

Public-Private Partnerships

In 20 jurisdictions worldwide

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo



2015

GETTING THE
DEAL THROUGH 

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General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

As Austria started implementing PPPs relatively late, the way in which PPP projects are structured has very much been influenced by experience gathered abroad, in particular in Central and Eastern Europe and the United Kingdom and, to a lesser extent, in Germany. Most major Austrian players in the PPP market (eg, construction companies, banks and advisors) gained experience internationally before participating in their first Austrian projects.

There is no statutory definition of PPPs and no legal restriction on any particular type of PPP transaction. Usually, design-build-finance-operate-maintain or design-build-finance-maintain models are used.

Originally, the motivation for implementing PPP projects in Austria was to increase efficiency by relying on international experience of how to better coordinate all players in complex projects. However, in recent years the main motivation has often been to keep projects out of the public budget in accordance with the Maastricht criteria regarding government budget deficits.

2 What categories of public infrastructure are subject to public-private partnership transactions in your jurisdictions?

When it comes to large-scale projects, it is mainly road projects that have been implemented as PPPs. In addition, projects regarding schools, hospitals and rehabilitation centres have also been quite successful, although admittedly no such projects have been implemented recently. Moreover, only certain other kinds of projects have been implemented as PPPs, such as logistic centres, cable cars, waste collection and recycling systems.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

There is no particular PPP legislation in place. PPPs are mainly governed by public procurement law. This includes both the awarding of public contracts and concessions.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

Austria has no centralised PPP authority, competence centre or comparable organisation.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

There are no legal restrictions on what kind of public entity may award a PPP. The majority of PPPs have been implemented on a provincial or municipal level. On a national level there have only been a few, albeit large projects (such as Austria's only highway PPP, the A5 'Ostregion' project).

6 How is the private party in a PPP remunerated in your jurisdiction?

In Austria, the private partner is usually remunerated by means of availability fees or other forms of payments, which depend on the quality of the

services or infrastructure provided. It was only in the very early projects that private parties were made to assume usage risks, such as traffic risks. If a large infrastructure project has to be newly built before commencing operations and, thus, the initial private investments become too large for an attractive business model, some Austrian PPP contracts also grant minor ramp-up payments during the construction phase or at the commencement of operations.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

As mentioned in question 6, it is rather unusual in Austria for revenue or usage risks to be assumed by the private party. However, there is no legal restriction as to such an allocation of risks. Market standards and, in particular, bankability requirements are the driving forces in this respect.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

In general, law-making bodies are strictly separated from the public administration in Austria so that no legislative approval for particular projects or funding methods is required. Payments to private partners during a particular year must, of course, be covered by the respective annual public budget of the awarding entity that acts as employer or concession-grantor.

However, it must be noted that the financial situation of the municipalities (no matter what size) is subject to review by the provincial governments. All public activities are reviewed by a court of auditors, either on a provincial or federal level.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

There is no statutory cap on the return or profits that a private partner in a PPP is allowed to earn. Unlike in many other European jurisdictions, Austrian law does not provide any possibility for the public to get access to PPP contracts. Therefore the compensation of private partners usually remains confidential.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

There are no legal restrictions on the transfer of ownership in project companies. However, the law is very strict if such transfers are undertaken to circumvent a procurement procedure or to create an in-house situation. On the other hand, PPP contracts usually contain very detailed stipulations for all kinds of transfer of shares in the project company. Usually the transfer of shares in the project company to other parties, as well as the assignment of rights or obligations arising from the project contracts, is subject to the prior consent of the public partner or the lenders. The shares in the project company are pledged to the lenders. Sometimes lenders have step-in rights (in to the project company – but more often in to the PPP contract) in certain crisis scenarios.

Procurement process
11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

A PPP contract is almost always a public service contract or works contract and thus must be awarded in a public procurement procedure. In some cases, the PPP contract is a concession (within the meaning of EU procurement law) and is awarded in a (more flexible) concession award procedure. In all cases public procurement law is applicable, which is fully harmonised with EU procurement law. However, in general Austrian public procurement law also becomes applicable below the thresholds stipulated by EU procurement law, but this irrelevant for PPPs.

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

As the award of a PPP contract generally has to be made in a public procurement procedure, the whole content of the contract may be subject to negotiations – but only during the procedure and before the award of the contract. Different solutions for different bidders are almost impossible because procurement law strictly requires that all bidders be treated equally, in a non-discriminatory manner as well as transparently. Tender documents (including draft contracts) must ensure that the bids are fully comparable and that published award criteria are uniformly applied to all bids. Technical and economic alternatives are possible if explicitly allowed in the tender documents (rules for concession awards are less strict concerning alternative bids).

This is also why negotiations or amendments to the PPP contract going beyond what is relevant following the selection of a preferred bidder are not permissible under Austrian law. Instead of this, it is usual practice in Austria to shortlist bidders in several rounds and to invite only two or three bidders to submit their last and final offer based on a final version of the PPP contract.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

Unsolicited proposals must not be considered in Austria.

14 Does the government party provide a stipend for unsuccessful shortlisted proponents or otherwise bear a portion of their costs?

In large and complex projects the public partner sometimes grants a fixed sum as compensation for the costs of preparing the (unsuccessful) bids. Usually this sum is only symbolic and is not paid to excluded bidders.

15 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

In Austria, PPP contracts are drafted and proposed by the public partner. Depending on the chosen procurement procedure and tender documents the whole draft contract or only certain parts of it are subject to negotiations. Before the final bids, the public party decides which amendments it wishes to accept and issues a unified final contract version to all bidders. Only as far as technical or economic aspects are concerned is the public party obliged to accept alternative bids. For these reasons, the PPP contract is under the public partner's control during the entire procedure and the enforceability of the PPP agreement is not in question. If a party to the transaction insisted on such an opinion, it would be issued. But we are not aware of such PPPs in Austria.

16 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

All foreign entities from World Trade Organization member states are free to participate in PPPs in Austria and must not be discriminated against by the awarding authority.

Design and construction in greenfield PPP projects
17 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

There are no statutory restrictions concerning the form and content of PPP contracts and no obligatory standard contracts, whether for greenfield or brownfield projects. There is also no statutory restriction on the chosen law, but Austrian public authorities never accept laws other than Austrian law. We are not aware of any projects where dispute resolution by means of arbitration was chosen instead of Austrian state courts – although this would be possible under Austrian law. This includes projects that have been (co)financed by the European Bank for Reconstruction and Development or the European Investment Bank.

18 Does local law impose liability for design defects and, if so, on what terms?

Usually the private partner in a PPP project is responsible for both the design and construction of infrastructure. All architects and other design providers are therefore sub-contractors of the private partner. On the other hand, it is general practice that the design work required for applying for an environmental impact review and the respective permits are provided by the public partner. In these cases, the public party also assumes the respective permit risk (eg, delay or additional costs).

Austrian law does not provide for joint liability of designers and contractors as such, if they have been contracted under different contracts by the public authority or employer. However, both the designer and the contractor are obliged to examine all information and instructions provided by the public partner or employer and to notify them in case of any defects. In doing so, the designer and contractor must apply a level of care that is reasonable in relation to the type and scope of the project and the skills and experience that the employer or public partner may expect from them.

19 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

No specific warranties are required for PPPs. But even if the contract remains completely silent on this issue, statutory warranty obligations apply. They are comparable to warranties in other civil law jurisdictions but must not be confused with defect liability under common law. The warranty period for construction works is three years, and for delivery of moveable assets and services it is two years. This applies to all kinds of defects; there is, however, no decennial liability for structural defects.

20 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

Under Austrian law, both liquidated damages and contractual penalties in the narrow sense are enforceable and common.

21 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

Compensation for damages comprises all kinds of damages, disadvantages and costs, including indirect or consequential damages and lost profits. Usually, PPP contracts deal with such issues in a very detailed manner; in addition, there are detailed statutory provisions and a large number of Supreme Court rulings hereto.

22 May a contractor suspend performance for non-payment?

Under Austrian statutory law, a contractor is entitled to suspend performance for non-payment based on its general right to withhold performance if the other contractual party is delayed in fulfilling its obligations. PPP contracts (as well as works contracts in general) nevertheless usually exclude this right of the contractor. As this is a very crucial point in daily practice, a large number of court decisions exist in this regard.

23 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

'Pay if paid' clauses and 'pay when paid clauses' are unusual in Austrian construction contracts, so there is limited experience in this area. But the interests of contractual parties in a PPP contract are the same as in works

contracts – where more experience exists. Generally, ‘pay if paid’ clauses are considered unreasonable and therefore void. ‘Pay when paid’ clauses are in principle possible insofar as the sub-contractor does not have to assume the risk that the public party is unable or unwilling to pay (solvency risk).

Austrian law does not however contain statutory provisions for direct payments from a public party to subcontractors, except for social insurance contributions.

24 Are ‘equivalent project relief’ clauses enforceable under local law?

Limited jurisprudence exists with respect to such clauses. Clauses that restrict a sub-contractor’s entitlements to what the PPP contract grants to the private party (or general contractor) would not be considered problematic per se. As far as compensation for performance of contractual obligations or contractual damages is concerned, and so long as the respective provisions of the PPP contract are disclosed to a sub-contractor, such clauses may be possible too.

Austrian courts have taken a restrictive view if the purpose of a clause is to pass down the solvency risk of an employer to the sub-contractor. In addition, clauses according to which the sub-contractor loses claims due to the general contractor’s fault (eg, general contractor misses deadlines for claiming against the employer) may be unreasonable and thus void. But it is considered permissible to pass down, en bloc, all rights and obligations arising from a specific part of the general contractor’s scope of works and services under a PPP contract.

25 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

Under Austrian statutory law, the employer is not allowed to extend the scope of the works or services. However, it is standard to include such clauses in PPP agreements and construction contracts (variation clauses). Usually, the contract also provides for a particular variation procedure that is very similar to international standard contracts, such as the FIDIC books. Austrian courts generally tend to approve all additional works and services that are of the same or very similar character. The private partner or contractor is, however, not obliged to accept completely different works and services. Above certain tolerance thresholds the private partner or contractor is entitled to adapt prices due to significantly increased or reduced quantities (even if this concerns similar services or works).

26 Does local law entitle either party to have a PPP agreement ‘rebalanced’ or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Austrian law is familiar with the same concept of force majeure as other civil law jurisdictions (this is not comparable to the same legal instrument in common law jurisdictions). Based on these principles, purely national contracts only contain provisions on, for example, unforeseen physical events, but not force majeure events. In PPP contracts, involvement of international banks and contractors is expected and hence international standards and clauses are applied.

Another issue concerns unduly burdensome obligations arising from unbalanced negotiation powers and not due to unforeseen events. In such cases, a particular clause or part of a clause may be rebalanced by the courts. Only in very severe cases can the whole contract be rescinded from the outset.

Another possibility to challenge a contract or to have it rebalanced by the court is if the challenging party concluded the contract based on a substantial error. The precondition is that such an error was either caused by the other party or, if it was not caused but was obvious to the other party, that party could have clarified the error. Termination is possible if the challenging party would not have concluded the contract at all, had the error been clarified in time. Rebalancing is possible if the parties would have agreed different solutions but would have concluded the contract in any case. However, rebalancing does not mean that the court writes a new clause but only that the provision to which the error relates is deleted. Both results (termination and rebalancing) can cause severe problems to a mainly debt-financed project like a PPP. This is why PPP contracts usually exclude this remedy.

27 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

No specific lien laws apply to PPPs. However, mandatory law grants the contractor of a works contract the right to demand a specific security, namely a payment security worth 20 per cent of the outstanding contract price (even if not yet due). This also applies to construction works under a PPP contract.

28 Are there any other material provisions related to design and construction work that PPP agreements must address?

The applicability of public procurement law has a strong effect on the content of PPP agreements. Procurement law requires all private bidders to be treated equally and in a non-discriminatory way, the procedure to be conducted in a transparent manner and to only apply objective and previously announced award criteria. Moreover, the contracts must be drafted carefully by the public authority before being included within the tender documents. The contracts must be formulated in such a way that all bidders can calculate their bids without assuming uncertain risks. The public authority must ensure that the bids are fully comparable.

Operation and maintenance

29 Are private parties’ obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

Both approaches are legally possible. Usually, PPP contracts contain detailed requirements for the services or infrastructure to be provided, as well as performance criteria. Where the private party is paid according to availability or other quality criteria (which is the rule and not the exception in Austria), performance criteria are needed in any case to determine the actual price paid. If the private party is only paid by the users of the service or infrastructure, the public party may still wish to evaluate whether the performance of the private party is defective or in full compliance with the PPP contract. Thus, some performance criteria are always necessary.

30 Are liquidated damages payable, or are deductions from availability payments possible, for the private party’s failure to operate and maintain the facility as agreed?

PPP contracts in Austria usually structure payments made to private parties in such a way that a basic payment for perfect service or performance and deductions for each failure on the part of the private party are possible. In some cases, premiums are also possible. It depends on the particular contract as to whether such deductions are structured as part of the compensation or as liquidated damages or penalties. The law leaves this decision to the parties.

In order to enable the private party to present a robust financial model to its lenders, PPP contracts deviate from the statutory rules on compensation for damages and try to regulate the amount to be paid and the conditions for payment as precisely as possible. The contracts try to make every project risk as predictable and computable as possible.

31 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

There are no statutory requirements in this regard but it is usual that PPP contracts specify what condition infrastructure needs to be in at the time of the handover to the public partner at the end of the contract term. During a particular phase before the end of the contract, the state of the facilities is assessed either jointly by the parties or by an expert. Any identified defects must subsequently be remedied by the private partner within a certain time before the end of the contract. If the private partner fails to do so, the public partner is either entitled to engage replacement contractors or suppliers and remedy the defects at the cost and risk of the private partner, or make deductions from the last instalments of the contract price. It is common practice to also demand securities for the performance of these obligations.

Whether and to what extent the private partner is obliged to refurbish facilities is decided on a case-by-case basis.

Risk allocation
32 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

It is customary that under PPP contracts the private partner receives payments and generates turnover only after the commencement of its services or availability of the respective infrastructure. In these cases, the private partner assumes the delay risks. Where the PPP mainly concerns existing facilities that the private partner only has to operate (or exploit), the PPP contract must specify other consequences of a delay. In any case, most contracts foresee a longstop date for achieving financial closing, following the expiry of which the public partner may rescind the contract.

33 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

In most cases the permit risk remains in the sphere of the public party. Licences for the business activities of the private party, however, must be obtained before or during the contract award procedure.

34 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

Austrian law defines force majeure in general terms as an extraordinary, external event the consequences of which cannot be prevented by the parties with reasonable efforts. Thus a contractual definition of force majeure events is not necessary – but it is customary because international banks expect force majeure clauses based on common law standards. Geotechnical risks and environmental risks (pollution) do not constitute force majeure events under Austrian law but form part of the ground risk falling within the ambit of the public partner's responsibility. In addition, adverse weather conditions do not constitute force majeure events unless they are extraordinary and cannot be prevented. As far as construction works are concerned there is a long tradition of using (non-mandatory) standard contracts. Public procurement law even forces the public party to use these standard contracts and only deviate from them where there is an objective reason. In addition, numerous technical norms exist in Austria as well as definitions of extreme weather conditions (eg, floods exceeding the recorded maximum in the last 20, 30 or 50 years before the conclusion of the contract are contractually defined as force majeure).

35 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Such risks can either be part of force majeure (strikes, revolutions, etc), or contractually allocated to the parties – mostly to the private partner. However, the permit risk usually remains with the public party. The same usually applies to ownership or access to land, as only the public partner may be entitled to expropriate land (in particular for roads and railways). Acquiring private consent is left to the private party.

36 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

Nationalisation and discriminatory changes to laws are considered risks of the public party. All other legal and tax risks, as well as technological developments, usually remain on the private party's side.

Different solutions may be considered appropriate where the private partner or concessionaire assumes demand risks.

37 What events entitle the private party to extensions of time to perform its obligations?

According to both statutory law and contractual practice, delays caused by a reason falling within one party's sphere of responsibility (as defined by the contractual or customary allocation of tasks and obligations) entitle the other party to an extension of time or another relief from performing its own obligations. It is not necessary that a delay be caused by the other party's fault (any form of negligence or intent). If there is fault, PPP contracts usually grant compensation of other disadvantages or damages in addition to a pure extension of time for completion or performance of a service.

38 What events entitle the private party to additional compensation?

This is usually defined by the PPP contract on a case-by-case basis and follows the same principles as the entitlements to an extension of time.

39 How is compensation calculated and paid?

A PPP contract may determine how additional compensation is calculated on a case-by-case basis, and contracting parties do so extensively. But where a PPP contract comprises construction works (which is often the case), public procurement law obliges the public party to use standard contracts. Although several such contracts exist, they are all based on one document called ÖNORM B 2110 (General Terms for Construction Contracts in Austria).

ÖNORM B 2110 not only sets forth which claims a party may have and which procedure must be followed to notify, specify and determine a claim, it also refers to a norm for the calculation of costs and prices for construction works. The calculation norm contains provisions for calculating prices for additional works (same prices) and, when significantly changed quantities justify a recalculation of unit prices, how prices for works or services shall be calculated if the contract and its bill of quantities do not contain prices. As all contractors, subcontractors and suppliers use these calculation methods, they are transparent and well accepted in PPP projects.

As far as other contractual services besides works are concerned, a PPP contract must contain equivalent provisions.

As a general rule, compensation in the sense of this question is based on a cost basis and not in relation to return on investment or other benchmarks that the private party expected. The reason behind this is that, by compensating up to an expected financial balance, the public party would assume the private party's business risk and not risks of a specific project.

40 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

Some statutory provisions require mandatory or minimum insurance coverage, for example liability insurance. Every bidder in an award procedure for a PPP contract must fulfil such requirements. But what is more important are bankability requirements and internationally accepted standards of insurance coverage.

Default and termination
41 What remedies are available to the government party for breach by the private party?

No additional remedies are available to government parties other than those available to any private party. It is customary to restrict remedies to delay liquidated damages, quality liquidated damages and a right to termination (with predefined compensation).

However, under statutory law in cases of delay the other party may insist on performance and claim compensation for damages caused by the delay, or it may terminate the contract after an appropriate grace period and claim damages for non-performance. In other cases of defective performance, the other party may refuse acceptance of the service, works or delivery if the defect is material, and terminate the contract. In the case of minor defects, the other party may demand performance and claim compensation for the difference.

In all cases compensation for damages means being put into the same situation as the respective party would have been in had the other party fully performed its obligations. As the law does not restrict compensation to payment of money this is usually explicitly provided for by the PPP contract (claims are reduced to time or money, or both).

42 On what grounds may the PPP agreement be terminated?

See question 41 – delay or defective performance constitute grounds for termination. In addition, a general principle of law grants one party to a contract the right to terminate the contract with immediate effect whenever the other party breaches the terminating party's trust so that it would be unreasonable to expect the terminating party to continue the contract. It is worth noting that, under Austrian law, an initiation of insolvency proceedings and comparable events cannot be agreed as termination events.

Update and trends

The number of PPP transactions in Austria per year has always been low compared with Central and Eastern Europe. Although the restrictions in the public budgets have increased – in particular on a provincial and municipal level – the appetite for PPPs is not likely to grow significantly in the next one or two years. The public administration is very reluctant to accept PPP models. But small and medium-sized projects relating to traffic, health, schools and waste will continue to develop.

Over the medium and long term more large-scale PPPs are possible. The main reason is that, since the financial crisis in 2009, the Austrian government has not returned to the usual level of public investment in infrastructure and public services. This is why the need to refurbish, enlarge or update infrastructure is growing every year. Not only in Austria but also at the EU level intensive discussions are ongoing concerning how to boost economic growth and competitiveness once the European Central Bank has exhausted its tools. Infrastructure investments are likely to be among the first steps the Austrian government will take. Private participation in such investments, like in PPPs, will increase their effectiveness. Finally, Austria has kept its public debts under stricter control than other European states, so it has more resources at hand.

On a provincial and municipal level, the aspect of keeping projects outside of the public budget will continue to play an important role. According to the Maastricht criteria regarding government budget deficits, this requires major shifts of risks to private partners (construction risk and either availability or demand risk).

43 Is there a possibility of termination for convenience?

Statutory law only foresees termination for convenience for works contracts, but the parties may agree on such termination rights in all other contracts too. It is common practice that only the public party shall be allowed to terminate for convenience. If it chooses to do so, it usually has to compensate a major part of the remaining contract price, for example the outstanding debt capital plus a projected rate of return minus expenses the private party did not have to incur due to the early termination.

44 If the PPP agreement is terminated, is compensation available?

For bankability reasons it is usual practice that, even in cases of termination due to a fault on the part of the private party, the latter gets compensated for all or a major part of the outstanding debt at termination.

Financing

45 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

Usually, the government neither provides debt financing nor any securities. In a majority of cases it does not even participate in project companies and thus does not provide equity either.

46 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

In large and medium-scale projects, direct agreements granting temporary step-in rights or comparable tools in crisis scenarios to lenders are common.

47 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

Usually, claims of the project company arising from the PPP contract may be pledged to the lenders. However, public parties are reluctant to allow an assignment of the whole contract or permanent step-in rights without having an approval right to the new contractor or concessionaire.

When drafting contracts in Austria, step-in rights and comparable tools if not explicitly foreseen and precisely determined in the PPP contract are critical from the perspective of public procurement law. Amendments to public contracts may result in the obligation to retender the contract if the amendment (had it been known from the outset) may have resulted in other undertakings being interested in submitting a bid.

48 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

Usually their cure rights apply after the project company has failed to perform.

49 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

PPP contracts usually foresee an approval right and sharing of refinancing gains (up to a 50 per cent share).

Governing law and dispute resolution

50 What key project agreements must be governed by local law?

There is no mandatory rule providing for the applicability of Austrian law. However, we are not aware of any project where – except for the project financing documentation – another law was chosen. Usually, not only the PPP contract and subcontracts but also the securities and the project financing are governed by Austrian law. As far as the financing contracts are concerned, the use of standard contracts like the LMA standard is widely accepted.

51 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

No immunities are available to the public party.

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52 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

International and national arbitration are available. Although Austria is a very arbitration-friendly jurisdiction, arbitration is hardly ever agreed by the public side as the dispute resolution mechanism in PPP contracts.

53 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

No.

54 Is there a special mechanism to deal with technical disputes?

In Austria it is well accepted to agree on expert determination before going to court, in particular with respect to technical aspects. However, decisions of experts or adjudicators are not enforceable in the same way as a court decision or an arbitral award.

GETTING THE
DEAL THROUGH 

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General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

In Bulgaria, PPP transactions have been concluded before any statutory framework was established. It was not until the start of 2013 when the Public-Private Partnership Act (the Act) came into force and legally shaped the concept of PPP in the country. Its legal definition suggests that the PPP should be a long-term contractual cooperation between a public and a private partner for an activity of public interest, and should guarantee better value of invested resources as well as better risk allocation.

The legal framework calls for compliance with the principles of publicity, transparency, free and loyal competition, non-discrimination, equality and proportionality. The law does not prescribe specific restrictions as to the type of the PPP transactions, save for public tenders and concessions (the public tenders are subject to the Public Procurement Act whereas the Concessions Act and the Subsurface Resources Act regulate the concessions). The Act also provides that the term of the PPP agreement shall be no less than five and no more than 35 years. Customarily, design-build-finance-maintain and design-build-finance-operate-maintain agreements seem to be the main choices for PPP transactions.

2 What categories of public infrastructure are subject to public-private partnership transactions in your jurisdictions?

The following two categories of public infrastructure are subject to PPP transactions in Bulgaria:

- technical and green infrastructure (eg, parking lots, garages, public transportation sites, CCTV, street lighting, green areas, parks and gardens); and
- social infrastructure (eg, healthcare, education, culture, sport, leisure and tourism, social aid, prisons and administrative buildings).

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

As of 2013, the applicable legislation for PPPs is the Public-Private Partnership Act. In order for a transaction to fall under this act, certain legal criteria must be met:

- the particular activity falls outside the scope of the Public Procurement Act, because the public partner is not able to finance the project or because the PPP structure would ensure better risk allocation; and
- the particular activity could not be assigned as a concession because there are no revenues generated from the service in question or the private partner has no rights over such revenues.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

The Council of Ministers defines the PPP policy for Bulgaria by preparing the National Programme for PPP and the operational plan for each programme period. Each PPP project must be included in the operational plan of the Council (for each year) in order to be completed.

The Minister of Finance governs the actual spending of public funds for PPPs and reports annually to the Council of Ministers. The respective ministers and directors of agencies implement the state policy on PPPs

according to their field of competence. Municipal PPP projects follow a municipal PPP policy defined by the respective municipal council.

The Ministry of Finance maintains a publicly available register of all PPPs.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

The Act explicitly indicates all public partners. They may be divided into three categories:

- ministers and directors of agencies and departments – for state PPPs involving state-owned objects that are part of the technical and green infrastructure;
- mayors of municipalities – for municipal PPPs involving objects that are part of the technical and green infrastructure and owned by the respective municipality; and
- state and municipal public organisations – for activities of public interest involving objects that are part of the technical and green infrastructure and owned by the respective organisations.

6 How is the private party in a PPP remunerated in your jurisdiction?

The public partner's involvement in the PPP is in the form of financial support. Such support may be payments to the private party, the granting of real estate rights (real estate property not subject to the PPP) and the granting of rights for additional economic activities notwithstanding the PPP activities. The financial support is rendered as per the State Aid Act.

The amount of the financial support includes all payments to the private party, the value of the granted real estate rights and the profit of the private party generated through the additional economic activities.

The payments towards the private party are intended to reimburse the investment and operational costs for management and maintenance. The reimbursement of investment costs covers the private party's own-invested capital, in accordance with the predefined rate of return for the private partner, and the borrowed capital with its interest.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

Each PPP project has its own risk allocation. The parties share all risks as per the particular PPP contract depending on their own capabilities.

However, there are some mandatory rules. The private party always assumes the construction risk and at least one of the risks related to the availability or demand for the PPP service. Assuming those risks does not guarantee reimbursement of the invested funds.

There is one exception though – when a statutory act predefines the price of the PPP service, the risk related to the demand of the service is shared between the parties or is assumed entirely by the public partner.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

All PPP projects where state funding is provided are attached as an enclosure to the State Budget Act (or the Municipal Budget Act) for the respective

year. Since each PPP project must be included in the operational plan of the Council of Ministers, all PPP transactions are subject to preliminary estimation and approval, although the figures in the plan are only a forecast.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

Yes. The public partner opens the procedure for electing a private partner with a decision. This decision defines the maximum rate of return for the private partner.

Each participant in the procedure offers his or her own rate of return, which shall not exceed the cap set by the opening decision for commencement of the procedure for selection of a private partner.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Yes. The Act determines that a private partner is either an existing commercial company or a special-purpose vehicle (SPV), incorporated in accordance with the provisions of the Act. The law prohibits the private partner from issuing bearer shares.

If the private partner is not a corporation or the procedure for election of a private partner demands it, an SPV shall be incorporated. The SPV may be solely owned by the private partner or may be shared between the private partner and the public partner. The change of control of the private partner in the SPV is subject to definition by the procedural documentation for election. The public partner may participate in the SPV via a cash contribution or by a contribution in kind, though this participation is considered financial support for the private partner. The public partner, irrespective of its shares, always has a blocking quota when the SPV adopts decisions for the transfer of assets.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

A minister or a director of an agency or department extends a proposal to the Council of Ministers for the initiation of a procedure. For municipal PPPs, the mayor extends the proposal to the Municipal Council. The respective body adopts a decision for opening a procedure to elect a private partner. The procedure for election is an open procedure, a competitive dialogue or a negotiation procedure with an invitation as per the Public Procurement Act.

Overall, the procedure for election of a private partner largely resembles a procedure for a public tender under the Public Procurement Act. The public partner defines the main clauses of the future PPP contract, the cap on the rate of return, the major risks' allocation, etc. The procedure is announced in the Register of Public Tenders. All of the legal requirements towards the participants in a public procurement procedure apply to it as well (eg, the private partner not being convicted of certain crimes, not being in a liquidation procedure, etc).

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

No such opportunities have been stipulated by law.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

Any interested person may propose a PPP project to a competent public partner. This proposal should be accompanied by a motivation and a financial-economic analysis (when the project involves construction, pre-investment research or an investment project should be included as well).

The proposal may then be addressed by the respective minister within the Council of Ministers, and a decision for opening a procedure may follow.

14 Does the government party provide a stipend for unsuccessful shortlisted proponents or otherwise bear a portion of their costs?

No.

15 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

The public partner in Bulgaria drafts and proposes the PPP contracts. In general, the draft contract is not subject to a negotiation procedure, except when a complex evaluation of the bid is needed.

16 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

As long as the company is an equity one, existing or newly established in compliance with the requirements provided for in the Act, there should be no restrictions over the company, regardless of its nationality.

Design and construction in greenfield PPP projects

17 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

The legislation stipulates that contracts related to design and construction are to be executed in a written form. There is also a minimum set of requirements for PPP contracts. The provisions of these contracts must include: the parties to the contract, the risk allocation between the partners, the amount and sources of funding from the private partner, procedures for the participation of subcontractors, etc. PPP contracts are governed by Bulgarian law.

18 Does local law impose liability for design defects and, if so, on what terms?

Under general civil law principles, if during the performance of the work the contractor has deviated from the order or if the work has deficiencies, the assignor may claim one of the following:

- repair of the work within a period stipulated by the assignor, without payment;
- covering of the expenses needed for the repair; or
- a reduction of the compensation.

If the deviation from the order or the deficiencies are so material that the work is deemed unfit for its contractual or ordinary purpose, the assignor may terminate the contract.

In addition, the designer may be subject to a penalty of €1,500 to €7,500 if he or she designs a project that does not comply with the Bulgarian legislation governing construction works.

19 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

Under Bulgarian law, there are minimum warranties in relation to construction works, eg, for all newly constructed buildings - 10 years; for rehabilitated construction of buildings - eight years; for motorways - five years; and for railways and runways - 10 years. In addition, the PPP contract itself will provide for additional warranties related to the specifics of the project.

20 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

The parties will implement specific terms in the agreement in relation to the private party's non-performance of its obligations under the PPP agreement. Moreover, under Bulgarian law, the performing party may either require from the non-performing party the performance alongside damages for delay or damages for the non-performance. The damages will cover the incurred losses as well as the missed benefits. Also, in the case of non-performance the performing party may terminate the agreement after giving a reasonable notice to the other party to perform.

21 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

Under Bulgarian law, only direct and immediate damages are covered. The private partner will not be liable for indirect and consequential damages.

In addition, the private partner may not limit its liability with respect to gross negligence or wilful misconduct.

22 May a contractor suspend performance for non-payment?

Yes.

23 Does local law restrict ‘pay if paid’ or ‘paid when paid’ clauses?

Generally, such clauses are not restricted under Bulgarian law. Their implementation in a contract depends on the arrangements between the contractual parties.

24 Are ‘equivalent project relief’ clauses enforceable under local law?

Generally, such clauses are not restricted under Bulgarian law. Their implementation in a contract depends on the arrangements between the contractual parties.

25 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

If there are unforeseen circumstances that require the assignment of additional construction work outside the scope of the original PPP agreement, such amendment agreements are under the authority of the Council of Ministers or the Municipal Council.

26 Does local law entitle either party to have a PPP agreement ‘rebalanced’ or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

A PPP contract shall stipulate the economic balance of the PPP, which constitutes the balance between the benefits for the parties and the distribution of risks among them. In the case of a change in the economic balance, each of the parties to a PPP contract may request an amendment to the contract with a view to restoring the economic balance. The request shall be sent to the other party along with a motivated proposal based on a new, detailed analysis of the circumstances leading to the change in the economic balance.

27 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

No specific lien laws apply to PPPs under Bulgarian law. The public partner may insist on compliance guaranteed with securities under general civil law.

28 Are there any other material provisions related to design and construction work that PPP agreements must address?

In the case of construction agreements, an offer by a private bidder must be accompanied by an investment project or pre-investment research.

Operation and maintenance

29 Are private parties’ obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

In all cases, there are minimum requirements for the content of the PPP agreement. These requirements relate to the specific inclusion of the rights and obligations of the parties, as well as the conditions and terms for their fulfilment. These rights and obligations are clearly defined in detail.

These rights and obligations can only be varied with the signing of an annex to the original PPP agreement. Amendments to the opening of the procedure, the selection of the private partner, or the offer of the private partner shall be approved by the public partner with a decision. If there are unforeseen circumstances that require the assignment of additional construction work outside the scope of the original PPP agreement, such amendment agreements shall be approved by the Council of Ministers or the Municipal Council.

30 Are liquidated damages payable, or are deductions from availability payments possible, for the private party’s failure to operate and maintain the facility as agreed?

See question 20.

31 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

There are no specific statutory provisions regarding the refurbishment of facilities upon the transfer back to the government. However, the law foresees that the PPP agreement must include specific clauses for the consequences of the agreement’s termination. Thus, it is almost certain that in all cases the agreement will have a specific list of requirements related to the condition of the infrastructure upon its transfer back to the public authority. Securities for the performance of the private partner’s obligations may be required.

Risk allocation

32 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

The law stipulates that the risks are allocated between the public and the private partner on a case-by-case basis. The allocation is done subject to the capabilities of the partners to evaluate, control and manage the specific risks. There is no customary allocation due to the size of the market. It must be noted that the private partner always carries the construction risk and at least one of the risks related to the availability and the demand for the public service. In addition, the allocation of risks to the private partner does not guarantee the return of the invested funds under the agreement.

33 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

A government’s methodology for PPPs indicates that this type of risk is usually borne by the private partner, but is likely to be assigned on case-by-case basis.

34 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties’ control or is it defined with reference to specific enumerated events?

The existence of force majeure clauses in the PPP agreement will be left to the parties themselves. Customarily, in agreements signed under Bulgarian law there are several options. One is that the parties will have a general clause about force majeure events, without any explicit examples. In another scenario, the partners will prescribe an exhaustive list of events that constitute a force majeure, and anything outside this list will not be deemed to affect the performance of the parties’ obligations. Alternatively, the parties may agree that a force majeure event will only be deemed to be in existence if the Bulgarian Chamber of Commerce and Industry issues a certificate for force majeure.

35 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

The government’s methodology for PPPs indicates that this type of risk is usually borne by the private partner, or less commonly shared between the parties. It must be noted that some acts of third parties may fall under the description of a force majeure event.

36 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

The government’s methodology for PPPs indicates that, customarily, risks of a political, regulatory or economic nature are borne by the private party or shared. Insurance against political risks, like the one offered by the World Bank, may be applicable for the private partner. If there is nationalisation or another type of discriminatory act by the government against the private partner, the latter is free to seek remedies through the judicial system.

37 What events entitle the private party to extensions of time to perform its obligations?

Extensions for the performance of the private party’s obligations will be subject to the respective PPP agreement.

Update and trends

The previous government in Bulgaria, which resigned in July 2014, discussed repealing the current version of the Public-Private Partnership Act (though this never happened), deeming it to be non-operational and too restrictive. The then government argued that the scope of the Act in its current form only relates to a small number of projects, that it burdens investors and that its procedure is too complex. This statement of the government came only a day after the Bulgarian Industrial Association urged it to conclude more PPPs in order to stimulate the economy and boost national GDP.

However, it is almost certain that the Act will not be repealed. Nevertheless, changes and amendments to the Act will probably happen. There are only a limited number of PPPs in Bulgaria. Although the macro-economic environment has affected the likelihood and viability of these partnerships, the current version of the Act has also taken its toll.

38 What events entitle the private party to additional compensation?

Any additional compensation will be foreseen in the respective PPP agreement. For example, additional compensation may become available when there is assignment of additional construction work outside the scope of the PPP contract or a change in the value of the materials used.

39 How is compensation calculated and paid?

Upon the signing of the PPP contract, an economic balance between the benefits for the parties and the assignment of risks is determined. This economic balance is maintained throughout the duration of the contract. If the economic balance is disrupted, either party may request amendment of the contract in order to restore the economic balance.

40 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

It is customary that the private partner will try to cover the risks he or she is responsible for with specific insurances. The premiums for these insurances make up part of the value of the project. The public partner will usually set minimum insurance requirements, including but not limited to the insurance of the property of the PPP.

Default and termination

41 What remedies are available to the government party for breach by the private party?

The parties will implement specific terms in the contract in relation to the private party's non-performance of its obligations under the PPP agreement.

Moreover, under Bulgarian law, the performing party may require from the other party the performance alongside damages for delay or non-performance. The damages will cover the incurred losses as well as the missed benefits, which are the direct result of the contractual breach. Penalties may also be provided for in the PPP agreement.

In addition, in the case of non-performance the public party may terminate the agreement after giving reasonable notice for the private party to perform.

42 On what grounds may the PPP agreement be terminated?

The PPP agreement is terminated at the end of its term. In addition, it can be terminated when:

- the private partner is reorganised and a request for the continuation of the agreement is not submitted;
- in the case of default of the private partner;
- in the case of non-performance of either party, with an extension of a reasonable term for rectification;
- in the case of partial or full loss of the property of the PPP; and
- in the case of a threat to national security and defence, public health and safety or public order.

The public partner may terminate the agreement unilaterally if the private partner is in material breach of its obligations under the agreement.

43 Is there a possibility of termination for convenience?

There are no specific provisions for termination for convenience in the applicable law, but such a clause may be implemented in the PPP agreement.

44 If the PPP agreement is terminated, is compensation available?

If the PPP agreement is terminated before the end of its term because of the public partner, the private partner is entitled to the sum of the non-refunded investment expenses, when the property of the PPP is the property of the public partner; or the sum equal to the set rate of profitability of the private party for the term of the agreement, decreased with the value of the refunded investment expenses, when the property of the PPP is property of the private party.

If the PPP agreement is terminated before the end of its term because of the private partner, the private partner is entitled to compensation in the amount of the non-refunded investment expenses, minus the sum equal to the set rate of profitability of the private party for the term of the agreement, but not more than the investments made by the private party, when the property of the PPP is the property of the public partner.

Financing

45 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

The public partner provides financial help to the private partner through:

- payments to the private partner;
- the granting of rights over real estate properties that are not the property of the PPP for the performance of additional economic activities; and
- the granting of rights for the performance of additional economic activities with the property of the PPP, which are different from the public objective of the PPP.

46 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Due to the small amount of PPP contracts in Bulgaria, no information on this specific matter is available. As there are no particular provisions in the legislation, this will be subject to the respective PPP agreement.

47 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

See question 46.

48 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

As there are no particular provisions in the legislation, this will be subject to the respective PPP agreement.

49 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

See question 48.

Governing law and dispute resolution

50 What key project agreements must be governed by local law?

The PPP agreement shall comply with the requirements of the Act. The governing law will be determined by the parties, however, the public partner would prefer Bulgarian law to be the governing law.

51 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

Under Bulgarian law, the private partner cannot impose encumbrances over assets of the public partner (government or municipalities) as a security for its claims for payment. In addition, forced execution of claims for payment against the government is not allowed.

52 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

The general rule under the Act is that all disputes related to the signing, performance, amendment and termination of PPP agreements are decided by the competent Bulgarian court.

53 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

No.

54 Is there a special mechanism to deal with technical disputes?

No.

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General PPP framework

1 How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

In Germany there has not been any comprehensive PPP statute or PPP master plan (like PFI in the United Kingdom). Also, there is no strict definition of the term 'public-private partnership'. PPPs are therefore regulated by a bundle of different statutes, including public law, public budget law, procurement law, etc. The contracts are governed by ordinary contract law.

Following German reunification in 1990, partnerships with private parties in the wastewater and waste management sectors have been developed mainly in the former German Democratic Republic federal states. In western Germany, institutional PPPs became popular in the waste sector in the form of public-private joint service companies. In the beginning of the 2000s, PFI-type models were widely discussed and implemented more and more frequently. These projects followed the design-build-finance-operate-maintain model and included social infrastructure projects and toll tunnels. In the context of traffic infrastructure, shadow toll projects on the extension of motorway sections from four to six lanes (A-Modell) were established. Tax law-driven institutional PPPs became an option for the operation of auxiliary services (eg, catering, cleaning and facility management) in hospitals and cultural establishments. Institutional PPPs in the defence sector have been related to outfitting management, vehicle management and IT.

2 What categories of public infrastructure are subject to public-private partnership transactions in your jurisdictions?

In Germany, PPPs were discussed and implemented in the typical sectors of social infrastructure, including government and administrative buildings, schools, hospitals, and prisons as well as municipal services like waste and wastewater management. Transport infrastructure, including motorways and road tunnels as well as other roads and road networks, has been subject to PPP projects.

3 Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

There is no statute especially tailored to regulate PPPs. PPPs are therefore subject to general legal provisions. Due to their particular nature, PPPs are subject to public procurement law and to private law regarding the specifics of the contractual agreements. There are specific regulations concerning implementing PPPs for toll tunnels, bridges or motorway sections or the levying of the heavy vehicles toll.

4 Is there a centralised PPP authority or may each agency carry out its own programme?

There is no central government agency carrying out a PPP master programme.

However, a group of institutions exists for the coordination and facilitation of certain programmes, such as VIFG and DEGES for road and motorway management. The *Partnerschaften Deutschland* (Partnerships Germany) has been set up following the model of Partnerships UK as a joint venture between the government and the private sector to facilitate PPPs and act as an independent consultant for government bodies in PPP

issues. The German states (*Länder*) have set up task forces for the facilitation of PPPs.

5 Are PPPs procured only at the national level or may state, municipal or other subdivision government bodies enter into PPPs?

PPPs may be procured at all government levels, such as:

- the relevant federal ministries have the competency to procure PPPs involving motorways, defence or federal government buildings;
- the *Länder* hold the competency to enter into PPPs on state roads, prisons and hospitals; and
- the majority of PPPs are carried out by municipal bodies, which hold the competency for PPPs involving schools, accommodation, waste and wastewater management.

6 How is the private party in a PPP remunerated in your jurisdiction?

In terms of transport infrastructure, toll and shadow toll road projects for motorways and tunnels were implemented. In order to reduce the risks for the industry (mainly for SMEs), they were developed into an availability model.

In social infrastructure projects, availability payments are commonplace.

7 May revenue risk or usage risk be shared between the private party and the government? How is risk shared?

Revenue or user risk sharing is generally possible, but customarily not applied in PPP agreements except in the transport sector. In some projects involving the extension of motorways (A-Modell), risk-sharing mechanisms were applied between the private party and the government – while the toll price risk was allocated to the government through a complicated compensation mechanism, the private party had to bear the traffic risk.

8 In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?

Such long-term obligations require a commitment authorisation under budgetary law, by which funding in the future is secured.

9 Is there any cap on the rate of return that may be earned by the private party in the PPP transaction?

In general, there is no such cap on returns.

10 Is the transfer of direct or indirect ownership interests in the project company or other participants restricted?

Such restrictions may arise from PPP agreements containing change of control clauses.

Some provisions require discretionary consent by the authority for a transfer of ownership interests, whereas others regulate the conditions under which such consent must mandatorily be granted by the authority.

Procurement process

11 What procedures normally apply to a PPP procurement? What evaluation criteria are used to award a PPP transaction?

PPP projects are normally procured following a negotiated procedure. Sometimes the authority may choose a competitive dialogue instead.

Evaluation criteria for the award of a PPP contract comprise economic parameters, such as price and economic feasibility, as well as technical criteria, such as mode of construction and operation and maintenance (O&M) concepts.

12 May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

In general, a variation not changing the basic concept may lead to an adaptation of technical specifications during negotiations. Some procedures allow alternative proposals that comply with the output-related tender specifications. Deviations without altering technical characteristics are not allowed.

13 May government parties consider unsolicited proposals for PPP transactions? How are these evaluated?

Unsolicited proposals may not be considered during an ongoing procurement procedure. Such proposals may initiate a new procurement procedure but the authority must ensure that all bidders are treated equally.

14 Does the government party provide a stipend for unsuccessful shortlisted proponents or otherwise bear a portion of their costs?

Yes, but in general the sums awarded to unsuccessful proponents are very low and only cover a very small proportion of the costs that occurred.

15 May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

PPP project agreements are drafted by government counsels and therefore should be enforceable. Legal opinions of government legal counsels are advisable insofar as the government has to rely on foreign law securities.

16 Are there restrictions on participation in PPP projects by foreign entities? May foreign entities exercise control over the project company?

Basically, there are no such restrictions. Nevertheless, export control laws may lead to restrictions where applicable.

Design and construction in greenfield PPP projects

17 Does local law mandate that any particular form of contract govern design and construction activities? Does it mandate the choice of governing law?

German procurement law requires the application of the general terms for building contracts. However, the authority may deviate from these terms in order to adapt the agreement to the specific structure of the PPP. Procurement law also requires certain rules in contracts on construction works.

PPP agreements are always governed by German law.

18 Does local law impose liability for design defects and, if so, on what terms?

In general, designers are subcontractors of the general contractor and liable towards the general contractor only (which, in turn, is a subcontractor of the special purpose vehicle (SPV)). Designers may be directly liable towards the contracting authority or third parties under law of tort in the event of personal injuries or if the error caused damage to property.

19 Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

There is no legal obligation to include specific warranties in the contract. The German Civil Code lays down a warranty for defects with a duration of five years in the case of building works, which is applicable if the contract is silent on the matter. But the contracting parties may agree other warranties and duration of warranties.

20 Are liquidated damages for delay in construction enforceable? Are certain penalty clauses unenforceable?

Clauses stipulating contractual penalties for delays in performance are admissible under German civil law. Inequitably high penalties may be amended to a reasonable penalty sum by the courts, unless the penalty has already been paid.

However, penalty clauses in terms and conditions that put the other party at an unreasonable disadvantage may be declared void. Liquidated damages for delays or damages without default (at least negligence) are not enforceable.

21 What restrictions are imposed by local law on the contractor's ability to limit or disclaim liability for indirect or consequential damages?

German civil law generally does not discriminate between direct and indirect or consequential damages. However, the latter are excluded from compensation if they are not reasonably attributable to the author of damage.

Notwithstanding this, contractual parties are basically free to waive the obligation to pay damages. Waivers for indirect or consequential damages are widely agreed in commercial contracts.

22 May a contractor suspend performance for non-payment?

The German civil code grants contractual parties the right to withhold performance if the other party does not fulfil its contractual obligations (performance upon counter-performance). It is nevertheless possible (and, regarding the contractor, customary) to contractually waive said right unless such a waiver is grossly inequitable.

Again, a clause in terms and conditions waiving this right may be declared void if it puts the other party at an unreasonable disadvantage (eg, a suspension of performance in the event that the claim for payment is undisputed or subject to a final judgement).

23 Does local law restrict 'pay if paid' or 'paid when paid' clauses?

As a basic rule resulting from privity of contract, each contractual party's obligation to perform – including payment obligations – is independent from third-party behaviour. On the other hand, freedom of contract generally allows contractual parties to stipulate that an obligation will not come into force unless an external condition is fulfilled.

Clauses stipulating a time lapse before the obligation to pay comes into force had generally been admissible. A very recent change of law from July 2014 provides that clauses extending the due date for payment to more than 60 days after completion of works are in general no longer allowed.

In addition, German case law generally treats 'pay if paid' and 'paid when paid' clauses included in terms and conditions intended for use in more than one contract as unreasonable and therefore void.

24 Are 'equivalent project relief' clauses enforceable under local law?

In order to be legally effective, a contract has to comprise all essential elements, including stipulations of performance and consideration.

Yet, resulting from freedom of contract, parties may generally agree an equivalent project relief clause, as long as such a clause is not included in terms and conditions intended for use in more than one contract and imposed by one party, and does not put the other party at an unreasonable disadvantage.

25 May the government party decide unilaterally to expand the scope of work under the PPP agreement?

Customarily, PPP agreements include a right of the government party to modify construction works, whose exercise may be vetoed by the

contractor if its operation is not designated for the modified works. The government party must pay additional costs caused by such modification or may reduce payments if it leads to lesser costs. Parties often agree that additional costs or cost savings shall be fixed by technical experts if they find no agreement among themselves.

26 Does local law entitle either party to have a PPP agreement ‘rebalanced’ or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Following the doctrine of frustration (*clausula rebus sic stantibus*), a contract may be rebalanced or even set aside if its inherent basis becomes disrupted or falls away, causing an undue burden to a party.

Also, a party may withhold performance thereby losing its entitlement to consideration, if the performance becomes (technically) impossible or – where equitable – economically overburdening. If the impossibility or economic burden is caused by default of the obligated party, the other party is entitled to damages.

27 Are statutory lien laws applicable to construction work performed in connection with a PPP agreement?

The German Civil Code grants contractors a statutory lien on moveable objects belonging to the other party that are subject to contractual works. However, this does not apply to immovable property.

Immovable property can be subjected to a stipulated lien by contractual agreement in order to secure a claim, albeit such an agreement is not common in PPP contracts.

28 Are there any other material provisions related to design and construction work that PPP agreements must address?

The PPP agreement must provide for an appropriate change in law clause covering changes in technical standards (eg, regarding fire protection), as well as appropriate clauses on the risk of delays in the granting of permits and force majeure.

Operation and maintenance

29 Are private parties’ obligations during the operating period required to be defined in detail or may the PPP agreement set forth performance criteria?

There is no statutory prescription. Performance criteria are acceptable as long as the essential elements of the contract are sufficiently established.

A mixture of the approaches is customary. In general, O&M requirements are provided as output specifications, while particular issues of importance for security, political reasons or specific circumstances are regulated by detailed (technical) specifications.

30 Are liquidated damages payable, or are deductions from availability payments possible, for the private party’s failure to operate and maintain the facility as agreed?

There is no statutory regime setting up obligatory liquidated damages for private parties within a PPP regime. Most PPP agreements provide for a bonus-malus system under which availability payments are reduced for underperformance based on a catalogue of failures. General statutory provisions regarding malperformance are still applicable, but compensation to be paid is reduced by the sums by which payments are reduced under the bonus-malus system.

31 Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

Where the facility is subject to a lease, the German Civil Code only demands the facility to be in an orderly state when handed back. However, the parties may agree otherwise. In general, PPP agreements provide for technical specifications to be complied with at the end of the term and specific securities to ensure the SPV still has sufficient funds available.

Risk allocation

32 How is the risk of delays in commercial or financial closing customarily allocated between the parties?

Delays in commercial close may trigger an obligation to pay damages by the responsible party if there is culpa in contrahendo.

PPP agreements customarily allocate the risk to induce financial close to the private party and entitle the government party to cancel the contract for failure to do so in due time. Additionally, failure to do so by the private party may oblige it to pay damages unless it can show that the delay was not its fault. If financial close is achieved in time, interest rates are fixed on the basis of the benchmark rate offered by the bidder on the date of financial close. If not, the risk of an increase in interest rates is to be borne by the bidder. However, following the financial crisis, PPP agreements now provide for the right of the bidder to extend the time limit in the event of material adverse changes in the financial markets.

33 How is the risk of delay in obtaining the necessary permits customarily allocated between the parties?

The obligation to obtain all necessary permits for the project customarily lies with the private party. To mitigate the risk of delayed granting of permits, project agreements provide for a certain duration for the permit procedure and allocate the risk of any delay exceeding this duration to the government party unless it is caused by the private party (eg, by incomplete application documentation).

34 How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties’ control or is it defined with reference to specific enumerated events?

PPP contracts in general provide for force majeure clauses, either describing the force majeure event generally or listing certain events. Geotechnical, environmental and weather risks are always a critical issue in negotiations. The government always intends to transfer these risks to the private party, although statutory procurement law requires that, in general, the government party shall bear these risks.

35 How is risk for acts of third parties customarily allocated between parties to a PPP agreement?

Strikes or a lack of supply of energy or water is often defined as a force majeure event. Third-party events may mean that the private party is not liable for compensation, liquidated damages or deductions of payment because of lack of failure, but still must ensure performance. Project agreements often provide for specific vandalism clauses providing for a budget.

36 How are political, legal and macroeconomic risks customarily allocated between the parties? What protection is afforded to the private party against discriminatory change of law or regulation?

The German Constitution safeguards the fundamental rights of private persons against state discrimination without substantive grounds and against disproportionate state intervention. While the state may decide to expropriate a private person, it is then obligated to indemnify the former proprietor. Additionally, retroactive legislative acts affecting private persons are generally unconstitutional. Economic risks are mitigated by indexing the O&M part of the availability payment. Project agreements often provide a change in law clause, which is often subject to difficult negotiation regarding the events to be covered.

37 What events entitle the private party to extensions of time to perform its obligations?

Non-performance in spite of the obligation being due may put the private party into default. As long as the private party is, however, not responsible for the delay, default will not be triggered.

See also questions 33 to 36.

38 What events entitle the private party to additional compensation?

The private party is statutorily entitled to damages for negligent and intentional breaches of contract and default by the government party.

Update and trends

In recent years, PPPs became unpopular because of bad press and trade unions' and activists' opposition. The government's responses are ambiguous and indecisive. We are seeing few project financings, mainly the A-Modell motorway projects. Social infrastructure projects follow the forfeiting model (see question 45).

Also, the private party is customarily entitled to appropriate compensation by the government party if the turnover tax rate rises following the conclusion of the contract. This also applies vice-versa in the case of a lowering of the turnover tax rate.

For additional remuneration due to modified construction works, see question 25.

39 How is compensation calculated and paid?

The calculation of compensation for damages (eg, due to breaches of contract) is mandated by German civil law. Damages have to be awarded by restitution in kind and comprise causal losses of profit of the SPV to be calculated on a case-by-case basis.

40 Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

The private party is customarily responsible for obtaining an insurance scheme specified in the PPP agreement in favour of the government party at its own expense. The private party thereby customarily bears the risk of ensuring that the insurance scheme remains fully valid and effective. There are different approaches to the price risk (eg, indexation or compensation of real increase in costs with obligation to invite appropriate insurances to provide offers).

Default and termination

41 What remedies are available to the government party for breach by the private party?

It is customarily agreed upon in PPP agreements that delay in construction works triggers an obligation by the contractor to pay liquidated damages (see question 20).

The government party may also claim damages for malperformance (see question 30), default and other breaches of contract. For the calculation of these damages, see question 39.

Additionally, the government party may be entitled to terminate the contract where a breach by the private party is considered or defined as material (see question 42).

42 On what grounds may the PPP agreement be terminated?

Commonly, all statutory rights to withdrawal and termination are waived in PPP agreements, while specific grounds necessary for termination are laid down.

It is customarily stipulated that the government party may terminate the contract for a material breach that is unacceptable to the other party. Typically, specific termination is listed within the agreement and will mostly refer to default of the private party (see also question 32).

Correspondingly, private parties may terminate the contract for qualified failure to perform by the government party or for other good causes.

Before terminating the contract, it is generally necessary to issue a warning to the other party.

43 Is there a possibility of termination for convenience?

In general, a ground for termination is always required.

44 If the PPP agreement is terminated, is compensation available?

It is customary in PPP agreements to make the scope of compensation for termination dependent on the parties' respective default.

In the case of termination due to default by the private party, the government party is entitled to damages causally determined by the termination, while the private party is entitled to appropriate remuneration for the

works performed up to that point and to indemnification for debt capital not returned up to that point.

In the case of termination due to default by the government party, the private party is entitled to appropriate remuneration for the works performed up to that point, indemnification for debt capital not returned up to that point and to damages due to loss of profit and recourse by subcontractors.

In the case of termination without default by any party, the private party is entitled to appropriate remuneration for the works performed up to that point, indemnification for debt capital not returned up to that point and damages due to recourse by subcontractors.

In the case of termination due to default by both parties, the entitlement to compensation by the respective parties will have to be assessed on a case-by-case basis while considering the share of each party's default.

Financing

45 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?

In some projects (after the financial crisis), the government provided financing because lenders' financing, in particular project financing, had become too expensive. In some hospital projects, the government provided state guarantees if the authority had created a state-owned limited liability company as the contracting party for the public side.

In Germany, the 'forfeiting' model is very popular, in which the private partner sells its claims for remuneration against the authority to the bank. These claims are assigned to the bank (purchaser) while the intermediate construction loan is paid back. This structure allows for very favourable interest rates if, after acceptance of the construction works, the authority issues a waiver of any objections against payment of the remuneration for construction, not the O&M payment, which is deductible under the bonus-malus scheme.

46 Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

Yes. Under such direct agreements lenders typically have a step-in right under certain conditions and within a specific procedure, the right of prior notification in the event the government party intends to terminate, the right to cure the reason for termination, and express confirmation of the authority's consent with assignment of rights under the project agreement and the pledge of shares in the SPV (if such consents are required under the partnership agreement).

47 Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

Direct agreements generally provide for such step-in right. Typical security interests in the PPP project are:

- assignment of rights under the partnership agreement as security;
- pledge of shares in SPV;
- pledge of SPV's accounts; and
- assignment of claims against insurance.

48 Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

Direct agreements may provide for additional cure rights; see question 46.

49 If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

Recent partnership agreements provide for clauses under which the refinancing gains are to be shared with the government.

Governing law and dispute resolution**50 What key project agreements must be governed by local law?**

All German PPP projects are governed by German law (see question 17).

51 Under local law, what immunities does the government party enjoy in PPP transactions? Which of these immunities can be waived by the government?

The government does not enjoy any immunities in PPP contracts.

52 Is arbitration available to settle disputes under the project agreement between the government and the private party? If not, what regime applies?

Arbitration is possible and often agreed in PPP agreements. If not, recourse to the ordinary courts may be taken for litigation arising from PPP agreements.

53 Is there a requirement to enter into mediation or other preliminary dispute resolution procedures as a condition to seeking arbitration or other binding resolution?

PPP agreements often provide for mediation procedures, which are obligatory before taking legal action.

54 Is there a special mechanism to deal with technical disputes?

PPP agreements often provide for binding arbitration opinion on certain facts (no legal questions) by a technical expert to be appointed under an agreed procedure (eg, on additional costs for change orders).

C/M/S

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