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Key Features of Common and Civil Law Systems

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Under [Sources of Law](#) we explained that some countries will apply greater weight to certain sources of law than others, and that some will put more emphasis on judicial decisions than others.

There are two main types of legal system in the world, with most countries adopting features from one or other into their own legal systems, Common Law and Civil law.

For an unexhaustive list of the countries with common law and civil law systems, go to the [Legal Systems of the World on Wikipedia](#).

This section looks at key features of each system and highlights areas which of particular relevance to PPP projects:

Common Law System

Countries following a common law system are typically those that were former British colonies or protectorates, including the United States.

Features of a common law system include:

- There is not always a written constitution or codified laws;
- Judicial decisions are binding – decisions of the highest court can generally only be overturned by that same court or through legislation;

- Extensive freedom of contract - few provisions are implied into the contract by law (although provisions seeking to protect private consumers may be implied);
- Generally, everything is permitted that is not expressly prohibited by law.

A common law system is less prescriptive than a civil law system. A government may therefore wish to enshrine protections of its citizens in specific legislation related to the infrastructure program being contemplated. For example, it may wish to prohibit the service provider from cutting off the water or electricity supply of bad payers or may require that documents related to the transaction be disclosed under a freedom of information act. There may also be legal requirements to imply into a contract in equal bargaining provisions where one party is in a much stronger bargaining position than the other. Please see [Legal Framework/ Enabling Environment Assessment for PPPs](#) for more on this.

There are few provisions implied into a contract under the common law system – it is therefore important to set out ALL the terms governing the relationship between the parties to a contract in the contract itself. This will often result in a contract being longer than one in a civil law country.

Civil Law System

Countries following a civil law system are typically those that were former French, Dutch, German, Spanish or Portuguese colonies or protectorates, including much of Central and South America. Most of the Central and Eastern European and East Asian countries also follow a civil law structure.

The civil law system is a codified system of law. It takes its origins from Roman law. Features of a civil law system include:

- There is generally a written constitution based on specific codes (e.g., civil code, codes covering corporate law, administrative law, tax law and constitutional law) enshrining basic rights and duties; administrative law is however usually less codified and administrative court judges tend to behave more like common law judges;
- Only legislative enactments are considered binding for all. There is little scope for judge-made law in civil, criminal and commercial courts, although in practice judges tend to follow previous judicial decisions; constitutional and administrative courts can nullify laws and regulations and their decisions in such cases are binding for all.
- In some civil law systems, e.g., Germany, writings of legal scholars have significant influence on the courts;
- Courts specific to the underlying codes – there are therefore usually separate constitutional court, administrative court and civil court systems that opine on consistency of legislation and administrative acts with and interpret that specific code;
- Less freedom of contract - many provisions are implied into a contract by law and parties cannot contract out of certain provisions.

A civil law system is generally more prescriptive than a common law system. However, a government will still need to consider whether specific legislation is required to either limit the scope of a certain restriction to allow a successful infrastructure project, or may require specific legislation for a sector. Please go to [Legal Framework/ Enabling Environment Assessment for PPPs](#) sections for more information on this.

There are a number of provisions implied into a contract under the civil law system – less importance is generally placed on setting out ALL the terms governing the relationship between the parties to a contract in the contract itself as inadequacies or ambiguities can be remedied or resolved by operation of law. This will often result in a contract being shorter than one in a common law country.

It is also important to note in the area of infrastructure that certain forms of infrastructure projects are referred to by well-defined legal concepts in civil law jurisdictions. [Concessions](#) and [Affermage](#) have a

definite technical meaning and structure to them that may not be understood or applied in a common law country. Care should be taken, therefore, in applying these terms loosely. This is further considered under [Agreements](#).

Summary of Differences between Civil law and Common law legal systems

Set out below are a few key differences between common law and civil law jurisdictions.

Feature	Common Law	Civil Law
Written constitution	Not always	Always
Judicial decisions	Binding	Not binding on 3rd parties; however, administrative and constitutional court decisions on laws and regulations are binding on all
Writings of legal scholars	Little influence	Significant influence in some civil law jurisdictions
Freedom of contract	Extensive – only a few provisions implied by law into contractual relationship	More limited – a number of provisions implied into contractual relationship
Court system applicable to PPP projects	In most cases contractual relationship is subject to private law and courts that deal with these issues	Most PPP arrangements (e.g. concessions) are relating to a public service and subject to public administrative law administered by administrative courts

Civil Law Systems - Key Administrative Jurisprudence that can impact PPP arrangements

In many civil law countries a separate administrative law governs PPP arrangements. It is important to seek local legal advice to check whether these rules apply in a particular civil system. It is also important to note that in a civil law jurisdiction, unless the contract specifies that the parties have agreed to arbitration, the contract will be enforced by the administrative courts. Some of the key administrative rules that apply to delegated management arrangements are listed below.

Governments may wish to include these rules in the arrangement, and when they are part of the underlying law it may not be necessary to repeat them in the contract. But relying on just the underlying law is problematic because the rules are sometimes ambiguous. For example, the jurisprudence on restoring the “financial equilibrium” of the contract is not clear on what “financial equilibrium” really means.

A contract that takes a background administrative law principle and spells out exactly how it is to be applied will generally be effective. But, changing or overriding an administrative law principle may or may not be legally possible—that would need to be checked. For example, it may not be possible to completely remove the ability of a contracting authority to unilaterally change service standards. In France the law makes void any attempt to override the contracting authority’s ability to unilaterally cancel a contract. Some civil law codes also contain mandatory notice periods before termination for breach of contract that cannot be avoided or overridden.

Rights of contracting authority that may override contractual provisions

Right of unilateral modification

The contracting authority may, as in France, have the right to modify aspects of the contract unilaterally when it deems the change to be in the public interest. The contracting authority does not have the right to change the contract’s financial provisions or its fundamental nature, but it can change such aspects as the specification of the service to be provided.

Right of unilateral cancellation

The contracting authority has the right to cancel the contract early (although it must compensate the operator).

Right to continuity of service

The operator in an administrative contract may not suspend the execution of its obligations under the contract, even if the contracting authority breaches the contract. Under a concession or affermage-lease, the operator is deemed to assume duties relating to operating a public service, even beyond those included in the contract (such as investing to address increasing demand or adapting to new technologies).

Protections of operator implied by law

- **Operator's right to financial equilibrium** - The operator is protected in certain circumstances by the right to have the "financial equilibrium" of the contract preserved. For example, when the contracting authority imposes a unilateral modification, it must also adjust the financial terms of the arrangement so that the operator is not worse off (for example, if the contracting authority required higher service standards, it might also have to allow a higher tariff). Particular doctrines that form part of the operator's right to "financial equilibrium" in France, which have counterparts in other civil law countries, include:
 - ***Fait du prince***. Relief is granted when the contracting authority has caused the operator's profits to decrease without breaching the contract. Relief under *fait du prince* requires the following conditions:
 - the contracting authority's action has adversely affected the operator and was unforeseeable when the contract was concluded;
 - the contracting authority's action is beyond the scope of the contract (otherwise the action would merely constitute a breach of the contract); and
 - the action taken by the contracting authority must be specific to the operator (general decisions concerning all enterprises are not considered as *fait du prince*, but they may give rise to damages on the basis of the *imprévision* principle; see below).
 - ***Imprévision***. The operator is entitled to compensation for financial difficulties arising from large and unforeseen changes in economic conditions that render execution of the agreement financially hazardous. Examples of possible compensation events under *imprévision* include a major devaluation, price control decided by an authority other than the contracting authority, or a reduction in working hours that increases labor costs. The adverse economic impact of these events must not only be exceptional but beyond all limits foreseen by the contract. The operator's compensation is not equal to the total losses or damages incurred (an administrative circular provides for the administration to bear 90 percent of the losses as an indicative rule).
 - ***Sujétions Imprévues*** – The operator is entitled to compensation for unexpected material conditions that make construction and/ or operations more costly.
- **Force majeure** - Unpredictable and uncontrollable events that render the performance of the contract materially impossible exonerate the operator from its obligations. For example, a spill from a chemical factory causing permanent pollution of the only water source would be considered *force majeure*. Natural phenomena such as hurricanes and droughts may also be considered *force majeure*.

Other Civil Law rules that can impact PPP arrangements

Contractual penalties

Where there is a contractual commitment on the Operator to pay a penalty in the case of default and the amount is fixed by contract, under French law a judge may reduce or increase the amount of penalties (as

long as it is not reduced below the actual damage suffered). Similar concepts exist in Mali, Tunisia and Algeria, for example.

Gross-up clauses

Under the French tax code (article 1678 quarter) gross-up clauses related to indemnification of withholding taxes on interest are not to be binding on French tax administration when the debtor is a French entity.

Bankruptcy

In Common law jurisdictions, such as England and the US, the emphasis when a business gets into financial trouble is on seeking a reorganization rather than a liquidation to keep the business as a going concern (eg US, Chapter 11, UK administration). In Civil law jurisdictions the process focuses on liquidation (although reform of some bankruptcy laws such as France and OHADA countries is now permitting reorganizations of debtors before they become insolvent).

Financial Assistance(European doctrine), “Corporate Benefit ” (French doctrine)

These doctrines prohibit or severely restrict a target company and its subsidiaries from giving guarantees (up-stream and cross-stream) or security in connection with the acquisition of the target company’s shares – of particular relevance to PPPs involving private sector taking a stake in a utility (joint venture) and/ or privatizations. Other civil law countries such as the OHADA countries (Article 639 of Uniform Act related to commercial companies) and Algeria (Article 715 bis 60 of Commercial Code) have similar concepts.

Security interests and syndicated loans

Common law systems have greater flexibility in granting different types of security over assets - an important feature of PPP arrangements involving commercial funding such as BOTs. They also have the concept of trusts, which enable security interests to be held by a trustee for lenders in a syndicated loan situation without the need for formal transfer or re-registering of security interests in names of new lenders. Civil law does not have such a concept and so security interests generally required to be re-registered in the name of the new lender (involving additional registration costs and notarial fees). France is in the process of introducing a trust law which will resolve a number of these issues. In OHADA countries, however, filings involving public notary are required for formalizing security interests.

Concept of "Concession" as Understood in France

Find summary [here](#).

Sources - World Bank Toolkit (2006) - Approaches to Private Participation in Water Services, presentation to IFC on Some Differences between Civil Law and Common Law in a "nutshell" - Gide Loyrette Nouel 2007

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