

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

THIRD EDITION

Editors

Bruno Werneck and Mário Saadi

THE LAWREVIEWS

THE PUBLIC PRIVATE PARTNERSHIP
LAW REVIEW

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PREFACE

We are very pleased to present the third edition of *The Public-Private Partnership Law Review*. Notwithstanding the number of articles in various law reviews 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, to name a few), we identified the need for a deeper understanding of the specific issues in this topic in different countries. The first and second editions of this book were the initial effort to fulfil this need.

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 into 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 UK 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 UK 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 (PPP) 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 in our country. In our last preface, we called your attention to one specific feature of the PPP law in Brazil: 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: (1) a pledge of revenues; (2) creation or use of special funds; (3) purchase of a guarantee from insurance companies that are not under public control; (4) guarantees by international organisations or financial institutions not controlled by any government authority; or (5) 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 private investors' 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 point is made worse due to 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.

In this field, we highlight the current 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.

The 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.

In the second edition of this book, our contributors were drawn from the most renowned firms working in the PPP field in their jurisdictions, including Argentina (M&M Bomchil), Australia (Allens), Belgium (Liedekerke), China (Zhong Lun), Denmark (LETT), France (White & Case), India (Seth Dua), Ireland (Maples and Calder), Japan (Mori Hamada & Matsumoto), Mozambique (TPLA), Nigeria (G Elias), Paraguay (Parquet & Asociados), Philippines (SyCip Salazar Hernandez & Gatmaitan), Portugal (Vieira de Almeida), Tanzania (Velma), the United Kingdom (Herbert Smith Freehills) and the United States (Kilpatrick Townsend & Stockton). We would like to thank all of them and our new contributors for their support in producing *The Public-Private Partnership Law Review* and in helping in 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 third 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 2017

PHILIPPINES

*Marievic G Ramos-Añonuevo and Arlene M Maneja*¹

I OVERVIEW

In line with the state policy set out in the Philippines Constitution to recognise the indispensable role of the private sector in national growth, encourage private enterprise and provide incentives to attract needed investment, the Philippine government has long resorted to public-private partnerships (PPPs) to address problems of national interest. Even before the enactment of specific legislation on PPP arrangements in 1990, the government entered into PPPs in the 1980s to respond to a power shortage. The first build–operate–transfer (BOT) agreement was executed in 1989 between the National Power Corporation and Hopewell Energy Management Ltd for the construction and operation of a power station in Navotas.²

In 1990, Republic Act No. 6957 (the BOT Law) was enacted to provide a legal framework for PPP arrangements, particularly, through BOT and build–transfer (BT) arrangements. Amendments to the BOT Law were introduced in 1994 through Republic Act No. 7718, which serves to broaden the types of PPP schemes and introduce provisions governing unsolicited proposals, direct negotiations and special incentives for certain registered projects.

With specific laws in place, PPPs have been used to boost the Philippines' infrastructure development programme, including the establishment of facilities for agri-business development, transportation and road development, water supply, telecommunication and information technology, environmental protection, property development, health and education, to name a few.³ Of these, the transportation and road sectors have notably been attracting substantial private investment with contracts involving construction of highways, construction, operation and maintenance of railway systems, and the development and modernisation of ports.

1 Marievic G Ramos-Añonuevo and Arlene M Maneja are partners at SyCip Salazar Hernandez & Gatmaitan.

2 Maria Joy V Abrenica, 'Contracting for Power: The Philippine Case', available at www.adbi.org/files/2004.12.6.cpp.case.philippines.pdf (last accessed 7 January 2015).

3 The Build–Operate–And–Transfer Center, 'The Philippine PPP Program', available at www.philippineconsulatela.org/Trade/02b_Primer%20-%20The%20Philippine%20PPP%20Program.pdf (last accessed 7 January 2015).

II THE YEAR IN REVIEW

In 2016, the government awarded the Civil Registry System Information Technology Project (Phase II) and the unsolicited proposal for the NLEx-SLEx Connector Road Project.⁴

The government, however, halted the procurement of the Light Rail Transit (LRT) Line 2 Operations and Maintenance Project and the LRT Line 6 Project; deferred the bidding for the Regional Prison Facilities PPP to 2017; and approved the unbundling of the bidding for the Regional Airports Project consisting of five regional airports.

In late 2016, the government approved the roll-out of, among others, the Ninoy Aquino International Airport (NAIA) PPP Project, the Metro Manila Bus Rapid Transit Project, the Plaridel Bypass Road Project, the New Cebu International Container Port Project, the North-South Railway – South Line Project and the New Nayong Pilipino at Entertainment City Project.⁵

The government also allocated for the Risk Management Program about 30 billion Philippine pesos in its 2016 budget, which is intended to answer for commitments made by, and obligations of, the government under the concession agreements in respect of PPP projects, subject to the fulfilment of certain conditions.⁶ In 2017, the budget allocation decreased to 29 billion Philippine pesos.⁷

III GENERAL FRAMEWORK

i Types of public-private partnership

Under the BOT Law and its 2012 Revised Implementing Rules and Regulations (the BOT Regulations), the principal contractual arrangements for PPPs include BOT, BT, build–own–operate (BOO), build–lease–transfer (BLT), build–transfer–operate (BTO), contract–add–operate (CAO), develop–operate–transfer (DOT), rehabilitate–operate–transfer (ROT), rehabilitate–own–operate (ROO). Other contractual schemes may, however, be undertaken upon approval by the President.

ii The authorities

The PPP Center,⁸ an agency of the National Economic and Development Authority (NEDA), is a specialised body with particular focus on PPPs. It coordinates and monitors PPP projects implemented under the BOT Law, assists implementing agencies (IAs) and local government

4 The PPP Center, 'Pipeline of Projects', available at http://ppp.gov.ph/?page_id=26075 (last accessed 16 January 2017).

5 Id.

6 Special Provisions 4, Article XLI, Unprogrammed Fund, of Republic Act No. 10717, General Appropriations Act of 2016.

7 Special Provisions 5, Article XXXVII, Unprogrammed Fund, of Republic Act No. 10924, General Appropriations Act of 2017.

8 Section 1.3 (e), Rule 1, BOT Regulations. The PPP Center is the successor of the BOT Center and Coordinating Council of the Philippine Assistance Program, the agency mandated under Section 12 of the Act to coordinate and monitor projects implemented under the Act, pursuant to Administrative Order No. 105 (Section 1989), as amended by Administrative Order No. 67 (Section 1999), as amended by Administrative Order No. 103 (Section 2000), and Executive Order No. 144 (Section 2002), as amended by Executive Order No. 8 (Section 2010).

units (LGUs) in the preparation and development of projects and serves as a repository of information on the status of projects, copies of unsolicited proposals and other related documents received by IAs and LGUs.

PPP projects are also subject to approval by different bodies as follows: (1) NEDA's Investment Coordinating Committee (ICC) must approve national projects costing up to 300 million Philippine pesos; and (2) upon the recommendation of the ICC, the NEDA Board must approve national projects costing more than 300 million Philippine pesos and negotiated projects (regardless of the amount). For local projects, approval by the proper local legislative body is required.

The proposed PPP contract is subject to review by the Office of the Government Corporate Counsel, Office of the Solicitor General or any other entity prescribed by law as the statutory counsel of the procuring entity. The head of the IA or LGU concerned approves the reviewed PPP contract. If required, the Department of Finance (DOF) should also review the draft contract of projects of national government agencies, local projects involving funds of the national government and local projects requiring ICC approval.

iii General requirements for PPP contracts

PPP projects eligible to be implemented under the BOT Law are those involving infrastructure or development projects, including, but not limited to, power plants, highways, ports, airports, canals, dams, hydropower projects, water supply, irrigation, telecommunications, railroads and railways, transport systems, land reclamation projects, industrial estates or townships, housing, government buildings, tourism projects, markets, slaughterhouses, warehouses, solid waste management, information technology networks and database infrastructure, education and health facilities, sewerage, drainage and dredging.

In general, PPPs implemented under the framework of the BOT Law and the BOT Regulations must comply with the requirements, processes and procedures thereunder. However, for PPPs involving public utilities, the Philippine Constitution requires that: (1) the franchise, certificate or authorisation to operate public utilities be held by Filipino citizens or corporations or associations organised under Philippine law with at least 60 per cent of its capital owned by Philippine citizens; (2) the participation of foreign investors in the governing body of any public utility enterprise shall be limited to their proportionate share in its capital; and (3) all the executive and managing officers of such corporation or association must be citizens of the Philippines. Moreover, such franchise, certificate or authorisation for operation of a public utility is limited to a period of 50 years.

While there are no value thresholds for PPP contracts, additional registration requirements or approvals are imposed on certain contractual schemes, such as presidential approval for BOO projects and contract arrangements other than those listed in Section 2 of the BOT Law.

IV BIDDING AND AWARD PROCEDURE

Under the BOT Law, a PPP contract may be implemented through public bidding or by the submission of an unsolicited proposal.

i Expression of interest

A public bidding may be initiated through pre-qualification or simultaneous qualification proceedings. In a pre-qualification proceeding, upon approval of the parameters and terms

of a PPP project, the IA or LGU shall publish a notice inviting prospective proponents to pre-qualify and bid. The invitation shall be: (1) published once every week for three consecutive weeks in at least two newspapers of general circulation and in at least one local newspaper of general circulation in the region, province, city or municipality in which the projects are to be implemented; and (2) continuously posted on the website of the IA or LGU concerned, if available, and the PPP Center during the period stated above. If the total project cost amounts to 500 million Philippine pesos or more, the invitation may also be published in at least one international publication and the IA or LGU concerned shall issue official notification of the same to registered proponents of a project. On the other hand, when exigencies of service so require, the IA or LGU may opt to conduct a simultaneous qualification whereby the invitation to bid calls for the submission of qualification requirements and bid proposals.⁹

In both pre-qualification and simultaneous qualification proceedings as well as with unsolicited proposals, a pre-bid conference shall be conducted at least 30 calendar days before the submission of bids for projects costing less than 300 million Philippine pesos and a maximum of 60 calendar days before the submission of bids for projects costing 300 million Philippine pesos and above.

ii Requests for proposals and unsolicited proposals

In pre-qualification proceedings, prospective bidders have at least 15 calendar days from the last date of publication of the invitation to pre-qualify and bid to prepare their respective pre-qualification requirements, which include the legal requirements, experience or track record, and financial capability of prospective project proponents. These shall be evaluated by relevant pre-qualification, bids and awards committee (PBAC), which will determine the pre-qualified and disqualified project proponents within a period of 20 calendar days after the deadline for submission of the prequalification documents. The bidders shall then submit their bids on or before the deadline stipulated in the instruction to bidders. The bids shall be in at least two envelopes, the first containing the technical proposal and the second the financial proposal.

For simultaneous qualification proceedings, the qualification requirements and bid proposals are composed of three envelopes. The first envelope contains the qualification documents corresponding to the requirements; the second contains the technical proposal; and the third envelope contains the financial proposal.

In case of unsolicited proposals,¹⁰ a private proponent submits a complete proposal to the relevant IA or LGU, which shall acknowledge receipt of the proposal within seven calendar days and shall advise the proponent within 30 calendar days whether or not the proposal is complete. Within 120 days receipt of the complete proposal by the IA or LGU, it shall evaluate the proposal and inform the proponent of whether it accepts or rejects the proposal. The IA or LGU may accept an unsolicited proposal from a project proponent, provided that

⁹ Annex A, Timelines for Publicly Bid/Solicited Projects under the Revised Implementing Regulations of RA No. 6957, the BOT Regulations (citing Section 5.7, Rule 5, BOT IRR) [the Timelines for Public Bidding].

¹⁰ Section 1.3, Rule 1, BOT Regulations. 'Unsolicited proposals' refer to project proposals submitted by the private sector, not in response to a formal solicitation or request issued by an IA or LGU and not part of the list of priority projects as identified by the IAs or LGUs, to undertake infrastructure or development projects that may be entered into by an IA or LGU subject to the requirements or conditions set out in Rule 10 of the BOT Regulations.

all the following conditions are met: (1) such projects involve a new concept or technology¹¹ or are not part of the list of priority projects; (2) no direct government guarantee, subsidy or equity is required; and (3) the IA or LGU has invited by publication, for three consecutive weeks, in a newspaper of general circulation, comparative or competitive proposals and no other proposal is received for a period of 60 working days. However, in the event another proponent submits a lower price proposal, the original proponent shall have the right to match that price within 30 working days. We note that the PPP Center is currently drafting guidelines for Unsolicited Proposals which include a three-tiered assessment of the proponent to promote greater transparency.¹²

iii Evaluation and grant

For public biddings, the first-stage evaluation involves the assessment of the technical, operational, environmental, and financing viability of the proposal as contained in the bidder's first envelopes with regard to the prescribed requirements and basic parameters prescribed in the bidding documents. The second stage evaluation shall involve the assessment and comparison of the financial proposals of the bidders. Following the evaluations, the PBAC submits its recommendation to the head of the IA or LGU. Upon approval of the recommendation, the head of the IA or LGU will issue a notice of award to a winning proponent. Subject to compliance with the post-award requirements in the notice of award, the PPP contract shall be executed and signed by the winning bidder and the head of the IA or LGU.

In the case of unsolicited proposals, the IA or LGU first evaluates the unsolicited proposal and will decide to accept or reject it. If the IA or LGU accepts the unsolicited proposal, a letter of acceptance shall be issued, and the proponent shall be granted 'original proponent' status. The head of the IA or LGU then endorses the same to the ICC, which shall determine the reasonable rate of return and other parameters for negotiation. The approving body shall evaluate the recommendation made by the ICC and shall formally advise the IA or LGU of its approval or denial of the proposal. Negotiations between the IA or LGU and the original proponent shall then commence with the IA or LGU being required to submit a report to the ICC and approving body of the results of its negotiation within seven calendar days after the negotiation period. After the issuance of a certification of successful negotiation, the PBAC shall publish the invitation for comparative proposals. Thereafter, the procedure for the award of the PPP project for an unsolicited proposal is the

11 Pursuant to Section 10.2, Rule 10, BOT Regulations, to be considered a 'new technology,' the same must possess at least one of the following attributes:

- a* a recognised process, design, methodology or engineering concept that has demonstrated its ability to significantly reduce construction costs, accelerate project execution, improve safety, enhance project performance, extend economic life, reduce costs of facility maintenance and operations, or reduce negative environmental impact or social or economic disturbances or disruptions either during the project implementation and construction phase or the operation phase;
- b* a process for which the project proponent or any member of the proponent consortium possesses exclusive rights, either worldwide or regionally; or
- c* a design, methodology or engineering concept for which the proponent or a member of the proponent consortium or association possesses intellectual property rights.

12 The Public-Private Partnership Center, available at PPP Center <https://ppp.gov.ph/wp-content/uploads/2016/11/UnsolProp-A-General-Guidelines-for-Unsolicited-Proposals-Final-Draft.pdf> (last accessed 13 January 2017).

same as in a public bidding, except that in the event that a comparative proponent submits a price proposal better than that submitted by the original proponent, the latter shall have the right to match such price proposal.

V THE CONTRACT

i Payment

To facilitate payments under PPP contracts, the BOT Regulations prescribe specific repayment schemes for particular contractual arrangements as summarised below:

Contractual arrangement or scheme	Repayment scheme
BOT, CAO, DOT and ROT	Collection of reasonable tolls, fees, and charges for a fixed term, which shall not exceed 50 years.
BOO and ROO	Collection of reasonable tolls, fees, and charges for a fixed term. Upon renewal of its franchise or contract with the IA or LGU, the proponent is allowed to continue collecting toll, fees, charges and rentals for the operation of the facility or the provision of the service.
BTO	Option 1: Appropriate amortisation and collection of reasonable tolls, rentals and charges while operating the facility on behalf of the IA or LGU, which may be directly applied to the amortisation. Moreover, the facility operator may be repaid by the IA or LGU through a management fee provided in the management contract. Option 2: Directly collect tolls, rentals and charges for a fixed term.
BT and BLT	Repayment through amortisation.
NEDA Board approved/authorised contractual arrangements/schemes not enumerated under Section 2 of the BOT Law	Repayment through any of the schemes recommended by the ICC and approved by the NEDA Board.
Note: Where applicable, the proponent may likewise be repaid in the form of revenue sharing or other non-monetary payments (i.e., grant of commercial development rights, grant of a portion or percentage of the reclaimed land, subject to constitutional requirements or any other non-monetary payments).	

ii State guarantees

The BOT Law and the BOT Regulations provide for the following guarantee structures in favour of proponents: direct government guarantees, government undertakings and investment incentives.

Direct government guarantees are agreements whereby the government or any of its IAs or LGUs guarantees to assume responsibility for the repayment of debt arising from a loan default directly incurred by the proponent during the implementing the project.

Government undertakings are forms of contribution or support extended to the proponent by the government or its IAs or LGUs, including but not limited to cost sharing, credit enhancements, direct government subsidies, direct government equity, performance undertakings, legal assistance and security assistance.

Investment incentives are contributions or support extended to the proponent by the government, IAs or LGUs as set forth under applicable law such as the Omnibus Investment Code of 1987, Renewable Energy Act of 2008, Tourism Act of 2009, Mini-Hydroelectric Power Incentives Act or Local Government Code.

iii Distribution of risk

In general, Philippine PPP projects follow the risk allocation principle that the risk should be assigned to the party best able to control or influence its occurrence or manage the consequences of the risks. Thus, commercial risks (e.g., demand risk, supply risk, operational risk, financing risk) are typically allocated to the private sector while legal, political or regulatory risk are allocated to the government (e.g., approval of rates or tariff adjustments, change in law, material adverse government action). In some instances, the parties may agree to share certain risks. For instance, PPP agreements may provide that the government will only be liable for certain risks (e.g., force majeure risk) after a particular monetary threshold has been reached.

iv Adjustment and revision

Changes to the PPP contract may be allowed before the submission of the bids provided the head of the relevant IA or LGU secures the approval of the approving body.¹³ Changes after the bid submission and before the execution of the contract shall not be allowed except for changes to contract terms affected or decided by the winning bidder's bid.

During the implementation of the PPP contract, a contract may be varied upon approval by the head of the IA or LGU provided that: (1) there is no impact on the basic parameters and terms of the contract as approved by the approving body; (2) there is no increase in the agreed fees, tolls and charges or a decrease in the IA or the LGU's revenue or profit share derived from the project, except as may be allowed under a parametric formula in the contract itself; (3) there is no reduction in the scope of works or performance standards, or fundamental change in the contractual arrangement nor extension in the contract term, except in cases of breach on the part of the IA or LGU of its obligations under the contract; or (4) there is no additional government undertaking, or increase in the financial exposure of the government under the project. For contract variations that do not meet these requirements, approval by the approving body is required. Failure to observe this rule renders the contract variation void.

v Ownership of underlying assets

Generally, the government will obtain ownership of the underlying assets; however, the time of the transfer of ownership will depend on the contractual agreement between the parties. For example, in a BTO or BT scheme, transfer of ownership of the assets to the government occurs immediately after completion of the project, subject to later payments to the private party comprising its investment plus a reasonable rate of return. In contrast, in a BOT or BLT scheme, transfer will occur only after an agreed period, during which the private entity will be allowed to operate or lease the facility and charge its users the appropriate rentals, fees, or tolls.

13 Section 2.8, Rule 2, BOT Regulations. Approval must be sought for the following:

(1) changes that reduce the service levels to the public; (2) changes that reduce the economic internal rate of return below the hurdle rate used in the original analysis of the project; (3) changes that increase the total government subsidy to a project by at least 5 per cent of the total project cost; and (4) changes in the risk profile that are detrimental to the best interest of the government.

vi Early termination

The BOT Law and the BOT Regulations recognise early termination or rescission of PPP contracts and provide for the consequences thereof:

- a* In cases where the IA or LGU terminates, cancels or revokes the contract through no fault of the project proponent; the parties terminate the contract by mutual agreement; or a court revokes or cancels the contract by final judgment through no fault of the proponent, the government shall compensate the proponent for its actual expenses incurred in the project as of termination including a reasonable rate of return thereon not exceeding that stated in the contract and subject to such reliefs available to it under the insurance provision of the contract.
- b* When the government defaults on certain major obligations in the PPP contract and such failure is not remediable or, if remediable, shall remain unremedied for an unreasonable length of time, the proponent shall be reasonably compensated by the government for the equivalent or proportionate contract cost as defined in the contract, subject to the reliefs available to the government under the insurance provision of the contract.

In both instances, the compensation shall be determined by an independent appraiser, mutually acceptable to the IA or LGU and the proponent. Unless the parties agree on a different payment period, the compensation shall be paid by the IA or LGU concerned within 90 calendar days from the independent appraiser's advice of such determination, subject to the enactment of a law or ordinance, as the case may be, appropriating such amount, if required.

Lastly, the IA or LGU concerned may rescind the contract when the proponent: (1) refuses or fails to perform any of the provisions of the technical and performance standards in the approved contract; (2) fails to satisfy any of the contract provisions including compliance with the prescribed or agreed milestone activities; or (3) commits any substantial breach of the approved contract. In these instances, aside from forfeiting the proponent's performance bond, an IA or LGU may either take over the facility or allow the proponent's lenders, creditors and banks to exercise their rights and interests under the loan and collateral documents with respect to the project.

VI FINANCE

Historically, financing of PPP projects in the Philippines required the participation of multilateral agencies like the Asian Development Bank and the International Finance Corporation. However, due to the weakening of the US dollar, the increasing financial muscle of Philippine banks and their improved capability to do cash-flow lending and project financing, financing for PPP projects may be tapped domestically and in Philippine pesos.

In contrast with traditional corporate loans that used to fund government infrastructure projects undertaken with the help of the private sector more than a decade ago, non-recourse project financing is now being made available to PPP proponents. It also helps that Philippine banking regulations have increased the applicable single-borrowing limits. Thus, PPP projects that used to be financed by Philippine banks for five years with a maximum loan of 3 billion Philippine pesos half a decade ago can now take advantage of project financing of 80 billion Philippine pesos with 15-year maturity.

In terms of financing structure, ongoing PPP projects are required to maintain a debt-to-equity ratio of 80:20. Thus, PPP proponents can obtain financing for as much as 80 per cent

of the project cost; however, their ability to tap into the resources of Philippine banks largely depends on the quality of the security offered. Where PPP projects involve the operation of public utilities or the construction of social infrastructure like schools and hospitals, the security package is usually limited. For instance, the relevant concession agreements relating to the Mactan Cebu International Airport Project (MCIA Project) and the Modernisation of the Philippine Orthopedic Center (MPOC Project) contain express prohibition on mortgaging, pledging or hypothecating the facilities constructed by the concessionaires.

Apart from hard security, loan collaterals usually take the following forms:

- a* Assignment of Revenues: PPP contracts generally allow concessionaires to assign, with the prior consent of the government, their revenues and receivables to the lender or, if the project loans are syndicated, to a common security trustee appointed by the syndicate of lenders to act for and on their behalf. To capture and ring-fence all project revenues, it is usual for lenders to require the establishment of a cash waterfall account charged in favour of the lenders.
- b* Lenders' step-in rights: Probably the most important security that can be given to the lenders are step-in rights, which vest on the lenders the ability to nominate a substitute or successor concessionaire for the project upon occurrence of an event of default under the concession agreement or the financing agreement. Step-in rights may vary in terms of procedure and length of cure and nomination periods across the concession agreements relating to the various PPP projects, but the exercise thereof is always subject to prior approval of the government. Government approval will typically be granted for as long as the government is satisfied that the substitute or successor concessionaire has the technical competence and financial resources needed to continue the project. Moreover, applicable nationality requirements must be complied with.
- c* Assignment of project documents: To ensure full implementation of the step-in rights assigned to the lenders, a corresponding assignment of its rights and remedies under all project documents is also made by the concessionaire in their favour. To fortify such assignment, it is not unusual for the lenders to require direct agreements with the concessionaire's counterparties under the project agreements to create a privity between them and the lenders and enable the latter to have direct access to the counterparties in the enforcement of the assigned rights and remedies.
- d* Pledge of shares: Since the creation of liens on project assets is generally prohibited, lenders may have indirect access to such assets through a pledge on all the shares of the concessionaire. With the prior consent of the government, a pledge by the sponsors of their shares in the concessionaire may be allowed. However, there is one peculiarity of Philippine law that easily makes a pledge the least attractive of all the types of security that can be provided to the lenders. Under Philippine law, any foreclosure of the pledge extinguishes the loan, and lenders do not have the right to recover any deficiency in case the proceeds from the foreclosure of the pledge are insufficient to fully pay the outstanding balance of the loan.
- e* Sponsors' support: Most, if not all, PPP projects are financed on a non- or limited recourse basis. However, PPP sponsors or proponents are typically mandated to bear the burden of any cost overruns or any shortfall in the applicable maintaining balances required under the cash waterfall accounts. Some financing agreements allow sponsors to fund their sponsor support obligations through cash, corporate guarantee or a standby letter of credit issued by a bank acceptable to the lenders.

In November 2016, the Philippine Securities and Exchange Commission (SEC) approved the proposed supplemental listing and disclosure rules (PPP Rules) proposed by the Philippine Stock Exchange that applicable to PPP companies. In support of the government's efforts to sustain the country's economic growth through sustainable partnership with the private sector for infrastructure development, the approved PPP Rules will allow PPP companies to raise funds from the capital market.¹⁴

VII RECENT DECISIONS

In 2016, the Supreme Court in the case of *Osmeña v. Abaya et al.*¹⁵ clarified that the mere partnership or common directorship or direct involvement in one bidder is not sufficient to disqualify a prospective bidder due to conflict of interest.

Additionally, the NEDA Board also adopted new policies to improve and streamline the government's approval processes of major public investment projects, as follows: (1) the economic hurdle rate was reduced from 15 per cent to 10 per cent to facilitate the economic justification for more projects; (2) the ICC project cost floor was raised from 1 billion to 5 billion Philippine pesos to de-clog the pipeline of projects for ICC approval; (3) the ICC review process for minor changes in scope, design, cost, and extension of implementation or loan/grant validity of projects has been streamlined so that it may be approved by the ICC, the DOF and/or the NEDA Secretariat, as applicable, based on existing laws, rules and regulations; and (4) the proposed ICC Guidelines on Processing China-assisted Projects detailing the guidelines and procedures to process projects require the availment of support from China to conduct pre-investment and investment activities has been approved.¹⁶

VIII OUTLOOK

2016 proved to be a challenging year for PPPs since the May 2016 national elections seemed to have called a hiatus for the aggressive rollout and procurement of critical PPPs. However, PPP activities are expected to pick up in 2017 considering that the administration of President Rodrigo R Duterte is keen on shortening timelines for awarding PPPs¹⁷ and approving more PPPs for rollout in the coming months.

14 Securities and Exchange Commission, available at www.sec.gov.ph/wp-content/uploads/2015/10/SEC-Approved-PPP-Listing-Rules-November-08-2016.pdf (last accessed 17 January 2017).

15 G.R. No. 211737, 13 January 2016.

16 National Economic and Development Authority (NEDA), available at www.neda.gov.ph/2016/09/15/neda-board-approves-nine-projects-in-first-meeting-changes-in-the-investment-coordination-committee-icc-review-policies-also-green-lighted/ (last accessed 17 January 2017); NEDA, available at http://www.neda.gov.ph/wp-content/uploads/2016/11/Guidelines-for-Project-proposals-for-ICC-review-and-approval_availment-of-Chinese-support.pdf (last accessed 17 January 2017).

17 Presidential Communications Operations Office, 'Duterte administration to speed up infra projects, November 3, 2016', available at <http://pcoo.gov.ph/duterte-administration-to-speed-up-infra-projects-nov-03-2016/> (last accessed 13 January 2017).

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She is currently representing the various lending syndicates that have extended or committed to extend financing for the ongoing Metro Manila Skyway – Stage 3 Project (31 billion Philippine pesos), the MCIA Project (23.3 billion Philippine pesos), the NAIA Expressway Project (7.5 billion Philippine pesos), and the MPOC Project (2.9 billion Philippine pesos) under the public-private partnership programme of the Philippine government.

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She has been active in the bidding, implementation and financing of Philippine PPP projects and her projects include the bidding and financing of the Manila LRT1 Extension, Operations and Maintenance Project, the bidding of the MCIA Project, the LRT2 Operations and Maintenance Project, the Bulacan Bulk Water Supply Project and the Regional Airports

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