, Sample Drafting 8, Clause \(1\)](#) includes a contractual and non-contractual governing law provision. This guidance and [Section 8.3, Sample Drafting 8](#) are intended to be of general application, and to be used by Parties from civil and common law jurisdictions, irrespective of whether the selected law is a civil or common law system of law.

### 8.1.3 The concept of a dispute resolution provision

As explained above, the governing law provision determines what system of law governs any dispute arising out of the PPP Contract, but a dispute resolution provision is then needed to determine what forum will apply that law to resolve any such dispute and, in the case of arbitration, the procedure pursuant to which such dispute will be heard and resolved.

A dispute resolution clause sets out a pre-agreed mechanism for the resolution of any disputes that may arise out of the PPP Contract. All PPP Contracts should include a dispute resolution clause to provide as much certainty as possible about *where and how* disputes will be resolved. Such a clause aims to ensure that parties stick to the agreed mechanism and helps reduce the risk of their wasting time and costs arguing about where a claim can be heard. A good dispute resolution clause will also reduce the risk of duplicative proceedings being commenced, and irreconcilable decisions being issued, by different courts or tribunals. These clauses may be called “jurisdiction clauses”, “choice of court” or “forum selection” clauses.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

If there is no contractually agreed dispute resolution clause specifying how disputes are to be resolved, there will be uncertainty about where disputes under the PPP Contract should be referred. The Parties’ preferred courts may not accept jurisdiction over a dispute if there is no contractual clause specifying they are to determine disputes. Disputes may be commenced and heard by unreliable courts. This can be a particular risk in new and untested markets, where local courts may be unfamiliar with resolving complex commercial disputes in a timely way. There may also be a lack of confidence in the impartiality of the process.

The enforceability of the eventual decision will also be an important factor for Equity Investors and Lenders (see below). Given that disputes under PPP Contracts are likely to have some form of financial impact on the Private Partner and the choice of forum can impact enforceability of the respective decision, the inclusion of a workable dispute resolution clause is a key element in any assessment of the bankability of the PPP Project by the Private Partner and its Equity Investors and Lenders. [See Section E, PPP Contracts in Context.](#)

As with the governing law guidance, the guidance outlined below on selection and drafting of dispute resolution provisions and [Section 8.3, Sample Drafting 8](#) is intended to be of general application, and to be used by Parties from civil and common law jurisdictions, irrespective of whether the selected court is a civil or common law jurisdiction or the arbitration is seated in a civil or common law jurisdiction.

**Commented [A13]:** A similar lack of confidence may exist in developed markets. It is not apparent to us what guidance including this information provides. Ultimately, it is for the partners to decide if they are comfortable submitting their disputes for resolution in local courts. A prospective PPP partner, and the contracting authorities, will surely have views in this regard.



## 8.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY

This [Section 8.2](#) begins with a short overview of the key elements of any dispute resolution provision at [Section 8.2.1](#). [Section 8.2.2](#) then explains factors a Contracting Authority should consider when selecting a dispute resolution provision, i.e. factors relevant to choosing between court litigation (whether before local courts or the courts of an “offshore” jurisdiction) or arbitration. It also includes some important guidance as to whether a Contracting Authority is able to refer disputes to particular fora, for example for reasons of public policy. The guidance then discusses a number of the key elements of a typical dispute resolution provision in a PPP Contract. Key points covered include when an investor may want to move away from local courts, when Parties may select international arbitration as the dispute resolution mechanism, specific drafting issues in relation to arbitration clauses, when Parties might include alternative dispute resolution mechanisms such as expert determination and mediation, and finally some guidance on waivers of any immunities and privileges that a Contracting Authority (and other sovereign/quasi-sovereign entities) may have.

### *What are the key elements of a dispute resolution provision?*

In a PPP Contract, a dispute resolution provision typically specifies:

- (1) the governing law of the PPP Contract (if not specified in a different clause);
- (2) an obligation to attempt to reach a quick and amicable settlement;
- (3) a provision for the resolution of specific technical disputes by an independent expert;
- (4) a recourse to either (a) the courts that will have jurisdiction to determine the dispute or (b) international arbitration to finally determine all disputes not informally resolved or resolved by expert determination. An arbitration clause should specify the “seat” of arbitration and usually also incorporates by reference institutional procedural rules. It may also set out certain bespoke procedural rules to govern the arbitration process and joinder and consolidation provisions in the event the dispute concerns multiple related contracts and/or multiple parties and where arbitration selected;
- (5) an obligation to continue performance of the PPP Contract during the resolution of the dispute;
- (6) where appropriate a waiver of sovereign and other immunities and consent to enforcement and execution; and
- (7) the allocation of costs.

### *8.2.2 Selecting an appropriate dispute resolution provision and public policy*

**8.2.2.1 Local courts** – A Contracting Authority may prefer to select its local courts as the forum for the resolution of any disputes under the PPP Contract. This selection may be made for a variety of reasons including familiarity, compatibility with any concession/PPP legislation, and because the PPP Contract is governed by local law. The costs of litigating before local courts may also be much lower than before certain “offshore” courts or the costs involved in an international arbitration. [See Section 8.3, Sample Drafting 8, Clause \(r2\) Option 1.](#)

**Commented [A14]:** Local courts should be the default option. Presumably, the dispute would concern the performance of contractual obligations by either party. Local courts are best placed to hear evidence regarding the localized contractual dispute and apply local law. However, a factor to consider would be whether the local courts have the capacity and specialization to handle complex disputes on certain matters. If so, arbitration might be the preferable option.

8.2.2.2 Offshore courts – In some situations, however, Private Partners may be reluctant to agree to have disputes determined by local courts. For example, they may be concerned that the courts in the Contracting Authority's country are (or might become) unreliable, potentially more favourable to the local parties/the Contracting Authority, inefficient and prone to significant delays when a speedy resolution is needed. In these circumstances, Private Partners may push for the inclusion of an external (i.e. "offshore") jurisdiction (or choice of court) provision in the PPP Contract and seek to select a court or courts with a reputation for resolving complex international disputes in a fair and predictable manner. Offshore courts may be the preferred choice for Private Partners even where the PPP Contract is governed by a different (i.e. local) law. Courts in certain jurisdictions regularly determine commercial disputes arising under contracts governed by different laws (e.g. the English courts often determine disputes arising under foreign (non-English) law and do so by hearing expert evidence on that foreign law although this can increase costs). [See Section 8.3, Sample Drafting 8, Clause \(r2\) Option 1.](#)

Offshore court litigation may be preferred as the dispute resolution mechanism for Private Partners if they perceive particular courts as being transparent, efficient and with a judiciary consisting of highly regarded commercial lawyers with experience of disputes under PPP Contracts. Further reasons for selecting offshore courts may be the possibility of obtaining injunctive relief from those courts or the ability to obtain "summary" judgment (the early determination of a dispute without a full hearing). It is a procedure available in some courts but is less common in arbitrations.

From the Contracting Authority's perspective, even if offshore courts might not be its preferred option, there may be circumstances where this option needs to be considered as a necessary compromise in order to ensure the PPP Project is bankable. [See Section E, PPP Contracts in Context.](#)

8.2.2.3 Arbitration – Most commonly, Private Partners may suggest arbitration as a dispute resolution mechanism. Arbitration is a contractually agreed method of dispute resolution that is an alternative to litigation before the courts. Broadly, the parties agree that one or three individual arbitrators will determine their dispute rather than a court. [See Section 8.3, Sample Drafting 8, Clause \(r2\) Option 2.](#)

Arbitration may also be selected if there is a desire to keep the dispute confidential. Unlike court proceedings, arbitration proceedings often take place in private (but not always and the approach varies depending on the jurisdiction and any institutional rules). Private Partners concerned about the enforceability of any decision made in respect of a dispute under the PPP Contract may seek to include an arbitration clause rather than a court (litigation) clause because arbitration awards tend to be more widely enforceable than court judgments. [Contracting Authorities may seek to include an arbitration clause rather than a litigation clause as a way to promote investments by making the contract more attractive to Private Parties.](#) Arbitration can, however, be expensive and sometimes as time-consuming as court proceedings. However, the Parties can include provisions in their arbitration clause for summary judgment or expedited procedures and certain institutional rules also include provisions in this regard. The Parties have to pay for the arbitrators' time and may also have to pay for an institution's administrative costs. [See Section 8.2.3.](#)

8.2.2.4 Local limitations on forum selection – Before selecting a foreign court or choosing an offshore arbitration as the dispute resolution mechanism in any PPP Contract, it is important to establish that, under all applicable laws, the Contracting Authority is able to agree to refer disputes to a foreign court or be subject to international arbitration (related to this it is also important to establish it can agree to be subject to a "foreign" law). For example, a Contracting Authority may be required

**Commented [A15]:** Offshore courts should be highly disfavored. The resolution of disputes regarding PPP contracts should, if at all possible, take place according to the law, and ideally in local courts. If there are significant concerns about the fairness or efficiency of the local judiciary system, then international arbitration is likely to be a preferable alternative over offshore courts.

**Commented [A16]:** Arbitration should be conducted transparently, with the ability to redact confidential information from the material made public from the arbitration.

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under local laws relating to concession arrangements to refer all disputes relating to a PPP Project to the local courts (and/or to contract only under local law).

There may also be general prohibitions or limitations under local law in relation to a Contracting Authority's ability to agree to an offshore jurisdiction clause or foreign seated arbitration clause (or agree to a foreign law). For example, under local law sovereign entities may need specific waivers and approvals to agree contractually to arbitrate offshore, or to select a foreign jurisdiction clause and/or to contract under foreign laws. It will also be important to establish that under local law the Contracting Authority can contractually agree to waive immunity (see Section 8.2.6). Specific permissions may be required and certain formalities may need to be followed. Issues of capacity and authority may arise in this regard.

These are important points to establish at the outset of negotiations. Private Partners may require local law opinions to address these issues.

**8.2.2.5 General considerations** – Given the long term nature of the PPP Contract, it can be in the Parties' interests to have a dispute resolution process which supports their long term relationship. Generally, a dispute resolution provision in a PPP Contract should also include a clause imposing a time limited obligation to attempt to resolve a dispute informally (amicably) in the first instance. There are various alternative dispute resolution options which are discussed further below. See Sections 8.2.4 and 8.2.5.

The relative merits of arbitration against litigation before a particular court or courts will need to be assessed carefully for each project. If the Parties intend to instead choose an offshore jurisdiction clause, the drafting of such a clause is generally more straightforward than the drafting of an arbitration clause, which tends to be more bespoke. In all cases, the selection of a forum must be clear and unambiguous.

### 8.2.3 Key steps if selecting arbitration

**STEP 1: Choosing arbitration and selecting the rules of established independent arbitration institutions**

If the Parties decide to select arbitration as the dispute resolution mechanism for the PPP Contract, it is recommended that institutional (administered) arbitration is chosen. While there is a form of *ad hoc* (non-administered) arbitration, this is not the recommended approach for the reasons highlighted below.

- (1) **Institutional Arbitration.** Instead of drafting an overly long arbitration clause containing bespoke procedural rules, it is preferable for the Parties to incorporate the procedural rules of an established independent arbitration institution. For consistency, all dispute resolution processes under the PPP Contract and the related Project Agreements should apply the same institution's rules. The PPP Contract drafting will therefore vary to some extent according to the institutional rules selected. Reference to the rules of the arbitral institution usually incorporates the assistance of an institution, which may act as an appointing authority (if required) during the constitution of the tribunal, deal with the payment of arbitrators' fees during the proceedings and make arrangements for the respective hearings and issuance of the award.

**Commented [A17]:** Even if the contract adopts particular institutional rules, the parties can supplement that choice with options related to certain procedural considerations. These include:

- **Judicial economy**
  - The parties could provide for bifurcation of the proceedings if one has a valid jurisdictional objection; and
  - The parties could provide a fast-track procedure to dispose of frivolous claims and avoid the time and expense of litigating such claims;
- **Transparency & confidentiality**
  - The parties should consider incorporating the provisions of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, either directly or by reference, into their contract. This treaty represents the current best thinking regarding transparency in disputes regarding important public policy issues.
  - There should be a provision for redaction of confidential information in otherwise-public documents
- **Arbitrator conflicts of interest**
  - Conflicts of interest may arise from an arbitrator's representation of a party in similar disputes regarding similar issues, their previously expressed views on issues germane to the arbitration, etc. A dispute clause could provide criteria for resolving claims of conflicts of interest.
- **Document production**
  - Procedures for requesting documents
  - Law applicable to claims of privilege
- **Allocation of costs and fees**
- **The power of the tribunal to order relief**
  - Parties may consider specifying the type of relief that an arbitral tribunal is empowered to award. For example, if there is a concern that the governing law of the contract could empower a tribunal to order the repeal of a law or regulation, it might be advisable to specify that the arbitral tribunal lacks that power

A variety of institutional rules and of institutions are available for commercial arbitration. The rules of the ICC ("ICC Rules") are frequently used<sup>58</sup>. Other common options include the London Court of International Arbitration ("LCIA") rules, the Hong Kong International Arbitration Centre rules or the Singapore International Arbitration Centre rules. *See Section 8.3, Sample Drafting 8, Clause (12), Option Two. See Section 8.3, Sample Drafting 8, Clause (12), Option 2.*

In addition, there is a dispute settlement mechanism specifically designed for disputes between foreign private investors and States (or their agencies or subdivisions) created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). ICSID arbitration is available when the home State of the Private Partner and the host State of the project differ in nationality, and both States are party to the ICSID Convention (currently 153 States). As with the incorporation of any other institutional arbitration clause, both the Contracting Authority (the host State or its agency or subdivision) and the Private Partner may resort to ICSID arbitration for breach of the obligations set forth in the PPP Contract.

While recourse to ICSID arbitration provides some comfort to the Parties as to the enforceability of awards, it might not always be an option for a PPP Contract. This is because the ICSID Convention establishes essential jurisdictional conditions for access to ICSID arbitration and the Parties would need to include a fall back clause in the PPP Contract in case a dispute is determined not to meet these requirements. This may render the drafting of the dispute resolution provision more complex. ICSID arbitration may also be viewed as more slow-moving than standard commercial arbitration. Nevertheless, Contracting Authorities should be aware of the possibility of claims under this regime.

- (2) *Ad Hoc arbitration.* If the Parties incorporate an arbitration clause in their PPP Contract without referring to the arbitration rules of a particular arbitral institution, and without expressly agreeing to have the assistance of an arbitral institution to administer the proceedings, they will be agreeing to a non-administered or *ad hoc* arbitration. In those cases, the Parties would need to include a detailed procedure for the conduct of the proceedings, including, for example, the process for the selection of the tribunal deciding the case, its powers and the issuance of awards (*see Step 3*). This is not advisable as the Parties may omit to agree on crucial elements of the arbitral process which can result in procedural stalemate once the dispute arises.

The Parties may also choose a particular set of arbitration rules that do not necessarily include the selection of an arbitral institution that will assist in the administration of the case. This is the case, for example, if the PPP Contract incorporates a reference to arbitration under the rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"). The UNCITRAL Rules are often used in commercial disputes involving a public and a private entity, and are also commonly incorporated in international investment agreements (*see Schedule 2*). There is no institution specialized in administering UNCITRAL arbitrations, but they constitute an intermediate step to pure *ad hoc* arbitration, in the sense that they already include provisions governing each step of the arbitration process. Many institutions, such as the Permanent

**Commented [A18]:** The disadvantages of *ad hoc* arbitration are that national courts are more likely to intervene where there is no arbitral institution to administer the proceedings and, in the absence of an administrators, the Parties may have to apply to the Courts to resolve problems on which they cannot agree.

<sup>58</sup> For illustration purposes, Section 8.3, Sample Drafting 8, Clause (12), Option 2 onwards is based on a choice of the ICC Rules. This drafting is for guidance only

Court of Arbitration, the LCIA, the International Chamber of Commerce ("ICC"), the International Centre for Settlement of Investment Disputes ("ICSID"), the American Arbitration Association and the Stockholm Chamber of Commerce are available to provide institutional support for proceedings under the UNCITRAL Rules, should the Parties agree to such institutional support. It is advisable for such agreement to be

explicit in the arbitration clause in the PPP Contract, although the Parties can in theory agree this once a dispute has arisen.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

The selection of an established arbitral institution and of institutional procedural rules is of particular importance in many developing countries, where PPP Projects are unlikely to be bankable if recourse to acceptable arbitration arrangements (or courts) is not agreed. Specialist advice should be taken by Contracting Authorities.

#### STEP 2: Choosing the seat of arbitration<sup>59</sup>

If the Parties select arbitration<sup>60</sup> (as opposed to court litigation) as their dispute resolution mechanism, it is absolutely critical to specify a seat of arbitration. The importance of the seat (typically a major city) is that it places the arbitration within the legal framework of a particular jurisdiction (regardless of where any hearings in the arbitration are physically held). *See Section 8.3, Sample Drafting 8, Clause (15).*

There are three key reasons why the Parties should carefully consider the choice of seat:

- (1) The national courts at the seat have “supervisory” jurisdiction over the arbitration. This can be significant because those courts can influence the arbitral process by, for example, staying concurrent court proceedings or granting injunctive relief to protect assets subject to the arbitration. It is also the courts of the seat that will generally be competent to hear applications to set aside an arbitral award. It is important to choose a seat of arbitration in a jurisdiction where the local courts are supportive of the arbitration process and are not excessively interventionist.
- (2) Most national arbitration laws incorporated through selection of the seat include mandatory procedural provisions (e.g. regarding rights of appeal or the power of the courts to remove arbitrators) which will apply regardless of any contrary stipulation in the parties’ arbitration agreement. A careful assessment of such laws is therefore important.
- (3) An arbitral award is often only as good as the ability to enforce it effectively. Companies operating internationally typically hold assets in many jurisdictions. Before concluding an agreement providing for arbitration, it should be verified that the chosen seat of arbitration, as well as those countries in which enforcement of any award may be sought (which may or may not be the State of the Contracting Authority), are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Usually referred to as the “New York Convention”, there are now 156 State parties to this Convention. An arbitral award rendered by a

<sup>59</sup> Choosing the seat may be the Parties’ first step in forum selection but this may coincide with the selection of institutional rules (see Step 1).

<sup>60</sup> This does not apply to ICSID arbitration which is de-localized.

tribunal “seated” in a New York Convention State should be enforceable in all other New York Convention states without a review of the merits, although it should be noted that there are limited grounds on which a court may refuse enforcement and local advice should always be sought as to the practices of the courts where enforcement is likely to be sought.

#### CIVIL AND COMMON LAW DIFFERENCES

The courts in civil and common law jurisdictions often have different approaches to dispute resolution. However, where resolution of disputes is by arbitration then, generally speaking, it does not matter whether the arbitration has its seat in a civil law or a common law jurisdiction (nor does it matter whether the parties are from civil or common law jurisdictions).

As highlighted above, the key selection factors are whether a jurisdiction is considered to be “arbitration friendly” (the national arbitration law and local courts are supportive of the arbitration process and will not interfere with arbitral proceedings unnecessarily) and whether it is a signatory to the New York Convention.

STEP 3: Determining the method of constituting the arbitral tribunal and selecting the arbitrators – number, qualifications and nationality

The Parties should agree whether the arbitration clause will specify the number of arbitrators as well as the method by which such arbitrators will be appointed. In this context, it should be noted that most institutional arbitration rules will contain default provisions in the event the Parties fail to agree on the number of arbitrators and/or method of constituting the tribunal, or fail to appoint the agreed number of arbitrators.

Typically, for large value contracts parties would choose to have three arbitrators, even though this will make the resolution of any dispute more costly as the parties must pay the fees of three arbitrators. This is because a three arbitrator tribunal is less likely to reach a maverick decision than a sole arbitrator and so reduces unpredictability. [See Section 8.3, Sample Drafting 8, Clause \(13\).](#)

Some arbitration clauses may specify particular expertise or other requirements as to qualifications arbitrators should have, for example that an arbitrator should be a lawyer experienced in a particular type of transaction. It may be helpful to specify that all or the majority of arbitrators are legally qualified in the governing law. Parties should, however, avoid being too prescriptive, as this may narrow the pool of potential arbitrators available.

Sometimes Parties wish to specify that none of the arbitrators can be of the same nationality as any of the parties to the arbitration. This may be relevant to PPP Contracts as the Private Partner may have concerns that an arbitrator who is a national of the Contracting State may not be impartial. Certain institutional rules include provisions relating to the nationality of arbitrators, and these should be checked.

STEP 4: Consolidation and joinder – related contracts/related parties

The PPP Contract will be part of a wider “network of agreements” between various parties. The Private Partner may, for example, enter into a PPP Contract with the Contracting Authority regarding the underlying facility, but all cash flows may be

governed by a separate agreement between an off-taker and the Private Partner<sup>61</sup>. When this is the case, the Private Partner may require that all the related Project Agreements contain a similar dispute resolution provision, together with consolidation and joinder language whereby all parties to the related contracts agree to submit disputes to the same arbitral tribunal, under the same rules. For greater efficiency, it is recommended that all agreements contain similar dispute resolution clauses under which there is pre-agreement to consolidation of related disputes and the joinder of related parties to any arbitration<sup>62</sup>. However, the same principle does not always apply with regard to many agreements concluded with sub-contractors, as disputes arising under those contracts can be the sole responsibility of the Private Partner and it may be appropriate to keep the dispute processes separate. This will avoid the Contracting Authority getting dragged into expensive and time consuming peripheral disputes. On the other hand, there may be areas of overlap, e.g. where the counterparty to a Project Agreement is claiming on the basis of a provision that has been passed down from the PPP Contract, participation in a consolidated dispute resolution process may be desirable and so limited joinder arrangements may be appropriate. Any assessment of the need for joinder provisions is likely to be fact dependent. [See Section 8.3, Sample Drafting 8, Clause \(20\)](#).

Generally, consolidation and joinder is less of a concern with jurisdiction clauses where courts often will order consolidation of proceedings before it (and the Parties often can otherwise apply to the relevant courts for removal/transfer from one jurisdiction to another) or the joinder of parties under local procedural rules or inherent jurisdiction.

#### *8.2.4 Informal (alternative) dispute resolution – negotiation, mediation and alternatives*

Given the long term nature of many PPP Contracts and the desirability of maintaining an ongoing relationship between the parties, the inclusion of an informal (alternative) dispute resolution mechanism in the dispute resolution clause is often helpful. There are many forms of alternative dispute resolution (“ADR”), ranging from informal meetings of senior executives ([see Section 8.3, Sample Drafting 8, Clause \(4\)](#)) to mediation, the use of a panel of senior representatives and the appointment of an external Disputes Board ([see Section 8.3, Sample Drafting 8, Schedule 1, Options 1, 2 and 3](#)). Some of these are discussed further below.

The inclusion of an ADR clause can encourage the informal resolution of disputes, at a relatively early stage, before significant amounts of time and costs have been spent in any formal arbitration or court proceedings and, importantly, before relationships have deteriorated.

The dispute resolution clause should specify if the recourse to ADR is mandatory and a condition precedent to commencing arbitration (or court proceedings) and whether the result of the ADR is binding or non-binding. If ADR is mandatory, the Parties may also wish to provide that they are free to seek urgent (including injunctive) relief from the arbitral tribunal or court if needed prior to or during the ADR process. Parties must always ensure, however, that there is a fall back disputes clause (whether arbitration or litigation) if ADR fails to resolve the dispute.

**8.2.4.1 Mediation** – It may be desirable to add a requirement for the Parties to attempt to settle their disputes through mediation. Mediation is a settlement process involving an external “mediator” who acts as a neutral facilitator to help parties try to arrive at a

<sup>61</sup> Other examples include government support agreements and direct agreements.

<sup>62</sup> The ICC Rules provide some assistance in this regard in any event: see Articles 7-10.

negotiated settlement of their dispute. The use of external mediators is increasingly seen in commercial disputes in the United States, in the UK and parts of continental Europe, in Turkey, in parts of the Middle East and in some parts of South East Asia. Mediation can be a useful means of getting parties together and helping to forge a commercially acceptable settlement, before legal costs escalate – this could prove particularly worthwhile in large transactions such as PPP Projects. On the downside, unproductive mediation may simply cause delay in the final resolution of the dispute and increase costs (if the prospect of a negotiated settlement is very low). There have also been concerns about the impartiality of mediators and confidentiality breaches in the process. Parties are always free to agree to resolve a dispute by mediation even if there is no contractual clause requiring them to do so. See [Section 8.3, Sample Drafting 8, Schedule 1, Option 1](#).

**8.2.4.2 Disputes Board** – A Disputes Board is a more formal mechanism usually involving the appointment of a panel of external individuals at the commencement of a contract to whom disputes can be referred throughout the life of the contract. This process is common in construction contracts and usually requires the parties to pay for the retention of external experts. A key consideration is whether its decision will be final and binding;<sup>63</sup> the dispute may have to be re-tried before an arbitral tribunal (or the courts) if the parties do not give effect to the board's decision. Disputes Boards lack the consensual approach of mediation (or a panel of the Parties' senior representatives) and there continues to be a debate about the efficacy and costs of this mechanism. If the decision of the Disputes Board is binding, there is little difference as compared with the arbitration process (therefore the process may be redundant given the inclusion of the arbitration clause). If the recommendation is not binding there may be little difference with the obligation to try to reach amicable settlement – the involvement of and decision by experts may, however, be helpful in steering the Parties towards a resolution. See [Section 8.3, Sample Drafting 8, Schedule 1, Option 3](#).

**Commented [A19]:** There should be a section regarding the possibility of conciliation, which is a more formal type of ADR that results in a non-binding recommendation.

### 8.2.5 Independent experts for technical disputes

As noted in [Section 8.2.1\(3\)](#), PPP Contracts typically include a clause providing that "technical disputes" be referred to an independent expert or panel of experts for determination. For example, valuation issues or accountancy issues are regularly referred to expert determination because Parties may believe it is advantageous for the individual determining the dispute to have detailed knowledge of a particular market/area.

Parties will also need to think carefully about the definition of "technical disputes" so as to avoid, as far as possible, a dispute about scope. One option is to list particular clauses of the PPP Contract and specify that disputes under such clauses will be considered "technical disputes" unless otherwise agreed. To encourage efficiency, it is recommended that the clause specifies that the determination of the expert should be final and contractually binding, except in the case of manifest error or fraud. This approach should, however, be confirmed by local counsel, as certain jurisdictions may not give effect to an expert determination clause, even if this is specifically agreed in the PPP Contract.<sup>64</sup>

<sup>63</sup> For example, the ICC Dispute Board Rules give parties a choice between three different types of Dispute Boards: (a) Dispute Review Boards (which issue non-binding recommendations); (b) Dispute Adjudication Boards (which issue contractually binding decisions); and (c) Combined Dispute Boards (which issue non-binding recommendations but may issue binding decisions if the Parties so request). [Section 8.3, Sample Drafting 8, Schedule 1, Option 3](#) illustrates type (a).

<sup>64</sup> For example, it is understood that, whilst in theory there is scope for courts in the PRC to enforce an expert determination clause on the basis of general principles set out in PRC contract law, in practice there is a risk that the court may consider such a clause as contrary to public policy. In Thailand there is a risk that expert determination clauses may also be ineffective.



An expert determination is generally not “enforceable” in the same way as a court judgment or arbitral award. This means if the expert determination is not complied with voluntarily the Parties will need to resort to arbitration (or court litigation) in any event to resolve the dispute and obtain an enforceable award or judgment. For example, a Party may have to bring a claim for breach of the PPP Contract in respect of a failure to comply with the expert’s determination. Accordingly, even if Parties choose to include an expert determination clause they must also include an arbitration clause (or a jurisdiction clause) as a fall back to cover a situation where there has been a failure to comply with a determination. It is also important that matters outside the scope of the expert determination clause, as well as situations where something has gone wrong with the expert process itself, can be referred to arbitration (or the courts). *See Section 8.3, Sample Drafting 8, Clauses (6)–(11).*

### 8.2.6 *Waiver of immunities*

As highlighted in *Section 8.2.1*, one of the key negotiation points for a Contracting Authority to consider is whether and to what extent the dispute resolution clause in a PPP Contract should include a waiver of any privileges and sovereign immunities which the Contracting Authority enjoys before local and foreign courts (such as immunity from any suits by the Private Partner).<sup>65</sup> The Contracting Authority should seek advice on the nature and extent of any immunities early in the process. Generally speaking, a PPP Contract is expected to be fully enforceable and Private Partners and Lenders are therefore likely to have a policy of seeking a “clean” and wide-ranging waiver of sovereign immunity clause in commercial contracts with sovereigns or quasi sovereigns. The Contracting Authority will then need to assess whether it is bankable to resist a waiver entirely or whether negotiating limitations is an acceptable compromise.

Immunity is a complex legal area but, in short, a wide ranging waiver would usually cover both a waiver from any court proceedings connected to the resolution of the dispute (if an arbitration clause is used this relates to any court orders needed to assist the arbitration) and recognition of any award/judgment. It would also include an agreement by the sovereign entity to execution/enforcement against its assets (or certain of them) and an agreement to certain forms of relief e.g. asset freezes. The precise ambit of any waiver in a PPP Contract is likely to depend on relevant laws and the Parties’ bargaining power in the relevant real life contractual negotiations. An illustration of the scope of a wide ranging waiver is set out in *Section 8.3, Sample Drafting 8, Clause (22)*.

The Parties should also make sure they understand whether or not it is legally possible for the Contracting Authority to waive its privileges and immunities as a matter of local law (whether under constitutional arrangements, public policy or otherwise). In this regard it should be noted that under some laws an agreement to arbitrate is deemed to be a waiver of immunity from suit and a sovereign is not immune from suit where a dispute relates to both commercial activities and is not a sovereign act. Ultimately, a Contracting Authority may find it has more scope to resist or negotiate limits to any waiver in respect of recognition or enforcement of judgments or awards.

**Commented [A20]:** A Government may desire to limit its waiver to the subject matter of the arbitration, including the validity and interpretation of the arbitration clause, the arbitral procedure and the setting aside of the award. Waiving immunity from execution may be difficult for a Government to address. Under most legal systems, certain assets belonging to the State such as consular possessions or foreign embassies should not be available for satisfaction of the execution of an arbitral award

<sup>65</sup> This does not apply to ICSID arbitration as a State or Contracting Authority that consents in writing to ICSID arbitration is already waiving its immunity from being sued by the Private Partner and must therefore recognize an ICSID award and enforce the pecuniary obligations under it as if it were a final judgment of a local court. However, the same does not apply to “immunity from execution”. The concrete measures taken to execute the pecuniary obligations of an ICSID award will be governed by law of the State in which execution is sought, which includes that State’s rules on sovereign immunity.

## 8.3 SAMPLE DRAFTING 8

### Governing Law

- (1) This PPP Contract and any non-contractual obligations arising out of or in connection with it, are governed by and shall be construed in accordance with the laws of [country].

### Dispute Resolution

- (2) If any dispute arises out of or in connection with this PPP Contract including any dispute concerning any non-contractual obligations arising out of or in connection with it (a "Dispute") it shall be resolved in accordance with this Clause [ ].
- (3) Either Party may by notice in writing to the other Party, at the address for sending of notices under this PPP Contract and in a manner provided by Clause [ ], give notice that a Dispute has arisen ("Notice"). The Notice shall set out brief details of the nature of the Dispute.

### Negotiation

- (4) The Parties shall attempt to settle any Dispute referred to in a Notice by good faith negotiation. Each party shall be represented in any negotiation by that party's [CEO/a person with authority to settle the Dispute]. Such negotiation shall take place within fifteen (15) days of the delivery of the Notice. Any negotiations shall be confidential and shall be conducted without prejudice to the rights of the parties in any future proceedings.
- (5) Nothing in [Clause (4)] will prejudice the right of a Party to seek urgent injunctive or declaratory relief or other urgent relief in respect of a Dispute.

### Expert Determination

- (6) Any Dispute arising out of or in connection with Clauses [insert reference to every clause where a Dispute is considered a Technical Dispute] (a "Technical Dispute") which is not resolved amicably in accordance with Clause [reference], shall be resolved in accordance with Clauses [ ]. In any other case, the Dispute shall be resolved in accordance with Clauses [reference to Jurisdiction or International Arbitration clause as appropriate].
- (7) A Technical Dispute shall be referred, at the request of either party, to an independent expert for determination. The Parties shall agree on the appointment of the expert and shall agree with the expert the terms of his/her appointment. If the Parties are unable to agree on the identity of the expert, or if the person proposed is unable or unwilling to act, then, within [seven] days of either Party serving details of a suggested expert

Careful consideration should be given to the governing law selected in any PPP Contract, as this determines the legal system whereby the rights and obligations under the PPP Contract will be determined. A well-established and predictable system of law should be selected. Split governing law clauses should be avoided as they can result in complications. Investors may be concerned if the Contracting Authority's national law is selected because they may fear that the local law may change in a way that adversely affects their interests.

The clause could alternatively provide for a two stage negotiation process, with senior representatives only being required to be involved at the second stage.

An alternative approach is to list individual experts on an agreed list and select from that list. However, the selection of individuals at the transaction stage may be a time consuming distraction at a stage when the Parties are trying to complete the deal. Further, when a dispute arises there is a risk the experts identified may not be available or may be conflicted, especially in a long term PPP Contract.

on the other or the proposed expert declining to act, either Party shall then be entitled to request that an expert be appointed by [the ICC] on the application of a Party. All costs of and associated with the request for the appointment of an expert by the [ICC] shall be borne equally between the Parties.

- (8) The expert appointed may be an individual, partnership, association or body corporate and shall be generally recognized as an expert in [*specify field*] and shall have [X] years of experience in that field.
- (8) The expert shall act on the following basis:
  - (a) [on his/her appointment, the expert shall confirm his/her neutrality, independence and the absence of conflicts in determining the Technical Dispute] / [no person shall be appointed as an expert who at the time of appointment (or at any time before he/she gives his/her determination under such appointment, is a director, officeholder, employee or [ ] of [ ]];
  - (b) the expert shall act as an expert and not as an arbitrator;
  - (c) the expert's determination shall (in the absence of manifest error) be final and binding on the Parties and not subject to appeal;
  - (d) the expert shall decide the procedure to be followed in the determination in accordance with this PPP Contract [and in consultation with the Parties] [and shall be requested to make his/her determination in writing, with reasons, within [30] days after his/her appointment or as soon as practicable thereafter];
  - (e) any amount payable by one Party to another as a result of the expert's determination shall be due and payable within [seven] days of the expert's determination being notified to the Parties or as specified within the determination;
  - (f) any action required by the expert determination shall be implemented within [14] days following the expert determination being notified to the Parties or as specified within the determination;
  - (g) the expert may, if he/she thinks fit, award interest at the rate of [ ] on any amount which is determined to be payable (excluding costs) by one Party to the other from the date of [the Notice] referred to in Clause [ ];
  - (h) the costs of the determination, including the fees and expenses of the expert (but excluding the Parties' own costs which shall be borne by the Party incurring those costs), shall be borne equally by the Parties;
  - (i) the expert determination and all matters connected with it shall be held in complete confidence by each of the Parties and shall not be disclosed to any other person except:
    - (i) to the auditors and to the legal advisors of that Party to whom the confidentiality obligations set out in this agreement shall extend; or
    - (ii) where that Party is under a legal or regulatory obligation to make such a disclosure, but limited to the extent of that legal obligation; or

It is essential to include an appropriate appointing body in case the Parties are unable to agree on an expert. If there is no appointing authority, the clause may fail altogether. The ICC offers three services whereby it will (1) put forward the name(s) of one or more experts or neutrals upon a request from one or more parties, a court or an arbitral tribunal, (2) make a binding appointment if the parties request this, or (3) supervise the entire expert proceedings if necessary. Alternatively, a number of professional bodies are willing to assist in selecting appropriate experts in their fields, so a relevant professional body could be named here.

Parties should consider whether they want to provide that the expert may not be connected with any particular companies or organisations due to the possibility of conflicts arising.

(iii) to the extent that it is already in the public domain (other than as a result of a Party's breach of this agreement); or

(iv) with the prior written consent of the other Party to this agreement [such consent not to be unreasonably withheld].

(10) The Parties agree to take all reasonable steps to make their employees and agents aware of the terms of [Clause (9)(i)] and to instruct them to observe those terms.

(11) If the Parties fail to agree:

(i) whether or not a Dispute is a Technical Dispute within fifteen (15) days of service of the Notice;

(ii) whether the Expert's Determination was in manifest error or fraudulent; or

(iii) whether a Party has failed to implement fully the Expert's Determination,

then the matter shall be resolved in accordance with Clauses [reference to Jurisdiction or International Arbitration clause as appropriate].

*Option 1: Jurisdiction [delete if choosing arbitration – Option 2]*

(12) The courts of [ ] shall have exclusive jurisdiction to determine any Dispute and any matter provided by Clause [(11)]. The Parties irrevocably submit to the courts of [as above] and agree not to argue they are an inconvenient forum.

*Option 2: International Arbitration [delete if choosing court jurisdiction – Option 1]*

(12) Any matter provided by Clause [(11)] and any Dispute which is not a Technical Dispute and has not been resolved amicably between the Parties in accordance with Clause [(4)] shall be referred to and finally resolved by arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") which are deemed incorporated by reference into this PPP Contract.<sup>66</sup>

(13) The number of arbitrators shall be three (3) appointed in accordance with the ICC Arbitration Rules (the "Arbitral Tribunal").

(14) The arbitrators shall be fluent in [English and other relevant language]. The language of the proceedings shall be [English] and all documents submitted in such proceedings shall be in [English or accompanied by a certified English translation].

Broadly, this means that only the chosen court is competent to take jurisdiction over disputes, although this is usually subject to certain standard exceptions. It may be preferable to have certainty as to which courts will have jurisdiction by identifying the chosen court in this way. Other options exist and specific advice should be sought.

Where there is a US nexus, insert a "jury waiver" provision. Further, where proceedings need to be 'served' to be formally initiated then a process agent provision may be added.

Consider if this is potentially too restrictive.

<sup>66</sup> For illustration purposes, Option 2 drafting is based on a choice of the ICC Rules. It will need review/adaptation when using an alternative institution's rules.

(15) The seat of arbitration shall be *[insert choice]*. [This agreement to arbitrate is governed by and shall be construed in accordance with the laws of *[country]*.]

(16) The Parties undertake to keep confidential all awards in any arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another Party in the proceedings not otherwise in the public domain - save (i) with the permission of the Arbitral Tribunal or (ii) to the extent that disclosure may be required of a Party by legal duty or regulatory obligation or to protect or pursue a legal right, or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

(17) The Arbitral Tribunal shall issue a reasoned award in writing and shall endeavour to do so within *[sixty (60) calendar]* days from the date of the close of the arbitration hearing. The award of the Arbitral Tribunal shall be final and binding upon the Parties from the date it is made.

(18) Judgment on the award of the Arbitral Tribunal may be entered and enforced by any court of competent jurisdiction.

(19) Unless otherwise determined by the Arbitral Tribunal, the Arbitrators' fees and associated institutional costs shall be split equally between the Parties.

### Consolidation

(20) In order to facilitate the comprehensive resolution of related disputes, in the event that more than one arbitration is commenced under this PPP Contract and under *[add related agreements]*, (the "Related Agreements"), the Private Partner and the Contracting Authority consent to the consolidation of arbitrations as follows:

- (a) For the purposes of the Rules, the arbitration agreement set out in this PPP Contract and the arbitration agreement contained in each Related Agreement shall together be deemed to be an arbitration agreement that binds each Party to this PPP Contract and each party to each Related Agreement.
- (b) Any party to this PPP Contract or any Related Agreement may, in accordance with the ICC Arbitration Rules, be joined to any arbitration commenced under this PPP Contract or any Related Agreement.
- (c) In accordance with the ICC Arbitration Rules, Disputes may be resolved in a single arbitration together with Disputes (as defined in any Related Agreement) arising out of any such Related Agreement.
- (d) Pursuant to Article 10(a) of the ICC Arbitration Rules, the Parties agree to the consolidation of any two or more arbitrations commenced pursuant to this PPP Contract and/or the arbitration agreement contained in any Related Agreement into a single arbitration, as provided for in the ICC Arbitration Rules.
- (e) Each Party waives any objection, on the basis that a Dispute has been resolved in a manner contemplated in this Clause [ ], to the validity and/or enforcement of any arbitral award made by an arbitral tribunal following the Dispute being resolved in that manner.

As noted, the seat of arbitration is key and requires careful consideration. See Section 8.2.3. It should be noted that arbitral hearings can physically take place in another location than the seat of arbitration. If the place of hearings (the venue) is important for the Parties, it should be agreed upon at an early stage of negotiations.

The parties may wish to add a provision specifying the law applicable to the arbitration agreement. To keep matters simple it is often helpful to specify the same law as for the seat.

See discussion under Section 8.2.3, Step 4: Consolidation and Joinder - related contracts/related parties.

### Continuing Obligations

(21) Performance of this PPP Contract shall continue during arbitration proceedings or any other Dispute resolution mechanism pursuant to this Clause [ ].

There may be circumstances in which a provision along these lines would not be appropriate. (e.g. if the PPP Project is not time critical and/or the Dispute is fundamental)

### Waiver of Immunities

(22) [To the fullest extent permitted by law the Contracting Authority irrevocably and unconditionally]:

This clause is a wide ranging waiver which a Contracting Authority is likely to want to resist or limit, in particular subclause (b).

- (a) submits to the courts of any jurisdiction in relation to the recognition of any judgment or order of the courts of *[jurisdiction of arbitration seat]* in support of any arbitration in relation to any Dispute and in relation to the recognition of any arbitral award and waives and agrees not to claim any sovereign or other immunity from the jurisdiction of any court in relation to the recognition of any such judgment or court order or arbitral award and agrees to ensure that no such claim is made on its behalf.
- (b) [consents to the enforcement of any order or judgment in support of arbitration or any award made or given in connection with any Dispute and the giving of any relief in the courts of any other jurisdiction whether before or after final arbitral award including, without limitation: (i) relief by way of interim or final injunction or order for specific performance or recovery of any property; (ii) attachment of its assets; and (iii) enforcement or execution against any property, revenues or other assets whatsoever (irrespective of their use or intended use) and waives and agrees not to claim any sovereign or other immunity from the courts of any other jurisdiction in relation to such enforcement and the giving of such relief (including to the extent that such immunity may be attributed to it), and agrees to ensure that no such claim is made on its behalf].

Contracting Authorities may choose to concede immunity from suit waiver language because as a matter of applicable law such immunity is deemed to be waived, for example because it is a commercial transaction. Specialist legal advice should be sought.

## SCHEDULE 1 – FURTHER DRAFTING OPTIONS

In addition to the informal negotiation provision included in [Section 8.3, Sample Drafting 8, Clause \(4\)](#), the Parties may decide to include some or all of the informal dispute resolution provisions below. When considering these further options, reference should be made to [Section 8.2.4](#). For illustration purposes, the drafting is based on a choice of the ICC Rules. This drafting will need review/adaptation when using an alternative institution's rules.

Option 1 may be useful to encourage informal resolution at an early stage in the dispute.

### Option 1 – Mediation

(1) If the Parties are unable to negotiate the settlement of a Dispute referred to in a Notice within [15] Business Days of the date of the Notice (or such further period as is agreed in writing between the Parties before the expiry of that [15] Business Day period), [either/any] Party may refer the Dispute to mediation by notice in writing to the other [Party/Parties] [at the address given for the sending of notices under this agreement at Clause [\[reference\]](#) (Notices), and in a manner provided for in that Clause] (a "Mediation Notice"). If a Party refers a Dispute to mediation in accordance with this Clause [\[Mediation\]](#) [both/all] Parties to the Dispute shall be obliged to follow the procedure below.

(2) The mediation shall be conducted by a single mediator who shall be appointed by agreement in writing between the Parties. If the Parties are unable to agree on the identity of a mediator within [\[five \(5\)\]](#) Business Days of the date of the [\[Mediation Notice\]](#), or if the mediator agreed by the Parties is or becomes unable or unwilling to act, the mediator shall be appointed by [\[the ICC\]](#) on the application of [\[either/ any\]](#) Party.

(3) The mediation shall be conducted in [\[place\]](#) and in the English language under the [\[ICC Mediation Rules\]](#). Each Party shall be represented at the mediation by an individual with authority to settle the Dispute.

(4) Save for the purposes of implementing and/or enforcing a written legally binding settlement agreement or as otherwise required by law, the mediation shall be conducted without prejudice to the rights of the Parties in any future proceedings.

(5) The costs of the mediation, including the fees and expenses of the mediator (but excluding each Party's own costs, which shall be borne by the Party incurring those costs) shall be borne equally by the Parties, unless otherwise agreed in writing.

Option 2 is often seen in construction disputes, but can add costs and delay final resolution.

### Option 2 – Escalation to a panel of senior representatives

(1) As soon as is practicable after the effective date of this agreement, the Contracting Authority and the Private Partner will establish a panel of senior representatives of the Parties. The Senior Panel will meet and attempt to resolve informally any Disputes referred to the Senior Panel by notice for resolution ("Senior Panel Notice").

(2) The Senior Panel will comprise [\[four members\]](#), [\[two\]](#) appointed by each of the Contracting Authority and the Private Partner. Each Party is entitled to terminate the appointment of a representative designated by it to the Senior Panel and to appoint a replacement.

- (3) The representatives on the Senior Panel will be duly authorised to make decisions on behalf of, and to bind contractually, the Party appointing such representative in relation to the Dispute referred for determination.
- (4) [At any meeting the Senior Panel may, by unanimous resolution, elect to appoint a mediator to assist them in resolving a Dispute on such terms as they may then agree].
- (5) The Senior Panel must meet and attempt in good faith to resolve any Dispute referred to the Panel by negotiations within *[fifteen (15) business]* days of the date on which the Senior Panel Notice was delivered. If the Senior Panel fails to meet within this timeframe, and no extension is agreed by Parties then either Party may submit the Dispute to arbitration or in the case of a Technical Dispute, an expert in accordance with Clause *[Expert Determination]*.
- (6) Senior Panel Notices convening meetings of the Senior Panel will specify the nature of the Dispute.
- (7) Meetings of the Senior Panel will be held in *[insert name of City or address]* unless otherwise agreed by the Parties.
- (8) The quorum of any Senior Panel meeting will be *[at least one representative of each of the Contracting Authority and the Private Partner]*. If a quorum is not present within 30 minutes after the time appointed for commencement of the meeting, that meeting will be adjourned to a time, day and place agreed upon by the representatives of both Parties. In the event there is no agreement concerning the adjourned meeting or there is no quorum at the adjourned meeting, either Party may submit the Dispute to arbitration in accordance with Clause *[Arbitration]* or in the case of a Technical Dispute, an expert in accordance with Clause *[Expert Determination]*.
- (9) The Senior Panel will attempt to resolve the Dispute within *[ten (10) business]* days, following the date on which the Senior Panel initially convenes pursuant to Clause (5), above. If the Senior Panel is unable to resolve the Dispute within that period, either Party may immediately submit the Dispute to arbitration or expert determination as required pursuant to Clause *[Expert Determination]* or Clause *[Arbitration]*.
- (10) At any meeting of the Senior Panel, voting on any decision relating to the Dispute will be by unanimous resolution, with each representative having one vote. Duly passed resolutions of the Senior Panel will be final and contractually binding on the Contracting Authority and the Private Partner provided that they are in writing and signed by all members of the Senior Panel.
- (11) If the Dispute is not resolved by amicable settlement between the Parties or through a resolution by the Senior Panel, as evidenced by the signing of its written terms, within *[thirty (30) calendar]* days of delivery of the Senior Panel Notice provided in Clause (1) above, any Party may submit the Dispute to arbitration in accordance with Clause *[Arbitration]* or in the case of a Technical Dispute to an expert in accordance with Clause *[Expert Determination]*.



### Option 3 – Dispute Review Board Clause

(1) Failing an amicable settlement on a Dispute that is not a Technical Dispute pursuant to CLAUSE *[insert reference to the amicable settlement clause]* above within [thirty (30) calendar] days of the receipt of the notice provided therein, any such Dispute shall be referred by either Party for resolution by the dispute review board ("Dispute Review Board") in accordance with this Clause [ ].

(2) The Parties hereby agree to establish a Dispute Review Board in accordance with the Dispute Board Rules of the International Chamber of Commerce (the "ICC Dispute Board Rules"), which are incorporated herein by reference.

(3) The Dispute Review Board shall be comprised of three (3) members, each of whom shall be fluent in *[English]* with professional experience in the matters with respect to contractual obligations in projects similar to the PPP Project, appointed in accordance with the ICC Dispute Board Rules.

(4) All Disputes arising out of or in connection with this PPP Contract shall be submitted, in the first instance, to the Dispute Review Board in accordance with the ICC Dispute Board Rules. For any given dispute, the Dispute Review Board shall issue a recommendation in accordance with the ICC Dispute Board Rules.

(5) If any Party fails to comply with a recommendation when required to do so pursuant to the ICC Dispute Board Rules, the other Party may refer the failure itself, without having to refer it to the Dispute Resolution Board, to arbitration in accordance with Clause *[insert reference to the arbitration clause]*. A Party that has failed to comply with a recommendation when required to do so pursuant to the ICC Dispute Board Rules shall not raise any issue as to the merits of the recommendation as a defense to its failure to comply without delay with the recommendation.

(6) If any Party sends a written notice to the other Party and the Dispute Review Board expressing its dissatisfaction with a recommendation, as provided in the ICC Dispute Board Rules, or if the Dispute Review Board does not issue the recommendation within the time limit provided in the ICC Dispute Board Rules, or if the Dispute Review Board is disbanded pursuant to the ICC Dispute Board Rules, the Dispute shall be finally settled under arbitration in accordance with Clause *[insert reference to the arbitration clause]*.

Option 3 is often seen in construction disputes, but can add costs and delay final resolution.

## **SCHEDULE 2 – ASSESSING WHETHER THE PRIVATE PARTNER MIGHT HAVE RECOURSE TO AN INTERNATIONAL INVESTMENT AGREEMENT**

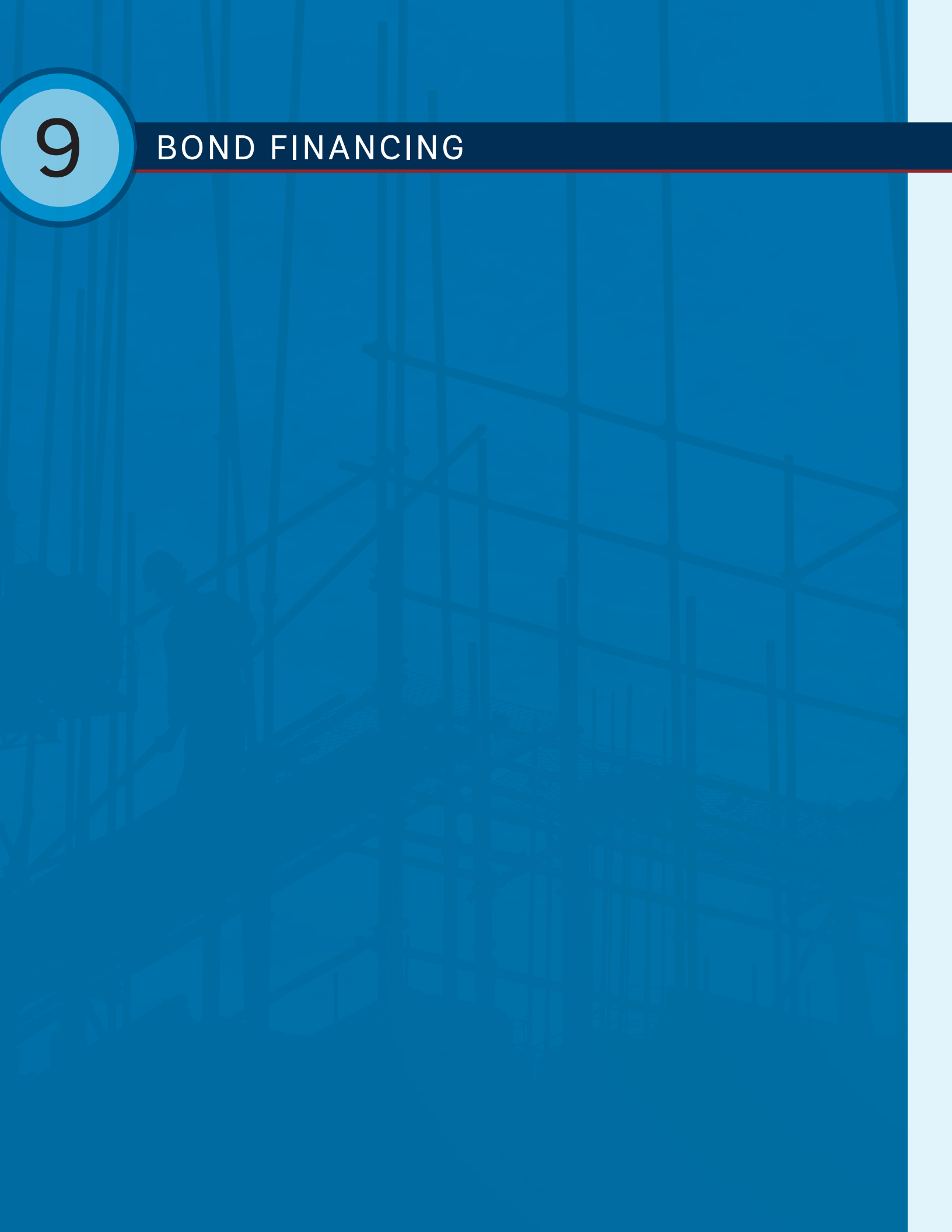
The Parties should consider whether the Private Partner may, in addition to its contractual rights, at some point have recourse to an international investment agreement ("IIA"), which could be either a Bilateral Investment Agreement ("BIT") (of which more than 3,000 have been signed globally), a multilateral investment treaty (such as the Energy Charter Treaty) or the investment chapter in a Free Trade Agreement ("FTA"). These IIAs provide investors with a number of substantive protections against State measures, such as arbitrary and discriminatory treatment, expropriation without adequate and prompt compensation or failure to provide fair and equitable treatment and full protection of security. The majority of IIAs also provide investors with the right to refer investment disputes to binding arbitration against the host State in which they have invested.

If the home States of the Private Partner and the Contracting Authority are both parties to an IIA, the Private Partner might, under certain circumstances, be able to bring claims for breaches of substantive protections set forth in the respective IIA, and which relate to the PPP Contract, under the arbitration mechanism established in the IIA. Very often, the mechanisms envisaged in this respect will be arbitration under the UNCITRAL Rules, ICSID arbitration or the ICSID Additional Facility Rules (an additional set of arbitration rules that apply to the settlement of disputes that do not meet the jurisdictional requirements set forth under the ICSID Convention).

It is important to note that generally the right to bring a claim pursuant to an IIA exists independently of, and may be in addition to, any contractual claims under the PPP Contract.

# 9

## BOND FINANCING



## 9.1 KEY ASPECTS

### 9.1.1 *The concept of Bond Finance*

In the general corporate world, instead of borrowing from a bank, companies may choose to raise private finance by issuing bonds which are purchased by investors. Bonds in this context are debt instruments and may provide more certain, longer-term financing than bank debt. The company which issues the bond pays interest to the bondholders periodically, most commonly at a fixed rate but also potentially at a floating or index linked rate and repays the principal amount either in full on final maturity or in scheduled instalments. As with a bank loan, specific documentation is required for a bond issue and there is an established process to follow.

Bond issues may be public (listed on a stock exchange) and freely tradeable between investors. Alternatively, bonds may be issued by private placement (offered to a very limited number of investors) in which case they may be subject to transfer restrictions. The restrictions will depend on the relationship between the issuer and the investors. A privately placed transaction can be listed or unlisted. If a bond is publicly listed, the issuer will have to comply with the listing authority's detailed rules on the level of information it must disclose to prospective investors about its business and also will be subject to securities laws which will dictate the specifics of the disclosure.

A public bond issue is usually assigned a credit rating by at least one rating agency. A private placement may or may not have a credit rating. This provides an independent assessment of the underlying credit of the issuer and is a guide to investors as to the likelihood of the issuer meeting its principal and interest payment obligations under the bonds. Some investors may only (for regulatory or policy reasons) invest in 'investment grade' issuances (i.e. those rated at least BBB- by Standard & Poor's or Fitch or Baa3 by Moody's).

As bonds can be issued with long maturity dates, they suit the investment profile of institutions seeking predictable long term investments to match their maturing liabilities, such as pension funds and insurers.

### 9.1.2 *Why are PPP Projects bond financed?*

Prior to the 2008 global financial crisis, most PPP Projects were successfully financed through long term commercial bank debt borrowed by the Private Partner. More recently, as a result of the financial crisis and ensuing banking regulation<sup>67</sup>, the volume of bank debt available for large infrastructure projects has reduced and loan tenor has shortened with a corresponding effect on pricing and the introduction of refinancing risk if debt cannot be obtained for the whole project period. In addition, comparing bids with different tenors has proved challenging, with questions around the noncompliance and comparability of bids without full term committed pricing.

<sup>67</sup> For example, the Basel III capital adequacy requirements imposed on banks.

This has meant that in some PPP markets (e.g. particularly Europe and Australia), both bidders and Contracting Authorities have had to consider alternative forms of finance – on the bidders’ side to ensure that their bids can be financed and remain competitive, and on the Contracting Authorities’ side to ensure that value for money is obtained from the range of financing options procured by bidders (e.g. by requiring non-bank financing solutions to be submitted as part of bids).

Even in markets where liquidity is not such a concern, there are also other reasons to consider bond financing as an alternative financing method. In some circumstances, bond finance – private or public – can offer long term finance for PPP Projects at a more affordable price than bank debt. Recent examples of this in developed markets include the projects funded under the EIB’s Project Bond Credit Enhancement programme. Due to the longer term repayment profile of bonds, scheduled repayments may be lower than bank loan repayments and, in such cases, this should feed through to a lower priced PPP Contract for the Contracting Authority (or end user). From the Private Partner’s perspective, it may also result in more cash being available for distribution to its equity investors during the repayment term than would be the case in a bank financing. The long term (and generally fixed rate) nature of bond financing also enables the Private Partner to fix its financing costs for the life of the PPP Project (or the remaining life if after a refinancing) without the need for separate interest rate hedging arrangements, giving it certainty and reducing the likelihood of a subsequent refinancing. However, as discussed in [Section 9.3.2](#), bond financing is unlikely to be suitable for all PPP Projects, particularly those of smaller value due to the relative size of transaction costs.

Investor appetite is another reason to consider bond financing. Non-bank financial institutions (such as insurance companies and pension funds) are becoming increasingly interested in investing in PPP Projects because they recognize that the long term predictable returns in PPP Projects can provide a hedge to the profile of their long term liabilities. Facilitating the entry of such institutions to the PPP debt market widens the lender base and increases liquidity. With more private finance available, Contracting Authorities should in turn be able to procure more PPP Projects and at more competitive pricing.<sup>68</sup>

Bond financing of PPP Projects does have its own challenges, however, which are described further in this [Section 9](#). One key factor is that, particularly for a public bond, the pricing of the bond may not be finally committed until shortly (e.g. five business days) before financial close. This may cause difficulties for the Contracting Authority in the evaluation of bids, given that the choice may be between a bid with committed financing and one where the financing may be notionally more competitively priced, but on an uncommitted basis.<sup>69</sup> A bond financing process also has certain timing implications which need to be factored into the procurement process. Some PPP Projects may also require credit enhancement in order to achieve a successful bond financing – this is discussed further in this [Section 9](#) and is particularly relevant in projects with specific risks (whether political, technological or developmental). In such cases, Contracting Authorities should consider engaging with potential credit enhancement providers early on in the procurement process if there are likely to be benefits in widening the field of possible financing options. [See Section 9.5](#).

<sup>68</sup> A number of institutions have produced resources on bond financing as an alternative to bank financing of infrastructure projects. Please see links in [Appendix: Additional PPP Resources](#) – these have been drawn on where appropriate in compiling this Guidance.

<sup>69</sup> It should be borne in mind, however, that even in a bank financing, certain elements of pricing are only fixed at financial close – see [Section 9.3.4](#).

In some cases (e.g. due to the type of risks mentioned above or constraints such as timing), PPP Projects may be financed by other means (e.g. bank debt) at financial close but refinanced by bond financing at a later stage (usually after construction completion). This [Section 9](#) focuses primarily on bond financing at financial close but also touches on the refinancing approach.

The guidance in this [Section 9](#) gives an overview of the bond financing process in a PPP Project, highlights the factors a Contracting Authority will want to take into account in assessing whether bond financing could be a suitable option for its PPP Project and (if it decides that it is) what considerations are then relevant both during the bid phase and ultimately in reaching successful close with a bond financed bid. The key point for the Contracting Authority is that it would need to be prepared to adapt its approach to facilitate bond financing where appropriate – this should not require the Contracting Authority to take on more risk or responsibility than under a bank financing. [As discussed further below, in the context of both the tender and the negotiation processes for a PPP Project, Contracting Authorities should also obtain their own expert financial advisors who can provide in-depth advice on the complexities of bond financing, including in comparison with other types of debt and equity financing.](#)

## 9.2 UNDERSTANDING PROJECT BOND FINANCING

### 9.2.1 Overview of bond process

Bonds issued in a PPP Project financing context are commonly known as “project bonds”. The Private Partner may be the issuer of the project bonds itself, but it is common for the bonds to be issued by a special purpose entity (the “Issuer”), separate from the Private Partner, who on lends the proceeds to the Private Partner. This may be for reasons of convenience, or for regulatory or tax reasons. Commonly, the Issuer and the Private Partner will be sister companies. Issuers, like Private Partners, must ensure they comply with their constitutional documents, applicable legislation and regulations and obtain all necessary internal and external authorisations. [Contracting Authorities will want to have in place a mechanism through which the Issuer and/or Private Partner will certify to it compliance with the applicable legislative, regulatory and authorisation requirements.](#)

The process for issuing the bonds will depend on whether they are to be publicly issued or privately placed. The timing depends on a range of issues and due diligence requirements, such as the time required for due diligence and credit review by rating agencies and investors, preparation of disclosure documents such as an offering memorandum or prospectus, the listing process (if applicable), the opening of bank accounts, planning and implementation of a roadshow marketing process and preparation of final transaction documentation.

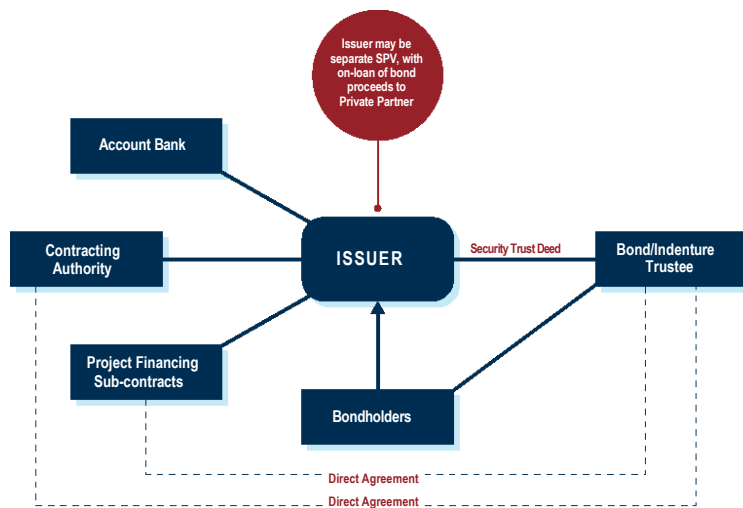
The arranging bank and Private Partner representatives usually go on an investor roadshow at which they will present the Issuer, the PPP Project, the management of the Private Partner, the proposed financing and the risk mitigation features, and give the investors the opportunity to ask for more information. In the case of a private placement, a similar but more targeted process aimed at individual investors would take place.

Project bonds are repaid in instalments which may be equal or sculpted and/or a ‘balloon’ (larger) principal repayment at final maturity. Interest is typically paid regularly and is known as the bond “coupon” – this is the investors’ return.

### 9.2.2 Project Bond structure - single source financing

If a PPP Project is financed solely by bond financing, the structure will resemble this:

#### PROJECT BOND STRUCTURE – SINGLE SOURCE

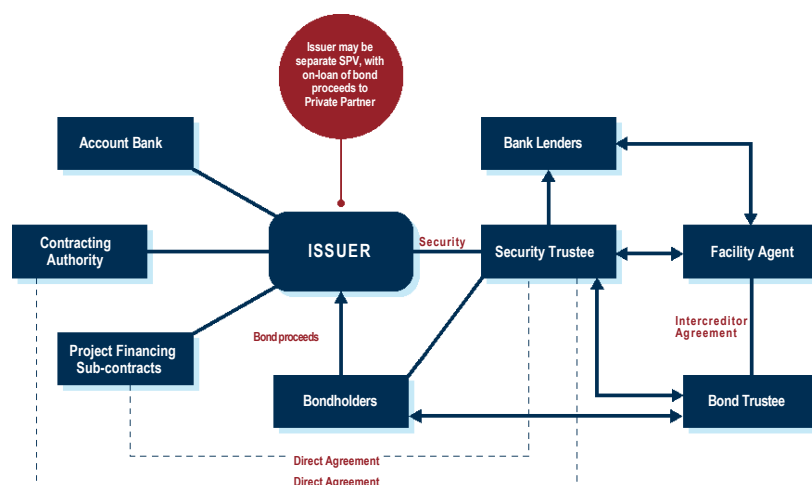


### 9.2.3 Project bond structure – multi source financing

Many large project financing transactions include both commercial bank facilities and project bond financing. This multi-source approach may be used for a variety of reasons, including the diversification of financing sources, the use of bank financing as a temporary bridge while awaiting optimal capital market financing conditions and the need for revolving working capital finance, which realistically can only be provided by banks.

If the PPP Project is to be financed by a mixture of bond and bank finance, the structure is likely to resemble the following:

#### PROJECT BOND STRUCTURE – MULTI SOURCE



#### 9.2.4 Parties

The key parties in a project bond financing are the Issuer, the bondholders and, for a public bond, the arranger and the bond trustee. In a private placement there may be a representative for bondholders, but this is not universal.

As in a bank-funded project, a security trustee or agent will hold security interests for the bondholders.

#### 9.2.5 Documentation

The bond-specific documentation will depend on the transaction, but a bond issue generally requires the following:

- A form of offering memorandum – this must contain all information and disclosure which an investor needs to make an informed investment decision. The standard of disclosure will be mandated by the rules of the relevant stock exchange and/ or applicable securities laws [\(by virtue of the investor's residence or citizenship\)](#). The Issuer is responsible and liable for the accuracy of this document both under securities laws and contractually under indemnities given to the arrangers under the subscription arrangements for the bond. The offering memorandum sets out risk factors relating to the bonds and information on the Issuer's business, the project (including any risk mitigation), the Issuer, the Private Partner, any guarantor and the use of the bond proceeds. For a PPP Project, it also discloses the nature of the PPP Contract the Private Partner has with the relevant Contracting Authority. A public bond issuance will always involve an



offering memorandum; a private placement may have a (less formal) information memorandum. In each case, as well as its legal and contractual relevance, the offering memorandum is a marketing tool, used by the arrangers to sell the bonds.

- For a public bond issuance, a Subscription or Purchase Agreement – between the Issuer and the Arranger by which the Arranger subscribes for the bonds.
- A Trust Deed (or Indenture for New York law bonds) – between the Issuer and the Bond Trustee. The bonds are constituted under this document and it may contain the covenant package (if there is more than one source of finance, a common terms agreement may be used).
- For private placements, a Note Purchase Agreement or Note Subscription Agreement – under which the privately placed bonds will be constituted and the initial holders will agree to buy the bonds.

As with a bank financing, there will also be security, equity and intercreditor documents, and the concession agreement will usually require some limited amendment as described in [Section 9.3.9](#) below.

#### *9.2.6 Public bond issuance*

As mentioned in [Section 9.2.1](#), public bonds may be issued either by the Private Partner, or by a separate (usually sister) company incorporated to issue the bonds and on-lend the proceeds to the Private Partner. An Issuer may choose to distribute its project bonds through either an arranger (typically a bank) or a syndicate of banks (in which case the arranger will be the “lead manager” or “lead arranger”). The arranger serves as an advisor, structures the transaction, and subscribes for the bonds pursuant to a Subscription Agreement (or less commonly underwrites the bonds via an Underwriting Agreement). In practice however, the arranger will only enter into the agreement to subscribe for the bonds a few days (normally five business days) prior to the closing date, and prior to doing so the arranger will have entered into back-to-back arrangements with investors whereby investors commit to buying the bonds from the arranger. If this arrangement is not honoured by the investor, the arranger remains bound to subscribe for (or underwrite) the bonds pursuant to the terms of the Subscription (or Underwriting) Agreement.

#### *9.2.7 Private placement issuance*

The debt private placement process is similar to the public bond process but more straightforward. No arranger is appointed, but rather a placement agent who will facilitate but not underwrite the placement. No syndicate of banks is required as the debt will be privately placed to a small number of select investors. The terms and conditions of the bonds, will be negotiated directly between the Issuer and the investors (similar to the negotiation process for a bank loan). Similarly, the flow of due diligence information will be directly between the Issuer and the investors. An agent will probably still be required to carry out administrative tasks, such as making the payments of principal and interest to investors.

### 9.2.8 Types of non-bank bond investor

Non-bank capital market investors are typically insurers, specialist fund managers, pension funds and sovereign wealth funds. Traditionally, some of these investors have tended to invest in project equity as opposed to debt, but they are now looking increasingly at the debt side. Their investment strategies vary and various factors influence their approach, such as market trends, investment beliefs, regulation, risk appetite, liability considerations, cultural factors, governance structures, tax issues, jurisdiction and, ultimately, domestically available assets. Some may require investments to have an investment grade credit rating or security, or to be listed. Others can hold non-investment grade or unrated instruments. The return they expect on bond investments will depend on the risks involved and how easily they can liquidate their investment. As with commercial banks, they will have competing demands on their funds and only invest if risks are mitigated to their satisfaction.

The two main challenges for institutional investors looking to invest in PPP Projects are understanding the risk profile of the asset and the need for extensive interaction with creditors. These are discussed further in [Sections 9.3.8 and 9.5.1](#).

### 9.2.9 Drawdown of Bond Finance

Bond proceeds are usually received in a lump sum at Financial Close, but as the PPP Project's expenditure profile may vary, the Private Partner will need to invest these proceeds until they are actually required by the PPP Project over its construction period<sup>70</sup>. This typically results in a "negative carry" because the interest received by the Private Partner is generally lower than that paid to the bondholders (although this may be mitigated by an overall lower cost of funding). This contrasts with traditional bank financing where funds are drawn over the construction period as and when required.

In some circumstances (more likely in private placements), the bondholders may agree to staged drawdown of the bond proceeds (more in line with the PPP Project's expenditure profile). This means that bonds are only issued and subscribed for effectively as and when the funding is needed, rather than all being issued at financial close. While this may reduce the risk of negative carry, bondholders may require a higher return on their investment because they have to keep those funds available and are not able to freely invest them elsewhere. A staged drawdown structure will generally limit the universe of potential investors as only certain investors can cope with it. This is one reason why PPP Projects have been bank financed during the construction period and then refinanced by project bonds once financing is fully drawn and construction has completed so cash flow is being generated.

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

A staged drawdown structure is less likely to be workable in an emerging market PPP Project. Similarly, while alternative solutions to reduce/avoid negative carry have been tried in developed markets, these are likely to be highly bespoke and only feasible for a certain class of investor in an established market.

<sup>70</sup> In a bond financing, the proceeds are often deposited with a highly rated bank until required, through a fixed-rate deposit, to reduce the cost of servicing unutilised debt.

### 9.2.10 Credit rating

As stated above, bond issuances (especially public issuances) often carry a credit rating from an external credit rating agency. Many investors will, for regulatory, capital adequacy or policy reasons only be able to invest in rated instruments. A credit rating is used as a tool during the marketing of the bond to investors.

Typically, each rating agency would also publish a 'pre-sale report', setting out its rating rationale for the PPP Project and assigning a provisional rating (denoted by a "[P]" in front of the rating). Information from the pre-sale report will typically be used to facilitate the roadshow phase. A definitive rating is typically assigned once the bonds have been issued and following the agency's review of final documentation.

## 9.3 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 9.3.1

### Advisors

If bond financing is under consideration, the Contracting Authority should ensure it engages legal and financial advisers with the requisite experience [and current market knowledge](#) in project bonds (as well as other financing options) as early as possible. Such advice will be essential in assessing suitability of financing, formulating bid requirements, evaluating bids, assessing pricing and deliverability, reviewing the relevant financing documents and understanding how ~~the~~ bond financing [would](#) impacts the PPP Contract provisions and mechanics. As flagged in [Section 4.2.2, Termination Payments](#), understanding the relevant agreements is also key to limiting the Contracting Authority's liability under any compensation provisions linked to the financing documents.

### 9.3.2 Suitability of financing

If the Contracting Authority wishes bidders to be able to submit the best value financing available, the bid process should, where appropriate, allow for financing approaches other than bank debt. At [the](#) project preparation stage, the Contracting Authority should therefore assess the suitability of the key features of its proposed PPP Project for bond financing and, if it is considered suitable, publicise this to bidders when the PPP Project is first launched. In such circumstances, bid documentation and procurement rules should be drafted accordingly.

While the Private Partner will ultimately decide on its financing approach, the Contracting Authority's role is to be neutral as to the financing method to the extent appropriate [and beneficial](#) for its PPP Project, [taking all policy, social, financial and development goals into account](#), but to facilitate, where appropriate, different financing methods. Selecting the right type of financing will depend on a PPP Project's particular characteristics. Both Sponsors and Contracting Authorities will need to take into account a range of factors and assess how these compare under different financing approaches (e.g. [equity financing](#), bank or bond financing – whether public or private placement). These include the flexibility to accommodate changes to circumstances over the life of the PPP Project, the degree to which the tenors and interest rate structures offered by finance parties lending through each type of financing best suit the requirements of the PPP Project's revenues and debt profile, the nature of the transaction risk and the risk appetite of the target investors, the importance of confidentiality (in the context of the level of disclosure which may be required), the all-in cost effectiveness and economics of the method chosen and the consequent value for money.

Contracting Authorities should bear in mind that bond financings involve significant preparatory costs (e.g. obtaining a credit rating, preparing the bond documentation and marketing). Legal costs can be significant especially in the case of publicly listed issues. Because of their costs, complexity and investor appetite, bond financings are typically best suited to PPP transactions of a significant size (e.g. involving bond financing in excess of USD200 million). Whilst public offerings may suit larger transactions, private placements, given the more flexible information flow and the less rigorous disclosure requirements, are potentially more suited to the PPP market. In addition, the universe of private placement investors is growing and therefore liquidity is enhanced.

If public authority bidding procedure rules require certainty of financing this may limit the choice to a degree. As explained above, in a public bond solution, the pricing and availability of the financing will as a rule only be committed very shortly prior to closing, although, as noted, elements of a bank-funded solution [arecan be](#) similarly uncommitted until closing. In certain jurisdictions, the choice of financing for public authorities may also be shaped by practice rather than by law. [See Section 9.3.6.](#)

### 9.3.3 Comparing bids

Comparing bids can be more complex where different financing solutions are presented and bid documentation should be drafted to facilitate a transparent comparison of all finance solutions or categories of solutions.

One option for the Contracting Authority may be to require bidders to submit a compliant bid based on specific terms (e.g. bank debt), but to permit variant bids as well (e.g. bond financing). The Contracting Authority should bear in mind that preparing two financing offers is costly for bidders and bidders are likely to want to select a financing approach as the bid process reaches the latter stages and a fully developed solution is typically required. As is the case for any tenders that require significant bidder investment, the Contracting Authority may wish to consider whether it is appropriate to reimburse part of the costs associated with preparing financing proposals.

As flagged in [Section 9.3.7](#), specialist expertise is essential to assist in bid evaluation and, as regards bond solutions specifically, to assess differences in placement capability, pricing levels, pricing features and means of managing pricing risk – a process which can be more complicated in bond financings due to the pricing process. [See Sections 9.1.2, 9.3.4 and 9.3.5.](#)

### 9.3.4 Assessing deliverability

The deliverability and pricing of public bonds are normally only firmed up shortly before actual issuance (i.e. a few days prior to financial close) as the underwriting of bonds by their arrangers is not common practice. An element of deliverability risk will therefore remain with the Contracting Authority in a way which would not be the case in a bank financing. The position can be different in the private placement market, although this will depend on investors being willing to hold pricing during a bidding process. Contracting Authorities will often find it difficult to seek fully committed bond financing offers at bid or final offer stages and commitments obtained from banks at bid or final offer stages may be – or appear to be – stronger than those obtained for bond solutions. It should however be borne in mind that, whilst margins for bank debt may be fixed and commitments (which will generally have a certain level of

conditionality attached) can be obtained from banks in relation to the margin, the underlying swap rate which will affect the all-in cost payable by the Contracting Authority will only be fixed at financial close. Therefore, whilst deliverability risk may be somewhat greater in a bond solution, elements of the final cost of a bank solution equally remain a Contracting Authority risk until financial close.

Contracting Authorities can obtain some comfort that a public bond solution can be delivered by requiring bond arrangers to provide letters of support at bid or final offer stages and relying on the expert opinion of the Contracting Authority's adviser. The terms of the bond arranger support letters should therefore be set with care. In addition, at final offer stage, to help in mitigating the deliverability risk, it is advisable that the Contracting Authority require bidders to obtain a "pre-rating" on their proposed financial structure. The Contracting Authority may also ask bidders to (i) submit evidence that a minimum rating sufficient to drive investor demand is achievable (e.g. investment grade – that is, BBB- or higher, or even A) and (ii) accept the risk of any price increases associated with failing to eventually secure the targeted rating. As flagged in [Section 9.3.3](#), Contracting Authorities may need to compare bond proposals from several bidders.

#### *9.3.5 Assessing price*

In order to be able to carry out a proper comparison of financing offers, the Contracting Authority should set out in the tender documents clear minimum requirements and evaluation criteria to facilitate a correct comparison of (uncommitted) bond financed bids as against committed bank or corporate financed bids. The same complexity occurs when bidders are allowed to submit offers with mixed financing. The Contracting Authority may also wish to include requirements relating to rating (both the level and the identity of the agency or agencies providing the rating). In addition to assessing price (which may be difficult without a firm pricing commitment), it is key to assess the risk and robustness of the pricing methodology used by bidders for any proposed bond solution (detailing the various pricing components). The pricing methodology should refer, to the extent possible, to market prices for similar bond issues or baskets of bond issues or, where such comparators are not available, sovereign issuances or issuances by government agencies or parastatal organisations could potentially be used as reference points. When seeking final offers, the Contracting Authority may consider providing indicative bond pricing data or benchmark yield curves on which bidders can base their offers. Bidders would use such pricing in their financial models to derive the price of their offer. Such pricing data should break down information according to different rating outcomes and other key features of the financing. The Contracting Authority could consider setting a pricing range within which the PPP remains affordable and the bonds would be issued and reserving the right not to close the transaction if pricing falls outside this range.

#### *9.3.6 Price fluctuation between preferred bidder and financial close*

As mentioned in [Section 9.3.4](#), the pricing of public bonds (and in some cases private placements) is only confirmed a few days prior to actual issuance and final public bond pricing is largely market-driven, so there is a risk of price fluctuation between final offers and financial close. In order to help eliminate any potential uncertainty in price

between the bid stage and final pricing, at an early stage of the procurement process the Contracting Authority and the bidders should discuss a risk sharing mechanism for allocating the risk of price fluctuations. Depending on the jurisdiction, this will often result in bidders providing a firm upfront commitment, with the fluctuation risk being assumed as agreed – ~~usually~~<sup>sometimes</sup> by the Contracting Authority but ~~some~~<sup>other</sup> times by all (or a combination) of the sponsor, the bidder, the investors and the Contracting Authority. Such mechanisms may also be left to the bidders' discretion as part of their bid strategy.

Following appointment of ~~the~~ preferred bidder, the Contracting Authority should also require the preferred bidder to track pricing movements and inform it on a regular basis up to financial close.

Contracting Authorities should also ensure that the mechanics of the closing fit with national (public) law rules on budget approvals (as the preferred bidder announcement or award may take place for a price that will only be determined after the award and may need to be conditional).

#### CIVIL AND COMMON LAW DIFFERENCES

France's public procurement rules oblige the Contracting Authority to agree on a total cost of the PPP Project at an early stage – an approach generated by practice rather than law. This may steer the transaction towards bank financing and private placements because the price in a public bond issue is only set at the 'pricing' stage (a few days before issuance) which creates uncertainty in the exact total cost of the PPP Project.

Belgian market practice, and to a large extent public law, is in many ways similar to that in France, but a bond financed road project proved possible through a combination of innovative tender and contract rules, including measures whereby the Contracting Authority could assess and approve maximum expenditure prior to contract award.

#### 9.3.7 Timing

Contracting Authorities need to be aware that bond solutions generally require more time to prepare than bank solutions as there is usually a need to obtain credit ratings, prepare the bond placement documentation, market the bonds with investors and meet regulatory requirements. The procurement timetable will need to cater for this.

As flagged in [Section 9.2.10](#), a pre-rating may be required at final offer stage and a final rating at financial close. A rating process typically lasts for at least four weeks – longer for a more complicated transaction. However, the preparation of the required supporting material needs to track the progress made in developing a bid. As a result, the process of seeking a pre-rating can only start once the deal structure (e.g. risk sharing, other key terms of the PPP Contract) is stable and is unlikely to change materially. Likewise, a final rating can only be sought once the PPP Project documentation is virtually finalised. Overall, once a preferred bidder has been selected and the PPP Project documentation is finalised, seeking a final rating and marketing the bonds may take four to six weeks longer than financial close in a bank financing.

### 9.3.8 Bondholder decision making

Holding project bonds requires more resources than holding sovereign or corporate bonds due to the need to respond efficiently to the numerous waivers, change consents and other issues which will inevitably arise during a PPP Project's construction phase. A key difference to bank lenders is that institutional investors may not have the same capacity to be actively involved with the Issuer and the Private Partner, however, particularly in Europe, there are more and more active private investors who will wish to be - and be capable of being - closely involved with a PPP Project on an ongoing basis. The Contracting Authority and its advisers need to be aware of this and check that the bondholder decision making mechanisms in place will not inhibit the Private Partner's ability to perform the PPP Contract.

In **monoline-guaranteed bonds**, this risk was mitigated by the monoline acting as "controlling creditor" and taking decisions on behalf of the bondholders. This structure has, however, caused problems where monolines have been downgraded, but still continue to be entitled to take such decisions, despite not offering tangible credit enhancement. There are other mechanisms, known as monitoring advisers or similar, designed to facilitate effective decision-making, although these have not met with universal acceptance in the market since the monitoring adviser does not provide credit and therefore has no risk position alongside the bondholders to protect in its decision-making. Credit enhancement structures may achieve a similar result where there is a "credit provider". [See Section 9.5.](#)

**Commented [A21]:** This term should be clearly explained, as many sovereign State officials will not be familiar with it.

### 9.3.9 Changes to documentation

If a PPP Project is to be bond financed, the PPP Contract drafting must reflect the structure, parties and documentation involved. The key point to bear in mind is that in practice the drafting will not require much amendment. Broadly speaking, the main provisions affected are:

- Definition of the financing documents (e.g. "Senior Finance Documents") – this will need to include the bond finance documentation (but not any on-loan documents between the Issuer and the Private Partner).
- References to the relevant parties - the Issuer may need to be referred to if separate from the Private Partner, the definition of Lenders may need adapting.
- Termination payments [\(if any\)](#)-these need to reflect the bond mechanics. [See Section 9.4.](#)
- Confidentiality – apart from facilitating the disclosure around the PPP Project in the offering memorandum, the provisions will also need to permit details of the PPP Project to be disclosed to potential investors where the bonds are transferable. In addition, as well as the initial disclosure in the offering memorandum of the project arrangements, including details of contracts, securities laws will generally require ongoing public disclosure of project performance, especially of significant underperformance. This should both be borne in mind by project participants and be reflected in the Project Contract.
- Refinancing – the provisions need to permit ordinary trading of the bonds without triggering the refinancing provisions (e.g. by adapting the definition of "Exempt Refinancing").

The same applies to ensure the Direct Agreement works effectively ([see Section 6, Lenders' Step-in Rights](#)). Additional changes may be required to reflect certain bond mechanics (e.g. different reporting requirements/timing) and more than one party may want the rights normally afforded to the Agent (e.g. both the Credit Provider and the Security Trustee would normally receive all notifications usually provided to an Agent).

In considering amendments to documents, a Contracting Authority wishing to attract the full range of financing options will want to avoid making bond-specific amendments beyond those strictly necessary to ensure that it is not making other finance solutions less attractive to bidders and/or discouraging bank debt providers from participating. It will also want to ensure that any solution-specific amendments are objectively and duly justified.

Where the PPP Project is being financed through other means (e.g. bank debt) at financial close, but a bond refinancing is envisaged upfront, contract provisions should be drafted with this in mind. This may entail drafting provisions appropriately in the PPP Contract signed at financial close (e.g. as regards refinancing), as well as potentially scheduling amendments designed to come into effect when the bond refinancing is implemented. If a bond refinancing has not been contemplated in the PPP Contract, appropriate amendments will need to be agreed at the time when discussing consent and related matters. [See Section 5, Refinancing](#).

## 9.4 TERMINATION PAYMENT CALCULATION

### 9.4.1 Calculation of Outstanding Senior Debt

Only bonds that have been issued and purchased at financial close should count as Outstanding Senior Debt. Bonds which have been issued but are being held by the Issuer to be sold to raise further financing at a later stage (e.g. to cover the cost of certain changes required under the PPP Contract) should not count until they have actually been purchased. Only the actual amount paid for the bonds should be taken into account- if they are not issued "at par" (i.e. at their face value) but at a premium or a discount, careful consideration will be needed as regards their treatment.

### 9.4.2 Make-whole payments

The terms and conditions of project bonds usually include break cost provisions where there is an early repayment of the bonds to compensate bondholders for the loss of yield over the remaining life of the bonds. The bond terms will therefore generally call for the payment of a prepayment fee to put bondholders in an equivalent position as if the bonds had not been prepaid. This is known as a "make-whole" payment and is calculated according to a specified formula which applies a particular discount rate (which will be based on the yield on a government bond with a maturity equivalent to the average life of the bonds), reflecting the fact that the payment is received early. Essentially, the make-whole amount would notionally allow the investor to invest the amount received in early redemption in a government bond and receive the same yield as if it had remained invested in the project bond. Contracting Authorities may wish to consider imposing more risk on investors by adding a margin to the government bond yield to produce the discount rate.



It may not be appropriate for the Contracting Authority to include such break costs in the termination compensation calculation for every termination situation. The recommended approach in some jurisdictions (e.g. the UK and Belgium) has been for the Contracting Authority to pay the full make-whole amount on termination for Contracting Authority Default<sup>71</sup>, a reduced amount on Voluntary Termination, and no payment on any other termination (including Force Majeure and Private Partner Default termination) although Contracting Authorities should consider whether a full make-whole payment is required in any circumstances. However, in emerging markets, for example, there may be justifications for including a make-whole amount in more termination scenarios (e.g. Force Majeure or potentially Private Partner Default, although – particularly in the latter case – the value for money question would have to be addressed). In relation to private placements, some investors (particularly US investors) will insist on currency swap breakage payments on early termination of non-USD instruments, since such investors fund themselves only in US dollars. Contracting Authorities will need to consider the value for money questions inherent in funding such payments. [See Section 4, Termination Payments.](#)

#### 9.4.3 Fees and other costs

As with bond break costs, the Contracting Authority will also want to ensure that other bond-related fees and costs are only included in the termination compensation calculation if appropriate and that there is no double counting between the various financial instruments. There may also be fees associated with guarantees or other credit enhancement products.

### 9.5 CREDIT ENHANCEMENT

#### 9.5.1 Benefits of credit enhancement

Credit enhancement can be helpful for PPP Projects that face challenges in long-term financing, or might otherwise not be financeable at all. It is also useful for large PPP Projects where liquidity may be an issue. While credit enhancement is not always essential, it is likely to be extremely useful, if not vital, in successfully financing PPP Projects with particular risks (e.g. political, technological or development). The Contracting Authority needs to be alive at an early stage of the procurement process to where credit enhancement and particular credit ratings are likely to be required by investors and how this could benefit it by possibly lowering the cost of financing and resulting in a more competitive price and better value for money. The Contracting Authority should be prepared to engage early on with potential credit enhancement providers. [See Section 9.2.10.](#)

One example of a key challenge in achieving a successful bond financing at financial close is construction risk. The bond market has traditionally been averse to investing prior to construction completion, due to the perceived risk of the asset not being built and being unable to start earning income to meet principal repayments under the

<sup>71</sup> By extrapolation, other termination events for which the Contracting Authority bears the risk (e.g. MAGA and Change in Law) might follow a similar approach.

bonds.<sup>72</sup> There are signs that investor attitudes are slowly changing as the investors begin to understand PPP Project risk better. Studies of infrastructure projects (e.g. by Moody's<sup>73</sup>) have shown that the default rate in PPP Projects is relatively low (perhaps because of the level of due diligence typically carried out by all parties before PPP Contract signature, the in-built checks and balances in the project and finance documentation and the mutual desire of all parties to ensure the PPP Project starts generating income). However, credit enhancement can also help mitigate this risk to encourage non-bank investors' appetite.

Credit enhancement usually has the effect of taking the "first loss", insulating bondholders against a certain level of loss in a default or termination scenario, and/ or providing liquidity in times of cashflow stress. This can provide reassurance to potential investors as well as potentially resulting in a higher credit rating. Depending on the form of credit enhancement, it may also result in the credit provider being the controlling creditor for decision-making purposes. [See Section 9.3.8.](#)

#### EMERGING AND DEVELOPED MARKET DIFFERENCES

The institutional investor market for infrastructure in Europe has evolved to the extent that there is now a ready supply of institutional capital for robust PPP Projects in stable countries. Credit enhancement is not always needed. However, it will continue to be needed to facilitate the use of non-bank funding in PPP Projects with technology risk, unusual development or construction risk, significant demand risk or in challenging jurisdictions.

**Commented [A22]:** Add the following sentence: "For the Contracting Authority, construction risk should be attenuated by the procurement of satisfactory surety bonding or provision of completion guarantees from the Private Partner, its affiliates in the case of an SPV participant, and/or sub-contractors engaged in the construction phase."

#### 9.5.2 Types of credit enhancement

Project bonds can be credit enhanced in whole or in part through various means, including:

- **Guarantee:** a guarantee of the Private Partner's obligations might be provided by a sponsor (if it has a suitably high credit rating), a bank or a multilateral agency. In some cases, a guarantee might equate to wholesale credit substitution (as distinct from enhancement).
- **Wrap:** this is the provision of insurance by a highly rated private sector financial guarantor (often a 'monoline' insurer), insuring the underlying principal and interest payments on a bond in return for a fee. Although not uncommon in Europe before the financial crisis, only one major international monoline insurer continues to operate. The insurer's credit rating is key to the rating of the bonds.
- **Sovereign Guarantee:** in some circumstances, it may be value for money for governments to provide a guarantee (typically in return for a fee). This may be part of a concerted programme to facilitate infrastructure investment.

<sup>72</sup> As in a bank financing, a bond financing is typically structured so that interest payments during construction are met out of drawdowns.

<sup>73</sup> Moody's Investors Service Data Report (6 March 2017): Default and Recovery Rates for Project Finance Bank Loans, 1983-2015

- **Multilateral product:** the World Bank, MIGA and IFC have a long track record in providing guarantees for bonds.<sup>74</sup> These guarantees generally focus on specific risks which the private sector is unable to manage (such as adverse government action) and are available to World Bank and IDA countries. MIGA insurance focuses on political risk. More generally, since the financial crisis, bodies such as the EIB and the Asian Development Bank<sup>75</sup> have been considering ways to boost liquidity and incentivise capital markets investors to invest in infrastructure in both developed and emerging markets. Multilateral funding agencies and development banks are the ideal channel for this type of support because they have both the credit quality and the political influence to stimulate investor appetite.

The EIB Project Bond Credit Enhancement Programme (PBCE) was launched to provide support for capital markets financing of infrastructure and to broaden the investor base for infrastructure projects. It offers credit enhancement in two forms: funded (internal) involving EIB as an internal party investing in the capital structure, and unfunded (external). The unfunded form involves the provision of a standby letter of credit in favour of the bond trustee for 20% (now 30%, following the pilot phase) of the value of the bond. This allows the bondholders to draw down cash from the EIB which can be used to make principal and interest payments to the senior debt holders as well as financing a cost overrun or, in some cases, a revenue shortfall. The Private Partner pays interest on any drawdown and a commitment fee to the EIB. EBRD and MIGA have recently successfully partnered on a risk mitigation product used on a Turkish project. EBRD provided a liquidity facility for construction cost overruns and to keep debt payments current during operation and MIGA provided political risk insurance to insulate the project from the risk of certain adverse government action.

Ten projects involving the PBCE were successfully bond financed in its pilot phase. Moody's Investors Service<sup>76</sup> reported that this demonstrated the effectiveness of project bond credit enhancement in improving projects' risk profiles, including in these cases by mitigating country-specific risk by achieving project ratings at or above the rating of the host sovereign<sup>77</sup> (which the EBRD/MIGA product also achieved). Both the PBCE and the EBRD/MIGA products have therefore had the effect of making the project bonds into an investment as safe as, or indeed safer than, government bonds.

<sup>74</sup> <http://treasury.worldbank.org/documents/GuaranteesMatrix.pdf>

<sup>75</sup> In 2015, Asian Development Bank provided a 75% guarantee to a Philippine project bond.

<sup>76</sup> Moody's Investors Service Sector In-depth (14 April 2016): Infrastructure Renewal and Investment - Europe project bond market set for growth after pilot initiative endorsed

<sup>77</sup> As shown by the rating Moody's assigned the N25 in Ireland (Baa1 positive) and CAV in Italy (Baa2 stable).

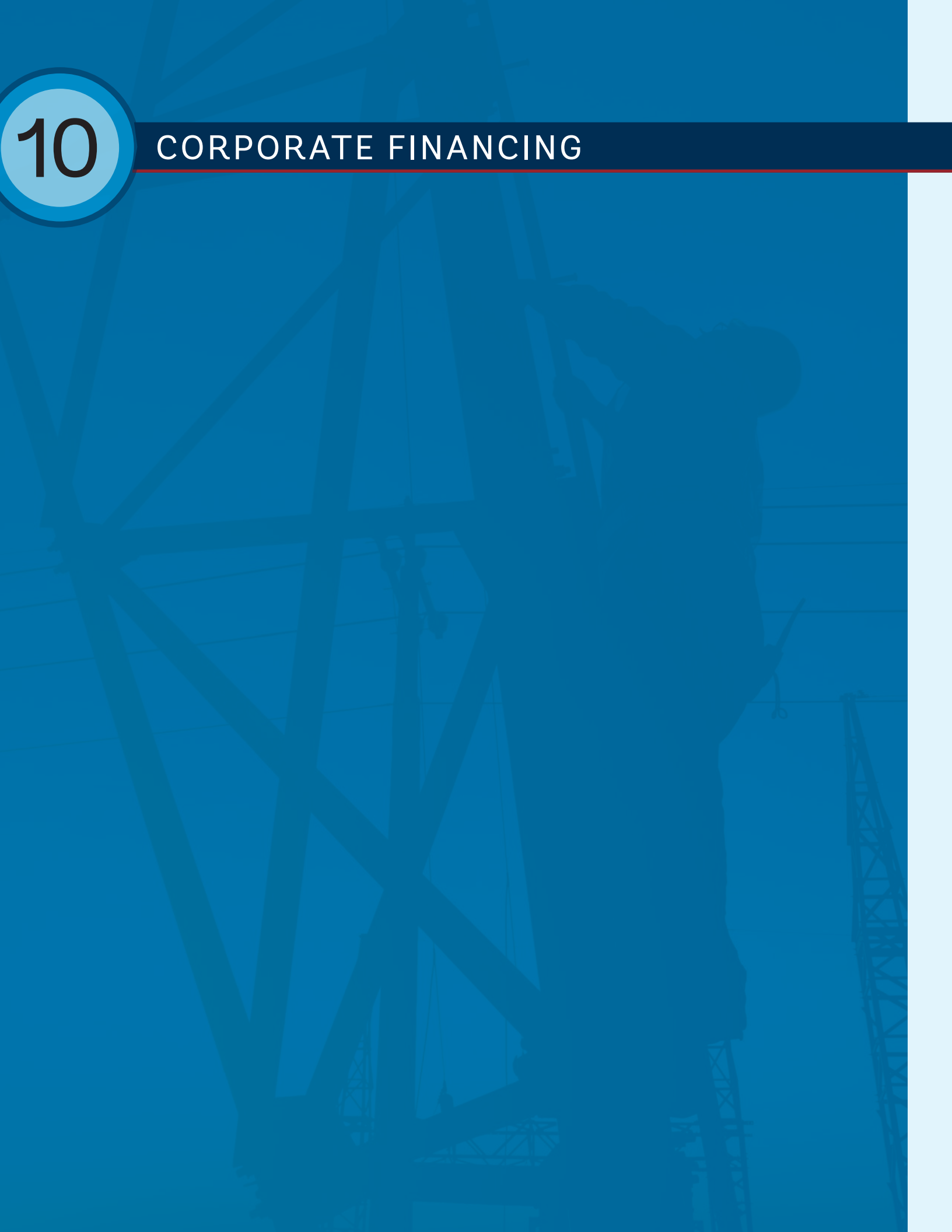
#### EMERGING AND DEVELOPED MARKET DIFFERENCES

Credit support like the PBCE could be used to mitigate sovereign and macroeconomic risks as well as project-specific risks. It could benefit PPP Projects which are higher risk in stable creditworthy countries, as well as PPP Projects in countries with weak or challenging credit profiles. Many such credit enhancement tools are already available for this purpose from multilateral and bilateral institutions and their use is being gradually mainstreamed and increased.

Credit support can also overcome basic unfamiliarity with non-bank funding for infrastructure even in more developed financing markets (e.g. the first Belgian project bond was a PBCE pilot project).

# 10

## CORPORATE FINANCING



## 10.1 KEY ASPECTS

### 10.1.1 *The concept of Corporate Financing*

Corporate entities typically use a range of financing means to fund their daily business needs across their corporate group. They will have credit facility arrangements with their relationship banks and may also raise finance through bond issues (public or private). They may also have multiple operating assets already generating revenue. If a new investment opportunity arises (such as a PPP Project), some corporate entities may prefer to put in place additional finance on a corporate basis instead of going down an investment-specific route (such as project finance). The strength of the corporate entity's balance sheet (potentially alongside consortium partners, parent companies or key subcontractor(s)) will be key to its ability to do this, as generally the lenders or investors involved in the new corporate financing will have recourse to the whole corporate entity, not just the specific asset being financed. Depending on the size of the corporate entity relative to the size of the investment in question, the lenders or investors may in fact be less concerned with the asset itself, and more focused on the performance of the corporate entity as a whole.

Some corporates may not even need to enter into specific additional financing arrangements for particular investments as their balance sheets are so strong that they have sufficient financial reserves to finance the investment in question.

The funding of investments in this way is called corporate financing and is also known as "on balance sheet" financing.

### 10.1.2 *Why are PPP Projects financed "on balance sheet"?*

As described in [Section C, PPP Contracts in Context](#), PPP Projects are typically funded through limited recourse project financing of an SPV owned by sponsor parties. This is both because of the need to bring together different sponsors to build and operate an asset (e.g. financial investors would not have the technical capability to build the required asset) and possibly because the amount of finance required is usually beyond the balance-sheet capacity of an individual sponsor. Project financing is usually classified as "off balance sheet" which may be useful from an accounting perspective for the parties involved and can often have a lower cost of capital than corporate financing because of the high gearing of cheaper third party debt to more expensive equity.

However, although not commonly used, corporate/on balance sheet financing can play a role in PPP-type projects and may be suitable in a number of circumstances. These include where a bidder is the sole sponsor, has a strong balance sheet and typically uses corporate finance for new projects as part of its normal business model or where it may be more cost-effective to use balance sheet financing to reduce transaction costs (e.g. on smaller transactions). A bidder may wish to finance through equity rather than limited recourse financing for tax reasons or because it is willing to take more risk than third party lenders are prepared to take in a particular market (particularly

if it has access to export credit or other support) or simply because it is an overall less expensive form of funding. From the Contracting Authority's perspective, if a project is to be financed on balance sheet, the key is to ensure that an appropriate risk allocation is maintained between the Contracting Authority and the Private Partner, following the same principles as in a project financing (and as outlined in this Guidance). Ideally the procurement process should accommodate bids using corporate and other types of financing, as well as a mix. It is important to ensure that, the tender and (if applicable) draft- contract documentation works for different financing scenarios. In some circumstances, it may also prove simpler, faster and more cost-effective – e.g. because of the fewer parties (and advisers) involved and simpler documentation and debt mechanics.

It is also possible that PPP Projects may be financed by a combination of project and corporate finance and the procurement process and documentation will need to be adapted appropriately. For the purposes of this [Section 10](#), the assumption is that the PPP Project is to be wholly corporate financed.

## 10.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY

### 10.2.1 Advisors

If corporate financing is an option, the Contracting Authority should (as with any form of financing under consideration) ensure it has engaged legal and financial advisers with relevant expertise [and knowledge of current market conditions](#) as early as possible in the procurement process. Specialist advice will be needed in relation to formulating bid requirements, evaluating bids and assessing how the corporate financing impacts the PPP Contract provisions and mechanics. Understanding the overall contractual structure will also be key in formulating any compensation provisions and limiting the Contracting Authority's liability under the PPP Contract appropriately.

### 10.2.2 Procurement implications

As highlighted in [Section 9, Bond Financing](#), if the Contracting Authority wants bidders to be able to submit the best value financing available, the bid process must allow for a range of financing approaches. The Contracting Authority should consider from the start of the procurement process the implications of a corporate financed bid as compared with a limited recourse project financed bid. The procurement documentation should make clear whether such bids are permitted and what the bidder will need to address in its bid in terms of minimum requirements (e.g. regarding price commitment and contract terms), and in particular in place of bank commitment letters. The bid documentation should also spell out transparently how bids will be evaluated and how different solutions will be compared. Not only will this facilitate alternative financing solutions, but it will also mitigate the risk of non-compliant bids. Setting sufficiently ambitious prequalification/selection criteria (including as regards financial standing [and the furnishing of a deposit, in cash or via letter of credit, to accompany a bid](#)) and – if consortia are allowed – requiring (a mix of) joint and several liability, performance bonds, maintenance guarantees and/or parent company guarantees may be necessary.

### 10.2.3 Due diligence

In a project financing, there are usually several parties carrying out due diligence on the PPP Project from the private sector side: the Private Partner, its sponsors and the lenders, as well as all their advisers. As mentioned in [Section E, PPP Contracts in Context](#), the lenders go through a rigorous process to satisfy themselves that the PPP Project is bankable and this can give the Contracting Authority additional comfort in terms of its own (and its advisers') assessment of the Private Partner's ability to successfully deliver the PPP Project. In a corporate financed PPP Project, this level of third party due diligence may not happen, so the Contracting Authority may have to rely solely on its own (and its advisers') evaluation of the financial and technical robustness of the Private Partner, its bid and its sub-contractors (who may or may not be part of the same corporate group).

### 10.2.4 Creditworthiness of Counterparty

A project-financed PPP Project necessarily involves an SPV which is party to carefully structured sub-contract arrangements and financing involving third party lenders, sponsor equity and guarantees or similar support at requisite levels (e.g. of equity or sub-contractor obligations). The SPV's income and expenditure are relatively transparent and its financial robustness assessable.

In a corporate financed PPP Project, this level of transparency may not be automatically present where the financing and sub-contracting arrangements are being kept within the relevant corporate group and no third party funding is involved. The Contracting Authority needs to be able to satisfy itself that its Private Partner in this scenario is at least as financially robust as it would be expected in a project financing (which would be largely ring-fenced from external factors).

As described in [Section 10.2.2](#), at the bid stage, the Contracting Authority will need to consider what comfort it requires from the bidder to show that the relevant corporate funding will be forthcoming as there will be no third party lenders to provide the type of commitment letter typically required in a project financed bid. If the Private Partner is not demonstrably creditworthy in its own right (e.g. with a satisfactory credit rating), the Contracting Authority may need to request specific information about the proposed financing and/or require a form of guarantee or commitment letter from a creditworthy company in the corporate group (typically a parent company as its credit rating/financial standing will be the determining factor), or from a third party subcontractor or key supplier. If the bidder is a consortium, the Contracting Authority will want the consortium members (or appropriate parent companies) to take on joint and several liability under any credit support (this may be a requirement rather than an option in a public procurement process where entities have formed a consortium to meet minimum financial standing requirements). [The Contracting Authority will also want to ensure that it has the right to conduct due diligence on the winning bidder \(whether a sole bidder or the members of a consortium bidder\), members of the winning bidder's corporate group, and any relevant third party subcontractors or key suppliers.](#)

### 10.2.5 Price fluctuation between preferred bidder and financial close

Unlike in a project financing, a corporate financed bid may be able to offer a fixed price bid (without variation for funding costs, as its costs of funding will not be as directly affected by interest rates that may move between bid and financial close as in a bank financing, or by the price fluctuation risk in a bond financing). This certainty



may be of particular value to the Contracting Authority, depending on the PPP Project circumstances, and encouraging bidders that are raising third party debt to pre-hedge may not be feasible.

#### 10.2.6 Transparency

[Section 10.2.4](#) highlights that there may be less transparency regarding price and cost in a corporate financed bid where the sub-contracting and financing elements are kept within the corporate group. For example, group overhead costs and return on intra-group loans may be factored into the price in a way which would not be possible in a project financing and the true level of equity return may not be easily ascertainable. The Contracting Authority should try to obtain a level of transparency equivalent to a project financed bid and in doing so should require a financial model as part of the bid submission so that it has sufficient information to understand the bidder's proposed flow of funds and capital structure.

The same applies during the life of the PPP Project. The Contracting Authority will want to ensure that it is able to obtain the same level of financial and technical information that it would expect in a project financing, particularly where relevant to its own liability under the PPP Contract.

As mentioned in [Section 7, Confidentiality and Transparency](#), governments in many jurisdictions are increasingly moving towards greater transparency in relation to public procurement and the use of public funds and this is also a factor in accessing support from multi-lateral agencies. It may therefore also be important from a policy perspective for the Contracting Authority to ensure that a sufficient level of detail is obtainable.

#### 10.2.7 Addressing poor performance

The Contracting Authority should bear in mind that in a corporate financed structure involving only one sponsor group, poor performance may not realistically be able to be addressed in the same way as it can be in a structure where more than one corporate group is involved, as well as possibly third party lenders. There will be a different dynamic without parties who would insist on contractual arrangements being put in place to enable a poorly performing sub-contractor (and/or Private Partner) to be replaced before the PPP Contract is terminated (e.g. as would be the case in a typical project financing). Similarly, Direct Agreements with sub-contractors are unlikely to be of much benefit if the whole PPP Contract is essentially being delivered by one corporate group and failure to perform is likely to be indicative of a systemic failure within the group as a whole.

As there are no third party lenders, there will be no Direct Agreement either (see [Section 6, Lenders' Step-in Rights](#)). While this means the Contracting Authority has fewer constraints on its ability to terminate the PPP Contract in default circumstances, the lack of third party lender involvement removes one line of defense to rescue a PPP Project in trouble.

The Contracting Authority should consider what alternative protection to seek in these circumstances – e.g. requiring certain guarantees or payment retention rights, direct rights against key suppliers or rights to appoint third parties to remedy defaults at the cost and risk of the Private Partner. [Performance guarantees, surety bonds and letters of credit can also be employed, depending on cost and availability.](#)

#### 10.2.8 Flexibility

A corporate financed Private Partner may have greater flexibility when it comes to agreeing significant changes to the scope of work/services under the PPP Contract if it does not have to involve third party lenders in the process.

#### 10.2.9 Changes to documentation

If a PPP Project is being corporate financed and there is no prospect of a refinancing/ introduction of senior debt post commencement, then logically various adjustments should be made to the PPP Contract terms to reflect the structure, parties and documentation involved. These will include:

- (c) References and provisions relating to financing documents (e.g. Senior Financing Documents) – there will not be Senior Finance Documents as in a project financing context. Advice will be needed as to the extent that relevant definitions and provisions should be adapted to take into account the corporate finance structure and any credit support required (such as parent guarantees). Some of these are explored further below.
- (d) References and provisions relating to relevant parties – e.g. there will not be any third party lenders.
- (e) Pricing adjustment provisions – PPP Contracts typically provide for an adjustment to pricing in certain circumstances (e.g. to cover the cost of implementing a qualifying change in law or the cost of certain delay events which are not the Private Partner's fault). In a project financing, the adjustment may be measured by reference to restoring senior debt cover ratios or Equity IRR. As there is no senior debt, this will need to be adapted (e.g. by providing for a lump sum payment(s) or using other criteria as a reference instead).
- (f) Insurance provisions – in a corporate financing, insurance cover may be provided via corporate group policy arrangements as opposed to by project-specific policies. This may feed through to a cheaper bid price but will also mean that the type of insurance provisions typically seen in a project financed project may need adapting as the policies and premia will not necessarily be project-specific nor the terms as transparent. Advice will be needed to ensure the Contracting Authority has equivalent (or satisfactory) protection in terms of uninsurability, placing of insurances, size of deductibles, indemnity cover, endorsements, notice of policy changes, loss payee provisions and premium risk sharing. In addition, as there are no third party lenders, there should be no need to have a threshold above which insurance proceeds are applied against debt as opposed to reinstatement of the PPP Project.
- (g) Refinancing – these provisions should be tailored appropriately to reflect the fact that there will not be any third party financing (or none being planned) but also to cater for a possible future change in financing which should require Contracting Authority consent and which may give rise to a form of refinancing gain (e.g. from a corporate financing to a project financing). If this is envisaged at Financial Close then relevant amendments should be agreed as a schedule to the PPP Contract – if not, the changes and the sharing of the refinancing gain will need to be negotiated as part of the Contracting Authority consent process.

- (f) Termination payments – in a corporate financed PPP Project with no third party debt the funding is being provided by the parent group and is in principle equity. However, it is likely that the principles relating to compensation set out in [Section 4, Termination Payments](#) will still need to apply in order for the parent group to be prepared to commit the level of funding required for the PPP Project. Appropriate adjustment to the calculation formulae will be required to reflect that there is no Senior Debt but instead just equity. [See Section 10.3.](#)

As mentioned in [Section 10.2.7](#), there is no need for a Direct Agreement if there are no third party lenders. The Contracting Authority should consider whether any alternative step-in/direct agreement-type contracts with other parties/parent companies might be appropriate in the proposed structure, including in relation to ensuring oversight of corporate documentation and any joint and several arrangements.

## 10.3 TERMINATION PAYMENT CALCULATION

### 10.3.1 Contracting Authority Default, MAGA, [Qualifying Change in Law](#) or Voluntary Termination

Following the market practice described in [Section 4.3.1, Termination Payments](#), in a corporate financing the Private Partner is still likely to expect full compensation if the PPP Contract is terminated early for Contracting Authority Default, MAGA, [Qualifying Change in Law](#) or Voluntary Termination. A form of financing-based compensation approach as described in [Section 4.3.3](#) (consisting of senior debt plus equity plus third party cost elements) can be adopted, but will need to take into account that there is no senior debt. Options are set out below.

- (h) As the equity element represents the full PPP Contract funding, if the Private Partner's sole business is the PPP Project, it is possible to choose any of the three Options described in [Section 4.3.3.2](#) in place of the senior debt plus equity element. Third party costs (e.g. redundancy and sub-contracting break costs) ~~should~~[may](#) be added as described in [Section 4.3.3.3](#).
- (i) If the PPP Project is not the Private Partner's sole business, the Options in [Section 4.3.3.2](#) will not be appropriate and one approach is to use the value of the PPP Contract as the basis for compensation – i.e. the amount which the PPP Contract could be sold on the open market (assuming no termination). Again, third party costs ~~should~~[may](#) be added. This reflects the approach described in [Section 4.4.2\(b\)](#).
- (j) An alternative to (b) is to base compensation on the net present value of future payments which would have been due under the PPP Contract from the termination date, less future operating costs and capital expenditure (in each case as shown in the Original Base Case and discounted at the pre-tax Base Case Project IRR). Third party costs ~~should~~[may](#) again be added.

Approaches which are based on a market value may prove hard to implement in practice on the basis that a market is unlikely to exist in some of these termination circumstances, particularly in an emerging market with a limited market anyway. An estimated value may have to be used instead.

In a corporate financing, the Private Partner may be able to more effectively mitigate costs to the Contracting Authority, particularly on a Voluntary Termination, in a way which proves less expensive to the Contracting Authority than in a project financing. One reason for this is that, with reasonable notice, resources and investment may be capable of being redeployed in other areas around the group on termination, reducing break costs.

With any of these scenarios, the Contracting Authority will want to ensure that termination fees under any sub-contracts are not so disproportionate as to result in excessive compensation of intra-group companies who are sub-contractors.

### 10.3.2 Private Partner Default Termination

In a Private Partner Default Termination, the debt-based option mentioned in [Section 4.4.2\(a\)](#) will not be applicable as there is no senior debt. The appropriate method of calculating any termination payment should be determined on a case by case basis and will depend entirely on the particular circumstances of the PPP Project and the nature and source of the corporate funding. Possible alternatives include:

- (k) basing compensation on the market value of the PPP Contract if retendered, as highlighted in [Section 4.4.2\(b\)](#) and [Section 10.3.1\(b\)](#). As bidders may want to bid on a project financed basis, the PPP Contract drafting should allow for this. As stated above, the market value approach is uncommon generally and more difficult to implement in emerging markets and therefore careful consideration should be given to the justification for using this approach.
- (l) using the related and more feasible alternative to (a) of estimated market value as described in [Section 4.4.2\(b\)](#). However, again such approach may be difficult in emerging markets, and the Contracting Authority may need to consider agreeing a "top up" or baseline amount.
- (m) following a similar approach to Force Majeure (see [Section 10.3.3](#)) and calculating capital and operating expenditure up to the termination date (as shown in the Original Base Case), subtracting payments up to that date and adding some element of third party costs.
- (n) basing compensation on the equity investment cost, e.g. if financed by intercompany loans by reference to the coupons on those loans.

In any event, Contracting Authorities should bear in mind the principles set out in [Section 4.4.1](#), particularly in respect of unjust enrichment.

### 10.3.3 Force Majeure Termination

On a Force Majeure Termination, any compensation will again need to reflect that there is no senior debt. This can be done by calculating capital and operating expenditure up to the termination date (as shown in the Original Base Case), subtracting payments up to that date, and adding third party costs. As in any type of financing, the Contracting Authority will want to ensure that termination fees under subcontracts are proportionate to avoid disproportionate compensation of intra-group companies acting as subcontractors.



## APPENDIX

## ADDITIONAL PPP RESOURCES

Public-Private Partnership in Infrastructure Resource Center

<http://ppp.worldbank.org/public-private-partnership/>

PPP Reference Guide Version 3.0, dated April 2017

<https://pppknowledge.org/guide/>

Public-Private Partnerships Fiscal Risk Assessment Tool (April 2016)

<http://www.worldbank.org/en/topic/publicprivatepartnerships/brief/ppp-tools#T2>

Public-Private Partnerships Fiscal Risk Assessment Model User Guide (April 2016)

<http://pubdocs.worldbank.org/en/422531461874706371/PFRAM20160401-Guidance-Note-for-PFRAM-March-28-2016.pdf>

A Framework for Disclosure in Public-Private Partnerships, World Bank 2016

<http://pubdocs.worldbank.org/en/143671469558797229/FrameworkPPPDisclosure-071416.pdf>

Disclosure in Public-Private Partnerships: Jurisdictional Studies, World Bank 2015

<http://pubdocs.worldbank.org/en/910311448299077946/Disclosure-in-PPPs-Jurisdictional-Studies.pdf>

Disclosure in Public-Private Partnerships: Good Practice Cases, World Bank 2015

<http://pubdocs.worldbank.org/en/610581448292161621/Disclosure-in-PPPs.pdf>

Infra Australia PPP Guidelines

<https://infrastructure.gov.au/infrastructure/ngpd/files/Volume-3-Commercial-Principles-for-Social-Infrastructure-Dec-2008-FA.pdf>

<https://infrastructure.gov.au/infrastructure/ngpd/files/Volume-7-Commercial-Principles-for-Economic-Infrastructure-Feb-2011-FA.pdf>

South Africa PPP Guidelines

[http://www.ppp.gov.za/Legal%20Aspects/Standardised%20PPP%20Provisions/National%20Treasury%20PPP%20Practice%20Note%20No%201%20of%202004;%20Standardised%20PPP%20Provisions;%20First%20Issue;%2011%20March%202004\\_1.pdf](http://www.ppp.gov.za/Legal%20Aspects/Standardised%20PPP%20Provisions/National%20Treasury%20PPP%20Practice%20Note%20No%201%20of%202004;%20Standardised%20PPP%20Provisions;%20First%20Issue;%2011%20March%202004_1.pdf)

UK PF2 Guidance

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207383/infrastructure\\_standardisation\\_of\\_contracts\\_051212.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207383/infrastructure_standardisation_of_contracts_051212.PDF)

UK Private Finance 2 (and related materials)

<https://www.gov.uk/government/publications/private-finance-2-pf2>

Field Code Changed

Field Code Changed

Dutch Model (DBFM infrastructure and DBFMO accommodation)

<https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/06/07/dfbm-overeenkomst-rijkswaterstaat>

<https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/04/07/rijksbrede-modelovereenkomst-dbfmo-huisvesting-rijksvastgoedbedrijf-versie-4-3>

France FIN INFRA guidelines

<http://www.economie.gouv.fr/ppp/clusier-type>

Field Code Changed

Termination and Force Majeure Provisions in PPP Contracts - Review of current European practice and guidance (March 2013) - EPEC/Allen & Overy LLP

[http://www.eib.org/epec/resources/Termination\\_Report\\_public\\_version](http://www.eib.org/epec/resources/Termination_Report_public_version)

European PPP Expertise Centre Library

<http://www.eib.org/epec/library/index.htm>

Global Guide to Public-Private Partnerships (March 2010) and Asia Pacific Guide to Public-Private Partnerships (March 2012) – Allen & Overy LLP

Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition

<http://globalinfrastructurehub.org/allocating-risks-in-ppps/>

#### *Bond financing resources:*

EPEC: Financing PPPs with project bonds - Issues for public procuring authorities

[http://www.eib.org/epec/resources/publications/financing\\_ppps\\_with\\_project\\_bonds\\_en\\_17\\_17\\_2013](http://www.eib.org/epec/resources/publications/financing_ppps_with_project_bonds_en_17_17_2013)

<http://www.eib.org/epec/resources/financing-ppps-project-bonds-in-germany-july-2013pdf.pdf>

AFME: Guide to infrastructure financing

<https://www.afme.eu/en/reports/publications-and-data/publications/guide-to-infrastructure-financing/>

OECD:

<https://www.oecd.org/finance/Financing-infrastructure-international-trends2014.pdf>

Infra Australia:

[http://infrastructureaustralia.gov.au/policy-publications/publications/files/Review\\_of\\_Infrastructure\\_Debt\\_Capital\\_Market\\_Financing\\_2014\\_03\\_28.pdf](http://infrastructureaustralia.gov.au/policy-publications/publications/files/Review_of_Infrastructure_Debt_Capital_Market_Financing_2014_03_28.pdf)

Canada:

<http://www.pppcouncil.ca/>





