

The Commercial Law Development Program *Presents* *Public-Private Partnership Webinar Series*



Project implemented by:



Public Private Partnerships: Dispute Resolution



Today's presenter



RAJAH & TANN ASIA
LAWYERS
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KNOW
ASIA

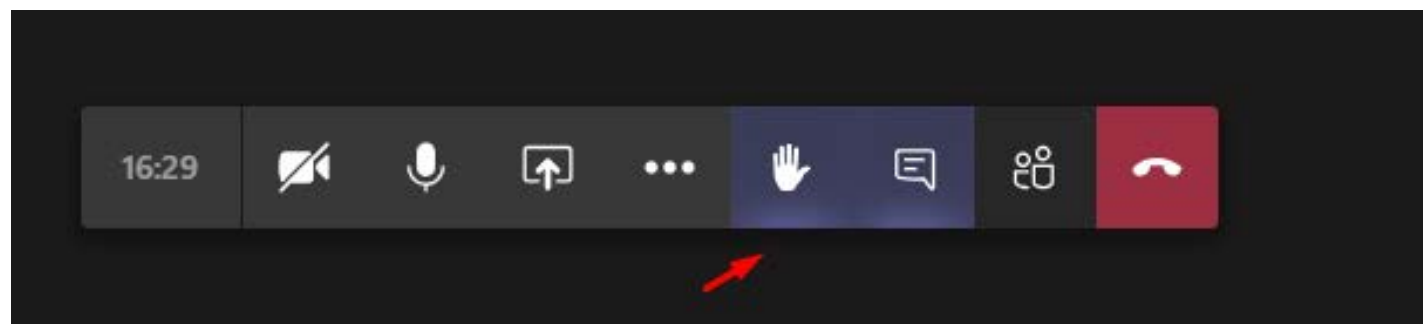
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Open Floor for Questions

Please use the chat box to submit a question, or use the 'raise hand' feature. If you raise your hand, you will be invited to unmute and ask your question.



Kindly keep yourself on mute unless asking a question.





Agenda

01

The PPP

02

Dispute Resolution

03

Sample PPP Provisions



A photograph of three business professionals in an office setting. A man in a dark suit and glasses is seated on the left, looking at a laptop. A woman in a white blouse is seated in the center, writing on a document. Another woman in a dark suit is standing on the right, leaning over the desk and pointing at the document. The background shows office equipment like printers and monitors.

1. THE PPP



PPP Law

It depends on:

- a) the terms of the contract
- b) the relevant PPP law.

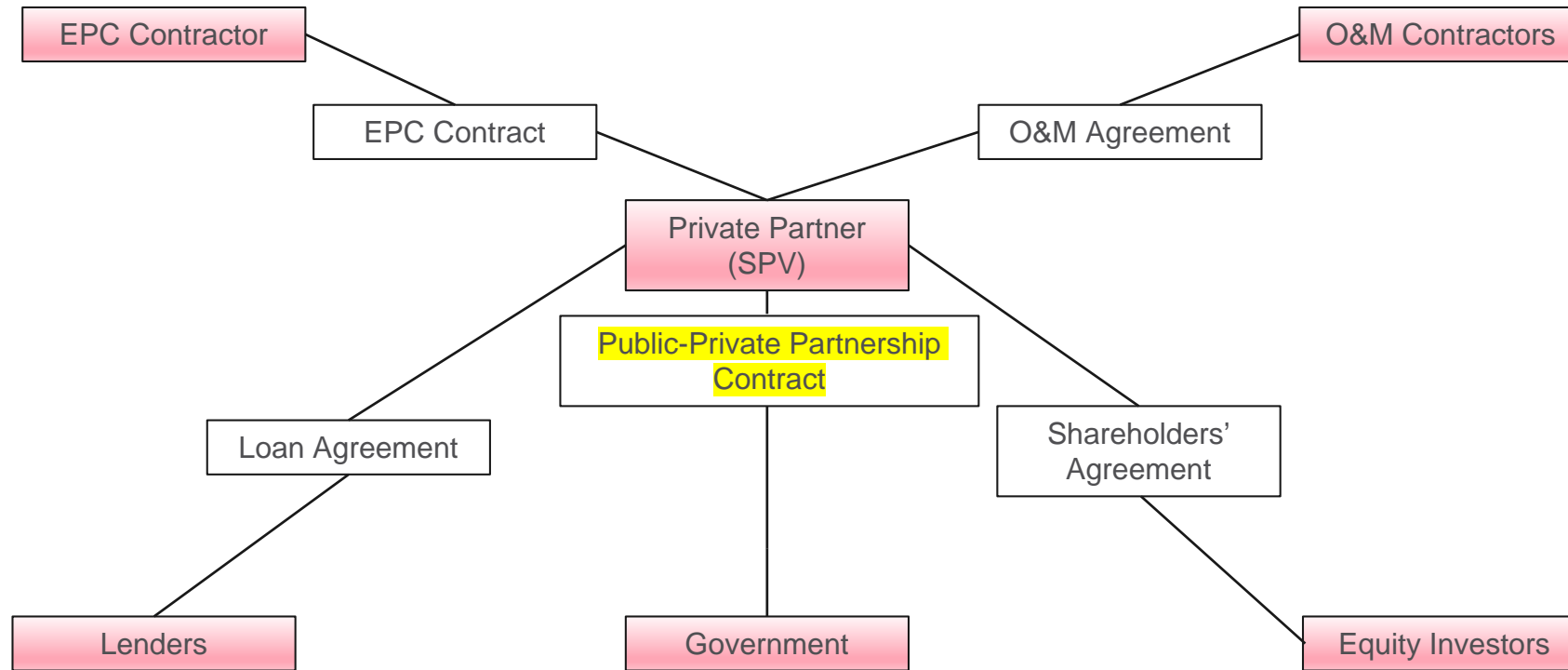
The policy and laws are of paramount importance, see guidance:

UNCITRAL Guidance on PPP/ Concession Laws

EBRD Core Principles for a Modern Concession Law



Typical PPP Contracting Structure



PPP contract structures

- BOT Contract (Build – operate – transfer)
- BTO Contract (Build – transfer – operate)
- BOO Contract (Build – own – operate)
- BT Contract (Build – transfer)
- BTL Contract (Build – transfer – lease)



Singapore's first PPP project :
Tuas Desalination plant
completed under the BOO contract model.



PPP – Considerations in SG

“Under PPP, the private sector can look forward to providing a wider range of services and over a **longer contract period** (usually between 15 to 30 years).

Public services can be delivered in a more **value for money** way by making optimal use of the public and private sectors “expertise, resources and innovation to **meet public needs** effectively and efficiently.”



Why PPP?

- Access to finance
- Private sector expertise and competitive advantage
- Cost efficiency through lifecycle optimisation
- Optimal sharing of risks
- Public interest is protected and that service delivery will meet public needs at the best value for money by focusing on efficiency, clear accountability and public interest



Competing or common interests?

- **Government** – Quality of infrastructure, appropriate prices for services, timely delivery and align with country strategy
- **Sponsor** – Ownership rights, ease of obtaining licences/permits, enforceable contract, currency conversion and transfer, and recourse to international arbitration
- **Lenders** – Enforceable security, credit enhancement, step-in rights and effective dispute resolution



PPP flashpoints?

A non-exhaustive list:

-Issues can arise over time. Since PPP contracts tend to be long-term, possibly up to 30 years, risk of a dispute over the nature of the facilities and services to be delivered is amplified.

-How would you measure performance? It is common for outcome/output specifications to be framed by the public service. But these requirements would normally be framed as output expectations, instead of precise input.

And many others eg Change of laws? Economic viability issues? etc



PPP flashpoints?

Output specifications detail what needs to be achieved, ***not how it is to be achieved.***

Input Specifications	Output specifications
Maintaining School Playing Fields Playing fields must be trimmed and cleaned thrice a week.	Playing fields must be capable of providing seven hours playability per week.
Maintaining Drains, sewers and gutters Drains, sewers and gutters must be cleared at least once every day.	All drains, sewers and gullies to be maintained free-flowing and free from odours.



Causes of PPP disputes

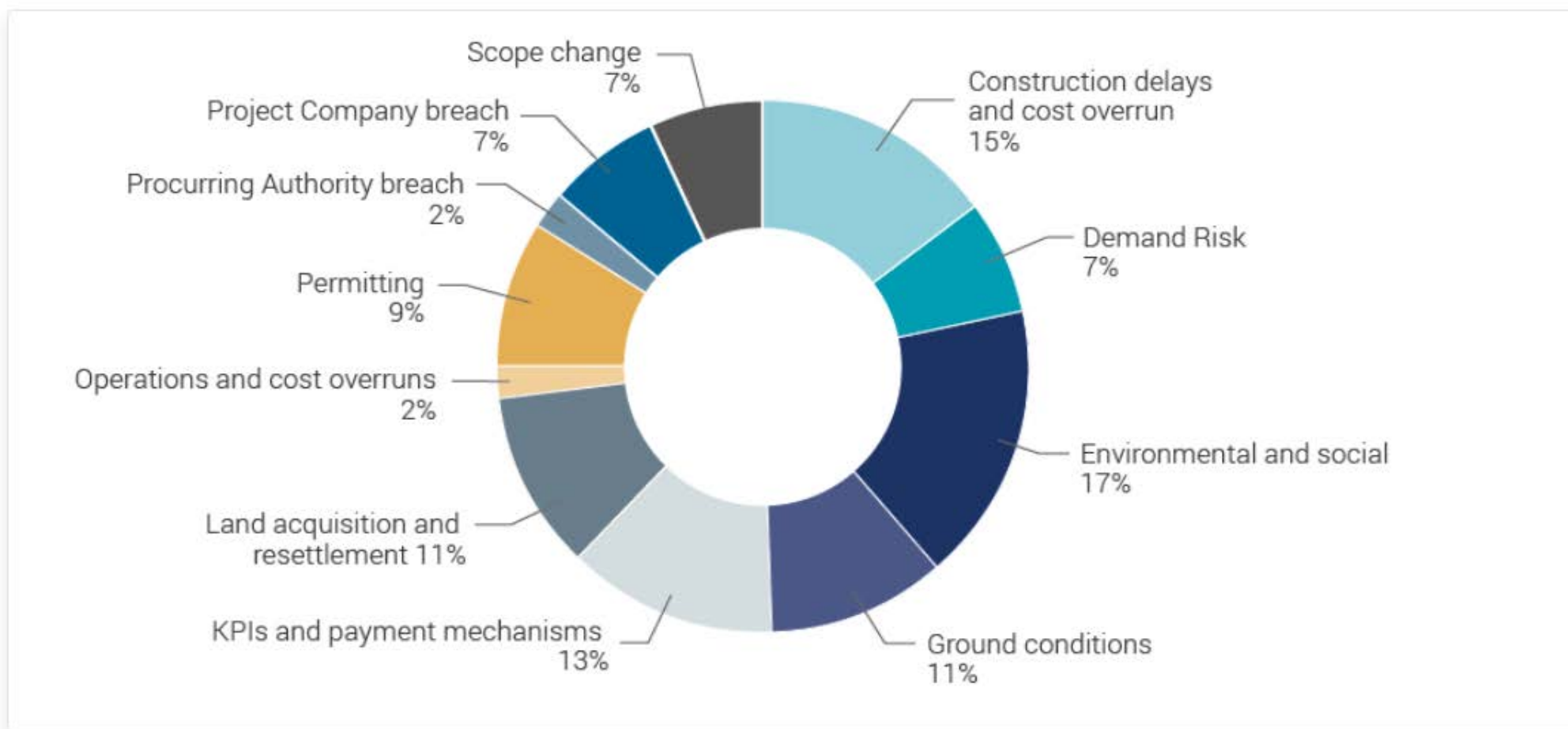


Figure 11: Causes of disputes, based on 30 projects that experienced disputes and causes are available, noting that some projects have multiple causes



Disputes time line

- PPP disputes can be categorized into disputes arising from either the construction phase or the operational phase:

Construction phase	Operational phase
Construction delays and cost overrun	Operation cost overruns
Change of scope of work	Project Company breach (failure to met operational requirements)
KPIs and payment mechanisms	
Ground conditions	Procuring Authority breach (failure to make payment in accordance with payment schedule)
Environmental and social	



A close-up photograph of a person's hands in a dark suit jacket and light blue shirt, holding a black pen over a white document. The background is a blurred office window with a brick building visible. A semi-transparent white rectangular box is centered over the image, containing the text '2. Dispute Resolution'.

2. Dispute Resolution



Dispute Resolution Avenues

- Facilitated senior executive negotiations
- Mediation
- Review of technical disputes by expert determination
- Dispute Adjudication Board under FIDIC
- Arbitration
- Litigation

Suggested reading material: https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/ppp_testdumb/documents/disputeresolution.pdf



Facilitated senior executive negotiations

- Typically present in PPP contracts. Each Party may nominate a person with express authority (senior executive and above) to :

Settle the dispute (meet and attempt to resolve amicably)



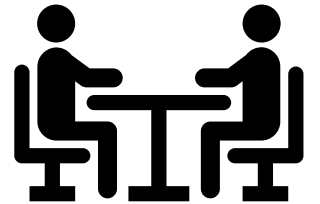
If unable, to **initiate other prescribed dispute resolution methods** under the PPP contract

A common pitfall is the inability of a public service to compromise or resolve a claim. Good governance considerations? E.g. will the relevant public body be accused of bias or ulterior motives in favour of settlement? How will a payout be justified?



Mediation

- In Feb 2020, the Singapore parliament passed the Singapore Convention on Mediation Act 2020 (“the Convention”). Bangladesh is presently not a signatory to the Convention.
- The Convention is a uniform and efficient framework for international settlement agreements resulting from mediation
- Mediation is typically an additional dispute resolution option to litigation and arbitration in settling cross-border disputes



Advantage? – a third party mediator proposes compromise framework?



Review of technical disputes by expert determination

- An expert is typically a person with commercial or technical expertise in the area of dispute (i.e. engineer)
- Either party may nominate the expert and if no agreement is reached within a prescribed period, the expert may be appointed by the director of an arbitration centre (for eg: director of the Singapore International Arbitration Centre or SIAC).
- Findings of an expert is final and binding on parties unless otherwise provided in the PPP contract.

Query: will parties be able to accept binding expert determination without a full merit hearing typically associated with arbitration or litigation?



Dispute Adjudication Board (“DAB”)

- Meant to be a fast-track process to :
 - a) Resolve any disputed Engineer’s determinations; and
 - b) Avoid the necessity to proceed with Arbitration.
- DAB decision is final and binding unless challenged in arbitration or in courts.
- Is referring a dispute to DAB mandatory? Depends on applicable law

Pro: embedding a board to review disputes throughout phase of construction?



Singapore Infrastructure Dispute-Management Protocol

- Introduced by the Ministry of Law in 2018 to help parties involved in mega infrastructure projects manage disputes and minimise the risks of time and cost overruns.
- A set of contract terms and conditions which provide for the appointment of a Dispute Board in an infrastructure type project.
- Intended to be incorporated into the EPC contract for the project.
- For projects of value **exceeding S\$500million.**



Arbitration



- Arbitration is a common feature in PPP contracts around the world for its ease of enforcement.
- Both Singapore and Bangladesh are signatories to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards (“**New York Convention**”)
- Confidentiality of arbitration proceedings



Arbitration

SIAC Rule 32.11

“Subject to Rule 33 and Schedule 1, by agreeing to arbitration under these Rules, the parties agree that **any Award shall be final and binding** on the parties from the date it is made, and undertake to carry out the Award immediately and without delay.

The parties also irrevocably waive their rights to any form of appeal, review or recourse to any State court or other judicial authority with respect to such Award insofar as such waiver may be validly made.”



Litigation

Key considerations:

- a) local court system
- b) length of time for processing claims
- c) objectivity of judiciary
- d) quality of the judiciary
- e) time and cost involved in enforcing judgments.



Query: Would a government party prefer litigation under its court system instead? Does a project company, particularly a foreign one, wish to subject itself to a system that may be perceived to state interests?



Statistics on dispute resolution method used in resolved disputes

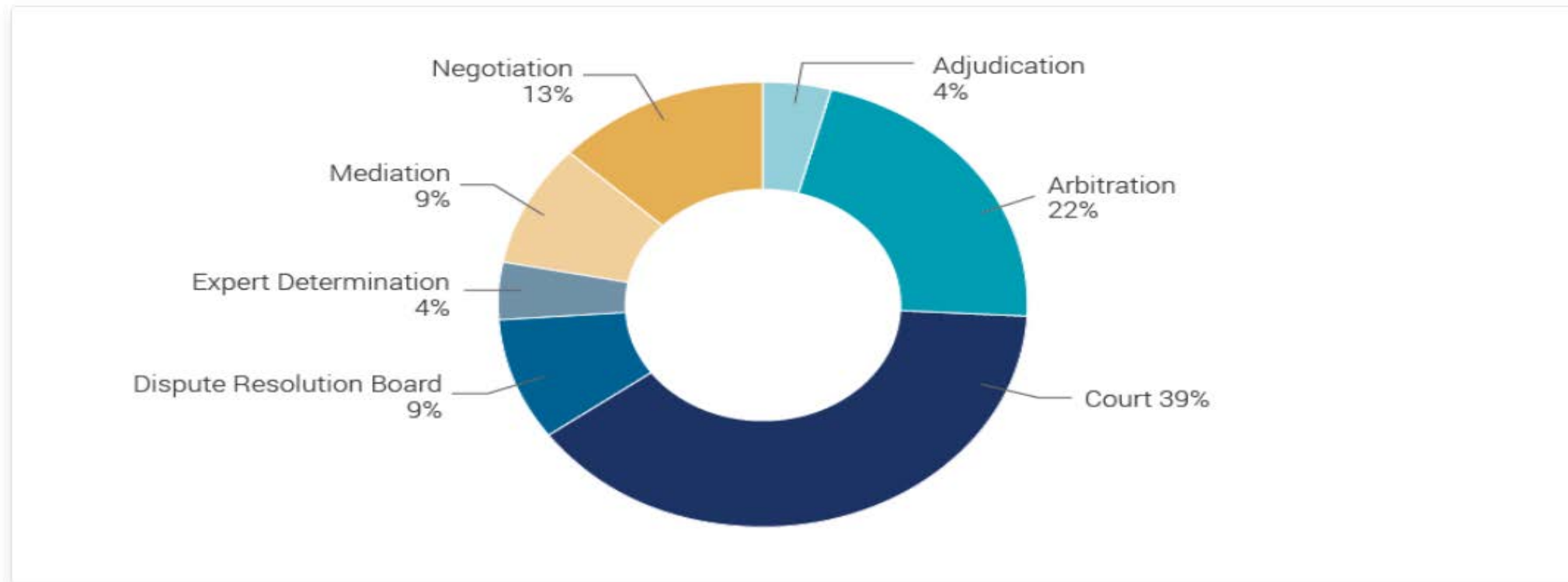


Figure 12: Methods used to resolve disputes, based on 28 projects with resolved disputes



Note: Data obtained from <https://managingppp.github.org/data/disputes-data/>



3. Sample Provisions in Review



Sample PPP provision (Site Conditions)

- The Contract Sum has been fixed on the basis of **the Contractor having had full opportunity to inspect the Facilities Site** and the means of access to the Facilities Site and their suitability for the undertaking of the Works (including among others the climatic, hydrological, aquatic, soil and general conditions of the Facilities Site). If applicable, the Contractor accepts responsibility for any delay and/or cost associated with or resulting from aquatic, ground and/or soil and/or subsoil conditions at or around or adjacent to the Facilities Site (whether or not foreseeable at the time of inspection or the Effective Date) and for the suitability of the Facilities Site for the performance of the Works.
- **The Company shall bear no responsibility** (and the Contractor shall not be entitled to any extension of the time limited for achieving Provisional Acceptance of the Facilities or addition to the Contract Sum or any other change to this Contract) for or **in respect of the actual conditions prevailing at the Facilities Site or the suitability of the Facilities Site for the performance of the Works or for any error, inaccuracy or omission of any kind in any data on the Facilities Site** provided to the Contractor by the Company and the Contractor shall be solely responsible for checking and verifying the accuracy, correctness and completeness of all such information supplied by the Company and shall be deemed to have checked such information before signing this Contract.



Sample PPP provision (Price Adjustment)

- The Original Contract Sum is arrived at on the basis that the Facilities will achieve a system capacity of [x] Wp at the rate of SGD [x] / Wp. The Contract Sum shall be adjusted (**whether by way of an increase or a reduction**) such that it will be equal to the sum of the actual installed capacity of the Facilities, as determined upon successful completion of the Performance Test, multiplied by the rate of SGD [x] / Wp.
- The Parties shall agree and **determine the adjusted Contract Sum** (including any consequential adjustment to the Onshore Contract Sum and Offshore Contract Sum) **promptly after the actual installed capacity of the Facilities is determined.**



Sample PPP provision (Change in Law)

The **Concessionaire shall bear all risks of Change in Law.** Except as set out in this Clause 22.4(a), the Concessionaire shall not be entitled to have any recourse or relief or make any Claim against the Authority for any Losses as may be incurred or suffered by reason of or arising from a Change in Law. The **sole remedy** of the Concessionaire with respect to a Change in Law shall be limited to an **extension of time** to the Scheduled Commercial Operation Date to the extent the Change in Law delays or will delay the completion of the Initial Facility Works.



Sample PPP provision (Force Majeure)

- exhaustive

“Force Majeure” means any of the following events or circumstances (whether or not foreseeable as at the Effective Date):

- acts of war (whether declared or not), invasion or act of foreign enemy, in each case occurring within or involving the Republic of Singapore and the People’s Republic of China;
- acts of rebellion, riot, civil commotion, strikes of a political nature, act or campaign of terrorism, or sabotage of a political nature in each case occurring within the Republic of Singapore;
- termination of the Land Lease, otherwise than as a result of a breach by the Company or Contractor of the terms of the Land Lease;
- action or failure to act by a Legal Authority that results in a Legal Approval;
- lightning, earthquake, tsunami, unusual flood, storm, cyclone, typhoon, tornado or other natural calamity or act of God;
- **Epidemic, pandemic or plague (including Covid-19 or a Covid-19 event) including any measures implemented or imposed by any Legal Authority as a consequence;**
- strikes, works to rule or go-slows (other than by employees of the Party claiming this as a Force Majeure or of any shareholders of such Party or by employees of any direct or indirect Affiliate, parent or subsidiary of any shareholder of that Party);
- nuclear, chemical or biological contamination (unless the Affected Party is a source of such contamination);
- accidents, fire or explosions (except if such accident, fire or explosions are caused by the fault or negligence of the Affected Party); and
- where air quality in Singapore is classified as hazardous under the prevailing “Guidelines For Employers On Protecting Employees From The Effect of Haze” published by the Ministry of Manpower of Singapore..”



Sample PPP provision (Notice as condition precedent)

The Contractor shall, within twenty-eight (28) Days from the occurrence of the event or circumstance causing delay as stipulated in Article 10.1.1, give the Company Representative a written Notice requesting an extension of time (“Extension Notice”). The Extension Notice shall:

- a) cite this Article 10.2.1;
- b) give details of the nature and extent of such event or circumstance;
- c) state the probable consequences of such event or circumstance; and
- d) provide detailed particulars (with all supporting documents to the extent available to the Contractor) in justification of the period of extension of time claimed.

The giving of the Extension Notice in full compliance with this Article 10.2.1 **shall be a condition precedent to the Contractor’s entitlement** to any adjustment of the scheduled milestone set out in the Facilities Milestone Schedule or Facilities Construction Schedule or Scheduled Provisional Acceptance Date (as the case may be).



Closing Remarks

- Bespoke vs standard form contracts?
- Governing law and choice of seat for dispute resolution
- Contract administration and dispute management
- Sustainable development (ESR)?
- Bilateral Investment Arbitration Treaties



Questions and Comments?

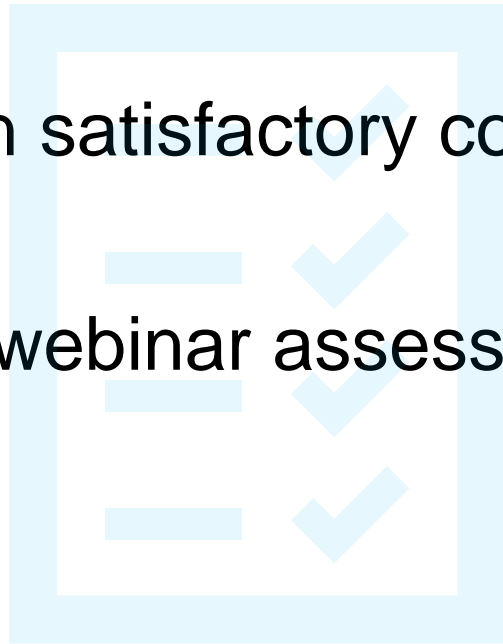


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CLDP PPP Pre-Recorded Webinar Series

Go to:

www.cldp.doc.gov/PPP

Register

Watch

The screenshot shows the CLDP website's 'Public Private Partnerships (PPP) Series' page. The header includes the CLDP logo and the text 'Commercial Law Development Program Office of General Counsel, United States Department of Commerce'. The main content area features a navigation menu with 'ABOUT CLDP', 'AREAS OF EXPERTISE', 'COUNTRIES & REGIONS', 'WHO WE SERVE', 'PROGRAMS', and 'RESOURCES'. The 'Introduction to the Webinar Series' section describes the 'Public-Private Partnership (PPP) Series' as a collection of pre-recorded webinars. Below this, there is a video player showing a webinar titled 'The Commercial Law Development Program Presents Public-Private Partnership Webinar Series'. The 'PPP: Project Finance' section includes a video player and text describing the webinar's focus on project finance. The 'PPP: Screening Tools' section includes a video player and text about the 'Scope & Preliminary Economic Analysis' tool.

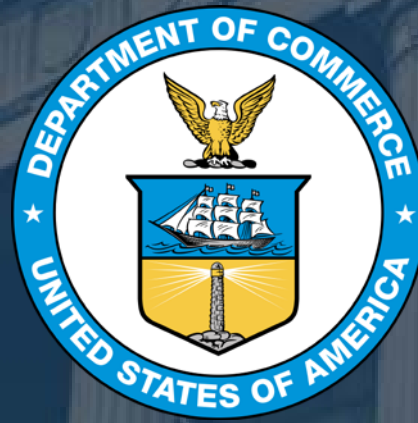
The screenshot shows the 'PPP: Project Finance Registration' form. The form is titled 'PPP: Project Finance Registration' and includes a search bar. The form is divided into sections for 'Required' information. The first section is '1. Name *' with a text input field. The second section is '2. Organization *' with a text input field. The third section is '3. Country *' with a text input field. The fourth section is '4. Email address *' with a text input field. The form also includes a 'Required' section with a 'View Upcoming Events' link.

The screenshot shows a YouTube video player for the webinar. The video title is 'PPP: Unsolicited Proposals'. The video player includes a search bar, a play button, and a progress bar showing 3:30 / 58:22. The video content shows a construction site with a crane and workers. The video player includes a 'Today's Agenda' section with the following items:

- Lessons Learned From Global Survey of Unsolicited Proposals (USPs)
- Colorado's High Performance Transportation Enterprise's Experience with USPs

The video player also includes a 'SHARE' button, a 'SAVE' button, and a '4 views • Sep 30, 2020' indicator.





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