Draft Report on Recommended PPP Contractual Provisions

2016 Edition

1818 H Street NW
Washington DC, 20433
Telephone: +1-202-473-1000
Internet: www.worldbank.org

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

This current edition of the Report is largely based upon work done by the international law firm of Allen & Overy LLP, under a team led by Dolly Mirchandi, with the participation of Tim Scales, David Lee, Helga van Peer, Fleur Clegg, Sarah Garvey and Valentijn de Boe. It builds on the Report's previous edition as developed by a Paris based team of the international law firm of Gide Loyrette Nouel, led by John Crothers, with the participation of Victor Grandguillaume and Barthélemy Littot. The work done by both Allen & Overy LLP and Gide Loyrette Nouel was generously funded by the Public Private Infrastructure Advisory Facility (PPIAF).

The Report received the expert technical support from various World Bank Group staff, including from the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), the International Centre for Settlement of Investor Disputes (ICSID), the Global Infrastructure Facility (GIF) as well as the World Bank's Public-Private Partnerships Group. In addition, special thanks is due to the following organizations for their valuable inputs: the Global Infrastructure Hub (GIH), the African Legal Support Facility (ALSF) and the Inter-American Development Bank (IDB).

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 a government or other public entity and a private company. In a number of countries efforts have been made to develop complete standardized PPP agreements 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 agreements 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 agreement, 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 of the Report 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 of the Report 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.

In regard to the recommended drafting contained in this document, the authors would like to emphasize that this is not intended to be 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 Report 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 the provisions. In doing so, the authors of the Report 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 specialists – needs to be undertaken by both Contracting Authorities and private parties before concluding a PPP Contract. In this regard, the contents of this Report 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 Report 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. Where appropriate, this is indicated throughout the document while linking its contents 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 Report 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 of the Report, the authors would finally like to stress that this is seen as an evolving process, with further iterations of the Report possibly being developed in the future once further industry feedback as to its further enhancement has been collected and as and when new consensus develops around the provisions considered in the document or other contractual language found to have typically formed the basis of successful PPP transactions.

Christina Paul
Washington, DC
November 2016

DEFINED TERMS

Capitalised terms in this Report have the meanings set out below and additional capitalised terms used in the Sample Drafting sections are defined in those sections.

Base Case Equity IRR	has the meaning set out in *Section 5, Refinancing*.
Contracting Authority	means the public authority that enters into the PPP Contract with the Private Partner.
Dutch Model	means *Version 4.3 of the Netherlands Standard PPP Contract* published in April (accommodation) and June (infrastructure) 2016. *See links in Appendix A, Additional PPP Resources.*
Equity Investors	means, at any time, the Shareholders and/or their parent companies, as the context requires.
Estimated Change in Project Costs	has the meaning set out in *Section 3, Change in Law.*
Infra Australia PPP Guidelines	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. *See links in Appendix A, Additional PPP Resources.*
Lenders	means the finance parties under the Senior Finance Documents providing senior debt to the Private Partner for the purpose of the PPP Project (excluding the Shareholders and their affiliates, as providers of equity or subordinated debt).
MAGA	means Material Adverse Government Action as further described in *Section 2, Material Adverse Government Action*.
Original Base Case	has the meaning set out in *Section 5, Refinancing.*
Party or Parties	means the Contracting Authority and/or the Private Partner, as the context requires.
PPP	means Public-Private Partnership *(see also definition of PPP Contract)*.
PPP Contract	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[1].
PPP Project	means the underlying project which is the subject of the PPP Contract.

[1] There is no single, internationally accepted, definition of Public-Private Partnership. This definition is the definition provided in the *PPP Reference Guide Version 2.0*, dated July 2014, published on the PPPIRC Website (http://ppp.worldbank.org).

Private Partner	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.
Project Agreements	means the *[any offtake agreement, construction contract, the operating and maintenance agreement, the land lease agreement]*[2].
Senior Finance Documents	has the meaning set out in *Section 4, Termination Payments.*
Shareholders	means, at any time, the shareholders of the Private Partner.
South Africa PPP Guidelines	means South Africa's *National Treasury Standardised PPP Provisions: First Issue*, published 11 March 2004. *See link in Appendix A, Additional PPP Resources.*
UK PF2 Guidance	means the *Standardisation of PF2 Contracts (Draft)* guidance issued by HM Treasury in the United Kingdom, launched on 5 December 2012. *See link in Appendix A, 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 Report

This Report 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 Report 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 Report 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 select this method of infrastructure procurement.

Prior to reviewing the detailed analysis and contractual provisions provided in this Report, 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.

To that end, set out below is a brief overview of why governments are establishing 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. All these factors are crucial to take into account in formulating and negotiating the terms of a PPP Contract.

Also included in this Report 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 A, Additional PPP Resources*.

A. Overview of infrastructure development utilising PPPs

Increasingly, PPP programmes are being established by governments across the world as a means to deliver and maintain infrastructure in particular 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;
- the need to accelerate delivery of both greenfield and rehabilitation infrastructure and the expansion of brownfield infrastructure; and
- the advantages of crowding in private sector expertise in delivering certain 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.[3]

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[4] 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"). This project company raises finance 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 this makes equity more expensive than debt, the aim in reducing the overall weighted average cost of capital of a PPP Project is to use a high proportion of debt to finance the PPP Project to the extent possible (typically 70 to 95 percent 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 results in a competitive price.

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 may be structured as "non recourse" or "limited recourse" financing. In non recourse PPP Projects, 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 mainly on the Private Partner's revenues to repay their loans and earn a return on their investments.

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. This 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.

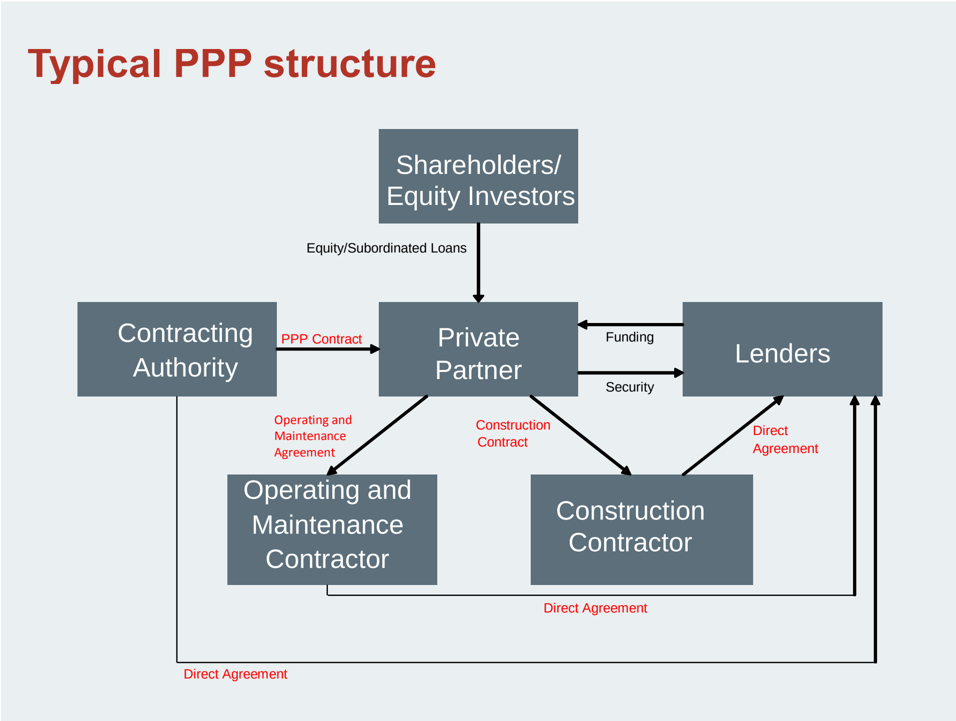
---

[3] See "PPP Contract" definition in *Definitions* and associated footnote.

[4] 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) may involve more comprehensive operational services.

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 the Operating and Maintenance Contractor that are often retained by a 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).



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 payment. 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. 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 off set 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).[5] 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, they cannot anticipate the entire range of events that might potentially arise during their lifetime. All 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.

5 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*.

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 above in *Section E*, 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). 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.

"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). 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

One of the further factors 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, PPP 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.

A road PPP Project, for example, is very different to a hospital PPP Project which in turn has some very different features to an airport PPP Project. Similarly, a defence PPP Project is likely to involve issues of national security which do not equally affect other sectors. 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.[6]

J. PPP Contracts in different legal systems

Common law and civil law are the two main types of legal system 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, there may be differences in how such risk allocation is reflected in PPP Contracts according to the degree of freedom the Parties have to contractually agree whatever terms they like. Underlying general laws may affect or apply to contractual relationships. The Parties need to verify whether and to what extent it is legally possible to amend or waive legal rights and obligations under such laws (taking into account this may also affect third parties, such as users). At the same time, the Parties may need to expressly spell out the underlying legal position in the PPP Contract for the sake of certainty. How such issues are factored into PPP Contract risk allocation negotiations and drafting 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 only 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 the PPP Contract for public policy reasons. For example, it may wish to prohibit the service provider from cutting off the water or electricity supply of delinquent payers, or limit any toll or tariff the Private Partner can charge users. It may also want to

[6] For sector specific risk matrices, see the Global Infrastructure Hub Report: *Allocating Risks in Public-Private Partnership Contracts, 2016 edition.*

expressly require that 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 below 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 will 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 inadequacies or ambiguities can be remedied or resolved by operation of law. This will often result in a civil law contract being shorter than an equivalent common law contract.

In a PPP Contract context, it is key for all Parties to understand how 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, rights of a public sector entity to voluntarily terminate a contract or rights to compensation of a party suffering financial hardship as a result of certain changes in circumstance).

Changing or overriding an administrative law principle 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 a growing move in civil law PPP Contracts 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. The alternative of taking a background administrative law principle and spelling out exactly how it is to be applied in a PPP Contract will generally be effective.

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 extremely lengthy and ultimately fail. Governments in both civil and common law jurisdictions need to consider what additional legislation may be required in order to facilitate and permit PPP programmes – 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 in the desired form is legally permitted. Governments will also need to consider whether specific legislation is required to facilitate PPP 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.

A <u>stable</u> 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 great 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 to offer enhanced 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 final decision to invest in some jurisdictions. However, in neither case should any Party see these as a substitute for negotiating a well-balanced PPP Contract.

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

As highlighted at the outset of this Section, understanding the whole context of a PPP Project is key 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 model. There is no "one size fits all" PPP Contract and contractual provisions cannot be looked at in isolation due to their close interplay.

The guidance in this Report is therefore intended to help Contracting Authorities carefully assess the issues specific to their own PPP Project and jurisdiction in developing contractual provisions. It presents and describes the rationale for drafting that has formed the basis of many successfully procured PPP transactions around the globe and which has been developed through detailed risk allocation assessment and negotiation between Contracting Authorities, Private Partners and Lenders. Using the guidance in this Report will help Contracting Authorities negotiate key aspects of PPP Projects confidently and efficiently and will reduce the risk of time and money being spent negotiating contractual terms which may ultimately result in an unaffordable or unbankable PPP Contract.

1. FORCE MAJEURE

1.1 Key aspects

1.1.1 The concept of Force Majeure

"Force Majeure" was originally a civil law concept, which 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 control of the contracting Parties; and

(b) make it impossible for one Party to fulfil its contractual obligations (i.e. they are catastrophic 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 is to allocate the financial and timing consequences of Force Majeure Events between the Contracting Authority and its Private Partner[7]. In a PPP Project, the affected party is most likely to be the Private Partner and this raises four important issues for the Contracting Authority:

(1) what events qualify as Force Majeure events;

(2) whether and how the Private Partner is compensated during Force Majeure events (e.g. for increased costs and/or loss of revenue);

(3) whether the Private Partner or the Contracting Authority is relieved from its obligations to perform under the PPP Contract and the related consequences (e.g. the risk of termination due to default); and

(4) whether the PPP Contract should be terminated if a Force Majeure event persists for a significant period of time and the termination compensation to be paid, if any.

Civil and common law differences

Many jurisdictions have a concept of Force Majeure under general law[8]. 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. This is particularly the case in civil law jurisdictions. However, most PPP contracts 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.

---

[7] 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 A, Additional PPP Resources.*

[8] 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.

1.1.3 Relationship to other types of event

When negotiating Force Majeure provisions, the starting assumption for both Parties should be that the risk of a Force Majeure event occurring is outside either Party's control and neither is better placed than the other to manage the risk of such occurrence or its consequences and that therefore such risks will be shared.

Traditionally, the concept of Force Majeure includes "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 refusal to grant licenses) – often referred to as "political force majeure". While both natural events and political events may fall under the Force Majeure definition and be treated as shared risks, it is common that the Contracting Authority bears the responsibility for certain political events outside the Private Partner's control. These risks are either deemed to be within the Contracting Authority's control or borne by the Contracting Authorities – in particular in nascent markets with limited track record of private sector investment – because, even if they are not in control of the risk or able to manage it, the Private Partner otherwise will price for the additional risk or may even decide not to pursue the deal.

The dividing line between such political risk and certain commercial risks (which the Private Partner is expected to take) is in practice, likely to be a difficult one to draw. This will inevitably depend on the situation in the relevant jurisdiction and the type of event being considered. For example, while it is usually accepted that the type of political risk which should lie wholly with the Contracting Authority (as a Material Adverse Government Action ("MAGA") risk event) includes deliberate acts of state such as outright nationalisation of the PPP Project, 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. In more volatile jurisdictions, however, these type of events may be better treated as Contracting Authority risk (i.e. MAGA), or looked at more individually so that, for example, civil war may be classed as MAGA, but external war events classed as Force Majeure.

In any case however, if there are political risk events considered within the Contracting Authority's (or its government's) control or management, it is likely that these events will require separate treatment in bespoke provisions. In this Report, events in this category are termed "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 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.[9] *See also Section 2.1.3, Material Adverse Government Action and Section 3.1.3, Change in Law.*

[9] 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.

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[10]) 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. Again, this is to provide certainty for the Parties and is the recommended approach for Contracting Authorities where possible under the applicable governing law.

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.

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 recognised forms of construction contract[11] 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 resulting in a construction contract that is "back-to-back" with the PPP Contract.

---

[10] 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.

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

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.

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[12]), 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.

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 *(see Section*

1.2.1.*)* 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. *See Section 1.4, Sample Drafting 1, Clause (1).*

In any event, stating that Force Majeure includes certain specific events (without limitation) can be advisable in jurisdictions where the courts are unlikely to expand upon the contractual definition given by the Parties, to ensure they are included.

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, or natural disasters and government interference may be more likely.

12 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.

(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 natural events such as nuclear explosions natural disasters (e.g. earthquakes, landslides, floods) and depending on whether or not and in how far political events are included as Force Majeure events (such as wars, acts of terrorism, strikes and protests. An example of this is the Dutch Model which sets out a very limited list of Force Majeure Events, as does 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".*

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.[13]

(c) **Exclusions and qualifications:** in relation to both Approach 1 and Approach 2, it is also common to specify events which are specifically excluded from the definition of Force Majeure or which only qualify if they are 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 particular requirements as well – for example, defence 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 defence project).

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 how limited the potential list of events is.

[13] This is part of the approach described in the footnote to *Section 1.1.3*.

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 additional 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 *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[14].

1.2.1.4 Insurance – Contracting Authorities typically require the Private Partner to insure key 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. Nowadays, 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 and insurance proceeds paid and not used to compensate third parties may also be deducted from any termination amount payable. The Contracting Authority should also expect that the costs of insurance coverage that the project requires will ultimately be passed on to third party users via the approved tariff or fee (under the "user pays" model) or the Contracting Authority itself (under the "government pays" model).

Generally, uninsurability is addressed in separate provisions, although some jurisdictions may not recognise 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 to completion may cause the Private Partner to incur additional financing costs (e.g. additional Interest During Construction (IDC) 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 status may be at risk. This applies whether the "user pays" or "government pays" payment model is being used *(see Section G, PPP Contracts in Context)*.

[14] For example, see the Infra Australia PPP Guidelines.

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. 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). *See Section 1.5, Sample Drafting 1A, Clause (4).*

The availability of insurance will be relevant to this debate *(see Section 1.2.1. and Section 1.3)*, 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 usually of outstanding senior debt). *See Section 4, Termination Payments.*

Types of relief are discussed in *Sections 1.2.2.1 – 1.2.2.8.*

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 1.4, Sample Drafting 1, Clauses (3) and (5) and Section 1.5, Sample Drafting 1A, Clause (1).*

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 continuing. *See Section 1.4, Sample Drafting 1, Clauses (3) and (5) and Section 1.5, Sample Drafting 1A, Clause (1).*

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 infrastructure 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 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 **Error! Reference source not found.***).

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 if often critical, as well as if it is legally possible to increase the relevant toll payments or tariffs. 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 may have to agree to pay such costs. It should also be noted that Lenders will likely consider any compensation mechanism involving increased tariffs as increasing the overall risk profile and may 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 is received. One way to address this would be for the Private Partner to have an obligation to seek financing for such additional costs on the best possible terms but, if financing was not available or the Contracting Authority was to reject the terms, the Contracting Authority would be the lender of last resort.

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 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* above, where no financial compensation is expressed to be 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).*

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. 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) and 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 by the Private Partner). This to some extent reflects the practice in more developed markets mentioned in *Section 1.2.1.2(b)* above 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.*, 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. For example, the PPP Contract may require the Private Partner to insure against the risk of damages caused by named windstorms, but insurers may no longer offer such coverage or only offer such coverage at prohibitive cost. 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 though general law provisions, or may not recognise the concept of uninsurability[15]. 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 same 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.

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

---

15 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 A, Additional PPP Resources.*

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 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, 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.[16]

[16] 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 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.

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

(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, drought;

(b) fire, explosion, or chemical contamination (other than a fire, explosion, or chemical contamination 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), 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 labour disturbance such as boycotts, strikes and lock-out, go-slow, 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].

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, (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 against 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;

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.

(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

(iv) the Affected Party is using all reasonable endeavours to perform its 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 prevented, hindered or delayed in such performance by reason of the Force Majeure Event.

(6) 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.

(7) 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 its 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.

Termination due to Prolonged Force Majeure

(8) If a Force Majeure Event subsists for a continuous period of more than *[180-360 calendar]* days, 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]*.

1.5 Sample Drafting 1A (exhaustive list of specific events, concept of foreseeability not included)

Required Definition

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

(a) war, civil war, armed conflict or terrorism; 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.

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)), 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 endeavours to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the PPP Contract.

> For example, if the Force Majeure Event occurs during the construction phase, the Parties could agree that relevant milestone dates are postponed by such time as is reasonable, taking into account the likely effect of the delay.

(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) 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 endeavours to prevent and mitigate the effects of any delay and the Private Partner shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with industry good practice to overcome or minimise 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 its 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 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 allocated to the public sector entity/government.

Very broadly, MAGA events can be contrasted with Force Majeure events, which, as explained in *Section 1, Force Majeure*, are considered outside both parties' control and the risk is therefore shared.

As described in *Section 1, Force Majeure*, MAGA is also referred to as "political risk" or "political force majeure". While MAGA events may be included in a Force Majeure clause or other provisions in the same contract, this Report follows the approach of giving these events 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.*

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.

Transferring any 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.

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 more established 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)[17]. In Australia, certain categories of environmental/indigenous rights risks are allocated to the Contracting Authority 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). This may be because of an actual or perceived increased likelihood of certain MAGA events occurring in the jurisdiction concerned, or be due simply to a lack of track record in running 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 the political risks concerned 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 Report 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. *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*.

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 minimise 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 or on its financial status[18]. However, as far as possible such

17 This is part of the approach described in the footnote to *Section 1.1.3, Force Majeure.*

18 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.

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) 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 failures by the Contracting Authority/government to grant licenses or comply with certain obligations.

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, market practice is that they 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.

The individual circumstances of the PPP Project and jurisdiction will 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 port or airport within a certain distance from the port or airport to be operated under the PPP Contract concerned.

Emerging and developed market differences

Some jurisdictions are more politically volatile than others. If a political event (such as a civil or external 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, these type of events may be better treated as Contracting Authority risk. It may also be appropriate to differentiate certain political risks (such as war) so that they are classified as Force Majeure Events if they occur outside the country and as MAGA events if within. 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 Materiality – 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. 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 include a "materiality" threshold related to the effect of the event on the Private Partner. However, the Contracting Authority is strongly advised to define 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) - (6).*

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, Clauses (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 failure to grant a permit), while agreeing on a lesser amount (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*] set out in Clause (2), 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 [*insert defined term for [Project Costs]*].

Where possible, undefined materiality qualifications should be avoided to minimise 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) any act or omission shall mean and be limited to the following circumstances:

(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 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];

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

(b) 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]]*;

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

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

(e) 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.

(f) 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;

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

(h) [*add any event specific to the PPP Project such as the construction of competing infrastructure or a pollution event*].

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 endeavours to perform its obligations under the PPP Contract.

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

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

(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

(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 (3) 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, relief from the Private Partner's obligations under this PPP Contract, 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

Everyone must operate within the law and so must factor the cost, time and any other implications of complying with applicable law into any performance or services they provide. 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, 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 obliged under the PPP Contract to comply with all applicable law. Therefore, 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 tax 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 (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.

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 and in the Netherlands where change in law and certain other defined events (sometimes called "Compensation Events") all entitle the Private Partner to the same type of relief (namely both cost reimbursement and extensions of time)[19]. *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 adjustments 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 it is entitled to under the PPP Contract. *See Sections 1.1.4, Force Majeure and 2.1.4, Material Adverse Government Action.*

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 private sector financing for infrastructure.

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

[19] This is part of the approach described in the footnote to Section 1.1.3.

Private Partner will not typically have the same flexibility. It will have priced its proposal on the basis of the legal framework 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 so the Private Partner will 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, 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 as part of its pricing due diligence exercise.

3.2.1.2 Bankability – The Private Partner's starting point 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[20].

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 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 science, but the Contracting Authority (or users) may then end up with an unnecessarily expensive PPP Contract if the risk never materialises.

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 – 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 unable to 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

20 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 A, Additional PPP Resources.*

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 matters with which the Private Partner is legally obliged to comply:

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

3.2.2.2 Change in Applicable Law – Changes will be defined by reference to the qualifying elements of Applicable Law. However, 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. Where this is a risk, it may be appropriate for change in law also to include any modification in the interpretation or application of any Applicable Law. *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".*

3.2.2.4 Foreseeability – Classifying what is "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. It may also be appropriate to use foreseeability criteria. If there is a particular concern in relation to a change in law which is contemplated, it can be addressed specifically in the PPP Contract. 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.

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 specifically impact it or the PPP Project as opposed to others. 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 bears all the risk of change in law and provides full relief to the Private Partner. This may be the only way that private finance can be attracted and raised in its jurisdiction for the bankability reasons mentioned above.

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 or legal environment is established in its jurisdiction which generates greater confidence in the private sector, 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 specified amount 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. Above the threshold, 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.

Emerging and developed market differences

Contracting Authorities will need to consider whether, depending on the jurisdiction they are operating in, 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 for this approach is given in *Section 3.3, Sample Drafting 3, Clause (3)(c) and Section.*

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[21]. 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** 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 Changes in Law are 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 now that 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;

- **General Changes in Law requiring capital expenditure** – these are general changes in law (i.e. excluding Discriminatory Changes in Law and Specific Changes in Law) which require the Private Partner to incur capital expenditure during the operating period. These are also allocated to the Contracting Authority as the Private Partner has no means of absorbing this type of potentially significant costs once the PPP Project is operational and the relevant asset built; and

- **Any other Changes in Law** – these are all changes in law including those which trigger capital expenditure during the construction period (but excluding the categories above). These are 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.

[21] See the Infra Australia PPP Guidelines and the UK PF2 Guidance and the definition of "Relevant Change in Law" in the Dutch Model.

Emerging and developed market differences

With 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 sector 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 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*) 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. 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)[22]. *See Section 3.3, Sample Drafting 3, Causes (1)(a), (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.

For background to the above *see Section 1.2.3, Force Majeure and Section 3.3, Sample Drafting 3, Clause (3)(c).* 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).*

[22] 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.

3.2.5 Termination

The Parties should determine whether, and in which circumstances, the occurrence of a change in law could allow the affected Party to terminate the PPP Contract.

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))*.

3.3 Sample Drafting 3

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: (i) the enactment of any new Applicable Law; (ii) the repeal, modification or re-enactment of any existing Applicable Law; and/or (iii) a change in the interpretation or application of any Applicable Law, which (a) 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 (b) was not published as a draft law in the [*insert applicable publication source for legislation*] or in effect at the Setting Date.
"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.

This date could be a period of time before bid submissions but is usually no later than the bid date. See discussion under Section 3.2.1.3.

Definition and limbs will need to tie in with the definition of Applicable Law to avoid argument or circularity and also 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;

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

(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 result from the relevant Change in Law;

(e) any (positive or negative) estimated change in the costs of the PPP Project that directly result from the Change in Law; or

(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 endeavours (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimise 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, which was anticipated to be incurred to replace or maintain the contractual obligations of the Private Partner that have been affected by the Change in Law concerned, 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 and for the avoidance of doubt a mere loss of profits shall not be considered as a hindrance or prevention of performance;

(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 further to 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 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

(5) 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]*.

3.4 Sample Drafting 3A

Option 2: Protection against Discriminatory or Specific Changes in Law

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

"Capital Expenditure"	means any expenditure which falls to be treated as capital expenditure in accordance with generally accepted accounting principles in [*insert Country*] 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 Change in Law"	means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law.
"Qualifying Change in Law"	means: (i) a Discriminatory Change in Law; (ii) a Specific Change in Law; or (iii) a General Change in Law which comes into effect during the *[insert defined term for operating period]* 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 [*services the same as or similar to the services provided under the PPP Contract - define*] and/or (ii) the holding of shares in companies whose main business is providing [*services the same as or similar to those provided under the PPP Contract - define*].

Qualifying Change in Law

(1) If a Qualifying 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 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 Contract including any necessary Contracting Authority variation;

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

(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;

(d) any (positive or negative) change of revenue that will result from the relevant Qualifying Change in Law;

(e) any (positive or negative) estimated change in the costs of the PPP Project that directly result from the Qualifying Change in Law; or

(f) 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 endeavours (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimise 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, which was anticipated to be incurred to replace or maintain the contractual obligations of the Private Partner that have been affected by the Qualifying Change in Law concerned, 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

Delete if no materiality threshold is to be included.

reasonably incurred or obtained further to 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]*.

(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

(5) 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. Generally speaking, where there is an innocent party, they 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 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 provision 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 crucial in determining whether a PPP Project will be bankable by Lenders. 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.[23]

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 though into the price bid by the Private Partner for the PPP Contract.

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 (his may be the case in less stable regimes or where the Contracting Authority is not a main arm of the government). As such, the Private Sector and Lenders could, for example, benefit from extended political risk insurance provided by multilateral organizations and export credit agencies.

[23] 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 A, Additional PPP Resources.*

4.1.3 Types of termination event

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[24] 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 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.*

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 should be understood by all Parties, including any breakage costs (e.g. under hedging arrangements[25]) and any "make-whole" payments (e.g. in respect of fixed rate loans[26] or bonds). 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.

[24] 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.

[25] Such hedging arrangements are specified in the Lenders' financing agreements, but often specifically in the documentation as published by the International Swaps and Derivatives Association (ISDA).

[26] 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.

4.2.2 Understanding relevant agreements

Where 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 and maintenance reserve account). 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 and any profit the Private Partner might make 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, definition of "Outstanding Senior Debt".*

4.2.4 Framework for negotiation

It is important to note that in practice, termination provisions must be enforceable as written ultimately, but are sometimes used by the Parties as a means for discussing possible alterations in the PPP Project to continue services. This is because it is usually in all parties' interests to find a way to continue the PPP Project and avoid termination. 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 and negotiating a way to continue the PPP Contract which works for all parties may be the best way to achieve this.

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 of the PPP Project asset, handover arrangements and access to information necessary for continuing to operate or construct the PPP Project.[27]

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 for each. *Section 4.7. Sample Drafting 4* is based on the principles set out below in *Sections 4.3 –4.6*.

[27] These aspects are not covered in this Report. For further information, see the Infra Australia PPP Guidelines and the UK PF2 Guidance.

4.3 Compensation on Contracting Authority Default, MAGA, 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, 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 project has been funded in the bond markets or by fixed rate loans, a "make-whole" payment would be payable to the bondholders or relevant fixed rate lenders in these circumstances to compensate them for the early repayment of their investment.

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 would still cover at least outstanding debt and contributed equity).

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 so the Parties should make sure they understand 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. This method is not as commonly used and although it is relatively clear and simple, it is generally not recommended 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.[28]

(b) **Financing-based compensation:** this is based on the financing for the PPP Project (e.g. senior debt, subordinated debt and equity), again with third party costs on top. This approach is more common across the PPP market and is the recommended approach in this Report. *See further detail in Section 4.3.3 and Section 4.7, Sample Drafting 4, Schedule, Clause ((1)).*

28 This approach is not in Section 4.7, Sample Drafting 4.

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 (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 bond or fixed rate funding); plus

(iii) breakage costs arising under applicable hedging agreements.

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) profits arising from the termination of the hedging agreements and, in some cases, from pre-paying fixed rate loans;

(c) insurance proceeds received or due to be received before 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 is uncertain - 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. 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 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. 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, they will want to ensure there are no excessive termination payments built in to contracts with parties who hold shares in the Private Partner as well as are sub-contracted to it.

- **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 financial 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 need to address is the extent to which compensation should cover the loss of future profits for the sub-contractors – 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 and may depend on applicable law and the ability to redeploy affected staff.

See Section 4.7, Sample Drafting 4, Schedule, Clause ((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 may 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 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 relevant:

(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 (i.e. an amount based on the formula under *Section 4.3.3.1*). The PPP Contract must clearly define the debt elements to be compensated and also applicable deductions of amounts available to Lenders (such as profit on close-out of the hedging arrangements, insurance proceeds and amounts in bank accounts).

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, 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 context, in which the PPP Project is conducted). The exact percentage of a haircut (if any) should be assessed on a project-by-project basis. *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 likely – the Lenders should 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 Authority chooses not to go down this 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. In this context, 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[29], 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.

Contracting Authorities should take a view as to whether market-based termination compensation is a viable option on a project-by-project basis.[30]

(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 Report as the result may not accurately reflect the reality of the sums owed. *See discussion under Section 4.3.2(a).*

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*); plus

29 See the Infra Australia PPP Guidelines (for Social Infrastructure).

30 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.

(ii) the amount of equity invested (taking into account any distributions already paid), 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:[31]

- **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.

- **Private Partner 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 and they are likely to 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.

- **Interest** – payment over time will incur interest costs for the Contracting Authority, usually from the date the payment is recognised 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.

- **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 will in general be

[31] These elements are not included in Section 4.7, Sample Drafting 4.

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

"Distribution"	means: (a) the payment of a distribution by the Private Partner (whether directly or indirectly) to its Shareholders; (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; (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.
"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.
"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.
"NPV"	means net present value.
"Outstanding Senior Debt"	means the sum of: *[See Section 4.2.2]* (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 amounts)], costs of terminating any hedging arrangements or other breakage costs, payable by the Private Partner 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 and the Lenders mitigating all such costs;
	less (without double counting): (aa) all credit balances held on any bank accounts held by or on behalf of the Private Partner on the Termination Date;

	(bb) all amounts 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 (cc) 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 Finance Documents"	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 and security documents]. [See Section 4.2.2]*
"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 endeavours to mitigate the Losses.
"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, 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) 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 (iv) if this is not contemplated in the PPP Contract.

(a) Outstanding Senior Debt; plus

(b) 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) any Sub-Contractor Breakage Costs; plus

(d) [*select from Option (1)(a), (1)(b), or (1)(c) depending on the required valuation method for the payments due to the equity party*]

- **Option 1(a):** an amount which, when taken together with any Distributions paid, interest paid and principle 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 principle 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 a compensation amount equal to [ ] % of Outstanding Senior Debt.

Compensation on 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) Outstanding Senior Debt, if any; plus

(b) Initial Equity and any outstanding principal under the Subordinated Finance Documents as at the Termination Date [less any Distributions or interest payments already made]; plus

(c) 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) any Sub-Contractor Breakage Costs.

5. REFINANCING

5.1 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 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. 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 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. 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 this point, or (in the case of a "hard" mini perm) that there will be an event of default[32]. 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 deliver any significant additional financial benefit.

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.

It is this type of refinancing which is more likely to realise 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.[33]

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, 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. 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".*

---

32 "Hard" mini perm financing structures are not permitted by Contracting Authorities in the Netherlands on the basis that they effectively introduce refinancing risk.

33 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).

However, in the case of a mini perm financing, Contracting Authorities should recognise that refinancing is virtually a given and the documents 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. 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. 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 internal rate of equity return envisaged in the Original Base Case.

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

It is also worth noting that 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 this 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.

5.2.3 Right to consent

The Contracting Authority's right to consent is key 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 reasonable for Contracting Authority consent not to be required or to be subject to fewer constraints than other refinancings. 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 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 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 deducted from the total refinancing gain amount prior to sharing. *See Section 5.3, Sample Drafting 5, Clause (7).*

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.[34] *See Section 5.3, Sample Drafting 5, Clause (4).*

5.2.6 Method of payment

This will depend on the nature of the refinancing and discussions at the time, but the Contracting Authority could be paid in a lump sum on refinancing or be given the benefit of a reduced availability payment (or a combination of the two). *See Sample Drafting 5, Clause (6).*

[34] 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: (a) dividend or other distribution in respect of share capital; (b) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital; (c) payments under any Subordinated Finance Documents; and (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.
"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"	(a) any Refinancing fully contemplated in the Original Base Case; (b) a change in taxation or in accounting treatment; (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: (i) breach of representations and warranties or undertakings; (ii) movement of monies between the project accounts in accordance with the terms of the Senior Finance Documents; (iii) late or non-provision of information, consents or licenses; (iv) approval of revised technical and economic assumptions in relation to the Financial Model; (v) failure by the Private Partner to obtain any consent by statutory bodies required by the Senior Finance Documents; or

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.

	(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; (d) any sale of shares in the Private Partner by the Shareholders.
"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.
"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) or which has the effect of limiting the Private Partner's ability to carry out any of (a) to (c).
"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 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 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.
"Subordinated Finance Documents"	means any agreements under which the Private Partner's Shareholders make subordinated debt available to the Private Partner.

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

Refinancing

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.

(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 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 percent (50%)] share of any Refinancing Gain.

(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)*].

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

(6) The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain as:

(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*

Drafting to be adjusted to fit the payment structure.

(c) *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 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*].

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. 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. 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) but will have been virtually finalised at the time the PPP Contract was signed. 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.

6.2.3 Scope of Direct Agreement/governing law

The Contracting Authority 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. This can be an advantage to all parties but can sometimes undermine the underlying risk transfer position agreed in the PPP Contract.

Given that the Direct Agreement can affect the Private Partner’s as well as the Contracting Authority’s rights and obligations it is recommended that the Private Partner should also be party to the Direct Agreement, at least to acknowledge and consent to the terms, and that the governing law of the Direct Agreement should be consistent with that of the PPP Contract itself.

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 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.

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 provisions (or their equivalent under the laws of the relevant jurisdiction):

(1) 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 acceleration of debt);

(2) 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);

(3) 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;

(4) 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

(5) 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 (or to any reasonable and objective requirements of) the Contracting Authority).

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 Report does not include proposed drafting.[35]

[35] 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 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, 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 they involve government or its agencies. It has therefore become increasingly common for Contracting Authorities[36] 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 but the main drivers behind greater transparency and disclosure 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.

However, given commercial sensitivities as well as public interest-related limitations a PPP Contract will have to make transparency and disclosure obligations 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 information confidential, for example if the PPP Contract is in the defence 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 legislation dealing with national security. 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 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.

[36] Compare A Framework for Disclosure in Public-Private Partnerships, World Bank 2016.

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[37], PPP policies, laws and regulations[38], procurement legislation, public financial management (PFM) legislation[39], 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.[40] 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[41]. 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 before, there may also be international financial institutions and multilateral agencies supporting the PPP Project who as a condition of their support require Contracting Authorities to comply with their own policies on transparency, though the information disclosed under such policies does not usually include disclosure of commercially sensitive or proprietary information

7.2.2 Scope of the transparency and disclosure undertaking

A disclosure and transparency provision would typically deal with the announcement of the PPP contract awarded, such as the announcement in the local press. In this regard, the Contracting Authority will want to control how information relating to the PPP Project is publicly communicated. It will therefore want to control any press announcements or written communication between the Private Partner and third parties about the PPP Contract. *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 respective 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 the PPP Contract gives it the freedom to make public the terms of the PPP Contract as well as information arising out of or connected to the PPP Contract (subject to applicable confidentiality restrictions) by its preferred means.[42] This may include publishing on the internet. *See Section 7.3, Sample Drafting 7, Clauses (3)-(5).* The effectiveness of such provisions will

---

37 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).

38 For example, Kenya's PPP Act (2013); Brazil, Minas Gerais PPP Law (2003), India Draft PPP Policy (2012), United Kingdom, Private Finance Initiative Standardisation of PFI Contracts (1999, update 2012), for details and further information see Table 3 PPP Legislation and Transparency Elements in: WB Disclosure Framework 2016.

39 For details see Table 3 PPP Legislation and Transparency Elements in: WB Disclosure Framework 2016.

40 Examples with short summaries are provided in Table 11 of the WB Disclosure Framework 2016.

41 Disclosure in Public-Private Partnerships: Jurisdictional Studies, World Bank 2016 and Disclosure in Public-Private Partnerships: Good Practice Cases, World Bank 2016.

42 Section 38.1 Partnership Victoria: Updated Standard Commercial Principles (2008) requires contracts to include a clause providing that the government will be entitled to disclose (on the Internet or otherwise) the terms and conditions of the project agreement and any associated transaction document; and any documents or information arising out of or connected to the agreement or transaction documents (including the performance of those agreements) except to the extent that any document or information are agreed by the parties to be confidential.

be dependent upon provisions elsewhere in the PPP Contract regarding the Private Partner's obligations to disclose information to the Contracting Authority on the progress of the project, including performance data and provisions imposing penalties on the Private Partner for failing to comply with such obligations (see e.g. UK PF2 model).

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 do not usually apply where a Party is obliged to disclose information, for example as part of a legal, regulatory or judicial process. Concerns relating to particular information should be addressed specifically in the drafting.

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

As mentioned above, the need for transparency and disclosure needs to be balanced against the interest of the Private Partner and the Contracting Authority to keep certain information related to a PPP Project confidential. Private players as well as the Contracting Authority will want to have protection for certain information, in particular commercially sensitive or proprietary information. This means that disclosure needs to be targeted and relevant to the Contracting Authority's objectives, and not release the Private Partner's commercially sensitive information without a good reason. At the same time, confidential information in the context of a PPP projects should be the exception and be based on a strong underlying reason that can be linked to the principles of confidentiality in the underlying transparency and disclosure policy or legislation.

In the context of a PPP project confidential information is typically information 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. See *Section 7.3, Sample Drafting 7, Clause (6).* Information that is typically considered as confidential are key pieces of financial information, such as methodology and elements of pricing; base case financial model, including details of the costs of financing through debt and equity; other unit costs, profits, elements, and composition of the payments made to the provider.

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 this approach is representative of an established market, it would also be appropriate for emerging market PPP Contracts where governments might want to implement transparency measures during the life of the PPP Contracts (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 itself, its employees or agents and 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:

(a) publish this PPP Contract [*and some of the Project Agreements*] on a website; and

(b) 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*].

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

(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.

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; 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*].

(8) 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 endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.

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

(a) 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;

(b) 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;

(c) 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;

(d) any disclosure which is required pursuant to any 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;

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).

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

(f) 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.

(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;

(h) any registration or recording of the required permits and property registration required;

(i) 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

(j) any disclosure for the purpose of:

(i) the examination and certification of the Contracting Authority's or the Private Partner's accounts;

(ii) 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;

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).

(iii) complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or

(iv) (without prejudice to the generality of Clause (9)(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 of the confidentiality restrictions set out in this clause and shall procure its compliance with the terms of this clause 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.

(11) 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.

(12) 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.

(13) The provisions of this clause are without prejudice to the application of *[insert any relevant law governing official secrets or national security information]*.

Schedule [●]

Commercially Sensitive Information

Part I - Commercially Sensitive Contractual Provisions

Column 1	Column 2
Commercially Sensitive Contractual Provisions	For a period ending on date below

Part II - Commercially Sensitive Material

Column 1	Column 2
Commercially Sensitive Material	For a period ending on date below

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.

Factors which typically influence contracting parties' choice of governing law include:

- non-legal preferences, such as market acceptability, 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;
- 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;
- 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)*; 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 Party 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 determined by the same law and any other approach would introduce unnecessary complexities. Accordingly, the choice of governing law for non-contractual obligations should match the choice for contractual obligations.

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.

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 they can bring a claim. 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" or "choice of court" or "forum selection" clauses.

Emerging and developed market differences

If there is no contractually agreed clause specifying how disputes are to be resolved, there will be uncertainty about where disputes under the PPP Contract might 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, 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* are 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.

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.

8.2.1 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. Such an arbitration clause should specify the "seat" of arbitration and usually also incorporates 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, Sample Drafting 8.3, Clause (12) Option 1.*

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, Sample Drafting 8.3, Clause (12) 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 the judiciary highly regarded commercial lawyers. 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 (although specific provisions can be included in an arbitration clause to seek to achieve this effect).

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 – By far 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, Sample Drafting 8.3, Clause (12) 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. Arbitration can, however, be expensive and sometimes as time-consuming as court proceedings. *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, under local law concession arrangements, a Contracting Authority may be required to refer all disputes relating to a 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 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 One: Choosing arbitration and selecting the rules of established independent arbitration institutions

If the Parties decide to select arbitration as the dispute resolution mechanism (to be incorporated in the PPP Contract, it is important to consider whether the Parties intend to refer to ad hoc (non-administered) or institutional (administered) arbitration.

(1) **Ad Hoc arbitration**. If the Parties incorporate an arbitration clause in their PPP Contract <u>without</u> 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 used with some frequency in commercial disputes involving a public and a private entity, and they 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 Court of Arbitration, the International Chamber of Commerce ("ICC"), the International Centre for Settlement of Investment Disputes ("ICSID"), the American Arbitration Association or 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.

(2) **Institutional Arbitration**. Instead of drafting an overly long dispute resolution clause containing bespoke procedural rules, it may be 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 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 arbitration institution usually incorporates the assistance of an institution, who may act as an appointing authority during the constitution of the tribunal, deal with the payment of arbitrator's fees during the proceedings and make arrangements for the respective hearings and issuance of the award.

A variety of institutional rules and of institutions are available for commercial arbitration. The rules of the ICC ("ICC Rules") are frequently used[43]. Other common options include the London Court of International Arbitration 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 Two.*

In addition, there is a dispute settlement mechanism specifically designed for disputes between foreign private investors and States (or its agency or subdivisions) created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). ICSI 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 members 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 ICSID arbitration affords advantages as to the enforceability of awards and should therefore bring comfort to the Parties, 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 a fall back clause in case a dispute does not meet these requirements. This may render the drafting of the dispute resolution provision more complex. Nevertheless, Contracting Authorities should be aware of the possibility of claims under this regime.

43 For illustration purposes, *Sample Drafting 8, clause 8.3 Option Two (12)* onwards is based on a choice of the ICC Rules. This drafting will need review/adaptation when using an alternative institution's rules.

Emerging and developed market differences

The selection of an established arbitration 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 is not agreed. Specialist advice should be taken by Contracting Authorities.

Step 2: Choosing the seat of arbitration

If the Parties select arbitration[44] (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 for the Parties carefully considering 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 be should verified that the chosen seat of arbitration, as well 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 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).

---

[44] This does not apply to ICSID arbitration which is de-localized.

The key selection factors[45] 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 arbitrator 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[46]. 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[47]. 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).*

---

45 See above.
46 Other examples include government support agreements and direct agreements.
47 The ICC Rules provide some assistance in this regard in any event: see Articles 7-10.

Generally, consolidation and joinder is less of a concern with jurisdiction clauses where courts often will order consolidation of proceedings before it 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 on-going 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). 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 negotiated settlement of their dispute. The use of external mediators is increasingly seen in commercial disputes in America, 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[48]; 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. There continues to be debate about the efficacy and cost of external Disputes Boards as with other means of ADR – however, DBs may appear to lack the consensual approach of mediation or a panel of senior representatives of the parties. 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

[48] 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).

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.*

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.[49]

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 get 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)[50]. As such, the Contracting Authority should seek advice on the nature and extent of any immunities early in the process. Generally speaking, it is expected that the PPP Contract will be fully enforceable and Private Partners and Lenders therefore are 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

---

[49] 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.

[50] 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.

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.

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*].

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.

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.

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

(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 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 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

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.

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.

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.

not be connected with any particular companies or organisations due to the possibility of conflicts arising.

(8) The expert appointed may be an individual, partnership, association or body corporate and shall be generally recognised as an expert in [*specify field*] and shall have [X] years of experience in that field.

(9) 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

(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 One: 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 [ ]. The Parties irrevocably submit to the courts of [*as above*] and agree not to argue they are an inconvenient forum.

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.

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

(12) Any matter provided by Clause [*(12)*] 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.[51]

(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*].

Consider if this is potentially too restrictive.

[51] For illustration purposes, Option Two 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*].]

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.

(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:

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

(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.

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)

Continuing Obligations

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

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 jurisdiction 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.

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.

(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.]

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 – Mediation

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

(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 [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 – Escalation to a panel of senior representatives

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

(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 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 [ ].

(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 [ ] or in the case of a Technical Dispute, an expert in accordance with Clause [ ].

(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 (7), 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 [ ] or Clause [ ].

(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 [(2)], any Party may submit the Dispute to arbitration in accordance with Clause [ ] or in the case of a Technical Dispute to an expert in accordance with Clause [ ].

Option 3 – Disputes Review Board Clause

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

(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 defence 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*].

Schedule 2 – Assessing whether the Private Partner might have recourse to an International Investment Agreement

As mentioned in *Section 8.2.3,* Contracting Authorities should be aware of the possibility of responding to claims under an international investment agreement ("IIA"). In particular, when deciding which arbitration mechanism to select, the Parties should consider whether the Private Partner may at some point have recourse to an 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 provides investors with the right to refer investment disputes to arbitration against the host State in which they have invested.

If the home State of the Private Partner and the one of the Contracting Authority are therefore 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).

APPENDIX A

ADDITIONAL PPP RESOURCES

Public-Private Partnership in Infrastructure Resource Center
A World Bank Resource of PPPs in Infrastructure
http://ppp.worldbank.org/public-private-partnership/

A Framework for Disclosure in Public-Private Partnsehsips, 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%20Provinsions/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

UK Private Finance 2 (and related materials)
https://www.gov.uk/government/publications/private-finance-2-pf2

Dutch Model (DBFM infrastructure and DBFMO accommodation)
https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/06/01/dfbm-overeenkomst-rijkswaterstaat

https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/04/01/rijksbrede-modelovereenkomst-dbfmo-huisvesting-rijksvastgoedbedrijf-versie-4-3

France FIN INFRA guidelines
http://www.economie.gouv.fr/ppp/clausier-type

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

EPEC 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/