Creating a Favourable Legal Framework for Public Private Partnerships (PPPs): the UNCITRAL Legislative Guide and International Best Practices

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Introduction

• Public infrastructure and private investment: an evolving relationship
  – Early infrastructure development
  – The “golden age” of private infrastructure
  – The 20th century and the trend towards State control
  – The privatization wave since the 1980s

• PPPs: undefined notion with variety of national experiences and models
  – The British tradition and recent developments (Private Finance Initiatives – PFI)
  – The French PPP model (Partnership contracts)
  – The US and Latin-American experience
Introduction

• Reasons for recent trend towards private infrastructure development and operation
  – Budget constraints
  – Introduction of competition
  – Efficiency gains

• Essential distinction between Concession-type PPP and non-concession PPP
  – Private partner operates and charges a price to the public under a license or concession
  – Private partner charges the public authority directly or both public authority and users

• The role of the law
  – Need for better regulation and preparation of PPPs to avoid costly projects failures
The new UNCITRAL Legislative Guide

• To be submitted to the 51st Commission session (July 2018)
  – Result of six years of work with experts
  – Modernized version in line with the current good practice and loopholes identified in PPP projects

• Model Provisions
  – Recommended legislative principles
  – Intended to assist in the adaptation of a legislative framework favourable to PPPs

• Notes provide analysis
  – Of the issues arising in the subject area of the respective recommendation
  – Other areas of law which also have an impact on PPPs
General Legal Framework

• New international standards and tools
  – Public Investment Management Assessment (IMF)

• New guiding principles for PPPs
  – Public interest
  – Proper management and accountability
  – Economy and efficiency
Project Planning and Preparation

- Hot topic in the newly revised Guide
- Is PPP the right option for the project?
  - Value for money test
  - Fiscal risk assessment
  - Welfare and social impact assessment

- Poor planning of PPPs lead to increasing costs for the public authority over the project cycle life
- PPP must be consistent with the needs of the public
Project Finance

• Lenders lend money for a specific PPP
• Based upon the lenders’ decision of whether
  – the PPP as a stand-alone unit
  – will create enough revenue
  – to repay the debts of the project
  – with/without recourse to the project sponsors/promoters

• Forms of Project Finance
  – Non-recourse PF: Sponsors not liable for any debts beyond the project monies
  – Limited-recourse PF: Sponsors remain liable for repayment of some of the debts of the project
Project Risks

• Main Project Risks
  – Force majeure and similar risks
  – Political risk
  – Construction and operation risks
  – Commercial risks
  – Exchange rate risk
Guidelines on Risk Allocation

• Risk to be allocated to the party who is best suited to assess, control, manage and bear the risk; i.e. party who has
  • Best access to hedging instruments; or
  • Greatest ability to diversify the risk; or
  • Greatest ability to mitigate the risk at the lowest cost, especially the technical risk

• Risk to be allocated to the parties according to their financial strength

• Principle: any risk transferred to the private partner will be charged to the public authority
Financing and Government Support (Overview)

• Financing
  – Project finance
  – Traditional financing sources for infrastructure projects
  – International financial institutions, export credit agencies

• Government Support
  – Guarantees
  – Loans, equity participation
Traditional Financing Sources

- Equity Capital
- Commercial loans and "subordinated" debt
- Institutional investors
- Capital market funding
International financial institutions, export credit agencies

- Transfer restrictions
- Expropriation
- Breach of contract
- War and civil disturbance
Frequent Forms of Government Support

• Public loans and loan guarantees
• Equity participation
• Subsidies
• Political risk guarantees

• Performance guarantees
• Tax and custom benefits
• Exclusivity
• Supplementary revenue sources
Legal Framework

- Constitutional law
- Legal regime related to PPPs as such
- Scope of authority to award PPP contracts
- Administrative coordination (PPP Unit)
- Selection of private partner
  - Bidding
  - Negotiations
Core Terms of the PPP Contract

- Project description
- Financial arrangements
- Organization of private partner
- Transferability of project
- Project site and easements
- Construction works
- Operation of infrastructure
- Security interests
- General contractual arrangements
- Termination and compensation
- Transfer obligations
Selected Issues (Overview)

• Balancing the interests of public and private sector
• Devising appropriate bidding procedures
• Facilitating financial closing
• Dealing with changed circumstances
Balancing the Interests of Public and Private Sector

- Limitations to party autonomy in the form of
  - implied or mandatory contractual terms
  - implied powers of public authorities
- that result in a substantial inequality between the parties
Balancing interests (cont’d)

• **Guide**
  – invites countries interested in attracting private capital
  – to review their legislative framework or enter into international trade agreements in order
    • to provide the degree of protection needed for fostering private investment
    • to provide the long-term contractual stability required for infrastructure projects
Devising Appropriate Bidding Procedures

• Strong preference for the use of international competitive selection procedures in order
  – to counter improper practices and corruption
  – to obtain the best value for money
    • for the host government
    • and the users of PPP facilities
  – To foster a high level of technical and technological proposals
Devising bidding procedures (cont’d)

- Guide proposes selection procedures that
  - Is based on the request for proposals with dialogue (UNCITRAL Model Law on Public Procurement, 2011)
  - Government could also use two-stage tendering or competitive negotiations provided in the UNCITRAL Model Law on Public Procurement
  - Differ in many respects from the tendering process typically used in government procurement – but the latter remains an option if consistent with international standards
Facilitating Financial Closing

- Security arrangements are crucial for raising finance for infrastructure projects

- Guide therefore invites host countries to review relevant laws to ensure that these laws
  - provide adequate legal protection to secured creditors
  - do not hinder the ability of the parties to establish appropriate security arrangements
Security Interests

• Security over physical assets
• Security over intangible assets
• Security over shares of the private partner
Events of Default and Remedies

• General contractual remedies
• Step-in rights for the contracting authority
• Step-in rights for the lenders and compulsory transfer of the concession
Dealing with Changed Circumstances

• Contractual mechanisms important to preserve the long-term sustainability of PPP projects

• Particular categories of change to be borne in mind
  – Legislative or regulatory changes
  – Unexpected changes in economic conditions
Where to Get More Information

- **http://www.uncitral.org**
  - One-stop-shop for legal texts in the 6 official UN-languages

- **uncitral@un.org**
  - Email us when you have specific queries