

# PUBLIC PRIVATE PARTNERSHIPS

## Pakistan



# Public Private Partnerships

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Quick reference guide enabling side-by-side comparison of local insights into jurisdiction-specific legislative frameworks governing PPP; procurement processes; design and construction in greenfield PPP projects; operation and maintenance; risk allocation; default and termination; financing; governing law and dispute resolution; and recent trends.

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## GENERAL PPP FRAMEWORK

### Overview

How has the concept of public-private partnership (PPP) developed in your jurisdiction? What types of transactions are permitted and commonly used in your jurisdiction?

The federal legislature and the respective provincial legislatures of Punjab, Sindh, Khyber Pakhtunkhwa and Balochistan have each passed dedicated PPP legislation. Therefore, there are five major fragmented regimes on PPP in Pakistan. The application of a regime will primarily depend on the public authority or the implementing authority that is undertaking a PPP project. For the purposes of this chapter, we have focused on the PPP laws promulgated by the legislature of Sindh.

While private participation in public works has existed for a prolonged period of time, the concept of PPPs in Sindh has only developed within the past two decades. The first concession, a road infrastructure project, was granted in the year 2009, and a dedicated legislation for PPPs was promulgated for the first time in 2010. The government of Sindh has been actively pursuing PPP projects since then, with several executed and current projects as well as a pipeline of PPP projects.

The Sindh Public-Private Partnership Act 2010 (the Sindh PPP Act) defines PPP as a partnership carried out under a PPP agreement (which must be in writing) between the public sector and a private party for the provision of infrastructure, management functions or services, and has a clear allocation of risks between the two parties.

Under the Sindh PPP Act it has been specified that agreements and arrangements with private parties can be made in one or several project planning and management functions, such as designing, financing, building, constructing, owning, operating and maintaining different infrastructure projects. While specific transaction types have not been elaborated separately, the language of the Sindh PPP Act is flexible and includes a broad spectrum of transaction types within its realm, including those that are not conventionally considered to be PPPs, such as build-and-transfer. The Policy for Public-Private Partnership 2017 (the Sindh PPP Policy), issued by the government of Sindh, further builds upon acceptable transaction types for PPPs.

The Sindh PPP Policy is not a binding legislative instrument, but it specifies that the Sindh PPP Policy was issued to 'supplement the legal and regulatory framework for PPPs and to assist both the private and the public sectors in implementing this innovative procurement methodology'. The Sindh PPP Policy lists 14 transaction types that can be utilised to structure the arrangement for PPP projects ranging from build-and-transfer to build-own-operate-transfer (BOOT) to management contracts and service contracts. This list has been categorised as indicative only, and the Sindh PPP Policy specifies that agencies can utilise any other arrangement with the approval of the PPP Policy Board (constituted under the Sindh PPP Act).

In our experience, the most popular PPP projects in Sindh are concessions granted to private parties for road infrastructure projects under different variants of the BOOT model.

*Law stated - 14 December 2022*

### Covered categories

What categories of public infrastructure are subject to PPP transactions in your jurisdiction?

Under the Sindh PPP Act an infrastructure project can be implemented as PPP in any of the sectors listed in the schedule, including education, health and power generation facilities, roads, sewerage or drainage, social welfare, and urban transport. Certain categories such as telecommunications and prisons have not been expressly listed in the Sindh PPP Act. However, it has been specified that the PPP Policy Board is empowered to approve any sector or

service, which is not otherwise listed in the schedule to the Sindh PPP Act, to be undertaken under PPP mode.

*Law stated - 14 December 2022*

### **Legislative framework**

Is there a legislative framework for PPPs in your jurisdiction, or are PPPs undertaken pursuant to general government powers as one-off transactions?

The federal legislature and the respective provincial legislatures of Punjab, Sindh, Khyber Pakhtunkhwa and Balochistan have each passed dedicated PPP legislation. Therefore, there are five major fragmented regimes on PPP in Pakistan. The application of a regime will primarily depend on the public authority or the implementation authority that is undertaking a PPP project.

For the purposes of this chapter, we have focused on the PPP laws promulgated by the legislature of Sindh.

*Law stated - 14 December 2022*

### **Relevant authority**

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

There is no centralised PPP authority under the Sindh PPP Act. However, the agencies themselves cannot independently carry out their own programmes. Besides the agencies, there is the Sindh PPP Policy Board, the PPP Unit and the PPP Node, which together form the institutional framework under the Sindh PPP Act.

The agencies have the power under the PPP Act to identify and prepare projects and to enter into a PPP agreement with private parties. However, the administrative head of each such agency that seeks to implement a PPP project is required to form a PPP node in the prescribed manner that will take the responsibility of, among others, identifying suitable projects, conducting tendering, negotiating and signing the PPP agreement, and monitoring operations of its PPP project.

The Sindh PPP Unit was established under the Sindh PPP Act to promote and facilitate the development of PPP projects. The Sindh PPP Unit is mandated, among others, to prepare and regularly update a pipeline of projects, to provide technical support and assistance to agencies throughout the PPP process, and to evaluate and prioritise project proposals submitted by the agencies.

Administratively, the Sindh PPP Policy Board, also established under the Sindh PPP Act and consisting of the Chief Minister of Sindh (as the chair) as well as various other dignitaries, ranks the highest among the hierarchy of PPP functionaries. The functions and powers of the Sindh PPP Board include, among others: to approve, reject or send back for reconsideration project proposals submitted by agencies; to decide on any direct or contingent support for project proposals submitted by agencies; and to approve, reject or send back for reconsideration recommendations submitted by agencies for contracts awarded to private parties. The PPP Board is also the final deciding authority for all the projects.

*Law stated - 14 December 2022*

### **Procurement**

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

Under the Sindh PPP Act, a department, an attached department, a body corporate, an autonomous body of the government of Sindh, a local government as per the Sindh Local Government Ordinance 2001, or any organisation or corporation owned or controlled by the government of Sindh or the local government, can participate in and procure a PPP.

*Law stated - 14 December 2022*

## **Remuneration**

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

Remuneration schemes can be adjusted to the specific characteristics of the relevant PPP. Both user pay and authority pay methods are permissible and have been utilised by the government of Sindh for different projects.

*Law stated - 14 December 2022*

## **Sharing revenue and usage risk**

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

There is no restriction on revenue and usage risk sharing. Feasibility studies as well as risk analysis is required to be undertaken during project preparation, which normally acts as a precursor to the determination of the distribution of revenue or usage risk between the private party and the government of Sindh. In terms of the Sindh PPP Policy, the basic principle is that risks should generally be borne by the party best able to manage them at minimum cost.

The government may assume the risk of financial unsustainability arising from change in law, early termination, expropriation, force majeure, demand risk and government default under the PPP agreement.

The risk to revenue and usage resulting from changes in law, early termination and certain force majeure events tend to be provisioned in the PPP agreement as compensation or relief events. In at least one road infrastructure PPP, demand risk has been such that while the primary method of revenue generation for the concessionaire is usage payment in the form of tolls collected from users, in cases of shortfall, the public partner has guaranteed minimum revenue (in the form of cash payments) up to the financing repayment date covering payments for financing due, operations and maintenance costs, and taxes, thereby creating a risk-sharing model involving elements of both user pays and availability and annuity-based payments.

*Law stated - 14 December 2022*

## **Government payment obligations**

**In situations where the private party is compensated in whole or in part through availability or other periodic payments from the government, are the payment obligations of the government subject to the relevant legislative body approving budgetary funding in the future?**

In our experience, payment obligations are not made subject to further legislative body or cabinet approval once agreed under the PPP agreement. We consider that this will, in any case, be an unlikely approach for the government of Sindh as it would severely diminish investor appetite by adversely impacting the bankability of the project.

*Law stated - 14 December 2022*



### Rate of return caps

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

There are no legally mandated caps on the rate of return. The public party may, however, as part of a PPP arrangement, require revenues beyond specified thresholds to be held on account of the public party thereby contractually capping the rate of return.

*Law stated - 14 December 2022*

### Restriction of ownership transfer

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

Yes. Under the Sindh PPP Act, the change in the ownership of or transfer of interest in the private party can be undertaken only with the prior approval of the public party subject to the conditions set forth in the PPP agreement, provided the members or shareholders of the private party are replaced by an entity or entities that are at least as legally, technically and financially qualified to meet their project obligations.

For some projects under a PPP agreement, a change in ownership is completely restricted until commercial operations have commenced, while a change in control is restricted until a few years after commercial operations have commenced. Transfer of ownership to any person who is blacklisted or a defaulter is also normally restricted.

*Law stated - 14 December 2022*

## PROCUREMENT PROCESS

### Relevant procedure

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

A public competitive bidding process is required to be undertaken for all PPPs in accordance with the Sindh Public Procurement Act 2009 and the Sindh Public Procurement Rules 2010 (the Sindh Procurement Rules). The award of contract will be undertaken on the basis of the best evaluated bid based on technical and financial proposals. The criteria for determining the best evaluated bid will depend on the proposed PPP arrangement. For example, in cases where government equity is involved, one of the criteria will likely relate to the lowest amount of government equity funding required for the PPP. In cases where there is only one complying bidder left as described under the Sindh Procurement Rules, the authority may resort to direct negotiations with this sole complying bidder.

*Law stated - 14 December 2022*

### Consideration of deviating proposals

May the government consider proposals to deviate from the scope or technical characteristics of the work included in the procurement documentation during the procurement process, without altering such terms with respect to other proponents? How are such deviations assessed?

The Sindh Procurement Rules require the minimum design and performance standards or specifications to be prescribed as part of the procurement process. Proposals that deviate from the scope or technical characteristics should not be considered by an authority for reasons of transparency, fairness and equal treatment in the procurement process. Subject to the foregoing, it is possible for the authority to consider alternative technical concepts proposed by proponents provided that these possibilities are considered in the bidding documents, and the parameters and criteria for evaluation can be established to ensure transparency, fairness and equal treatment for all proponents.

*Law stated - 14 December 2022*

### **Unsolicited proposals**

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

Yes, an unsolicited proposal can be submitted to an agency. There are no separate evaluation parameters for unsolicited proposals. If the unsolicited proposal is considered viable, it remains subject to a competitive selection process by soliciting proposals on technical and financial aspects. However, several advantages are offered to the initiator for submission of a viable unsolicited proposal, with the two key advantages being an award of 5 per cent additional weightage to the initiator in the combined evaluation of its proposal for that project, and the option to match the winning bid and win the contract.

*Law stated - 14 December 2022*

### **Government stipend**

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

No; to the contrary, it is normal for the bidding documents to expressly stipulate that the procuring agency will not reimburse or compensate costs or expenses incurred from participation in the bidding process.

*Law stated - 14 December 2022*

### **Financing commitments**

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

Although there is no bar for a government authority to incorporate such a criterion as part of the bidding process, in our experience, upfront financing commitments are not required to be submitted as part of the proposal. The obligation to achieve financial close is on the private party, and a failure to achieve financial close within the prescribed period agreed under the PPP agreement may lead to termination of the agreement at the cost of the private party and the encashment of the bid or performance security of the private party.

*Law stated - 14 December 2022*

## Legal opinion

May the government ask its counsel to provide a legal opinion on the enforceability of the PPP agreement? May it provide representations as to the enforceability of the PPP agreement?

The government of Sindh may seek legal opinions from its counsel on the enforceability of the PPP agreement for its benefit, but these are not customarily provided for the benefit of the private party. On the contrary, one of the key requirements for financial close under a PPP agreement is usually the provision of a legal opinion from the legal counsel of the private party (or sponsors of the private party) to the government of Sindh (acting through an agency). Representations on enforceability of the PPP agreement against it are customarily provided under the PPP agreement by both parties.

*Law stated - 14 December 2022*

## Restrictions on foreign entities

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

Foreign entities may exercise control over the project company except that bidders may not be eligible if they belong to a foreign country blacklisted or not recognised by Pakistan. Certain types of projects may become subject to sector-specific requirements that may restrict foreign ownership. Foreign shareholders are also subject to security clearance from the Ministry of Interior, but this is normally a low-risk procedural requirement.

*Law stated - 14 December 2022*

## DESIGN AND CONSTRUCTION IN GREENFIELD PPP PROJECTS

### Form of contract

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

A form of contract has not been mandated for the PPP agreement, although these are generally executed in a standard form. The requirement of the Pakistan Engineering Council Act 1975 and the by-laws and code made thereunder will apply to contracts for design- and construction-related activities in addition to other sector-specific laws such as those relating to health and safety and environment. It is important for the contractual arrangement to comply with these requirements.

As per the Sindh Public-Private Partnership Act 2010 (the Sindh PPP Act), the PPP agreement must be governed by local laws. By necessary corollary, all project documents with the public party (other than strictly any finance-related documents) should be governed by local laws.

*Law stated - 14 December 2022*

## Design defect liability

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

Yes. Under PPP agreements, design risk is normally on the private party. The private party may allocate this risk to the

designer and the contractor in its subcontracts with the designer or contractor but will continue to remain liable to the public partner under the PPP agreement.

*Law stated - 14 December 2022*

### **Warranties**

Does local law require the inclusion of specific warranties? Are there implied warranties in cases where the relevant contract is silent? Does local law mandate or regulate the duration of warranties?

Under the Sindh Public-Private Partnership Act 2010 (the Sindh PPP Act), the PPP agreement is required to include provisions on warranty period. However, specific warranties or durations of warranties have not been specified. The requirement of the Pakistan Engineering Council Act 1975 and the by-laws made thereunder will apply.

*Law stated - 14 December 2022*

### **Damages for delay**

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

Where an amount is mentioned as a penalty payable on breach of contract, the parties are entitled to recover only actual damages not exceeding the amount mentioned as the penalty.

As an estimation of damages, the parties may by agreement fix a specified amount as liquidated damages to avoid the difficulty that would be found in setting the actual damages that might accrue against the defaulting party on the breach of contract. However, where these liquidated damages are disputed, the court, if it considers that the amount mentioned in the contract as liquidated damages is oppressive or highly penal in nature, may refrain from granting this amount and determine a reasonable amount to be paid as damages by the defaulting party.

*Law stated - 14 December 2022*

### **Indirect or consequential damages**

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

Indirect or consequential losses cannot normally be claimed under the contract law of Pakistan.

*Law stated - 14 December 2022*

### **Non-payment**

May a contractor suspend performance for non-payment?

The provisions on suspension can be agreed under the PPP agreement.

*Law stated - 14 December 2022*

## Applicable clauses

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

There are no restrictions on 'pay if paid' or 'paid when paid' clauses under local law. It is common to have 'pay if paid' or 'paid when paid' clauses as part of transfer of risk by the private party to the private party's subcontractors.

*Law stated - 14 December 2022*

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

There are no restrictions on equivalent project relief under local law. It is common for the private party to include provisions on 'equivalent project relief' in its subcontracts to ensure that compensation or relief to be provided by it to the subcontractors does not exceed that which it receives under the PPP agreement.

*Law stated - 14 December 2022*

## Expansion of scope of work

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

It is debatable whether the unilateral right of the government to expand the scope of work will be held to be enforceable. We consider that the unilateral expansion of work by the government is possible provided the relevant thresholds for the extent of change in scope permissible, the available compensation or relief, and the other procedural requirements are detailed in the PPP agreement so that challenges to a lack of acceptance or uncertainty of contract do not arise. Expansion in the scope of work should be reasonable in nature. What might be reasonable will be subjective, but normally the expansion should not change the nature of the work and should not be such that it may be considered independent of the original work.

*Law stated - 14 December 2022*

## Rebalancing agreements

### Does local law entitle either party to have a PPP agreement 'rebalanced' or set aside if it becomes unduly burdensome owing to unforeseen events? Can this be agreed to by the parties?

Local law does not entitle either party to have a PPP agreement rebalanced. The parties may agree to this in the PPP agreement in the form of compensation or relief or termination rights, but we recommend that this should be done only if such rebalancing was clearly envisaged during the bidding process to ensure fairness of the procurement process. It is common to allow parties under the PPP agreement to unilaterally terminate the contract in cases of prolonged periods of force majeure. In terms of the Sindh PPP Act, the government may terminate the contract unilaterally acting in the public interest; although, compensation may be payable to the private party.

*Law stated - 14 December 2022*

### **Lien laws**

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

No.

*Law stated - 14 December 2022*

### **Other relevant provisions**

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

The Sindh PPP Act requires that for major construction works, the private party shall prepare a detailed engineering design and implementation plan in accordance with the main technical specifications prescribed in the PPP agreement. There are no additional material provisions prescribed by the Sindh PPP Act.

*Law stated - 14 December 2022*

## **OPERATION AND MAINTENANCE**

### **Performance obligations**

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

This can vary on project-by-project basis. In our experience, the private parties' obligations during the operating period are defined in detail as against only setting forth performance criteria.

*Law stated - 14 December 2022*

### **Failure to maintain**

Are liquidated damages payable, or are deductions from availability payments possible, for the private party's failure to operate and maintain the facility as agreed?

Under the Sindh Public-Private Partnership Act 2010 (the Sindh PPP Act), provisions on penalties and liquidated damages for delay are required to be incorporated in the PPP agreement.

*Law stated - 14 December 2022*

### **Refurbishment of vacated facilities**

Are there any legal or customary requirements that facilities be refurbished before they are handed back to the government party at the end of the term?

There are no such legal requirements. We have seen handover provisions in concession agreements that require the handover of the concession assets on an 'as is where is' basis after bringing them to a safe condition.

**RISK ALLOCATION****Delay**

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

In terms of the Policy for Public-Private Partnership 2017 (the Sindh PPP Policy), the basic principle is that risks should generally be borne by the party best able to manage them at minimum cost.

The risk of delay in commercial close and financial close are private party risks. For financial close there are certain conditions precedent, including those relating to execution by the parties of other project documents. However, the primary risk of ensuring the funding is in place for financial close is on the private party.

Law stated - 14 December 2022

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

Generally, the risk of delay in obtaining necessary permits is on the private party.

Law stated - 14 December 2022

**Force majeure**

How are force majeure and geotechnical, environmental and weather risks customarily allocated between the parties? Is force majeure treated as a general concept relating to acts outside the parties' control or is it defined with reference to specific enumerated events?

Force majeure events are normally defined with reference to certain events listed in the PPP agreement, and these listed events may not be exhaustive in nature. The risk of force majeure is normally shared between the parties. It is common for there to be provisions entitling the affected party to suspend the performance of obligations under the PPP agreement and provisions that allow either party to terminate the PPP agreement if the force majeure continues beyond a specified time period. Force majeure events tend to be split into 'political events' and 'non-political events', with the former entitling the private party to compensation and relief and the latter only entitling the private party to relief.

Regarding geotechnical and environmental risks, the agency will have likely undertaken certain environmental feasibility before the award of contract. Notwithstanding this, geotechnical and environmental risks are generally borne by the private party.

Extreme weather conditions are normally covered within the provisions on force majeure.

Law stated - 14 December 2022

**Third-party risk**

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

In terms of the Sindh PPP Policy, the basic principle is that risks should generally be borne by the party best able to manage them at minimum cost. Generally, if the risk of the third-party obligation relates to a private party, the risk will be allocated to the private party. For example, the risk of faulty design where the obligations relating to design belongs to the private party and has been subcontracted by the private party to the third party, remains with the private party. If the risk relates to an obligation of the public party under the PPP agreement, the risk will be allocated to the public party.

*Law stated - 14 December 2022*

### **Political, legal and macroeconomic risks**

How are political, legal and macroeconomic risks customarily allocated between the parties?  
What protection is afforded to the private party against discriminatory change of law or regulation?

Political risks, such as expropriation, nationwide strikes and embargoes, will generally be covered as force majeure events and allocated to the public party. Macroeconomic risks may or may not be specifically allocated depending on the nature of the PPP arrangement.

Whether the public party takes the risk for general changes to the law or only discriminatory changes to the law may vary between different PPP agreements. A change in law can be covered as a force majeure event or as a stand-alone event entitling the private party to relief or compensation, or both.

*Law stated - 14 December 2022*

### **Mitigating events**

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

The private party may be entitled to seek an extension of time if the event that triggered the need is the responsibility of the public partner or arises out of unusual circumstances. This may include force majeure events and public party default.

*Law stated - 14 December 2022*

What events entitle the private party to additional compensation?

Additional compensation is permissible in limited circumstances as may be prescribed in the PPP agreement and will relate to shared risks or those risks that are assumed by the public party. Additional compensation may be provided in cases of certain force majeure events, public partner default, a change in law or early termination of the PPP agreement.

*Law stated - 14 December 2022*

### **Compensation**

How is compensation calculated and paid?

The amount of compensation may be linked to the financial model attached to the PPP agreement or otherwise on the basis of the actual loss or damage suffered by the private partner.



## Insurance

Are there any legal or customary requirements for project agreements to specify a programme of insurance? Which party mandatorily or customarily bears the risk of insurance becoming unavailable on commercially reasonable terms?

Minimum insurance requirements should be included in the PPP agreement as required by the Sindh PPP Act. The risk of insurance becoming unavailable on commercially reasonable terms can be allocated to either party, but in our experience is normally assumed by the private partner.

Law stated - 14 December 2022

## DEFAULT AND TERMINATION

### Remedies

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

The public party may seek payment of damages or liquidated damages if allowed under the PPP agreement, or may terminate the PPP agreement.

Law stated - 14 December 2022

### Termination

On what grounds may the PPP agreement be terminated?

The Sindh Public-Private Partnership Act 2010 sets out the following circumstances in which the PPP agreement may be terminated:

- expiry of the term of the PPP agreement;
- unilateral termination by the public party on account of public interest;
- termination by the private party on default of the agency or public party;
- termination by the public party on default of the private party; and
- termination on the occurrence of force majeure events.

Law stated - 14 December 2022

Is there a possibility of termination for convenience?

The PPP agreement may be terminated by the public party acting in the public interest.

Law stated - 14 December 2022

If the PPP agreement is terminated, is compensation available?

Yes, compensation is available in cases of early termination. In cases where the PPP agreement is terminated owing to default of the private party, the public party may only compensate for the outstanding financing due, if any. In other

cases, in addition to outstanding financing due, the public partner will normally also compensate the private party for fair market value of the equity investment, and in cases of termination arising from political force majeure, changes in the law or public party default, additionally for amounts that fairly compensates the private party for its lost revenue.

*Law stated - 14 December 2022*

## **FINANCING**

### **Government financing**

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

The government may provide guarantees to the private party from the Project Support Facility established under the Sindh Public-Private Partnership Act 2010 (the Sindh PPP Act). Under the Sindh PPP Act, this can be to finance the gap between project revenues constrained by the factors including affordability considerations, initial capital requirements and revenue needed to generate a fair return on investment for the PPP projects. The proposals for projects that require financial support from the Project Support Facility are submitted to the Project Support Facility. These funding requirements will normally be approved before the bidding process for grant of project is commenced. The responsible entity is termed the 'Project Support Facility' in the Sindh PPP Act, incorporated as a not-for-profit company under the companies laws of Pakistan under the name 'Public-Private Partnership Support Facility'.

*Law stated - 14 December 2022*

### **Privity of contract**

Are lenders afforded privity of contract with the government party through direct agreements or similar mechanisms? What rights will lenders typically have under these agreements?

It is normal for the lenders and financiers providing project financing for the PPP project to enter into direct agreements with the public party providing the lenders and financiers with step-in rights and may further entitle the lenders and financiers to propose the substitution of the then existing private party with another person. The private party is also usually a party to the direct agreement.

*Law stated - 14 December 2022*

### **Step-in rights**

Is there a mechanism under which lenders may exercise step-in rights or take over the PPP project? Are lenders able to obtain a security interest in the PPP agreement itself?

Lenders and financiers are normally provided step-in rights under direct agreements executed with the public party and the private party and may also propose the substitution of the then existing private party with another person. The rights that the lenders and financiers can exercise during the step-in period will be set out in the direct agreement and the PPP agreement.

*Law stated - 14 December 2022*

### **Cure rights**

Are lenders expressly afforded cure rights beyond those available to the project company or are they permitted to cure only during the same period and under the same conditions as the project company?

This can be agreed under the terms of the direct agreement. Normally, lenders and financiers have additional time to cure or rectify defaults once step-in rights are exercised.

*Law stated - 14 December 2022*

### **Refinancing**

If the private party refinances the PPP project at a lower cost of funds, is there any requirement that the gains from such refinancing be shared with the government? Are there any restrictions on refinancing?

There is no such requirement or restriction in the Sindh PPP Act regarding refinancing and sharing of gains resulting therefrom.

*Law stated - 14 December 2022*

## **GOVERNING LAW AND DISPUTE RESOLUTION**

### **Local law governance**

What key project agreements must be governed by local law?

As per the Sindh Public-Private Partnership Act 2010 (the Sindh PPP Act), the PPP agreement must be governed by local laws. By necessary corollary, all project documents with the public party (other than strictly any finance-related documents) should be governed by local laws.

*Law stated - 14 December 2022*

### **Government immunity**

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

Immunity is granted to acts done or intended to be done in good faith and in accordance with the applicable laws against any suit, claim or other legal proceedings by the private party or any other person.

Under the PPP agreement, customary provisions are inserted whereby sovereign immunity is waived: (1) so that the execution and performance of the PPP agreement and related project documents by the public party constitute private and commercial acts and not public or government acts; and (2) in relation to any assets that the public party has or may acquire in the future other than those that are significant in respect of the nation security of Pakistan.

*Law stated - 14 December 2022*

### Availability of arbitration

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

Disputes, if not settled by direct discussions or mediation, are required to be settled by arbitration under the Sindh PPP Act.

*Law stated - 14 December 2022*

### Alternative dispute resolution

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

Yes. If the dispute cannot be settled through direct discussions and, thereafter, mediation to be administered by an independent and impartial person appointed by the Sindh PPP Board, then arbitration is to be resorted to under the Sindh Public-Private Partnership Act 2010.

*Law stated - 14 December 2022*

### Special mechanisms

Is there a special mechanism to deal with technical disputes?

No.

*Law stated - 14 December 2022*

## UPDATE AND TRENDS

### Key developments of the past year

What are the current issues of note and trends relating to public-private partnerships in your jurisdiction? Are there any identifiable trends in the financing of PPP projects in the jurisdiction?

There have not been any legislative trends or changes over the past year.

The government of Sindh is actively working on various PPP projects and has established a pipeline containing multiple projects. This is likely to attract investors, considering that the public party has a more structured approach to conducting PPPs and because there is a potential to make invests across multiple projects.

Financing of PPPs is normally undertaken by commercial banks. Infrastructure projects are financed through limited resource project finance, and sponsor commitments are expected and usually a key requirement. To make the projects bankable, the public party may guarantee repayment of financing due including in cases of early termination.

*Law stated - 14 December 2022*

## Jurisdictions

	<b>China</b>	Shanghai JianLingChengDa Law Firm
	<b>Ghana</b>	AB & David Law Affiliates
	<b>India</b>	Clarus Law Associates
	<b>Japan</b>	Mori Hamada & Matsumoto
	<b>Mexico</b>	Galicia Abogados SC
	<b>Pakistan</b>	RIAA Barker Gillette
	<b>Panama</b>	Ivette Martinez Attorney at Law