

Public-Private Partnerships

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo



2019

GETTING THE
DEAL THROUGH

GETTING THE
DEAL THROUGH 

Public-Private Partnerships 2019

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo
Debevoise & Plimpton LLP

Reproduced with permission from Law Business Research Ltd
This article was first published in October 2018
For further information please contact editorial@gettingthedealthrough.com

Publisher
Tom Barnes
tom.barnes@lbresearch.com

Subscriptions
James Spearing
subscriptions@gettingthedealthrough.com

Senior business development managers
Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com

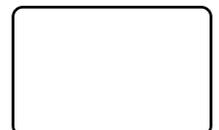


Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

© Law Business Research Ltd 2018
No photocopying without a CLA licence.
First published 2014
Fifth edition
ISBN 978-1-78915-061-2

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between August and September 2018. Be advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



CONTENTS

Overview	5	Japan	50
Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP		Miho Niunoya, Yuko Nihonmatsu, Shintaro Hamasu and Masayuki Matsuura Atsumi & Sakai	
Argentina	6	Nigeria	56
M Lorena Schiariti Marval, O'Farrell & Mairal		George Etomi, Akasemi Ollor and Veronica Alaba Oyedeji George Etomi & Partners	
Bulgaria	13	Portugal	65
Asya Dyankova Arsov Natchev Ganeva, Attorneys & Counsellors at Law		Margarida Olazabal Cabral Morais Leitão, Galvão Teles, Soares da Silva & Associados	
China	20	Romania	70
Jihong Wang Zhong Lun Law Firm		Marta Popa Voicu & Filipescu SCA	
Colombia	25	Spain	75
Carlos Francisco Saavedra Roa and Ramiro Saavedra Becerra Saavedra Becerra Abogados SAS		Manuel López Ashurst	
England & Wales	31	Turkey	80
Adam Cooper, Richard Dyton, Simon Moore, Simon Kenolty, Jack Rutherford, Louise McErlane, Shu Shu Wong, Sam Cundall, Yeji Lee, EunJung Kim and Khalifa Aljabr Simmons & Simmons LLP		Senem Denктаş, Nihat Aral and Ahmet Zafer Yılmaz Herguner Bilgen Ozeke Attorney Partnership	
Ghana	39	United Arab Emirates	87
David Ofosu-Dorte, Ferdinand Adadzi and Sena Agbekoh AB & David		Mark Rocca CMS Cameron McKenna Nabarro Olswang LLP	
Greece	45	United States	95
Vasilis Keramaris Bahas, Gramatidis & Partners		Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP	

Preface

Public-Private Partnerships 2019

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *Public-Private Partnerships*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Greece.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Ivan E Mattei and Armando Rivera Jacobo of Debevoise & Plimpton LLP, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
September 2018

England & Wales

Adam Cooper, Richard Dyton, Simon Moore, Simon Kenolty, Jack Rutherford, Louise McErlane, Shu Shu Wong, Sam Cundall, Yeji Lee, EunJung Kim and Khalifa Aljabr
Simmons & Simmons LLP

General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

Since the beginning of the industrial revolution, England and Wales have been pioneers in the development of PPPs. The sector grew strongly during the Labour government of 1997 to 2010 that wanted to increase national infrastructure investment without increasing public debt. Projects such as design-build-finance-maintain, design-build-finance-maintain-operate, design-build-operate and concessions – were given public support, often under the Private Finance Initiative (PFI).

While many of these projects were successful, some high-profile failures, including those involving the recent collapse of facilities management and construction firm Carillion and its fall out, have led to further questions about the outsourced services model challenging PPPs. The political perception from some quarters that the private sector has generated excessive profits without taking commensurate risk has caused the present government to scale back and, in some cases, restructure the PFI/PPP programme. Moreover, the ultra-low government borrowing rate, combined with reduced long-term bank debt availability, have removed part of the commercial incentive for the government to use PFI/PPP as a delivery model.

Such changes led to reforms addressing some PFI/PPP criticisms, with the government introducing greater emphasis on efficiency, transparency and risk sharing as a result. The modified approach to PPPs (Private Finance 2 (PF2)) encourages, for example, a government taking a minority equity stake in the project company. Notwithstanding this, the current Labour opposition has made clear its opposition to PPPs in general, announcing its intention to end use of the UK PFI/PPP model in some cases, bringing assets and state-provided services into public ownership.

Many companies participating in UK PFI/PPP projects are now signatories to the voluntary code of conduct (the Code of Conduct for Operational PFI/PPP Contracts 2013), which applies to every PPP that signatories are party to, setting out commitments from both public and private-sector parties in relation to their constructive engagement and flexibility, and to improve the operational efficiency of their projects. The Code of Conduct aims to reflect best practice and should be reviewed in detail by new bidders looking to enter the sector. The Code forms part of the government's efforts to reduce the cost of PFI deals under the Operational Savings Programme, which has already achieved savings of more than £1.5 billion since its launch, having been developed with the support and engagement of relevant trade bodies and a cross-section of lenders, investors, construction contractors and facilities management providers.

2 What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

PPPs are common in almost every aspect of public infrastructure in England and Wales, including:

- roads, schools, university student accommodation, prisons, defence, healthcare and hospitals;
- waste to energy and waste management;
- public security and border control;

- waste water transportation;
- certain natural resources developments; and
- street lighting, energy transmission and other energy projects, including solar.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

There is no specific PPP law, but there is substantial legislation, including that of the EU, on procurement by public authorities. While this varies to some extent from sector to sector, government policy looks to standardise and achieve a good degree of consistency across the sector. Accordingly, model contracts and guidelines are published by central government, which must be followed to the extent negotiated and agreed, and some government departments have issued model contracts for particular sectors subject to their authority. The Treasury issued overarching PF2 guidance in December 2012 (as a replacement to version four of the Standardisation of PFI Contracts (SOPC4)). We understand that an update to PF2 will follow in due course. Meanwhile, the Welsh Government has developed its own mutual investment model.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

Different government agencies may carry out their own programmes provided they are largely consistent with the standard centralised approach. Some departments and sectors have more developed programmes adapted to their sector, including the Department for Environment, Food and Rural Affairs, the Department of Health, the Department for Education and the Ministry of Defence.

The National Infrastructure Commission is mandated to take long-term strategic decisions on the UK's infrastructure needs. The Infrastructure and Projects Authority has been established through a combination of Infrastructure UK and the Major Projects Authority, and its role is to act as the government's implementation arm of UK infrastructure transactions.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

Subdivisions of government bodies and central government alike may enter into PPPs. Examples include PPPs in the health, education, waste disposal, housing, fire, police, leisure and street-lighting sectors, all of which are entered into by local authorities or subdivisions of government bodies.

6 How is the private party in a PPP remunerated in your jurisdiction?

The mechanism depends on the sector and the purpose of the PPP project. Most PPP projects generate a monthly 'availability payment' or 'unitary charge' from the government client, provided that the performance regime specified under the relevant project agreement is adhered to (ie, the relevant asset or facility is made available to the standards required by the PFI/PPP contract). Generally, there will be deductions for poor performance and unavailability, usually ratcheted up for repeated failure. A small number of PPP contracts transfer usage

risk to the private sector where revenue is generated by the asset's user including, for example, 'real toll' motorways.

Some PPP projects operate a cost recovery mechanism whereby the private-sector party is remunerated for costs incurred in its performance of the services, provided that such services meet the required standards and that costs are incurred pursuant to the relevant payment mechanism. In addition, the private-sector party may also be incentivised to achieve savings for the government client because the private-sector party receives a share of any savings made against an agreed baseline for performance of the services.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

Yes. For example, different commercial models are used in the university accommodation PPP sector, where student occupation is wholly or partially underwritten by the public sector.

The government may agree to private-sector use, for example, of spare capacity in the PPP asset to generate third-party revenue, which is often subject to revenue sharing between the private party and the government. Such an agreement is usually subject to prior government approval and control on the type of commercial activity that can be undertaken by the relevant asset or facility.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

Neither PPP contracts as a whole, nor the government's payment obligations under the contracts, are typically subject to specific legislative approval or approval of funding by the legislature.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

There is no set cap on return applicable to all projects, or a limit on maximum leverage. There are, however, mechanisms to ensure the private party's rate of return on the project is not excessive, for example, open-book accounting, sharing of refinancing gains, and benchmarking and market testing (for some facilities management services where these are included in the project). Use of the gainshare mechanism, where profits made by the private party are shared with the public body once they reach a certain threshold, is now common practice.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Normally, a lock-in period exists, during which change of ownership cannot occur, which often applies until two years after the service commencement date. There can be additional restrictions on change of control or ownership, for example, for reasons of national security, that apply throughout the term. Conversely, there are often lesser or no restrictions on the transfer of ownership interests by purely financial investors.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

PPP procurements are currently subject to EU procurement law. Selection criteria are used to determine if parties are considered suitable to participate in the procurement, based on suitability to pursue a professional activity, economic and financial standing, technical and professional ability and certain mandatory exclusion criteria. Under the Public Procurement Directive 2014/24/EU and the Public Contracts Regulations (SI 2015/102), the contract will be awarded on the basis of the most economically advantageous tender, with the government deciding an appropriate weighting between quality and cost to calculate this. The evaluation criteria used must be disclosed in the contract notice or tender documents. The government has made clear its intention that the jurisdiction of the European Court of Justice in the UK will come to an end with Brexit. Nevertheless, at the time of writing, everything remains under negotiation. In any event, post-Brexit, it is expected that there will be some form of rules-based procurement

regulations in place to ensure competition and value for money for taxpayers.

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

Variant bids may sometimes be permitted in addition to the required bids (eg, to encourage innovative proposals) or where the procuring entity is unsure about the best solution for its project.

If variant bids are permitted, this will be stated in the tender documents and will apply to all parties. The criteria used to assess the variant bid will be the same as for the required bid.

Variant bids may be either mandatory (where the procuring authority requires a specific alternative proposal) or may be voluntary, where a bidding party may propose an alternative proposal if it wishes, but is not obliged to do so.

In certain circumstances, the government may also be open to proposals from the private sector providing innovative technical solutions that may offer the government the opportunity to make further savings or increase revenue. However, where such deviations are not included as part of the evaluation criteria, they will not be evaluated and therefore may only be considered once a preferred bidder has been appointed.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

The requirement to comply with EU procurement rules means that the government is unable to accept unsolicited proposals from contractors for PPP transactions.

The position after Brexit remains unclear. However, it seems unlikely that the UK will repeal the procurement rules in their entirety, owing, in part, to the public policy benefits of regulating procurement and also because of significant UK input into the EU directives that gave rise to the current procurement regime. Yet, it remains a possibility that the government may take the opportunity to amend procurement regulations to encourage participation and account for UK-specific concerns.

14 Does the government party provide a stipend for unsuccessful short-listed proponents or otherwise bear a portion of their costs?

Government policy is generally to not pay any bid costs for unsuccessful bidders; however, it retains discretion to do so where it considers this to be appropriate. Claims may be brought against the government where its procurement obligations have been breached.

15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

The requirement for financing commitments will depend on the nature of the PPP in question. To the extent that any private financing is required, the government needs assurance that the financing will be delivered. This may include evidence of commitments from lenders or that adequate corporate finance is available. Once procured, there is limited scope to revise projects in order to make them more financeable. Bidders should, therefore, raise their potential financiers' concerns during the bidding process.

16 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

The government generally does not ask its counsel to provide opinions on the enforceability of PPP contracts, nor does it generally provide representations as to enforceability. Bidders must take their own view as to enforceability and bear the risk themselves.

The government will generally provide confirmation that its proposed signatory is authorised to execute the PPP agreement; however, it will not typically provide any representations as to the enforceability of the PPP agreement, on the basis that it is for the bidder's lawyers to advise their clients on enforceability.

However, specific comfort may occasionally be offered regarding contracts entered into by certain types of public entities, such as the deeds of safeguard issued in respect of NHS Foundation Trusts, and the Local Government (Contracts) Act 1997 certificate. These are usually provided to certify that a local government counterparty has the power to enter into the contract and to allow for compensation to be payable if there is a subsequent successful challenge by way of judicial or audit review.

17 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

Foreign entities are not generally prohibited from participating in PPP projects as contractors or subcontractors, or exercising control over the project company. Exceptions are typically made if a project entails particular national security concerns or for any entity to which sanctions may be applied.

Due diligence will be carried out by the government client on any private-sector contracting party, regardless of their country of origin, because the government client needs to be comfortable with the ultimate ownership of any private-sector party before contracting with them.

Design and construction in greenfield PPP projects

18 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

There are no legally mandated forms of contract for design and construction contracts. A broad range of contract forms are used, reflecting the broad scope of asset provision, ranging from air-to-air refuelling tankers to school buildings. As a matter of policy, the government will require that the contract is governed by English law. The form of standard contract that is promoted by the UK government for construction projects is the NEC4 engineering and construction contract, issued by the Cabinet Office in 2017, which states: 'the Government Construction Board ... recommends that public-sector organisations use the NEC contracts and in particular the NEC4 contracts where appropriate, when procuring construction' on the basis that 'standardising use of this comprehensive suite of contracts should help to deliver efficiencies across the public sector and promote behaviours in line with the principles of the Government Construction Strategy'. Use of this form is not, however, compulsory unless mandated by the relevant procurement authority.

19 Does local law impose liability for design defects and, if so, on what terms?

UK PPP transactions are typically structured on the basis that the bidder assumes liability for the design, construction and operation of the relevant asset, and will enter into a single design and build contract with a subcontractor (the 'design and build contractor'). There are no specific statutory liabilities covering design defects, but bidders will have a range of contractual remedies against the design and build contractor. For example, to the extent defective design causes construction delay, the design and build contractor will typically be liable to the bidder for liquidated damages. Where defective design manifests during the defects' liability period (typically 24 months from construction completion), the design and build contractor will be contractually obliged to rectify those defects at its own cost. Beyond the defects' liability period, the bidder may also claim against the design and build contractor for a defined limitation period. The design and build contractor may also assume contractual liability to the government client through a collateral warranty.

20 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

Specific warranties are not required by local law. Although certain terms are implied by law (eg, use of reasonable skill and care), the contract will invariably contain more onerous express terms defining the construction contractor's obligations. The duration of warranties in PPP construction contracts is not specifically restricted by local law; however,

there are general statutory limitation periods on liability depending on the type of contract (ie, whether a contract is a deed or executed under hand) and whether or not defects in works are latent. Even where liability under a contract comes to an end, any claims that were notified before the expiry of this period will normally remain valid.

21 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

Liquidated damages for loss caused by construction delays are generally enforceable. Liquidated damages clauses will be unenforceable if they are deemed to be 'penalties'. A provision that in substance imposes a secondary liability for breach of a primary obligation is penal if it imposes on the defaulting party a detriment out of all proportion to any legitimate interest of the innocent party performing the primary obligation, or is exorbitant, extravagant or unconscionable in comparison with the value of that legitimate interest. Since the penalty rule is an interference with freedom of contract in English law, it is not easy to conclude that a liquidated damages clause in a contract negotiated by properly advised parties of comparable bargaining power, is a penalty.

In general, liquidated damages are treated as an exhaustive financial remedy for the breach they apply to, and are often expressly stated to be exhaustive. Most liquidated damages clauses, therefore, operate as a limitation on the contractor's liability for financial losses arising from that breach. Often, the total financial cap on liability will include any liquidated damages payable, but in some circumstances they can be specifically excluded.

22 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

In the context of PPP contracts, there are no specific restrictions on the contractor's ability to disclaim liability for indirect or consequential damages. Liability for indirect or consequential losses is almost always dealt with expressly under the contract terms. Liability for death or personal injury caused by a party's negligence cannot be disclaimed by that party.

23 May a contractor suspend performance for non-payment?

In the case of PFI contracts, a construction contractor's statutory right to suspend for non-payment can be excluded in the construction sub-contract. The position under other types of PPP contracts depends on whether they are classed as construction contracts, where there is a statutory right to suspend (subject to the PFI exemption) or other service contracts where there is no general right to suspend for non-payment (although there may be a contractual right to do so).

24 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

These clauses are prohibited in public-sector construction contracts in England and Wales by the Housing Grants, Construction and Regeneration Act 1996, unless the statutory 'PFI exemption' applies. This exemption applies to contracts that are stated to be entered into under the PFI, or similar principles, fulfilling statutory criteria, including being entered into under the PFI or similar principles, having performance or availability-based payments and a counterparty that is, broadly, a public authority. There is no express prohibition on such clauses in non-construction service contracts.

25 Are 'equivalent project relief' clauses enforceable under local law?

'Equivalent project relief' clauses can be enforceable. However, in the context of contracts classed as construction contracts, terms relating to rights to payment are likely to be subject to the restrictions on 'pay when paid' provisions noted in question 24.

26 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

The government is able to unilaterally expand the scope of work if, and to the extent that, the PPP agreement and applicable procurement law regime permit. The government will generally be entitled to unilaterally expand the scope of work subject to specified rights of the contractor to object (eg, a material change in the risk profile). The contract will specify the time and cost implications of the change, such as entitling

the contractor to more time and increased payments under a detailed, clear, precise and unequivocal change procedure.

SI 2015/102 has codified the law from the German case of *Presstext* (Case C-454/06), which now states that contracts may be modified without a new procurement procedure, including where:

- the modifications (irrespective of value) are set out in the original contract documents in clear, precise and unequivocal review clauses, stating the scope of the modifications and do not alter the overall nature of the contract;
- a change in contractor cannot be made for technical or economic reasons, with the additional work being carried out by the existing contractor (as long as the increase does not exceed 50 per cent of original contract value);
- the need to modify the contract has been brought about by unforeseen and unforeseeable circumstances, it does not alter the nature of the contract and the price increase is less than 50 per cent of the original contract value; and
- the modifications, irrespective of value, are not substantial under paragraph 72(8) of SI 2015/102 (ie, where the change is so substantial it renders the contract materially different in character, it introduces conditions that will have allowed other candidates to participate in the procurement process, it changes the economic balance in favour of the contractor or it extends the scope considerably).

27 Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

There is no right under local law that is equivalent to the civil law concept of economic hardship, allowing legal claims for contracts to be set aside or 'rebalanced'. Moreover, the UK government has a strong record keeping to its contractual commitments, including financial commitments.

There is a limited right to have agreements set aside if performance is frustrated by events. In addition, the parties will agree in the contract a limited set of force majeure events that will, if they prevent performance for a sustained period, allow the contract to be terminated for long-term force majeure.

28 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

Yes. However, the payment and transfer of title terms of PPP agreements and construction contracts may limit the circumstances in which a party has debts regarding a lien that can be exercised.

29 Are there any other material provisions related to design and construction work that PPP agreements must address?

PPP agreements will also address:

- government obligations;
- testing and works' certification;
- risk allocation regarding ground conditions and permitting;
- events entitling the contractor to extra time and money; and
- design approval and compliance with requirements as to the undertaking of works (including statutory requirements).

We expect provisions to be included that provide the government client with direct routes of recourse (including step-in rights) against any material subcontractors appointed (usually with government consent) to perform any of the services under the construction contract.

Operation and maintenance

30 Are private parties' obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

The project agreement will contain details of what the project company must do or achieve, usually based on an 'output specification'. This defines the desired project outcome – normally in line with a key policy objective – as opposed to giving a detailed specification of how the outcome is to be achieved. It is often the role of the private party to put forward a proposal for 'how' it will achieve the desired project outcome. During the evaluation period, this will be reviewed against the output specification, and once the project is awarded to a bidder it is typically incorporated into the agreement itself. Compliance with the proposal

will generally not be sufficient to avoid liability if the specification has not also been complied with.

31 Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Performance deductions for underperformance are a common feature of PPPs. The regime for performance deductions is not established in legislation and is decided on an individual basis. It is rare for PPP contracts to contain liquidated damages provisions for the operational phase of a project.

32 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

Where facilities are to be handed back to the government party, the contract will specify what condition they should be in at such a time and provide for a third-party assessment to determine whether the prescribed condition has been met. The contract should also make provision for retentions to be made from the service fee to be held as a guarantee.

Risk allocation

33 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

In relation to a delay in closing, the risk of increased delivery costs (eg, construction costs), and therefore the price, increases. The risk allocation is not prescribed by law, but will be provided for in the relevant bid documentation and contract. When submitting its bid, the private-sector bidder will be required to hold the price it bids for a specified period. Thereafter, there may be an adjustment mechanism set out in the selected bidder letter, specifying how the bidder's costs are permitted to inflate beyond this fixed date. Typically, the bidder will not be allowed to inflate the costs and price where it has caused the delay; however, in practice, determining which party has been responsible for a failure to reach close by the scheduled date will be difficult and it is likely to have been caused by both parties to some extent.

34 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

Where certain permits can be obtained by the public party before awarding a contract to the private party, they generally will be (eg, planning permissions for land that will be sold, leased or licensed to the private party). The responsibility for obtaining other permits and consents will generally rest with the private party, unless the consents can only be obtained by the public party or the public party is better placed to obtain them. The risk allocation is not prescribed by law, but will be provided for in the relevant contract.

Typically, where the private party is required to obtain planning permission, it will be required to do so before financial close. Where planning (or other key consents, such as environmental permits) are unobtainable before financial close, the contract will contain detailed provisions to deal with the consequences of a delay in obtaining the relevant consent, the consent only being granted subject to onerous conditions or the consent not being obtained and the agreement needing to be amended or even potentially terminated as a result.

35 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

Force majeure is generally limited to specific circumstances such as war, civil war, armed conflict, terrorism, or nuclear, chemical or biological contamination providing for the occurrence of exceptional events beyond the parties' control. The force majeure provision usually allows the party that cannot perform the contract to suspend its obligations and then terminate the contract if the force majeure event continues for a specified period of time.

Given the severity of this remedy, force majeure clauses (and particularly the definition of force majeure events) are often heavily negotiated and there is no standard definition under law.

Other events, such as lightning, flooding and earthquakes, will generally be treated as 'relief events', which will not give a right to terminate but will allow parties to apply to the public body for relief from termination for default and for postponement of the dates by which they must achieve certain milestones (eg, service commencement). Geotechnical and environmental risks will generally be allocated to the contractor, with specific exemptions on a case-by-case basis, taking into account factors such as the ability of the contractor to investigate the site and the likelihood of existing contamination. The risk allocation is not prescribed by law, but will be provided for in the relevant contract.

36 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Risk of third-party action or inaction, such as failure by statutory undertakers, utility companies or local authorities to carry out works or provide services are generally treated as relief events. This generally applies even when the action by a third party is critical to enable the private party to perform its obligations under the contract (eg, lack of access to property or work performed or required to be performed by the government or its contractors). Failure by the contracting government body to perform an obligation will generally entitle the contractor to additional time and money, provided they have taken appropriate steps to mitigate such risk and additional costs. The risk allocation is not prescribed by law, but will be provided for in the relevant contract.

37 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

Expropriation or nationalisation of the contract or the contractor usually represents a default by the public party, allowing the private party to terminate and claim compensation on a default basis. Separately, the public party will often have rights to step into the contract in an emergency to discharge a statutory duty or where there is a serious risk to the health and safety of persons, property or the environment. This step-in is temporary and will be regulated by the contract in terms of the parties' conduct, with the assistance and cost consequences afforded by the private party.

For unforeseeable changes in law that have a particular or discriminatory effect on the project or the private party concerned, or that necessitate additional capital expenditure, there is generally a provision whereby the public party provides the funding necessary to compensate for such effects. The contractor will, in any case, be required to comply with the law. Discriminatory or specific changes to tax law will be covered by the same provisions.

In the 2012 PF2 reforms, the government suggested that it may be appropriate for the public sector to take all cost consequences arising from certain 'unmanageable risks', such as a general change in law with capital expenditure consequences that arise in the services period. Previously, the stipulated position was that this risk should be shared between the parties on a sliding scale. See also question 46 and the government approach taken on the Thames Tideway project.

Although regular payments will generally have an element of indexation, and there may be benchmarking or market testing of 'soft services' such as cleaning and catering on a five-yearly basis, the private party generally does not have a right to reopen pricing because of adverse macroeconomic conditions. The risk allocation is not prescribed by law, but will be provided for in the relevant contract.

38 What events entitle the private party to extensions of time to perform its obligations?

Aside from those events mentioned above, extension of time events may include:

- public party defaults;
- transaction-specific events;
- fire;
- explosions;
- riots;
- power, fuel or transport shortages, blockades or embargoes; and
- strikes and industrial disputes affecting the industry or a part of it generally – provided they are not caused by the private party.

In applying for extensions of time to perform its obligations, the private party must demonstrate that it could not have mitigated the effects of the event without material expenditure, and that the event caused the delay. The duration of the contract as a whole is not extended – this is to motivate the private party to mitigate any event as quickly as possible.

39 What events entitle the private party to additional compensation?

Contracts typically contain a 'compensation event' mechanism, which provides a process for the private party to claim its additional compensation (and additional time) where certain events have occurred. These are generally circumstances of contract breach by the public party, where the private party receives compensation and relief from its obligations. As well as default by the public party, other compensation events may include specific legal issues impacting on the title of the site in question, the occurrence of on-site contamination, which the private party has not taken the risk of, or alternate deal or sector-specific issues.

40 How is compensation calculated and paid?

The compensation calculation is set out in the contract and is not mandated by law. It is generally based on the estimated change in project costs or loss of revenue because of the event. The intention is generally to put the contractor in a position that is no better or worse than the position they would have been in had the event not occurred, with regard to the equity internal rate of return, debt service obligations, etc.

In sectors or projects where there is a significant third-party income element (such as waste, leisure or in care homes partly funded by private patients), the compensation event mechanism will need to expressly cover lost third-party income and provide for a formula or mechanism to calculate what will be payable.

41 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

The private party will generally be required by the project agreement to take out insurance for specific risks. This is particularly the case with a special purpose vehicle structure and will be expected by both lenders and the public body, following the recommendations of the standardised documentation.

While not mandatory, to obtain better value for money, the public body may agree to a mechanism whereby the risk of insurance becoming increasingly expensive or unavailable on commercially reasonable terms is shared between the parties.

Default and termination

42 What remedies are available to the government party for breach by the private party?

Prior to termination, the relevant PPP contract will contain a detailed payment deduction regime for non-performance or breach. Repeated failures will lead to termination. The contract will also contain additional 'one-off' events that lead to termination. Where the PPP involves the construction of assets for service provisions, upon termination of the agreement, subject to the interests of project finance lenders, and payment by the government party of contractually defined compensation to the bidder – most, if not all, of the project's assets will usually become vested in the government party. The government party may also be entitled to claim damages from the bidder for breach of contract.

43 On what grounds may the PPP agreement be terminated?

The typical grounds for termination are:

- default by the PPP company;
- default by the government party;
- a voluntary decision by the government party; and
- termination in the event of prolonged force majeure.

44 Is there a possibility of termination for convenience?

The government party will include a termination right for convenience (with contractually agreed compensation) clause in all project agreements to enable it to terminate the contract.

Update and trends

PFI/PPP re-negotiation and termination

Given increased budgetary pressure on central and local government, there is increased scrutiny by them on the payment and performance regimes in operational PFI and PPP contracts. It is now common for these contracts to be re-negotiated or even terminated before contract expiry. These exercises require detailed scrutiny of the project and finance documents, and in particular the contractual compensation on termination provisions. Government bodies also need to consider how the services delivered under the relevant PFI/PPP arrangements will be delivered post termination, whether through a PFI/PPP solution or a different contractual model.

Numerous unfortunate consequences result from the growing tendency for termination or renegotiation. The first is the creation of industry support in an era of austerity, for example, the support by cost-saving local authorities focusing on historic and minor breaches which, when aggregated, can lead to a case for contract termination or renegotiation. The second is low public perception of PFI/PPP benefits (particularly in circumstances where major PPP contractors enter into insolvency) since service continuity is adversely disrupted by changes as significant as termination. Focussing on the benefits of sound contract management (public and private sectors alike) would avoid scenarios leading to such unfortunate consequences.

UK solar and energy storage

With government subsidy no longer available for solar projects, the United Kingdom is now seeing the emergence of subsidy-free solar projects. In the absence of subsidy, these projects need to be larger to be economically viable, so larger multi-site projects are now emerging, sometimes combining multiple energy sources (eg, solar and battery storage). For UK developments in a zero-subsidy environment, many renewables projects are considering adding battery storage as an additional project revenue stream. Solar projects typically only use a percentage of their grid connection potential. Installing battery storage units to these sites can enable an operator to unlock the potential of the remaining grid connection, which can be used to participate in the National Grid markets, either directly or through an aggregator. The decreasing costs of battery technology means that the economics of storage is also becoming compelling. For mixed-use sites, if a

connection point is shared between multiple generating sources (eg, solar and storage) then connection capacity, priority of access to connection capacity and bankability of individual projects (or a multi-source project) need to be considered from the outset. If storage is being installed at an existing project, and grid capacity (for the existing asset and the new battery storage facility) means that the grid is constrained, then a contractual grid sharing agreement will usually be required by all parties. If the existing 'incumbent' project has grid priority, then the developer will need to consider if it can assume the risk of not providing storage capacity to the third party offtaker arising from those grid constraints.

Frequency response models

The UK's energy mix is shifting from a small number of large-scale generating assets (power stations) to a larger number of smaller-scale generating assets (eg, solar farms). This means that there is an increased requirement to 'balance' the grid, and as a result the National Grid has outlined plans to develop frequency response and reserve contract models throughout 2018 and 2019. The minimum requirements needed to participate in the National Grid's firm frequency response process is one megawatt of response capacity (single unit or aggregated), which was recently reduced from 10 megawatts, and an ability for generators to respond within specified timeframes. Smaller scale private-sector generators will commonly sell frequency response capacity to an aggregator, who will contract with a number of generators to aggregate that capacity, before entering into a frequency response contract with the National Grid. The developer will generally be obliged to pay liquidated damages for delayed or non-provision of storage capacity to the aggregator, and may also be required to indemnify the aggregator for any loss. Payment will usually be based on availability and performance (ie, response times) over a settlement period. A developer will then need to consider the extent to which these liabilities have been backed off to any subcontractors appointed by the developer to install and maintain the storage equipment and infrastructure. The covenant quality of the engineering, procurement and construction contractor and security package on offer will also be relevant for the developer in assessing this risk.

45 If the PPP agreement is terminated, is compensation available?

Following termination, the project's assets will generally vest in the government party. PPP contracts usually require the government party to pay some degree of compensation to the private party if the agreement is terminated, even where the private party is in default. The amount of compensation owed will vary depending on the reason for termination.

In general, on termination for convenience by the public party or on termination for public party default, compensation is designed to put the private party and funders in the position they would have been in had the contract not been terminated. On termination for force majeure (eg, events outside the parties' control), compensation is based on the initial investment and not on expected return. Finally, on termination for default by the private party, compensation is based on retendering (where new proponents bid for the right to finish the contract term, with the net sale proceeds being paid to the contractor), or based on no retendering, where the contractor is compensated based on the hypothetical remaining operating cash flow.

Financing

46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

The UK has a government guarantee scheme to support a range of projects including rail, roads or other transport facilities, social infrastructure and housing. As well as greenfield projects, the scheme can also apply to the acquisition, conversion, enhancement, operation or repair of project assets. In exchange for a guarantee fee the government gives an unconditional and irrevocable guarantee, up to a specified limit, of scheduled principal and interest. The exact terms of the guarantee are agreed on a deal-by-deal basis and based on standard documents.

Furthermore, the UK Municipal Bonds Agency, which was formed in 2014, plans to issue municipal bonds to help enable local authorities

diversify funding sources, with particular emphasis on investment in infrastructure, housing and other assets.

The government has also shown willingness to develop innovative ad-hoc solutions to problems such as with the Thames Tideway project, where the government underpinned the multibillion-pound waste water project that could not have been procured by Thames Water without the government's support for, and acceptance of, key project risks.

47 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Lenders will typically enter into a direct agreement with the relevant governmental institution. This will provide rights to novate the contract to a substitute on default by the private-sector party, and for step-in rights for lenders. It will also provide, among other things, for acknowledgement by the government of the lenders' security rights and payment of the service fees into designated secured project accounts.

48 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

A direct agreement will grant lenders step-in rights in respect of the PPP agreement if the government proposes to terminate for contractor default. During the step-in period, lenders may either appoint a representative to assume the contractor's responsibilities or transfer the PPP agreement to a substitute contractor (subject to specified government rights to object).

Lenders can take security over the PPP agreement as part of their security package. The associated direct agreement can include:

- government acknowledgement of this security;
- consent for its transfer to a new owner on default with satisfactory technical, commercial and financial ability to perform the agreement;

- rights for lenders to step in to the agreement and cure ongoing defaults; and
- agreement to pay fees and other revenue into designated secured project accounts.

49 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

The direct agreement with the government will typically give lenders additional cure rights beyond those that the contractor has under the PPP agreement, including further periods to cure defaults and the ability to transfer the PPP agreement to a substitute contractor.

50 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

The PPP agreement will require government consent for refinancing, except for limited exemptions. It will also require a sharing of the refinancing gains. The government share of such gains will vary but commonly falls between 50 to 70 per cent.

Governing law and dispute resolution

51 What key project agreements must be governed by local law?

Where projects are carried out in the jurisdiction, project agreements will invariably be governed by the laws of England and Wales.

52 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

As a matter of common law, the government is subject to the rule of law; claims may be made against it in the courts and judgments can be enforced.

In relation to courts not of England and Wales, the government has sovereign immunity that includes:

- immunity to jurisdiction: preventing it from being sued in the court of another state; and
- immunity to execution: preventing the courts of another state from seizing its property.

Sovereign immunity to jurisdiction can be waived. Immunity to execution cannot be waived entirely since certain state assets cannot be available for satisfaction of the execution of an arbitral award or court judgment.

53 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

Arbitration is available to settle disputes where the governing law is English law. Contracting parties have a right to choose their own form of dispute resolution and arbitration clauses are commonly included in project agreements in which parties select the forum, procedures and controlling law for arbitration (invariably English law).

Frequently, disputes under PPP contracts are first subject to expert determination and subsequently to arbitration or the courts, depending on the relevant sector.

Arbitration is often preferred over litigation because:

- parties can agree important aspects of the process (eg, appointment of the arbitration tribunal);
- most arbitrations are final and binding;
- arbitration hearings are private whereas courts are public forums. English law recognises that it is an implied term of arbitration agreements that the proceedings are private and confidential, but this can also be expressly agreed by the parties; and
- London is an established centre for major arbitrations with a strong international reputation.

54 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

There is no preliminary requirement to enter into mediation or other preliminary dispute resolution procedures as a condition for seeking arbitration or other binding resolution; however, there may be specific contractual obligations compelling parties to a project agreement to do so. Preliminary steps to resolve disputes through negotiation are often required in PPP contracts.

The rules of court procedures do encourage parties to attempt to resolve disputes. Before starting a claim in the courts of England and Wales, a party should consider the rules governing pre-action conduct. There are potentially serious consequences for failing to comply with the Practice Direction on Pre-action Conduct and Protocols (Pre-action PD) or any pre-action protocol as relevant to the particular claim. The

Simmons & Simmons

Adam Cooper
Richard Dyton
Simon Moore
Simon Kenolty
Jack Rutherford
Louise McErlane
Shu Shu Wong
Sam Cundall
Yeji Lee
EunJung Kim
Khalifa Aljabr

adam.cooper@simmons-simmons.com
richard.dyton@simmons-simmons.com
simon.moore@simmons-simmons.com
simon.kenolty@simmons-simmons.com
jack.rutherford@simmons-simmons.com
louise.mcerlane@simmons-simmons.com
shushu.wong@simmons-simmons.com
sam.cundall@simmons-simmons.com
yeji.lee@simmons-simmons.com
eunjung.kim@simmons-simmons.com
khalifa.aljabr@simmons-simmons.com

CityPoint
One Ropemaker Street
London
EC2Y 9SS
United Kingdom

Tel: +44 20 7628 2020
Fax: +44 20 7628 2070
www.simmons-simmons.com

claimant should choose the protocol that it believes to be most appropriate to its claim. Otherwise, where a specific protocol does not apply, the parties should follow the guidelines in the Pre-action PD.

The primary aims of the Pre-action PD and each of the specific protocols are to ensure that, before issuing proceedings, the parties have exchanged information and sought to narrow issues at an early stage. Litigation should be seen as a last resort. The Pre-action PD and various protocols differ slightly in their detailed guidelines as to the required pre-action steps, but all seek to achieve their underlying aims by requiring the parties to exchange information and documentation setting out their respective positions, and to consider negotiation or some other form of alternative dispute resolution (ADR) before proceedings are commenced.

Non-compliance with the protocols may be taken into account by the court when giving case management directions or making orders regarding costs and interest rates on sums due. Compliance with the spirit rather than the technical letter of the protocols is key, so parties should aim to be reasonable, pragmatic and proportionate in their pre-action conduct. The court has the power to deprive a successful party of costs if it is shown that the successful party acted unreasonably in refusing to agree to ADR.

The rules of arbitral proceedings (the Arbitration Act 1996) do not specify requirements for pre-arbitral conduct. Unless otherwise agreed, arbitral proceedings are commenced when one party serves written notice on the other requiring it to appoint an arbitrator or to agree to the appointment of an arbitrator.

The tribunal can (but is not obliged to) make an award allocating the costs of the arbitration between the parties, subject to any agreement between them. When deciding on costs issues, a tribunal will typically consider a wide range of factors, such as whether a party's conduct has been unreasonable.

55 Is there a special mechanism to deal with technical disputes?

Technical disputes are often subject to expert determination under PPP contracts. Expert determination is often favoured for highly technical matters and to enable disputes to be resolved quickly in order not to disrupt construction or operation of facilities.

Getting the Deal Through

Acquisition Finance
Advertising & Marketing
Agribusiness
Air Transport
Anti-Corruption Regulation
Anti-Money Laundering
Appeals
Arbitration
Art Law
Asset Recovery
Automotive
Aviation Finance & Leasing
Aviation Liability
Banking Regulation
Cartel Regulation
Class Actions
Cloud Computing
Commercial Contracts
Competition Compliance
Complex Commercial Litigation
Construction
Copyright
Corporate Governance
Corporate Immigration
Corporate Reorganisations
Cybersecurity
Data Protection & Privacy
Debt Capital Markets
Dispute Resolution
Distribution & Agency
Domains & Domain Names
Dominance
e-Commerce
Electricity Regulation
Energy Disputes
Enforcement of Foreign Judgments
Environment & Climate Regulation
Equity Derivatives
Executive Compensation & Employee Benefits
Financial Services Compliance
Financial Services Litigation
Fintech
Foreign Investment Review
Franchise
Fund Management
Gaming
Gas Regulation
Government Investigations
Government Relations
Healthcare Enforcement & Litigation
High-Yield Debt
Initial Public Offerings
Insurance & Reinsurance
Insurance Litigation
Intellectual Property & Antitrust
Investment Treaty Arbitration
Islamic Finance & Markets
Joint Ventures
Labour & Employment
Legal Privilege & Professional Secrecy
Licensing
Life Sciences
Loans & Secured Financing
Mediation
Merger Control
Mining
Oil Regulation
Outsourcing
Patents
Pensions & Retirement Plans
Pharmaceutical Antitrust
Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public M&A
Public-Private Partnerships
Public Procurement
Rail Transport
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
Risk & Compliance Management
Securities Finance
Securities Litigation
Shareholder Activism & Engagement
Ship Finance
Shipbuilding
Shipping
Sovereign Immunity
State Aid
Structured Finance & Securitisation
Tax Controversy
Tax on Inbound Investment
Telecoms & Media
Trade & Customs
Trademarks
Transfer Pricing
Vertical Agreements

Also available digitally

Online

www.gettingthedealthrough.com