

THE PUBLIC–PRIVATE
PARTNERSHIP
LAW REVIEW

EIGHTH EDITION

Editors

Matthew Job and Christophe Lefort

THE LAWREVIEWS

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PREFACE

We are very pleased to present the eighth edition of *The Public–Private Partnership Law Review*. Since the publication of the previous edition, there have been wide and varied developments in the design and use of public–private partnerships (PPPs) throughout the world, and the purpose of this volume is chiefly to report on those.

PPPs continue to be under examination in a number of jurisdictions, particularly in countries that have long-established and relatively mature relationships with PPPs. Concerns regarding value for money, flexibility and, not least, the validity of the fundamental element of partnership within that model remain. In addition, attention has been given in many places to the most appropriate contractual model for PPPs, and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose. This has been compounded by the continuation of the covid-19 pandemic throughout the whole of 2021, which in many parts of the world has slowed economic activity generally and PPP procurements specifically. It is only now in 2022 that governments around the world are beginning to look beyond covid-19 (rather than dealing with its immediate and pressing consequences) and considering the role that PPP plays within their infrastructure plans.

Particularly in Europe, governments are looking at ways to stimulate their economies as part of their recovery from the impacts of covid-19. Infrastructure investment is a common theme in this, with the EU having agreed a €750 billion recovery plan and the UK government promising its ‘build back better’ plan for growth. The role of PPP within this remains unclear. In countries such as Germany and, to a lesser extent the Netherlands and Portugal, there are still concerns as to suitability of traditional PPP and whether it represents value for money; meanwhile there is an expectation that infrastructure development will benefit PPP in other countries such as Italy (where they have a new standard form PPP contract and a strong pipeline of projects, France and the UK (in sectors where private sector investment in infrastructure is prevalent). Active PPP procurements continue in countries such as Norway, the Czech Republic and Ireland.

Outside of Europe, PPP continues to be an important procurement tool in countries such as Australia, South Africa and the United Arab Emirates (with a strong pipeline of PPP projects also promised in Saudi Arabia). Many other countries are continuing to develop their PPP markets, with new PPP laws in countries such as Senegal and Uzbekistan and ambitious pipelines in countries such as Indonesia (as you will see from the following chapters of this book).

In some of the more mature PPP markets, the application of PPP and its derivative structures is heavily influenced by government policy. This is particularly the case in the UK, where variants on PPP are widespread in ‘consumer pay’ sectors such as renewable power generation, notwithstanding the ongoing embargo on PPP as a procurement method for

central government (where costs are implicitly routed through to the taxpayer). It will be interesting during 2022 to see the extent to which PPP evolves as a means of procuring key energy transition projects. In the UK carbon capture and storage projects will benefit from revenue support that is in effect an evolution of PPP, while PPP is a likely beneficiary of EU recovery and resilience funds for developing energy transition projects in Italy and France.

An interesting development over the past few years has been an attempt to make the PPP model more efficient by moving from the orthodox fixed price (with construction price risk transferred to the private sector) to a target cost approach in which the risks of cost overruns (and the benefits of cost savings) are shared between the public and private sectors. This is implicit in some of the regulatory asset base structures that have been discussed in the UK for a couple of years, but is also characteristic of some large PPP and infrastructure projects in Australia.

A key landmark in the modern PPP market was the advent of the ‘private finance initiative’ in the UK 30 years ago this year. This led to an explosion of projects in the UK during the late 1990s and early 2000s, and its structures and documentation have been followed widely around the world since. As it is now 2022, those early PFI projects are now approaching the end of their contract terms, forcing the government to confront the question of what comes next.

So where does that leave the outlook for PPP during 2022 and into the future? The inclination of many governments to invest in new infrastructure is arguably stronger than at any time in the past 50 years; energy transition will require huge infrastructure investment that is largely incremental. The question for those in the industry is how PPP can evolve in order to respond to this opportunity. The past 15 years have been characterised by very low cost of borrowing for government, which has made it easier for governments to justify borrowing to fund traditional procurement, perhaps tipping the balance away from PPP. However, responses to the covid pandemic have had a dramatic adverse impact on public sector finances across the globe. In this context, the prospect of stimulating the economy and delivering new infrastructure, but paying for the services that it delivers over time, may be more attractive than ever.

As legal practitioners with more than 50 years’ combined experience working with PPPs, we continue to believe that PPPs are and, where used appropriately, will remain an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets. This may prove to be all the more important following the economic shock of the covid pandemic.

The use of the PPP model, in addition to financial benefits, imports additional scrutiny, rigour and arm’s-length contracting practice, which ultimately benefit both the public and private sector and, most importantly, the consumer and taxpayer.

In this, the eighth edition of *The Public–Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions.

We hope that you will enjoy and find useful this edition of *The Public–Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

Matthew Job and Christophe Lefort

Herbert Smith Freehills LLP

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March 2022

UZBEKISTAN

Nail Hassanov and Jakhongir Olimjonov¹

I OVERVIEW

Public–private partnership (PPP), as a legal instrument of cooperation between the state and the private sector aimed at solving social and infrastructural problems, is a relatively new phenomenon for Uzbekistan. The concept of PPP was first introduced at the legislative level on 5 April 2018, by the Regulation on Public–Private Partnership in the Sphere of Preschool Education No. PP-3651. Since then, a number of regulatory by-laws have been adopted at the level of the President and the Cabinet of Ministers of Uzbekistan designed to regulate the procedures for procurement of PPP projects in certain very limited industries, such as healthcare, public services, museums and theatres.

In order to facilitate the development of PPP in Uzbekistan, a new state agency has been established – the Public–Private Partnership Development Agency (PPPDA) – under the Ministry of Finance by the Presidential Decree No. PP-3980 of 20 October 2018. From the first days of its establishment, the PPPDA began to actively promote PPP projects, including through drafting a comprehensive legislative framework.

The Law on Public–Private Partnership No. ZRU-537 dated 10 May 2019 (the PPP Law) which was developed under the auspices of a number of IFIs, has become an important milestone for further accelerated development of this institution in Uzbekistan. To elaborate the procedural steps for the procurement of PPP projects as set in the PPP Law, the Regulations on Implementation of Public–Private Partnership Projects No. 259 of 26 April 2020 have been adopted. Though this document did not bring much clarity to the existing PPP Law, it specified some procedural terms and introduced the template forms of PPP project concept and requirements for PPP project feasibility studies, namely a project evaluation document (PED).

The first PPP agreements (PPPAs) were concluded as early as 2018 (i.e., before the adoption of the PPP Law), yet, the first PPPA with a foreign investor and under the PPP Law was only signed in 2020 (the Dialysis PPP Project).

Currently, the most popular PPP sector in Uzbekistan is the energy industry, which accounts for more than half of the overall foreign investments attracted in PPP projects. The Uzbek government has announced an ambitious energy sector development programme

¹ Nail Hassanov is the head of the banking and finance and the infrastructure, PPP and project finance practices and Jakhongir Olimjonov is a senior associate at Kosta Legal.

aimed at almost doubling the volumes of produced energy by 2030.² The attraction of private investment through PPP mechanisms has been chosen as one of the primary methods in achieving this goal.

II THE YEAR IN REVIEW

The PPP legal framework in Uzbekistan has been undergoing constant changes over the past three years. In 2021, this trend continued, and a number of major amendments to the PPP Law and the Regulation on PPP have been introduced and new procedural regulations adopted in this sector.

In particular, on 22 January 2021, the President of Uzbekistan signed Law No. 669 aimed at addressing certain gaps and shortcomings of the PPP Law identified during the preceding two-year testing period. Notable amendments include:

- a* The definition of a public partner has been changed to allow the ministries, state agencies, local municipalities and other authorised entities to enter into a PPPA as a public partner on their own behalf, while previously only the Republic of Uzbekistan could be a public partner in any PPP project. The purpose of this amendment was to decrease or limit the amount of direct liability of the state in PPP projects while keeping its contingent liability to the fullest extent.
- b* Concessions have been recognised as one of the forms of PPP. As a result of the changes, the PPP project procurement procedures now apply to concession projects as well, and the Law on Concessions No. 110-I of 30 August 1995 was abolished.
- c* Government support agreements (GSAs) have had the introduction of a new mechanism of provision of additional state support and guarantees to be entered into with a private partner (and/or its lenders) and the Ministry of Finance on behalf of the Republic of Uzbekistan.
- d* Special purpose vehicles (SPVs) now allow for a winning bidder to enter into a PPPA as a private partner. Previously, only a winning bidder could become a private partner (i.e., sign a PPPA).
- e* Pegging of prices to foreign currency is now permitted. This amendment basically allows an indexation of prices (i.e., adjustment of PPP prices (payments) depending on forex or inflation fluctuations, or both) in PPP projects, which is certainly crucial for the viability of the PPP mechanism in general.

Another important legislative change was a land reform introduced by Presidential Decree No. UP-6243 of 8 June 2021. The document has established that land plots in PPP projects may be allocated to a private partner only through a lease agreement. This amendment increased the predictability of the PPP procurement process and was welcomed among investors and PPP specialists in Uzbekistan.

Apart from the legislative novelties, 2021 was a productive year from the perspective of the practical implementation of PPP mechanisms in the procurement of infrastructure and energy projects. In 2021, more than 150 PPP projects were awarded or signed, which

2 This is stipulated in the 'Concept of Providing the Republic of Uzbekistan with Electric Energy for 2020-2030', available at: https://minenergy.uz/uploads/1a28427c-cf47-415e-da5c-47d2c7564095_media_.pdf.

is thrice the 2020 figure.³ Out of these PPP projects, around 10 were cross-border financing transactions involving international bidders and lenders. The aggregate value of awarded PPP projects and concluded PPPAs in 2021 was more than US\$2 billion. Below we highlight some of them.

Table 1: Major PPP projects awarded/signed in 2021 in Uzbekistan

No.	Project name	Public partner	Private partner	PPP form	Procurement form	Status	Value
1.	Tashkent District Heating ⁴	Tashkent City Municipality	Veolia Central & Eastern Europe (France)	Affermage (O&M+Modernisation)	Direct negotiations	Signed	Approx. €1.4 billion
2.	Namangan Wastewater Treatment Plant	Republic of Uzbekistan represented by the Ministry of Housing and Communal Services	Metito Utilities Ltd. (UAE)	DBFOM and Transfer	Tender	Awarded	More than US\$90 million
3.	100MW Uzbekistan Wind Power Project	JSC 'National Electric Grids of Uzbekistan'	ACWA Power (Saudi Arabia)	Power Purchase Agreement	Tender	Awarded	US\$108 million
4.	Modernisation and Operation of Samarkand International Airport ⁵	JSC 'Uzbekistan Airports'	LLC 'Air Marakanda' (Uzbekistan)	DBFOM and Transfer	Direct negotiations	Signed	US\$80 million

Further, the analysis of tender documents and PPPAs of 2021 shows that the government has achieved a more-or-less unified approach with respect to the covid-19 pandemic. Due to travel restrictions all over the world, in the majority of tenders for PPP projects, bidders were allowed to submit bid documents electronically subject to a subsequent submission of documents in paper format. It is expected that the same approach will be continued in 2022. Within the framework of PPPAs, the position of the government is to treat the covid-19 event as a *force majeure* only if such an event makes the performance of the PPPA impossible for any of the parties. The reimposition of covid-19-related restrictions, which had previously already been practised in Uzbekistan (such as global lockdown), will not grant CIL relief to the private partner.

3 The list of PPP projects that have been awarded/executed in Uzbekistan in 2020-2021 can be found via the following link: <https://pppda.uz/ru/projects-custom>.

4 Tashkent District Heating PPP Project has been awarded to Veolia CEE through this option of direct negotiations.

5 Samarkand International Airport PPP project has been awarded to Air Marakanda through this option of direct negotiations.

III GENERAL FRAMEWORK

i Types of public–private partnership

In Uzbekistan, the following forms of cooperation of public and private sectors are available:

- a* concession;
- b* government investment agreement;
- c* public procurement;
- d* privatisation;
- e* trust management with investment obligations; and
- f* PPPA.

From a legal perspective, none of the above-listed project procurement instruments, except for concession, is considered to be a PPP. Under the PPP Law, a PPP is defined as a legally formalised cooperation between a public partner and a private partner based on the pooling of their resources for the implementation of a certain PPP project. In turn, a PPP project is a set of activities carried out based on the attraction of private investments and (or) introduction of best management practices, aimed at addressing economic, social and infrastructural objectives.

Despite the broad definition of PPP projects, legally, a PPPA is a separate type of civil contract that has a special procurement and award procedure, as well as its own subject matter and distinctive features. The following can be a subject matter of a PPPA:

- a* design, construction, operation, management of assets, proprietary complexes or public infrastructure; and
- b* delivery of works and services.

In this respect, in Uzbekistan, a PPP project is understood to be cooperation based on a PPPA, and the rest of this chapter is based on this thesis.

The PPP Law allows the implementation of PPP projects by any possible types of PPPA. The type of PPPA is usually decided by the public partner in agreement with the PPPDA (and the Ministry of Finance) based on the project specifics. The following types of PPPA have been utilised in practice in Uzbekistan so far:

- a* build-operate-transfer (BOT);
- b* build-operate-own-transfer (BOOT);
- c* design-build-finance;
- d* design-build-finance-maintain (DBFM);
- e* design-build finance-operate-maintain (DBFOM) (the most popular type); and
- f* affermage/operate and maintain (O&M).

ii The authorities

In accordance with the definition of the public partner, basically, any ministry or local municipality can be involved in the implementation of PPP projects as a public partner, if the given project is being implemented in the area of activity or competence of the ministry or within the territory of the local municipality.

The main government bodies engaged in the PPP sector (not necessarily as public partners) are the following:

- a* the President of the Republic of Uzbekistan. Within the PPP sector, the President is entitled to:

- authorise a public partner to enter into PPPAs through direct negotiations;
 - make a decision on the transfer of the PPP object to the ownership of a private partner;
 - approve GSAs;
 - provide customs and tax benefits; and
 - allow pegging of the prices to goods and services sold in Uzbekistan under a PPP project to foreign currency;
- b* the Cabinet of Ministers, which is responsible for:
- the implementation of the state policy and adoption of regulatory legal acts in the PPP sector;
 - the appointment of a public partner for PPP projects on the proposal of the PPPDA (in the event of uncertainty);
 - approval of the concept of the PPP project with a total value exceeding the equivalent of US\$10 million;
 - approval of the composition of the tender commission;
 - issuance of the decision on the procurement of the PPP project through direct negotiations;
 - approval of GSAs; and
 - approval of any amendments, additions and early termination of PPPAs;
- c* the Ministry of Finance, which is responsible for:
- the execution of GSAs (if any) on behalf of the Republic of Uzbekistan;
 - analysis of the feasibility of financial aspects of a PPP project and issuance of an opinion in relation to the PPP project concept if the project envisages monetary allocations from the state budget; and
 - registration of the public partner's financial liabilities under the PPPA and allocation of relevant budgetary assignments to the public partners;
- d* the PPPDA, which is the main government body enforcing the state policy in the PPP sector. The PPPDA carries out the following functions in respect of PPP projects:
- provision of general assistance in the development of PPP projects;
 - approval of PPP project concepts with a total value exceeding US\$1 million;
 - approval of tender documentation and draft PPPAs;
 - provision of explanations and clarifications on PPP matters;
 - maintenance of the register of PPP projects;
 - monitoring the implementation of PPP project in line with the terms of the PPPA; and
 - a collection of success fees for the successful execution of PPPAs; and
- e* the Antimonopoly Committee, which is responsible for the examination and approval of PPP project concepts and draft PPPAs, if the PPP project is being procured via direct negotiations.

iii General requirements for PPP contracts

PPP criteria

A project to be procured under the PPP modality shall meet the following criteria:

- a* have the aim of solving economic, social and infrastructure issues;
- b* the project duration shall be no less than three years and no more than 49 years;
- c* activities to be carried out under the project are currently or have been previously carried out by ministries, state agencies or local municipalities;

- d* the quality of goods, works and services to be procured under the project shall be higher than it is currently provided;
- e* the public partner has proprietary rights over the PPP object;
- f* availability of financial resources for the project implementation;
- g* attraction of private investments;
- h* similar projects in Uzbekistan or abroad receiving approbation;
- i* a social necessity for the project;
- j* project risk allocation between the public partner and private partner; and
- k* innovative approach and implementation of best management practices.

The compliance of a PPP project with the above criteria is examined by the public partner at the project initiation phase.

Public partner

The PPP Law defines the public partner as the Republic of Uzbekistan and (or) government bodies, local executive authorities and other legal entities or their associations authorised by the Cabinet of Ministers.

In the majority of recent PPP projects, a public partner is either a local municipality or a relevant ministry responsible for the sector in which the PPP project is to be implemented.

PPP legislation does not provide for a specific list of government bodies that can act as a public partner in their respective area of regulation. In this regard, the public partner for a PPP project is determined on a project-by-project basis. Usually, the public partner is either an entity that owns or operates the public assets being transferred to the private partner (brownfield or O&M-type PPP projects) or an entity that generally performs actions that the private partner is expected to perform under the PPP project (greenfield or DBFOM-type projects). Where there is uncertainty with respect to the identity of the public partner, the public partner is determined by the Cabinet of Ministers upon the PPPDA's recommendation.

Private initiator

A private initiator is a person that submits an unsolicited proposal to the potential public partner together with all required documents (i.e., project concept and PED). Any commercial entity, including entities registered abroad, can initiate a PPP project. In accordance with the non-discrimination principle provided for in Article 8 of the PPP Law, foreign entities are guaranteed the same treatment as local players. In accordance with Article 23 of the PPP Law, a private initiator must meet the following criteria in order to be eligible to submit an unsolicited proposal:

- a* have the legal capacity to have rights and accept obligations;
- b* possess sufficient financial, technical and qualified labour resources necessary for the performance obligations set in PPPA; and
- c* have no conflicts of interest.

Private partner

Pursuant to Article 3 of the PPP Law, a private partner is defined as a commercial entity, registered in accordance with the legislation of the Republic of Uzbekistan or a foreign state, or an association of such entities, with whom the public partner entered into a PPPA.

In accordance with Article 26 of the PPP Law, a public partner may enter into a PPPA with a participant of direct negotiations, a winning bidder or an SPV. Though it is not clearly established in the PPP Law or the Regulation on PPP, the overall understanding is that there can be only one public partner and one private partner per PPP project (i.e., the transaction structure contemplating more than one person acting as a public partner or private partner (unless it is a consortium) is not workable under laws of Uzbekistan).

It is not mandatory for the private partner to be a resident of Uzbekistan. However, given that the majority of large PPP projects are being implemented through project finance and, in practice, it is quite difficult for a foreign entity to operate in Uzbekistan without a local legal presence (mainly due to taxation, banking and licensing issues); a foreign winning bidder enters into PPPAs through SPVs.

PPP objects

A PPP object is a property, property complex, public infrastructure, design, construction, creation, supply, financing, reconstruction or modernisation, the operation and maintenance of which are carried out as part of a PPP project, land plots, as well as works (services) and innovations to be introduced during the implementation of the PPP project. There is no restriction in respect of types of property that can be a PPP object.

Term

The minimum term of a PPPA is three years, and the maximum is 49 years.

Land plots

The provision of land plots necessary for the implementation of the PPP project is the public partner's sole obligation. No separate tender or other procedures are required for the purposes of the provision of land. Land plots are provided based on a separate lease agreement to be entered into between the public partner and the private partner. Assignment of a land plot (including pledge) is not allowed, except in favour of project lenders.

Assignment of PPPA

A public partner may assign its rights to third parties subject to the terms of the PPPA. Assignment of a PPPA by a private partner is not permitted, except for the PPP project lenders under direct agreements. With that said, a private partner can delegate its rights and obligations to third parties, provided it will always bear full responsibility for the performance of such obligations.

In turn, the public partner is also entitled to engage third parties to perform its obligations provided that the public partner will at all times be fully responsible for the actions of such third parties as well for the performance of the public partner's obligations under the PPPA.

Dispute resolution

In accordance with Uzbek law, parties to a PPPA are free to choose the forum where proceedings are heard. However, the economic courts of Uzbekistan have exclusive jurisdiction over disputes where:

- a a dispute is in relation to the property owned by the government, including disputes concerning the privatisation of state property and the expropriation thereof; and

- b* the subject matter of a dispute is immovable property or rights over such immovable property if the property is located in the territory of Uzbekistan.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

Expression of interest (EOI) is no longer a mandatory phase of the PPP project awarding procedure. That is, the procuring authority may directly go to the tender (i.e., RFQ), once the project concept has been approved. The PPP Law stipulates that RFQ shall be made publicly available to any interested party, rather than only those who have expressed their interest, as it is done in many jurisdictions.

ii Requests for proposals and unsolicited proposals

In accordance with the PPP Law, a PPP project can be initiated both by a public partner and a private initiator. The initiation of the project basically means the preparation and approval with a relevant body of the PPP project concept and PED.

The project concept of a PPP project is a written document prepared by a public partner or private initiator, which justifies the chosen procurement method (i.e., PPP), determines the cost of the project, source and profitability of the project, efficiency and relevance of its implementation. The template form of the project concept, as well as the requirements to the content of the PED, are provided in the Regulation on PPP.

The initiation of a PPP project with a total value of more than US\$10 million consists of the following key milestones:

- a* the development of a PPP project concept and PED;
- b* the submission of an unsolicited proposal (which should contain a PPP project concept) to the potential public partner for approval (only if the project is initiated by a private initiator);
- c* if the potential public partner finds the unsolicited proposal economically feasible and if it meets all the PPP project criteria, it makes a decision on the implementation of the PPP project (within 30 days) and submits the PPP project concept to the PPPDA for the assessment, coordination and approval;
- d* approval, rejection or returning for the improvement of the project concept by the PPPDA (within 10 days); and
- e* approval of the agreed PPP project concept project by the Cabinet of Ministers (within 10 days).

Once the project concept is approved by the Cabinet of Ministers, the project can be further awarded to the private partner either through tendering or via direct negotiations as described below.

iii Evaluation and grant

Tender

Normally, any PPP project must be awarded through a tender. A two-stage tender shall be held for PPP projects, the value of which is above US\$1 million. It is permitted to hold tenders electronically (i.e., electronic submission of applications and tender proposals), and it has become a common practice nowadays due to the covid-19 pandemic and subsequent travelling restrictions.

During the RFQ stage, applicants are shortlisted against qualification criteria specified in the tender documentation. The duration of the RFQ stage is at least 30 days (in practice, it lasts 40 to 70 days). There shall be at least two pre-qualified bidders in order to commence the second stage of the tender.

In the RFP stage, the technical and financial proposals of the pre-qualified bidders are examined and the winning bidder is selected. Also, it is mandatory to select and announce a reserve winning bidder (i.e., the bidder whose tender proposal was found the second best). The reserve winning bidder will be substituted for the winning bidder if the latter fails to sign the PPPA and is disqualified. At the RFP stage, the pre-qualified bidders shall be given at least 45 days for the preparation and submission of tender proposals (in practice, it is usually 60 to 90 days).

The evaluation of bids is carried out by the tender commission specifically established for this purpose. The evaluation is done within the period and against the criteria set in the tender documents.

Direct negotiations

Awarding PPP projects through direct negotiations is possible in the following limited cases:

- a* when the PPP project is initiated by a private initiator and no eligible third party has expressed its interest in the project within 45 days following the EOI request;
- b* if the public partner reasonably determines that the procurement of a PPP project through direct negotiations is necessary for ensuring the defence and national security of Uzbekistan;
- c* if a certain person exclusively owns intellectual property rights, other exclusive rights, a land plot, immovable property or other property, without which it is impossible to implement the PPP project; and
- d* if there is a resolution or decree of the Cabinet of Ministers or the President of Uzbekistan instructing to award the project through direct negotiations.

V THE CONTRACT

i Payment

In Uzbekistan, there are no restrictions or limitations for revenue model mechanisms that can be applied in PPP projects. Generally, in most PPP projects, the private partner recovers its costs in delivering the project (together with a return on capital invested in the project) and gains profit through the periodic payments it receives from the public partner for the products produced or services rendered. It may be in a form of energy charges to be paid by the public partner (in energy projects) or availability payments in social and infrastructure projects.

In other PPP projects, the private partner's revenue may be formed through the private partner being responsible for generating user-payments from end-users of the PPP project, with the state providing a minimum revenue guarantee if the user-payments are not sufficient to reach agreed profitability levels.

The exact type of revenue model is determined at the project concept approval stage. At this stage, the projected maximum amount of state expenditure for the project is also approved (i.e., the amount of money that can be allocated from the state budget either in form of availability payments or subsidies to the public partner to be further paid to the private partner under the PPPA).

ii State guarantees

The PPP Law provides for the list of means of state support that may be granted to a private partner or project lenders, which includes:

- a* subsidies, including those directed at ensuring a guaranteed minimum income of the private partner in the PPP project;
- b* contributions in the form of assets and property, necessary for the implementation of the PPP project;
- c* budget funds from the budgetary system of the Republic of Uzbekistan, directed for the payment for consumption or use of goods (work, services) produced within the PPP project;
- d* provision of budgetary loans, borrowing, grants, credit lines and other types of financing;
- e* tax incentives and preferences; and
- f* other guarantees and (or) compensations by mutual agreement of the parties.

In addition to the means of state support directly listed in Article 38 of the PPP Law, a public partner may procure any other internationally accepted guarantees, as agreed by the parties under the PPPA or the GSA. For example, the following are common state guarantees provided in PPP projects in Uzbekistan:

- a* guarantees of the termination payments;
- b* guarantees of availability payments or service payments for the services rendered by a private partner under the PPPA;
- c* change-in law protections; and
- d* guarantees against political *force majeure* events and the like.

The PPP Law stipulates that the state support or additional guarantees may be provided directly in the PPPA or by entering into a GSA with the government. A GSA is entered into between the Ministry of Finance, acting on behalf of the country, and the private partner. In addition, the project lenders may secure their interests in the PPP project through becoming a party to a GSA or entering into PPPA and GSA direct agreements with the public partner or government.

iii Distribution of risk

Allocation of risks is one of the key aspects of the PPP project and is decided at a very early stage of its implementation (at the stage of the project concept approval). There is no single pattern for risk allocation for all PPP projects: it always depends on the type of PPP project. For instance, in availability payment-based DBFOM type PPP projects, the risks are approximately distributed as follows in Table 2.

Table 2: Distribution of risk in DBFOM PPP projects

Risks	Public	Shared	Private
Land risks	✓		
Change in law risk	✓		
Financing risk			✓
Design and construction risk			✓
Commissioning risk		✓	
Operation risk			✓
O&HS and environmental risk			✓
Demand risk	✓		
Availability risk			✓
Service/Product quality risk			✓
Utilities risk	✓		
Forex inflation and exchange risks	✓		
Termination risks		✓	

iv Adjustment and revision

In Uzbekistan, the amendment of PPPA terms (with the value exceeding US\$10 million) is subject to the Cabinet of Ministers' approval. However, if the adjustment mechanism is already included in the PPPA, that is, if the price is automatically adjusted depending on certain external factors (such as lack of demand, increase in utility price, etc.), the price adjustment is not considered as an amendment of the PPPA.

In addition, there might be pre-agreed PPPA revision mechanisms (such as an extension of the PPP services' scope, or the implementation of the next phase of PPP object). Pre-agreed revisions do not need to be approved by the Cabinet of Ministers as well.

v Ownership of underlying assets

The PPP object ownership structure varies from project to project. The PPP Law is quite flexible in terms of the ownership of assets under the PPPA. Depending on the chosen approach and the terms of the PPPA, any party can be an owner of the PPP asset during the term of the PPPA, provided that in all scenarios the PPP asset must be transferred to the ownership of the public partner at the termination of the PPPA unless otherwise decided by the President of Uzbekistan in a relevant decree.

In practice, irrespective of the owner of PPP assets, in project finance PPP projects, the public partner usually agrees to pledge the asset in favour of the project lenders to secure financing obligations of the private partner.

As per the accounting standards of Uzbekistan, the depreciation costs are borne by an entity that holds the PPP asset on its balance sheet.

vi Early termination

The PPP Law states that early termination of the PPPA exceeding US\$10 million is subject to the Cabinet of Ministers' approval. Our interpretation of this provision is that such authorisation is only required for a public partner, while the private partner's rights to terminate a PPPA is only limited by the terms of the PPPA and not dependent on approval of the government.

The grounds of early termination are specified in the PPPA, and usually include the events of default, prolonged *force majeure* and termination on convenience by the public partner subject to payment of increased compensation payments. In addition, as per Uzbek law, either of the parties to the PPPA may request the termination or amendment of the PPPA in the event of material changes in circumstances. The question of whether a particular change in circumstances is material (i.e., making the performance of PPPA impossible or not feasible) will be decided by a court.

In the event of early termination of a PPPA, the public partner shall make the payment of compensation for termination and, as a general rule, the PPP object shall be transferred to the public partner. The rules for calculation and payment of the compensation for termination are set in the PPPA and are generally similar to internationally accepted precedents.

VI FINANCE

As a rule, PPPs in Uzbekistan are financed by foreign investors' own equity or loans attracted by foreign investors such as private partners or sponsors (i.e., on a project finance basis). However, the financing structure is largely dependent on the type of PPP.

In addition, the PPP Law provides for such financing options as co-financing, state subsidies, budgetary loans and credit facilities as well as proprietary contributions of the public partner. However, we have not yet seen any of these options being utilised in Uzbekistan in practice for projects exceeding US\$10 million.

In practice, the majority of large-scale projects are financed through cross-border financing mechanisms. In such PPP projects, the inflation and foreign exchange risks are borne by the public partner through the incorporation of the indexation mechanisms into the PPPA. For this mechanism to be in compliance with Uzbek law, there shall be issued a presidential or governmental decision authorising the price of goods, works and services carried out under the PPP project to be pegged to foreign currency.

VII RECENT DECISIONS

Due to the novelty of the PPP modality in Uzbekistan, no case law has yet been generated (both local and international arbitration) in respect of tendering, execution or performance of PPPAs in Uzbekistan.

VIII OUTLOOK

The government has been highly encouraged by the success of PPP mechanisms in attracting private investments this year and, in our opinion, is planning to continue using this modality in future infrastructure projects. Currently the majority of cross-border finance PPP projects are being implemented in the energy sector due to the high demand for electricity in the country. However, the Investment Programme of Uzbekistan for 2022–2026, approved by Presidential Decree No. PP-72 of 30 December 2021, shows that, in the near future, the priority directions of PPP in Uzbekistan will be the social and infrastructure sectors. In particular, during this period, it is planned to implement four projects for the construction of toll motorways and tunnels, reconstruction of nine bus terminals, two projects in healthcare, the construction of 14 schools and 40 kindergartens and dozens of projects in the water and sewage sector.

The PPP legislation will continue to develop further. This year, the Regulation on PPP will undergo significant amendments, as a result of which it is expected that any inconsistencies will be eliminated and more clarity will be brought to the PPP procurement and implementation process.

In addition, in 2022, the PPPDA is planning to enhance the institutional potential of the PPP in Uzbekistan at the expense of the World Bank's 'Institutional Capacity Building Project' financing programme, through the attraction of private consultants into a number of PPP sectors (education, transport, energy, healthcare and communal services). This initiative is aimed at addressing the possible 'lack of capacity and shortage of employees' issues that may face the PPP procuring authorities in light of the growing demand for PPP projects in Uzbekistan.

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