

# GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE

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2016



# **GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE**

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## FOREWORD

ÇAKMAK PUBLISHING is pleased to publish the first edition of the *Global Public-Private Partnership (PPP) Guide*.

*Global PPP Guide* is designed to provide an overview of applicable legislation and available incentives to PPP projects worldwide. It will aid investors, lenders and government agencies in understanding and comparing relevant provisions from different jurisdictions.

The publication maintains a Q&A format with a common questionnaire set by the editors and answered by leading practitioners from 34 jurisdictions around the world.

The following are notable observations from this 2016 edition of the *Guide* regarding the regulatory regime and available incentives for PPP projects in the 34 jurisdictions explored:

- In most of the countries, 23 out of 34, PPP projects are commonly used or starting to gain popularity, while in the remaining 11 countries PPP projects are either non-existent or not commonly used.
- The sectors where PPP model is used the most are the transportation sector (28 out of 34 countries), healthcare sector (14 out of 34 countries) and the energy sector (10 out of 34 countries). PPP model is also used in other sectors such as education, agriculture, water, IT, tourism, urban development, public buildings and mining.
- Almost half of the countries, 16 out of 34, have a centralized and PPP-specific regulatory authority to supervise and regulate the PPP projects.
- 18 out of 34 countries have a PPP framework law, while the remaining 16 countries rely on their public procurement and concessions legislation or general legal principles.
- More than half of the countries involved, 19 out of 34, provide for some sort of tax advantages for PPP projects.
- 15 out of 34 countries provide for additional incentives for the domestic manufacturing of equipment and materials used in PPP projects.

We are grateful to all of the authors of this publication, who have been selected for their recognized expertise in the PPP field, and thank them for making this Guide a reality.

We also gratefully acknowledge the support of CCN Holding, Gama Holding, Garanti Bank, Mitsubishi UFJ Financial Group, PPP Investment and Management Association, Rönesans Sağlık Yatırım, Türkerler Holding and Türkiye İş Bankası the publication of this Guide.

Dr. Zeynep Çakmak  
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Ankara, August 2016

# FRANCE<sup>12</sup>



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Two types of public-private partnerships (PPPs) are mainly used in France: (i) concession agreements, which have been used for decades, serve to implement major infrastructure projects such as canals, motorways, water distribution systems and toll bridges and (ii) partnership contracts, used since 2004, which are comparable to PFI contracts.

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

Usually, for new projects, when a public authority decides to assign the performance and the operation of a project to a private entity, Build-Operate-Transfer or Build-Operate-Own-Transfer models used.

However, if the public authority is assigning the management of a public service or infrastructure which has already been built then Transfer of Operation Rights type contracts are usually used.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

In France, PPPs are used in various economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) and the PPP market generates billion worth of activity every year. For example, in 2015, some landmark projects were finalized in the education sphere<sup>3</sup> and with regards to concession agreements, a major agreement was executed in the transport sector.<sup>4</sup>

<sup>3</sup> E.g. a 28-year partnership contract for the financing, design, construction, and maintenance of a new facility for the *Ecole Centrale Supélec* near Paris.

<sup>4</sup> The A355 Strasbourg bypass motorway concession.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

The transposition of the European directives pertaining to concession agreements and public procurements<sup>5</sup> has substantially modified existing French PPP laws which included several distinct legal regimes (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

Today, there are two types of PPP agreements: (i) the agreements where the private party is directly paid by the public entity (e.g. partnerships contracts) and (ii) agreements where the private party is paid by the users (e.g. concession agreements).

French PPP legislation has been consolidated and is now categorized into:

- the ordinance No. 2015-899 dated 23 July 2015 (the “Public Procurement Ordinance”) and its implementing decrees No. 2016-360 and No. 2016-361 dated 25 March 2016 (the “Public Procurement Decree”) which transposed the 2014/24/EU and 2014/25/EU public procurement directives<sup>6</sup> and which regulates the partnership contracts; and
- the ordinance No. 2016-65 of 29 January 2016 (the “Concession Agreement Ordinance”) and its implementing decree No. 2016-86 dated 1 February 2016

(the “Concession Agreement Decree”)<sup>7</sup>, which transposed the 2014/23/EU directive pertaining to concession agreements and which regulates the concession agreements.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

One major actor in the PPP sector in France is the Infrastructure Finance Support Service (mission d’appui au financement des infrastructures) (the “Fin Infra”). The Fin Infra is a dedicated unit within the Ministry of the Economy that assists public bodies in the implementation of partnership contracts<sup>8</sup>. The Fin Infra, which assists and advises public authorities in the preparation and negotiation of partnership contracts, has to issue an opinion about the financial sustainability of each partnership contract.<sup>9</sup> This requirement seems to be an effective way of avoiding the financial difficulties which come about in the implementation of some partnership contracts in France.

### 5. Are there any restrictions for foreign investors to develop/operate PPP projects?

The legislative framework for PPPs does not place any restrictions on foreign investors. Moreover, direct or indirect discrimination regarding investors or operators coming from European Union member States, from third countries parties to the Government Procurement Agreement of the World Trade Organization<sup>9</sup> or to Free Trade Agreements to

<sup>5</sup> Directives No. 2014/23/EU, No.2014/24/EU and No.2014/25/EU.

<sup>6</sup> Directives 2014/24/EU and 2014/25/EU related to public procurement, which were approved by the European Parliament on 15 January 2014 and adopted by the Council on 11 February 2014.

<sup>7</sup> Ordinance n°2016-65 of 29 January 2016 about concession agreements.

<sup>8</sup> The Fin Infra was created by a Decree No. 2016-522 dated 27 April 2016 and replaced the “MAPPP”.

<sup>9</sup> [https://www.wto.org/english/docs\\_e/legal\\_e/rev-gpr-94\\_01\\_e.htm](https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm).

which the Union is party is strictly prohibited<sup>10</sup>.

Contracts have to be awarded on the basis of objective criteria that ensure compliance with the principles of transparency<sup>11</sup>, non-discrimination and equal treatment<sup>12</sup>, with a view to ensuring an objective comparison of the relative value of the tenders in order to determine, in conditions of effective competition, which tender is the most economically advantageous.

Therefore, in accordance with the European directives<sup>13</sup>, public authorities from all members States (including France) must ensure equal treatment and not commit direct or indirect discrimination against economic operators from other Member States.

#### **6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

The Public Procurement Ordinance and the Concession Agreement Ordinance do not impose a long-stop date for the completion of construction.

However, it clearly provides that both partnership contracts<sup>14</sup> and concession agreements<sup>15</sup> are entered into for a period to be determined in light of the period needed to amortize the investments required.

<sup>10</sup> Subparagraph n°98 of the 2014/24/EU Directive regarding Public Procurement contracts opening statement.

<sup>11</sup> Article 18 of the 2014/24/EU Directive regarding Public Procurement contracts.

<sup>12</sup> Article 1 of the Public Procurement Ordinance and Article 1 of the Concession Agreement Ordinance.

<sup>13</sup> Directives No. 2014/23/EU, No. 2014/24/EU and No.2014/25/EU.

<sup>14</sup> Article 39 of Ordinance No. 2015-899 dated 23 July 2015 provides that the period of performance has to be determined in the contract.

<sup>15</sup> Article 34 of the Concession Agreement Ordinance.

Regarding the duration of the construction works the most common practice is that the parties determine specific clauses pertaining to the maximum duration of such works in the contracts.

#### **7. How are force majeure events defined, and what are the consequences of their occurrence?**

Under French case law, force majeure events are defined as an event beyond a party's control which the party could not reasonably have provided against before entering into the contract and which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party. For example, natural disasters, wars or strikes can be categorized as force majeure events.

French law does not expressly provide for the consequences of a force majeure event occurring. To get a sense of the potential consequences it is necessary to consider French case-law and French administrative law principles.

Usually, when this event is temporary, the private entity cannot be held responsible if it does not fulfil its contractual obligations during the duration of the force majeure event. However, when the event is not temporary, the agreement can be terminated by the judge<sup>16</sup>. In both cases, the public authority can unilaterally decide to terminate the contract.

When the contract is terminated as provided for in the contract, the private entity will be indemnified on the basis of the 'useful expenses' theory developed by the Supreme Administrative Court<sup>17</sup>.

<sup>16</sup> « *Synthèse - Délégations de service public* » Stéphane Braconnier, Emmanuel Kalnins, LexisNexis, date of update 27 July 2015.

<sup>17</sup> Supreme Administrative Court, 19 April 1974, *Société Entreprise Louis Segrette*, No. 82518.

In practice, the parties would define the consequences of force majeure events occurring under the contract.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

Article 70 of the Public Procurement Ordinance provides that the parties have to include a specific clause in the partnership contract pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

As regards concession agreements, French legislation does not impose any obligations. Pursuant to the freedom of contract principle, parties can agree on the consequences of political and legal risks occurring. Nevertheless, it should be noted that the risk regarding the operation of the works (which implies, among other things, real exposure to market fluctuation) are always borne by the private entity (the concessionaire)<sup>18</sup>. However, for most of the potential political and legal risks, French administrative case-law already defines the consequences of their occurrence.

For example, if the public authority, using the public power (*puissance publique*), enacts an administrative measure which makes performance of the agreement more difficult or expensive for the private entity, the latter can obtain full financial compensation<sup>19</sup>.

Finally, as regards potential cancellation or termination of concession agreements by a

<sup>18</sup> It should be bear in mind that this risk is the main feature of concession agreements and is the main criteria to distinguish concession agreements and partnerships contracts.

<sup>19</sup> For example, French Administrative Supreme Court, 28 April. 1939, *Cie des chemins de fer de l'Ouest*, Rec. CE 1939, p. 275, RDP 1940, p. 58, concl. Josse (see: *Le Lamy Droit Public des Affaires* 2015, No. 2845)

judge following a third party challenge, both PPP Agreement Ordinance<sup>20</sup> and Concession Agreement Ordinance<sup>21</sup> define the quantum of financial indemnification applicable. In such cases, the concessionaire may request to be indemnified for the expenses incurred under the concession agreement which have been benefitted the public authority, including financing costs.

From a project finance perspective, this express reference to the theory of “useful expenses” (*dépenses utiles*) should be reassuring for both sponsors and lenders.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under French law the reinstatement test is not envisaged. Pursuant to the freedom of contract principle, such a test may be included in a PPP agreement.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specially defined or provided for under French legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under French law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

French PPP legislation does not expressly

<sup>20</sup> Article 89.

<sup>21</sup> Article 56.

provide that step-in clause or substitution mechanisms have to be included into PPP agreements.

However, in practice, substitution mechanisms are provided by the direct agreements usually entered into force between the lenders and the public authority. Indeed, in this type of agreement, it is often provided that lenders are allowed to request, under certain circumstances and with prior approval of the public authority, the private entity's substitution.

As regards concession agreements, pursuant to French administrative case law, in cases of early termination, the public authority substitutes the private entity to ensure that the public service is still provided to users (in compliance with the public service continuity principle)<sup>22</sup>.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Under French Administrative law, arbitration procedures are not authorized for public authorities. This prohibition is a general principle of French public law<sup>23</sup>, but there are some legal exceptions<sup>24</sup>.

As regards concession agreements, according to a decision from the French Administrative Supreme Court dating back from 1966, the parties are not allowed to set arbitration provisions in the concession agreements<sup>25</sup>.

<sup>22</sup> Conseil d'Etat 19 décembre 2014, No. 368294, AJDA 2014. 2503.

<sup>23</sup> French Administrative Supreme Court, Opinion, 6 March 1986 No. 339710.

<sup>24</sup> Exceptions are listed in Article L. 311-6 of French Code of Administrative Justice.

<sup>25</sup> French Administrative Supreme Court, 20 May 1966, *Sieur Meunier*, No. 58839, Rec. CE 1966, p. 343.

However, regarding to the recent evolution in the legislation<sup>26</sup> it is not certain that such prohibition is still effective.

Partnership contracts are one of the legal exceptions given that arbitration procedure can be provided for by the agreement. Under Article 90 of the Public Procurement Ordinance, arbitration procedure can be used to settle disputes arising during the performance of the partnership contract. However, it is specified that only French law can apply to the arbitration procedure and, when the public authority is the French State Article 90 states that the arbitration procedure has to be authorized by decree.

PPP agreements are always governed by French law and parties cannot agree otherwise<sup>27</sup>.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

French legislation does not provide for regular market testing procedure. However, according to the freedom of contract principle, such test may probably be included in a PPP agreement.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The acceptance procedure is ruled by the

<sup>26</sup> As regards specifically the French legislation regarding the partnership contracts (i.e. Article 9 of the Public Procurement Ordinance).

<sup>27</sup> Article 9 of the Public Procurement Ordinance and Article 8 of the Concession Agreement Ordinance provide that the listed public authorities are subjected to the Ordinances provisions when they use PPP agreements.



provisions of the French civil code<sup>28</sup>.

Under these provisions, the acceptance of the work (*réception*) is the act by which the owner of the work declares that he accepts the work with or without reservation.

The acceptance occurs at the demand of the more diligent party, if not amicably, then judicially. In any case, it is a unilateral act of the owner which shall be pronounced adversarial.

The perfect completion period (*garantie de parfait achèvement*) is a period of one year, after the acceptance of the works.

#### **15. Are there any expected changes or reform to the existing legislation?**

The transposition of the European directives pertaining to concession agreements and public procurements has substantially modified the existing French PPP laws which that included several distinct legal regimes with strong specificities (i.e., administrative long-term leases, temporary occupation permits, partnership contracts and concession agreements).

While preserving certain specificities of French law, the new provisions, aim to simplify, clarify and unify the existing legal framework governing the award and implementation of concession and partnership contracts in accordance with recent French and European case law.

As regards the recent and major reform of the French PPP legal framework, no substantial changes are expected in the near future.

However, it should be noted that to further clarify the legal regime which applies to public law contracts, the French Economy Ministry decided to seize the opportunity provided for

<sup>28</sup> Article 1792-6 of the French Civil Code.

by the 2014 European directives transposition to simplify the French Public Procurement Code and to prepare a new code encompassing all public law contracts (including partnership and concession agreements) that should be published in the next few months<sup>29</sup>.

### **FINANCING & INCENTIVES**

#### **16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under a concession agreement, the operating risk is transferred to the concessionaire and this transfer necessarily implies a real exposure to market fluctuations. As such, the compensation of the concessionaire is linked to the results of such operation. Therefore, the concessionaire's compensation mainly arises from service users<sup>30</sup>.

However, this requirement does not prevent the payment of subsidies by the procuring authority. Given the requirements that could be imposed by the concession agreement, maintaining the financial viability and economical balance of the concession agreement is necessary so that the concessionaire does not apply higher rates to service users. For example, significant financial contributions are paid in concession projects related to rail infrastructure such as high-speed rail and motorways. Local authorities usually subsidize public transport or school catering concessions.

Apart from the revenue collected from service users and subsidies granted by public authorities, the concessionaire may also earn

<sup>29</sup> <http://www.boamp.fr/Espaceacheteurs/Actualites/Calendrier-de-la-reforme-des-marches-publics-2016>.

<sup>30</sup> Article 32 of the Concession Agreement Ordinance.

additional revenues (e.g., proceeds from side activities such as advertising and fines).

As regards partnership contracts, they are characterized by the payment of rents by the public authority to the private partner<sup>31</sup> throughout the term of the contract. This remuneration is determined for the services provided by the private entity (works, intangible investments, supplies and services) and is divided into several parts. One part represents the compensation of the private entity for the supply of equipment and the cover costs for servicing the loans contracted to carry out the investment, financing costs, taxes and fees that the private entity pays on its investments. The compensation also takes into account the services provided by the private partner. Finally, the compensation of the private entity must cover the maintenance costs and expenses for major maintenance and the renewal of certain infrastructures.

Partnership contracts should define the terms of the rents calculation and disbursement of the payment, which may be monthly, quarterly or half-yearly.

Under partnership contracts, the compensation is not necessarily fixed as it can take into account:

- (a) the completion of performance objectives – the compensation of the private entity may depend on performance targets set in the partnership contract. Premiums or bonuses may be paid (e.g., if the works are completed before the date specified in the contract). Likewise, penalties (e.g., in case of a delay in completion) may reduce the amount of the rent to be paid by the public authority; and
- (b) the collection of ancillary revenues – French law allows the private entity to

develop structures and equipment in order to benefit from complementary incomes.

Finally, the Public Procurement Ordinance specifies that should a partnership contract include the transfer of a public service management, the contractor could receive direct payments from service users on behalf of the public authority responsible for this public service. As such, the cash flows of each party will have to be clearly distinguished in order to avoid any confusion with the legal framework applicable to concessions.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under French law. However, pursuant to the freedom of contract principle, such a mechanism may be included in PPP agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There are no state guarantees per se issued for PPPs in France.

However, in early 2009, the State established a guarantee system for priority PPP projects in response to the financial crisis, which was affecting a number of very large PPPs. The Fin Infra examined four projects worth a total of over €13 billion, but only one project – under a concession agreement scheme – was selected to benefit from the guarantee: the high-speed railway – *Sud Europe Atlantique* – which was the biggest rail PPP ever launched in Europe (with total financing of €7.8 billion). This concession agreement was granted by

<sup>31</sup> Article 83 of the Public Procurement Ordinance.

*Réseau Ferré de France* to a consortium led by VINCI and the State guaranteed a €1.06 billion senior secured debt to the lenders.

Unlike the State, local authorities may guarantee loans assumed by the project company under a concession agreement or a partnership contract.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, French law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership or concession agreements. The guarantees issued to the benefit of the private partner are most of the time issued by financial institutions.

**20. Are deductions from the service and availability payments subject to a cap?**

Under the Public Procurement Decree, partnership contracts may include variation of the terms of the private entity's payment<sup>32</sup>. Furthermore, as outlined in question 16, under partnership contracts, the payment of the private entity is linked to performance objectives and therefore penalties may reduce the amount of the rent to be paid by the public authority.

It should be noted that the rent paid by the public authority may be reduced depending on the amount of ancillary revenues collected by the private entity.

<sup>32</sup> Article 161 of the Public Procurement Decree.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Being long-term agreements, PPP agreements often include specific clauses for the review of contractual terms, such as tariff-variation clauses, indexation clauses and meeting clauses.

Amendments can also be entered into, but only if the overall structure of the contract is not materially altered.<sup>33</sup> Administrative case law protects the co-contracting party of the administration. In fact, the economic balance of the contract must be maintained and the private co-contractor must be adequately compensated for the damages suffered.

The Concession Agreement Decree clarifies the legal framework applicable to concession agreements' amendments by setting out six circumstances in which valid modification of the concession agreement is permitted<sup>34</sup>.

For example, the Concession Agreement Decree provide that concession agreements may be amended provided that the amendment amount is less than (i) the European threshold published in the Official Journal of the French Republic and (ii) 10% of the original concession agreement<sup>35</sup>.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under French law, there is no requirement to share any gains from refinancing of the PPP project with the public authority. However, it is a common practice to include in PPP agreements refinancing gains sharing clauses. Generally, the refinancing gains sharing takes

<sup>33</sup> Article 65 of the Public Procurement Ordinance.

<sup>34</sup> Article 36 of the Concession Agreement Decree.

<sup>35</sup> Paragraph 6 of the Article 36 of the Concession Agreement Decree.

account of the rate of return (*taux de rentabilité interne*) and the term of the contract<sup>36</sup>.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

The public authority (including the State) may enter into direct agreements with the private party and its lenders to cover specific issues (cancellation or nullity of the concession agreement or the partnership contract) and preserve the lenders' interests.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Both the Concession Agreement Ordinance<sup>37</sup> and the Public Procurement Ordinance<sup>38</sup> provides that the public authority may assume the useful financial expenses incurred by the private entity in case of judicial termination or the cancellation of the contract subsequent to a third party claim. However the legislation does not specify whether the payable financial expenses cover the debts of the project and in particular the full amount of equity. In any case, the parties shall agree on such a mechanism.

<sup>36</sup> Decree No. 2011-85 of 21 January 2011 approving the concession agreement entered into for the operation of the motorway A 63.

<sup>37</sup> Article 56 of the Concession Agreement Ordinance

<sup>38</sup> Article 89 of the Public Procurement Ordinance.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The provisions for early terminations are the same for partnership contracts and concession agreements.

(a) Termination on the grounds of general interest

Should the public authority be a public entity, it cannot waive its unilateral right to terminate a public law contract on the grounds of general interest<sup>39</sup>. The quantum of the indemnity owed to the private entity is the highest of all termination cases.

(b) Termination for contractual breach by the public authority

To terminate a concession agreement on the basis of a contractual breach by the public authority, the concessionaire must request such termination before the relevant administrative jurisdiction. The concessionaire would then be entitled to be indemnified in accordance with the principles established by administrative case law, namely, to be indemnified in respect of losses suffered, as well as in respect of the loss of profits. Recent case law confirmed the possibility to include in a contract, not related to the performance of the public service, a provision allowing the private entity to terminate the contract for a contractual breach by the public authority.<sup>40</sup> Consequently, certain partnership contracts not related to the performance of the public service could potentially include such contractual provision.

<sup>39</sup> Supreme Administrative Court, 2 May 1958, Distillerie de Magnac-Laval, Rec. p. 246.

<sup>40</sup> Supreme Administrative Court, 8 October 2014, Société Grenke Location, No. 370644.

Except for these types of termination, the terms and conditions of other forms of termination can be freely negotiated by the parties.

(c) Termination for force majeure

If a force majeure event or an unforeseen event occurs, the PPP agreements may be terminated and the contract will usually provide that the private entity will be indemnified on the basis of the “useful expenses” (*dépenses utiles*) theory developed by the Supreme Administrative Court. As it is a jurisprudential theory, it is still difficult to determine which costs are deemed to be useful expenses and consequently are to be indemnified. However, financial expenses should be indemnified.<sup>41</sup>

In any case of termination, it is preferable to contractually provide the financial consequences and terms of payment of owed indemnities in the contract.

One of the major points of both the Public Procurement Ordinance<sup>42</sup> and the Concession Agreement Ordinance,<sup>43</sup> is the enshrinement of the principle of indemnification of financial expenses incurred under the partnership or the concession agreement in case of judicial cancellation following a third-party challenge.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

The Public Procurement Decree provides that

<sup>41</sup> The Supreme Administrative Court has recently held that financial expenses can be considered as useful expenses (Supreme Administrative Court, 7 December 2012, Commune de Castres, No. 351752). However, it must be specified that in this case, the concession agreement was not terminated on the grounds of a force majeure.

<sup>42</sup> Article 89 of the Public Procurement Ordinance.

<sup>43</sup> Article 56 of the Concession Agreement Ordinance.

during the awarding procedure, the public entity can introduce criteria or restrictions based on (i) the origin of all or part of the works, supplies or services offered in the tenders or (ii) on the nationality of the bidders<sup>44</sup>.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages available to the PPP projects provided for in the Public Procurement Ordinance and the Concession Agreement Ordinance.

**28. What are the other incentives available to PPP projects?**

There are no other incentives for the PPP projects provided for in the Public Procurement Ordinance and the Concession Agreement Ordinance.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In France, public-private partnerships (PPPs) are implemented in many economic sectors (e.g., transport, health, justice, education, urban equipment, environment, energy efficiency, telecommunications and culture) for more than €100 billion of activity each year.

Despite a climate of ideological distrust, financial difficulties faced by some local authorities and the decreasing number of executed agreements due to the weak economic climate, a closer look at 2015 activity seems to indicate a possible renewal of confidence in PPPs for the coming year.

Indeed, even though few partnership contracts were executed in France in 2015, it should still be noted that some landmark projects were

<sup>44</sup> Article 3 of the Public Procurement Decree.

finalized that year in the education sphere: a 28-year partnership contract<sup>49</sup> for the financing, design, construction, and maintenance of a new facility for the *Ecole Centrale Supélec* near Paris and a 25-year partnership contract for the financing, design, construction, operation and maintenance of two University of Lorraine's buildings.<sup>50</sup>

With regards to concession agreements, one major agreement was executed in the transport sector: the A355 Strasbourg bypass motorway concession, consisting of approximately 24 kilometres, entered into between the State and a consortium formed by VINCI Concessions and SOC 44 on 2 February 2016. Furthermore, the new French Ministry of Defence located in Paris (whose costs reached approximately €4.2 billion)<sup>51</sup> was inaugurated in November 2015.

<sup>49</sup> [www.partnershipsbulletin.com/news/view/86417](http://www.partnershipsbulletin.com/news/view/86417).

<sup>50</sup> [www.partnershipsbulletin.com/projects/view/8875](http://www.partnershipsbulletin.com/projects/view/8875).

<sup>51</sup> [www.wsws.org/en/articles/2015/11/12/hexa-n12.html](http://www.wsws.org/en/articles/2015/11/12/hexa-n12.html)

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# GUINEA<sup>1 2</sup>



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

In order to support sufficient economic growth and reduce poverty, the Republic of Guinea uses PPP agreements to address the country's substantial needs and to develop major new infrastructure and rebuild existing ones, especially in the sectors of mining, agriculture and services.

Since 1998<sup>3</sup>, a specific legal framework has been implemented for build-operate-transfer

(the “BOT”) agreements, which are types of PPP agreements. Agreements pertaining to the “Financing, Building, Operating, Maintenance and Transfer” of infrastructure<sup>4</sup> can be entered into by public authorities and private parties.

In a BOT project, a public entity authorizes to a private company the right to develop and operate a facility for a limited period. This company finances, owns and constructs the facility and operates it commercially for the project period. Usually, this type of agreement is used for building new infrastructures.

- 2. Which sectors apply a PPP model to develop infrastructure projects?**

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services. This includes among other things: hydro power infrastructure (dams and plants), mining infrastructure, transport infrastructure (roads, harbours, railways, and airports), telecommunication infrastructure, agricultural facilities, public facilities, tourist infrastructure and social infrastructure such as education and health.

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> Law No. 97/012/AN dated 1 June 1998.

<sup>4</sup> Article 1.1 of Law No. 97/012/AN.

Pursuant to the Guinean Public Procurement Code, public service delegation agreements can be entered into in all sectors where public services are, or are supposed to be, managed.

Since 1990, private sector participation in infrastructure, totalling US\$ 1.3 billion, has been concentrated in the telecoms sector through divestitures and new projects implementation<sup>5</sup>. However, major PPP transactions have also taken place in the transport<sup>6</sup>, mining, water and electricity sectors.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

In order to facilitate the development of infrastructure projects, the Republic of Guinea enacted Law No. 97/012/AN dated 1 June 1998 (the “BOT Law”) authorizing the private sector to finance, build, operate, maintain and transfer infrastructure. Indeed, public authorities can enter into different types of BOT agreements, such as build-and-transfer agreements (BT), develop-operate-and-transfer agreements (DOT) and rehabilitate-own-operate agreements (ROO).<sup>7</sup>

The PPP legal framework is complemented by the Guinean Public Procurement Code (the “Public Procurement Code”) enacted by Decree 2012/128/PRG/SGG dated 3 December 2012. This Code regulates public procurement contracts, including a specific type of PPP agreement, the “public service delegation agreements” (a type of concession agreement).

<sup>5</sup> <http://ppi.worldbank.org/snapshots/country/guinea>.

<sup>6</sup> Such as a 25-year port concession agreement for the Conakry container terminal.

<sup>7</sup> Article 1 of the BOT Law.

This type of agreement, usually authorized in relation to existing assets or an existing utility, gives a concessionaire a long term right to use all utility assets conferred, including responsibility for operations and some investment. The concessionaire bears the risk for the condition of the assets and for investment.

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

Except for public service delegation agreements, there is no dedicated regulatory body for PPP agreements.

As regards public service delegation agreements, the regulatory body is the Regulatory Authority of Public Procurement Contracts (*l’Autorité de Régulation des Marchés Publics*).<sup>8</sup>

This body is responsible for, among other things, ensuring regular application of the Public Procurement Code provisions, drafting and updating methodological handbooks for potential bidders and public authorities, setting up a data bank of public procurement contracts and controlling company certification procedures.

In addition to this regulatory body, there exists:

- The National Public Procurement Contracts Directorate. Its main mission is to implement the contract awarding process. It is exclusively responsible for receiving and opening the bids, evaluating them, selecting a temporary private entity and sending its choice to the Ministry of Finances for approval.<sup>9</sup>

<sup>8</sup> Chapter 3 of the Public Procurement Code.

<sup>9</sup> Article 9 of the Public Procurement Code.



- The Public Procurement Contracts and Major Projects Administration (“*Administration et Contrôle des Grands Projets et des Marchés Publics*”), an entity directly under the control of the Guinean President<sup>10</sup>. It is in charge of controlling the regular application of the public procurement laws and the public procurement contracts awarding procedure and performance.<sup>11</sup>

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

Nevertheless, it should be noted that in relation to public service delegation agreements, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Guinean economy.<sup>12</sup>

For example, during the bid evaluation phase the public authority can decide to apply an increasing percentage on the price of tenders by foreign bidders.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Guinean PPP legislation does not impose a long-stop date for the completion of construction in BOT agreements.

However, the BOT Law does provide that BOT agreements are entered into for a period determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be

performed.<sup>13</sup> The period must also be determined in accordance with a feasibility study.

It is common practice that the parties would determine specific clauses pertaining to a maximum duration for the construction in the contracts.

As regards public service delegation agreements, the period of the contract as well as the schedule for the completion of each step must be defined under contractual provisions.<sup>14</sup>

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

Guinean PPP legislation does not especially provide for the consequences of a force majeure event occurring during the performance of BOT agreements. It only states that contract duration can be modified in case of a force majeure event<sup>15</sup>.

In relation to public service delegation agreements, the Public Procurement Code<sup>16</sup> defines a force majeure event and the consequences of its occurrence. It states that a force majeure event occurs when: there is a practical difficulty which is due to causes outside of the private entity’s control and which hinders the private entity in fulfilling its contractual obligations

As the Guinean PPP legislation does not provide for all the potential consequences of a force majeure event occurring, the parties are free to agree on the consequences of this type of event in respect of the other provisions of the agreement (i.e. early termination, etc.)

<sup>10</sup> Article 10 of the Public Procurement Code.

<sup>11</sup> Articles 11 and 12 of the Public Procurement Code.

<sup>12</sup> Articles 65 and 66 of the Public Procurement Code.

<sup>13</sup> Article 12 of the BOT Law.

<sup>14</sup> Article 85 of the Public Procurement Code.

<sup>15</sup> Article 12.2 of the BOT Law.

<sup>16</sup> Article 109 of the Public Procurement Code.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The Guinean State provides that a list of guarantees<sup>17</sup> may be awarded to private party to limit the consequences of political and legal changes which could directly impact upon the PPP agreement's performance and economic rationale.

For example, the State ensures unrestricted importation of equipment and supplies<sup>18</sup>, free movement of capital necessary for the project implementation<sup>19</sup> and subsidies if the services to be provided under the BOT agreement cannot be sold at the price defined in the agreement.<sup>20</sup>

In relation to public service delegation agreements, the legislation does not provide any specific political and legal risk allocation.

In any case, parties can agree on the consequences of certain risks occurring as long as it complies with the BOT Law's provisions pertaining to risk guarantees.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Guinean legislation no reinstatement test is provided. Pursuant to the freedom of contract principle such a test may be included in BOT agreements. However in practice, public entities are keen to reinstate the facilities rather to repay debt to the lenders.

<sup>17</sup> Article 7 of the BOT Law.

<sup>18</sup> Article 7.2.1 of the BOT Law.

<sup>19</sup> Article 7.2.4 of the BOT Law.

<sup>20</sup> Article 7.2.13 of the BOT Law.

**10. Is the concept of 'uninsurability' recognized in the project agreements?**

The concept of "uninsurability" is not specifically defined or provided for under Guinean legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Guinean law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

In cases of early termination, the lenders can ask the public authority to substitute the private entity for a third party if such a party is able to ensure proper performance of the contract and is qualified enough to carry out the PPP project.<sup>21</sup>

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Guinean PPP legislation allows BOT agreements to stipulate that disputes can be settled through international arbitration<sup>22</sup>. Arbitration clauses in BOT agreements will need to set out this procedure (e.g. seat of arbitration, language of the arbitration, procedural law applicable).

Parties can choose the law that governs the contract. If no specific governing law is chosen by the parties then Guinean law applies automatically.

In relation to public service delegation agreements, the Public Procurement Code

<sup>21</sup> Article 12.6 of the BOT Law.

<sup>22</sup> Article 13 of the BOT Law.

does not expressly specify that arbitration procedure can be used to settle disputes. However, in the case of a dispute arising during the contract's performance, prior to any judicial or arbitral remedy, the private entity has to first seek remedy from the public authority or a higher administrative authority<sup>23</sup>. Therefore, we can assume that it is possible for parties to public service delegation agreements to choose an international arbitration procedure to settle potential disputes.

Finally, the Public Procurement Code does not expressly provide that foreign laws can govern contracts.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Guinean PPP legal framework does not provide for a regular market testing procedure to procure the services to be provided by the private entity.

Such a test is also not provided for in public service delegation agreements or BOT agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Guinean PPP legislation does not provide a specific acceptance procedure once the construction works of the infrastructure is

<sup>23</sup> Articles 133 and 134 of the Public Procurement Code.

completed. However, parties can freely include a particular procedure under the PPP agreement provisions.

Under the Guinean Building and Housing Code (*Code de la Construction et de l'Habitat Guinéen*), a technical control has to be done<sup>24</sup> and an acceptance procedure has to be performed<sup>25</sup>. The acceptance phase consists in a contradictory procedure involving the construction contractor (*entrepreneur*) and the project owner (*maître d'ouvrage*).<sup>26</sup>

**15. Are there any expected changes or reform to the existing legislation?**

Although Guinea has a framework PPP law (the BOT Law), the use of PPP agreements is not widespread among public authorities. This may be due to the lack of guidelines, the absence of a strategic framework with clear political support and sufficient expertise for the technical structuring of such agreements and projects.

The solution to this problem would be to strengthen the capacity of public authorities to plan, coordinate and implement projects.

It should be pointed out that, pursuant to Decree dated 17 October 2014 and following a formal request from the Guinean President, Alpha Condé, the Presidential Council about Investments and Public Private Partnership ("*Conseil Présidentiel des Investissements et des partenariats publics et privés*")<sup>27</sup> has been implemented.

This new entity, acting under the President authority, is supposed to promote a direct dialogue between the State, the private sector and the civil society to identify and remove

<sup>24</sup> Articles 43 to 45 of the Guinean Building and Housing Code.

<sup>25</sup> Articles 46 to 48 of the Guinean Building and Housing Code.

<sup>26</sup> Article 46 of the Guinean Building and Housing Code.

<sup>27</sup> Article 1 of Decree dated 17 October 2014.

barriers to investment in the country.<sup>28</sup> In light of this we can expect future changes to the Guinean PPP legal framework based on the work and recommendations of the Presidential Council about Investments and Public Private Partnership.

## FINANCING & INCENTIVES

### 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

Under BOT Law<sup>29</sup>, the payment of the private entity is provided either by the public authority or by the users (royalties, fees and other cost under the usage tariffs).

In respect of public service delegation agreements, the Public Procurement Code provides that payment of the private entity comes from the revenues generated from operating the project.<sup>30</sup>

Finally, as regards inflation and/or foreign exchange protection and pursuant to the BOT Law<sup>31</sup>, the public authority guarantees to foreign investors the free transfer of (i) the income generated by their investments; (ii) the dividends due to foreign shareholders; and (iii) the liquidation proceeds of such investments.

### 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

The BOT Law refers to a rate of return (*taux de rentabilité raisonnable*) for BOT agreements that shall not exceed 12% unless otherwise agreed<sup>32</sup>. There is no similar provision in the Procurement Code. However, in accordance

with the freedom of contract principle, such a mechanism may be included in public service delegation agreements.

### 18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?

Under the BOT Law<sup>33</sup>, the public authority undertakes to provide a payment guarantee (*subvention d'équilibre*) to the private entity in the event that the services under BOT agreements are sold locally at lower prices than those provided for in the PPP agreement.

### 19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Guinean law does not provide for separate guarantees to be granted by the Treasury to private entities. It should be noted that such guarantees are not usually provided for in BOT agreements. The guarantees provided for the benefit of the private partner are mainly given by financial institutions.

### 20. Are deductions from the service and availability payments subject to a cap?

Deductions from the service and availability payments are not specifically provided for under the BOT Law. However, such clauses can be included in BOT agreements in accordance with the freedom of contract principle.

In respect of public service delegation agreements, the Public Procurement Code<sup>34</sup>

<sup>28</sup> Article 2 of Decree dated 17 October 2014.

<sup>29</sup> Article 1.3 of the BOT Law.

<sup>30</sup> Article 1 of the Public Procurement Code.

<sup>31</sup> Article 7.2.4 of the BOT Law.

<sup>32</sup> Article 1.23 of the BOT Law.

<sup>33</sup> Article 7.2.13 of the BOT Law.

<sup>34</sup> Article 1 of the Public Procurement Code.

provides the private entity' payment is substantially provided by the revenue generated by operation of the service but neither specifies whether deductions from service payments can be provided. In practice, such clauses are included by the parties in public service delegation agreements.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Guinean law is silent on the question of whether variations may be subject to a cap. However, in accordance with the freedom of contract principle, the parties may agree to such a cap.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share any gains arising from refinancing of the PPP project with the public authority under Guinean law. However, in accordance with the freedom of contract principle, gains sharing clauses may be agreed by the parties.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There is no requirement to enter into direct agreements under Guinean law. However, as outlined in question 11, the BOT Law<sup>35</sup> authorizes lenders substitution rights in case of termination of BOT agreements.

It should be noted that in general under direct agreements, the lenders will be entitled to intervene or "step-in" the shoes of the project company or the contractors in respect of the key project agreements. The step-in rights are usually triggered when either the project

company or the contractors have defaulted or there is reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over the project company, the project itself or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

**24. Is there a debt assumption mechanism whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Neither the BOT Law, nor the Public Procurement Code provide for a debt assumption mechanism whereby the public authority undertakes to reimburse the debt of the project company to the lenders. However, in accordance with the freedom of contract principle, such a mechanism may be included in BOT agreements.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

The BOT Law<sup>36</sup> only provides for payments to be made by the public entity to the project company in case of termination for a reason of national defence. However, in accordance with the freedom of contract principle, other cases of termination may triggers payments to be discharged by the administration to the private entity.

<sup>35</sup> Article 12.6 of the BOT Law.

<sup>36</sup> Article 12.5.2 of the BOT Law.

Besides, it should be also noted under the BOT Law<sup>37</sup>, the public authority guarantees a proper compensation to the private entity in case of early handover.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

There is no incentive for domestic manufacturing of equipment or materials used in the construction of PPP projects under the BOT Law.

However, in respect of public service delegation agreements and as outlined in question 5 above, a “national preference” percentage can be applied during the selection of the tenders which takes account of domestic manufacturing of equipment.<sup>38</sup>

**27. Are there tax advantages available to PPP projects?**

The BOT Law<sup>39</sup> provides that the private entity is exempted from any tax or customs royalties and guarantees a stable tax regime. There is no similar provision in the Public Procurement Code.

**28. What are the other incentives available to PPP projects?**

The BOT Law<sup>40</sup> guarantees to the private entity the benefit of all incentives granted under the Guinean Investment Code.

Furthermore, in respect of large investments implemented in sectors of particular importance to the national economy and public interest, the BOT Law<sup>41</sup> provides full

exemption from taxes, a reduced VAT as well as pricing structure similar to the one applicable to oil products.

Finally, in addition to financial incentives, the BOT Law<sup>42</sup> provides to the private entity a full range of incentives, including the freedom to choose subcontractors, freedom to import goods, materials, equipment, machinery, equipment, spare parts and consumables and all the necessary public permits and authorizations required to implement the PPP project.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

Although infrastructures development is one of the key priorities of the Guinean State, it should be noted that investments in PPP projects have been relatively minor up to 2012. However, since then a number of major projects have been developed in Guinea. For example, the rehabilitation and the extension of electricity network of Conakry<sup>43</sup>. A major PPP project, namely the 240 MW Kaleta hydro power plant was also inaugurated in 2015.

<sup>37</sup> Article 7.2.12 of the BOT Law.

<sup>38</sup> Articles 65 and 66 of the Public Procurement Code.

<sup>39</sup> Article 10 of the BOT Law.

<sup>40</sup> Article 9.3 of the BOT Law.

<sup>41</sup> Article 9.6 of the BOT Law.

<sup>42</sup> Article 7.2 of the BOT Law.

<sup>43</sup> [http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN\\_data/Cn\\_Long\\_FR/Guinee\\_2015.pdf](http://www.africaneconomicoutlook.org/fileadmin/uploads/aeo/2015/CN_data/Cn_Long_FR/Guinee_2015.pdf).

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# IVORY COAST<sup>12</sup>



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### GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP contract model is commonly used in Ivory Coast to develop major infrastructure projects. The first Ivorian PPP agreement (which was a concession agreement) entered into force in 1960 in the water sector between the national water utility of Ivory Coast and

the Ivorian company SODECI.<sup>3</sup>

From 2012, with the adoption of a new decree pertaining to partnership agreements, Ivorian law recognizes two categories of contracts for the financing, construction, operation, servicing and maintenance of infrastructure and public assets. These are: (i) public service delegation agreements, where the contract holder generates revenue through the commercial operation of a project (in particular the fees paid by users); and (ii) partnership agreements where a private sector entity is paid rents by a public entity for building and operating infrastructure.

As such, the public authority has to determine the exact nature of the contract that is agreed, taking into account the services to be performed and the payment conditions of the private entity.

In both public service delegation agreements and partnership agreements, the public authority can assign the design, build and operation of a project to a private entity (i.e. Build-Operate-Transfer or Build-Operate-

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> <https://library.pppknowledgegelab.org/PPIAF/documents/1694>. The operation of urban public distribution of drinking water in Ivory Coast and in Abidjan was delegated to SODECI under concession agreements (*affermage*).



Own-Transfer agreements). However, under a particular type of contract known as a *contrat d'affermage*, the public authority can only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

Given the needs of the Ivory Coast in terms of infrastructure, we note that the Ivorian State launched reforms in 2016 in order to modernize the PPP legal framework.<sup>4</sup>

## 2. Which sectors apply a PPP model to develop infrastructure projects?

PPP agreements are commonly used in Ivory Coast for the development of infrastructure and the management of public services in the following sectors: water, education, health and transport<sup>5</sup>.

Since 1990, ten PPP projects, totalling US\$ 1,618 million<sup>6</sup>, have reached financial close mainly in the water and the transport sectors. This includes the Henri Konan Bédié bridge (the first public-private partnership scheme of its kind in West Africa<sup>7</sup>).

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

The Ivorian PPP legal framework is characterized by its dualism.

In order to facilitate the development of infrastructure projects, Ivory Coast recently created a new category of contracts called

partnership agreements and implemented this through Decree No.2012-1151 dated 19 December 2012 (the “PPP Decree”). Moreover, the institutional framework pertaining to partnership agreements is set up by Decree No.2012-1152 dated 19 December 2012 as modified by Decree No. 2014-246 dated 8 May 2014 (the “PPP Institutions Decree”).

Public service delegation agreements used for decades in Ivory Coast (i.e. concession agreements and *contrats d'affermage*) are today governed (by the Ivorian Public Procurement Code enacted by Decree No. 2009-259 dated 6 August 2009 and modified by Decree No. 2013-308 dated 8 May 2013, Decree No. 2014-306 dated 27 May 2014 and Decree No. 2015-525 dated 15 July 2015 (the “Public Procurement Code”).

### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

At present, pursuant to the PPP institutions Decree<sup>8</sup>, there are three bodies which regulate partnerships agreements in the Ivory Coast.

The most important body is the *Comité National de Pilotage des PPP* (the “CNP-PPP”). Its main mission is to, among other things; devise strategies to develop PPP agreements, submit new drafts of new rules to the government in order to upgrade the PPP legal framework, give its approval regarding infrastructure projects using PPP agreements and give approval to awarding procedure documents and evaluation criteria etc.<sup>9</sup>

The other regulatory bodies are the *Secrétariat Exécutif des PPP* (the “SE-PPP”) and the *Cellule d'Appui des PPP* (the “CA-PPP”), which have been created to provide support to the CNP-PPP.

<sup>4</sup> See question 15 of the questionnaire.

<sup>5</sup> Article 4 of Decree No. 2012-1151.

<sup>6</sup> <https://pppknowledgelab.org/countries/c%3%B4te-d%20E2%80%99ivoire>

<sup>7</sup> <http://www.globalconstructionreview.com/news/ivory-coast-g4et4s-n8e8w-p0p0p-br4id4ge/>

<sup>8</sup> Article 3 of the PPP Institutions Decree.

<sup>9</sup> Article 4 of the PPP Institutions Decree.

With regard to public service delegation agreements, none of the regulatory bodies detailed above is involved in implementation and performance. Article 2 of Decree No. 2009-260 dated 6 August 2009 established the regulatory body known as the *Autorité Nationale de Régulation des Marchés publics*. This institution regulates the public procurement sector<sup>10</sup>; among other things, it provides support to government in defining new rules, assists in developing strategies regarding the implementation of public procurement contracts, conducts independent audits of public procurement contracts in force, and settles disputes related to awarding procedures and contract performance.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

The legislative framework for PPPs does not place any restrictions on foreign investors.

However, it should be noted that in any awarding procedure for public service delegation agreements, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Ivorian economy.

During the bids evaluation phase, the public authority can decide to apply a margin of preference (“*marge de préférence*”) from 1% to 15% to the tenders of bidders from the Economic Community of West African States (“ECOWAS”).

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Ivorian PPP legislation does not impose a long-stop date for the completion of construction in PPP agreements.

<sup>10</sup> Article 3 of Decree No. 2009-260 dated 6 August 2009.

However, the PPP legislation does provide that PPP agreements must define the performance period and the terms and conditions of any potential extension<sup>11</sup>.

Moreover, it is common practice for parties to determine specific clauses pertaining to a maximum duration for the completion of construction in contracts.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in Ivorian case law as an “*unforeseeable and irresistible event, including external causes*”. Therefore force majeure is defined as an event beyond a party's control which the party could not reasonably have foreseen before entering into the contract or which the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

The events that could be defined as force majeure events in the context of PPPs include natural disasters, war, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, riot, commotion, disorder, strike or lockout by persons other than the parties' personnel.

Moreover, the PPP Decree<sup>12</sup> provides that direct negotiation procedure can be used by the public authority to enter into PPP agreements (rather than using the normal public tender procedure) in case of a force majeure event.

As regards public service delegation agreements, the Public Procurement Code<sup>13</sup> provides that in case of force majeure,

<sup>11</sup> Article 22 of the PPP Decree.

<sup>12</sup> Article 17 of the PPP Decree.

<sup>13</sup> Article 96.2 of the Public Procurement Code.

mutually agreed contracts (“*contrats de gré-à-gré*”) can be used and late penalties can be partially or totally waived<sup>14</sup>.

Although Ivorian PPP legislation largely does not cover the consequences of a force majeure event occurring during the term of a PPP agreement, parties are still free to agree on the consequences of this type of event for other elements of the agreement (i.e. early termination etc.).

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Decree<sup>15</sup> provides that partnership agreements have to include a specific clause pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

Under the PPP Decree<sup>16</sup>, the State ensures that tax legislation, customs procedures and financial regimes during the entire period of the PPP agreement’s performance remain stable. In addition, it ensures that when the authorized company cannot use adjustment clauses under the agreement, modifications regarding tax laws and financial regulations do not affect the financial model and the financial and economic balance of PPP agreements already in force.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Ivorian law, no reinstatement test is provided. Pursuant to the freedom of contract

principle, such a test may however be included in PPP agreements.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specifically defined or provided for under Ivorian legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Ivorian law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Ivorian PPP legislation is silent as to whether or not substitution clauses or step-in clause have to be included in PPP agreements. Therefore, it seems that the parties can freely stipulate such clause to be included.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Pursuant to the PPP Decree,<sup>17</sup> only Ivorian law can govern project agreements and direct agreements with lenders.

It provides<sup>18</sup> that disputes between a public authority and a private entity shall be settled according to the procedure the parties agreed on under the agreement. Therefore, if the parties agree on an international arbitration clause, this procedure can be used if a dispute arises.

<sup>14</sup> Article 109.3 of the Public Procurement Code.

<sup>15</sup> Article 22 of the PPP Decree.

<sup>16</sup> Article 23 of the PPP Decree.

<sup>17</sup> Article 29 of the PPP Decree.

<sup>18</sup> Article 30 of the PPP Decree.

However, disputes regarding awarding procedure cannot be settled through arbitration procedure given that only the *Autorité Nationale de Régulation des Marchés Publics* has jurisdiction over this matter<sup>19</sup>.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Ivorian PPP legislation does not provide for a regular market testing procedure to procure the services to be provided by the authorized company.

Such a test is also not provided for in public service delegation agreements or partnership agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Ivorian PPP legislation does not provide for a specific acceptance procedure once the construction works of infrastructure is completed.

In practice, the procedure of acceptance is defined by the parties in the contractual provisions. It is usually provided that acceptance procedure is divided into two phases.

<sup>19</sup> Article 30 of the PPP Decree.

Firstly, once the construction works are completed, a “temporary acceptance” phase takes place. During this phase, the public authority controls the compliance of the works with the laws and the contractual and technical specifications. After this period, the private party can be asked to undertake complementary works. Once the latter are performed, a “definitive acceptance” phase can take place.

**15. Are there any expected changes or reform to the existing legislation?**

The Ivorian government recently decided to reform existing PPP legislation.

The aim is to unify the current legal framework which is divided into the Public Procurement Code and the PPP Decree in order to take into account the goals pursued by the 2005 WAEMU’s directives on public procurement contracts awarding procedure and performance<sup>20</sup>.

It should be noted that changes in the legislation could help the country meet the government’s 2020 deadline for reaching emerging economy status. Among Ivory Coast’s planned projects, there are 94 PPP agreements, offering several opportunities for foreign investors to participate in the development of the country<sup>21</sup>.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

Under the PPP Decree, the payment of the private entity is provided either by the public

<sup>20</sup> Newsletter “Objectif Afrique”, n° 19 dated 5 February 2016, page n°11.

<sup>21</sup> <http://www.oxfordbusinessgroup.com/news/la-c%C3%B4te-divoire-multiplie-les-projets-dinfrastructures-de-grande-envergure>.

authority or by the users<sup>22</sup>. Generally, the payment provided by the public authority is linked to performance objectives.

As regards public service delegation agreements, the private entity is compensated from income derived from service users and such payment is substantially linked to service operation outcomes.

In addition, as regards inflation and/or foreign exchange protection, the PPP Decree<sup>23</sup> provides that Ivorian State guarantees to the operators a stable financial system for the duration of the PPP agreements. It is also specified that change in law in respect of financial matters shall not result in changes to the economic balance of partnership agreements.

Furthermore, in respect of public service delegation agreements, the Public Procurement Code<sup>24</sup> provides that public service delegation agreements must guarantee a legal, financial and accounting framework for the benefit of both parties.

The “Franc Zone” is an economic and monetary union whose members include France, Ivory Coast and fourteen other African States. Its core principles are laid down in the Monetary Cooperation Agreement of 1972 between the Bank of Central African States (BCAS) and France, and the Cooperation Agreement of 1973 between the West African Monetary Union (WAMU) and France. These principles revolve around an unlimited convertibility guarantee whereby the French Treasury guarantees without any limits the conversion of CFA francs to euros, and a fixed exchange rate between the CFA franc and the euro. In exchange for pegging the CFA franc to the euro and for the unlimited convertibility guarantee, BCAS and WAMU undertake to deposit some of their foreign

exchange reserve with the French Treasury on an operational account whose mechanism is governed by the aforementioned cooperation agreements.

In Ivory Coast and more generally in the entire Franc Zone, key hedging related issues are quite typical for this type of transaction. These include, in respect of the borrower, establishing capacity and authority, and in respect of the jurisdiction, confirming enforceability of the hedging documentation and foreign judgments, as well as determining whether any licensing and/or consent requirements exist. ISDA Master Agreements have been used in the past by Ivorian borrowers with foreign entities.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or sponsors under Ivorian law. However, pursuant to the freedom of contract principle, such a mechanism may be included in partnership agreements and public service delegation agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Decree, nor the Public Procurement Code provides for a specific payment guarantee provided by the relevant public authority for PPP projects. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership agreements and public service delegation agreements.

<sup>22</sup> Article 1 of the PPP Decree.

<sup>23</sup> Article 23 of the PPP Decree.

<sup>24</sup> Article 181 of the Public Procurement Code.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Ivorian law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership agreements and public service delegation agreement. The guarantees issued to the benefit of the private partner are usually issued by financial institutions.

**20. Are deductions from the service and availability payments subject to a cap?**

Deductions from the service and availability payments are not specifically provided under the PPP Decree. However, such clauses can be included in Partnership agreements pursuant to the freedom of contract principle.

In respect of public service delegation agreements, the Public Procurement Code<sup>25</sup> provides that the private entity's payment is substantially provided by the service operation incomes but does not specify whether deductions from service payments can be provided. In practice, such clauses are provided by the parties under public service delegation agreements.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Decree<sup>26</sup> provides for the conditions of variations and amendments to Partnership agreements but there is no reference to a cap.

**22. Is there a requirement to share gains any arising from refinancing of the PPP project with the public authority?**

There is no requirement to share gains arising from refinancing of the PPP project with the public authority under the PPP Decree. However, the parties are free to agree such a mechanism.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

Although Ivorian PPP law does not specifically refer to direct agreements, it is common practice that the lenders and the relevant public authority will sign direct agreements.

Under direct agreements, the lenders will be entitled to intervene or "step-in" the shoes of the project company or the contractors in respect of key project agreements. The step-in rights are usually triggered when either the project company or the contractors have defaulted or there is a reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over either the project company or the project itself, or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

<sup>25</sup> Article 3 of the Public Procurement Code.

<sup>26</sup> Section III of Chapter V of the PPP Decree.

The PPP Decree<sup>27</sup> provides that the parties must provide for indemnification clauses but doesn't specifically refer to any debt assumption mechanism. Therefore, the parties can freely agree on mechanism for the benefit of the lenders.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Although it does not regulate the payments to be made by the administration in cases of termination, the PPP Decree requires, as outlined in question 24, that the parties agree on indemnification clauses under partnership agreements.

In respect of public service delegation agreements, payments are to be made by the administration in cases of termination except in case of contractual breach by the private entity.<sup>28</sup> This compensation is strictly linked to the expected loss of profit and calculated at the termination date unless otherwise provided for in public service delegation agreements.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Although there is no clear incentive for domestic manufacturing of equipment used in the construction of PPP projects, it should be noted that it follows from the PPP Decree<sup>29</sup> that one of the main principles that governs partnership agreements is the promotion of such agreements as a source of (i) development of Ivorian companies, in particular small and

medium-sized businesses; (ii) growth and employment, especially through professional development opportunities for young people and upskilling of the local workforce.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages under the PPP Decree other than, as the case may be, those referred to in the Investment Code dated 7 June 2012. For instance, this code provides for a range of tax exemptions<sup>30</sup> and customs charges reductions<sup>31</sup> available to projects implemented in the eligible sectors.

**28. What are the other incentives available to PPP projects?**

There are incentives available to PPP projects, other than those referred to in the Investment Code dated 7 June 2012. For instance, some incentives are available to small and medium-sized companies such as exemption from registration fees for all documents subject to registration and the provision by the Ivorian State of the lands necessary for the implementation of the projects.<sup>32</sup>

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

In connection with the National Development Plan (*Plan National de Développement*) for 2012-2015, US\$ 22 billion was expected to be invested in several projects, with almost half of this amount to be provided by the private sector in infrastructure, agriculture and security. A part of this amount is aimed at developing PPP projects<sup>33</sup>.

<sup>27</sup> Article 28 of the PPP Decree.

<sup>28</sup> Article 144 of the Public Procurement Code.

<sup>29</sup> Article 6 of the PPP Decree.

<sup>30</sup> Article 37 of the Investment Code.

<sup>31</sup> Article 45 of the Investment Code.

<sup>32</sup> Article 49 of the Investment Code.

<sup>33</sup> <http://www.globalbusiness.uk.com/pdfs/2014/2014-09-ivorycoast.pdf>

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# KINGDOM OF MOROCCO<sup>12</sup>



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Until 2015, infrastructure projects were implemented in Morocco only under the model of concession agreement and delegated management agreement (*gestion déléguée*) that can be classified in the same category of contracts as the private partner is compensated by third party revenues.

Since 2015, PPPs can also be implemented under the model of partnership contract (*contrat de partenariat public-privé*).

As such, Moroccan law establishes two categories of global contracts for the financing, construction, operation, servicing and maintenance of structures, facilities and public assets: (i) concession agreements and delegated management agreements whereby the contract holder is mainly remunerated by the commercial operation of the work (in particular by fees paid by users) and (ii) partnership contracts whereby the contract holder is mainly remunerated by public entity payments from the commissioning date of the work until the end of such agreement.

Based on the envisaged project, the grantor will determine the type of contract to be concluded. He will take into consideration the services to be performed and the payment conditions of the private entity.

For concession agreements, delegated management agreement and partnership contracts, the grantor can assign the design, build, and operation of a project to a private entity (*i.e.* Build-Operate-Transfer or Build-Operate-Own-Transfer agreements).

However, under a particular type of contract known as *contrat d'affermage*, the grantor can

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services.

Major areas in which PPPs are implemented include transport (in particular motorways and ports) higher education and agriculture<sup>3</sup>.

A major project in Morocco is the port development at Tanger-Med, scheduled for completion by 2016.

For the year 2016, the Ministry of Equipment intends to continue to develop the PPP model for the construction and operation of motorways<sup>4</sup>, ports and airports.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

The legal framework applicable to concession agreements was established by several sector specific laws<sup>5</sup> but the main framework

pertaining to the concession schema is the Law No. 54-05 dated 14 February 2006 on delegated management agreements<sup>6</sup> (the “Delegated Management Law”).

However, through Law No. 86-12 of 24 December 2014<sup>7</sup> (the “PPP Law”) and its implementing decree (the “PPP Decree”)<sup>8</sup>, Morocco recently introduced the partnership contract, a new category of BOT.

According to the PPP Law, the partnership contract is a contract whereby a grantor (i.e. the State and its public institutions) entrusts a private partner with a comprehensive project relating to the design, construction, conversion, maintenance, operation or management of works, as well as the financing of the latter.

The PPP Law was introduced in order to create a unified and incentivizing framework conducive to the development of infrastructure projects in Morocco and to increased visibility for both foreign and local investors. In consideration of the best international practice, the PPP Law was drafted, after analysing the legal frameworks applicable to public-private partnership contracts in various countries, such as France, Spain and Egypt.

The main difference between a concession based schema and a partnership contract is that the private partner is remunerated -in its entirety or partially- by the public authority.

<sup>3</sup> <http://www.oxfordbusinessgroup.com/analysis/morocco-increases-role-private-sector-0>

<sup>4</sup> <http://www.morocoworldnews.com/2015/12/176337/moroccos-three-largest-highway-projects-for-2016/>

<sup>5</sup> Law n°4-89 relating to motorways (dated 6 August 1992); Law n°15-02 relating to ports and creating the Ports National Agency (*Agence Nationale des Ports*) and the Ports Operating Company (*Société d'Exploitation des Ports*) (dated 23 November 2005); Law n°52-02 relating to the organization and the operation of the national railway network (dated 7 January 2005); and Law n°25-79 creating the Airports National Office (*Office National des*

*Aéroports*) as amended by Law n°14-89 and Law n°1-93-140.

<sup>6</sup> Law No. 54-05 dated 14 February 2006 (Official Bulletin No. 5404 dated 16 March 2006) and Decree No. 2-06-362 dated 9 August 2006 (Official Bulletin No. 5454 dated 7 September 2006)

<sup>7</sup> The PPP Law was published in the Official Bulletin No. 6332 of 5 February 2015).

<sup>8</sup> The implementing decree No. 2-15-45 dated 13 May 2015 was published in the Official Bulletin No. 6365 dated 1 October 2015.

#### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

The PPP Decree created a commission, mainly composed of representatives of various Moroccan ministries, set up under the aegis of the Ministry of Economy and Finance in order to identify a list of projects to be carried out as PPPs and validate preliminary assessments prepared by grantors before launching tenders.

This commission will also provide support for grantors through issuing opinions on partnership contracts implementation (e.g. during the award of the partnership contract or for amendments projects).

The underlying goal of this commission is to ensure the financial sustainability of each partnership contracts in order to avoid financial difficulties for Moroccan public entities.

In respect of delegated management agreements, there is no specific regulatory body.

#### 5. Are there any restrictions for foreign investors to develop/operate PPP projects?

Neither the PPP Law, nor the Delegated Management Law places any restrictions on foreign investors.

Nevertheless, it should be noted that the PPP Decree<sup>9</sup> specifies that in any awarding procedure, criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Moroccan economy.

For example, the grantor can decide to apply a percentage increase on the price of tenders presented by foreign bidders.

<sup>9</sup> Article 35 of the PPP Decree.

In addition, the grantor can also provide in the tender documentation for awarding criteria linked for example to the part of national companies, goods and services coming from Morocco which are involved or used to perform the future contractual obligations.

#### 6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?

The PPP Law and the Delegated Management Law do not impose a long-stop date for the completion of construction.

However, the PPP Law does provide that partnership contracts are entered into for a maximum duration of thirty years that can be extended to fifty years depending on the complexity and the technical, economic and financial features of the project.<sup>10</sup> The duration is determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be performed.

The Delegated Management also provides that concession agreements are entered into for a limited period of time that cannot exceed the depreciation period of the selected investments.<sup>11</sup>

As such, the most common practice is that the parties determine specific clauses pertaining to a maximum duration for the construction in the contracts.

#### 7. How are force majeure events defined, and what are the consequences of their occurrence?

As in other civil law countries, force majeure events are described in the Moroccan law<sup>12</sup> as

<sup>10</sup> Article 13 of the PPP Law.

<sup>11</sup> Article 13 of the Delegated Management Law.

<sup>12</sup> Article 268. of the Code of Obligations and Contracts (as promulgated by Dahir 9 Ramadan 1331).

an “unforeseeable event” for the parties. Therefore force majeure events are defined as (i) an event beyond a party's control, (ii) which the party could not reasonably have provided against before entering into the contract and (iii) the party could not reasonably have avoided or overcome provided that the event is not substantially attributable to the other party.

More particularly, the Moroccan law<sup>13</sup> specifies certain force majeure events: natural disasters (flood, drought, fire, storms, invasion of grasshoppers), invasion and the “*fait du prince*”.

The PPP Law<sup>14</sup> provides that force majeure events have to be defined in the contract.

Moreover, the PPP Law provides that the parties have to define precisely the consequences of a force majeure event occurrence to preserve the economical balance of the agreement events given that the partnership contract can be terminated in case of force majeure.<sup>15</sup>

The Delegated Management Law<sup>16</sup> only specifies that contractual provisions have to provide for termination in case of force majeure events.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law provides<sup>17</sup> that partnership contracts have to include a specific clause in the PPP contract pertaining to the allocation of risks between the parties. This is modelled

on the contractual practice of optimal risk sharing. Indeed, the PPP Law specifies that the risks linked to the different phases of the project must be identified and detailed.

Moreover it is specified that each type of risk has to be borne by the party who can bear them in the most efficient way, in order to minimize potential costs, and in consideration of public interest and the project specificities.

The Delegated Management Law does not provide for such obligation.

In general, in PPP contracts, the risks linked to the expropriation and the changes in law are assumed by the public entity.

In relation to adverse court decisions pertaining to the validity of the agreement, the allocation of risks is often provided for in direct agreements.

It is common practice that for court decisions pertaining to the early cancellation of the PPP, the risk is borne by the public entity. However, a private entity would bear such risk in case of breach of its contractual obligations.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Moroccan law, the reinstatement test is not envisaged<sup>18</sup>. Pursuant to the freedom of contract principle, such a test may be included in a PPP agreement.

However, based on our experience of PPP projects in Morocco, public entities are keen to reinstate the facilities rather to repay debt to the lenders.

<sup>13</sup> Article 269 of the Code of Obligations and Contracts (as promulgated by Dahir 9 Ramadan 1331).

<sup>14</sup> Article 26 of the PPP Law.

<sup>15</sup> Article 17 of the PPP Law.

<sup>16</sup> Article 10 of the Delegated Management Law.

<sup>17</sup> Article 16 of the PPP Law.

<sup>18</sup> No laws or regulations seem to prohibit such test.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specially defined or provided for under Moroccan legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Moroccan law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law recognizes a substitution right, whereby the public authority can replace the private partner with a substituted entity in order to ensure the continuity of the public service, notably in the event of a serious breach of its contractual obligations.<sup>19</sup> The terms and conditions of such substitution have to be determined in the partnership contract.

The PPP Law also provides that the lenders can ask the public authority to substitute the private partner with a new entity, in case of serious breach of its contractual obligations.

By contrast, the Delegated Management Law does not provide for such rights. Nevertheless, delegated management agreements and concession agreements can provide for step-in rights for the grantors or the lenders in accordance with project finance practice.

It is interesting to note that the PPP Law provides for rights for lenders. Indeed, the step-in right for lenders in international project finance projects is always requested by the lenders despite the fact that it is rarely implemented in practice.

<sup>19</sup> Article 21 of the PPP Law.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP Law provides that the project agreement can provide for disputes to be settled through an international arbitration procedure under the partnership contract<sup>20</sup>. In such case, the agreement must specify the competent international arbitration procedures. Moreover, next to arbitration procedure, parties can agree on conciliation proceedings or mediation process under contractual clauses.

Arbitration procedures can also be used to settle disputes in respect of delegated management agreement performance<sup>21</sup>.

Then, as is required by international law, the arbitration clauses of all the PPP agreements must define conditions of the arbitration procedure (*i.e.* seat of arbitration, language of the arbitration, procedural law applicable).

In addition, even if arbitration procedures are permitted, Moroccan legislation in respect of PPP agreements does not expressly provide for the possibility of project agreements and direct agreements to be governed by foreign laws.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Moroccan legislation does not provide for a regular market testing procedure. However, according to the freedom of contract principle, such a test may probably be included in a PPP agreement.

<sup>20</sup> Article 27 of the PPP Law.

<sup>21</sup> Article 9 of the Delegated Management Law.

Such a test is also not provided for in concession or partnership agreements.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

Both the PPP Law and the Delegated Management Law do not provide for a special procedure for the acceptance of the facilities built (*procédure de réception*).

The acceptance procedure is not clearly defined for PPPs under Moroccan law<sup>22</sup>. Only, Article 769 of the Code of Obligations and Contracts<sup>23</sup>, provides that during a ten year period, the private partner will be presumed liable to the grantor (or to the person acquiring the work) for latent defects and damages, including damages resulting from sub-soil conditions, which either impair the strength of the work.

As in other civil law countries, the acceptance is pronounced by the owner once the work is suitable for its purpose (*réception provisoire*). If reparations and adjustments on the work are needed, the owner can establish punch list items (*liste des réserves*) that have to be confirmed by the contractor. It contains a list of items or tasks that need to be repaired or completed prior a determined date. After the complete reparation, the final acceptance of the work is pronounced by the owner.

The final acceptance by the owner of the facilities (*i.e.* the grantor, the public entity) is a crucial event as upon acceptance, the owner takes control and ownership of the project and

<sup>22</sup> However, for public procurements, articles 65 and seq. of the “CCAG-T” (approved by Decree No. 2-99-1087 dated 29 moharrem 1421) provide for a specific acceptance procedure of the work.

<sup>23</sup> As promulgated by Dahir 9 Ramadan 1331.

the risk of loss passes from the private entity to the owner.

**15. Are there any expected changes or reform to the existing legislation?**

Given the changes recently introduced by the PPP Law, no major reform of existing legislation is expected.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

***In respect of partnership contracts:***

Under the PPP Law<sup>24</sup>, the payment of the private entity shall be paid, in its entirety or partially, by the public authority. In the event where the public authority fails to pay entirely the private entity’s payment, the latter may be remunerated by the users and/or the cash flow generated by the project. In any case, the remuneration is linked to performance objectives, guaranteeing the fulfilment of partnership contracts.

Neither the PPP Law nor the Delegated Management Law specifically provide for inflation and/or foreign exchange protection for PPP projects.

***In respect of delegated management agreements:***

Under the Delegated Management Law<sup>25</sup>, the private entity receives payments from the users. This law<sup>26</sup> also specifies that delegated management agreements may authorize the private entity to collect, on behalf of the public authority, state taxes, royalties, funds or investments.

<sup>24</sup> Article 15 of the PPP Law.

<sup>25</sup> Article 2 of the Delegated Management Law.

<sup>26</sup> Article 29 of the Delegated Management Law.

Delegated management agreements must specify, as applicable, the calculation methods of the entrance fees and the royalties paid by the private entity, as well as the contributions or interest in the financing of the public service that could be discharged by the public authority to the private entity.

It is also provided that delegated management agreements set out the principles and the pricing terms of the delegated service and the conditions and rules of adjustment and amendment or revision of the pricing or the remuneration.

Furthermore, the Delegated Management Law provides that such pricing or remuneration clauses must take into account not only the financial balance of delegated management agreements, but also the productivity gains, cost savings from improved management and delegated management agreements performance.

Consequently, in respect of inflation and/or foreign exchange protection, it should be noted that neither the PPP Law nor the Delegated Management Agreement Law provide for such protection. However, it should be noted that, in the Kingdom of Morocco, foreign investors benefit from a convertibility system that guarantees complete freedom to transfer the income generated by these investments and the retransfer of the liquidation proceeds or the investments sale.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return for the project company or the sponsors under Moroccan law. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership contracts and delegated management agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Law nor the Delegated Management Law provides for a specific payment guarantee provided by the relevant public authority for PPP projects. However, it is common practice in PPP agreements that a public entity (which is not necessarily the contracting authority) provides first-demand bank guarantee to cover certain of its obligations.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Moroccan law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that usually such guarantees are neither provided in partnership contracts nor in delegated management agreements.

**20. Are deductions from the service and availability payments subject to a cap?**

The PPP Law<sup>27</sup> provides that, in case of contractual breach by the private entity, partnership contracts must determine the conditions whereby penalties shall be deducted from the private entity's remuneration, but such deduction is not subject to a cap. There is no similar provision under the Delegated Management Law.

As such, pursuant to the freedom of contract principle, the cap mechanism may be included

<sup>27</sup> Article 19 of the PPP Law.

in both partnership contracts and delegated management agreements.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

*In respect of partnership contracts:*

Although the variations requested by the public authority are not subject to a specific cap, the PPP Law<sup>28</sup> provides that any amendment to partnership contracts must not alter the balance of such contracts.

*In respect of delegated management agreements:*

Pursuant to the Delegated Management Law<sup>29</sup>, delegated management agreements may allow the parties to reconsider the delegated management operation conditions in accordance with the principle of public service adjustment and with the financial balance of delegated management agreements. However, no cap is set in the Delegated Management Law.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

Under Moroccan law, there is no requirement to share any gains from refinancing of the PPP project with the public authority. However, according to the freedom of contract principle, gain sharing provisions may be included in a PPP agreement.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

There is no requirement to enter into direct agreements under Moroccan law. However as

<sup>28</sup> Article 23 of the PPP Law.

<sup>29</sup> Article 19 of the Delegated Management Agreement.

outlined in question 11, PPP Law specifies that step-in clauses can be provided in partnership contracts. For instance, the PPP Law grants to the lenders substitution rights notably in the event of a serious breach of its contractual obligations. Such step-in rights are usually provided for under direct agreements.

**24. Is there a debt assumption whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Moroccan law does not have debt assumption mechanism, whereby the public authority undertakes to reimburse the debt of the project company to the lenders. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership contracts and delegated management agreements in some circumstances.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

*In respect of partnership contracts:*

Pursuant to the PPP Law<sup>30</sup>, the project company can be indemnified only in case of force majeure or disruption of the financial balance of partnership contracts.

<sup>30</sup> Article 26 of the PPP Law.



*In respect of delegated management agreements:*

The Delegated Management Law<sup>31</sup> specifies that delegated management agreements may provide for the indemnification principles and terms of the private entity only in case of termination for contractual breach by the public entity.

Pursuant to the freedom of contract principle, the termination conditions are agreed by the parties.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Pursuant to the PPP Law<sup>32</sup> and the PPP Decree<sup>33</sup>, the assessment criteria of the bids include the measures taken for the preference for national companies and in particular, the share of the services the private entity undertakes to subcontract to Moroccan companies as well as the utilization of domestic inputs. Unlike the PPP Law, the Delegated Management Law does not specifically include such provisions.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages to PPP projects except for, as the case may be, those referred to in Law No. 18-95 relating to the Investment Charter dated 3 October 1995. For instance, pursuant to this law<sup>34</sup>, advantageous customs duties can apply when equipment, materials and goods are imported for the needs of a project.

<sup>31</sup> Article 32 of the Delegated Management Law.

<sup>32</sup> Article 8 of the PPP Law.

<sup>33</sup> Article 35 of the PPP Decree.

<sup>34</sup> Article 3 of Law No. 18-95 relating to the Investment Charter dated 3 October 1995.

**28. What are the other incentives available to PPP projects?**

There are no other incentives available to PPP projects, except for, as the case may be, those referred to in Law No. 18-95 relating to the Investment Charter dated 3 October 1995. For example, under this law<sup>35</sup>, a private entity can enter into a contract with the Kingdom of Morocco in order to obtain financial compensation for the acquisition of lands, for external infrastructure expenses or for professional training expenses.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

According to the World Bank, between 2014 and 2015, four PPP projects have reached financial closure and US\$ 6 billion were invested in PPP projects, mainly in electricity and telecom sectors<sup>36</sup>. In the next years, according to the Ministry of Equipment and Transport, PPP agreements will be used to develop transport infrastructures<sup>37</sup> (ports, airports, motorways etc.)

<sup>35</sup> Article 17 of Law No. 18-95 relating to the Investment Charter dated 3 October 1995.

<sup>36</sup> <http://ppi.worldbank.org/snapshots/country/morocco>.

<sup>37</sup> <http://www.equipement.gov.ma/Investisseurs/Documents/Projets%20PPP%20version%20anglaise.pdf>.

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# SENEGAL<sup>12</sup>



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## GENERAL

- 1. Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

The PPP model has a long history of use in Senegal as the first concession agreement in the country was entered into on 21 May 1888 for a boat transport service<sup>3</sup>. PPP models are now commonly used in order to develop major infrastructure projects.

<sup>1</sup> The authors are French lawyers registered at the Paris bar. The answers to the questionnaires relating to Senegal, Morocco, Guinea and Ivory Coast are based on their knowledge of the applicable regulations and on their experience of PPPs projects implemented in these countries. The accuracy of these answers remains however subject to the confirmation by lawyers duly registered in the said countries

<sup>2</sup> The authors would like to thank Hugues Martin-Sisteron (member of the Paris Bar Association), Diane Houriez and Salimatou Kaba for their help in the preparation of this questionnaire.

<sup>3</sup> <http://terangaweb.com/cadre-juridique-des-partenariats-public-privé-au-senegal-une-reforme-incomplete>.

From 2004 to 2014, a specific legal framework was implemented for build-operate-transfer contracts (*contrat de construction-exploitation-transfert d'infrastructures*); an arrangement whereby a public entity would pay rents to a private sector entity for building and operating infrastructure.

The adoption of a new law pertaining to partnership agreements and repeal of the law relating to build-operate-transfer contracts has meant that since 2014 Senegalese law only recognises two categories of contracts for the financing, construction, operation, servicing and maintenance of infrastructure and public assets. These are: (i) concession agreements where the contract holder generates revenue through the commercial operation of a project (in particular the fees paid by users); and (ii) partnership agreements where the contract holder is paid by public entities from when the project is commissioned until the end of the relevant agreement.

As such, the grantor has to determine the exact nature of the contract to be agreed, taking into account the services to be performed and the payment conditions of the private entity.

In both concession agreements and partnership agreements, the grantor can assign the design, build and operation of a project to

a private entity (i.e. Build-Operate-Transfer or Build-Operate-Own-Transfer agreements). However, under a particular type of contract known as *contrat d'affermage*, the grantor can only assign rights to the management of a public project that has already been built (i.e. Transfer of Operation Rights contracts).

It is envisaged that PPPs will play an important role for the implementation of the “*Plan Sénégal Emergent*” (Emerging Senegal Plan), the country’s long-term strategic plan for development and economic growth over the next decade<sup>4</sup>.

## 2. Which sectors apply a PPP model to develop infrastructure projects?

The PPP model is used in all economic sectors for the development of infrastructure and the management of public services.

Since 1990, fourteen PPP projects totalling US\$ 1,219 million have reached financial close mainly in the transport sector. This includes the Dakar-Diamniado motorway project (the first greenfield road PPP project in sub-Saharan Africa<sup>5</sup>) and Blaise Diagne international airport. PPP models have also been used in other sectors such as water. For example, an affermage contract (*contrat d'affermage*) for the production and the distribution of drinking water was entered into between a Senegalese water company - *Sénégalaise des Eaux* - and the Senegalese state in 1996<sup>6</sup>.

The Emerging Senegal Plan also sees PPPs as playing a key role in reinforcing the position of Senegal as an economic and infrastructure hub for West Africa in sectors as diverse as agro-

industry, construction, logistics, road and rail-road transportation and tourism<sup>7</sup>.

## LEGISLATION & REGULATION

### 3. What are the principal laws and regulations? Is there a framework PPP Law?

In order to facilitate the development of infrastructure projects, Senegal recently created a new category of contracts called partnership agreements and implemented this through the enactment of the law No. 2014-09 dated 20 February 2014<sup>8</sup> (the “PPP Law”) and of the decree No. 2015-386 dated 20 March 2015 (the “PPP Decree”).

The PPP law also repealed Law No. 2004-13 dated 1 March 2004 pertaining to build operate transfer agreements (the “BOT Law”).

The PPP Law was aimed at consolidating existing laws on PPPs and providing a framework conducive to the development of infrastructure in Senegal. It is hoped that the new law will act to stimulate foreign and domestic investment in sectors such as agriculture, education and health.

In accordance with article 2 of the PPP Law, the partnership agreements could be implemented in all economic sectors, with the exception of the sectors governed by a specific legislation, among which the energy, mining and telecoms sectors.

The concessions agreements are regulated by the new Senegalese public procurement code enacted in 2012 through Decree No. 2014-

<sup>4</sup> <https://pppknowledge.org/countries/senegal>.

<sup>5</sup> <http://blogs.worldbank.org/ppps/taxonomy/term/11800>.

<sup>6</sup> <http://blogs.worldbank.org/ppps/senegal-shifts-its-thinking-rural-water-delivery-moves-private-operators>.

<sup>7</sup> <http://www.iflr1000.com/NewsAndAnalysis/10-Things-to-know-about-PPPs-in-Senegal/Index/2563>.

<sup>8</sup> The PPP Law was that modified by Law No. 2015-03 dated 12 February 2015 (only article 31 of the PPP Law has been modified).

1212 dated 22 September 2014 (the “Senegalese Procurement Code”).

#### 4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?

At present, there are two bodies which regulate partnership agreements in Senegal.

A dedicated unit within the Ministry of Finance known as the PPP Committee (*Comité national d’Appui aux Partenariats Public-Privé*) (the “PPP Committee”) validates partnership agreements drafted by potential grantors and assists grantors to implement agreements. The committee also promotes the standardisation of PPP agreements through periodic controls and assessments.<sup>9</sup>

The Infrastructure Council (*Conseil des Infrastructures*) composed of twelve members comprising three magistrates, three private sector representatives, three civil society and consumer associations’ representatives, and three members of Parliament<sup>10</sup> also acts as a regulatory body for PPPs.

The Infrastructure Council is responsible for dispute resolution, procedure, and auditing of all partnership agreements. This regulatory body must issue a favourable opinion regarding a draft partnership agreement before a partnership agreement is concluded (note: a favourable opinion must also be issued by the Minister of Finance).

The Infrastructure Council opinion must also specify if the project complies with the Senegalese infrastructure development strategy and environmental standards.

As regards concession agreements, none of the regulatory bodies detailed above is involved in their implementation and performance. The

specific entities tasked with public procurement procedures are responsible for concession agreements.

#### 5. Are there any restrictions for foreign investors to develop/operate PPP projects?

The legislative framework for PPPs does not place any restrictions on foreign investors.

Nevertheless, it should be noted that the PPP Law<sup>11</sup> specifies that in any awarding procedure, a criteria of national preference can be taken into account in the selection of the tenders in order to support the domestic Senegalese economy.

During the bids evaluation phase, the grantor applies a margin of preference (“*marge de préférence*”) from 5% to 10% to the tenders of bidders from the Economic Community of West African States (the “ECOWAS”), to the tenders of a consortium of bidders including at least one company from ECOWAS or to bidders who promise to subcontract at least 30% of global value of the supply and works agreement necessary to perform the PPP agreement to companies from ECOWAS. A preference margin (of 2%) also applies to bidders who promise to enter into contracts with small and medium-sized companies from ECOWAS<sup>12</sup>.

In addition, if the estimated global cost of the project is under 5 billion FCFA, the tendering can only be opened to bidders from ECOWAS<sup>13</sup>.

In relation to concessions agreements, preference principles can apply to offers from bidders from Senegal and ECOWAS or to

<sup>9</sup> Article 3 and 38 of the PPP Law.

<sup>10</sup> Article 1,10 and 39 of the PPP Law.

<sup>11</sup> Article 13 of the PPP Law.

<sup>12</sup> Article 21 of the PPP Law.

<sup>13</sup> Article 5 of the PPP Decree.

offers involving products originating in Senegal and ECOWAS<sup>14</sup>.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Senegalese PPP legislation does not impose a long-stop date for the completion of construction in PPP agreements.

However, the PPP Law does provide that PPP agreements are entered into for a period determined by the depreciation period of the selected investments, financing terms and the type of construction and services to be performed<sup>15</sup>.

In respect of concession agreements, the Senegalese Procurement Code does not provide a long-stop date for the completion of construction. It only imposes that the duration of the concession and the starting date of the concession agreement has to be defined under the contract<sup>16</sup>.

It is common practice that the parties would determine specific clauses pertaining to a maximum duration for the construction in the contracts.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

As in other civil law countries, force majeure events are described in the Senegalese case law as an “*unforeseeable and irresistible event, including external causes*”. Therefore, force majeure is defined as an event beyond a party's control which the party could not reasonably have provided against before entering into the contract or which the party could not reasonably have avoided or overcome

provided that the event is not substantially attributable to the other party.

The events that could be defined as force majeure events in the context of PPPs include natural disasters, war, hostilities (whether war be declared or not), invasion, act of foreign enemies, rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, riot, commotion, disorder, strike or lockout by persons other than the parties' personnel.

The PPP Law only provides that parties can agree on the possibility to terminate the contract in case of force majeure event. In this case, the PPP Law provides that the contractual provisions can set the possibility for all parties to initiate the termination procedure when a force majeure event occurs<sup>17</sup>.

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions etc.) allocated between the parties, and what are the consequences of their occurrence?**

The PPP Law provides<sup>18</sup> that partnership agreements have to include a specific clause pertaining to the allocation of risks between the parties. This is modelled on the contractual practice of optimal risk sharing.

The PPP Law also specifies that the risks linked to the different phases of the project must be identified and set out in detail.

It should be noted that during its preliminary assessments, the PPP Committee has to analyse the risk allocation set out in any draft PPP agreement<sup>19</sup>.

In general, the risks linked to the expropriation and changes in law are assumed by the public

<sup>14</sup> Article 50 of the Senegalese Procurement Code.

<sup>15</sup> Article 1 of the PPP Law.

<sup>16</sup> Article 13 of the Senegalese Procurement Code.

<sup>17</sup> Article 35 of the PPP Law.

<sup>18</sup> Article 7 of the PPP Law.

<sup>19</sup> Article 8 of the PPP Law.

entity. In relation to adverse court decisions pertaining to the validity of the agreement, the allocation of risks is often provided for in direct agreements.

It is common practice that for court decisions pertaining to the early cancellation of the PPP, the risk is borne by the public entity. However, a private entity would bear such risk in case of breach of its contractual obligations.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

Under Senegalese law, no reinstatement test is provided. Pursuant to the freedom of contract principle, such a test may be included in partnership agreements.

However, based on our experience of PPP projects in Senegal, public entities are keen to reinstate the facilities rather to repay debt to the lenders.

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

The concept of “uninsurability” is not specifically defined or provided for under Senegalese legislation. However, the parties can freely stipulate that risk above a certain threshold will no longer be insured provided that such article does not conflict with any mandatory provisions under Senegalese law.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

The PPP Law provides that the public entity can establish direct contractual relationships with the lenders that financed, in full or in

part, a project. This empowers a contracting public authority to enter into direct agreements (i.e. a tripartite agreement or letter of intent) with the lenders of a project<sup>20</sup>. This implicit reference to direct agreements is welcome; however it would have been preferable if the PPP Law had explicitly acknowledged the independence between such agreements and the relevant partnership agreement.

The PPP Law provides for the transfer of partnership agreements during their performance. An authorized company can transfer the PPP agreement to a third party with the prior approval of the grantor and according to the terms and conditions set out in the relevant agreement. The PPP agreement can also be directly transferred to the lenders or someone appointed by them<sup>21</sup>.

In such cases, the new party will need to provide sufficient financial, technical and legal guarantees and be able to ensure public service continuity.

In relation to concession agreements, a substitution mechanism can be used by the grantor if a breach of contract by the private partner threatens public service continuity.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

The PPP Law allows partnership agreements to state that disputes would be settled through an international arbitration procedure<sup>22</sup>. Arbitration clauses in partnership agreement will need to set out this procedure (e.g. seat of arbitration, language of the arbitration, procedural law applicable).

<sup>20</sup> Article 33 of the PPP Law.

<sup>21</sup> Article 34 of the PPP Law.

<sup>22</sup> Articles 7 and 37 of the PPP Law.

However, even if arbitration procedures are chosen to settle disputes, the PPP Law provides that only the Senegalese Law can be applied during arbitration<sup>23</sup>.

Concession agreements can also be settled through an arbitration procedure<sup>24</sup>.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The Senegalese PPP legal framework does not provide for a regular market testing procedure to procure the services to be provided by the authorized company.

Such a test is also not provided for in concession or partnership agreements.

However, in accordance with the freedom of contract principle, such a test may be included in the contracts entered into between the private entity and its subcontractors (i.e. with the contractor and/or the operator).

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

The Senegalese Construction Code<sup>25</sup> sets the rules pertaining to the acceptance process for the work performed (*réception de l'ouvrage*).

Prior to the acceptance of the work, a technical assessment has to be performed for all construction works which are open to public

or which could threaten the safety of persons because of the size or nature of the building<sup>26</sup>.

This technical assessment in relation to the feasibility, design, performance and maintenance of the infrastructure is to be only performed by an authorized and independent technical controller.

Once acceptance of the work is pronounced by the owner, the work is deemed suitable for its intended purpose, the private partner is bound to repair any defects at its own cost pursuant to a “guarantee of perfect completion” for a period of one year following the acceptance of the facilities.

In addition, during a ten year period, the private partner will be presumed liable to the grantor (or to the person acquiring the facilities) for any latent defects and damage, including damages resulting from sub-soil conditions which impair the strength of the facilities<sup>27</sup>.

The acceptance by the owner of the work (i.e. the grantor, the public entity) is a crucial event as upon acceptance the owner takes control and ownership of the project and risk of loss passes from the private entity to the owner.

**15. Are there any expected changes or reform to the existing legislation?**

As the Senegalese legislation has been recently modified by the PPP Law, no deep changes or landmark reforms are expected from now.

Indeed, the existing legislation already provides a clarified and unified legal conducive to the development of infrastructures in Senegal and to the increase of visibility of foreign and local investors.

Indeed, as the existing legislation takes into consideration standard market practices which

<sup>23</sup> Article 7.14 of the PPP Law.

<sup>24</sup> Article 139 of the Senegalese Procurement Code refers to the arbitration procedure defined in the OHADA's Uniform Act on Arbitration dated 11 March 1999.

<sup>25</sup> As enacted by Law No. 2009-23 dated 8 July 2009.

<sup>26</sup> Article 27 of the Senegalese Construction Code.

<sup>27</sup> Article 19 of the Senegalese Construction Code.



are implemented in international project finance, it should permit to avoid the main pitfalls observed in countries with similar frameworks.

## FINANCING & INCENTIVES

### 16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?

Under the PPP Law<sup>28</sup>, payment of the private entity is provided by the public authority for the duration of the agreement. It should be noted that the private entity's payment is linked to performance objectives (e.g. those relating to sustainable development) and service availability. The partnership agreement may also allow the authorized company to receive additional revenues for related activities.

Furthermore, the public authority may empower the authorized company to collect on its behalf, the service payments of the users due to the public authority.

In respect of concession agreements, the Senegalese Procurement Code provides that the concessionaire's compensation is mainly derived from service users and such payment is substantially linked to service operation outcomes.

Finally, the PPP Law does not specifically provide for inflation and/or foreign exchange protection for PPP projects except for the protection provided for in Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.<sup>29</sup>

<sup>28</sup> Article 6 of the PPP Law.

<sup>29</sup> Articles 5 to 7 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

The "Franc Zone" is an economic and monetary union whose members include France, Senegal and fourteen other African states. Its core principles are laid down in the Monetary Cooperation Agreement of 1972 between the Bank of Central African States (BCAS) and France, and the Cooperation Agreement of 1973 between the West African Monetary Union (WAMU) and France. These principles revolve around an unlimited convertibility guarantee whereby the French Treasury guarantees without any limits the conversion of CFA francs to euros, and a fixed exchange rate between the CFA franc and the euro. In exchange for pegging the CFA franc to the euro and for the unlimited convertibility guarantee, BCAS and WAMU undertake to deposit some of their foreign exchange reserve with the French Treasury on an operational account whose mechanism is governed by the aforementioned cooperation agreements.

In Senegal and more generally in the entire Franc Zone, key hedging related issues are quite typical for this type of transaction. These include in respect of the borrower, establishing capacity and authority, and in respect of the jurisdiction, confirming enforceability of the hedging documentation and foreign judgments, as well as determining whether any licensing and/or consent requirements exist. ISDA Master Agreements have been used in the past by Senegalese borrowers with foreign entities.

### 17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?

There is no guaranteed rate of return or a cap on the rate of return for the project company or the sponsors under Senegalese law. However, pursuant to the freedom of contract principle, such a mechanism may be included in partnership agreements.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

Neither the PPP Law nor the Senegalese Procurement Code provide for a specific payment guarantee provided by the relevant public authority for PPP projects. However, pursuant to the freedom of contract principle, such a mechanism may be included in both partnership agreements and concession agreements.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

The obligations of the administration are not qualified as Treasury obligations. Furthermore, Senegalese law does not provide for separate guarantees to be granted by the Treasury to the concessionaire or the lenders. It should be noted that such guarantees are not usually provided in partnership or concession agreements. The guarantees issued to the benefit of the private partner are most of the time issued by financial institutions.

**20. Are deductions from the service and availability payments subject to a cap?**

As the compensation of the private partner is linked to performance targets set out in partnership agreements, penalties (e.g., in case of a delay in completion or contractual breach) may reduce the amount of rent paid by the grantor.

In respect of concession agreements, financial penalties could be deducted from payments due to the concessionaire in cases of contractual breach. However, under Senegalese law such deductions are not subject to a cap but the parties are free to agree such a cap.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

The PPP Law<sup>30</sup> provides that partnership agreements must set out the conditions in which the partnership agreement may vary at the request of the public authority. The PPP law does not, however, refer to a specific cap.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project with the public authority?**

There is no requirement to share any gains arising from refinancing of the PPP project with the public authority under Senegalese law.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

As outlined in question 11, under the PPP Law<sup>31</sup>, the public authority may enter into direct agreements with the private entity and its lenders to cover specific issues (i.e. contractual breach) and protect the lenders. Under direct agreements, the lenders will be entitled to intervene or “step-in” the shoes of the project company or the contractors in respect of the key project agreements. The step-in rights are usually triggered when either the project company or the contractors have defaulted or there is reasonable belief that they will default in the near future. Step-in-clauses allow the lenders to take over the project company, the project itself or to obtain control rights to make decisions on behalf of the project company. Thereafter, the lenders may take over the project or appoint a professional third party to take over the project.

<sup>30</sup> Paragraph 10 of Article 7 of the PPP Law.

<sup>31</sup> Article 33 of the PPP Law.

The PPP Law<sup>32</sup> also provides that partnership agreements can be transferred to the lenders or to any third party chosen by the lenders.

In respect of concession agreements, a substitution mechanism could also be provided in direct agreements where the grantor substitutes the private entity with a third party in case of serious breach of contract by the private partner which threatens public service continuity. Consequently, entry into direct agreements is common practice in international project finance.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

Senegalese law does not provide for a debt assumption mechanism, whereby the public authority undertakes to reimburse the debt of the project company to the lenders. It should be noted that the PPP Law<sup>33</sup> contemplates that, in cases of termination due to a reason of public interest, compensation is to be paid by the public authority to cover expenses incurred by the project company and for lost earnings.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

In relation to partnership agreements, the PPP Law<sup>34</sup> provides for payments to be made by

the public authority to the project company if a partnership agreement is terminated except when such termination is due to a force majeure event. The PPP Law also provides that the project company can claim damages in case of (i) material breach by the public authority; or (ii) adverse financial changes due to the actions of the public authority.

Furthermore, as mentioned above, in cases of termination due to a reason of public interest, the project company is entitled to seek compensation for the expenses incurred by it and for lost earnings.

Finally, in cases of project company default termination, financial compensation may be provided by the public authority if it is specifically provided for in the partnership agreement.

In relation to concession agreements, the Senegalese Procurement Code<sup>35</sup> sets out the termination provisions for concession agreements and also provisions relating to the possible deferment (*ajournement*) of the concession agreement's performance.

For example, the project company can seek compensation when the deferment period is less than three (3) months. In such cases, the indemnity cannot exceed the amount of expenses incurred by such deferment.

In case of termination for contractual breach by the public authority, the authorized company may, in addition to the repayments of expenses incurred by a possible prior deferment, request the payment of an indemnity corresponding to the damage suffered. However, such indemnity shall not exceed the profit loss of the authorized company whose contract is terminated.

To conclude, payments to be made by the administration to the concessionaire are not payable in all termination scenarios. On the

<sup>32</sup> Article 34 of the PPP Law.

<sup>33</sup> Article 35 of the PPP Law.

<sup>34</sup> Article 35 of the PPP Law.

<sup>35</sup> Article 128 of the Senegalese Procurement Code.

contrary, in the event of termination for material contractual breach of the project company, the latter shall bear the costs arising from the termination<sup>36</sup>.

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

As outlined in the PPP Law<sup>37</sup>, there is a clear incentive for local manufacturing of equipment or materials used in the construction of PPP projects. For example, the assessment criteria of the bids takes account of (i) the portion of the agreement performance that the candidate undertakes to entrust to local companies; (ii) the level of use of locally produced materials; and (iii) the level of employment of the local workforce.

In addition, the PPP Law<sup>38</sup> provides that the bidder must undertake to reserve a significant part in local workforce employment, promote technology transfer and subcontract to domestic economic operators.

**27. Are there tax advantages available to PPP projects?**

There are no specific tax advantages to PPP projects except for, as the case may be, those granted under Law No. 2004-06 dated 6 February 2004 in the Senegalese Investment Code. For example, under this law<sup>39</sup>, customs advantages can be available for a three years period when specific materials are imported.

**28. What are the other incentives available to PPP projects?**

There are no other advantages to PPP projects except for, as the case may be, those granted

under Law No. 2004-06 dated 6 February 2004 in the Senegalese Investment Code. For example, pursuant to this law<sup>40</sup>, during the operation phase, advantageous employment rules can apply to the additional workers employed by the private entity.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

To our best knowledge, the only PPP project developed in Senegal in 2015 was the International Airport of Diass<sup>41</sup>. Furthermore, under the Priority Action Plan (*Plan d'actions prioritaires*), a five-year plan implemented to achieve the “*Plan Sénégal Emergent*” (Emerging Senegal Plan) from 2014 to 2018<sup>42</sup>, more than 18 key PPP projects will be developed in sectors such as agriculture, health, education, mining and tourism with investments ranging between US\$ 16 million up to US\$ 734 million.<sup>43</sup>

<sup>36</sup> Article 88 of the Administration Contract Code (*Code des obligations de l'administration*).

<sup>37</sup> Article 20 of the PPP Law.

<sup>38</sup> Article 25 of the PPP Law.

<sup>39</sup> Article 18 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

<sup>40</sup> Article 19 of Law No. 2004-06 dated 6 February 2004 on the Senegalese Investment Code.

<sup>41</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>42</sup> [www.initiative-ppp-afrique.com](http://www.initiative-ppp-afrique.com).

<sup>43</sup> <http://senpppfinance.com/overview/ppp-projects-in-senegal/>.

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