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Limitations on Freedom of Contract

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Highlighted below are three limitations on freedom of contract that are commonly found in a number of common law as well as civil law jurisdictions and are likely to have an impact on the PPP project:

The legal environment of a host country is likely to contain a number of restrictions on the parties' ability to contract freely and may also imply a number of provisions into the agreement. Civil law jurisdictions have a number of doctrines that will be implied into the relationship between the parties. For more, go to Key Issues in Civil Law systems that impact PPP projects.

Limits on Damages and Compensation

The laws of some countries, such as England, require that any damages that may be recovered for breach of the contract or other obligations should be limited to the level of damage or loss actually suffered. Any provision in a contract, such as a liquidated damages clause in a construction contract, seeking to set damage levels in certain situations, will be void if it exceeds what would be a genuine pre-estimate of damage. It would then be for the court to determine the appropriate level of damages.

Legal restrictions on Contract Duration

When considering whether the enabling environment is consistent with the infrastructure project, existing laws that prescribe the length of a contract or the period that public assets can be let to a private entity need to be considered. For more information, see Agreements.

A host country may also wish to enact such limitations to create boundaries for projects.

Other issues that need to be considered in this respect are:

- Does the law contain constraints on the parties' freedom to agree on termination rights and procedures?
- Does the law allow the term of the agreement to be extended in specific instances?
- Are there constraints on the ability of the parties to a contact to agree compensation payments in the event of termination?

Limits on Liability and Indemnity Clauses

Many jurisdictions have express provisions at law limiting the extent to which a party to a contract can limit its liability for death, injury and damage to property. These provisions are seen as protecting the general public, in particular. Care needs to be taken when drafting project agreements that these constraints are understood as an agreement that seeks to go beyond the permitted limits may result in the whole agreement being void.

There may also be provisions that prohibit parties from seeking indemnities from other parties against certain liabilities, particularly criminal liability.

Related Content

- **Laws and Regulations**
- **PPP Legal Foundations - Further Reading**
- **Legislation and Laws - General and Sector Specific**
- **Regulatory Systems and Sector Overview**
- **Country Profiles**

Additional Resources

- World Bank Guidance on PPP Legal Frameworks
- PPP Reference Guide - PPP Framework
- PPP Contract Management

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