



PPP Risk Matrices and PPP Contractual Provisions Workshop

Session Summary

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BACKGROUND

Risk allocation is at the centre of every public-private partnership (PPP) transaction, and a deep understanding of the risk allocation arrangements is a precondition to the drafting of every PPP agreement. The appropriate application of risk allocation principles is what determines whether a given PPP project will be 'bankable' (i.e. financeable), and whether it will be long-lasting (i.e. able to remain viable though to the end of a long-term contract).

As part of its 'leading practices' mandate, the Global Infrastructure Hub is interested in developing a set of annotated risk allocation matrices for PPP transactions, in a variety of sectors. The objective of this initiative is to provide guidance to countries, including both members and non-members of the G20 that wish to develop a programme of PPP transactions. The primary focus will be on those countries with limited or no prior experience with PPPs, and the desired outcome of the initiative is that such countries will have a useful reference guide to assist with their understanding of typical PPP risk allocation arrangements.

The Global Infrastructure Hub has engaged Norton Rose Fulbright, a global law firm, to prepare a Report on Allocating Risks in PPP Contracts, 2016 Edition (the PPP Risk Allocation Report), with matrices showing the allocation of risks as between the public and private sectors in typical PPP transactions, along with related information on twelve designated types of projects within the transport, energy and water and sanitation sectors.

In parallel to the work on the Risk Allocation Report, the World Bank Group, with the support of the international law firm of Allen & Overy, is currently developing the Report on Recommended PPP Contractual Provisions, 2016 Edition (the PPP Contractual Provisions Report) which follows up on its previous 2015 edition. The latter was produced against the backdrop that, whilst recognizing it is not possible to have universally-accepted language for every provision in a PPP agreement (given the variety of PPP transactions and the different legal, regulatory, financial and institutional frameworks in every country), there might, nevertheless, be merit in fostering greater understanding of certain important contractual provisions typically found in virtually every PPP contract. Conceivably, this would, in turn, also contribute to reducing the costs in regard to and accelerating the process of preparing and finalizing PPP contracts.

In response to the industry feedback received on the contents of the 2015 edition, the PPP Contractual Provisions Report is essentially aimed at presenting (i) additional material and/or alternative recommended language in regard to countries with different levels of PPP transactional experience and/or different types of legal systems, (ii) commentary as to which alternatives/options reflect a rather lender-friendly or government-friendly approach, as well as (iii) ample commentary to link the recommended provisions to the principles of risk allocation (including the contents of the PPP Risk Allocation Report).

The PPP Risk Matrices and PPP Contractual Provisions Workshop, co-hosted jointly by the Global Infrastructure Hub, the OECD, the Monetary Authority of Singapore, and the World Bank Group on May 30, 2016, brought together a mix of senior executives and infrastructure professionals from both France and the United Kingdom. Both the second draft of the PPP Risk Allocation Report and the first draft of the PPP Contractual Provisions Report was circulated to the attendees prior to the workshop. The discussion focused on the contents of these two reports, opportunities and suggestions for enhancement, and the participants also explored ways to encourage the use of both reports by relevant stakeholders.

Mark Moseley of the Global Infrastructure Hub indicated that the second draft of the PPP Risk Allocation Report would be updated before its publication mid-June 2016 to reflect the discussions in Paris. This has now happened, and an interactive version of the revised Risk Allocation Report can be found at <http://globalinfrastructurehub.org/allocating-risks-in-ppps/>. Likewise, Christina Paul of the World Bank Group indicated that the first draft of the PPP Contractual Provisions Report would be updated according to the comments received, in preparation for a subsequent workshop which, in the meantime, was held on 14 and 15 July in Pretoria.

SUMMARY OF KEY POINTS DISCUSSED

The following are the key points drawn from the discussion:

Comments on the Contents of both Reports

Overall, both Reports were viewed as commendable and very useful initiatives, which could provide practical information and guidance to the many stakeholders in developing and implementing PPP projects.

Recommendations for Further Enhancement of the PPP Risk Allocation Report

- A participant queried how the distinction between developed and emerging markets had been drawn. It was clarified that this had been done on the basis of an assessment of indicative risks (for example regulatory risk, exchange risk) in the context of each of the twelve designated projects.
- It was noted that it would be useful if a bit more background was provided in respect of the twelve projects so as to allow the reader to better understand the context of the respective risk allocation matrix.
- To the same end, a participant suggested that a picture diagram of a PPP transaction could be incorporated in the introductory section of the PPP Risk Allocation Report.
- Some participants articulated that, apart from addressing the relevance of differences between civil and common law jurisdictions at the beginning of the PPP Risk Allocation Report, it would also be helpful if those were highlighted in the various risk allocation matrices, where appropriate.

Recommendations for Further Enhancement of the PPP Contractual Provisions Report

- A participant raised that the introductory section providing background on PPP could be expanded so as to include a bit more detail on the finance structures of PPP.
- Some participants expressed the view that it would be useful if refinancing gains were either addressed in this or the next version of the PPP Contractual Provisions Report. Further matters recommended to be dealt with in a forthcoming edition were the role of both hedging and equity transfers in refinancing.
- A proposal was put forward to expand on the alternatives currently indicated in the context of compensation amounts to be paid by the Contracting Authority in the event of contract termination due to a private partner default.
- In addition, it was suggested that it would be useful if the balance sheet treatment of PPP and the treatment of government liabilities respectively could likewise be explained and further resources in this respect were cross-referenced for readers' benefit.

Comments Concerning the Application of both Reports

Main Recommendations

- The participants noted that, in order for the reports to gain widespread acceptance, the private sector should be actively engaged in disseminating the documents (for example, during contractual negotiations when respective law firms and legal advisors could point to both reports as guidance materials).
- It was also emphasized that both reports would need to be further socialized among their target audience, particularly government officials, (by means of workshops, seminars or as part of pilot projects) in order to ensure their application within actual PPP programmes. Ideally, this would be done in cooperation with other development banks/agencies and international organizations involved in the PPP community.