THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

NINTH EDITION

Editors
Matthew Job and Tom Marshall

THE LAWREVIEWS

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

NINTH EDITION

Reproduced with permission from Law Business Research Ltd
This article was first published in April 2023
For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Matthew Job and Tom Marshall

THE LAWREVIEWS

Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK

www.thelawreviews.co.uk

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at March 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to info@thelawreviews.co.uk.
Enquiries concerning editorial content should be directed to the Content Director,
Clare Bolton – clare.bolton@lbresearch.com.

ISBN 978-1-80449-159-1

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AXIS LAW CHAMBERS

BOMCHIL

DKMS LAWYERS

GALICIA ABOGADOS, SC

HERBERT SMITH FREEHILLS

HOUTHOFF

KOSTA LEGAL

URÍA MENÉNDEZ

VIEIRA DE ALMEIDA

WEERAWONG, CHINNAVAT & PARTNERS LTD

WHITE & CASE

CONTENTS

PREFACE

It has been a privilege to contribute to and edit *The Public–Private Partnership Law Review* over the past three years and we are very pleased to present this ninth edition. Doing so has provided an insight into how public–private partnerships (PPPs) are used and perceived around the world and has introduced us to people and opportunities that would otherwise not have arisen for us. Since the publication of the eighth edition a year ago, there have been significant developments in the design and use of PPPs in some parts of the world, while in other parts little has changed. The purpose of this volume is chiefly to report the current state of PPP across a range of jurisdictions around the world.

Twelve months ago the world was finally beginning to look beyond the impact of the covid-19 pandemic and we speculated that PPP might have a role to play in the economic recovery that was then anticipated. In practice, the past year has been dominated by fallout from the war in Ukraine. While the conflict may be geographically limited, the economic consequences have been felt around the world.

Many international businesses have closed down their operations in Russia and most of Europe has been forced to move its supply of natural gas from Russia, resulting in an energy price spike and fears about energy security. Russia's blockade of Ukrainian food exports has resulted in food shortages and higher food prices across the globe. Energy and food prices have triggered global inflation, which many commentators felt was always a latent but inevitable consequence of quantitative easing and covid lockdown support measures. Higher inflation has led to fiscal tightening and higher interest rates, finally calling time on the low (often virtually zero) interest rate environment that has prevailed since the financial crisis in 2008. All in all, the economic background for PPPs could hardly be more different than it was a year ago.

Against that backdrop, PPP continues to be a key procurement tool for both national and local infrastructure projects in a diverse range of countries such as Australia, France, Italy, Pakistan, Saudi Arabia, South Africa, Thailand, the United Arab Emirates and Uzbekistan. PPP legislation has been bolstered in Indonesia and Italy, following on from the new PPP laws that we saw in 2021 in Senegal and Uzbekistan. Indonesia continues to have an ambitious PPP pipeline although progress to implement its national development plan has been slow. Perhaps the most impressive national performance for PPP has been in Uzbekistan – in a year that our contributors describe in Chapter 15 as 'truly pivotal', Uzbekistan has signed 178 PPP projects with a total capital value estimated at US$4.5 billion.

Meanwhile, PPPs continue to be under examination in a number of jurisdictions, particularly in European countries that have long-established and relatively mature relationships with PPPs (such as the United Kingdom, the Netherlands and Portugal), but also in Latin American countries such as Argentina and Mexico (where some large projects

that were previously slated to be PPPs have been restructured as traditional public works contracts). As ever, the principal case against PPP is the embedding of a private sector cost of capital in place of cheaper sovereign borrowing and the assertion that this makes it an expensive procurement model whatever the benefits in terms of risk transfer and private sector procurement expertise.

Climate change and energy transition has been a global trend for several years, but arguably it has been concerns about energy security as a result of the Ukraine war that have accelerated a push towards new privately financed energy transition projects in Europe, particularly in the United Kingdom and France, which have seen new revenue models and legal structures for new nuclear power, carbon capture and storage and hydrogen projects. PPP projects for renewable energy and grid stability to support renewable energy have also been seen in Australia and South Africa.

So where does this leave the outlook for PPP during 2023 and beyond? Concerns regarding value for money, flexibility and, not least, the validity of the fundamental element of partnership within the PPP model remain. In addition, attention has been given in many places to the most appropriate contractual model for PPPs, and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose. However, the inclination of many governments to invest in new infrastructure is arguably stronger than at any time in the past 50 years; energy transition alone will require huge infrastructure investment that is largely incremental. The question for those in the industry is how PPP can evolve in order to respond to this opportunity and we are already seeing evidence of this in the United Kingdom in particular.

Furthermore, the advent of inflation and higher interest rates is squeezing growth in many countries, but in particular in Europe. This comes on top of ruinously expensive covid support schemes that have pushed national debt above GDP in many cases and make it less attractive to finance new infrastructure on the national balance sheet. The role that PPP could play in alleviating this remains unclear. In countries such as Germany and, to a lesser extent, the Netherlands and Portugal, there are still concerns as to the suitability of traditional PPP and whether it represents value for money. This has been a particular issue during the past 15 years of very low-cost borrowing for governments and it remains to be seen whether the return of a higher cost of government borrowing will dilute the incremental cost of private sector borrowing in a PPP when compared with sovereign debt.

Meanwhile there is an expectation that infrastructure development will benefit PPP and PPP-like structures in other countries such as Italy, France and the United Kingdom (in those 'consumer pay' sectors where private sector investment in infrastructure is prevalent). In these jurisdictions the prospect of stimulating the economy and delivering new infrastructure, without an immediate cost to the public purse, may be more attractive than ever – especially in sectors where the costs can be routed directly to consumers rather than being a burden on taxpayers and the public finances.

In the United Kingdom we are now seeing the cycle of private finance initiative (PFI) projects from the 1990s turning to hand-back on contract expiry. Although the number of early projects reaching expiry in 2023 will only be in single digits, it rises steadily into double digits over the next two or three years and then continues to rise to a peak of 80 projects scheduled to expire in 2037 alone. Inevitably this begs the question of what will come next and how the government will wish to handle facilities management and refurbishments on a fleet of ageing projects as the existing arrangements come to an end.

Perhaps the most important characteristic of PPP in 2023 and beyond will be its adaptability. PPP in countries as diverse as Argentina, Indonesia and Uzbekistan has never followed the mould of UK 1990s PFI. Elsewhere we have seen the PPP model adapting, for example, in countries such as Norway and the Netherlands where public sector capital contributions on completion reduce the impact of private sector cost of capital over the life of the project, while preserving typical PPP risk transfer and efficiencies during construction. In the United Kingdom and Australia, we have seen the advent of price adjustments and risk sharing based on how the outturn construction cost compares to a target cost; in parallel, the regulated utility model that was traditionally reserved for established operating monopoly networks is increasingly being used to procure new greenfield infrastructure assets.

At Herbert Smith Freehills we are proud of having a long and successful history working within the PPP industry for more than 30 years. We were at the forefront of the market when the PFI model was introduced in the mid-1990s and have followed its evolution around the globe since that time. We continue to believe that PPPs, where used appropriately, are and will remain an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets. The use of the PPP model, in addition to financial benefits, imports added scrutiny, rigour and arm's-length contracting practice, which ultimately benefit both the public and private sectors and, most importantly, the consumer and taxpayer. This may prove to be all the more important following the economic shocks of the covid pandemic and the Ukraine war.

In this, the ninth edition of *The Public–Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions. We hope that you will enjoy and find useful this edition of *The Public–Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

Matthew Job and Tom Marshall
Herbert Smith Freehills LLP
London
March 2023

Chapter 7

NETHERLANDS

Jessica Terpstra, Michel Klijn and Sander van den Boogaart[1]

I OVERVIEW

Over the course of the past 20 years the public–private partnership (PPP) has been an important and successful tool of Dutch contracting authorities for the realisation of projects. The contract form most used for major PPP projects in the Netherlands has been that of the design, build, finance and maintain (DBFM) contract. DBFM contracting came to the Dutch market in the late 1990s and early 2000s. A first push for its use was made in 2004 when the Ministry of Finance introduced a policy whereby, subject to the outcome of a public–private comparator (PPC), PPP was deemed the preferred option for all projects with a value above certain thresholds. In 2008 the government embraced the PPP model further and lowered the applicable thresholds (to, e.g., €60 million for infrastructure projects). Standard DBFM documentation was developed and the Netherlands saw a significant wave of PPP projects. Initially these projects concerned certain types of government accommodation and roads. From 2014 onwards the Dutch Rijkswaterstaat agency, part of the Dutch Ministry of Infrastructure and Water Management, added several wet infrastructure works (river and sea locks as well as the Afsluitdijk dam) to its PPP tender pipeline.

However, more recently enthusiasm in the Netherlands for DBFM as a contract form has started to wane. Concerns were raised about the lack of flexibility and the division of risks within the standard DBFM contract, the latter, in particular, because of the increased complexity of the projects tendered. Certain projects, most notably the A15 road project and the IJmond sea lock project, saw contractors faced with very large costs as a result of risks materialising. In addition, a difficult market had resulted in contractors submitting low bids for projects. When market conditions in the building sector improved certain large Dutch contractors decided against bidding for new PPP projects, citing risks and costs. This meant that recent Dutch DBFM tenders such as, for instance, the A9 and ViA15 road projects attracted fewer bids.

It is against this backdrop that in 2019 the Minister for Infrastructure and Water Management presented the Dutch parliament with a report entitled 'The Future Task of Rijkswaterstaat'. The conclusion of this document was that change was necessary, both to improve competition in the market and in view of the complexity of the new challenges the government was facing. In March 2020 the report was followed by a transition agenda, 'Together in transition to a vital infra sector', prepared by Rijkswaterstaat in close consultation with market participants (an example of a PPP of a different kind). The aim of the transition agenda is to realise an infrastructure sector that is 'sustainable and innovative, financially

1 Jessica Terpstra and Michel Klijn are partners and Sander van den Boogaart is counsel at Houthoff.

healthy and with proper risk control'. The agenda only explicitly refers to PPPs in one of its action points, where it mentions PPP alliance-type contracts, but it is silent on the role of DBFM contracts as part of the new approach.

Further to the transition agenda, Rijkwaterstaat and Bouwend Nederland, a body representing contractors in the Netherlands, jointly commissioned a study into the performance of DBFM in the Dutch market over the past 15 years. The outcome of this study by the Universities of Rotterdam and Groningen, published in October 2020, is described in Section II.

II THE YEAR IN REVIEW

No DBFM contracts were awarded in 2022. There were also no new DBFM contracts tendered during this period.

In January 2022 the IJmond sea lock project (contract value of over €500 million) became available to the public. On 13 December 2022, the Wâldwei (N31) motorway project, the first DBFM contract for a large infrastructure project in the Netherlands, was handed back to the government by the contractor after the conclusion of the contract's 15-year management and maintenance period. This is one of the first DBFM contracts that has reached its end date and where the contracting authority has taken back the maintenance of the tendered project.

There are currently several large DBFM projects in the realisation phase, including the A9 Badhoevendorp–Holendrecht motorway (contract value of over €800 million; expected availability 2026), the A13/A16 motorway (contract value of approximately €1 billion; expected availability 2025) and the Afsluitdijk dam (contract value of over €500 million; expected availability 2025).

There has been some activity in the secondary market for PPP projects with transfers by existing shareholders of their stake in PPP projects to infrastructure investors.

In October 2020, the report 'Learning of 15 years of DBFM projects at Rijkswaterstaat' was presented by researchers of the Erasmus University Rotterdam and Groningen University. According to the report, which was commissioned by Rijkswaterstaat and Bouwend Nederland, projects realised using DBFM projects are on average of a higher quality, more often delivered on time and realised with less hindrance to the public. The contract form was, however, considered less suitable for more complex projects, and the researchers concluded that DBFM is a suitable contract form for projects of limited complexity with a value of €200 million to €400 million. It seems the government is in agreement with the findings of the report. In a letter from the Dutch Minister of Finance of 1 February 2021 the Minister confirms that the recent transition agenda does not mean a change in the government's policy with respect to DBFM. DBFM remains one of the tools to realise government projects. Where projects are of a sufficient size (€60 million for infrastructure projects), Rijkswaterstaat will still need to determine if the use of DBFM provides the best value for money by using the tool of the public private comparator (PPC). However, the Minister does note that the Ministry of Finance and Rijkswaterstaat are currently working on a new version of the PPC that will take account of recent experiences with the DBFM contract form. This new version of the PPC has not yet been published. In addition, the Central Government Real Estate Agency and the Royal Dutch Construction and Infrastructure Federation have instructed Erasmus

University Rotterdam to conduct a follow-up study, which will focus on the operational phase of design, build, finance, maintain (DBFM) and design, build, finance, maintain and operate (DBFMO) projects. This follow-up study has not yet been published.

Following the October 2020 report, several proponents of the DBFM contract form declared the importance of retaining DBFM as a tool for Dutch infrastructure projects. Without deal flow, the knowledge built up over the course of the past 15 to 20 years would disappear. In an evaluation of the aforementioned report by the researchers themselves, published in March 2021, they underline that expertise gained should not be lost. This has, however, not led to the announcement of new DBFM projects.

Finally, in May 2021 the joint initiative of the Dutch financial sector to achieve climate transition, consisting of the Dutch Fund and Asset Management Association, the Dutch Association of Banks, the Federation of Pension Funds and the Federation of Insurers, sent a joint letter in which it emphasised the need for government measures to achieve climate transition. In their letter they urged the government to stimulate the use of public–private partnerships for the funding of this transition. To date, no clear new initiatives for PPP in the climate transition space have been announced.

III GENERAL FRAMEWORK

i Types of public–private partnership

The vast majority of major PPP projects in the Netherlands are structured as DBFM or DBFMO contracts and therefore include private financing. These contracts are mostly tendered by the central government. On a local government level, we occasionally see alliance-type contracts, where the decentralised authority and the market operator share most relevant project risks. For smaller projects, other integrated forms of contract (D&C, DBFM, DBFMO, etc.) are being applied more often, although it could be questioned whether these contract types qualify as PPPs.

ii The authorities

There is no centralised Dutch PPP authority. In practice, however, the vast majority of PPP projects are tendered by the central government, in particular by the agencies Rijkswaterstaat (part of the Ministry of Infrastructure and Water Management) 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.

There is no restriction, legal or otherwise, which prohibits local government bodies from entering into PPP contracts, but so far this has rarely happened, at least with regard to DBFM. Examples of DBFMO projects by decentralised authorities are a new city hall in the municipality of Westland and an international school in the municipality of Eindhoven.

iii General requirements for PPP contracts

There is no comprehensive legislative framework for PPPs in the Netherlands. The use of PPP is policy-based. The current policy of the central government with regard to DBFM is that it can be a tool to achieve better quality for less money (value for money). A possible choice for DBFM is made on the basis of a comparison between different contract forms by means of the PPC. For every project above €25 million for accommodation projects and €60 million

for infrastructure projects, this assessment is made. If the outcome of this assessment is that DBFM is the appropriate contract form, the project is tendered making use of existing (EU-based) procurement legislation (especially by way of the competitive dialogue).

All Dutch PPP projects tendered by the central government are governed by standardised DBFM contracts developed by such government. Currently, version 5.0 (June 2018) of these model contract forms applies. Contracting authorities adhere strictly to these standard forms and are unwilling to deviate from these, other than on project-specific matters.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

The tendering of Dutch PPP projects is subject to the EU public procurement directives. These directives allow for the use of various types of tender procedures, but in PPP tenders normally the competitive dialogue procedure is used. The award criterion in this procedure is the most economically advantageous tender.

ii Requests for proposals and unsolicited proposals

The competitive dialogue tender for PPP projects consists of two stages. The first stage starts with an EU-wide announcement of the tender inviting market parties to submit their interest in the project. Market parties can express their interest by submitting a request to participate. When submitting their interest parties need to provide the contracting authority with the information requested for qualitative selection. The assessment of the expressions of interest is based on requirements concerning a party's technical and economic capability to perform the contract.

Only those parties invited to do so by the contracting entity following its assessment of the information provided in stage one may submit a bid in the subsequent tender (stage two). Contracting authorities may limit the number of bidders invited to participate in stage two of the process.

In principle, contracting authorities can consider unsolicited proposals for PPP transactions. However, if such unsolicited proposal would include a public contract subject to the EU public procurement directives, such contract could only be awarded following a public procurement tender taking into account the principles of transparency and equality of treatment. This means that the party that submitted the unsolicited proposal would need to put in a winning bid in such tender. Perhaps unsurprisingly, unsolicited proposals are rare.

iii Evaluation and grant

In tenders for DBFM contracts, the candidates are putting in a bid for the draft DBFM contract provided by the contracting authority as part of the tender documentation. During the second phase of the tender candidates can ask questions about and provide comments to the draft contract. When submitting their bid, candidates must also submit a financing plan, a financial model, support letters from their debt and equity providers and a financial close guarantee. The tender guidelines will 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. Bidders also need to use specific formats for their support letters and the financial close guarantee.

The award criterion used by the contracting authority in the competitive dialogue procedure for a DBFM project is the most economically advantageous tender. The sub-criteria used for awards are a combination of price-related criteria and qualitative criteria, including a risk management plan.

The winning bidder will enter into the DBFM contract with the contracting authority after the contract has been finally awarded (contract close). The DBFM contract contains a maximum term within which financial close will then need to occur.

Especially in large PPP tenders, unsuccessful bidders receive a fixed payment for costs incurred in connection with the tender. The amount of compensation bidders are entitled to is included in the tender guidelines. It only covers part of the actual costs. Most recent practice has been that bidders that make it to the best and final offer stage receive a (significantly) larger financial contribution than participants that were excluded in the first stage of the process.

V THE CONTRACT

i Payment

All recent DBFM projects in the Netherlands have had availability-based payment mechanisms. Under this payment mechanism, the contracting authority pays the contractor a periodic fee that is based on the availability of the project (the availability payment). This availability payment is due in full during the operational phase of the project. During the realisation phase, the contractor normally receives a relatively small percentage of the standard gross availability payment. The Dutch payment mechanisms have evolved over time (including, for instance, carve-outs for lost vehicle hours in road projects).

Depending on the project, availability payments are either made monthly or quarterly. The gross availability payment is subject to any applicable availability corrections and performance corrections. Availability corrections can be imposed if the object is not available. For instance, in road projects, availability corrections can be imposed for each quarter of an hour that a lane is not available. Performance corrections can be imposed if the contractor fails to comply with certain, specifically described contractual obligations, for example, regarding traffic safety.

In addition to the availability payment, in more recent projects the contracting authority also pays one or more lump sum milestone payments to the contractor. This happens on either or both the availability and completion of the project. The financing of such projects will consist of short-term bridge funding alongside long-term facilities.

ii State guarantees

In PPP projects in the Netherlands the state does not provide state guarantees to the sponsor. Furthermore, the state does not participate in the equity or debt financing of the delivery vehicle.

iii Distribution of risk

The starting point of standard Dutch DBFM contracts is that all risks in relation to the project are for the account of the private party, unless a supervening event occurs. To achieve this division of risk, nearly all statutory risk allocation provisions included in the Dutch Civil

Code are excluded in the standard DBFM contract. Only certain mandatory Dutch law provisions, which cannot be excluded contractually, remain relevant, such as the provision that one cannot exclude liability for gross negligence or wilful misconduct.

As mentioned above, the contractor only escapes contractual liability for risks in the case of a supervening event. There are three categories of such supervening events: compensation events, delay events and *force majeure* events.

If a circumstance arises that qualifies as a compensation event, the contractor is fully compensated for any damage suffered. Contractual deadlines are postponed for the duration of the delay caused by the relevant circumstance. Examples of compensation events are contracting authority defaults, contracting authority changes, a relevant change in law, damage to the infrastructure caused by traffic accidents and measures by the contractor to mitigate *force majeure* events.

In the case of a delay event, all contractual deadlines are postponed for the duration caused by the relevant circumstance. The compensation contractor is entitled to limited certain financing costs attributable to the delay. All compensation events as well as *force majeure* events constitute delay events. Other examples of delay events are no (or late) accessibility of the project site and no (or late) coming into force of zoning and planning decisions.

The occurrence of a *force majeure* event gives the contractor broadly the same rights as in the case of a delay event. However, to the extent that the contractor is unable to fulfil certain obligations as a result of a *force majeure* event, the contractor shall be entitled to payment or continued payment of the availability payment minus certain cost savings. *Force majeure* is a precisely defined concept, referring to a limited number of events. Examples are war, armed resurrection, hurricanes and earthquakes.

iv Adjustment and revision

The standard DBFM contract contains a detailed mechanism for changes to the scope of work of the project. Both the contracting authority and the contractor are entitled to propose changes.

A change proposed by the contracting authority qualifies as a contracting authority change. In principle, the contractor is obliged to accept such change (except in limited circumstances, for instance when the contractor would have to act contrary to regulations). A contracting authority change qualifies as a compensation event, entitling the contractor to compensation in money and time. A contracting authority change may not involve a significant change of the works compared to the original scope of the DBFM contract.

The contractor is also entitled to propose a change. Such change qualifies as a contractor change. The contracting authority is not obliged to accept such change, except in limited circumstances, for instance if without the change the contractor would have to act contrary to regulations. Unless the parties agree otherwise, the consequences of a contractor change are for the account of the contractor.

Furthermore, the 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. However, the standard DBFM contract contains a specific provision stating that the parties agree that the contract itself intends to cater exhaustively for such unforeseen circumstances. The intention is to limit the possibility of either party to invoke the unforeseen circumstances provision of the Civil Code.

v Ownership of underlying assets

Typically, ownership of the asset that forms the basis of a PPP contract remains with the public party throughout the entire term of the contract (i.e., no transfer of ownership between the public party and the private party takes place).

vi Early termination

The standard DBFM contract may be terminated by the contracting authority in the event of:

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

The standard DBFM contract may be terminated by the contractor in the event of:

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

The standard DBFM contract provides for a sophisticated termination compensation regime, whereby compensation is linked to the cause of termination.

Maximum compensation (including make whole of lenders, compensation of subcontractors and compensation for the loss of expected profits (return on equity) of the shareholders of the project) 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 in the event of termination for an immediate termination event or contractor default.

VI FINANCE

Funding of Dutch DBFM projects usually consists of roughly 10 per cent equity and 90 per cent debt.

Equity is provided by the bidding consortium, usually formed by the relevant contractors together with one or more infrastructure investors. The latter could be infrastructure funds as well as institutional investors. According to the recent 'Learning from 15 years of DBFM projects at Rijkswaterstaat' report, on average the internal rate of return of the projects included in this research was 11 per cent.

In nearly all Dutch PPP projects the debt element of the funding is provided by way of project financing. Financing is mostly provided by European and Asian banks. Dutch government-owned bank BNG and the European Investment Bank play an important role in the Dutch market. Over the years the involvement of infrastructure funds and other

institutional investors has increased. The government explored the possibility of index-linked financing for PPP projects in a pilot in 2013. Although the pilot was successful, the conclusion was that index-linked financing structures were not necessary to induce institutional investors such as pension funds and insurers to participate in PPP projects. Similarly, the first bond financing of a Dutch PPP project (Zaanstad prison) in 2013 was successful, but did not lead to increased use of capital market solutions for projects in the Netherlands. Traditional project financing is still the favoured financing method for PPP projects in the Netherlands.

The role of the contracting authority in the financing of Dutch DBFM projects is limited to the direct agreement relating to the DBFM contract that it signs with the security agent of the lenders and the contractor. The contracting authority does not provide any guarantees to the lenders. It has, however, become standard practice to include milestone payments in the DBFM contract, mostly payable on either or both the availability and completion of the project. This alleviates to a degree the need for long-term debt for the project.

Over the years several PPP projects have been refinanced. Under the DBFM contract the consortium will need to notify the contracting authority of any such refinancing. In certain cases a refinancing requires prior permission of the contracting authority. If a refinancing leads to financial gain for the consortium it will need to share these gains with the contracting authority. The more recent DBFM contracts contain a 50/50 split of these gains between the contracting authority and the consortium.

VII RECENT DECISIONS

As for major PPP projects, little case law exists regarding the tender procedures or award decisions. In the 2017 DBFM tender for the Blankenburgtunnel, the awarding decision was unsuccessfully challenged in summary proceedings initiated by the runner-up consortium. We are not aware of other recent proceedings of this nature. As for the realisation and performance of these projects, some disputes have arisen, but the outcomes thereof, if any, have not been made public. Based on the standard DBFM and DBFMO contracts, such disputes are handled by expert committees whose judgements are not publicly disclosed. An example of this is the Afsluitdijk project where parties have appointed an expert committee to decide on the liability of the parties for the cost overruns of the project. Also regarding the DBFM project for the construction of the new main building of the National Institute for Public Health and the Environment it is known that two disputes are currently being handled by expert committees. Their binding opinions are expected in the first quarter of 2023. Finally, a decision is due in the proceedings before the Supreme Administrative Court in the Netherlands in relation to the route decision for the Via15 Project near Rotterdam. This decision is also expected in the first quarter of 2023. Objections raised mainly concern the nitrogen impact of the new road on the surroundings. The proceedings have caused substantive delays for the project with the government having to stand down its projects team until the court decision.

VIII OUTLOOK

After what has been a period of 15 years of mostly successful DBFM projects, there currently is no pipeline for new PPP projects in the Netherlands. Nevertheless, as a result of the long durations of DBFM contracts, DBFM projects will not disappear just yet. In fact, the annual 2023 budget for highways and freeways of the Ministry of Infrastructure and Water Management shows that €514 million of the total budget of €3.4 billion is earmarked for DBFM projects. Although there have been difficulties in a few projects, these difficulties were not caused by the fact that they were tendered by way of a DBFM contract. In view of the successes with DBFM in the Netherlands, it has been a positive sign that the Dutch Minister of Finance confirmed that DBFM remains a contract form the government will consider when tendering new projects. It will, however, amend the PPC assessment tool to determine the projects for which DBFM provides value for money. The future will show whether this new assessment tool and the positive endorsement of the Minister of Finance will lead to a new pipeline of Dutch PPP projects in the coming years, for instance in the renewable energy space and related infrastructure.

Appendix 1

ABOUT THE AUTHORS

JESSICA TERPSTRA

Houthoff

Jessica Terpstra is a partner in our finance group with extensive experience in project financing transactions. She has been involved in many PPP projects in the Dutch infrastructure sector, most recently on the restructuring of the financing for the IJmuiden sea lock project.

MICHEL KLIJN

Houthoff

Michel Klijn is a partner in our construction group with extensive experience in projects in the infrastructure, real estate and energy sectors. He has been involved in many PPP projects in the Netherlands, most recently on the A9 Badhoevedorp–Holendrecht motorway project.

SANDER VAN DEN BOOGAART

Houthoff

Sander van den Boogaart specialises in PPP projects and project financing, construction law and procurement law. He has extensive experience in drafting and evaluating complex construction contracts (including DBFM and DBFMO and project alliances) and advising on construction-related matters.

HOUTHOFF

16th Floor, 125 Old Broad Street
London EC2N 1AR
United Kingdom
Tel: +44 20 7422 5050
j.terpstra@houthoff.com

Gustav Mahlerplein 50
1082 MA Amsterdam
Netherlands
Tel: +31 20 605 60 00
Weena 355
3013 AL Rotterdam
Netherlands
Tel: +31 10 217 20 00
m.klijn@houthoff.com
s.van.den.boogaart@houthoff.com

www.houthoff.com

ISBN 978-1-80449-159-1