

Public-Private Partnerships

Contributing editors

Ivan E Mattei and Armando Rivera Jacobo



2018

GETTING THE
DEAL THROUGH 

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Turkey

Naz Bandik Hatipoğlu, Nigar Özbek and Başak Ayık

Çakmak Avukatlık Ortaklığı

General PPP framework

1 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?

There is no single statutory definition of the PPP concept in Turkey. The build-operate-transfer model was the first PPP model used in Turkey in the early 1980s in the energy sector. It was followed by build-operate and transfer of operational rights models. The build-lease-transfer model also started to be used in the late 2000s, mainly in the healthcare sector.

All of these models have been used for a significant number of projects in various sectors.

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

Energy, transportation and healthcare infrastructure are the main sectors subject to PPP transactions in Turkey. Education, municipal waste disposal, water management (irrigation, water treatment, waste water management, etc) and railway infrastructure are also expected to be subject to PPP transactions in the near future.

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

Although there is no framework PPP law in Turkey, a legislative framework is established for PPPs. The main legislation applied to PPP projects is as follows:

- Law No. 3096 on the Authorisation of Enterprises other than Turkish Electricity Authority for Power Generation, Transmission, Distribution and Trading;
- Law No. 4283 on the Construction and Operation of Electrical Power Plants and Purchasing of Electricity through Build-Operate Model;
- Law No. 3996 on the Realisation of Certain Investments and Services through Build-Operate-Transfer Model;
- Law No. 4046 on Privatisation;
- Law No. 6461 on the Liberalisation of Railway Transportation;
- Law No. 3465 on the Authorisation of Enterprises other than the General Directorate of Highways for Construction, Management and Operation of Access Controlled Highways;
- Law No. 6428 on the Construction of Facilities, Renovation of Existing Facilities and Purchasing of Services by the Ministry of Health through Public-Private Partnership Model and its Implementing Regulation; and
- Decree No. 652 on the Establishment and Duties of the Ministry of National Education.

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

There is no centralised PPP authority in Turkey. Instead, each procuring authority develops its own programme and the specific rules to apply.

Accordingly, the principal regulatory bodies are as follows:

- the Ministry of Energy and Natural Resources;
- the Ministry of Health;
- the Ministry of National Education;
- the Ministry of Transportation, Maritime Affairs and Communication;
- the Privatisation Administration;
- the General Directorate of State Airports;
- the General Directorate of Highways; and
- the General Directorate of State Railways.

On the other hand, the High Planning Council, which operates under the Ministry of Development, is the approval authority for PPP projects that are developed by the aforementioned regulatory bodies. Other entities playing a role in facilitating the national PPP programme are the Department of PPP of the Ministry of Development, the Ministry of Finance and the Undersecretariat of Treasury.

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

Any subdivision government bodies may conduct PPP projects, provided that they obtain the approval of the relevant ministry to which they are attached and the authorisation of the High Planning Council. For example, motorways can be procured through the PPP model by the General Directorate of Highways with the approval of the Ministry of Transportation, Maritime Affairs and Communication and provided that the specific project is approved by the High Planning Council.

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

The remuneration of the private party depends on the method agreed between the parties and the nature of the project. For example, in a motorway construction through the build-operate-transfer model, the private party's remuneration would be dependent on the usage of the facility (ie, the fees collected from vehicles using the motorway). As a different example, in a hospital construction through the build-lease-transfer model, the private party would benefit from availability payments for the usage of the hospital building and also from service payments for the non-medical services that it provides as part of the operation of the health facility.

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

Depending on the remuneration mechanism determined for the private party, it may seem that the private party bears this risk. However, it is a common practice in Turkey that the state provides guarantees for the projects and takes some part of this risk away from the private party. For example, in motorway PPP projects, the General Directorate of Highways guarantees the passage of a certain number of vehicles per month and if the actual number of vehicles using the road remains below the amount guaranteed by the state, then the General Directorate of Highways pays the private party the difference.

- 8 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?**

The only approval process required for PPP projects is the approval of the High Planning Council as stated in question 4. When a PPP project is submitted for the approval of the High Planning Council, the budget of the procuring authority is also reviewed. In any event, each year the budgets of the public authorities are reviewed by the Turkish parliament. However, this process is not specific to PPP projects. The total amount of investments subject to availability payments executed in the same year may not exceed 50 per cent of the capital expenses of the central budget for the relevant year.

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

There is no rate of return guarantee or cap for PPP projects in Turkey.

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

There are no prohibitions regarding the transfer of direct or indirect ownership interests in Turkish PPP legislation. However, such transfers are generally subject to notification requirement or to the approval of the relevant administrative body in accordance with the relevant project agreement signed with the administration. For instance, in healthcare PPPs, all share transfers resulting in a change of control in the project company are subject to the administration's prior written approval provided that they are realised within the period that starts at the beginning of the construction period and ends 24 months following the actual completion. After such term, the share transfers resulting in a change of control in the project company shall be notified to the administration prior to the actual transfer of the shares.

Procurement process

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

An ordinary PPP procurement procedure starts with the announcement of the relevant tender in the Official Gazette. The relevant tender specifications are kept available for review by potential candidates at the premises of the procuring authority. A commission is formed, made of up high-level directors of the procuring authority, to assess the bids. The most favourable bid is determined by this commission and the winner of the tender is invited to sign the implementation contract with the procuring authority. The evaluation criteria used to award a PPP transaction depend on the project specifications.

- 12 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?**

Deviations from the technical specifications are not acceptable under Turkish procurement law. The underlying principle is the 'equality among participants', which requires that no participants obtain an advantage over the others using any means not foreseen in the tender specifications. If a project is tendered to a bidder whose offer deviates from the technical specifications, the tender decision may be challenged.

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

Unsolicited proposals are not regulated by the legal framework and do not happen in practice.

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

No, the unsuccessful bidder bears all of its costs.

- 15 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?**

There is no such mechanism and the procuring authority requires the financing of PPP projects to be undertaken by the private party.

- 16 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?**

It is common practice in PPP agreements that the relevant authority represents that no litigation, precautionary measure, administrative proceeding or any request in relation to the project or tender is pending against any of the authority, the project, or the tender that may have a material adverse effect on the ability of the authority or the private party to perform its obligations under the implementation agreement, and that the site is suitable for the construction of the facilities, is at the disposal of the authority and there are no encumbrances on the site that would prevent construction.

In addition, the relevant authority requests that its internal or external legal counsel provide both capacity and validity legal opinions for the projects. In most of the PPP projects in Turkey, the lenders in particular are provided with such a legal opinion.

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

The legislation does not restrict the participation of foreign investors in PPP projects. On the contrary, foreign investment is promoted by various incentives provided under the Foreign Investments Law No. 4875 and its secondary legislation. The Foreign Investments Law provides a broad definition of foreign investment, which covers funds in convertible currency, corporate securities, machinery and equipment and industrial and intellectual property rights. In addition, 'any rights generated in Turkey and relating to dividends, sales proceeds, receivables or other investment rights with monetary value, as well as assets with an economical value such as rights relating to exploration and extraction of natural resources' are included within the definition of foreign investment. The Foreign Investments Law repeats the well-established principle that foreign investors are to be granted equal treatment with local investors. There are no restrictions as to the control by foreign entities of the project company either.

Design and construction in greenfield PPP projects

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

Local law does not mandate any particular form of contract for design and construction activities. There are no restrictions as to the governing law either. However, in practice, the administration will not be party to agreements governed by foreign law.

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

Local law does not impose specific provisions for design defects. The liability for design defects is regulated under the implementation contracts. In common practice, the private party is liable for both the design and the construction and it remains so even if it subcontracts these works to third parties. Under the Turkish Code of Obligations, the prescription for liability in construction works is five years from delivery of the construction. Such term is determined as 20 years for contractors' gross fault.

- 20 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?**

The parties may establish specific warranties and special warranty durations within the implementation contract. Where the implementation

contract is silent, the provisions of the Code of Obligations mentioned above are applied.

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

Provisions envisaging liquidated damages or penalty clauses are enforceable under Turkish law. However, although the determination of a penalty provision is under the freedom of contract principle, Turkish courts may decide on a reduction in the penalty amount if they determine it is excessive.

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

The PPP legislation does not impose specific restrictions on limitations of liability or consequential damages. These are governed by the general provisions of the Code of Obligations. Accordingly, contractual clauses stating that the contractor will not be liable for damages caused by its gross fault are void. Other restrictions can be decided by the parties.

23 May a contractor suspend performance for non-payment?

Suspension of works for non-payment is not foreseen under PPP legislation. However, it is common that non-payment by the procurement authority is regulated as an event of default that gives the private party the right to suspend performance or terminate the agreement, or both. Suspension of performance until the payment is made is also regulated under the Code of Obligations. Accordingly, in the contracts where both parties are under obligation towards each other, a party may suspend its performance until the counterparty performs its own obligation. This mechanism is usually used for subcontracts and lenders generally do not accept 'pay if paid' or 'paid when paid' clauses.

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

No, local law does not restrict such clauses. We have seen many examples of contracts that provide that the payments to be made to a third party will be made in line with the payments to be made by the procuring authority to the private party. However, this kind of payment structure is generally used for subcontracts and lenders generally do not accept 'pay if paid' or 'paid when paid' clauses.

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

Yes, the equivalent project relief mechanism is enforceable under Turkish law.

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

As a general principle, the legislation allows variations for PPP projects owing to changing economic conditions and needs of public service. However, the variations must be agreed by both parties. The variation amount is generally limited with a cap under the legislation or the project agreements. In most of the recent PPP projects, variations in the construction works are limited to 20 per cent of the total investment amount during the construction period and variations in the services are limited to 10 per cent of the service payments during the operation period.

27 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 allows parties to have a PPP agreement rebalanced if it becomes unduly burdensome owing to unforeseen events. For example, in case of occurrence of a force majeure event, the parties can revise the contract terms in a way to make its performance possible despite the consequences of the force majeure event. Another example applied recently for PPP agreements, is the possibility of revising the terms in case of a change in legislation having a direct effect on the PPP agreement. Accordingly, the payment amounts and conditions can be amended and the change in legislation can be treated as a variation.

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

The right of creditors to apply statutory liens is recognised by the Turkish Civil Code. The conditions to apply a statutory lien can be summarised as follows:

- the creditor holds the moveable property subject to a statutory lien with the consent of the debtor;
- the moveable property subject to a statutory lien is in connection with the subject of debt;
- the debtor is the owner of the property subject to a statutory lien; and
- the debt in question is due.

Accordingly, if these conditions are met, statutory lien laws are also applicable to construction works performed in connection with a PPP agreement.

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

PPP agreements must indicate the quality standards for the design and for the materials to be used in construction. They shall also provide for security and environment protection issues.

Operation and maintenance

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

Private parties' obligations during the operating period are required to be defined in detail in the PPP agreements. In practice, these obligations form the longest part of the PPP agreement because the procurement authorities tend to regulate them in detail to ensure the good provision and continuity of public service. In addition, during the tender process, the procurement authority requires the participants to comply with several criteria that aim to evaluate the sufficiency of the participants to provide the operation and maintenance services for the project. The winning bidder shall continue to comply with these criteria throughout the agreement term.

31 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?

In accordance with the PPP agreements, the private party is liable to the procuring authority for the damages arisen from the private party's failure to operate and maintain the facility as agreed under the relevant agreement. Provisions regarding the calculation of damages can be changed depending on the project. In addition to the payment of damages, deductions can be made from payments to be made to the private party. Deductions are usually subject to a cap in order to provide a guaranteed cash flow for the continuity of the project. In most of the recent healthcare PPP agreements, deductions to be made from the availability payments are limited to 10 per cent of the relevant availability payment and deductions to be made from the service payments are limited to 20 per cent of the relevant service payment.

32 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?

Both the legislation and the relevant PPP agreements envisage that the private party must leave the facilities in an operative and good state. Some of the PPP agreements foresee periodic renewal of some of the equipment that is essential for the operation of the facility. For example, in healthcare PPP projects, the life cycle of each item of medical equipment and furniture is determined in the PPP agreement and a market testing procedure is applied for the re-purchasing of these materials by the end of their life cycle.

Risk allocation

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

It is the private party who bears the consequences of delays in financial closing. Customarily, a certain date for financial close is foreseen under

the PPP agreement and the procuring authority is entitled to terminate the agreement if the financial close is not reached by the contemplated date.

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

Customarily, the procuring authority is under the duty to assist the private party during the acquisition of the permits. In case the permits are not obtained owing to the default of the procuring authority, the damages of the private party are compensated by the procuring authority. However, if the necessary permits cannot be received owing to the fault of the private party, it can result in termination of the relevant agreement.

35 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?

Although force majeure events are defined under the PPP legislation, the general tendency is to define them in the project agreements. Definitions under both the legislation and the project agreements are generally non-exhaustive and cover events that occur because of a natural cause or human act or omission that cannot be foreseen at the time of the signing of the agreement and are beyond the control of the parties. As a result of the occurrence of a force majeure event, the construction and operation terms may be extended to remedy the damages of the project companies, or if it is decided by the parties that the extension will not remedy the damages and it is impossible to continue to implement the project agreement, the project agreement may be terminated. In case of a termination, damages of the project company, including the sponsors' equity and debts to the lenders, are usually payable by the relevant public authority. It can be concluded that the risk of force majeure is borne by the procuring authority.

When it comes to geotechnical and weather risks, these are not regulated under PPP legislation and the PPP agreements may provide for different provisions. In common practice, the private party is responsible for conducting a geotechnical survey on the land subject to construction and to perform the construction works accordingly. For events that can not be objectively determined despite the geotechnical survey or that existed before the handover of the land by the procuring authority to the private party, the geotechnical risks are borne by the procuring authority. The same principle applies for the contamination of the land.

Weather risks are usually not regulated in PPP agreements. However, if a weather risk causes a natural disaster, then it can be accepted as a force majeure event.

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

The risk for acts of third parties is generally governed by the 'strict liability' provisions of the Code of Obligations. Accordingly, even if the employer is not at fault with respect to the damages caused by its employees, it is liable for such damages. For instance, it is commonly regulated under healthcare PPP agreements that each of the private party and the procurement authority are liable for the damages caused by their employees and subcontractors.

In general, this kind of liability is limited to the direct losses suffered by the counterparty and is reduced in the existence of concurrent fault.

37 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?

The risks regarding expropriation, change in law and adverse court decisions are generally undertaken by the procurement authority. Upon the occurrence of any such event, payments to be made to the private party may be adjusted or the term of the agreement may be extended to remedy the negative effects of such events. If the implementation of the project agreement becomes impossible, the parties may terminate the project agreement and in such a case, similarly to the termination

for force majeure event, damages of the project company, including the equity and debts to the lenders, are paid by the procurement authority. On the other hand, the risks related to the long-term operation of the PPP projects, which includes macroeconomic risks, are generally undertaken by the private sector. In cases of discriminatory change in law, the private party is entitled to ask for rearrangement of the payments if this change imposes any economic burden on the private party.

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

The most common examples entitling the private party to a time extension are force majeure events, variations, discriminatory changes in law, any change in law that requires the private party to carry out works that were not initially required and administration events of default.

39 What events entitle the private party to additional compensation?

Additional compensation may be regulated differently in each type of PPP agreement. Under healthcare PPP agreements, the procuring entity shall compensate the private party for any losses suffered owing to:

- any final court decision regarding the death or injury of any employee of the procurement authority;
- any final court decision regarding the death or personal injury of third parties during the provision of medical services; and
- any damages caused to the health facilities or to third-party assets owing to the act or negligence of the employees of the procurement authority.

On the other hand, compensation on termination is regulated separately under healthcare PPP agreements.

40 How is compensation calculated and paid?

The calculation and payment of compensation is determined on a case-by-case basis, in each PPP agreement. As a general principle, compensation is calculated in a way to compensate the actual damages and shall be paid as soon as possible. Documents required for the calculation of compensation and time periods for its payment are also regulated under each healthcare PPP agreement.

41 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?

Insurance requirements are regulated in the PPP agreement for each project. The private party is responsible for the establishment and maintenance of the relevant insurance. When a risk becomes uninsurable, the procuring authority bears such risk. 'Uninsurable risk' is usually defined as a risk for which there is no insurance available in the market or for which the insurance that is available is not affordable on commercially reasonable terms.

Default and termination

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

As a general rule, the private party shall remedy the direct losses suffered by the procuring authority. In some PPP agreements, if the facility becomes inoperative owing to the default of the private entity, the private entity shall compensate all kinds of damages suffered by the procuring authority.

43 On what grounds may the PPP agreement be terminated?

The main grounds for termination of a PPP agreement are as follows:

- continuing default of a party;
- bankruptcy, insolvency or other similar situations that the private entity falls into;
- the occurrence of a force majeure event preventing the implementation of the agreement for a long term; and
- long-term suspension of the works.

44 Is there a possibility of termination for convenience?

Termination for convenience is regulated in a different manner in each PPP agreement. A special example of termination for convenience is the termination of the agreement by the procuring authority upon the declaration of the private party that it is not capable of fulfilling its obligations under the PPP agreement. This type of termination is applicable only for the period between the signing of the PPP agreement and the initiation of investment activities.

45 If the PPP agreement is terminated, is compensation available?

The termination compensation to be paid in case of termination of PPP project agreements usually consists of the equity of the project company and the costs of financing (loan payments, interest, etc). In recent PPP projects, there is a tendency to include the loss of profit in the termination compensation, only if the termination is not caused by a default of the project company. In some PPP agreements, the termination compensation is payable directly to the lenders. In the event of termination for convenience by the procuring authority upon the declaration of incapacity of performance by the private party prior to the commencement of investment, the letter of guarantee provided by the private entity will be forfeited.

Financing**46 Does the government provide debt financing or guarantees for PPP projects? On what terms? Which agencies are responsible?**

Guarantees can be provided for PPP projects by the following:

- a payment guarantee mechanism provided under the project agreement (eg, in healthcare PPP projects, a guarantee of a certain rate of annual occupancy for volume services is provided);
- a debt assumption agreement (whereby the public authority undertakes to assume the debt to lenders upon termination of the project agreement); and
- a Treasury guarantee depending on the type of the project.

In practice, public authorities usually tend to use one or more of these mechanisms to attract foreign investors and lenders.

47 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?

In most of the recent PPPs, the lenders signed a direct agreement to have direct interface with the procuring authority. Direct agreements mainly regulate the lenders' step-in and substitution rights, the process that the relevant public authority is obliged to pursue when it has the right to terminate the project agreement and the right of lenders to receive the termination compensation directly.

48 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?

The lenders' step-in right is a concept that is clearly regulated under the legislation for certain PPP projects. In practice, most PPP project agreements (or direct agreements signed between the public authority, the project company and the lenders) provide step-in and substitution rights of the lenders. The step-in right permits the lenders to take control of the management of the project by taking measures such as changing the members of the board of directors of the project company. In case such measures are not sufficient to rectify the situation, the substitution mechanism, consisting of the transfer of the project agreement or the shares of the project company to another investor, may also be initiated. Public authorities may also have step-in rights in cases where the project company violates the laws and regulations to a degree that will result in non-performance of the public services. The step-in right of the public authorities mainly consists of the assumption of the project company's duties and is generally conducted in coordination with the lenders. In addition to the step-in rights, it is also common that the lenders are entitled to request that the procuring authority make the payments directly to the lenders in case of default of the private party.

In accordance with most recent healthcare PPP agreements, in case of a termination, the private party cannot use its termination

Update and trends

The build-lease-transfer method appears to be a rising trend since the revision of Law No. 3359 on healthcare services. This method is also expected to be applied in other sectors, such as education and waste management. Privatisation by transfer of operation rights remains a commonly used method, especially in the electricity generation sector.

For the financing of projects, traditional methods are being used, but with an increase in the variety of financing tools adopted (eg, bond-based project financing has recently been applied).

compensation paid by the procuring authority until all the obligations towards the lenders are satisfied. Generally, the PPP agreements also explicitly state that the procuring authority consent to the establishment of security interests on the assets of the private party and revenues to be earned by the private party under the PPP agreements in favour of the lenders. For this purpose, in practice, all available securities are established in favour of the lenders.

49 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?

Lenders are usually not afforded cure rights beyond those available to the project company. However, there are other provisions that provide them extra protection. One of these provisions is that the procurement authority shall notify the lenders before termination of the PPP agreement owing to the private party's default. This mechanism is established to give the lenders the opportunity to exercise their step-in or substitution rights. Another advantage that the lenders have under direct agreements is that the direct agreements are usually subject to international arbitration, even if arbitration or international arbitration is not provided for under the PPP agreement.

50 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?

In general, the gains arising from the refinancing of PPP projects are required to be shared with the procuring authority. For example, in healthcare PPP projects, the legislation provides that the gains arising from a refinancing or debt restructuring, or both, shall be equally shared between the private entity and the procuring authority through the adjustment of the availability payments.

Governing law and dispute resolution**51 What key project agreements must be governed by local law?**

The legislation does not prohibit PPP agreements from being governed by foreign law. However, as a matter of state policy, the procurement authorities do not accept and sign up to agreements governed by foreign law. Therefore, in practice, PPP agreements are always governed by local law.

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

The only immunity that the procurement authority enjoys in PPP transactions is that Turkey's assets cannot be seized. This immunity is limited to assets that are specifically allocated to the performance of public services. In addition, since the implementation of Turkish law is limited to within the borders of Turkey, this immunity is not applicable to Turkey's assets in foreign countries.

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

Under Turkish law, the parties are free to select arbitration as a dispute settlement mechanism. In practice, most of the PPP project agreements and direct agreements provide for international arbitration.

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

Mediation or other preliminary dispute resolution procedures are not compulsory for seeking arbitration or other binding resolution. However, in practice, PPP agreements may provide additional procedures such as an expert procedure applicable as a condition to seeking arbitration.

55 Is there a special mechanism to deal with technical disputes?

As mentioned above, an expert procedure can be envisaged for disputes; however, there is no compulsory special mechanism to deal with technical disputes.

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