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Public-Private Partnerships Conference

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

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HARNESSING
OPPORTUNITIES
and
OVERCOMING
CHALLENGES

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



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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



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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



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General Legal Framework

- **New international standards and tools**
 - Sustainable Development Goals (2015)
 - United Nations Convention against Corruption (2003)
 - Public Investment Management Assessment (IMF)
- **New guiding principles for PPPs**
 - Public interest
 - Proper management and accountability
 - Economy and efficiency



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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**



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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



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Project Risks

- **Main Project Risks**
 - Force majeure and similar risks
 - Political risk
 - Construction and operation risks
 - Commercial risks
 - Exchange rate risk



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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**



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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



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Traditional Financing Sources

- **Equity Capital**
- **Commercial loans and "subordinated" debt**
- **Institutional investors**
- **Capital market funding**



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International financial institutions, export credit agencies

- **Transfer restrictions**
- **Expropriation**
- **Breach of contract**
- **War and civil disturbance**



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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**



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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**



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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**



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Selected Issues (Overview)

- **Balancing the interests of public and private sector**
- **Devising appropriate bidding procedures**
- **Facilitating financial closing**
- **Dealing with changed circumstances**



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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**



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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



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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



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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



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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**



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Security Interests

- **Security over physical assets**
- **Security over intangible assets**
- **Security over shares of the private partner**



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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**



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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**



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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



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