

Keynote Address: Legal Issues for PPP Transactions

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Outline of Presentation

- **Legal Frameworks for PPPs**
- **Contract Design – Risk Allocation**
- **Contract Design – Recommended Provisions**
- **Resources on Legal Aspects of PPPs**

Legal Frameworks for PPPs

General Principles

- World Bank surveys of investors have repeatedly shown that the issue of 'protection of legal rights' is the primary concern in making decisions as to where to undertake major infrastructure projects



Legal Frameworks for PPPs

General Principles (cont.)

- this finding was reconfirmed by a just-completed study of the opinions of international infrastructure investors undertaken by the GI Hub with the EDHEC Infrastructure Institute of Singapore



Legal Frameworks for PPPs

General Principles (cont.)

- although individual PPP transactions can take place on an *ad hoc* basis, a proper legal and institutional framework is needed to develop a 'pipeline' of PPP transactions – as the G20 High Level Panel on Infrastructure said: “PPPs require their own infrastructure”
- there is no ‘universal’ PPP legal framework that is suitable for all countries – UNCITRAL has published the *Model Legislative Provisions on Privately-Financed Infrastructure Projects (2003)*, and it is now working on an update, but countries with successful PPP programs have developed their own approaches
- some developed common law countries (the UK, Australia, Canada) have developed PPP programs without having PPP-specific legislation
- however, for a developing country (whether common law or civil law), there is value in having a Public-Private Partnerships Act – to address key institutional and legal issues, and to send a positive signal to prospective investors

Contract Design – Risk Allocation

The Sample Risk Matrices

- the GI Hub *Report on the Allocation of Risks in Public-Private Partnership Contracts* presents 12 sample risk matrices, covering all the major infrastructure sectors
- the matrices are extensively annotated, to describe the different risk allocation arrangements that exist as between mature and developing PPP markets
- there are five sample transport projects:
 - a new toll road project, developed as a Design, Build, Finance and Operate (DBFO) transaction
 - a new airport project, again developed as a DBFO transaction
 - a new municipal light rail project, again developed as a DBFO transaction
 - an intercity railway project involving an existing railway, developed as a Rehabilitate-Operate-Transfer (ROT) transaction
 - a container terminal port project, developed as a DBFO transaction

Contract Design – Risk Allocation

The Sample Risk Matrices (cont).

- there are four sample energy projects:
 - a new photovoltaic power generation project, developed as a Build-Own-Operate (BOO) transaction, where the power is being sold to a state-owned single buyer;
 - a new large-scale (greater than 100 MW) hydroelectric power project, developed as a Build-Own-Operate-Transfer (BOOT) transaction, again where the power is being sold to a state-owned single buyer;
 - a new power transmission project, developed as a BOOT transaction; and
 - a natural gas distribution project involving an existing distribution for an existing utility, developed as a ROT transaction, in a situation where the wholesale supplier of natural gas is a state-owned entity and where natural gas tariffs are set by a regulator

Contract Design – Risk Allocation

The Sample Risk Matrices (cont).

- and three sample water and sanitation projects:
 - a new water desalination project, developed as a BOOT transaction, where the desalinated water is being sold to a state-owned single buyer
 - a water distribution project involving an existing distribution for an existing utility, developed as a ROT transaction, in a situation where the wholesale supplier of water is a state-owned entity and where water tariffs are set under the terms of the Concession Agreement
 - a solid waste collection, disposal, landfill and recycling project, developed as a BOT transaction

Contract Design – Risk Allocation

Sample Extract from the GI Hub Report

Risk Matrix 3: Light rail (DBFOM)

Risks	Description	Variable	Allocation				Mitigation	Government Support Arrangements	Market Comparison Summary
			Public	Private	Shared	Rationale			
Land purchase and site risk	<p>The risk of acquiring title to the land to be used for a project, the selection of that site and the geophysical conditions of that site.</p> <p>Planning permission.</p> <p>Access rights.</p> <p>Security.</p> <p>Heritage.</p> <p>Archaeological.</p> <p>Pollution.</p> <p>Latent defects.</p>	Developed			X	<p>The Contracting Authority bears the principal risk as it is best placed to select and acquire the required land interests for the project.</p> <p>That said, there may be some areas where risk will be shared with the Private Partner. Whilst the Contracting Authority may be able to secure the availability of the corridor, the suitability of the corridor may be dependent on the Private Partner's design solution (such as catenary location for overhead power), as well as depot location etc.</p> <p>The Contracting Authority would generally be responsible for providing a "clean" site, with no restrictive land title issues, and existing utilities and contamination either dealt with or fully surveyed and warranted. Existing assets proposed to be used in the project should also be fully surveyed and warranted. The Private Partner may take some risk for dealing with adverse conditions revealed by surveys but other unforeseeable ground risks (e.g. archaeological risks) are likely to need to be held by the Contracting Authority.</p> <p>Where it is not possible to fully survey prior to award (eg identification of underground existing utilities in high density urban areas) risk will be allocated to Contracting Authority or shared.</p> <p>The Contracting Authority should also consider the impact that the project will have on neighbouring properties and trades and may need to retain this risk of unavoidable interference.</p> <p>In a Dutch project, the Contracting Authority is the legal owner of the project's</p>	<p>The Contracting Authority should undertake detailed ground, environmental and social assessments and should disclose such information to the Private Partner as part of the bidding process.</p> <p>The Contracting Authority should, to the greatest extent possible, ensure that it has a complete understanding of the risks involved in securing the site and the site constraints that will impact on the construction and operation of the system.</p> <p>The Contracting Authority should also manage any indigenous land rights issues that may impact on the use of the site.</p> <p>Prior to awarding the tender the Contracting Authority could (through legislation and a proper consultation process) limit the ability for potential land right owners or neighbouring properties and trades to raise claims on the land and/or for injurious affection.</p>	<p>The Contracting Authority may need to use its legislative powers to secure the site (e.g. through expropriation / compulsory acquisition).</p> <p>Even where you have a legally clear site, Government enforcement powers may be needed to properly secure the site for the private sector.</p> <p>There may be historic encroachment issues that the Private Partner cannot be expected to deal with.</p> <p>Examples include the need to manage the relocation of people (e.g. the removal of informal housing or businesses) and continued efforts to manage the social and political impact of the project on and around the site.</p> <p>The Contracting Authority may be required to provide additional site security / assistance during operations to manage this risk.</p>	<p>Land rights and ground conditions in developed markets are typically more established and risks can be mitigated with appropriate due diligence with relevant land registries and utility records.</p> <p>The Private Partner's obligations with regards to indigenous rights are generally well legislated in developed markets, for example requirement to enter into indigenous land use agreements under native title legislation in Australia and the equivalent under first nations law in Canada.</p>

Contract Design – Recommended Contract Provisions

Introduction

- the preparation of the legal documentation for PPP projects is frequently an expensive and time-consuming process
- many of the provisions found in PPP contracts are project-specific – accordingly, it would not be practicable to attempt to create complete agreements in a standardized format, even on a sector-specific basis
- however, there are certain provisions which are common to virtually every PPP agreement, in respect of which a degree of standardization can be achieved – thereby reducing the cost, and increasing the speed, of the contract drafting process

Contract Design – Recommended Contract Provisions Introduction (cont.)

- against this backdrop, a first edition of the WBG Report on Recommended PPP Contractual Provisions was published in August 2015 and soon after endorsed by the G20 Investment and Infrastructure Working Group
- following industry feedback on the Report's 2015 version, a new edition (prepared with the help of the international law firm of Allen & Overy LLP), has now been developed and has just been released for public consultations

Contract Design – Recommended Contract Provisions

Objectives of the Report

- assisting contracting authorities, particularly in emerging PPP markets, with having a deeper and more comprehensive understanding of certain contractual provisions usually encountered in every PPP agreement
- fostering discussion of the contractual provisions contained in the Report, with the possibility of further editions being prepared as consensus evolves around the contractual language used in PPP transactions

Contract Design – Recommended Contract Provisions

Overview of the Report’s Contents

- eight contractual provisions are presented
- commentary and alternative sample language in regard to different levels of PPP transactional experience and different types of legal systems
- commentary as to which alternatives reflect a relatively lender-friendly or government-friendly approach
- commentary linking the recommended provisions to the principles of risk allocation and the risk matrices contained in the Global Infrastructure Hub’s (GIH) *Report on Allocating Risk in PPP Contracts, 2016 Edition*

Contract Design – Recommended Contract Provisions

Overview of the Report’s Contents (cont.)

- the Report presents recommendations on the following provisions:
 - Force Majeure
 - Material Adverse Government Action (MAGA)
 - Change in Law
 - Termination Payments
 - Refinancing
 - Lenders’ Step-in Rights
 - Confidentiality and Transparency
 - Dispute Resolution

Contract Design – Recommended Contract Provisions Consultation and Dissemination Process

- stakeholder consultations were held both during the drafting stage of the Report's new edition (March-August 2016) and the WBG internal vetting process conducted in this respect (September-October 2016)
- the final draft of the Report's new edition has now been made available for public consultation and feedback – comments may be submitted until January 31, 2017 on the following platform:
<https://consultations.worldbank.org/consultation/recommended-public-private-partnership-ppp-contractual-provisions>
- publication of the new edition of the Report is planned for Spring 2016, to be followed by further dissemination/socialization events

Resources on Legal Aspects of PPPs

The PPP Infrastructure Resource Center

- a web-based knowledge management tool, jointly funded by the World Bank, PPIAF, the IFC, the African Legal Support Facility and the Inter-American Development Bank, designed to provide guidance on legal issues relating to infrastructure projects
- includes practice notes and checklists, together with sample agreements and clauses, sample legislation and regulatory instruments, and sample terms of reference for advisors
- there are links to websites and materials produced by government agencies and PPP units from around the world, such as standardized bidding documents
- the website includes documents in English, French, Spanish, Portuguese, with some materials in Arabic and Mandarin
- www.worldbank.org/pppirc

Resources on Legal Aspects of PPPs

The PPP Infrastructure Resource Center (cont.)




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Home » Agreements

PPP Arrangements / Types of Public-Private Partnership Agreements

Public-private partnerships (PPPs) can take a wide range of forms varying in the degree of involvement of the private entity in traditionally public infrastructure. A PPP is generally memorialized in a contract or agreement to outline the responsibilities of each party and clearly allocate risk. The graph below depicts the spectrum of PPP agreements.



For a summary of each type of arrangement and sample agreements, see:

- [Utility Restructuring, Corporatization and Decentralization](#)
- [Civil Works and Service Contracts](#)
- [Management and Operating Agreements](#)
- [Leases / Affermage](#)
- [Concessions, Build-Operate-Transfer \(BOT\), Design-Build-Operate \(DBO\)](#)
- [Joint Ventures and Partial Divestiture of Public Assets Full Divestiture](#)
- [Full Divestiture](#)
- [Contract Plans and Performance Contracts](#)

Resources on Legal Aspects of PPPs

The PPP Infrastructure Resource Center (cont.)

- agreements posted on the website are intended as samples and NOT models
- agreements that are not already in the public domain have been 'sanitized' to preserve confidentiality
- the sample agreements have been annotated to indicate provisions that are unusual, or applicable only in special circumstances
- each sample agreement is accompanied by a summary

Resources on Legal Aspects of PPPs

The PPP Infrastructure Resource Center (cont.)

Power Purchase Agreement (PPA) - Emergency Power - Mobile Plant

To download the document click on 

Sector:	Energy
Name of Agreement:	Power Purchase Agreement for emergency power generation complex - thermal power generation plant
Type of Agreement:	Power Purchase Agreement - for emergency power - short-term arrangement for mobile plant (on skids) prepared, together with an Implementation/Government Support Agreement
Region (if known):	Africa
Civil law/ common law:	Suitable for both, subject to modification to take into account local laws and regulations and subject to local law advice
Year of Agreement	2007
Agreement prepared by:	International law firm - modified by World Bank staff
Annotation by:	Victoria Delmon (LEGPS), Mark Moseley (LEGPS)
Purpose and Context:	Agreement sets out terms on which Company is to sell electricity from an electric generating station (mobile plant) it is installing and the state owned utility/ grid (Utility) undertakes to purchase capacity and delivered energy.
Circumstances where this contract may be appropriate:	This is a simplified power purchase agreement for use in situations requiring emergency power or in rural electrification projects, where a short-term arrangement is envisaged.
Main Features:	<p>Company undertakes to make available and to sell to the Utility and Utility undertakes to purchase Declared Available Capacity and Net Energy Output at the Complex after the Commercial Operations Date (2.1)</p> <p>Company may not without the express prior written authority of the Utility sell/ deliver energy to another party for duration of contract (2.2)</p> <p>Company to design, finance, construct, operate and maintain Complex in accordance with minimal functional specifications and prudent utility practice and relevant laws and regulations etc (5.6)</p> <p>...</p>
Possible additional provisions that it might be appropriate to include:	It might be appropriate to include a provision dealing with changes of law in the PPA
Provisions that may not be advisable to replicate:	Expert determination is final and binding – unusual

This document has been prepared for the purposes of the world bank "Infrastructure and Law" website found at www.worldbank.org/inflaw. It is a sample document FOR REFERENCE PURPOSES ONLY and SHOULD NOT BE used as a "model". The inclusion of any legal materials on the World Bank Infrastructure And Law website does not mean that they are in any way approved, endorsed or recommended by the World Bank Group. Legal advice should be sought to determine whether a particular legal document is appropriate for any given project, and how the specific terms of the document should be adapted to fit the circumstances of that project.

as soon as reasonably practicable after the relevant Party becomes aware of such claim or proceeding.

Section 14.6. Basket Limitation⁵

Neither Party shall be entitled to make any claim under this Article XIV until such time as all such claims by such Party exceed [AMOUNT AND CURRENCY] in the aggregate, at which time all such claims of that Party may be made; provided, however, that, when such claims have been made, the same rule shall apply in respect of future claims. Notwithstanding the foregoing, any claims outstanding at the termination or expiration of this Agreement may be brought at that time.

Section 14.7. Conduct of Proceedings

14.7.1 Each Party shall have the right, but not the obligation, to contest, defend and litigate (and to retain legal advisers of its choice in connection therewith) any claim, action, suit or proceeding by any third party alleged or asserted against it arising out of any matter in respect of which it is entitled to be indemnified hereunder, and the reasonable costs and expenses thereof shall be subject to the said indemnity; provided, however, that, the indemnifying Party shall be entitled, at its option, to assume and control the defense of such claim, action, suit or proceeding at its expense and through legal advisers of its choice if it (i) gives notice of its intention to do so to the other Party, (ii) acknowledges in writing its obligation to indemnify that Party to the full extent provided by this Article XIV, and (iii) reimburses that Party for the reasonable costs and expenses previously incurred by it prior to the assumption of such defense by the indemnifying Party.

14.7.2 Following acknowledgment of the indemnification and assumption of the defense by the indemnifying Party, the indemnified Party shall have the right to employ its own counsel, and such counsel may participate in such action, but the fees and expenses of such counsel shall be at the expense of such indemnified Party, when and as incurred, unless (i) the employment of counsel by such indemnified Party has been authorized in writing by the indemnifying Party, (ii) the indemnified Party shall have reasonably concluded that there may be a conflict of interest between the indemnifying Party and the indemnified Party in the conduct of the defense of such action, or (iii) the indemnified Party shall have reasonably concluded and specifically notified the indemnifying Party either that there may be specific defenses available to it that are different from or additional to those available to the indemnifying Party or that such

⁵ useful to have a threshold amount that needs to be reached before a claim can be made or a minimum value of claim – or a combination of both – to avoid multiplicity of claims

Resources on Legal Aspects of PPPs

The GI Hub PPP Risk Allocation Webpages:

<http://globalinfrastructurehub.org/allocating-risks-in-ppps/>

Global Infrastructure Hub

HOME RESOURCES NEWS ABOUT CONTACT

Allocating Risks in Public-Private Partnership Contracts

Understanding risks is essential to every PPP agreement. Search below for how to best allocate risks between public and private sectors.

Search all projects and risk types...

Question and Answer Page From the Blog Español

Browse by sector

TRANSPORT ENERGY WATER & SANITATION

Questions and Answers

Q: Any examples of PPP project failure due to exchange rate risk? ...
POSTED 4 OCT 2016

A: In most PPPs the tariff paid to the private sector (whether by the government or users) is paid in the domestic currency...
» MORE

Q: Can we assume that the documentation risk is best allocated to the lawyers? PPP deals are legally complex transactions, with multiple ...
POSTED 29 SEP 2016

A: Documentation risk in most forms of PPP or project finance transaction sits with counsel insofar as they are responsible for supporting their...
» MORE

» Go to Question & Answer page

Submit a Question

Name*

Resources

The GI Hub Field Guide:

<http://guide.globalinfrastructurehub.org/>

The screenshot shows the 'Field Guide to Infrastructure Resources' page. At the top left is the Global Infrastructure Hub logo. The navigation menu includes HOME, RESOURCES, NEWS, ABOUT, and CONTACT. The main heading is 'Field Guide to Infrastructure Resources', followed by a description: 'The Field Guide is a searchable database of infrastructure publications and organisations. Search below by region, service or product, organisation or infrastructure sector.' Below this is a search bar with a magnifying glass icon. Underneath the search bar are four dropdown menus: 'Region: Any', 'Service/Product: Any', 'Organisation: Any', and 'Sectors: Any'. Below these is a 'Browse:' section with links for 'Regions', 'Service/Product', 'Organisation', and 'Sector'. The 'Browse by Region' section features a world map with a sidebar listing regions: ASIA-PACIFIC, EUROPE & MIDDLE EAST, LATIN AMERICA (highlighted in teal), NORTH AMERICA, and AFRICA. A link below the sidebar says '> Click here to browse by country'. The 'Browse by Sector' section is a dark blue bar with icons and labels for: ALL SECTORS, AIRPORT, ROAD, RAIL, PORT, WATER, COMMUNICATIONS, and ENERGY.

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