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# PPPs in Civil Law Systems

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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.

**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.*

Governments may wish to include these rules in the arrangement, and when they are part of the background law it may not be necessary to repeat them in the contract. But relying on just the background rules 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.

**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.

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