DESIGNS IN PROJECT AGREEMENTS TO SAFEGUARD INTERESTS FROM MULTIPLE PERSPECTIVES

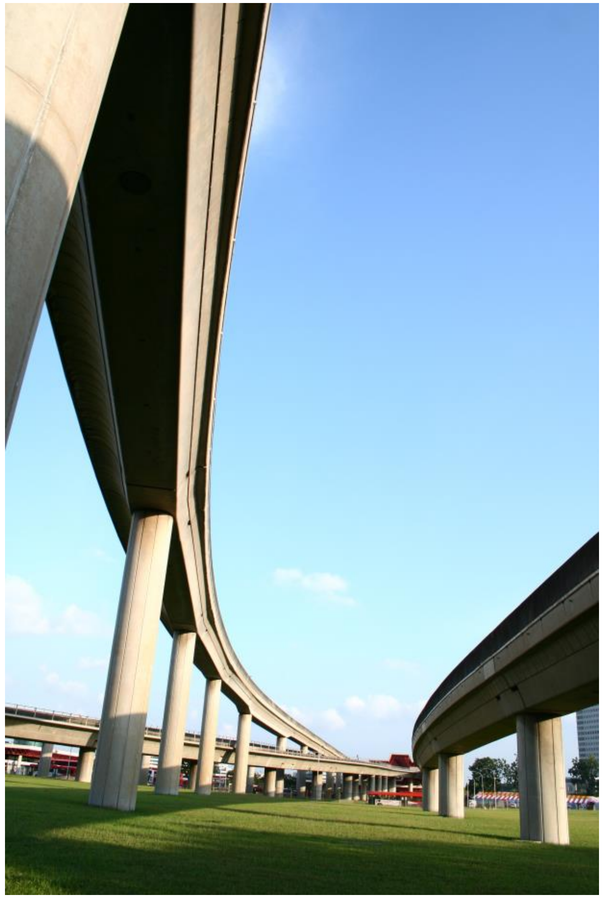
OVERVIEW

- The world needs to invest USD3.9 trillion in economic infrastructure annually through 2035 to keep pace with projected growth. This includes Roads, Rail, Ports, Airports, Power, Water and Telecoms.
- Globally, we have an enormous infrastructure gap. Sustainable infrastructure development is essential to GDP growth, social and economic development and the betterment of society. So, how can we develop frameworks that foster sustainable pipelines of infrastructure investment which attract investors and liquidity to develop, construct and operate these essential assets?
- Over the last 5 years Clifford Chance has advised on Belt and Road projects exceeding USD 126 billion. Globally, last year alone, the worldwide projects group advised on over USD58 billion of privately financed projects on a limited recourse basis. In APAC we cover the full spectrum of sectors and regional and global geographies.

SUCCESSFUL PROJECT FRAMEWORKS

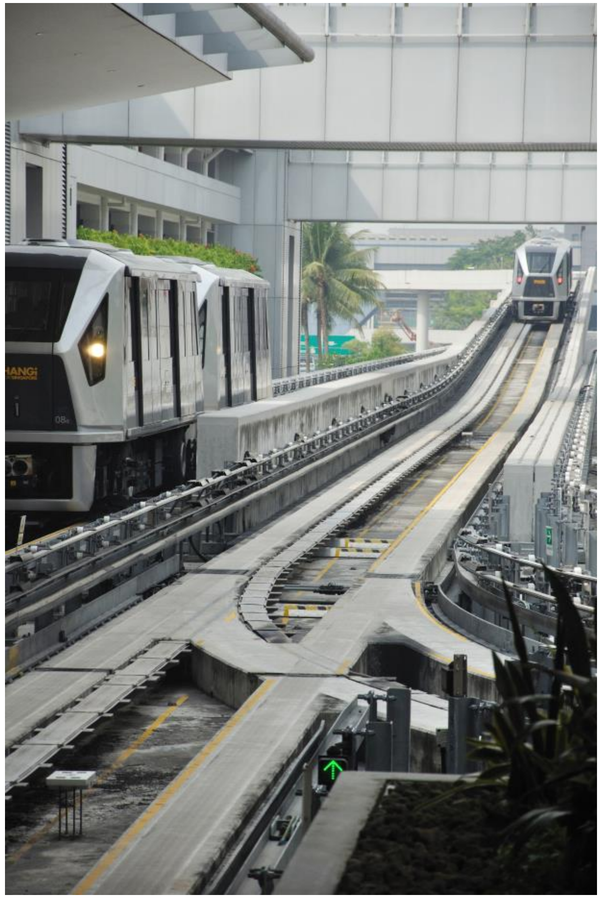
We know that there is huge competition for liquidity in the global market place and therefore to attract liquidity, on the best terms, projects need to:

- be commercially justifiable and competitive
- have the necessary commercial and political support
- be supported by an appropriate legal framework
- be well structured with credit worthy counterparties with good track records



UNCITRAL OBJECTIVES

- The UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects provides useful analysis and recommendations on how to structure and implement projects. In structuring and financing major infrastructure projects the key objective for all parties is to ensure that the project can be continuously and reliably available.
- This requires a detailed understanding of all this risks (such as land, permitting, construction, environmental and social, operational, availability or demand, credit and political risks) and the consequences for failure to perform (breach), inability to perform (force majeure), changes in law and, ultimately, termination.



KEY RISK AREAS

In assessing a project we would typically focus on the following key risk areas and typically expect:

Risk	Public	Private	Comments
Project Scope	X		Well defined, realistic and achievable output specification
Land	X		Depending on the project this risk may also be a Private sector risk with expropriation assistance from the Public sector
Permitting		X	The risk to obtain and maintain tends to sit with the Private party, whereas change in permitting sits with Public (captured under CiL)
E&S		X	
Construction		X	
Operation		X	
Revenue			The revenue for each project varies by sector and country. There are various models. In general, in developing economies, merchant or pure demand risk can be challenging (but there are exceptions)

KEY RISK AREAS (CONTINUED)

Risk	Public	Private	Comments
Counterparty credit	X	X	Development of bankable projects needs to ensure that the project company is isolated from counterparty credit risks
Currency (availability, convertibility, transferability)	X		Example: Indonesia where all domestic transactions must be conducted in Rupiah (unless an exemption applies) vs Bangla Regas where revenue is in USD. Government contractual assurances of availability of Dollars / converting bank agreements.
Political (including change in law and stabilisation)	X		Change in law may be shared up to agreed thresholds General v discriminatory/specific CiL
Natural Force Majeure (including Foreign Political FM)	X	X	Shared risk – excuse from performance
Termination			Compensation to the project company depends on the grounds for termination and depending on whether or not the project is retained by the Public sector. In general, the Public sector should not be unjustly enriched and the lenders will always be concerned to get their debt repaid

SUMMARY

- To attract significant diverse investment (and a wider pool of liquidity), the success of a country's economic infrastructure programme is proportionate to the reliability of its legal framework and the consistency of the model
- “Partnership" means that all stakeholders need to share risks that they can reasonably bear and unfair burdens placed on any party inevitably result in failure for all
- Wrongly, the stakeholder that is last to the table is often the lenders (who are key to the success of the project as major risk takers)
- Developing legal frameworks with well-balanced risk allocation requires good planning, a clear understanding of all stakeholders' objectives and limits, transparent procurement processes and realistic timeframes.

There are huge benefits:

- attractive to a diverse investor base
- increase competition
- speed up execution time
- transfer risk to the private sector where it can be best managed
- facilitate true public – private partnerships