

THE PUBLIC-PRIVATE
PARTNERSHIP
LAW REVIEW

SEVENTH EDITION

Editors

Patrick Mitchell and Matthew Job

THE LAWREVIEWS

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editors

Patrick Mitchell and Matthew Job

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PREFACE

We are very pleased to present the seventh edition of *The Public-Private Partnership Law Review*. Since the publication of the previous edition, there have been considerable developments in the design and use of public-private partnerships (PPPs) throughout the world, and the purpose of this volume is chiefly to report on those.

PPPs have been under examination in a number of jurisdictions, particularly in countries that have long-established and relatively mature relationships with PPPs. Questions have been asked over the past few years about significant issues including value for money, flexibility and, not least, the validity of the fundamental element of partnership within that model. In addition, attention has been given in many places to the most appropriate contractual model for PPPs and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose.

Of course, one topic dominated the news agenda during 2020 (and continues to do so during 2021), namely the covid-19 pandemic. The pandemic had significant and immediate effects on PPPs throughout the world and will continue to have an effect in terms of the use – or otherwise – of PPPs as affected countries seek to recalibrate their economies and transition from crisis mode to economic recovery.

Covid had an immediate impact on many construction phase projects, affecting availability of labour and materials. The issues were chiefly caused by social distancing on construction sites and facilities for the production of materials, the closure of hotels and other workers' accommodation, and the closure or curtailment of public transport to bring workers to site. Such factors inevitably resulted in additional time and costs. Throughout the world, there have been mixed responses by the public sector. Some jurisdictions provided for enhanced definitions of force majeure to provide additional relief to contractors. This was seen, for instance in certain states in the US, the Czech Republic and the UK (in Wales). In addition, France provided additional subsidies, relief remedies and state guarantees. Taiwan specifically provided for temporary relief from obligations to make land payments under PPP contracts. The Infrastructure and Projects Authority in the UK issued guidance providing that the provision of services under PPPs was to be viewed as the provision of essential public services, thereby giving contractors some protection in continuing their activities through lockdown and asking their employees to continue to come to work.

In a number of jurisdictions, the consequences of covid-19 were particularly pronounced. For instance, in Argentina, financing difficulties caused by the pandemic led to the cancellation of a number of PPP projects, with the suggestion that non-PPP models will be used more in the future. Mexico, likewise, saw a number of PPPs cancelled because of the financial impact of covid.

As regards operational PPPs, clearly the most severely affected by the covid-19 pandemic were those in the transport sector, in particular aviation and passenger rail. Projects with usage or demand risk, such as toll roads or some user-pay public transport infrastructure, have seen revenues fall materially as a result of reduced public use. In many cases the popular view is that this is unlikely to continue beyond the period of the pandemic as travel restrictions lift; however in other cases the impact on usage (and so on revenue) is likely to be longer lasting. In countries like the United Kingdom, which has a well-established record of PPPs and collaboration in passenger rail, the future structure of the passenger rail industry is uncertain, so badly has it been impacted by covid. At the time of writing, publication of the Williams Report on the future of the GB passenger rail industry is awaited. It is anticipated that the Williams Report will recommend wide-ranging reform. The long-term prospects for regional airports and some airlines are similarly uncertain.

Generally, however, PPPs have appeared resilient, indeed robust, throughout the pandemic. There seems to have been sufficient goodwill and pragmatism on all sides to enable the public sector and the private sector to continue fulfilling their obligations.

That is one of the more gratifying notes from 2020.

As you will see from the following chapters of this book, many governments intend to use PPPs to drive their economies out of the economic crisis caused by the covid-19 pandemic. Many governments see infrastructure as an absolute cornerstone of recovery and, at a time when public finances are stretched, PPP offers a way to stimulate the economy in the short term while deferring the cost of new infrastructure to its operating phase.

Turning from covid to more 'business as usual' developments, we have seen continued and, indeed, increased use of PPPs in many jurisdictions. Active jurisdictions since the previous edition include France, Australia, Norway, Slovakia, the Czech Republic, certain states of the US, Thailand and Pakistan. Poland appeared to have turned its back on PPP for major road procurements during 2020, but there are recent reports that PPP is now back under consideration. We have also seen the expansion of PPPs out of what might be called classical or core infrastructure into new sectors and sub-sectors; of particular note is the increased use of PPPs in areas such as district heating, broadband, cable and fibre communications, renewables, water and, more recently, electric vehicle charging. This diversification of PPP has brought with it new revenue models and technologies, with a consequent evolution of the traditional PPP risk profile. We anticipate that this is a trend that will continue and, indeed, grow apace in coming years.

We have also seen certain oil-rich states using PPPs not just to enhance investment in infrastructure but also to diversify their economies. Subject to the prevailing oil price, we again anticipate that this is a trend that will continue.

A further significant development in 2020 was the increasing introduction of foreign direct investment (FDI) regimes. These FDI measures typically give a government body the ability to intervene in and, ultimately, block acquisitions of interests in critical infrastructure. Such intervention is typically exercised on the grounds of national security or some other national interest test. We have seen measures introduced in the past year or so, partly in response to covid (to protect nationally critical infrastructure at a time when countries were particularly vulnerable and also when the relevant assets could be viewed as being particularly 'cheap' to acquire) but also, in the longer term, on the basis of geopolitical considerations. Such measures have existed for some time in a number of jurisdictions, including Australia (which strengthened its own tests during 2020), but have now been or are being introduced in the United Kingdom and also at a pan-European Union level.

As we note above, the use of PPPs and their relative structures were under review in a number of jurisdictions before the covid-19 crisis commenced. For instance, the UK government had previously indicated its intention to cease using PFI and PF2. That was confirmed formally with the publication of the National Infrastructure Investment Strategy in November 2020. The government has not committed to a specific replacement for PFI and PF2, but it is important to note that, while PFI and PF2 have been consigned to history, there is no suggestion that PPPs in their wider sense will not continue to be used significantly. Indeed, the government has noted the possible use of the Regulatory Asset Base model (the model used to provide for an appropriate return on capital to investors in regulated utilities and currently being used for the first time in a major greenfield project on the Tideway Super Sewer) in other projects, including civil nuclear. In addition, the Contract for Difference model is likely to see application outside its traditional sector of renewable power generation.

A number of jurisdictions have continued to promote and encourage the use of unsolicited proposals, where the private sector is encouraged to design and come forward with schemes for new infrastructure. Such proposals have been used extensively in Australia and, increasingly, in some of the states in the US. During 2020, the Italian government brought forward new regulations to provide for institutional investors to develop unsolicited proposals. Likewise, Pakistan is developing a new law to accommodate unsolicited proposals. Unsolicited proposals are also seen in emerging market jurisdictions, where there is a high demand for new infrastructure and governments may not have the bandwidth to prepare extensive pipelines of PPP tenders.

Various jurisdictions, including Italy and South Africa, have taken measures either to develop further model form PPP contracts (in Italy, effectively by a DBOT concession) or to create more unified, single PPP frameworks (in the case of South Africa). Other jurisdictions that have subjected their PPP regimes to detailed examination include the Netherlands, where a study was undertaken into the efficacy and value for money of the DBFM model, concluding that it has proved efficient where it has been used.

As legal practitioners with more than 50 years' combined experience working with PPPs, we continue to believe that PPPs are and, where used appropriately, will remain, an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets.

The use of the PPP model, in addition to financial benefits, imports additional scrutiny, rigor and arm's-length contracting practice, which ultimately benefit both the public and private sector and, most importantly, the consumer and taxpayer.

In this, the seventh edition of *The Public-Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions.

We hope that you will enjoy and find useful this seventh edition of *The Public-Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

Patrick Mitchell and Matthew Job

Herbert Smith Freehills LLP

London

March 2021

THAILAND

Weerawong Chittmittrapap, Jirapat Thammavaranucupt and Praewa Wang-ngam¹

I OVERVIEW

Public-private partnerships (PPPs) were formally introduced into the Thai legal framework by the promulgation of the Private Participation in State Undertakings Act BE 2535 (1992) (PPSU Act). For two decades the PPSU Act served as the foundational piece of legislation governing PPPs in Thailand; however, it lacked clear-cut criteria addressing matters of scope, duration and authority with regard to initiating and implementing PPPs. To clarify those criteria, the Private Investments in State Undertakings Act BE 2556 (2013) (PISU Act) was enacted. The PISU Act explicitly states that Thailand is in need of infrastructure construction and various other forms of public services, an imperative that is echoed in many other state policies, development goals and plans.

Consequently, PPPs began to become more common nationally as the government relied on PPPs as the main mechanism in the development of the nation's infrastructure. With the increase in the utilisation of PPPs it became apparent that the framework laid out by the PISU Act needed to be further developed. As a result, the Public-Private Partnership Act BE 2562 (2019) (New PPP Act) was enacted to replace the PPSU Act, thereby allowing PPPs to be conducted in Thailand in accordance with international standards.

The New PPP Act was passed by the National Legislative Assembly and became effective in March 2019. PPPs are now being implemented under the New PPP Act and in projects in connection with the Eastern Economic Corridor of Thailand (EEC).

II THE YEAR IN REVIEW

The New PPP Act was written in such a way that a series of ancillary laws would ensue after its enactment. Subsequently, new laws were published in the form of notifications issued in 2020 by the Public-Private Partnerships Policy Committee (Committee) and the State Enterprise Policy Office (Office) and ministerial regulations. These notifications and regulations serve to clarify some of the rules governing certain procedures in relation to PPPs. Several projects have recently been initiated under the New PPP Act, such as the Bang Pa-in–Nakhon Ratchasima Intercity Motorway (M6) and the Bang Yai–Kanchanaburi Intercity Motorway (M81).

¹ Weerawong Chittmittrapap is a senior partner, Jirapat Thammavaranucupt is a partner and Praewa Wang-ngam is an associate at Weerawong, Chinnavat & Partners Ltd.

The above-mentioned improvements to the New PPP Act (and its ancillary laws) are based on principles that reflect international standards and touch upon the following points:

- a* applicability criteria for PPP projects;
- b* business case guidelines drafted with the aim of ensuring fair risk sharing that does not overburden the state;
- c* full consideration of the possible and appropriate government support measures;
- d* transparent procurement procedures including negotiation;
- e* increasing the bankability of projects; and
- f* opening up the option of authority step-in for cases that may be detrimental to national security.

These points have also been included in the Eastern Special Development Zone Act BE 2561 and a number of ancillary laws, as the government uses the EEC as a pilot model for PPP regulations. The EEC Office is in the process of finalising guidelines that reflect best practice standards.

To date, several EEC projects have been initiated. These projects include the High-Speed Rail Link to three airports, connecting Rayong province and Bangkok metropolitan city (US\$7.2 billion), the biggest PPP concession project in Thailand and the first concession granted on a high-speed train project, and the U-Tapao International Airport, valued at approximately 200 billion baht, Thailand's first PPP airport project. The total amount of investment for all of the projects in the EEC area will exceed 1.5 trillion baht.

Further, there are projects currently under way, including the Metropolitan Rapid Transit Orange Line, Digital Park Thailand and Laem Chabang Port, Phase III. The principles of these projects have been approved by the Cabinet. The selection process for private parties is currently ongoing and is expected to be completed within the first quarter of 2021. The implementation period for these projects will be considerably faster in comparison to the implementation of projects under the PISU Act, and public sector involvement in the development of these projects is increasing as the EEC ancillary laws, as well as the ancillary laws under the New PPP Act, require the collection and analysis of private sector opinions acquired through market-sounding procedures.

III GENERAL FRAMEWORK

i Public-private partnership applicability criteria

In the past, the PISU Act loosely defined the criteria for projects that would fall under the PPP purview as the state intended PPPs to serve as a mechanism to develop infrastructure in Thailand indefinitely. According to the PISU Act, any project that fell within the criteria of being a state undertaking and a public-private joint investment would have been eligible for PPP procurement.

The New PPP Act reserves the use of PPPs for infrastructure projects, and the use of state assets is no longer considered a PPP. A project that falls under the PPP regime must fulfil three main criteria:

- a* a state investment project involving an undertaking that any particular state agency has the duty and power to carry out under the law or in accordance with the objects of its establishment;
- b* a partnership with a private party by any means or authorising a private party to invest alone by way of permission, concession or licensing in any form whatsoever; and

- c* infrastructure and public services as specified under the New PPP Act, such as roads, highways, expressways, railways, mass transit systems or airports.

The New PPP Act provides flexibility on PPP applicability, and the categories of PPP may be expanded by a royal decree. The infrastructure and public services specified under the New PPP Act also include projects that are incidental to achieving other projects, as prescribed in a notification of the Committee with the approval of the Cabinet. The Committee's notifications concerning the relevant projects for roads, railways, ports and airports have been published.

Once a project fulfils the criteria above and is considered a PPP, the three main procedures that are involved include preparation of the project (e.g., conducting a feasibility study); selection of the private party; and supervision and control.

ii Types of public-private partnership and the transfer of the assets used in a project

PPPs in Thailand may take many forms because, under the New PPP Act, there is no classification of the types of investment. The type of PPP project is chosen based on the specific conditions of each project and is further defined by the functions under the responsibility of the private entity. The most common types of PPP for infrastructure projects are design–build–operate–maintain, where the private entity is in charge of the development and long-term operation and maintenance of the asset, as well as arranging financing; and operate and maintain, where the private entity is in charge of the operation and maintenance, as well as for arranging financing.

For the transfer of the assets used in a project, PPP projects in Thailand have used the following contractual structures:

- a* build–transfer–operate (the most common structure), whereby a contract is signed between an authorised state agency and investors to build an infrastructure facility, and then the investors transfer the facility to the authorised state agency and obtain the right to operate the facility commercially for a fixed term; and
- b* build–operate–transfer, whereby the investor transfers the facility at the end of the concession.

As such, the investors are able to finance, design, construct and operate the facility stated in the concession contract, and this enables the project sponsors to recover their investment and project operating and maintenance expenses. Regardless of the type of transfer, the end result will always be the transfer of the ownership of the assets necessary for the operation of the project to the state at the end of the PPP agreement.

Caution is required in the selection of the type of assets to be transferred and owned by the private entity as the Thai Constitution prohibits the private ownership of infrastructural public utility services that are essential to the nation's subsistence and security.

iii The authorities

Under the New PPP Act, there are three main authorities involved in the PPP process: the Cabinet, the Committee and the Office.

The Cabinet plays an important role in administering the principles of the particular PPP project, and in deciding the annual government budget for PPP projects.

According to Section 13 of the New PPP Act, the Committee is composed of the Prime Minister as chair, the Minister of Finance as vice-chair, the Permanent Secretary for

Finance, the Director of the Bureau of the Budget, the Secretary-General of the Council of State, the Secretary-General of the National Economic and Social Development Council, the Secretary-General of the Board of Investment, the Attorney-General, the President of the Board of Trade of Thailand, the President of the Federation of Thai Industries, the President of the Thai Bankers' Association and not more than five qualified persons appointed by the Cabinet, as members. The main powers and duties of the Committee are to:

- a* give approval in principle to a project involving a private investment and the operation of a project;
- b* consider and approve the principles of a partnership project; and
- c* consider and prescribe rules and procedures for the preparation of a partnership project that has a value below 5 billion baht or below the value additionally prescribed by the Ministerial Regulation regarding rules and regulations under the New PPP Act.

The Office serves as an ancillary body to the Committee responsible for carrying out secretarial tasks (i.e., supporting the Committee in the implementation of PPP projects). According to Section 21 of the Act, the Office has the following powers and duties:

- a* to prepare and submit partnership project preparation plans for the consideration and approval of the Committee;
- b* to propose the designation of state agencies as project-handling agencies;
- c* to develop necessary databases and bodies of knowledge and provide dissemination, training, education and advice in connection with PPPs;
- d* to give opinions or advice to, or lay down practices for, agencies in connection with the execution of the law; and
- e* to report problems and obstacles with regard to the execution of the law to the Committee.

iv General requirements for PPP contracts

In general, PPP contracts must conform to the framework of the New PPP Act and the requirements of the Notification of the Office regarding the Invitation to Bid, the Request for Proposal and the Core Contract Terms for Public-Private Partnership Contracts BE 2563 (2020). A draft PPP contract must contain the standard contract terms for investment contracts as prescribed by such notification with the approval of the Committee. Generally, PPP contracts must at least contain the following clauses:

- a* the background, objective and scope of a project;
- b* its definition and interpretation;
- c* the hierarchy of documents under the PPP contract;
- d* the source of funds and investments;
- e* the duration, provision of services and implementation of the project;
- f* the operation, output specification and level of service;
- g* the rights and duties of each party;
- h* the ownership of the project assets and their valuation;
- i* transfer of knowledge;
- j* returns each party is entitled to, and ways to provide such returns;
- k* the governance and monitoring of project operations;

- l* changes to a contracting party, contractor or subcontractor, and the assignment of claims;
- m* force majeure;
- n* termination of the contract;
- o* the rights of the project owner in using power for the public benefit;
- p* step-in rights and details thereof;
- q* dispute resolution;
- r* the governing law;
- s* the mechanism to support the project;
- t* taxes, fees, interest;
- u* the warranty, disclosed information and payment for damage;
- v* insurance;
- w* changes in laws; and
- x* guarantees.

Notably, in the EEC, a direct agreement – that is, an agreement to be entered into by and between the private entity, the financiers and the procuring government agency to increase the bankability of the project – is allowed. The step-in right specified in such an agreement protects the financiers, and ultimately the project, with the remedy of a capable private entity stepping in to preserve the continuity of a project in a state of distress induced by the collapse of the former private entity.

Provisions allowing a unilateral renewal or extension of the duration of the project under the PPP are prohibited. Legal provisions regulating all general PPPs and PPPs under the EEC framework reiterate the same principle and prohibit granting the private entity the unilateral right to adjust or amend any contractual conditions in a manner that will have an impact on the provision of public services or benefits to the public sector.

PPP contracts and other documents integral to the implementation of a PPP must be prepared in Thai. Only parts that must be in English may be prepared in English.

IV BIDDING AND AWARD PROCEDURE

i Expressions of interest

The project-handling agency, which is the state agency that intends to enter into the partnership, has the duty to prepare a draft invitation for submission to the selection committee for consideration and approval. The selection committee is appointed during the stage when the Cabinet has granted approval for the operation of a partnership project and consists of a representative of the project-handling agency as chairperson, a representative of the responsible ministry, a representative of the Office of the Attorney General, a representative of the Office and two qualified persons possessing knowledge and expertise in regard to the partnership project, as members, and one representative of the project-handling agency as a member and secretary. A consultant with the qualifications specified by the Committee must be engaged for the preparation of the draft invitation. After the approval of the draft invitation by the selection committee, the project-handling agency can then announce the invitation to bid.

ii Requests for proposals and unsolicited proposals

The project-handling agency has the duty to prepare a request for proposals (RfP) and a draft PPP contract for submission to the selection committee for approval. The project-handling agency must also conduct market soundings and take such opinions into consideration for the preparation of the RfP and draft PPP contract. In addition, a consultant must be engaged to facilitate the preparation of the documents.

The selection of private parties must be made by way of bidding unless:

- a* during the selection of the private parties, the project-handling agency and the selection committee share the opinion that the selection should not be made by way of bidding; or
- b* at the stage of the project feasibility study, it is apparent that the selection of private parties should not be made by way of bidding.

In either case, the final decision on the method is subject to the consideration and approval of the Cabinet.

iii Evaluation and grant

When the selection committee has approved the RfP and draft PPP contract, the project-handling agency and the selection committee may proceed with the selection of a private party. The RfP will be announced to the public, and interested parties may submit a proposal. The selection committee evaluates the submitted proposals and negotiates the PPP contract with the winning bidder. Then, the project-handling agency must furnish the draft PPP contract to the Office of the Attorney-General for scrutiny.

The project-handling agency must submit the results of the selection of the private party, the draft PPP contract as scrutinised by the Office of the Attorney General and essential terms and conditions thereof to the minister of the responsible ministry for approval prior to submission to the Cabinet for further consideration. Upon the Cabinet's approval of the result of the selection of the private party and the essential terms and conditions of the PPP contract, the project-handling agency may sign the PPP contract with the selected private party.

V THE CONTRACT

i Payment

No specific regulations impose restrictions or limitations on the way in which private parties in PPP contracts are remunerated in Thailand. As such, the parties are free to determine all variables, such as the frequency of payment and rates of payment, through the PPP contract. In general, however, two forms are prevalent.

The first is where the private investor collects and allocates the revenue according to the agreed terms in the contract. Any increase in the amount of profit will be reflected in the amount of remuneration. Because of the nature of the payment, it is most frequently used in PPPs that involve commercial development projects.

Another form is where the state assumes the responsibility for collecting revenue, and makes a fixed payment to the private investor. Because of the nature of the payment, it is most frequently used in PPPs that involve social development projects.

ii State guarantees

There is no separate regulation regarding state guarantees in Thailand. Nonetheless, under the New PPP Act, the government provides support measures for projects under the PPP scheme. Under the New PPP Act, the project handling agency may request government support measures, such as benefits from Board of Investment promotion, the right to take a lease of land or immovable property in the partnership project for a term not exceeding 50 years (normally a lease is limited to 30 years), or other financial or non-financial support as announced by the Committee.

Under the EEC regulations, in addition to benefits from Board of Investment promotion, the benefits or support to be granted are considered based on several factors, such as how the project benefits and is in line with the success of the development of the EEC, or how a project having economic and technical feasibility, but not financial feasibility, may attract private investors or be made bankable to procure the financial resources of the private sector. Examples of the supporting measures include:

- a* subsidies, in which the state provides financial support to reduce the financial risks of the private sector;
- b* the granting of rights to use state land (e.g., during the duration of the PPP agreement, the state may grant the private sector the right to use state assets for commercial purposes to support the financial feasibility of the project; or
- c* non-compete clauses.

The EEC Act also provides additional benefits for investors in the EEC area.

iii Distribution of risk

Under the New PPP Act, PPP projects must show an understanding of the allocation of risks, and remunerative benefits to private parties must be made in a fair manner, having regard to the achievement of the partnership project and the value of the operations of the project. Moreover, the feasibility study report to be prepared as a part of the project submission is required to include the risks involved in the project, with an indication of the risks, consideration of risk opportunities, potential impacts from the occurrence of risks and methods for the management of risks.

iv Adjustment and revision

When a partnership project has been signed, the minister of the responsible ministry must appoint a supervisory committee consisting of a representative of the responsible ministry, being a government official in an agency of the responsible ministry other than the project-handling agency having a rank not lower than that of a primary-level executive, as chairperson, a representative of the Office of the Attorney-General and a representative of the Office, as members, and one representative of the project-handling agency as a member and secretary. The supervisory committee has the duties and powers to:

- a* monitor the partnership project to ensure its operation as specified in the PPP contract;
- b* make suggestions for resolving problems arising from the operation of the partnership project;
- c* report operational results, progress and problems to the minister of the responsible ministry;
- d* furnish a copy of the report and relevant documents to the Office; and
- e* provide opinions on amendment of the PPP contract.

The amendment of the contract may be considered in two situations:

- a* the amendment would not result in essential terms and conditions different from those of the PPP contract as approved by the Cabinet. In such case, the amendment must be approved by the responsible ministry; or
- b* the amendment would result in the essential terms and conditions being different from those of the PPP contract as approved by the Cabinet. In such case, the amendment must be approved by the Cabinet.

v Ownership of underlying assets

Under the New PPP Act and the EEC framework, there is no provision that clearly stipulates which contractual party has ownership of the underlying assets. Nevertheless, the standard PPP contract must contain a clause setting out the transfer and holding of ownership of the project. The transfer of ownership of the underlying assets depends on the type of PPP contract used. In practice, there is usually provision in the PPP contract for transfer of ownership of the project assets to the public sector. If state assets are utilised in implementing the project, the rights and duties of each party in relation to the utilisation and maintenance of those assets will also be specified.

vi Early termination

Although the consequences of early termination were not stated in the PISU Act, under the New PPP Act, the project-handling agency has the power to amend or terminate the PPP contract to maintain public order or national security, or in the case of any event causing the operation of the project to be so interrupted as to have a severe impact on the public or the economy or social affairs of the country. If this is not attributable to the private contractual party, the project-handling agency must make fair compensation to the private contractual party. In exercising its power, the project-handling agency must always take the concept of partnership between the public and private sectors into consideration. This reflects the partnership concept and ensures qualified private participation. For cases where the early termination is because of the acts or deeds of the private entity, the state is entitled to recover from the private entity its loss arising out of such breach.

VI FINANCE

In Thailand, PPPs are generally financed via capital markets or financial institutions. One option is for the concessionaire to list its company on the Stock Exchange of Thailand and to offer its shares to the general public as a means of raising capital (initial public offering). Second, financing may be obtained by setting up an infrastructure fund and offering fund units to the general public. An example of an infrastructure fund is the BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF), which was established in 2013 to finance mass transit PPP projects. These options have limitations, as the concessionaires must receive the prior approval of the grantor of the concession to be listed on the Stock Exchange. In addition, any transfer of concessionary rights must receive the prior approval of the grantor of the concession even when it becomes inevitable as a result of changes to the company's shareholding structure.

Project financing via financial institutions also imposes similar limitations to those mentioned above. Generally, project funding requires a step-in clause: in the case of critical situations the financial institution, as a creditor of the project, shall have the right to step in

and take control of the project. Thus, the possibility of the financial institution exercising its step-in rights remains open at all times throughout the venture, subject to prior approval of the relevant state authority.

There is no restriction under Thai law for cross-border financing; therefore, so far it has been freely employed. BTSGIF was open for sale to international investors.

Under both the EEC framework and the New PPP Act, there are specifications that instil the use of a direct agreement to promote bankability and confidence in a project coming to successful completion. Step-in and step-out rights are available for banks to opt for.

VII RECENT DECISIONS

Recent court judgments indicate a strict adherence to the rules and regulations governing PPPs and suggest that a failure to do so would warrant legal and binding consequences.

An example of this is the judgment of the Highest Administrative Court No. Aor 349/2549, where the Court ruled that the latest amendment to a PPP contract made by the relevant state agency and ITV Public Company Limited was non-binding, as it failed to comply with the provisions of the PPSU Act in relation to procedures for amendments to the PPP contract. The legal consequences of the court judgment in relation to non-binding PPP contracts remain unclear, meaning that unlawful amendments to a PPP contract could be void or voidable, or automatically terminated or still valid, until terminated by the relevant state agency.

VIII OUTLOOK

As a growing nation, Thailand has a tremendous need for investments in infrastructure development and public services to promote the nation's economy, support fast-paced urbanisation and enhance the quality of life of the general public. However, the capacity of the government to provide funds directly to infrastructure and public services projects is limited. Therefore, the government recognises the PPP mechanism as a prominent instrument in the implementation of projects in Thailand, as evidenced by the amount of PPP projects successfully initiated or currently undergoing bidding and procurement procedures.

In April 2020, the Committee announced its PPP Project Preparation Plan⁷ to be developed between 2020 and 2027, worth an estimated 1.09 trillion Thai baht, including 92 possible projects. The PPP Project Preparation Plan outlines the urgent need for partnership projects, the objectives of the projects, and brief information on projects, the project-handling agencies, the total investment amount for the projects and the time frame for the preparation and operation of the projects. Basic infrastructure, including roads and city trains (sky train, metro) projects, feature prominently among the new projects selected for the PPP Project Preparation Plan list. Digital technology infrastructure might also be significantly developed to further digitise the main platform for communications. It is also expected that the healthcare sector will be a focus, since the coronavirus has exposed the shortcomings of Thailand's current healthcare system.

In light of the robust trend in public sector investment projects and the fact that a number of PPP undertakings are being rolled out, it is anticipated that the implementation of PPP projects in Thailand will continue to grow in the coming years.

ABOUT THE AUTHORS

WEERAWONG CHITTMITTRAPAP

Weerawong, Chinnavat & Partners Ltd

For more than 10 years, Weerawong has been named as one of Asia's leading lawyers in several practice areas by legal publications. Weerawong is the author of the following books: *The Roles, Duties and Responsibilities of the Directors of Listed Companies* (Stock Exchange of Thailand, 1997) and *The Roles and Liabilities of the Directors of Financial Institutions* (Bank of Thailand, 2002). Based on the recommendation of the Securities and Exchange Commission, Weerawong was retained by the World Bank to assist it in its preparation of the Corporate Governance Country Assessment of the Kingdom of Thailand (September 2005). He has been the instructor of the 'directors' roles and liabilities' course for the Thai Institute of Directors (IOD) since its establishment in 2001. He led the firm's advisory role to various state agencies during the development of the current framework for PPPs in the EEC. He is leading all five outstanding EEC projects, including U-Tapao International Airport, High Speed Rail Linking 3 Airports, Laem Chabang Port, Phase III, U-Tapao Aircraft Maintenance Repair Overhaul and Map Ta Phut Industrial Port Development, Phase III.

JIRAPAT THAMMAVARANUCUPT

Weerawong, Chinnavat & Partners Ltd

Jirapat Thammavaranucupt is a partner in the projects and infrastructure practice group at Weerawong C&P. He has substantial experience advising domestic and international clients on public-private partnerships (PPPs), capital markets, mergers and acquisitions. He recently advised the Ministry of Finance on PPPs in Thailand. He is a regular speaker at training sessions on PPPs, corporate governance and anti-corruption law arranged by the Thai Institute of Directors and national law schools. He provided counsel in establishing the current framework for PPPs in the whole nation and in the EEC. He is also a core team member developing all five outstanding EEC projects including U-Tapao International Airport, High Speed Rail Linking 3 Airports, Laem Chabang Port, Phase III, U-tapao Aircraft Maintenance Repair Overhaul and Map Ta Phut Industrial Port Development, Phase III.

PRAEWA WANG-NGAM

Weerawong, Chinnavat & Partners Ltd

Praewa Wang-ngam is an associate in the projects and infrastructure practice group at Weerawong C&P. She assisted in the establishment of the current framework for PPPs in the nation as well as the EEC. She also has extensive experience in recent remarkable infrastructure and PPP projects, including all EEC mega projects (U-Tapao International Airport, High Speed Rail Linking 3 Airports, Laem Chabang Port Phase III and Map Ta Phut Industrial Port Development, Phase III) and the renewal of the concession for the Bangkok Mass Transit system (BTS) Green Line.

WEERAWONG, CHINNAVAT & PARTNERS LTD

22nd Floor, Mercury Tower

540 Ploenchit Road

Lumpini, Pathumwan

Bangkok 10330

Thailand

Tel: +662 264 8000

Fax: +662 657 2222

weerawong.c@weerawongcp.com

jirapat.t@weerawongcp.com

praewa.w@weerawongcp.com

www.weerawongcp.com

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