

THE PUBLIC-PRIVATE  
PARTNERSHIP  
LAW REVIEW

FIFTH EDITION

**Editors**

Bruno Werneck and Mário Saadi

THE LAWREVIEWS

THE PUBLIC-PRIVATE  
PARTNERSHIP LAW  
REVIEW

FIFTH EDITION

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# PREFACE

We are very pleased to present the fifth edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of chapters in various publications in The Law Reviews series on topics involving public-private partnerships (PPPs) and private finance initiatives (in areas such as projects and construction, real estate, mergers, transfers of concessionaires' corporate control, special purpose vehicles and government procurement), we identified the need for a deeper understanding of the specific issues related to this topic in different countries.

In 2014, Brazil marked the 10th year of the publication of its first Public-Private Partnership Law (Federal Law No. 11,079/2004). Our experience with this law is still developing, especially in comparison with other countries where discussions on PPP models and the need to attract private investment in large projects dates from the 1980s and 1990s.

This is the case for countries such as the United Kingdom and the United States. PPPs have been used in the United States across a wide range of sectors in various forms for more than 30 years. From 1986 to 2012, approximately 700 PPP projects reached financial closure. The United Kingdom is widely known as one of the pioneers of the PPP model; Margaret Thatcher's governments in the 1980s embarked on an extensive privatisation programme of publicly owned utilities, including telecoms, gas, electricity, water and waste, airports, and railways. The Private Finance Initiative was launched in the United Kingdom in 1992, aiming to boost design-build-finance-operate projects.

In certain developing countries, PPP laws are more recent than the Brazilian PPP law. Argentina was the first country in Latin America to enact a PPP Law (Decree No. 1,299/2000, ratified by Law No. 25,414/2000). The Argentinian PPP Law was designed to promote private investment in public infrastructure projects that could not be afforded exclusively by the state, especially in the areas of health, education, justice, transportation, construction of airport facilities, highways and investments in local security. In Mozambique, Law No. 15/2011 and Decree No. 16/2012 govern the Public-Private Partnerships Law and other related PPP regulations, which establish procedures for contracting, implementing and monitoring PPP projects. In Paraguay, a regulation establishing the PPP regime has been enacted (Law No. 5,102) to promote public infrastructure and the expansion and improvement of services provided by the state; this law has been in force since late 2013.

In view of the foregoing, we hope a comparative study covering practical aspects and different perspectives regarding PPP issues will become an important tool for the strengthening of this model worldwide. We are certain this study will bring about a better dissemination of best practices implemented by private professionals and government authorities working on PPP projects around the world.

With respect to Brazil, the experience evidenced abroad may lead to the strengthening of this model. One specific feature of the PPP law in Brazil, for instance, is state guarantees. This

feature permits that the obligation of the public party to pay a concessionaire be guaranteed by, among other mechanisms authorised by law: a pledge of revenues; creation or use of special funds; purchase of a guarantee from insurance companies that are not under public control; guarantees by international organisations or financial institutions not controlled by any government authority; or guarantees by guarantor funds or state-owned companies created especially for that purpose.

The state guarantee pursuant to PPP agreements is an important innovation in administrative agreements in Brazil; it assures payment obligations by the public partner and serves as a guarantee in the event of lawsuits and claims against the government. This tool is one of the main factors distinguishing the legal regimen of PPP agreements from ordinary administrative agreements or concessions – one that is viewed as crucial for the success of PPPs, especially from a private investor's standpoint.

Nevertheless, the difficulty in implementing state guarantees on PPP projects has been one of the main issues in the execution of new PPP projects in the country. This is made worse by the history of government default in administrative contracts.

In other jurisdictions, however, state guarantees are not a rule. Unlike PPP projects in developing countries, government solvency has not historically been a serious consideration in other jurisdictions. That is the case in countries such as Australia, France, Ireland, Japan, the United Kingdom and the United States.

We expect that the consolidation of PPPs and the strengthening of the government in Brazil may lead to a similar model, enabling private investments in areas where the country lacks the most.

Brazil must adopt cutting-edge models for awarding PPP agreements. The winner is usually chosen based solely on the price criterion (offering of lower prices or highest offers), which sometimes leads to projects lacking advanced or tailor-made solutions. Despite the legal provisions on the role of technical evaluation of offers, they are becoming less relevant. However, some ongoing discussions regarding amendments to the Brazilian procurement legislation and new criteria, which are based on the international experience, could (fortunately) be approved.

We highlighted some discussions regarding the amendment to the Federal Procurement Law (Federal Law No. 8,666/1993), which is expected to expedite public procurement in Brazil. One of the main innovations proposed in this debate is the competitive dialogue, a type of bid in which the authority engages with bidders to discuss and develop one or more solutions for the tendered project. After the conclusion of the dialogue phase, the authority will establish a term for the submission of bids.

Competitive dialogue is a reality in many jurisdictions (e.g., Australia, Belgium, China, France, Ireland, Japan and the United Kingdom). In Japan, for example, some projects are procured through the competitive dialogue process. This process may be adopted if a relevant authority is unable to prepare a proper service requirement, in which case it proposes a dialogue with multiple bidders simultaneously to learn more about the specific service it seeks to implement. As another example, in France a dialogue will be conducted with each bidder to define solutions on the basis of the functional programme. At the end of the dialogue period, the procuring authority will invite the candidates to submit a tender based on the considered solutions. After analysis of the tenders, a partnership contract will be awarded to the bidder with the best price in accordance with the criteria established in the contract notice or in the tender procedure. We hope the importance of this tool is recognised in Brazil and reflected in our legislation.

Further, the Investment Partnerships Programme, as established in Federal Law No. 13,334/2016, is a legal plan regarding infrastructure development in the country, providing conditions for the attraction of investments in infrastructure projects and creating environments for greater integration between public and private sectors.

The PPI is comprised of two relevant bodies within the federal government: the PPI Board and the PPI Secretariat. The first one evaluates and recommends to the President the projects that should be part of the PPI, as well as decides on subjects concerning the execution of partnership contracts and privatisations. The second one is a taskforce that acts in support of the Ministries and Regulatory Agencies to execute the PPI's activities. These entities, together with other bodies and controlling agencies, are expected to act in an articulated manner as to ensure stability, legal certainty, predictability and effectiveness of the investment policies.

With regard to the plans of the president-elect for infrastructure investments in Brazil, the responsible governmental team has already confirmed the continuity of the PPI, linked to the presidency and preserving the members of its current technical team. In addition, the new government team endorses the development of a programme by PPI to support public-private partnerships of states and municipalities, which would mainly cover sanitation and public lighting sectors. Given the lack of operational, technical and economic-financial ability of municipalities to manage such programmes, the federal government is expected to act closely with local entities to boost projects in priority areas.

In the fifth edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions. We would like to thank all of them for their support in producing *The Public-Private Partnership Law Review*, and in helping with the collective construction of a broad study on the main aspects of PPP projects.

We strongly believe that PPPs are an important tool for generating investments (and development) in infrastructure projects and creating efficiency not only in infrastructure, but also in the provision of public services, such as education and health, as well as public lighting services and prisons. PPPs are also an important means of combating corruption, which is common in the old and inefficient model of direct state procurement of projects.

We hope you enjoy this fifth edition of *The Public-Private Partnership Law Review* and we sincerely hope that this book will consolidate a comprehensive international guide to the anatomy of PPPs. We also look forward to hearing your thoughts on this edition, and particularly your comments and suggestions for improving future editions of this work.

**Bruno Werneck and Mário Saadi**

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

São Paulo

March 2019

# TAIWAN

*Pauline Wang and Yung-Ching Huang<sup>1</sup>*

## I OVERVIEW

In Taiwan, public-private partnership (PPP) schemes were prescribed under several laws before the Statute for Encouragement of Private Participation in Transportation Infrastructure Projects was enacted in 1994. The Statute for Encouragement of Private Participation in Transportation Infrastructure Projects covers only transportation infrastructure, which is supervised by the Ministry of Transportation. Taiwan High Speed Rail is a representative project of transportation infrastructure subsidised by the Statute for Encouragement of Private Participation in Transportation Infrastructure Projects.

As PPPs became popular in Taiwan, Taiwan strove to create a hospitable environment for PPPs by statutory enactments and amendments. In 2000, the Act for Promotion of Private Participation in Infrastructure Projects (PPIP Act) was enacted, covering various types of infrastructure, for example, transportation facilities and common conduits, environmental pollution prevention, water supply, and sanitation facilities. The PPIP Act not only establishes a set of fair bidding procedures but also offers many incentives, such as favourable rentals or tax exemptions.

Besides the PPIP Act, there are other laws governing private participation in specific infrastructure projects, including the Mass Rapid Transit Act, the National Property Act, the Local Government Public Property Administration Act, the Commercial Port Act, and the Electricity Act. Together, the different objectives and operating guidelines of those laws create a sound legal environment that has fostered many accomplishments through the united efforts of government agencies. However, the PPIP Act governs most PPP projects in Taiwan. Meanwhile, even when the PPIP Act does not apply in some projects, Article 99 of the Government Procurement Act may apply to the procedures by which an entity selects an investor to construct or operate a project approved by the competent authority for private investment, provided that the project is one in transportation, energy, environmental protection, tourism, and planned or approved by the government. But the benefits under the PPIP Act, such as favourable rentals or tax exemptions, will not apply.

There are various ways for private entities to enter into partnerships with the government in Taiwan. From 2003 to 31 May 2018, more than 1,500 contracts were signed, totalling over NT\$1.31 trillion in value. To accelerate national development and curb government expenditure, the Taiwanese government works in earnest to promote PPPs. Well-known projects include the build–operate–transfer (BOT) projects for the Electronic Toll Collection, the Taipei Bus Station and the City Hall Bus Station; the operate-transfer (OT) projects

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<sup>1</sup> Pauline Wang is a partner and Yung-Ching Huang is a senior associate at Lee and Li.

for the National Center for Traditional Arts, the Nangan Exhibition Center, the Kaohsiung Exhibition Center and the Kaohsiung Public Library; and the rehabilitate-operate-transfer (ROT) projects for National Center for Traditional Arts and Alishan House.

## II THE YEAR IN REVIEW

According to the Ministry of Finance (MOF), there were a total of 66 signed concession agreements as at October 2018. Major projects include Former Lung-Hua Elementary School Mall and Elderly Rental Houses in Kaohsiung (NT\$375 billion), Taipei City Nangang Bus Station BOT Project (NT\$307 billion), and Superficies Project of Taipei Air Force Recreation Center (NT\$107 billion). The following projects are estimated to begin before the end of the year: the BOT project for Taichung Station Railway Cultural Park (NT\$30 billion), Zhong-xiao-huai-sheng Urban Renewal in Taipei (NT\$30 billion), and the Parkingland BOT Project of Land No. 470-1, Gong-yuan Section, Zhubei City, Hsinchu County (NT\$17 billion).

Before some minor wording adjustment in 2018, there were several important amendments to the PPIP Act in 2015, including:

- a* government office buildings were added in Article 3 of the PPIP Act as a kind of infrastructure project subject to the PPIP Act;
- b* a feasibility assessment before promoting PPP projects was added in Article 61 of the PPIP Act;
- c* Paragraph 2, Article 11 of the PPIP Act was amended to the effect that the concession agreement between the authority in charge and the private entity shall specify the payment of rental for the land. Additionally, 'control and management of operation quality' was added to Paragraph 7 of the same article for elaborating on the concession agreement and the efficiency of operation. 'Adjustment and revision to or termination of the agreement' was added to Paragraph 8, Article 11. The last addition requires the dispute resolution mechanism to be prescribed in the concession agreement;
- d* Paragraph 2, Article 14 of the PPIP Act was added to require that where environmental impact assessment, and soil and water conservation treatment and maintenance for the land needed for a major infrastructure project are compulsory, the assessment, treatment and maintenance be reviewed jointly or concurrently by the authorities concerned in accordance with the laws and regulations governing urban planning and regional planning; and
- e* Paragraph 1, Article 29 of the PPIP Act introduced the key performance indicators into the subsidy mechanism for the PPP projects in which private entities cannot fully self-finance their investment.

In 2017, in response to the 2015 amendments, regulations and guidelines for PPP projects were issued or amended by the MOF, as follows:

- a* The Regulations on Takeover of PPP Government Office Buildings were published. These Regulations cover the procedure and rights and obligation of both parties if the government agency takes over the project in the condition described in Paragraph 1, Article 53 – any failure to take immediate action may jeopardise major public interests or result in imminent danger.

- b* The Evaluation Mechanism for Public Infrastructure was amended. This evaluation mechanism is meant to help government officials consider whether to initiate a PPP project. The evaluation factors include policy and financial aspects.
- c* The Control and Management of Operation Quality Evaluation Guidelines were renewed. The guidelines elaborate on the control and management of operation quality evaluation procedure.
- d* The PPP Operating Performance Subsidy Evaluation Guidelines were published, and these guidelines provide a basis for the government to evaluate the self-financing capability of the project and establish the key performance indicators for different kinds of public infrastructure.
- e* The Guidelines for the Authority in Charge to Execute PPP Projects were reviewed and revised according to the amended PPIP Act.

In 2016, the MOF published the Regulations for Private Institutions Applying to Participate in the Infrastructure Project under its Own Planning, which would be discussed in detail in the privately initiated project.

In 2016, the Guidelines for Mediation Committee in Performance of Concession Agreement in PPP Projects were published by the MOF. Such guidelines clarify the composition, appointment and the mission of the committee in Article 48-1 of the PPIP Act, in hope of enhancing the efficiency of mediation.

### III GENERAL FRAMEWORK

#### **i Types of public-private partnership**

Pursuant to Article 8 of the PPIP Act, a private entity may participate in an infrastructure project in any of the following ways: BOT, build–transfer–operate (BTO), ROT, OT and build-operate-own (BOO):

- a* BOT: the private entity invests in the construction and operation of a new infrastructure, and upon expiration of the operation period, transfers the ownership of such infrastructure to the government;
- b* BTO: either:
  - the private entity invests in the construction of the infrastructure and, upon completion of the construction, relinquishes the ownership to the government without compensation. The government then lets the private entity operate the infrastructure. Upon expiration of the operation period, the right to operate reverts to the government; or
  - the private entity invests in the construction of the infrastructure. Upon completion of the construction, the government acquires the ownership by paying the construction expenses in a lump sum or in instalments. The government then lets the private entity operate the infrastructure. Upon expiration of the operation period, the right to operate reverts to the government;
- c* ROT: the private entity invests in the extension, reconstruction or repair of an existing infrastructure, and operates the infrastructure. Upon expiration of the operation period, the right to operate reverts to the government;
- d* OT: the private entity operates an infrastructure facility built with investment from the government. Upon expiration of the operation period, the right to operate reverts to the government; and

- e* BOO: the private entity invests in the construction of an infrastructure on private land provided by the private entity itself, has the ownership thereof upon completion of the construction, and then operates the infrastructure itself or commissions a third party to operate it.

In addition, PPP project implementation projects can also be divided into two types:

- a* government-initiated projects, wherein private entities are recruited by the government to implement a publicly financed project, where the government sees the private entity as having superior capacity and expertise to deal with the project than the government, and expects the private entity to be more efficient than the government; and
- b* privately initiated projects, wherein a private entity independently discovers a project that is deemed profitable among the public-private partnership projects and proposes its implementation to the government.

## **ii The authorities**

According to Paragraph 1, Article 5 of the PPIP Act, the competent authority is the Public Construction Committee of the Executive Yuan, which became the Department of Promotion of Private Participation of the Ministry of Finance (the DPPP) in 2013. In practice, the DPPP is the agency in charge of the PPP scheme. Besides helping the Ministry of Finance (MOF) interpret the PPIP Act, the DPPP also drafts guidelines, frameworks, principles and programmes and announces them in the name of the MOF.

Besides the above, the DPPP engages in a wide range of work to promote PPPs. For example, it publishes investors' manuals, explaining approaches to the PPIP Act and related incentives or benefits to foreign investors. It also schedules training courses for officials participating in PPP. To incentivise execution and consultation, 'Golden Thumb Awards' are given every year to consultants or authorities in charge and private entities for well-executed projects.

In addition, according to Paragraph 2, Article 5 of the PPIP Act, the authority in charge refers to any authority in charge of matters relating to private participation in infrastructure projects, which may be the central authorities in charge of the industries, the municipal governments at the municipal level or the county governments at the county level. An authority in charge may authorise any of its subordinate agencies to execute matters to be handled as authorised by the Act.

## **iii General requirements for PPP contracts**

According to Article 3 of the PPIP Act, projects for constructing any of the following facilities for public use and for promotion of public interest could be deemed an infrastructure project under the PPIP Act:

- a* transportation facilities and common conduits;
- b* environmental pollution prevention facilities;
- c* sewerage, water supply and water conservancy facilities;
- d* sanitation and medical facilities;
- e* social and labour welfare facilities;
- f* cultural and educational facilities;
- g* tourist attractions and lodgings;
- h* power facilities and public gas and fuel supply facilities;
- i* sports facilities;

- j* parks and green spaces;
- k* industrial, commercial and hi-tech facilities;
- l* development of new towns;
- m* agricultural facilities; and
- n* government office buildings.

As previously stated, there are other laws governing private participation in specific infrastructure projects; therefore, if a project does not fall within the types prescribed in Article 3 of the PPIP Act, it may still proceed under the PPP scheme. However, in such cases, the benefits under the PPIP Act, for example, favourable rentals or tax exemptions, will not apply.

Besides the limitation on types of projects qualifying under the PPIP Act, Article 11 of the PPIP Act also requires the following matters to be specified in concession agreements case by case:

- a* the planning, building, operation and transfer of the infrastructure;
- b* the payment of the rental for the land;
- c* the royalties, the relevant expenses, the fare rate and the adjustment;
- d* renewal of the agreement upon the expiration of the operation period;
- e* risk allocation;
- f* the solution in the case of poor construction or operation;
- g* the step-in right of the related parties;
- h* the auditing, construction control and management of operation quality;
- i* a dispute-resolution mechanism;
- j* the arbitration clause; and
- k* amendment to or termination of the agreement, and any other agreed matters.

#### **IV BIDDING AND AWARD PROCEDURE**

Private entities interested in making an application can submit required documents for the government to select the best qualified applicant. Following selection, both parties enter into negotiation and sign an agreement. If, after the selection, the best applicant fails to execute the agreement in accordance with the schedule, then the government may make another public notice to negotiate and sign an agreement with the second-best applicant.

##### **i Expressions of interest**

As previously stated, PPP project implementation can also be divided into two types: government-initiated projects and privately initiated projects.

To the government-initiated projects, the authority in charge has to first evaluate whether the PPP scheme is suitable for the project. According to the Evaluation Mechanism for Public Infrastructure proposed by the MOF, the evaluation for feasibility covers the current public infrastructure operation, public policy, the type of PPP, finances and land ownership. After such an evaluation, evaluation of feasibility and preliminary plan should be done. According to the Guidelines for Governmental Agencies in Promotion of Private Participation, feasibility in market, engineering technology, finances, law and land securing should be evaluated carefully. Moreover, environmental impact assessment (EIA) has been a significant concern in evaluating feasibility in recent years.

Based on the evaluation of feasibility, the government should commence the preliminary plan for the project. The preliminary plan should include:

- a* the goal of the project;
- b* the term and scope of the approval;
- c* the plan for construction and operation;
- d* the timetable for EIA;
- e* finances and risk management;
- f* approved investment; and
- g* the plan for implementing the agreement.

The guidelines specifically point out that the plan for construction and operation has to cover EIA and carbon emission reduction initiatives. To the privately initiated projects, a private entity needs to submit:

- a* a land utilisation plan;
- b* a building plan;
- c* an operational plan;
- d* a financial plan;
- e* a letter of intent to finance issued by a financial institution; and
- f* other documents required by applicable laws (the requested documents) to the authority in charge for approval.

If the authority in charge finds the application meets the policy requirements, the application shall be reviewed according to the following procedure:

- a* where the private entity applicant provides private land needed by the project, the application shall be reviewed by the authority in charge; and
- b* where the authority in charge provides land and facilities needed by the project, the private entity applicant shall submit a project outline in advance.

After the project outline passes the preliminary review of the authority in charge, the application guide will be made and announced by the authority in charge. Then the original applicant and other applicants may submit the requested documents accordingly. To evaluate the applications, the authority in charge shall organise a selection committee to establish the evaluation criteria based on the purpose of the infrastructure project concerned, examine and evaluate the materials submitted by the applicants on a fair basis, and then select the best applicant within the evaluation period.

## **ii Requests for proposals and unsolicited proposals**

After the evaluation of feasibility and the preliminary plan in the government-initiated projects, the government would make a public notice to invite bids from interested entities to the privately initiated projects, where the authority in charge provides land and facilities needed by the project.

The public notice should specify:

- a* the character, basic requirements, concession period and scope of the infrastructure project;
- b* the qualification requirements for the applicant;
- c* the items and standards of application review;
- d* the items awaiting negotiation;

- e* the date of announcement, the deadline for application, the application procedure and earnest money;
- f* the scope for the ancillary enterprises allowed for private investment and the concession period for the land needed; and
- g* the matters authorised or commissioned by the authority in charge in accordance with Paragraphs 2 and 3, Article 5 of the Act.

Besides the information given in the public notice, the tender documents shall state the following items:

- a* information in the public notice;
- b* the main content and format of the investment proposal;
- c* the method and schedule of the application review;
- d* the commitment and cooperation matters of the government;
- e* the items and procedures of negotiation, only when negotiations are allowed;
- f* the deadline for contract negotiation and execution; and
- g* the draft of concession agreement.

If a private entity is interested in a project, then it may submit a bid by following the instructions on the public notice and the tender document.

### **iii Evaluation and grant**

According to the Regulations Governing the Organisation of the Selection Committee and the Evaluation for Private Participation in Infrastructure Projects, the authority in charge has to organise a selection committee for private participation in infrastructure projects (the Selection Committee) for each project. The Selection Committee has to be established before a public notice inviting private participation is posted, and should be dissolved upon completion of the review process and when there are no outstanding issues.

The duties of the Selection Committee include prescribing or approving evaluation criteria and ways of selection, conducting comprehensive evaluation of the applications, helping the authority in charge to interpret matters related to the evaluation items, evaluation criteria and the selection outcome. When prescribing or approving the evaluation items and evaluation criteria, the Selection Committee has to first consider the purpose of the infrastructure project and public interest. Evaluation criteria should include the financial plan and appropriate allocation standards; innovation and creativity may be included in the evaluation criteria or sub-criteria, subject to the type of the project. The financial plan has to cover the royalties or governmental premiums, subject to the type of the project.

As required by this regulation, the Selection Committee should consist of seven to 17 members appointed or retained by the authority in charge and have expertise or experience in fields related to the infrastructure project. To ensure fairness, at least half of the Selection Committee members have to be external experts or scholars.

## **V THE CONTRACT**

### **i Payment**

The payments typically made by the private entity in a PPP Project include the land rental and the royalties. Unlike royalties, which can be waived when the private entity's finances decline during a project, land rental is compulsory. According to the Regulations for

Favourable Rentals Regarding Public Land Lease and Superficies in Infrastructure Projects, rental calculation for public land in infrastructure projects is divided into building period and operation period. In the building period, the rental is equal to land-value tax plus the necessary maintenance fee. In the operation period, rental is 60 per cent of the amount calculated by the rental standard of State-Owned Land Lot. However, the amount of the rental may not exceed 106 per cent of the previous rental. Rental is an issue because the announced land value was once considerably lower than the market price, and today the announced land value is getting closer to the market price. During the bidding process, the rental is calculated using the announced land value. Therefore, if during the operation period, the market price of the land and the announced land value around the projects soar, then the private entity may face unforeseen financial risks.

## ii State guarantees

In Taiwan, only a few kinds of agreements involve state guarantees, for example, the guaranteed amount of sewage for operation and disposal fees calculation for sewer PPP projects, and there are fewer agreements having such guarantees in recent years.

## iii Distribution of risk

In concession agreements and civil law, the doctrine of change of circumstances and clauses in *force majeure* events are the principal means of distribution of risk.

The common terms regarding *force majeure* and changes in circumstances are:

- a *force majeure*, which includes:
  - wars (whether declared or not), invasions, actions of foreign enemies, rebellions, revolutions, insurrections, civil wars or terrorist activities;
  - radiation or radioactive contamination from explosion of nuclear fuels or burning of wastes;
  - natural disasters, including but not limited to earthquakes, floods, tsunami, lightning, or any occurrences due to forces of nature;
  - strikes, labour riots or other labour disputes not attributable to Party B or its contractors, which will affect the performance of this Agreement;
  - discovery of monuments or sites protected by laws and regulations, which will affect the construction procedure or the expected commencement of the operations; and
  - environmental pollution occurred in the construction sites which will affect construction workers; and
- b changes in circumstances, which are not attributable to either party and refers to:
  - events other than *force majeure* events, changes in government policies, revisions of laws, administrative orders, sanctions, actions or no action that has significant adverse effects on Party B's construction or operations hereunder or its financial condition and is likely to impact the performance of this Agreement;
  - major changes in the overall economy causing significant adverse impact on Party B's construction or operations hereunder or its financial condition, and likely to impact the performance of this Agreement or render the project not self-liquidity;
  - Party B's delay in obtaining construction-related licences and permits for over a certain number of days for causes not attributable to Party B; and
  - other non-*force majeure* events.

Once an event is identified as either a *force majeure* event or a change in circumstances, the parties can take one or more of the remedial measures set forth below according to the terms of the concession agreement:

- a* the damage resulting from *force majeure* events or change in circumstances shall first be indemnified by the insurance policies procured by the private entity or any of its contractors, suppliers, professional advisers or trustees;
- b* a reduction of the rents or other taxes in accordance with the applicable laws;
- c* if the private entity sustains material damage as a result of natural disasters, the authority in charge shall negotiate with financial institutions for extending serious natural disaster damage recovery loans or other reliefs to the private entity;
- d* to suspend the construction and operation periods in the concession agreement, and extend such periods as appropriate;
- e* to adjust the deadline for royalty payments and the royalty amounts;
- f* adjusting the fee schedule of the public utilities or the operations of Party B approved by Party A; and
- g* other measures agreed on by the parties.

### ***Adjustment and revision***

Adjustment and revision clauses are usually in the concession agreement. Common grounds for agreement revision include:

- a* occurrence of any *force majeure* events, exceptions, or changes in circumstances causing the continued performance of this Agreement to be unfair or difficult;
- b* out of consideration for public interests, continued performance of this Agreement or continued handling according to this Agreement that may have adverse effects on public interests;
- c* substantial reduction of Party B's construction and operation costs or tax burden results from causes other than Party B's performance of this Agreement;
- d* if revised, the schedules or appendices have no adverse effects on public interests and are not unfair; and
- e* a revision that is necessary for performance of this Agreement, is agreed on by the parties, has no adverse effects on public interests, and is not unfair.

In addition, as most concession agreements are long-term contracts, the MOF also encourages adding a term for regular review into the contract, such as a certain number of years after the signing of this Agreement or the last revision of this Agreement, the parties may review whether it is necessary to revise this Agreement. Issues to be reviewed include but are not limited to whether events not attributable to Party A have a great impact on Party B's performance of this Agreement. The events in question are as follows:

- a* the annual change in the price index announced by the Directorate-General of Budget, Accounting and Statistics of the Executive Yuan rises by a certain per cent or falls by a certain per cent for certain consecutive years;
- b* the national economic growth rate announced by the Directorate-General of Budget, Accounting and Statistics of the Executive Yuan rises by a certain per cent or falls by a certain per cent for certain consecutive quarters;
- c* Party B's accumulated construction and operation costs in a certain number of years increase by over a certain per cent as compared with the estimated costs set forth in the original financial schedule; and

- d* other factors, such as fluctuations of price indexes in other fields, or new technologies, new materials or new engineering technologies for medical tests or smart transportation systems, where product technology changes fast.

### ***Ownership of underlying assets***

To prevent interruptions in or abandonment of PPP projects, the PPIP Act imposes the following limitation on transferring the underlying assets in most cases. Pursuant to Article 51 of the PPIP Act, a private entity shall not transfer, lease out or create any encumbrance on the concession obtained under the concession agreement, nor shall it make such concession an object for enforcement in a civil action, unless the authority in charge declares that such an act is necessary for the improvement plan or the proper measures specified in the cases prescribed in the PPIP Act. This situation may happen in BOT or BOO cases, when the private entity owns the underlying assets. In short, unless the government's consent is obtained, the underlying assets may not be transferred, leased or set as security.

### ***Early termination***

The common grounds for early termination include:

- a* mutually agreed termination, which means that during the term of the agreement, the parties may mutually agree to terminate the agreement;
- b* termination for causes attributable to the private entity; and
- c* termination for causes not attributable to the private entity, such as *force majeure* events or changes in circumstances, termination for a reason attributable to the authority in charge, or termination due to changes of government policies

For each termination cause, the effects on the termination will be stipulated in the concession agreement.

## **VI FINANCE**

Before Paragraph 1, Article 29 of the PPIP Act was amended in 2015, if a project could not be fully self-financed, the authority in charge can subsidise the loan interest or invest in the project. However, shadow tolls under the private finance initiative module in the United Kingdom were consulted in the drafting of the 2015 amendment, and the above subsidy was replaced by the following alternative: if a private entity cannot fully self-finance its investment in an infrastructure project, even if other incentives under the PPIP Act are applicable, the authority in charge may, for the amount of the shortfall, subsidise the part of the interest on the loan needed by the private entity or grant a subsidy, depending on whether the private entity reaches the key performance indicators stipulated in the concession agreement. This system provides motivation for enhancing operational performance. The reason for the amendment provides that it is in the public interest for government agencies to be supportive, yet if subsidies were given improperly, they would lead to rampant speculation and cause inefficiency of the projects. Therefore, the private entities can be better motivated if the subsidies are contingent upon their operational performance.

## **VII RECENT DECISIONS**

Since Article 48-1 of the PPIP Act indicates that the concession agreement of every PPP project shall provide for the formation of a mediation committee for contract dispute resolution and may require that disputes be submitted to arbitration if mediation fails, more and more disputes that arose in the PPP projects can be resolved by either mediation or arbitration within a limited period.

In addition, disputes in PPP projects usually revolve around financial conditions, and if one party is not satisfied by the financial conditions, it will propose adjustments. In the past, it was usually the private entities that initiated such adjustment; however, in recent years, the government has initiated such adjustments to adjust the royalties.

## **VIII OUTLOOK**

In recent years, compared with local projects, major national projects have been rare. To boost the number of PPP projects, the government has developed more sophisticated standard operating procedures in different kinds of projects, and the types of projects open for PPPs are broader and more contemporary. Both central and local governments fully support and promote PPP projects, and foreign investment is especially welcome. We believe that in the coming year, the Taiwanese government will establish an even more conducive environment for the PPP scheme.

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Pauline Wang is a partner at Lee and Li. She graduated from the National Taiwan University in 1989 and obtained an LLM from the Columbia University in 1993. She also passed the New York Bar Examination.

Pauline specialises in government procurement and private participation in infrastructure projects and has vast experience in assisting clients in handling the project planning, bidding process, contract negotiation, contract management and dispute resolution. She assisted the Promotion of Private Participation Ministry of Finance in drafting and modifying the model contracts for various private participation modes (such as BOT, BOO, OT, ROT, BTO, etc.). She also acted as counsel to either the private entity or the authority in charge in many PPP projects; her efforts were recognised with a Golden Thumb Award for Consulting Firms from the Public Construction Committee of Execution Yuan in 2007.

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Yung-Ching is a senior associate at Lee and Li who specialises in BOT/PPP law, government procurement law and civil litigation. She is known for her extensive experience in the legal procedure and the contract negotiation of BOT/PPP projects and dedication and is sought after by clients from energy and natural resources, government and public policy, healthcare, media, real estate, retail, transportation, and travel and leisure.

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