



Report on Recommended PPP Contractual Provisions 2015 Edition



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INTRODUCTION

Public-Private Partnerships (PPPs) are now being used in many countries to develop infrastructure projects. Typically, PPP transactions are based on a network of complex legal agreements – however, at the center of each transaction there is normally a PPP Contract, in the form of a concession agreement or similar document, between a government or other public entity (the Contracting Authority) and a private company or a consortium of companies (the Private Partner).

The complexity and sophistication of PPP transactions, and the fact that they are often heavily negotiated to reflect the characteristics of a given infrastructure project, frequently means that considerable time and expense is involved in preparing and finalizing PPP Contracts. This has led many interested parties to ask if it is possible to reduce the costs, and speed the process, by standardizing the provisions found in such contracts. In some countries, efforts have been made to develop complete standardized PPP agreements for different types of infrastructure projects: road, railways, ports, power generation, etc. To date, however, there is no universally-accepted language for such agreements on an international basis.

Given the variety of PPP transactions globally, the different legal systems which exist in various countries, and the need to have ‘tailor-made’ provisions to deal with the individual characteristics of specific projects, it follows that the development of comprehensive PPP agreements on an international basis is likely an unrealistic goal. However, there may be merit in focusing on certain contractual provisions dealing with particular legal issues encountered in virtually every PPP Contract, such as the issues of force majeure, termination rights, dispute resolution, etc.

The purpose of this Report is to present and discuss ‘recommended’ language in respect of a selection of these typically encountered provisions. The ‘recommendations’ contained in this Report are not meant to be prescriptive – specifically, they are not mandatory clauses for use in all PPP transactions which the World Bank Group financially supports. Instead, the objective of this document is to set out contractual language that has been found to be appropriate in many PPP transactions, and to describe the rationale for the provisions. By this means, the authors of the Report hope to foster discussion of these contractual provisions, with a view to helping to reduce the aforementioned time and expense associated with PPP Contract development. We also hope that, by encouraging consensus-building around these provisions, infrastructure will become more attractive as an asset class for a variety of investors, including institutional investors such as pension funds.

In any document of this type, some cautionary notes should be stressed. As indicated, PPP transactions are usually very complex, and extensive due diligence – with the assistance of qualified legal specialists – needs to be undertaken by both Contracting Authorities and Private Parties before concluding a PPP Contract. In this regard, the contents of this Report should simply be regarded as one of many inputs for the contracting parties to consider.

Many of the provisions set out in this document will affect the allocation of risks in a PPP transaction – and the fairness of the overall risk allocation in a transaction can only be assessed by consideration of the entirety of the PPP Contract. Also, it should be noted that this document primarily focuses on PPP transactions on a project finance basis, as reflected by the attention given to the protection of lenders’ rights and the sharing of the benefits of refinancing.

In addition, it is important to point out that, to some extent, the provisions in this document have been developed for use in relatively mature PPP jurisdictions, with reasonably strong legal, regulatory, financial and institutional arrangements. Again, therefore, adjustments may well need to be made to adapt the provisions herein to meet the characteristics of countries with diverse legal systems and investment climates.

Lastly, it should be emphasized that the reference in the title of this Report to it being the “2015 Edition” reflects the fact that the authors see this as an evolving process, with further iterations of the Report being developed in the future. This is a ‘first step’ in the process and, as and when a new consensus

develops around the provisions considered in the document, or around other contractual language typically found in PPP transactions, a new edition will be published. In the interim, comments on the Report are most welcome – and can be sent to the World Bank Group via the feedback mechanism found at <http://ppp.worldbank.org/public-private-partnership/library/wbg-report-recommended-ppp-contractual-provisions> .

Mark Moseley and Christina Paul

Singapore and Washington, DC

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DEFINED TERMS

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| Applicable Law | means any decree, resolution, law, statute, act, decision, ordinance, rule, directive (to the extent having the force of law), order, treaty, code or regulation or any interpretation of the foregoing by a relevant authority having jurisdiction over the matter in question, as enacted, issued or promulgated by any relevant authority, including amendments, modifications, extensions, replacements or re-enactments thereof, in each case applicable in [<i>insert the name of the local jurisdiction</i>]. |
| Contracting Authority | means the public authority that enters into the PPP Contract with the Private Partner. |
| Country | means the country where the PPP Contract is performed. |
| Estimated Change in Project Costs | means the aggregate of any estimated increase in construction costs, operating costs and losses and financing costs and losses less the aggregate of any estimated reduction in construction costs, operating costs and losses and financing costs and losses. |
| Lenders | means the finance parties under the Senior Finance Documents providing senior debt to the Private Partner for the purpose of the PPP Project (excluding the Shareholders and their affiliates, as providers of equity or subordinated debt). |
| MAGA | means material adverse government action. |
| Original Base Case | means the version of the financial model containing assumptions agreed between the Parties as the base case in effect as from the [<i>effective date</i>] ¹ . |
| Party or Parties | The Contracting Authority and the Private Partner are individually referred hereinafter to as a " Party " and collectively referred to as the " Parties ". |
| PPP | means Public Private Partnership. |
| PPP Contract | means the long-term agreement between the Contracting Authority and the Private Partner, for providing a public asset or service, in which the Private Partner bears significant risk and management responsibility, and remuneration is linked to performance ² . |
| PPP Project | means the underlying project which is the subject of the PPP Contract. |

¹ Should be adjusted depending on the actual definition used in the PPP Contract, using the defined term for the date on which all the Conditions Precedent to the effectiveness of the PPP Contract have been satisfied.

² There is no single, internationally accepted definition of Public-Private Partnership. This definition is the definition provided in the PPP Reference Guide Version 2.0, dated July 2014, published on the PPPIRC Website (<http://ppp.worldbank.org>).

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| Private Partner | means the private company that enters into the PPP Contract with the Contracting Authority. The Private Partner often takes the form of a special purpose company. |
| Project Agreements | means the [<i>construction contract, the O&M agreement, the land lease agreement</i>] ³ . |
| Senior Finance Documents | means the finance documents entered into between the Lenders and the Private Partner for the purpose of financing the PPP Project, including the loan agreement and the security documents. |
| Shareholders | means, at any time, the shareholders of the Private Partner. |
| UK PF2 | means the “Standardisation of PF2 Contracts” (“PF2 Guidance”) issued by HM Treasury, launched on 5 December 2012. |

³ To be tailored on a project-by-project basis in order to refer to the material contracts relevant for the PPP Project.

1. FORCE MAJEURE

1.1 Key aspects

The concept of Force Majeure

Force Majeure provisions specify the contractual consequences of certain circumstances that are beyond the control of the parties, and result in the impossibility for the affected party to perform its contractual obligations. Force Majeure was originally a civil law concept, which is now widely used in commercial contracts, including those governed by the laws of common law jurisdictions.

In general, the purpose of a Force Majeure clause in a PPP Contract is to:

- a) define what events or circumstances the Parties agree should be construed as Force Majeure;
- b) provide relief from liability to the affected party and excuse it from further performance of its obligations under the PPP Contract while the Force Majeure Event is continuing;
- c) provide for the obligations of the Parties in relation to the Force Majeure Event (typically, information and mitigation);
- d) provide for termination rights in case of a Force Majeure Event lasting more than a certain period of time ; and
- e) specify the allocation of costs resulting from the Force Majeure Event and determine termination payments.

The typical assumption when negotiating Force Majeure provisions is that the risk of occurrence of a Force Majeure Event is beyond the control of the Parties and should not be allocated to a single Party. Accordingly, the financial consequences resulting from the occurrence of a Force Majeure Event should be shared.

Force Majeure provisions should also be distinguished from hardship clauses⁴, which deal with unexpected circumstances under which performance becomes more onerous without being impossible.

The scope of Force Majeure: public policy and contractual freedom

In many civil law countries, Force Majeure is a concept that arises from Applicable Law. In France, for example, Force Majeure is referred to in the Civil Code and provides the affected party with relief from its obligations. Its characteristics have been defined by French jurisprudence as an event which is (i) beyond the control of the parties, (ii) unforeseeable⁵ and (iii) impossible to overcome. Whether an event can be construed as Force Majeure is primarily a matter of fact but each criterion has been examined by abundant case law. Thus, in civil law jurisdictions, the contractual freedom of the Parties to amend the definition of Force Majeure can be limited⁶.

⁴ In France, administrative courts will also enforce the doctrine of hardship (*imprévision*), which allows the Private Partner to claim compensation through an increase in the contract price where the circumstances of the contract have changed in a manner which could not have been foreseen by the parties.

⁵ It should be noted that the concept of "foreseeability" would, generally, not be included in defining a Force Majeure event in a common law context.

⁶ In particular, in certain jurisdictions it may be helpful to set out the rationale followed by the Parties to exclude certain events from Force Majeure, as the courts may have the power to consider certain events as Force Majeure even though they have been excluded by the Parties.

In other jurisdictions (and in particular common law jurisdictions) where there is no underlying concept of Force Majeure in Applicable Law, the Parties will have more latitude to mutually agree on the scope of Force Majeure.

Accordingly, the drafting of any Force Majeure provision should be preceded by an analysis of the contractual freedom the Parties have when (i) defining the concept of Force Majeure in the PPP Contract and (ii) specifying its consequences, and whether there are any implied terms or overriding provisions under the relevant Applicable Law which will impact the contractual agreement of the Parties.

Another point to consider is whether there is a need to have a list of events constituting Force Majeure. Depending on the jurisdiction, such a list may not be necessary and a catch-all definition will be sufficient. Having an itemized list is however advisable in certain jurisdictions where the courts are unlikely to expand on the contractual definition given by the Parties.

As a middle ground, a widely used drafting device is to define Force Majeure Events by reference to a set of criteria to be satisfied, and to include an indicative but not limitative list of events which the Parties agree should constitute Force Majeure Events (to the extent that they otherwise satisfy the criteria set out in the definition).

The Parties should also consider the impact of insurability of a Force Majeure Event: one approach could be to split the potential events between insurable risks and uninsurable risks. Only the uninsurable risks would then be regarded as potential Force Majeure events. However, Contracting Authorities should be cautious with this approach as it requires a specific expertise and monitoring of the insurance market which can fluctuate during the term of the PPP Contract. If this approach is chosen, the Force Majeure provision should be drafted in conjunction with the "Insurance" provision and particular attention should be given to the provisions governing risks that were insurable at the time of execution of the PPP Contract but become uninsurable later⁷.

Force Majeure and other Project Agreements

The Private Partner and its Lenders will review Force Majeure provisions in detail and will want to ensure that the definition of Force Majeure Event, and its rights and obligations in relation to Force Majeure in the PPP Contract, are mirrored in the other Project Agreements which will be entered into for the purpose of the PPP Project, and in particular the construction contract(s) and any contractual arrangements relating to the operation and maintenance of the PPP Project.

In this respect, it should be noted that the approach taken for the proposed provision in this Report (i.e. the definition of a Force Majeure Event by reference to a list of criteria, as well as a non-limitative list of events), is similar to the FIDIC Silver Book⁸ approach and should be replicated in the other Project Agreements.

'Political' Force Majeure in PPP Contracts

In commercial contracts between private parties, events beyond the control of the parties will traditionally include "acts of God" (such as natural disasters, epidemics, etc.) as well as 'political' events that may be controlled or influenced by governmental authorities (such as general strikes, nationalization, refusal to grant licenses, etc.). In considering this approach in PPP Contracts, caution should be exercised, given that the Contracting Authority, being a government entity, has some control over such political events, and should arguably bear this risk. In this Report, the term "Material Adverse Government Action"

⁷ Reference is made to Article 17.9 of the UK PF2 standard language for a clear explanation of the rationale of such provisions.

⁸ The contracts of the International Federation of Consulting Engineers ("**FIDIC**") are a good example of internationally accepted standardization of contracts.

is used instead of “political force majeure” when referring to such events. Please refer to Section 2 below.

The effects of Force Majeure Events

The occurrence of a Force Majeure Event will generally allow the Private Partner relief from its obligations under the PPP Contract, to the extent that such relief is directly caused by the Force Majeure Event. To the extent that the Force Majeure Event occurs during the construction phase, this will include, in particular, postponing the date on which the infrastructure should have been completed by the Private Partner. Depending on the type of project, Contracting Authorities should consider if any other specific relief should be considered (such as, for instance, relief from payment deductions). As the consequences of the Force Majeure Event should be shared between the Parties, the occurrence of a Force Majeure Event should not, however, allow the Private Partner to claim for costs incurred as a result of a Force Majeure Event.

In those PPP Contracts, where the Private Partner takes commercial risk on private users (such as toll roads), the occurrence of a Force Majeure Event which makes it impossible to perform will result in loss of revenues to the Private Partner. In other PPP Contracts, where the Contracting Authority has payment obligations to the Private Partner for services provided or infrastructure made available, the occurrence of a Force Majeure Event will not give the Contracting Authority relief from its payment obligation, even if the Private Partner is relieved from performance. However, to reflect the risk sharing principle set out above, the Contracting Authority may consider reducing the amount of such payments to an amount equal to the debt service and an amount sufficient to cover fixed operating costs of the Project (but not variable cost or profit).

In many PPP Contracts, a prolonged Force Majeure Event (typically in excess of 6 to 12 consecutive months) will trigger a right for both Parties to terminate the PPP Contract. If the Private Partner wishes to terminate on the basis of a prolonged Force Majeure Event, it could be argued that the Contracting Authority should have the option to require the PPP Contract to continue, provided that the Private Partner is adequately compensated.

1.2 Proposed provision

Definition of Force Majeure Event

- (1) In this PPP Contract, a "**Force Majeure Event**" means any event or circumstance or combination of events or circumstances:
 - a) beyond the reasonable control of the Party affected by such event, circumstance or combination of events or circumstances (the "**Affected Party**");
 - b) which was not foreseeable or, if foreseeable⁹, could not have been prevented or avoided or overcome by the Affected Party having taken all reasonable precautions and due care;
 - c) which directly causes the Affected Party to be unable to comply with all or a material part of its obligations under this PPP Contract; and
 - d) which is not the direct result of a breach by the Affected Party of its obligations under this PPP Contract or, in respect of the Private Partner, under any other Project Agreement.

⁹ Inclusion of a criterion of foreseeability should be determined after careful analysis of local law. See Footnote 5, above.

- (2) Force Majeure Events include but are not limited to the following circumstances, provided that they meet the criteria set forth in clause (1) above¹⁰:
- a) plague, epidemic and natural disaster, such as but not limited to, storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tsunami, flood¹¹, lightning, drought;
 - b) fire, explosion, or chemical contamination (other than a fire, explosion, or chemical contamination caused by the negligence of the Private Partner, its contractors, or any subcontractor, supplier or vendor);
 - c) war (whether declared or not), armed conflict (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, act of terrorism, sabotage or piracy, in each case occurring outside the Country¹²;
 - d) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience, in each case occurring outside the Country¹³;
 - e) radioactive contamination or ionizing radiation, occurring outside the Country¹⁴; or
 - f) general labor disturbance such as boycotts, strikes and lock-out, go-slow, occupation of factories and premises, excluding similar events which are unique to the PPP Project and specific to the Private Partner or to its subcontractors, and occurring outside the Country¹⁵.

Consequences of Force Majeure Event

- (3) If a Force Majeure Event has occurred, the Affected Party shall be entitled to relief from its obligations under the PPP Contract if it meets the requirements of clause (4), below.
- (4) To obtain relief under clause (3) above, the Affected Party must:
- a) as soon as practicable, and in any event within [*seven (7) business*] days after it became aware that the Force Majeure Event has caused or is likely to cause breach of an obligation under this PPP Contract, give to the other Party a notice of its claim for relief from its obligations under the PPP Contract, including (i) satisfactory evidence of the existence of the Force Majeure Event, (ii) full details of the nature of the Force Majeure Event, (iii) the date of occurrence; (iv) its likely duration; and (v) details of the measures taken to mitigate against the Force Majeure Event.
 - b) within [*seven (7) business*] days of receipt of the notice referred to in clause (a) above, give to the other Party full details of the relief claimed, as well as information on all actions being taken by the Affected Party to mitigate the consequences of the Force Majeure Event;

¹⁰ The exact list of events to be inserted in a force majeure clause may be tailored for each project (for instance, in relation to infrastructure built near a river, the Force Majeure may define floods more precisely), and taking into account whether or not insurance is available for such risks.

¹¹ In countries where certain natural events are foreseeable (such as yearly rains resulting in floods), the definition of such natural events should be specified. For example, the description of floods could be specified to cover only "floods of a scale that occur not more frequently than once in every [100] years".

¹² This provision is likely to be negotiated. As a rule, these events, when occurring within the borders of the Country in which the PPP Project is developed as opposed to external events such as a foreign invasion, should be considered as MAGA.

¹³ Idem.

¹⁴ Idem.

¹⁵ Idem.

- c) demonstrate to the other Party that:
- i. the Affected Party, and its contractors, could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material cost;
 - ii. the Force Majeure Event directly caused the need for the relief claimed;
 - iii. the relief claimed could not reasonably be expected to be mitigated by the Affected Party, including recourse to alternate sources of services, equipment and materials and construction equipment, without incurring material cost; and
 - iv. the Affected Party is using all reasonable endeavours to prevent and mitigate the consequences of the Force Majeure Event of its obligations under this PPP Contract.
- (5) If the Affected Party has complied with its obligations under clause (4) above, then it shall be excused from the performance of its obligations under this PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Force Majeure Event.
- (6) If information required under clause (4) above is provided after the dates referred to in that clause, then the Affected Party shall not be entitled to any relief during the period for which the information is delayed.
- (7) The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with its obligations under this PPP Contract. Following such notification this PPP Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event.

Termination due to Prolonged Force Majeure

- (8) If a Force Majeure Event subsists for a continuous period of more than [*180-360 calendar*]¹⁶ days, either Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect [*thirty (30) calendar*] days after its receipt. If, at the end of this [*thirty (30)*]-day period, the Force Majeure Event continues, the PPP Contract shall be terminated pursuant to clause [*insert reference to the clause governing termination*] and the Private Partner shall be entitled to the compensation set out under clause [*insert reference to "termination payments" clause*]¹⁷.

¹⁶ This duration will be negotiated depending on the PPP Project and the location but is likely to be between 6 - 12 months.

¹⁷ Please refer to Section 0 for termination payments.

2. MATERIAL ADVERSE GOVERNMENT ACTION

2.1 Key aspects

Concept of MAGA and differences with Force Majeure

The concept of Material Adverse Government Action (or MAGA), which is also sometimes referred to as “political force majeure”, is typically only found in contracts where one of the parties is a public entity, or government. The purpose of MAGA clauses is to allocate certain types of “political” risk to the Contracting Authority.

MAGA presents similarities with the occurrence of Force Majeure Event¹⁸. For instance, if a MAGA occurs, it is generally agreed that the Private Partner may be able to claim relief from its obligations under the PPP Contract. The procedure to be followed by the Private Partner to establish that relief is needed is also very similar to the procedure followed after the occurrence of a Force Majeure Event. Finally, both Parties would typically have the right to terminate the PPP Contract in the event of a MAGA lasting longer than a certain period of time (generally between 6 to 12 months).

However, in PPP Contracts the risk of occurrence of a MAGA is allocated to the Contracting Authority, which has material consequences. Firstly, the Private Partner will be entitled to claim for losses incurred as a result of the occurrence of the MAGA. Secondly, the amounts payable to the Private Partner in case of termination further to a MAGA should, arguably, be similar to those payable upon default by the Contracting Authority.

Definition of MAGA

Since MAGA is a risk allocated to the Contracting Authority, its occurrence may result in the Contracting Authority paying substantial compensation amounts. Accordingly, the Contracting Authority should carefully consider the scope of MAGA, with a more defined list of MAGA events, in contrast to the non-limitative drafting of the list of events proposed for Force Majeure in Section 1.

Depending on the PPP Project, the definition of MAGA should also be tailored to take into account the specific risks of a given PPP Project (for instance, upstream water pollution in a water sector PPP Project, or the building of a competing port or airport within a certain distance from the port or airport operated by the Private Partner).

MAGA and “Change in Law” provisions

Change in Law is often included as one item of the MAGA definition. However, there is some benefit in treating the two subjects separately, as has been done in this Report¹⁹. Changes in Law may work to the benefit or detriment of either or both Parties, while MAGA – by definition – can only arise where there is an adverse impact upon the Private Partner.

¹⁸ Given this relationship with Force Majeure, MAGA clauses are not found in some PPP Contracts. See the discussion under ‘Political’ Force Majeure in PPP Contracts, in Section 1, above.

¹⁹ Please refer to Section 3 for the Change in Law provisions.

Materiality threshold

As with the Change in Law clause, the Contracting Authority should consider whether all MAGAs should trigger the contractual consequences provided therein (relief, compensation, termination) or if a "materiality" threshold should be specified. If a threshold is specified, only MAGAs having consequences above the materiality threshold would allow the Private Partner to claim compensation and/or termination.

2.2 Proposed provision

Definition of Material Adverse Government Action

- (1) For purposes of this PPP Contract, a Material Adverse Government Action means any act or omission by the Contracting Authority or any relevant public authority, which occurs during the term of this PPP Contract and which (i) renders the Private Partner unable to comply with all or a material part of its obligations under the PPP Contract and/or (ii) has a material adverse effect on the cost or the profits arising from such performance.
- (2) Material Adverse Government Action shall mean and be limited to the following circumstances, to the extent that they meet the requirements set forth in clause (1) above:
 - a) failure of any relevant public authority to grant to the Private Partner or renew any permit or approval that is required for the purposes of the Private Partner's proper performance of its obligations and enforcement of its rights under this PPP Contract, in each case within the required timeframe under Applicable Law, except where such failure results from the Private Partner's non-compliance with Applicable Law;
 - b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution, [*occurring inside the Country*]²⁰;
 - c) radioactive contamination or ionising radiation, [*originating from a source in the Country*]²¹;
 - d) any riot, insurrection, civil commotion, act or campaign of terrorism, [*occurring inside the Country*]²²;
 - e) any strike, work-to-rule, or go-slow which is not primarily motivated by a desire to influence the actions of the Affected Party so as to preserve or improve conditions of employment, [*occurring inside the Country*]²³;
 - f) expropriation, compulsory acquisition or nationalization by any relevant authority of any material asset or right of the Private Partner, including any of the shares in the Private Partner;
 - g) any act or omission of any relevant authority adversely affecting the legality, validity, binding nature or enforceability of this PPP Contract; and
 - h) [*add any event specific to the PPP Project such as the construction of similar infrastructure or a pollution event*].

²⁰ Depending on the position adopted in this respect of Force Majeure. See Footnote 11.

²¹ Depending on the position adopted in this respect of Force Majeure. See Footnote 13.

²² Depending on the position adopted in this respect of Force Majeure. See Footnote 12.

²³ Depending on the position adopted in this respect of Force Majeure. See Footnote 14.

Consequences of a Material Adverse Government Action

- (3) If a Material Adverse Government Action occurs, the Private Partner (i) shall be excused from the performance of its obligations under the PPP Contract to the extent that it is prevented, hindered or delayed in the performance of such obligations by reason of the Material Adverse Government Action and (ii) shall be entitled to compensation under this PPP Contract, in each case subject to and in accordance with the provisions of this clause.

To obtain relief and/or additional time and/or claim compensation pursuant to clause (4) below, the Private Partner must:

- a) as soon as practicable, and in any event within [*seven (7) business*] days after the Private Partner became aware that the Material Adverse Government Action has occurred, give to the Contracting Authority a notice of its claim for payment of compensation and/or relief from its obligations under the PPP Contract, following which the Parties shall meet and discuss in good faith to consider any option to mitigate the impact of the Material Adverse Government Action;
 - b) within [*seven (7) business*] days of receipt by the Contracting Authority of the notice referred in clause (a) above, give full details of (i) the Material Adverse Government Action and (ii) any Estimated Change in Project Costs and/or loss of revenue claimed and/or delay and/or any breach of the Private Partner's obligations under this PPP Contract,
 - c) demonstrate to the Contracting Authority that:
 - i. the Private Partner could not avoid such occurrence or consequences by actions which it might reasonably be expected to have taken without incurring material costs;
 - ii. the Material Adverse Government Action was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or delay and/or breach of the Private Partner's obligations under this PPP Contract;
 - iii. the Estimated Change in Project Costs, and/or loss of revenue and/or additional time and/or relief from the obligations under the PPP Contract claimed, could not be mitigated or recovered by the Private Partner; and
 - iv. the Private Partner is using all reasonable endeavours to perform its obligations under the PPP Contract.
- (4) If the Private Partner has complied with its obligations under clause (3) above, then the Contracting Authority shall:
- a) compensate the Private Partner for the actual Estimated Change in Project Costs as adjusted to reflect the actual costs reasonably incurred;
 - b) give the Private Partner such relief from its obligations under this PPP Contract as is reasonable for such Material Adverse Government Action; and
 - c) if the Material Averse Governmental Action occurs during the Construction Period and causes a delay in achieving the scheduled services commencement date²⁴, such

²⁴ Use the relevant defined term in the PPP Contract.

date shall be postponed by such time as shall be reasonably required by such Material Adverse Government Action.

- (5) In the event that information is provided after the dates referred to in clause (3) above, then the Private Partner shall not be entitled to any extension of time, compensation or relief from its obligations under this PPP Contract in respect of the period for which the information is delayed.
- (6) If the Contracting Authority and the Private Partner cannot agree on the extent of any compensation, delay incurred, relief from the Private Partner's obligations under this PPP Contract, or the Contracting Authority disagrees that a Material Adverse Government Action has occurred, the Parties shall resolve the matter in accordance with clause [*insert reference to the dispute resolution clause*].

Termination due to Prolonged Material Adverse Governmental Action

- (7) If a Material Adverse Government Action subsists for a continuous period of more than [*180-360 calendar*]²⁵ days, a Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect [*thirty (30) calendar*] days after its receipt. If, at the end of this [*thirty (30)*]-day period, the Material Adverse Government Action continues, the PPP Contract shall be terminated pursuant to clause [*insert reference to the clause governing termination*] and the Private Partner shall be entitled to the compensation set out under clause [*insert reference to "termination payments" clause*].

²⁵ This duration will be negotiated depending on the PPP Project and the location but is likely to be between 6 -12 months.

3. CHANGE IN LAW

3.1 Key aspects

Under the PPP Contract, the Private Partner will be required to comply with Applicable Law at all times and will price its bid taking into account the cost associated with the Applicable Law, as of the date of its bid. However, change in law is a political risk that cannot be controlled by the Private Partner. Accordingly, most PPP Contracts include provisions regulating the consequences of certain changes in law occurring after the bid submission date (or the signing of the PPP Contract where there is no bid), as a result of which the Private Partner incurs delays, additional costs, and/or is unable to perform any of its material obligations under the PPP Contract. Such provisions may also cover the situation where the change in law is beneficial and in such cases, the Contracting Authority should also benefit.

The principle of protecting the Private Partner against change in law is resisted by many Contracting Authorities since the Private Partner will obtain rights that are generally not granted to investors other than investors in PPP Projects in the Country. The justifications for including change in law protection in PPP Contracts are:

- a) protection against change in law allows the Private Partner to rely on the legal framework applicable as of the time on which it has submitted its bid, and at which it has conducted due diligence – this, in turn will allow the Private Partner to reduce the amount of contingency priced in its bid;
- b) the Contracting Authority will generally be in a better position than the Private Partner to control a change in law, although this will vary depending on the role of the Contracting Authority²⁶; and
- c) Lenders will generally require some type of protection against change in law, especially in jurisdictions where change in law is considered as more likely, and will not agree that this risk is borne by the Private Partner, thus it becomes a "bankability" issue.

One point to keep in mind when considering change in law provisions is that these clauses do not (and could not) bind the public authorities into not changing the Applicable Law, nor do they have the effect of freezing the framework applicable to the Private Partner (as was sometimes the case in certain mining and oil projects in certain jurisdictions). These clauses solely have the effect of allocating the risk of such changes to one Party or the other by providing relief from their obligations, additional time and/or costs to the Private Partner.

3.2 Drafting options to be considered

Although a degree of change in law protection will almost always be required, Contracting Authorities should carefully consider the extent to which that protection is provided to Private Partners. In particular, if the PPP Project allows the Private Partner to transfer the costs of a change in law to end-users, the protection which the Private Partner and its Lenders will require from the Contracting Authority should be more limited.

In this regard, the following issues are significant.

²⁶ In particular, if the Contracting Authority is a local or regional authority or a State company, it may have limited power to influence changes in Applicable Law. However, the Contracting Authority would still be required to bear this risk as discussed in clauses (a) and (c).

Definition of “Applicable Law”

The first drafting point to consider is the definition of what constitutes “Applicable Law”. This should be reviewed and adjusted in each jurisdiction since the denomination and the nature of legal instruments will vary. However, the key principle is that Applicable Law should be limited to instruments which the Private Partner is bound to comply with. In some common law jurisdictions, this could include case law to the extent that it constitutes binding precedent. Depending on the industry sector, certain industry guidelines, which the Private Partner is bound to comply with in accordance with the PPP Contract, could also be included.

Another point to consider is whether changes in international conventions should be included. This might be the case where the PPP Project is heavily regulated by international treaties (such as is the case with airports – that are subject to a considerable number of international regulations). In this context, the Contracting Authority could take the view that it has no control over international regulations and might, therefore, not be willing to accept the risk associated with a change in such regulations.

Exclusion of Foreseeable Changes in Law

The Private Partner is expected to have conducted a thorough due diligence of the legal framework for the purpose of determining its price for the PPP Contract. Accordingly, the protection which the Private Partner will receive against change in law should be limited to changes in law which were not ‘in the public domain’ at the date on which the Private Partner’s bid was submitted (or, in the absence of a bidding process at the signing of the PPP Contract). The required language in this respect will need to be adjusted depending on the Country, as the legislative process will vary from one jurisdiction to another. However, any change in law resulting from legislation which has been published in a draft form as of the date on which the Private Partner submitted its bid should generally be excluded. If there is a particular concern in relation to a change in law which is contemplated at the time the bid was submitted, it can be specifically referred to in the change in law provision in order to avoid any further disputes.

Certain PPP Contracts also contemplate that protection from a change in law should only be granted to the Private Partner in relation to changes occurring after the date on which the PPP Contract has been signed. However, unless the Private Partner has had the opportunity to amend its bid before signing the PPP Contract, this would not be appropriate.

Inclusion of Changes of Interpretation or Application of the Applicable Law

In many jurisdictions, a change in interpretation of Applicable Law could have a major impact on the PPP Project and investors will demand protection not only against adverse modifications of the legal framework but also against changes in the application of a legal framework that has not otherwise been modified.

Therefore the definition of "Change in Law" should include any modification in the **interpretation** or **application** of any Applicable Law, including a modification of the interpretation by local courts.

Approach to Change in Law

The 'traditional' approach to change in law in PPP Contracts was to compensate the Private Partner for any previously undisclosed change in law, without distinguishing whether that change in law was discriminatory or specific, or of general application. This traditional approach is set out in Option 1 below.

Recent standard provisions, including the UK PF2, have taken a different approach. This new approach is set out as Option 2 below, and is based on the following risk allocation:

- a) Discriminatory Change in Law (as defined below, a change in law applying to the PPP Project, and not to other projects, or to the Private Partner, and not to other PPP operators), or Specific Change in Law (as defined below, a change in law specifically impacting projects of the type of the PPP Project), should be allocated to the Contracting Authority;
- b) General Changes in Law (as defined below) which would require the Private Partner to incur capital expenditures during the operations period (and not during the construction period) would also be allocated to the Contracting Authority; and
- c) Any other Changes in Law would be allocated to the Private Partner throughout the duration of the PPP Contract.

Compared to the traditional approach outlined under Option 1, this leaves the Private Partner exposed to General Changes in Law (including those which trigger capital expenditures, but only during the construction period). This approach would generally be more beneficial to the Contracting Authority, however it may not be 'bankable' in every jurisdiction. Whether the approach as set out under Option 2 will be acceptable in a given context will essentially depend on the Lenders' view of the risk of legislative volatility in a particular jurisdiction, and should be contemplated on a case by case basis.

Materiality threshold

Another way in which the risk relating to change in law can be allocated between the Private Partner and the Contracting Authority is by setting a threshold of losses, generally on a yearly basis, below which the Private Partner will not be compensated. In other words, the Private Partner would only be entitled to compensation for change in law to the extent that it is able to demonstrate that the aggregate costs incurred as a result of a change in law exceed a certain amount per year. By establishing a threshold, the Contracting Authority is therefore effectively back-stopping the risk borne by the Private Partner in this respect. Subject to an appropriate threshold being set, this approach will generally be acceptable to Lenders, since the risk relating to Change in Law is no longer open-ended. Accordingly, Contracting Authorities may wish to consider whether, depending on the respective jurisdiction they are operating under, this approach constitutes good value for money.

Termination

The Parties should similarly determine whether, and in which circumstances, the occurrence of a change in law could allow the affected Party to terminate the PPP Contract.

Compensation

Finally, the PPP Contract should also contemplate how the Private Partner is to be compensated in the event of a change in law. This will depend on the payment structure foreseen under the PPP Contract, but compensation could be handled: (i) by way of increasing the charges claimed by the Private Partner

vis-à-vis the Contracting Authority or the public; (ii) by reducing the fee payable by the Private Partner (as applicable); or (iii) by way of a lump sum payment by the Contracting Authority to the Private Partner.

In the event of termination, the compensation scheme should be the same as for Contracting Authority default and MAGA.

3.3 Proposed exemplary provision

Option 1: Protection Against All Changes in Law

Required Definitions

| | |
|------------------------|--|
| “Change in Law” | <p>means, after the date on which the successful bidder²⁷ submitted its bid, any of the following events:</p> <ul style="list-style-type: none"> (i) the enactment of any new Applicable Law; (ii) the repeal, modification or re-enactment of any existing Applicable Law; (iii) a change in the interpretation or application of any Applicable Law; (iv) [the imposition by any government entity of any material condition in connection with the issuance, renewal or modification, or the revocation or non-renewal (other than in accordance with the existing Applicable Law) of any Approval;]²⁸ and/or (v) the imposition or levying of any taxes on the Private Partner or the increase or decrease in the tax rate of any taxes, which was not foreseeable at the date on which the successful bidder submitted its bid, <p>which</p> <ul style="list-style-type: none"> (a) has a material adverse effect²⁹ on (i) the ability of a Party to comply with its material obligations under the PPP Contract or (ii) the shareholder profits arising from such performance³⁰; and (b) was not published as a draft law [in the Government Gazette] at the date on which the successful bidder submitted its bid. |
|------------------------|--|

²⁷ This could refer to the Private Partner if the Private Partner was incorporated when the bid was submitted.

²⁸ If the PPP Contract already has a MAGA clause substantially similar to the one proposed in Section 2.2 (clause (2)(a)), this provision should be deleted. In the absence of a MAGA clause, the failure to renew any permit or approval that is required for the purposes of the PPP Project can be treated in the "Change in Law" provision.

²⁹ The materiality threshold could be specified in the definitions. In the proposed language this has been inserted in clause (3)(c).

³⁰ Another aspect that should be covered in the PPP Contract is the repatriation of dividends and/or debt service offshore. Usually these aspects are covered in clauses that are specific to the transfer of funds whereby the State warrants to the Private Partner that it will have the right to freely transfer any amount offshore (in local or foreign currency as the case may be).

Occurrence of a Change in Law

- (1) If a Change in Law occurs or is shortly to occur, then any Party may, within [*thirty (30) business*] days starting from the day it was aware (or should have been aware) of the Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:
 - a) any necessary change to the terms of this PPP Contract;
 - b) whether relief from compliance with obligations is required;
 - c) whether any deadline under the PPP Contract should be postponed;
 - d) any (positive or negative) change of revenue that will result from the relevant Change in Law;
 - e) any (positive or negative) estimated change in the costs of the PPP Project that directly result from the Change in Law; or
 - f) any capital expenditure that is required or no longer required as a result of a Change in Law.

Responsibility for the costs of implementation shall be dealt with in accordance with this clause.

- (2) As soon as practicable and in any event within [*thirty (30) business*] days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the issues referred to in clause (1) above and any ways in which either Party can, if applicable, mitigate the effect of the Change in Law, including, in relation to the Private Partner:
 - a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimize any increase in costs and maximize any reduction in costs;
 - b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Private Partner;
 - c) giving evidence as to how the Change in Law has affected prices charged by any similar businesses to the PPP Project; and
 - d) demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain the contractual obligations of the Private Partner that have been affected by the Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses (1)(e) or (1)(f) above.

provided that if the Parties cannot agree on the effects of the Change in Law, the matter shall be referred for determination in accordance with clause [*insert reference to the dispute resolution clause*].

Consequences of a Change in Law

- (3) If the Parties have followed the procedure set out under clauses (1) and (2) above, then:

- a) the affected Party shall be excused from the performance³¹ of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Change in Law and for the avoidance of doubt a mere loss of profits shall not be considered as a hindrance or prevention of performance;
 - b) if the Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Change in Law; and
 - c) the Parties shall agree on the amount and payment of any compensation to reflect the actual Estimated Change in Project Costs as adjusted to take into account the actual costs or gains reasonably incurred or obtained further to the Change in Law, *[provided that no compensation shall be made in relation to a Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Change in Laws that have occurred during the year during which the Change in Law in respect of which compensation is claimed occurs exceed [●]]*³².
- (4) In the event that the notice and relevant information are not provided within the period referred to under clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

Termination due to a Change in Law

- (5) If a Change in Law:
- a) results in the Private Partner not being able to achieve the services commencement date within [●] months after the scheduled services commencement date; or
 - b) prevents a Party from performing its material obligations under this PPP Contract for a period of [●] consecutive days,

either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect *[thirty (30) calendar]* days after reception of such termination notice. If, at the end of this *[thirty (30)]*-day period, the Change in Law continues, the PPP Contract shall be terminated pursuant to clause *[insert reference to the clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to "termination payments" clause]*.

Option 2: Protection against Discriminatory or Specific Changes in Law

Required Definitions

| | |
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| “Change in Law” | means, after the date on which the successful bidder ³³ submitted its bid, any of the following events: <ul style="list-style-type: none"> (i) the enactment of any new Applicable Law; (ii) the repeal, modification or re-enactment of any existing Applicable Law; |
|-----------------|--|

³¹ In the event the Private Partner is subject to "public service obligations" legal due diligence should be carried out to ensure that such a provision is valid and enforceable under local Applicable Law.

³² Note: delete if the Contracting Authority does not wish to include a materiality threshold.

³³ This could refer to the Private Partner if the Private Partner was incorporated when the bid was submitted.

| | |
|--------------------------------|--|
| | <p>(iii) a change in the interpretation or application of any Applicable Law;</p> <p>[(iv) the imposition by any government entity of any material condition in connection with the issuance, renewal or modification, or the revocation or non-renewal (other than in accordance with the existing Applicable Law) of any Approval;]³⁴ or</p> <p>(v) the imposition or levying of any taxes on the Private Partner or the increase or decrease in the rate or classification of any taxes.</p> |
| “Discriminatory Change in Law” | means a Change in Law, the terms of which apply expressly to: <p>(a) the PPP Project and not to similar projects; and/or</p> <p>(b) the Private Partner and not to other persons.</p> |
| “General Change in Law” | means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law. |
| “Qualifying Change in Law” | means : <p>(i) a Discriminatory Change in Law;</p> <p>(ii) a Specific Change in Law; or</p> <p>(iii) a General Change in Law which comes into effect during the [<i>operations period</i>]³⁵ and which involves additional capital expenditure for the PPP Project³⁶.</p> |
| “Specific Change in Law” | means any Change in Law which specifically refers to the provision of services the same as or similar to the services provided in the course of the PPP Project. |

Qualifying Change in Law

- (1) If a Qualifying Change in Law occurs or is shortly to occur, then any Party may, within [*thirty (30) business*] days starting from the day it was aware (or should have been aware) of the Qualifying Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:
- a) any necessary change in the obligations of the Private Partner;
 - b) whether any changes are required to the terms of this PPP Contract to deal with the Qualifying Change in Law;

³⁴ If the PPP Contract already has a MAGA clause substantially similar to the one proposed in Section 2.2 (clause (2)(a)), this provision should be deleted. In the absence of a MAGA clause, the failure to renew any permit or approval that is required for the purposes of the PPP Project can be treated in the "Change in Law" provision.

³⁵ Use the appropriate defined term referring to the period of operations.

³⁶ The contractual definition of "capital expenditure" should be similar to the definition set forth in the accounting principles applicable in the Country of the PPP Project.

- c) whether relief from compliance with obligations is required, including the obligation of the Private Partner to achieve any contractual deadline and/or meet any contractual performance requirement during the implementation of any relevant Qualifying Change in Law;
- d) any (positive or negative) change of revenue that will result from the relevant Qualifying Change in Law;
- e) any (positive or negative) estimated change in the costs of the PPP Project that directly result from the Qualifying Change in Law; or
- f) any capital expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the operation period of this PPP Contract,

Responsibility for the costs of implementation shall be dealt with in accordance with this clause.

- (2) As soon as practicable and in any event within [*thirty (30) business*] days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the issues referred to in clause (1) above and any ways in which either Party can, if applicable, mitigate the effect of the Qualifying Change in Law, including, in relation to the Private Partner:

- a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimize any increase in costs and maximize any reduction in costs;
- b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, Changes in Law at that time have been taken into account by the Private Partner;
- c) giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the PPP Project; and
- d) demonstrating that any expenditure that has been avoided, which was anticipated to be incurred to replace or maintain the contractual obligations of the Private Partner that have been affected by the Qualifying Change in Law concerned, has been taken into account in the amount which in its opinion has resulted or is required under clauses (1) (e) or (1) (f) above,

provided that if the Parties cannot agree on the effects of the Qualifying Change in Law, the matter shall be referred for determination in accordance with clause [*insert reference to the dispute resolution clause*].

Consequences of a Qualifying Change in Law

- (3) If the Parties have followed the procedure set out under clauses (1) and (2) above, then:
- a) the affected Party shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Qualifying Change in Law;

- b) if the Qualifying Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Qualifying Change in Law; and
 - c) the Parties shall agree on the amount and payment of any compensation to reflect the actual Estimated Change in Project Costs as adjusted to take into account the actual costs or gains reasonably incurred or obtained further to the Qualifying Change in Law, *[provided that no compensation shall be made in relation to a Qualifying Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Qualifying Change in Laws that have occurred during the year during which the Qualifying Change in Law in respect of which compensation is claimed exceeds [●]]*³⁷.
- (4) In the event that the notice and relevant information are not provided within the periods referred to under clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

Termination due to a Qualifying Change in Law

- (5) If a Qualifying Change in Law:
- a) results in the Private Partner not being able to achieve the services commencement date within [●] months after the scheduled services commencement date; or
 - b) prevents a Party from performing its material obligations under this PPP Contract for a period of [●] consecutive days,

either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect *[thirty (30) calendar]* days after reception of such termination notice. If, at the end of this *[thirty (30)]*-day period, the Qualifying Change in Law continues, the PPP Contract shall be terminated pursuant to clause *[insert reference to the clause governing termination]* and the Private Partner shall be entitled to the compensation set out under clause *[insert reference to "termination payments" clause]*.

³⁷ Note: delete if the Contracting Authority does not wish to include a materiality threshold.

4. TERMINATION PAYMENTS

4.1 Key aspects

Termination payments are a key element of the risk allocation in the PPP Contract, and are crucial in determining whether the PPP Project will be financeable by the Lenders (or “bankable”). They cover cases in which the PPP Contract may be terminated prior to the normal term of the PPP Contract, either (i) by the Contracting Authority in the event of failure by the Private Partner to comply with its obligations or for public policy, (ii) by the Private Partner in case of occurrence of a failure of the Contracting Authority to comply with its obligations, or (iii) by either Party in the event of prolonged Force Majeure Event, MAGA or Change in Law (please see the relevant provisions in this respect above), as well as the amount which will be payable by the Contracting Authority to the Private Partner.

The list of events under which the PPP Contract can be terminated will vary from one PPP Contract to another, as it will need to be tailored to take into account specific risks and obligations of each PPP Project, as well as the overriding provisions of Applicable Law (for instance, some jurisdictions will always provide for a right of the Contracting Authority to terminate for reasons of public interest).

4.2 Principles for the calculation of termination payments

The amount payable to the Private Partner upon early termination of the PPP Contract will depend on the grounds on which the PPP Contract is terminated. The provisions set out in this Section are based on the following principles:

Termination upon Contracting Authority Default, MAGA, Change in Law or voluntary termination by the Contracting Authority

If the PPP Contract is terminated upon Contracting Authority default, prolonged MAGA, Change in Law or termination by the Contracting Authority for public policy reasons, the Private Partner should obtain repayment of the sums used to finance the Project (equity and debt), as well as expected returns for a determined number of years to be negotiated between the Parties and not exceeding the contractual term of the PPP Contract. In order to be left in the same position as if the PPP Contract had not been terminated, the Private Partner will also expect to be compensated for any redundancy payments incurred, as well as for costs payable as a result of the early termination of its subcontracts.

Compensation to cover the outstanding senior debt

The calculation of the payments to be made to the Private Partner to repay Lenders generally includes (i) the principal outstanding under the Senior Finance Documents, as well as (ii) any interest, penalties and fees, and (iii) breakage costs arising under applicable hedging agreements.

Certain amounts should be deducted from the amounts paid to the Lenders, such as (i) any amounts credited to the bank account of the Private Partner (which are secured to the benefit of the Lenders), (ii) any profits arising from the termination of the hedging agreements, (iii) any insurance proceeds received and (iv) generally any other sums recovered by the Lenders before the date on which the termination amount is paid.

Accordingly, it is advisable for Contracting Authorities to review the terms of the Senior Finance Documents, in order to fully understand the amounts which may become payable in case of early termination.

Repayment of sums owed to the equity investors

Different options should be considered by the Contracting Authority for calculating the value of the compensation payable in addition to the outstanding senior debt, to make equity investors whole. The following list describes a number of these options:

Original Base Case Approach [Option 1a]: Under this approach, the compensation payable by the Contracting Authority to make whole the equity investors is determined by reference to the returns which were expected to be made based on the Original Base Case (see clause below for definition). Accordingly, the Contracting Authority will be required to pay the amount which, when taken together with all amounts already paid to the equity investors before the date on which the PPP Contract is terminated, will ensure that the equity investors recover the internal rate of return contemplated in the Original Base Case.

- The key benefit of this approach lies in its easy implementation and the fact that it leaves less room for disputes than the other approaches.
- A material drawback, however, is that this option assumes that the Private Partner has been performing as planned in the Original Base Case. In other words, it does not take into account the actual performance of the Private Partner under the PPP Contract. As a result, the amount paid by the Contracting Authority under this approach will be reduced if the Private Partner has been performing better than expected, which could incentivize the Contracting Authority to terminate a PPP Contract under which the Private Partner is performing well. Similarly, if the Private Partner has been performing worse than expected, there would be a strong incentive to ensure the PPP Project is terminated as the termination compensation will be more 'profitable' than the actual performance of the PPP Contract.

Market value [Option 1b]: under this approach, the compensation payable by the Contracting Authority to make whole the equity investors is determined by assessing the price which third party investors would be willing to pay for (i) the shares in the Private Partner and (ii) the receivables arising under subordinated debt, subject to certain assumptions (including that the event giving rise to the early termination had not occurred).

- Compared to the Original Base Case Approach, this option allows taking full account of the actual performance of the Private Partner under the PPP Contract, ensuring that the compensation payable by the Contracting Authority will not be over or under estimated.
- However, while being the fairest approach in theory, this method is complex to implement in practice and is very likely to result in protracted disputes over the valuation as a "market" may not exist.

Adjusted Base Case Approach [Option 1c]: under this approach, the compensation payable by the Contracting Authority to make whole the equity investors is determined by reference to the distributions which they would have expected to recover based on the Original Base Case, but only from the termination date. Accordingly, the amount payable under this method will be the aggregate amount of the distributions forecasted in the Base Case to be made after the termination date, discounted using the equity IRR set out in the Original Base Case.

- This approach allows taking into account the performance of the Private Partner under the PPP Contract up to the termination date. It also provides greater certainty to determine the amount

payable to make whole the equity investors, since it does not imply the use of market valuation mechanism.

- However, it does not take into account the performance of the Private Partner after the termination date. Accordingly, there is a residual risk of misvaluation of the compensation, especially if the PPP Contract is terminated at an early stage.
- One key point to consider if choosing this approach is that there is a risk of double counting if the Private Partner has taken on an additional amount of debt prior to the termination date. Accordingly, the amount of the payment should be adjusted to take into account the effect of any refinancing occurring before the date of termination, in order to avoid double counting.

In any event, the choice between these three options should be carefully considered by the Contracting Authority to take into account the particulars of the asset, the market and the jurisdiction.

Repayment for third party costs

The Private Partner will likely incur certain costs as a result of the early termination of the PPP Contract, including redundancy costs in relation to its own employees and its subcontractors, as well as other costs payable to its subcontractors in accordance with the terms of the relevant subcontracts.

Where the termination is caused by the Contracting Authority, the Private Partner should be made whole of any costs incurred in this respect. The Contracting Authority should however ensure that its liability incurred in relation to third party costs is limited, by

- (A) conducting due diligence over the key subcontracts;
- (B) limiting the heads of costs for which it will offer compensation;
- (C) capping the duration for which it will compensate any loss of profit to the subcontractors; and
- (D) imposing an obligation on the Contractor to mitigate such costs (and to procure that its subcontractors will mitigate their own costs).

The principle and application of these provisions should be carefully considered depending on the local jurisdiction, especially with respect to the sums which may become due by the Contracting Authority in relation to redundancy payments.

Termination upon Private Partner Default

If the PPP Contract is terminated on the grounds of a default of the Private Partner, the Private Partner, the Lenders should still be compensated, at least to some degree. This is because (i) the Contracting Authority could otherwise benefit from the default of the Private Partner (by, for instance, retaining the asset while paying no compensation) and would thus be incentivized for terminating the PPP Contract, and (ii) Lenders would not agree to finance a PPP Project where no compensation would be payable to them in case of Private Partner default, i.e. the PPP Project would not be 'bankable'.

Three options are generally considered for calculating the compensation in this case:

- **Debt-based compensation** (the most common approach in emerging markets): whereby the Private Partner (or in reality the Lenders) is compensated based on the amounts payable under the Senior Finance Documents. One major drawback is that, under this method, Lenders have limited interest in ensuring that the Project performs, and can become less involved in monitoring

and restructuring the Project. As a result, the level of compensation should be a percentage of the total debt (and not the full amount). This is commonly referred to as a “haircut”.

- **Market value:** Where the asset is sufficiently liquid and can be reasonably expected to be retendered, the fairest approach is to calculate the compensation payable to the Private Partner by reference to the market value of the infrastructure, as determined after a tendering procedure. This ensures, in theory, that the Contracting Authority will not pay to the Private Partner more than the value of the infrastructure built by the Private Partner. As a result, this calculation protects the Contracting Authority’s interests while ensuring that the Contracting Authority does not unfairly benefit from the Private Partner’s default. This is the method recommended by, notably, the UK PF2 standards.

However, it should be noted that Lenders may, in certain jurisdictions or in relation to certain assets, be reluctant to rely on market-based valuation method for fear of undervaluation. This is particularly the case in emerging markets. Contracting Authorities should take a view as to whether market-based termination compensation could be contemplated, on a project-by-project basis.

- **Book Value:** Although simpler, the calculation of compensation payments based on book value is not recommended, as the result may not accurately reflect the reality of the sums owed.

Termination upon prolonged Force Majeure

As discussed above, each Party should be able to terminate the PPP Contract as a result of prolonged Force Majeure. It is generally considered that the risk of occurrence of a Force Majeure event should not be allocated to one single Party and that, accordingly, all financial losses should be shared. Although this may be adjusted on a case by case basis, the proposed provision is based on the principle that the Private Partner is paid (i) the amount of senior debt and (ii) some or the entire amount of equity invested, but that it should not be compensated for future loss of revenues.

Method of payment

The method of payment of the termination compensation should also be considered by the Contracting Authorities. The Contracting Authority would be paying any compensation due upon termination of the PPP Contract as a lump sum, as it is generally not good practice for the Contracting Authority to pay compensation in several instalments (since the Contracting Authority would in that case be paying interest on the default amount). This is not included in the proposed provision.

4.3 Proposed provision

Please see below a proposed drafting for termination payments (noting that the provisions relating to the calculation of Termination Payments are generally set out in a separate Schedule).

Schedule [*Insert schedule number*] – Termination Payments

Capitalized terms set out in this Schedule shall have the meaning ascribed to them below.

"Distribution" means:

- (a) the payment of a distribution by the Private Partner (whether directly or indirectly) to its Shareholders;
- (b) any dividend, charge, fee or other distribution (or interest on any unpaid dividend, charge, fee or other distribution) (whether in cash or in kind) declared, paid or made on or in respect of share capital (or any class of share capital) in the Private Partner;
- (c) any repayment, or interest paid, under Subordinated Finance Documents; or
- (d) the redemption, repurchase, defeasance, retirement or repayment of any share capital of the Private Partner, including in connection with any merger or consolidation, or any resolution to do so.

"Initial Equity" means, as of the date of termination of the PPP Contract, the initial equity investment disbursed by the Shareholders plus any such other equity contributions approved by the Contracting Authority, less the Distributions paid by the Private Partner to its Shareholders as of the date of termination of the PPP Contract.

"IRR" means internal rate of return.

"Losses" means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or otherwise, internal costs or demands.

"NPV" means net present value.

"Outstanding Senior Debt" means the sum of:

- (a) the total amount outstanding at the Termination Date to the Lenders under any Senior Finance Documents and accrued but unpaid interest and including default interest; plus
- (b) any winding-up costs, prepayment charges, costs of terminating any hedging arrangements or other breakage costs, payable by the Private Partner to the Lenders as a result of a prepayment of sums due under the Senior Finance Documents, or, in the case of early termination of interest rate hedging arrangement, as a result of termination of the PPP Contract, subject to the Private Partner and the Lenders mitigating all such costs ;

less (without double counting):

- (c) all credit balances held on any bank accounts held by or on behalf of the Private Partner on the Termination Date;

- (d) all amounts payable by the Lenders to the Private Partner as a result of a prepayment of amounts outstanding under the Senior Finance Documents or termination of the PPP Contract; ; and
- (e) all other amount received or due to be received³⁸ by the Lenders on or after the Termination Date and before the date on which compensation is payable by the Contracting Authority to the Private Partner as a result of enforcing any other rights that they may have³⁹.

"Sub-Contractor Breakage Costs" means the value of Losses that have been or will be reasonably and properly incurred by the Private Partner as a direct result of the termination of the PPP Contract, but only to the extent that:

- (a) the Losses are incurred in connection with the Project and in respect of the provision of services or the completion of works, including;
 - i. any materials or goods ordered or the sub-contracts placed that cannot be cancelled without such Losses being incurred;
 - ii. any expenditure incurred in anticipation of the provision of services or the completion of works in the future;
 - iii. the cost of demobilisation including the cost of any relocation of equipment used in connection with the Project; and
 - iv. redundancy payments;
- (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the ordinary course of business and on reasonable commercial terms, excluding loss of profits calculated over a period which is longer than [*one (1) year*]⁴⁰ after the Termination Date; and
- (c) the Private Partner and the relevant sub-contractor have each used its reasonable endeavours to mitigate the Losses.

"Subordinated Finance Documents" means any agreements under which the Private Partner's Shareholders make subordinated debt available to the Private Partner⁴¹.

"Termination Date" means the date on which the PPP Contract terminates in accordance with Clause [●]⁴².

Capitalized terms used and not defined herein shall have the meaning set out in the PPP Contract.

³⁸ The words "due to be received" have been inserted so as to cover the possibility of insurance payments being made to Lenders after the date on which compensation is payable. To the extent that insurance payments may also be forthcoming to equity investors, this should similarly be taken into account when calculating any compensation that is payable to such investors.

³⁹ This may include, inter alia, insurance proceeds pledged or assigned to the Lenders.

⁴⁰ It is recommended that the Contracting Authority caps the amount of loss of profit which will be payable to subcontractors upon termination of the PPP Contract. The purpose of this provision is to limit the overall liability of the Contracting Authority in the subcontracts which it may not have reviewed and approved. Accordingly, it ensures that the Private Partner will limit its own liability to its subcontractors -- who may not have the same long term expectations and risk.

⁴¹ The PPP Contract should include provisions pursuant to which the Subordinated Finance Documents are to be approved by the Contracting Authority as a Condition Precedent to the entry into force of the PPP Contract. In addition, any amendment to the Subordinated Finance Documents or the entry into any new Subordinated Finance Document should be approved by the Contracting Authority.

⁴² Reference should be made to the provisions of the PPP Contract relating to termination.

1. Termination upon Contracting Authority Default, Material Adverse Government Action, Change in Law or public policy

If this PPP Contract is terminated further to (i) a Contracting Authority Default, (ii) a Material Adverse Government Action, (iii) a Change in Law or *[(iv) by the Contracting Authority, for public policy reasons]*⁴³, the Contracting Authority shall pay the Private Partner an amount equal to the sum of:

- (a) The Outstanding Senior Debt; plus
- (b) redundancy payments for employees of the Private Partner that have been or will be reasonably incurred by the Private Partner as a direct result of termination of this PPP Contract; plus
- (c) any Sub-Contractor Breakage Costs; plus
- (d) Initial Equity; plus
- (e) any outstanding principal of the Subordinated Finance Documents; plus
- (f) *[select from option 1a, 1b, or 1c depending on the required valuation method for the payments due to the equity party]*
 - *[[option 1a] an amount which, when taken together with any Distributions paid on or before the Termination Date, results in an IRR on the share capital subscribed and amounts advanced to the Private Partner under any Subordinated Finance Document equal to the Base Case Equity IRR]; or*
 - *[[option 1b] the aggregate amount for which the share capital of the Private Partner and the receivables arising under Subordinated Finance Documents could have been sold on an open market basis, under the assumption that there is no default by the Contracting Authority, that no Material Adverse Government Action or Qualifying Change in Law has occurred, that the sale is on a going concern basis and that no restrictions exist on the transfer of the share capital,⁴⁴] or*
 - *[[option 1c] the NPV of forecasted Distributions as at the Termination Date, determined based on the Base Case, using the Base Case Equity IRR].*

2. Termination upon Private Partner Default

If the Contracting Authority terminates this PPP Contract in the event of a *[Private Partner Event of Default]*⁴⁵, the Contracting Authority shall pay to the Private Partner a compensation amount equal to *[80 to 85]*⁴⁶ %⁴⁷ of the Outstanding Senior Debt.

⁴³ Delete if this is not contemplated in the PPP Contract.

⁴⁴ If the market-based option 1b is selected, then clauses (d) and (e) should be deleted, so as to avoid double-counting the compensation for Initial Equity and for the outstanding principal of the Subordinated Finance Documents.

⁴⁵ Use appropriate definition.

⁴⁶ An alternative could be to refer to all Outstanding Senior Debt minus unfunded equity contributions.

⁴⁷ The haircut on Outstanding Senior Debt is used to ensure that Lenders will have an interest in conducting proper due diligence and monitoring the PPP Project. The exact percentage (if any) should be assessed on a project-by-project basis.

3. Termination Upon prolonged Force Majeure Event

If this PPP Contract is terminated further to a Force Majeure Event in accordance with clause [●], the Contracting Authority shall pay the Private Partner an amount equal to the sum of:

- (a) The Outstanding Senior Debt, if any; plus
- (b) [●]% of the Initial Equity and any amounts outstanding under the Subordinated Finance Documents as at the Termination Date; *plus*
- (c) redundancy payments for employees of the Private Partner that have been or will be reasonably incurred by the Private Partner as a direct result of termination of this PPP Contract, *plus*
- (d) any Sub-Contractor Breakage Costs.

5. REFINANCING

5.1 Key aspects

PPP Contracts and Senior Finance Documents are long term. Changes in market conditions and the evolution of the risk profile of the PPP Project over the term may lead a Private Partner to the conclusion that it could obtain better financing conditions than under the original financing documents. This is especially true after the commissioning of the PPP Project has been reached.

Better refinancing terms may be available for many reasons. Some of them are under the Private Partner's control such as good performance of the PPP Project. Others could be seen as driven by the public authorities of the Country (improving regulatory environment, reduced country risk). Finally, some cannot be attributed to any Party, such as changes in market conditions or increasing appetite of financial institutions for certain sectors.

As a result, the PPP market has increasingly acknowledged that it would not be fair for the Private Partner to enjoy the full benefits of debt refinancing gains for which it is not fully responsible. The principle of sharing refinancing gains between the Private Partner and the Contracting Authority has been introduced by the UK PF2, and the drafting of refinancing gain provisions (including the provision proposed in this Report) are broadly based on concepts defined in the UK PF2⁴⁸.

The Contracting Authority should closely monitor any changes to the financing structure and to any refinancing, since the termination compensation payable by the Contracting Authority to the Private Partner will be based on the amounts payable under the Senior Finance Documents – and the amount of compensation could be adversely affected by a refinancing.

Refinancing provisions are fairly complex and their implications should be carefully considered by the Contracting Authority and its advisors. The key points to consider are (i) what should be considered a “refinancing”, (ii) the right of the Contracting Authority to provide its prior approval, (iii) how the refinancing gain should be calculated, (iv) in what proportion the refinancing gain is to be allocated between the Parties, and (v) how the Contracting Authority should receive the payment of its share.

Enforcing the Contracting Authority's rights under refinancing provisions will only be possible if the Contracting Authority is fully familiar with the terms and structure of the Senior Finance Documents entered into by the Private Partner for the purpose of the PPP Project.

In addition, some refinancing clauses include a right of the Contracting Authority to request the Private Partner to seek and implement refinancing. This is not included in the proposed provision set out below. The Contracting Authority should consider whether this is desirable in its jurisdiction, bearing in mind that this is a situation in which the interests of both Parties are often aligned.

⁴⁸ In relation to the question as to whether equity refinancing gains should also be shared, it has been argued (most notably in the public discussions that preceded the adoption of the UK PF2 rules) that a PPP Contract should include a ceiling imposed on the level of profits that may be extracted from equity, together with a requirement that the public sector should have a 50% share in any profit above a specified level. In the same context, it has been suggested that a new value for money methodology should be devised to take account the additional profits associated with equity refinancings. However, these suggestions for sharing the benefits of equity refinancings were, ultimately, not incorporated in the UK PF2 rules, on the basis that restrictions on the assignment of shares in privately financed companies would negatively impact the cost and availability of equity investments in infrastructure projects.

The concept of sharing equity refinancing profits has been adopted in Korea. It should be noted, however, that the Korean refinancing provisions are very much tailored to the PPP framework in that country, which entails strict gearing requirements (20/80 at signing, and 10/90 after the construction phase is completed). Therefore, a refinancing will always capture a transfer of equity from the construction sponsor. Other precedents (such as, for example, those in France and Ivory Coast) suggest that the question of refinancing equity gains might be better dealt with as an aspect of sharing profits (rather than suggesting restrictions on equity transfers by sponsors). In those jurisdictions, some PPP Contracts contain language allowing the Contracting Authority full access to the economic information of the Private Partner, which is put under an obligation to share its profits with the former, should they rise beyond a certain level.

5.2 Proposed provision

Required Definitions

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| "Base Case Equity IRR" | means the Equity IRR set out in the Original Base Case. |
| "Distribution" | <p>means whether in cash or in kind, any:</p> <ul style="list-style-type: none"> (a) dividend or other distribution in respect of share capital; (b) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital; (c) payments under any Subordinated Finance Documents; and (d) the receipt of any payment, contractual arrangement, transfer of asset and other benefit which is not received in the ordinary course of business and on reasonable commercial terms. |
| "Equity IRR" | means the projected blended internal rate of return to the Shareholders and any of their affiliates over the entire PPP Contract period, having regard to Distributions made and projected to be made. |
| "Exempt Refinancing" | <ul style="list-style-type: none"> (a) any Refinancing fully contemplated in the Original Base Case⁴⁹; (b) a change or accounting treatment; (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of: <ul style="list-style-type: none"> (i) breach of representations and warranties or undertakings; (ii) movement of monies between the project accounts in accordance with the terms of the Senior Finance Documents; (iii) late or non-provision of information, consents or licenses; (iv) approval of revised technical and economic assumptions in relation to the Financial Model; |

⁴⁹ This is fair, since the Private Partner would have already taken any gains arising from the refinancing for the purpose of submitting its bid, so that the Contracting Authority already has the expected benefit of such refinancing.

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| | <ul style="list-style-type: none"> (v) failure by the Private Partner to obtain any consent by statutory bodies required by the Senior Finance Documents; or (vi) voting by the Lenders and the voting arrangements between the Lenders in respect of the levels of approval required by them under the Senior Finance Documents; <p>(d) any sale of shares in the Private Partner by the Shareholders.</p> |
| "Financial Model" | means the financial model [<i>provided by the Private Partner as part of its bid/agreed between the Parties prior the date of the PPP Contract</i>] and as amended from time to time. |
| "Net Present Value" | means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Base Case Equity IRR. |
| "Pre-Refinancing Equity IRR" | means the Equity IRR calculated immediately prior to any Refinancing, but without taking into account the effect of such Refinancing and using the Financial Model as updated (including as to the performance of the PPP Project). |
| "Qualifying Refinancing" | means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing. |
| "Refinancing" | <p>means:</p> <ul style="list-style-type: none"> (a) any amendment, variation, novation, supplement or replacement of any Senior Finance Documents; (b) the grant of any waiver or consent, or the exercise of any similar right under any Senior Finance Documents; (c) the creation of or granting of any form of benefit or interest in the Senior Finance Documents, or the creation or granting of any rights or interest in any contracts, revenues or assets of the Private Partner whether by way of security or otherwise; and (d) any other arrangement having been put in place by any person which has an effect similar to any of (a) to (c) or which has the effect of limiting the Private Partner's ability to carry out any of (a) to (c). |

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| <p>"Refinancing Gain"</p> | <p>means a positive amount equal to $(A-B) [- C]$, where:</p> <p>A = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the project) so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of the PPP Contract following the Refinancing.</p> <p>B = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the Project) so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of this PPP Contract following the Refinancing, and</p> <p><i>[C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Base Case Equity IRR]⁵⁰.</i></p> |
| <p>"Subordinated Finance Documents"</p> | <p>means any agreements under which the Private Partner's Shareholders make subordinated debt available to the Private Partner⁵¹.</p> |

Refinancing

- (1) The Private Partner shall provide the Contracting Authority with full details in relation to any contemplated Refinancing, which shall include the Financial Model, a justification of the assumptions on which it is based, the proposed contractual documentation and any other information that the Contracting Authority may reasonably request in relation to that Refinancing.

The Contracting Authority shall, at all time, have unrestricted rights to audit the Financial Model used in relation to a Refinancing.

- (2) The Private Partner shall obtain the Contracting Authority's prior consent in relation to any Qualifying Refinancing.

⁵⁰ The addition of this component of the calculation has the effect that a gain from the refinancing will only be shared with the Contracting Authority if and to the extent that it would result in the Private Partner achieving a higher internal rate of return than what was contemplated by the original Financial Model. The rationale is that, in the event of a distressed scenario, Lenders agreeing to pour new money into the PPP Project would probably not agree to some of this being paid to the Contracting Authority. However, deleting this addendum should be considered where there are concerns that the Base Case Equity IRR would have been artificially inflated (e.g. if the competition during the bidding process has been weak).

⁵¹ The PPP Contract should include provisions pursuant to which the Subordinated Finance Documents shall be approved by the Contracting Authority as a Condition Precedent to the entry into force of the PPP Contract. In addition, any amendment to the Subordinated Finance Documents or the entry into any new Subordinated Finance Document should be approved by the Contracting Authority.

- (3) The Contracting Authority shall be entitled to receive a fifty percent (50%) share of any Refinancing Gain⁵².
- (4) [*The Parties shall act in good faith in relation to any Refinancing (including the manner of calculation of the Refinancing Gain and of payment of the Contracting Authority's share of the Refinancing Gain)*]⁵³.
- (5) The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain as:
 - (a) a lump-sum payment whose amount shall not exceed the relevant Distribution and whose due date shall occur immediately after the occurrence of the relevant Distribution,
 - (b) [*an increase of the fee payable by the Private Partner to the Contracting Party over the remaining PPP Contract period / or a reduction of the charge to be paid by the Contracting Authority to the Private Partner over the remaining PPP Contract period*]⁵⁴, or
 - (c) *a combination of both*].
- (6) The Private Partner shall pay, on behalf of the Contracting Authority, all reasonable costs of external advisors appointed by the Contracting Authority in relation to a Refinancing and the calculation of a Refinancing Gain.

⁵² Other common contractual provisions related to refinancing provide that the percentage of Refinancing Gain that the Contracting Authority should receive should vary depending on the projected amount of such gain, or whether such Refinancing Gain arises from a reduction in the Margin of the Senior Finance Documents. The Contracting Authority should consider whether this is appropriate.

⁵³ This will not be required in most civil laws jurisdictions as good faith obligations are implied.

⁵⁴ This sentence should be adjusted to fit the payment structure.

6. LENDERS' STEP-IN RIGHTS

6.1 Key aspects

Most PPP Projects are financed on the project finance model which is limited recourse lending based upon projected cash flows generated by the PPP Project. These revenues result from the PPP Contract entered into by the Contracting Authority and the Private Partner.

The Lenders are not a contracting party to the PPP Contract but the PPP Project could not be carried out without them. Accordingly, Lenders will seek to obtain comfort by regulating the right of the Contracting Authority to terminate to the PPP Contract in the event of a Private Partner default.

This will be achieved by means of an agreement (the "**Direct Agreement**") between the Contracting Authority, the Private Partner and the Lenders, under which Lenders will typically require certain rights:

- (1) information rights in the event of a Private Partner default under the PPP Contract which could allow the Contracting Authority to terminate the PPP Contract;
- (2) a standstill period, pursuant to which the Contracting Authority will undertake to notify the Lenders of its intention to terminate the PPP Contract, and will commit not to terminate for a given period of time;
- (3) appointment of an additional obligor to "step-in" and become jointly liable with the Private Partner to cure any grounds which gave rise to the Contracting Authority's right to terminate;
- (4) consent to the assignment of the PPP Contract and of the PPP Contract receivables to the Lenders, as well as a consent to assignments to insurers and guarantors upon payment of claims; and
- (5) the right of the Lenders to novate the Private Partner's rights and obligations under the PPP Contract to a substitute private partner of their choice.

The terms of the Direct Agreement are generally heavily negotiated, and Lenders will generally insist on relying on their own standard forms. Accordingly, it is usually not necessary to extensively set out the terms of the Direct Agreement in the PPP Contract. However, Lenders will still want to see a clear undertaking from the Contracting Authority to agree and enter into a Direct Agreement and a recognition of their step-in rights.

Step-in rights (and the corresponding direct agreement) will generally be required by the Lenders as a condition precedent to drawdown under the Senior Finance Documents. However, in many jurisdictions, there may be mandatory provisions of law preventing the granting or enforcement of Lender step-in rights (in particular, the public policy rules applicable to insolvency procedures and/or public procurement regulations applicable to Contracting Authorities). Accordingly, this point should be extensively considered and addressed before inserting step-in rights in the PPP Contract.

6.2 Proposed provision

As indicated above, the Contracting Authority typically enters into a direct agreement with the Lenders, pursuant to which the Lenders are granted certain rights including step-in rights in accordance with international project finance market practice. Accordingly, the terms of such a Direct Agreement are normally not outlined in the PPP Contract, which is why this Report does not include a proposed provision on this point.

7. CONFIDENTIALITY AND TRANSPARENCY

7.1 Key aspects

From confidentiality to transparency

Traditionally, a confidentiality clause is a provision whereby the Parties undertake not to disclose information related to the PPP Contract or the PPP Project or at least certain commercially sensitive information contained therein. The modern approach of some governments, non-governmental organizations and international organizations is now moving towards more transparency towards the general public.

The purpose of a 'transparent' confidentiality provision is to ensure that information on the PPP Project and the PPP Contract will be shared by the Private Partner, to the fullest extent possible, with the Contracting Authority and, as appropriate, with the public at large. The underlying objectives can be multiple: reducing the level of corruption; reassuring the general public in regard to service standards and costs; encouraging competition; facilitating the monitoring of the PPP Contract by the Contracting Authority; having access to important commercial information; etc.

Public Policy

Many jurisdictions have laws or regulations imposing disclosure obligations on Contracting Authorities and/or ensuring that citizens have full access to public procurement information. A confidentiality clause should always be drafted following an analysis of such provisions, and it is for the Contracting Authority to decide whether disclosing obligations should go beyond the obligations set forth by Applicable Law.

Costs and benefits of transparency obligations

Preparing reports, keeping detailed records, allowing site visits by the Contracting Authority on the PPP Project site are all measures that have a cost for the Private Partner. Contracting Authorities should always weigh the advantages and benefits for the PPP Project when imposing transparency obligations on the Private Partner. The Contracting Authority should anticipate resistance from Private Partners, who often see such obligations as costly administrative formalities slowing down the PPP Project. Such provisions are not included in the provision set out below, however, as this may be perceived as information sharing/ reporting by the Private Partner (to be dealt with separately) rather than aspects of confidentiality/transparency.

The proposed provision set out below, which is based on the UK PF2 model, can be viewed as representing a good balance between confidentiality in relation to commercially sensitive information, and transparency obligations towards the general public in compliance with Applicable Law.

7.2 Proposed provision

Public Relations and Publicity

- (1) The Private Partner shall not by itself, its employees or agents and procure that its subcontractors shall not, communicate with representatives of the press, television, radio or other communications media on any matter concerning the PPP Contract without the prior written approval of the Contracting Authority.
- (2) The Private Partner may not represent the views of the Contracting Authority on any matter, or use the name of the Contracting Authority in any written material provided to third parties, without the prior written consent of the Contracting Authority.

Publication of the PPP Contract in the public domain

- (3) The Parties agree that the provisions of this PPP Contract [*and insert any other relevant documents defined as the **Project Agreements***] shall, subject to clause (7) below, not be treated as Confidential Information and may be disclosed without restriction and the Private Partner acknowledges that the Contracting Authority, subject to clause (7) below, is entitled to:
 - (a) publish this PPP Contract [*and some of the Project Agreements*] on a website; and
 - (b) publish (on the internet or otherwise) a summary of the PPP Contract [*and the Project Agreements and any associated transaction document*] which shall include (i) the terms and conditions of the PPP Contract [*and the Project Agreements and any associated transaction document*] and (ii) any document or information arising out of or connected to the PPP Contract [*and the Project Agreements and any associated transaction document*], including performance of the PPP Contract [*and the Project Agreements and any associated transaction document*].⁵⁵
- (4) The Parties agree that Base Case Equity IRR⁵⁶ information shall not be treated as Confidential Information and the Private Operator acknowledges that the Contracting Authority intends to publish such information on a website.
- (5) The Parties agree that information in respect of any direct or indirect change in ownership which has actually taken place shall not be treated as Confidential Information.

Confidentiality

- (6) For purposes of this PPP Contract, **Confidential Information** means:
 - (a) information (however it is conveyed or on whatever media it is stored) which would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, including all personal data and sensitive personal data; and
 - (b) the sub-set of Confidential Information listed in column 1 of Part I (Commercially Sensitive Contractual Provisions) and column 1 of Part II (Commercially Sensitive Material) of Schedule [*insert reference to the Commercially Sensitive Information Schedule*] in each case for the period specified in column 2 of Parts I and II of such Schedule ("**Commercially Sensitive Information**").
- (7) Clause (3) above shall not apply to Confidential Information which shall, subject to clause (9) below, be kept confidential for the periods specified in Schedule [*insert reference to the Commercially Sensitive Information Schedule*].
- (8) The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this PPP Contract [*and any Project Agreements*] or the PPP Project and shall use all reasonable endeavours to prevent their employees and agents from making any disclosure to any person of any such Confidential Information.
- (9) Clauses (7) and (8) above shall not apply to:

⁵⁵ The effectiveness of this provision will be dependent upon provisions elsewhere in the PPP Contract regarding the Private Partner's obligations to disclose performance data and other information to the Contracting Authority. The UK PF2 model also contains provisions imposing penalties on the Private Partner for failing to meet such obligations.

⁵⁶ For the purpose of this provision, the definition of "Base Case Equity IRR" would be the same as that used in Section 5, above, on Refinancing.

- (a) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the PPP Contract for the performance of those obligations;
- (b) any matter which a Party can demonstrate is already, or becomes, generally available and in the public domain otherwise than as a result of a breach of this clause;
- (c) any disclosure to enable a determination to be made under clause [*insert reference to Dispute Resolution clause*] or in connection with a dispute between the Private Partner and any of its sub-contractors;
- (d) any disclosure which is required pursuant to any statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority concerned;⁵⁷
- (e) any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;
- (f) any provision of information to:
 - i. the Parties' own professional advisers or insurance advisers; and/or
 - ii. the Lenders or the Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Private Partner to enable it to carry out its obligations under the PPP Contract, or may wish to acquire shares in the Private Partner in accordance with the provisions of this PPP Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal; and/or
 - iii. international or bilateral financial institutions involved in the PPP Project as Lenders, political risk insurers or guarantors.
- (g) any disclosure by the Contracting Authority of information relating to the design, construction, operation and maintenance of the PPP Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new private partner, its advisers and Lenders, should the Contracting Authority decide to retender the PPP Contract or undertake any market testing;
- (h) any registration or recording of the required permits and property registration required;
- (i) any disclosure of information by the Contracting Authority to any other relevant authority or their respective advisers or to any person engaged in providing services to the Contracting Authority for any purpose related to or ancillary to the PPP Contract; or

⁵⁷ Consideration should also be given to having a general provision for the disclosure of information that is 'required in the public interest'. See also clause 9 (j) ii, below.

- (j) any disclosure for the purpose of:
 - iv. the examination and certification of the Contracting Authority's or the Private Partner's accounts;
 - v. any examination pursuant to [*insert reference to any auditing obligations for public contracts*] of the economy, efficiency and effectiveness with which the Authority has used its resources;⁵⁸
 - vi. complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or
 - vii. (without prejudice to the generality of clause (9)(d)) above) compliance with the Applicable Law,
 - viii. provided that, for the avoidance of doubt, neither clause (9)(j)(vii) nor clause (9)(f) above shall permit disclosure of Confidential Information otherwise prohibited by clause (8) above.
- (10) When disclosure is permitted under clause (9) above, other than clauses (b), (d), (e), (h) and (j), the Party providing the information shall ensure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this PPP Contract. The Private Partner shall expressly inform any person to whom it discloses any information under this clause of the confidentiality restrictions set out in this clause and shall procure its compliance with the terms of this clause as if it were party to this PPP Contract and the Private Partner shall be responsible for any breach by any such person of the provisions of this clause.
- (11) Where the Private Partner, in carrying out its obligations under the PPP Contract, is provided with information relating to [*end users*], the Private Partner shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Private Partner has obtained the prior written consent of that [*end user*] and has obtained the prior written consent of the Contracting Authority.
- (12) On or before the expiry date, the Private Partner shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to [*end users*] including any documents in the possession, custody or control of a sub-contractor, are delivered up to the Contracting Authority.
- (13) The provisions of this clause are without prejudice to the application of [*insert any relevant law governing official secrets or national security information*].

⁵⁸ Many jurisdictions require audit reports to be prepared in respect of transactions to which a Contracting Authority is a party. Depending on the arrangements in such jurisdictions for the publication of such documents, this provision should also address the issue of public disclosure of these audits reports. See also clause 9 (d), above.

Schedule [●]

Commercially Sensitive Information

Part I - Commercially Sensitive Contractual Provisions

| Column 1 | Column 2 |
|---|-----------------------------------|
| Commercially Sensitive Contractual Provisions | For a period ending on date below |
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| | |
| | |

Part II - Commercially Sensitive Material

| Column 1 | Column 2 |
|---------------------------------|-----------------------------------|
| Commercially Sensitive Material | For a period ending on date below |
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| | |
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| | |

8. DISPUTE RESOLUTION

8.1 Key aspects

Elements of a Dispute Resolution provision

In a PPP Contract, a dispute resolution clause typically specifies:

- (1) the governing law of the PPP Contract (if not specified in a different clause);
- (2) an obligation to attempt to reach a quick and amicable settlement;
- (3) a specific dispute resolution mechanism for technical disputes which can be settled by an independent expert;
- (4) a recourse to international arbitration and precise procedural rules governing such process;
- (5) an obligation to continue performance of the PPP Contract during the dispute;
- (6) a waiver of immunities; and
- (7) a joinder provision in the event of multiple related contracts.

The clause should specify, at each step, if the decision is final and binding, and how the costs of the arbitrators or the experts should be allocated.

Purpose of Dispute Resolution provisions

The purpose of a dispute resolution clause is to solve disputes:

- (1) in a cost efficient manner;
- (2) in a time efficient manner;
- (3) following a clear process where the procedural rules have been agreed upon BEFORE the dispute and in a way that is the less damaging possible for the relationship of the Parties; and
- (4) pursuant to a procedure where the Private Partner is certain that the process will be fair and that a favourable decision will be enforced. This final provision is crucial for investors and for bankability of PPP Contracts as its often feared that local courts might not be able to deliver an impartial judgment.

Rules of reputable (international) arbitration institutions

Instead of drafting an overly long dispute resolution clause it is recommended to submit the PPP Contract to the rules of an independent international institution. The International Chamber of Commerce ("ICC") is one such institution. UNCITRAL is another. However, the Parties may also choose other arbitration rules, such as the rules of arbitration organized by a regional arbitration organization to which the Contracting Authorities belongs. In this context, it should be emphasized that access to reputable arbitration institutions is of particular importance in many developing countries, where PPP projects will not be bankable if recourse to acceptable arbitration arrangements is not allowed.

Mediation, Dispute Panels and Dispute Boards

The relevancy and the efficiency of mediation and dispute boards are much debated with fervent proponents and strong opponents. There are many ways to designate a dispute board or dispute panel. It can be composed of independent mediators or it can be part of an escalation process composed of senior executives of both Parties. The key issue is often whether the decision of the dispute board or dispute panel will be final and binding or if it is only advisory. In the event the decision of a board or panel is not final and binding, the process can risk being regarded as slowing down dispute resolution in a PPP Contract of high importance for the economy of the Country.

In this Report the use of a dispute panel as designed by the Treasury of New Zealand is recommended, in that this proven to be a quick, cost efficient and consensual mechanism of resolving disputes. However, alternative language is also proposed for Contracting Authorities willing to submit their disputes to more elaborate and independent dispute boards.

The dispute resolution clause should also specify if the recourse to alternative dispute resolution is mandatory and should be a condition precedent to arbitration. Taking into consideration the time and the cost of international arbitration, serious consideration should be given to the use of mandatory alternative dispute resolution mechanisms.

Independent Experts for technical disputes

For purposes of time and cost efficiency, it is recommended that a clause be provided for dealing with 'technical disputes'. As the most important element of such clauses is the definition of what constitutes a technical dispute, and in order to avoid long pre-litigation discussions on this issue, there is a benefit in listing each clause of the PPP Contract under which a dispute is considered to be technical. The process is, therefore, straightforward. Of course, if the Parties may agree to submit to the technical dispute process a matter that is not on the list, and the PPP Contract should allow them to do so. For this process of 'technical dispute resolution' to be efficient, it is recommended that the determination of the technical expert should be final and contractually binding, except in the case of manifest error or fraud. This approach should, however, be confirmed by due diligence, as certain jurisdictions and international conventions will not allow the determination of an expert to be final and binding even if this is specifically agreed in the PPP Contract.

Recourse to international arbitration and public policy

Before submitting a PPP Contract to international arbitration, it should also be verified whether, under Applicable Law, the Contracting Authority may be subject to international arbitration and if so, to what extent, this is allowed.

New York Convention and ICSID

Both Parties should also verify if the Country of the Contracting Authority and the country of the Private Partner are subject to:

- (1) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958; and/or
- (2) the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 which established the International Centre for Settlement of Investment Disputes ("**ICSID**"); and/or
- (3) any multilateral or bilateral investment treaty.

If the Contracting Authority is a party to such international conventions, it will bring significant comfort to the Private Partner as to the enforceability of any arbitration award (although it does not always guarantee that local courts in a country will refuse to intervene).

Waiver of Immunities

For many Private Partners and Lenders, a 'clean' waiver of sovereign immunity clause is a customary provision expected by the investor community when entering into commercial contracts with sovereigns. This approach is reflected in the provision set out below.

Consolidation

The PPP Contract will be part of wider 'network of agreements' between various parties. The Private Partner may, for example, enter into a PPP Contract with the Contracting Authority regarding the underlying facility, but all cash flows may be governed by a separate agreement between an off-taker and the Private Partner⁵⁹. When this is the case, the Private Partner may require that all the agreements of the PPP Project contain a similar consolidation provision, whereby all parties to the related contracts agree to submit disputes to the same arbitral tribunal, under the same rules. For greater efficiency, it is recommended that all agreements contain similar dispute resolution clauses. The same principle does not, however, apply in regard to agreements concluded with sub-contractors, as disputes arising under those contracts should be the sole responsibility of the Private Partner.

8.2 Proposed provision

Governing Law

- (1) This PPP Contract and any non-contractual obligation connected with it, are governed by and shall be construed in accordance with the laws of [*Country*].

Amicable Resolution

- (2) If any dispute shall arise out of or in connection with this PPP Contract (a "**Dispute**"), either Party shall give notice thereof to the other Party, whereupon the Contracting Authority and the Private Partner shall meet promptly and in good faith attempt to reach an amicable resolution.

Escalation to the Dispute Panel⁶⁰

- (3) As soon as is practicable after the effective date of this agreement, the Contracting Authority and the Private Partner will establish a panel as a forum of senior representatives of the Parties to meet and attempt to resolve Disputes (the "**Dispute Panel**").
- (4) The Dispute Panel will comprise [*four members*], [*two*] appointed by each of the Contracting Authority and the Private Partner. The Parties will each nominate one person to be its senior representative on the Dispute Panel together with an alternative representative to represent such Party when any of those nominees cannot act. Each Party is entitled to terminate the appointment of a representative designated by it to the Dispute Panel and to appoint a replacement.

⁵⁹ Other examples include government support agreements and direct agreements.

⁶⁰ Contracting Authorities may also wish to consider simpler escalation mechanisms, such as a "Chief Executive Clause" which could be drafted as follows:

- "If the Dispute is not resolved by means of an amicable settlement within [*thirty (30) business*] days after entering into such process, or at such earlier time as the Parties may agree, the [*insert relevant minister or senior civil servant*] of the Contracting Authority and the Chief Executive Officer of the Private Partner shall meet and endeavor to resolve the Dispute between themselves.
- A joint and unanimous written decision of such representatives of the Parties shall be final and binding upon the Parties.
- If the representatives of the Parties are unable to meet or to agree within [*thirty (30) business*] days of the reference to them, then either Party may submit the Dispute to international arbitration pursuant to clause 23."

- (5) Each of the representatives on the Dispute Panel will be empowered to make decisions on behalf of, and to bind contractually, the Party appointing such representative in all matters raised for determination by the Dispute Panel.
- (6) At any meeting the Dispute Panel may, by unanimous resolution, elect to appoint a mediator to assist them in resolving a Dispute on such terms as they may then agree.
- (7) The Dispute Panel must meet and attempt in good faith to resolve such Dispute by negotiations within [*ten (10) business*] days of the date on which a notice of Dispute is served. If the Dispute Panel fails to meet within this timeframe, then either Party may submit the Dispute to international arbitration.
- (8) Notices convening meetings of the Dispute Panel will specify the nature of the Dispute and, unless unanimously agreed by the members of the Dispute Panel, no other item of business other than the Dispute specified in the notice will be transacted at the meeting.
- (9) Meetings of the Dispute Panel will be held in [*insert name of City or address*] unless otherwise agreed by the Parties.
- (10) The quorum of any Dispute Panel meeting will be [*at least one representative of each of the Contracting Authority and the Private Partner*]. If a quorum is not present within 30 minutes after the time appointed for commencement of the meeting, that meeting will be adjourned at a time, day and place agreed upon by the representatives of both Parties. In the event there is no quorum at the adjourned meeting, either Party may submit the Dispute to international arbitration.
- (11) The Dispute Panel will attempt to resolve the Dispute within [*ten (10) business*] days, following the date on which the Dispute Panel initially convenes pursuant to clause (7), above. If the Dispute Panel is unable to resolve the Dispute within that period, either Party may submit the Dispute to international arbitration.
- (12) At any meeting of the Dispute Panel, voting on any decision relating to the Dispute will be by unanimous resolution, with each representative having one vote, provided that if there is not a unanimous vote, then that decision will be referred to the next succeeding meeting of the Dispute Panel which will be held as soon as possible but in any event no later than [*two (2) business*] days after the initial meeting takes place.
- (13) If at the succeeding meeting the decision is again not unanimously agreed then either Party may submit the Dispute to international arbitration.
- (14) Duly passed resolutions of the Dispute Panel will be final and contractually binding on the Contracting Authority and the Private Partner provided that they are in writing and signed by all members of the Dispute Panel.
- (15) The Contracting Authority will appoint one member of the Dispute Panel to be the secretary who will perform such duties as are specified by the Dispute Panel and will arrange for the minutes of each meeting to be kept. A copy of the minutes of each meeting will be given to each member of the Dispute Panel within [*one (1) business*] day of each meeting and each member of the Dispute Panel will as soon as possible ratify the minutes as a true and correct record of the meeting.
- (16) If the Dispute is not resolved by amicable settlement between the Parties or through a resolution by the Dispute Panel, as evidenced by the signing of its written terms, within [*thirty (30) calendar*]

days of the receipt of the notice provided in clause (2), any Party may decide to submit the Dispute to the Independent Expert or to international arbitration, as the case may be, in accordance with either clause (17) or clause (23).

Independent Expert

- (17) If the Parties do not reach an amicable resolution of any Dispute arising out of or in connection with clauses [*insert reference to every clause where a Dispute is considered a Technical Dispute*] (a "**Technical Dispute**"), they agree to submit such Technical Dispute for a determination by an Independent Expert in accordance with the rules set forth under Schedule [*insert reference to the Schedule with the procedure applicable to the Independent Expert, see the Schedule at the end of this Dispute Resolution clause*].
- (18) The Parties can also decide by joint written agreement to submit any other Dispute to the Independent Expert in accordance with the rules set forth under this clause and Schedule [*insert reference to the Schedule with the procedure applicable to the Independent Expert, see the Schedule at the end of this Dispute Resolution clause*].
- (19) The Parties have drawn up a list of [ten (10) independent technical experts and then (10) independent financial experts] specified under Schedule [*insert reference to the Schedule setting out the procedure applicable to the Independent Expert, see the Schedule at the end of this Dispute Resolution clause*] (each an "**Independent Expert**"). Each of the proposed Independent Experts on this list speaks and writes both [*insert Language of Country*] and English fluently [*and must be of a nationality other than that of the Parties*⁶¹]. Each of the proposed Independent Experts has as applicable:
 - (a) substantial technical experience in the construction, operation and maintenance of projects equivalent to the PPP Project; or
 - (b) substantial project finance experience in the financing and economic aspects of projects equivalent to the PPP Project.
- (20) The determination of the Independent Expert shall be final and contractually binding on the Parties except in the case of manifest error or fraud.
- (21) If a Party asserts and the Parties agree that the Independent Expert's determination is in manifest error or fraudulent, the matter shall be submitted to a second Independent Expert pursuant to the rules set forth under Schedule [*insert reference to the Schedule with the procedure applicable to the Independent Expert, see the Schedule at the end of this Dispute Resolution clause*]. If the Parties disagree on whether the determination of the Independent Expert was in manifest error or fraudulent, the matter shall be submitted for final and binding international arbitration pursuant to clause (23).
- (22) The costs of the Technical Dispute procedure and the Independent Expert's fees shall be split equally between the Parties and each Party shall bear sole liability for its own expenses, provided, however, that the Parties may refuse to pay the expert's fees if the expert commits a fault in performing his assignment.

⁶¹ Provision to be inserted if the Parties believe that this criterion is relevant to ensure that the Independent Expert will act independently.

International Arbitration

- (23) If any Dispute which is not a Technical Dispute has not been resolved between the Parties through an amicable settlement or the Dispute Panel procedure within [*thirty (30) calendar*] days of the receipt of the notice provided in clause (2), which shall each be a condition precedent, the Parties agree that the Dispute shall be referred to and finally settled by international arbitration as provided below.
- (24) All arbitration proceedings with respect to the foregoing shall be conducted pursuant to the Rules of Arbitration of the International Chamber of Commerce ("**ICC Arbitration Rules**") which are deemed incorporated by reference into this PPP Contract. The following terms shall apply to the arbitration.
- (25) The arbitration shall take place before a tribunal of three (3) arbitrators appointed in accordance with the said ICC Arbitration Rules (the "**Arbitral Tribunal**").
- (26) The arbitrators shall be fluent in [*English and language of the Country*]. The language of the proceedings shall be [*English*] and all documents submitted in connection with such proceeding shall be in [*English or accompanied by a certified English translation*].
- (27) The seat of arbitration shall be [●]⁶². [Notwithstanding anything to the contrary contained in clause (1) above, this agreement to arbitrate is governed by and shall be construed in accordance with the laws of [*Country*]⁶³.
- (28) The Parties undertake to keep confidential all awards in any arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another Party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.
- (29) The Parties hereto agree to exclude any right of application or appeal to any court that would otherwise have jurisdiction in the matter in connection with any question of law arising in the course of the arbitration or out of the award. However, by agreeing to arbitration in accordance with this clause, the Parties do not intend to deprive any competent court of its jurisdiction to compel the production of any evidence (whether by discovery of documents, interrogatories, affidavits or testimony of witnesses or whatever means) and to issue a pre-arbitral injunction, pre-arbitral attachment or other order in aid of the arbitration proceedings, or the recognition and/or enforcement of any award. Notwithstanding any requirements for alternative dispute resolution procedures as set forth in this clause any Party to the Dispute may apply to a court for interim measures:
- (a) prior to the constitution of the Arbitral Tribunal (and thereafter as necessary to enforce the Arbitral Tribunal's rulings); or

⁶² The seat of arbitration is of great importance and should be thoroughly negotiated between the Parties. It is likely to have an impact on the procedural law and it will determine the role of local courts in relation to arbitration (such as the right to appeal for example). It should be noted that arbitral hearings can take place in another location than the seat of arbitration. If the place of hearings is important for the Parties, it should be agreed upon at an early stage of negotiations.

⁶³ Should there be any doubt as to the validity or enforceability of the arbitration clause, the Parties should add a provision, such as clause (27), specifying the law applicable to the arbitration agreement.

- (b) in the absence of the jurisdiction of the Arbitral Tribunal to rule on interim measures in a given jurisdiction.
- (30) The Parties agree that seeking and obtaining such interim measures shall not waive the right to arbitration. The Arbitral Tribunal may grant interim measures including injunctions, attachments and conservation orders in appropriate circumstances, which measures may be immediately enforced by court order. Hearings on requests for interim measures may be held in person, by telephone, by video conference or by other means that permit the parties to the Dispute to present evidence and arguments. Any interim or provisional relief ordered by any competent court may subsequently be vacated, continued or modified by the Arbitral Tribunal on the application of either Party.
- (31) The Arbitral Tribunal shall issue a reasoned award in writing and shall endeavour to do so within [sixty (60) calendar] days from the date of the close of the arbitration hearing. The award of the Arbitral Tribunal shall be final and binding upon the Parties from the date it is made.
- (32) The fees and expenses of the arbitrators and all other expenses of the arbitration proceedings shall be initially borne and paid equally by the Contracting Authority and the Private Partner subject to determination by the Arbitral Tribunal. The Arbitral Tribunal may provide in the award for the reimbursement to the prevailing Party of its costs and expenses in bringing and defending the arbitration claim, including legal fees and expert expenses incurred by such prevailing Party.
- (33) Judgment on the award of the Arbitral Tribunal may be entered and enforced by any court of competent jurisdiction.

Continuing Obligations

- (34) Performance of this PPP Contract shall continue during arbitration proceedings or any other Dispute resolution mechanism pursuant to this clause.

Consolidation

- (35) In order to facilitate the comprehensive resolution of related disputes, in the event that more than one arbitration is commenced under this PPP Contract and under [provide for a limitative list of related agreements, the Contracting Authority should resist including subcontracts in this list] (the "**Related Agreements**"), the Private Partner and the Contracting Authority consent to the consolidation of arbitrations as follows:
 - (a) if two or more arbitrations are commenced pursuant to this PPP Contract or under any other Related Agreement, any party in any of these arbitrations may ask the International Court of Arbitration of the ICC (the "ICC Court") or, if already appointed, the first arbitral tribunal appointed in these arbitrations to order that several arbitrations be consolidated in a single arbitration (a "Consolidated Order") before the Arbitral Tribunal appointed in accordance with this PPP Contract and in compliance with the ICC Arbitration Rules set forth herewith;
 - (b) in deciding whether to make such a Consolidated Order, the ICC Court or the first arbitral tribunal may consider whether the several arbitrations raise common issues of law or facts and whether to consolidate the several arbitrations would serve the interest of justice and efficiency and that no Party would be prejudiced as a result of such consolidation;
 - (c) in the event of different rulings on this question of consolidation by the different arbitral tribunals, the ruling of the Arbitral Tribunal appointed in accordance with this PPP Contract shall prevail; and

- (d) if before a Consolidation Order is made with respect to another arbitration, arbitrators have already been appointed in that other arbitration, their appointment terminates upon the making of such Consolidation Order; such termination is without prejudice to:
 - i. the validity of any acts done or orders made by them prior to the termination;
 - ii. their entitlement to be paid their proper fees and disbarments;
 - iii. the date when any claim or defence was raised for the purpose of applying any limitation bar or any like rule or provision; and
 - iv. evidence adduced and admissible before termination, which evidence shall be admissible in arbitral proceedings after the Consolidation Order.
- (36) The Parties expressly accept that any Dispute that may be referred to international arbitration under this PPP Contract may accordingly be disposed of in the same arbitration proceedings as any other dispute arising under another Related Agreement, even in the presence of parties other than the Parties to this PPP Contract, provided that such arbitration proceedings shall always take place before the Arbitral Tribunal and be held in accordance with the terms of this clause.
- (37) The Parties hereby waive any right to object to the validity and/or enforceability of an arbitral award rendered by the Arbitral Tribunal on the basis that such award was made in arbitral proceedings which were consolidated under this clause.

Waiver of Immunities

- (38) The Parties unconditionally and irrevocably agree that this PPP Contract and the transactions contemplated hereunder constitute private and commercial activities rather than public or governmental acts.
- (39) To the broadest extent permitted by Applicable Law, each Party hereby expressly and irrevocably waives any right of immunity which it or any of its assets has or hereafter may acquire (whether characterized as sovereign immunity or otherwise) from any arbitral proceeding instituted in accordance with this clause, whether in [*insert name of Country*] or any foreign jurisdiction, including, without limitation, immunity from service of process, immunity from jurisdiction or decision of any court or tribunal, immunity from execution of a judgment and immunity from prejudgment attachment of any of its assets.

Schedule [*Insert reference*]

Procedure Applicable to the Independent Expert

In the event of a Technical Dispute, which cannot be settled by amicable settlement, the procedure shall be as follows:

Notification of Technical Dispute

The Party wishing to refer the matter to the Independent Expert shall give notice of the Technical Dispute ("**Notice of Technical Dispute**") to the other Party. Said notice shall contain:

- (a) a description of the Technical Dispute,
- (b) a statement of the main arguments relied on by the referring Party, and
- (c) all written documents supporting said arguments.

Designation of the Independent Expert

- (1) The Parties agree to meet within [*twenty-four (24) hours*] of the Notice of Technical Dispute for the purpose of choosing one of the Independent Experts by random drawing.
- (2) The Parties shall agree on whether the Independent Expert shall be a technical or a financial expert. If the Parties cannot agree, both a technical and a financial expert shall be appointed being understood that the technical expert shall be deemed the Independent Expert and shall subcontract to the financial expert the work he estimates necessary.
- (3) The names of all of the Independent Experts (technical or financial as appropriate) appearing on the list attached hereto shall be drawn at random and the Parties shall set down in writing the order in which the names were drawn. The Independent Expert whose name is the first to be drawn shall be selected to resolve the Dispute. If that person is unavailable, the Independent Expert whose name was drawn second shall be selected to resolve the Dispute, and so forth.
- (4) If the Parties are unable for any reason to meet within the [*twenty (24) hour*] period referred to above to conduct the random drawing as described above, the drawing shall be conducted, at either Party's request, by [*the sitting Chairman of the Standing Committee of the International Center for Technical Expertise of the International Chamber of Commerce of Paris (the "Chairman")*].
- (5) In addition, in the event that none of the Independent Experts appearing on the list is available at the time a Dispute arises, the [*Chairman*], acting at the request of either Party, shall appoint an expert as swiftly as possible. The expert thus appointed must meet the qualifications and experience requirements described in clause [*insert relevant reference*]. In the event that the expert is appointed by the [*sitting Chairman*], the time period within which the expert must render his decision shall begin to run from the date on which the Parties receive notification of the name of the expert appointed by [*the Chairman*].
- (6) The procedure for appointing an Independent Expert applies to each Technical Dispute, with a new random drawing to be conducted upon the occurrence of each Technical Dispute.

General Duties and Responsibilities of the Independent Expert

- (7) The Independent Expert has an obligation to disclose any potential or actual conflict of interest to the Parties. In the event of a reasonable risk of conflict of interest, the Parties shall choose another Independent Expert pursuant to the procedure set forth above.
- (8) The Independent Expert shall liaise with the Contracting Authority and the Private Partner on a [*weekly*] basis.
- (9) The Independent Expert shall always act fairly, independently and expeditiously in the overall interest of the PPP Project.
- (10) The Independent Expert shall always fulfil its duties and responsibilities in accordance with Applicable Law and good industry practices.

Procedure for Technical Dispute Resolution

- (11) Within [*five (5) business*] days of the Independent Expert's written acceptance, each Party shall submit to the Independent Expert a notice setting forth in detail such Party's position in respect of the issues of the Technical Dispute (each referred to as a "**Brief**"). Such Brief shall include:
 - a. (i) a description of the nature and background of the Technical Dispute, (ii) the issues arising and (iii) the position and arguments of the author of the Brief;
 - b. a statement of the relief claimed; and
 - c. copies of all supporting documentation if appropriate.
- (12) The Parties may be assisted by counsel during the Technical Dispute procedure.
- (13) The procedure shall be conducted in [*insert language of the Country*], but for documents originally written in English the Parties shall have the right to submit the original version thereof to the Independent Expert in support of their arguments.
- (14) The Parties shall cooperate with the Independent Expert and comply with his reasonable requests made in connection with the Technical Dispute procedure.
- (15) Unless otherwise agreed by the Parties, a meeting to provide an opportunity to the Parties to explain their positions orally to the Independent Expert and to the Independent Expert to request any additional information he deems appropriate shall be held within [*twelve (12) calendar*] days following the appointment of the Independent Expert. The date and place of said meeting shall be set by the Independent Expert within [*two (2) business*] days of the date of his appointment.
- (16) The Independent Expert may, either before, during or after the meeting, ask the Parties for any additional information he deems necessary. The Independent Expert may visit the site, providing at least [*48 hour notice*] in advance of the time of his visit in order for the other Parties to be present.

Decision of the Independent Expert

- (17) Unless otherwise agreed by the Parties, the Independent Expert shall give notice of his decision in writing to each of the Parties within [*eight (8) calendar*] days following the meeting and such notice shall include a statement of reasons in such form as the Independent Expert considers reasonably appropriate, having regard to the amount and complexity of the Technical Dispute.

- (18) Unless a different time limit is specified in this PPP Contract, the Independent Expert's decision shall be rendered within a maximum of [*thirty (30) calendar*] days following his written acceptance of the appointment.
- (19) In the event that the Independent Expert is unable to render his decision by the deadline set, either Party may invoke the arbitration procedure provided for in this PPP Contract, subject to the Parties agreeing to extend the deadline by which the Independent Expert must render his decision.
- (20) The decision of the Independent Expert shall be final and contractually binding on the Parties except in the case of manifest error or fraud.
- (21) The Parties agree to implement the decision of the Technical Dispute by the Independent Expert within [*thirty (30) calendar*] days (or any other period of time that the Independent Expert may reasonably determine) of such decision notice being issued.

Costs of the Independent Expert

- (22) The costs of the Technical Dispute procedure and the Independent Expert's fees shall be split equally between the Parties and each Party shall bear sole liability for its own expenses, provided, however, that the Parties may refuse to pay the expert's fees if the expert commits a fault in performing his assignment.

[The Parties should not hesitate to tailor this Schedule to the specific needs of the PPP Project. For example there could be a specific process for the construction phase, the commissioning, the infrastructure acceptance process, the handover phase, etc.]

List of Technical Experts

| No. | Technical Expert | Country | Contact Information (address, phone, email) |
|-----|------------------|---------|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
| 5. | | | |
| 6. | | | |
| 7. | | | |
| 8. | | | |
| 9. | | | |
| 10. | | | |

List of Financial Experts

| No. | Financial Expert | Country | Contact Information (address, phone, email) |
|-----|------------------|---------|---|
| 1. | | | |
| 2. | | | |
| 3. | | | |
| 4. | | | |
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| 8. | | | |
| 9. | | | |
| 10. | | | |

Alternative Language with a Dispute Board

Preliminary introduction: please note that the ICC Dispute Board Rules give Parties a choice between three different types of dispute boards:

- a. **Dispute Review Boards** (which issue non-binding recommendations);
- b. **Dispute Adjudication Boards** (which issues contractually binding decisions); and
- c. **Combined Dispute Boards** (which issues non-binding recommendations but may issue binding decisions if the Parties so requests).

We see the following issues to the Dispute Board approach:

- (1) First, its cost because the idea of a Dispute Board is to appoint outside board members.
- (2) Second, it lacks the consensual approach of the Dispute Panel provided above. The Parties must first agree on the appointment of the Dispute Board members and this can be a long and conflicting process in the context of a Dispute.
- (3) Third, if the decision of the Dispute Board is binding, there is little difference with the arbitration process (therefore the process is redundant with the arbitration clause) and if the recommendation is not binding there is little difference with the obligation to try to reach amicable settlement (and there is redundancy with the amicable settlement clause or the Dispute Panel clause).
- (4) Fourth, the process can be long and complicated as third parties are involved who have no background information on the PPP Project.

Dispute Review Board Provision

- (1) Failing an amicable settlement on a Dispute that is not a Technical Dispute pursuant to clause [insert reference to the amicable settlement clause] above within [thirty (30) calendar] days of the receipt of the notice provided therein, any such Dispute shall be referred by either Party for resolution by the dispute review board ("**Dispute Review Board**") in accordance with this clause.
- (2) The Parties hereby agree to establish a Dispute Review Board in accordance with the Dispute Board Rules of the International Chamber of Commerce (the "**ICC Dispute Board Rules**").
- (3) The Dispute Review Board shall be comprised of three (3) members, each of whom shall be fluent in [English] with professional experience in the matters with respect to contractual obligations in projects similar to the PPP Project, appointed in accordance with the ICC Dispute Board Rules.
- (4) All Disputes arising out of or in connection with this PPP Contract shall be submitted, in the first instance, to the Dispute Review Board in accordance with the ICC Dispute Board Rules. For any given dispute, the Dispute Review Board shall issue a recommendation in accordance with the ICC Dispute Board Rules.
- (5) If any Party fails to comply with a recommendation when required to do so pursuant to the ICC Dispute Board Rules, the other Party may refer the failure itself to the arbitration in accordance with clause [insert reference to the arbitration clause].
- (6) If any Party sends a written notice to the other Party and the Dispute Review Board expressing its dissatisfaction with a recommendation, as provided in the ICC Dispute Board Rules, or if the Dispute Review Board does not issue the recommendation within the time limit provided in the ICC Dispute Board Rules, or if the Dispute Review Board is disbanded pursuant to the ICC Dispute Board Rules, the Dispute shall be finally settled under arbitration in accordance with clause [insert reference to the arbitration clause].

