

Public-Private Partnerships

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo



2016

GETTING THE
DEAL THROUGH 

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CONTENTS

Overview	5	Kenya	52
Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP		Tom Onyango, Eugene Nyamunga, Bryan Mylo, Catherine K Mulika and Janet Othero TripleOKLaw LLP	
Brazil	6	Mexico	56
Claudia Elena Bonelli, Ana Cândida de Mello Carvalho and Thaísa Toledo Longo TozziniFreire Advogados		Francisco Javier Treviño Moreno, Julio Manuel Rivera de los Reyes and María Fernanda Palacios Medina Rios Ferrer, Guillén – Llarena, Treviño y Rivera, SC	
Ecuador	12	Mozambique	63
Mario Alejandro Flor, Alfredo Larrea-Falcony and Alejandro Pérez Arellano Bustamante & Bustamante Law Firm		Pedro Couto, Jorge Graça, Paulo Ferreira, Márcio Paulo and Gisela Graça CGA Couto, Graça & Associados	
England & Wales	18	Netherlands	71
Adam Cooper, Andrew Petry, Simon Kenolty, Scott Townson, Jo Spalding, Rosanna Piper-Gill, Jack Rutherford and Louise McErlane Simmons & Simmons LLP		Peter Habraken, Michel Klijjn and Jessica Terpstra Houthoff Buruma	
Ghana	25	Nigeria	77
David Ofosu-Dorte, Ferdinand Adadzi and Sena Kpodo AB & David		George Etomi, Akasemi Ollor and Veronica Alaba Oyedeji George Etomi & Partners	
Greece	30	Turkey	84
Dimitris Assimakis, Alexandros Pavlopoulos and Minas Kitsilis Norton Rose Fulbright		Ziya Akinci Akinci Law Office	
India	37	United States	90
Amitabh Sharma and Shivanshu Thaplyal Khaitan & Co		Ivan E Mattei and Armando Rivera Jacobo Debevoise & Plimpton LLP	
Indonesia	44		
Deny Sidharta, Jared Heath and Bilma R Ganie Soemadipradja & Taher			

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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?

There is no statutory definition of a PPP in the Netherlands. PPPs are used to encompass a broad variety of models for cooperation between public and private parties, in sectors ranging from area development to information and communication technology. During the past decade, however, PPP has developed into a more clearly defined concept, referring to the use of standardised, availability-based design-build-finance-maintain (DBFM) and design-build-finance-maintain-operate (DBFMO) contracts for infrastructure and accommodation projects.

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

PPP contracts have been used for roads, wastewater treatment plants, schools, prisons, government offices and museums. Currently the first (river and sea) locks projects are being tendered by the Dutch government using PPP.

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 comprehensive legislative framework for PPPs in the Netherlands. PPP projects are usually tendered, making use of existing (EU-based) procurement legislation (especially by way of the 'competitive dialogue'). Dutch PPP projects are typically governed by standardised DBFM(O) contracts. Currently, the standard DBFM(O) contracts versions 4.0 apply. Contracting authorities very strictly adhere to the standard forms and are unwilling to deviate from these, other than on 'project-specific' matters.

In some sectors, such as roads and waterways, additional specific regulatory frameworks unrelated to PPPs may apply.

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

There is no centralised Dutch PPP authority. In practice, however, the vast majority of PPP projects are tendered by central government, in particular by the agencies Rijkswaterstaat (part of the Ministry of Infrastructure and the Environment) and Rijksvastgoedbedrijf (part of the Ministry of the Interior and Kingdom Relations). Occasionally, the Ministry of Defence acts as the contracting authority in PPP projects.

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

There is no restriction, legal or otherwise, which prohibits local government bodies from entering into PPP contracts, but so far this has rarely happened. However, one local government body – a municipality – recently awarded a DBFMO contract for the design, construction, financing, maintenance and operation of a new city hall. We are expecting more pilots by decentralised authorities (eg, provinces, water boards and municipalities) experimenting with PPP projects in the near future. This process is partly

driven by newly imposed restraints on (local) government spending, based on EU fiscal policy.

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

Nearly all PPP projects in the Netherlands have 'availability-based' payment mechanisms. These payment mechanisms have evolved over time (including, for instance, carve-outs for 'lost vehicle hours' in road projects). These payment mechanisms have become well known and broadly accepted by commercial banks and multilateral development banks.

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

As payments under PPP contracts are 'availability-based', revenue or usage risks are borne by the contracting authority. For risk sharing in general, see questions 33 to 41.

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?

At contract close, the contracting authority, the government, irrevocably commits itself to the payment obligations in accordance with the payment mechanism in the contract. No further future approval is needed. Theoretically speaking, the government may, of course, always change its policy, but that would qualify as a contracting authority default, enabling the private parties to claim fulfilment of contractual obligations or exercise termination rights (leading to full compensation of the private party).

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

The standard Dutch DBFM(O) contracts contain a provision maximising the internal rate of return of the shareholders of the project. If it becomes clear after the end date of the contract that the internal rate of return was in fact higher, the shareholders have to share these extra profits 50-50 with the contracting authority.

The amount to be paid by the shareholders to the contracting authority pursuant to this provision will, however, not exceed the present value (as of the end date) of all amounts paid by the contracting authority to the contractor in connection with supervening events during the term of the contract.

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

The standard DBFM(O) contracts contain restrictions on the transfer of direct or indirect ownership interests in the project company where such transfer leads to a change of control over the project company. In such a case the transfer is subject to prior approval of the contracting authority.

However, the contracting authority may only refuse its approval on certain limited grounds, such as:

- a lack of financial solidity of the proposed new party;
- entities based in countries that are subject to economic or political sanctions;

- entities with directors or managers engaged in illegal or terrorist activities;
- entities that mainly engage in the acquisition of debt of entities in financial difficulties (vulture funds); and
- entities that have a legal conflict with the contracting authority, which might interfere with the performance of the DBFM(O) contract.

Transfers between group companies and transfers pursuant to a direct agreement do not require prior approval.

Procurement process

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

Normally, the competitive dialogue procedure is applied, with the 'most economically advantageous tender' used as the award criterion. The most commonly used sub-criteria for awards are: the price (net present value), the risk management plan and the value of certain risks listed in the tender guidelines (listed risks) that the private party has chosen to bear.

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?

The government may only consider such proposals if this option was explicitly included in the public announcement of the tender. This option is hardly ever chosen.

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

Government parties may consider unsolicited proposals for PPP transactions. However, if such unsolicited proposal includes a public contract according to EU public procurement directives, the contract cannot be awarded to the party that submitted the unsolicited proposal without having followed a public procurement tender, taking into account the principles of transparency and equality of treatment. Unsolicited proposals are rare.

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

Yes. Especially in large PPP tenders a stipend is provided, but normally only to those proponents who have submitted a valid submission. Such stipend only covers part of the actual costs. Generally, when a phased tender procedure is used the participants that make it to the 'best and final offer' stage receive a larger financial contribution than the participants that were excluded at an earlier stage of the process.

15 Does the government party require that proposals include financing commitments for the PPP transaction? If it does not, are there any mechanisms during the procurement process to ensure that the applicable PPP transaction, once awarded, is financeable?

In most PPP tenders candidates must submit, among others, a financing plan, a financial model, support letters from their debt and equity providers and a financial close guarantee as part of their proposal.

The tender guidelines contain requirements for the content of the financing plan and financial model. One of these requirements is that candidates must enclose term sheets for each source of financing.

For the support letters and financial close guarantee the tender guidelines prescribe the use of specific formats.

The format for support letters states that the debt provider is offering a financing arrangement (pursuant to an agreed form term sheet) to the bidding candidate, which is valid for a certain number of weeks after the final submission date of the bid. The format support letter states that its offer is subject to credit committee approval and satisfactory loan documentation and that the letter does not constitute an unconditional or irrevocable obligation to provide financing.

The financial close guarantee needs to be issued in the form of a bank guarantee. The prescribed format states – in summary – that the issuing bank guarantees the obligation of the preferred bidder to pay compensation

to the government if financial close is not achieved within a certain number of weeks after the final submission date.

16 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 government does not ask for such a legal opinion. However, lenders have requested legal opinions with respect to the enforceability of the PPP agreement. Given that Dutch DBFM(O) contracts are based on standard documentation drafted by the government on which the private party has little to no influence, such requests are often a topic of discussion. If a legal opinion is provided, this opinion will contain carve-outs for certain elements of the PPP agreement, such as the technical annexes to the contract.

The PPP agreement does not contain any representations as to the enforceability of the contract.

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

World Trade Organization members, which include the EU member states, are bound to the government procurement agreement (GPA) if ratified. The EU signed the GPA. As a consequence, subsidiaries of undertakings from member states that are party to the GPA should be treated equally. In that case, there are in principle no restrictions on participation in PPP projects by foreign entities and foreign entities may exercise control over the project company. In practice, non-ratifying members are seldom excluded from public tenders nor treated differently.

Design and construction in greenfield PPP projects

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

Local law does not mandate that any particular form of contract govern design and construction activities. The choice of governing law is also not mandated. Project documentation for PPP projects in the Netherlands is generally governed by Dutch law.

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

Dutch law imposes liability for attributable shortcomings. A design defect could qualify as such. If the private party is a partnership consisting of several parties (eg, a designer and contractor), in principle all parties are jointly and severally liable to the contracting authority. In Dutch PPP projects it is common for a special-purpose vehicle (SPV), in the form of a Dutch BV (limited liability company), to be incorporated, in which case the SPV is liable. Any right of action for a defect in works delivered expires after a period of 20 years from the delivery.

20 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?

Dutch law does not require the inclusion of specific warranties. Where the relevant contract is silent, after delivery, the works shall be at the risk of the client. The contractor shall be discharged from liability for defects that the client should reasonably have discovered at the time of delivery.

In the standard DBFM(O) contracts this rule of Dutch law has been set aside, as the obligation of the contractor is to guarantee availability of the infrastructure or accommodation.

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

Liquidated damages for delay in construction are enforceable. Penalty clauses are enforceable, although in exceptional circumstances a claimed penalty may be moderated by the court.

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

No restrictions are imposed. According to the standard DBFM(O) contracts, no liability limit or disclaimer applies for indirect or consequential damages.

In the subcontracts for engineering, procurement and construction (EPC), and operation and maintenance (O&M), it is market practice to limit the liability of the subcontractor to a certain percentage of the EPC price or (a multiple of) the annual O&M fee.

23 May a contractor suspend performance for non-payment?

Based on the Dutch Civil Code a contractor may, in principle, suspend performance for non-payment. However, the standard DBFM(O) contracts contain a waiver of this right. If the contracting authority does not perform, the private party may terminate the DBFM(O) contract if this default remains unremedied, subject to the provisions of the direct agreement.

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

No.

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

Yes.

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

In the standard DBFM(O) contract, an expansion of the scope of work qualifies as a 'contracting authority change' of the contract. In principle the contractor is obliged to accept such change (except in limited circumstances, for instance, when the change would endanger the safety of infrastructure or persons). Such contracting authority change also qualifies as a compensation event, entitling the contractor to compensation in money and time.

EU public procurement rules also limit the possibility to add incremental work. In short, a public contract (such as a PPP agreement) awarded in accordance with these rules may not be modified substantially during its term. A modification of a public contract during its term is considered to be substantial where it renders the contract materially different in character from the one initially concluded, which could be the case in the event of a material extension of the scope of work. In the event of non-compliance with these rules, in principle a new procurement procedure is required.

27 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?

The Dutch Civil Code contains an unforeseen circumstances provision. If this applies, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. Based on Dutch case law, only in truly exceptional circumstances will a court rule as such.

However, the standard DBFM(O) contracts contain a specific provision stating that parties agree that the contract itself already contains a sufficient regime for such unforeseen circumstances. The intention is to limit the possibility of either party to invoke the Dutch Civil Code provision.

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

Based on the Dutch Civil Code a right of retention can also be exercised in construction works in connection with a PPP agreement. The provision concerned is non-mandatory and can, in principle, be set aside by contract.

The standard Dutch DBFM(O) contracts state that the contractor may not rely on such retention rights or reservation of ownership rights. The private party also needs to ensure that its subcontractors cannot invoke these rights.

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

No.

Operation and maintenance

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

Private parties' obligations are described as performance criteria, mostly in management specifications. These performance criteria can be very detailed, nevertheless. For instance, in road infrastructure projects, the availability and maintenance performance criteria are specified in detail. The same applies, mutatis mutandis, for accommodation projects, with detailed criteria for services like catering and surveillance.

31 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?

Failure by a private party to operate and maintain a facility as agreed leads to availability payment deductions. These are calculated using availability deductions (for general unavailability, eg, lane closures) and performance corrections (for specific underperformance, eg, (deadly) accidents, compromise of traffic safety and non-compliance with rectification periods).

Deductions and corrections are calculated in accordance with the payment mechanism in the DBFM(O) contract, via a sophisticated and detailed system, providing for 'multipliers', 'availability values', 'latitudes of disruption' etc. Furthermore, in infrastructure projects this system works with 'buffers' for 'lost vehicle hours', which mitigate (the occurrence of) availability deductions and enable the private party to plan (heavy) maintenance activities well before.

The standard DBFM(O) contracts do not include a regime for liquidated damages (nor does legislation). However, liquidated damages do play an important role in the subcontracts of the SPV with the EPC and O&M (sub)contractors.

32 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?

In practice, refurbishment requirements are arranged via the transfer certificate, which has to be issued before the facilities are handed back to the government party. This transfer certificate usually sets out in detail all requirements, procedures and (timely) planning of the transfer, including a transfer bank guarantee.

Risk allocation

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

Risk allocation is agreed between the parties; nearly all 'statutory' risk allocation provisions as provided for by Dutch law are explicitly excluded in the standard DBFM(O) contracts. Only certain mandatory Dutch law provisions remain relevant, such as the provision that one cannot exclude liability for gross negligence or wilful misconduct.

The leading principle of the standard DBFM(O) contracts is that all risks are for the private party, unless a supervening event occurs; these are limited to force majeure events, delay events and compensation events.

Therefore, risks of delays in financial closing are for the private party, unless a supervening event occurs. This may be a force majeure event (eg, disruption of financial markets before financial close). Such a force majeure event would, by definition, also qualify as a delay event (but not as a compensation event).

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

Normally speaking, all necessary permits have to be obtained by the private party, with limited exceptions, such as permits based on the Flora and Fauna act (based on EU legislation) and permits necessary for the felling of trees. In the standard DBFM contract for infrastructure projects, not obtaining a permit in a timely manner may, in limited cases, qualify as a delay event (not a compensation event). According to the standard DBFM(O) contract for accommodation projects, the risks of not obtaining a permit in

a timely manner and of an obtained permit being revoked or nullified by court qualify as a delay event or a compensation event, respectively.

35 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?

Force majeure is a precisely defined concept, referring to a limited number of events, normally including disruption of financial markets (before financial close), war, terrorist acts, explosions, radiation, plane crashes, meteorites, volcanic eruptions, hurricanes and flooding. Other than the risks mentioned, all other weather-related risks are borne by the private party.

Other extraneous risks, such as geotechnical and environmental risks, but also risks related to explosives, archaeological finds, cables and conduits and protected flora and fauna are borne by the private party, unless and to the extent that the parties agree otherwise in a specific contract. However, experience has so far shown that the contracting authorities are very reluctant to deviate from the standard DBFM(O) contracts.

In general, geotechnical and environmental risks, and those related to explosives and archaeological finds will be risks for the private party, unless this party relied on specific information supplied to it by the contracting authority.

Unexpected encounters with cables and conduits and protected flora and fauna will typically qualify as compensation events and, thus, be allocated to the contracting authority.

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

Lack of cooperation by third parties will typically qualify as a delay event, provided that the private party has made reasonable efforts to obtain such co-operation in a timely manner. Providing access to the project site is typically an obligation of the contracting authority, non-fulfilment of which constitutes a contracting authority default.

37 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?

Political risks would inevitably lead to a contracting authority default and related remedies for the contractor, such as the right to claim performance and the right to terminate the contract together with compensation.

Certain changes in law qualify as a compensation event (and therefore also as a delay event) under the standard DBFM(O) contracts. These are changes in law that are specifically aimed at the private party or parties of similar projects in general, or the project; or that require additional capital expenditure investments that take a period of more than one year to be depreciated.

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

Only contractually defined 'delay events' entitle the private party to an extension of time to perform its obligations with a period equal to the 'critical delay'. A critical delay is defined as a delay that would, without financial loss, inevitably lead to a delay in reaching certain milestone dates (such as the availability date and the completion date) within a minimum number of days.

All force majeure events and compensation events are also delay events. See question 35 in relation to force majeure and question 39 for more information on compensation events. Other examples of delay events are no (or non-timely) accessibility of the site, no (or non-timely) co-operation by third parties, no (or non-timely) re-arrangement of cables and conduits and no (or non-timely) coming into force of zoning and planning decisions, such as route decisions or zoning plans.

39 What events entitle the private party to additional compensation?

Under the standard DBFM(O) contract the private party is only entitled to additional compensation in the case of compensation events and, to a certain extent, force majeure events.

Examples of compensation events are contracting authority defaults, contracting authority changes, a relevant change in law, incident

management (traffic control, accident management, etc) by the contracting authority, damage to the infrastructure caused by traffic accidents, measures by the contractor to mitigate force majeure events and, to a certain extent, incompleteness or inaccuracy of information supplied to the private party.

Finally, early termination of the contract may, under certain conditions, entitle the private party to additional compensation.

40 How is compensation calculated and paid?

Compensation is meticulously calculated in accordance with specific schedules to the standard DBFM(O) contracts. Compensation will be calculated on the basis of the 'open book' method and will typically include compensation of additional finance costs, including interest and fees and breakage costs if applicable. Additional costs relating to the subcontracts will also typically be compensated. Compensation for force majeure events will typically include costs, but not lost profits.

The regime for compensation of financing costs has become more sophisticated over the past years, partly following the introduction of new types of financing for PPP projects in the Dutch market. The current arrangements in the standard DBFM(O) contracts take into account whether the financing is variable financing with hedging or, for instance, a fixed-rate financing provided by an institutional investor. Compensation includes certain hedging break costs as well as certain make-whole costs in connection with an institutional bond type of financing. Compensation can also include any additional costs incurred by the SPV as a result of changes in the utilisation and repayment profiles of its loans.

41 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 standard DBFM(O) contracts set out requirements for a mandatory insurance package. The risk of insurance becoming unavailable on commercially reasonable terms, including extraordinary premium increases (of 30 per cent or more), is, to a certain extent, borne by the contracting authority. The private party needs to notify the contracting authority of the occurrence of such an insurance event. The contracting authority then needs to decide to either qualify such an event as a compensation event, terminate the contract on the grounds of a force majeure event, or take over the relevant insurance risk of the project.

Default and termination

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

The standard DBFM(O) contract provides the government party with a limited set of remedies.

It can only claim the performance of any outstanding obligations by the private party, claim such performance by a designated third party (the costs of which plus a surcharge have to be borne by the defaulting private party), or terminate the contract.

As a result, the contracting authority is not entitled to claim damages or suspend the performance of its obligations under the contract.

43 On what grounds may the PPP agreement be terminated?

A standard DBFM(O) contract may be terminated by the contracting authority in the event of:

- an immediate termination event (these events would typically include the non-issuance of a bank guarantee, not reaching specific milestones (eg, commencement, availability, completion) before set longstop dates, suspension of work during a certain period of time, bankruptcy, suspension of payments and non-payment of certain minimum undisputed amounts);
- a (material) private party default, not remedied before set longstop dates;
- discretionary termination by the contracting authority;
- certain prolonged delay events (typically longer than two years); and
- a force majeure event (that continues longer than 180 days).

It may be terminated by the private party in the event of:

- a contracting authority default;
- certain prolonged delay events (typically longer than two years); and
- a force majeure event (that continues longer than 180 days).

44 Is there a possibility of termination for convenience?

Yes, the standard DBFM(O) contracts allow for discretionary termination by the contracting authority.

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

The standard DBFM(O) contract provides for a sophisticated termination compensation regime, whereby compensation is related to the cause of termination. Maximum compensation (allowing for 'make whole' of lenders, compensation of subcontractors and compensation for lost return on investment for the private party and its shareholders) is paid in the event of termination for contracting authority default or discretionary termination by the contracting authority. Compensation for costs (including 'make whole' of lenders and compensation of subcontractors) is paid in the event of termination for force majeure or prolonged delay events.

Limited compensation is paid when the contract is terminated on grounds of an immediate termination event or default by private party.

Under certain circumstances (eg, compensation in case of termination for contracting authority default or discretionary termination by the contracting authority), the contractor is also entitled to receive compensation for the loss of expected profits (return on equity) of its shareholders. This expected equity return is calculated on the basis of a detailed formula that takes into account expected returns on both equity and shareholder loans.

Financing**46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?**

The Dutch government does not provide financing or guarantees for PPP projects. It does, however, accommodate private financing of these projects, for instance, by agreeing to enter into a direct agreement with the financiers of the project. In addition, the current set of standard Dutch DBFM(O) contracts contains detailed provisions dealing with the repayment of financing costs if the project is terminated early due to, for instance, force majeure or a breach of contract by the contracting authority. The provisions also cover financings by way of a bond issue or financing solutions with credit enhancement.

These standard DBFM(O) terms have been deemed acceptable by the financing parties active in the Dutch market.

47 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?

The contracting authority will enter into a direct agreement with the collateral agent. This direct agreement follows a standard format, and is a schedule to the DBFM(O) contract.

Pursuant to the direct agreement the contracting authority may not terminate the DBFM(O) contract without first informing both the collateral agent and the private party of its intention to do so. As a result of this notice an interim period will start. During the interim period the contracting authority may not terminate the DBFM(O) contract. The interim period should be used to determine which obligations of the private party are outstanding and to draw up a remedial report. If the contracting authority and the collateral agent agree on a remedial report, a step-in period will commence.

During the step-in period the collateral agent needs to ensure that the actions set out in the remedial report are taken. During this period the collateral agent is also entitled to either transfer the DBFM(O) contract to another contractor or change the management, contractual or legal structure of the contractor (both of these are called 'restructuring'). If the obligations set out in the remedial report are not complied with, the step-in period ends and the contracting authority may terminate the DBFM(O) contract.

Finally, the direct agreement contains a mechanism whereby, in the case of an insolvency of the original contractor, the DBFM(O) contract with this original contractor is automatically terminated and a new DBFM(O) contract with a replacement contractor comes into force at the same time. This replacement contractor is an entity put forward by the collateral agent and the replacement DBFM(O) contract will be on the same terms and conditions as the original DBFM(O) contract. The reason for this mechanism is to try to avoid the possibility that a bankruptcy would interfere with

Update and trends

The Dutch PPP market is still active. The government is currently in the middle of a string of tenders involving sea and river locks. There is also a good pipeline for other infrastructure projects. However, for accommodation, the number of new projects announced by the state is limited. We are expecting more PPP projects, especially accommodation projects, to be tendered by local authorities.

the protection mechanism of the lenders under the direct agreement. The lenders are subsequently given a certain term to decide whether they want to keep the replacement DBFM(O) contract in place or whether they want to terminate this replacement contract.

48 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?

As regards direct agreements, see question 46. In addition to direct agreements the lenders will also obtain a right of pledge on all the rights of the private party under the DBFM(O) contract, which includes most importantly the right to receive the availability payments from the contracting authority. All rights the private party may have under any guarantees from its subcontractors will also be pledged to the lenders. The collateral agent will also enter into direct agreements with the main subcontractors of the contractor.

49 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?

Pursuant to the direct agreement the collateral agent will have additional time to cure any defaults of the private party under the DBFM(O) contract. During the interim period the contracting authority may not terminate the agreement nor suspend its obligations thereunder. As a result, this interim period functions as an extended remedy period.

50 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?

The private party will need to notify the contracting authority of any refinancing. Any refinancing involving a financial institution that is not registered with either the Dutch financial regulator or with a similar register in the European Union, the United States or Canada requires prior permission from the contracting authority. Such permission will be granted if none of the listed grounds for refusal apply (which aim to exclude entities subject to international sanctions or not considered financially sound enough to provide financing).

Pursuant to the standard DBFM(O) contracts, in the case of a refinancing any financial gains made will need to be shared with the contracting authority as follows:

- 50 per cent of any financial gains up to and including €1 million;
- 60 per cent of any financial gains over €1 million up to and including €3 million; and
- 70 per cent of any financial gains over €3 million.

The contracting authority can also initiate a refinancing by requesting that the private party examine whether a refinancing on better terms would be possible. It may do this once every three years and not before the completion date of the project.

Governing law and dispute resolution**51 What key project agreements must be governed by local law?**

In principle, contracting parties are free to decide which law governs the project agreements. In practice, DBFM and DBFMO agreements and other project documentation are governed by Dutch law. Part of the finance documentation is sometimes governed by English law, mainly depending on the amount of debt required.

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

Under Dutch law the government does not enjoy immunity in PPP transactions.

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

The civil courts settle disputes unless parties have explicitly chosen for arbitration or for a decision by way of a binding opinion. Subject to the dispute resolution procedure mentioned in question 54, in the standard DBFM(O) contracts the civil courts are appointed.

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

In the standard DBFM(O) contracts a dispute resolution board procedure must be followed first. The opinion of this dispute resolution board is binding unless one party informs the other that it cannot concur with the opinion within four weeks of the issue of the opinion and submits the dispute to the civil court within this period.

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

The Netherlands has an arbitration institute that specialises in construction disputes. However, as mentioned above, arbitration is not chosen in the standard DBFM(O) contracts.

The standard DBFM(O) contracts do contain an obligation of the contractor to provide the contracting authority with copies of each report prepared by the lenders' technical adviser.

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