

PUBLIC PRIVATE PARTNERSHIPS

Mexico



Public Private Partnerships

Consulting editors

Fernando J. Rodriguez Marin, Nicolai J. Sarad

Bracewell LLP

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

Generated 13 September 2022

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2022 Law Business Research

Table of contents

GENERAL PPP FRAMEWORK

- Overview
- Covered categories
- Legislative framework
- Relevant authority
- Procurement
- Remuneration
- Sharing revenue and usage risk
- Government payment obligations
- Rate of return caps
- Restriction of ownership transfer

PROCUREMENT PROCESS

- Relevant procedure
- Consideration of deviating proposals
- Unsolicited proposals
- Government stipend
- Financing commitments
- Legal opinion
- Restrictions on foreign entities

DESIGN AND CONSTRUCTION IN GREENFIELD PPP PROJECTS

- Form of contract
- Design defect liability
- Warranties
- Damages for delay
- Indirect or consequential damages
- Non-payment
- Applicable clauses
- Expansion of scope of work
- Rebalancing agreements
- Lien laws
- Other relevant provisions

OPERATION AND MAINTENANCE

Performance obligations

Failure to maintain

Refurbishment of vacated facilities

RISK ALLOCATION

Delay

Force majeure

Third-party risk

Political, legal and macroeconomic risks

Mitigating events

Compensation

Insurance

DEFAULT AND TERMINATION

Remedies

Termination

FINANCING

Government financing

Privity of contract

Step-in rights

Cure rights

Refinancing

GOVERNING LAW AND DISPUTE RESOLUTION

Local law governance

Government immunity

Availability of arbitration

Alternative dispute resolution

Special mechanisms

UPDATE AND TRENDS

Key developments of the past year

Contributors

Mexico



Alejandro de la Borbolla
aborbolla@galicia.com.mx
Galicia Abogados SC



Misael Román
mroman@galicia.com.mx
Galicia Abogados SC



Luciano Jiménez
ljimenez@galicia.com.mx
Galicia Abogados SC

Galicia

GENERAL PPP FRAMEWORK

Overview

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

The Federal Public Private Partnerships Act (PPP Act) sets forth the general definition for PPP. In this regard, PPPs are long-term contractual relationships (ie, with tenure greater than three years) between entities from the private and public sectors to render services to the public sector or to final users, in which infrastructure that is totally or partially provided by the private sector is used for purposes of improving Mexico's social welfare and investment levels.

Depending on the type of investment, PPP projects may be (1) pure projects, where all the amounts come from federal budgetary funds; (2) combined projects, where certain funds come from the public sector and others come from a different source; or (3) self-financed projects, where the funds for its development and execution come from the private sector, from revenues generated by the project itself or from non-cash contributions.

Depending on the type of transaction, PPP laws do not restrict PPP projects to certain types of transactions. Therefore, transactions such as design-build-finance-maintain (DBFM), design-build-finance-operate-maintain (DBFOM), design-build-operate (DBO), build-operate-transfer (BOT) or operation and maintenance (O&M) are permitted; however, the social benefits and the benefits in comparison with other financing schemes must be previously justified to carry out any type of project structured as a PPP transaction.

Law stated - 29 July 2022

Covered categories

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

Any category of public infrastructure may be subject to PPP transactions to the extent that the laws governing the activities related to each category of public infrastructure provide that the private sector may participate in such activities.

Law stated - 29 July 2022

Legislative framework

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

The PPP Act is the main law that governs PPP projects procured by the federal government. Each state of Mexico has its own PPP law. Furthermore, the Regulation for the PPP Act (PPP Regulation) provides a deeper level of detail as to the requirements and the proceedings set out in the PPP Act and, likewise, each state of Mexico has its own regulation for their PPP laws.

Mexico has a federal law providing for public construction works and services related to such works as well as a federal law that governs public acquisitions, leasing and services procured by the federal government. Just like the PPP Act, each state also has a local equivalent of these laws for procurements made by state and municipal contracting authorities and each of these laws has its own regulation.

There are also relevant regulations for federal PPP projects comprised in the Guidelines that establish the provisions to determine the convenience of carrying out a project through a public-private partnership (Guidelines).

Finally, several federal laws and regulations govern the financial discipline of states and municipalities, which set out the general criteria that such states and municipalities must comply with for sustainable management of their public finances. Public entities aiming to procure pure or combined PPP projects must comply with these laws and regulations.

Law stated - 29 July 2022

Relevant authority

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

There is not a centralised PPP authority; however, there are several governmental agencies and institutions involved in the infrastructure sector in Mexico at the federal level. Depending on the nature of the project and its financing, some public entities will have a deeper involvement. In this regard, we consider the following to be the most representative:

Federal public entities

- Ministry of Infrastructure, Communications and Transport (SICT).
- Federal Roads and Bridges of Revenue and Related Services (CAPUFE).
- Ministry of the Navy (SEMAR).

Public trusts

- National Infrastructure Fund (FONADIN).
- National Tourism Development Fund (FONATUR).

State-owned banks

- National Financial Institution (NAFIN).
- National Bank for Public Works and Services (BANOBRAS).

Law stated - 29 July 2022

Procurement

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

PPPs are procured at all levels of government (ie, federal, state and municipal). Each state of Mexico has its own PPP law. Therefore, PPP projects in Mexico may be governed either by the PPP Act or by any state PPP law. PPP state laws vary from state to state so projects governed by state laws should be analysed individually.

In accordance with the PPP Act, such law will apply when PPP projects are carried out (among other assumptions) by entities of the federal public administration or by state or municipal entities with federal funds or resources (where said funds or resources are greater than those contributed by a state or municipal entity).

On the other hand, the laws of the state or municipal entities will apply when their contributions are greater than the

federal contributions or when there are only contributions from such state or municipal entities. In that sense, there are state and federal laws that regulate PPP projects, and their applicability will depend on the nature of the public entities involved as well as the source of the funds.

Law stated - 29 July 2022

Remuneration

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

There are no specific rules that govern the structure of the private party's remuneration in a PPP transaction. The private party's remuneration structure and amount mostly depend on the feasibility analysis performed by the contracting authority; the purpose of the facility; budgetary availability from the contracting authority; forecasted demand; and other variables of the financial model agreed upon by the private party and the contracting authority.

Law stated - 29 July 2022

Sharing revenue and usage risk

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

The PPP law does not provide a specific scheme for revenue distribution and demand risk. However, an availability payment is applicable related to specific key performance indicators and the government party and the developer share any surplus income generated by the project.

Law stated - 29 July 2022

Government payment obligations

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

Yes. The House of Representatives at the federal level or the relevant legislative bodies of the states are entitled to approve the multi-annual project amount prior to the execution of such contracts, regardless of if such remuneration will be paid through availability or other periodic payments. Additionally, the annual public budget shall include the remunerations owing by contracting authorities under PPP agreements.

Law stated - 29 July 2022

Rate of return caps

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

No. The PPP Act does not set out caps on the rate of return that may be earned by the private party in a PPP transaction; however, contracting authorities may establish such caps in the rules governing a bidding procedure for the award of a PPP agreement.

Restriction of ownership transfer

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

Yes. Prior authorisation from the granting authority is required for any transfer of equity interest on the project company.

In addition to the legal restriction, PPP contracts usually include a restriction period (commonly three years) during which transfer of the equity interest on the project company cannot be carried out.

Contracting authorities may grant their authorisation to carry out such a transfer of ownership interests if the transfer does not jeopardise the project and, if the transfer would result in a change of control of the project company, the acquiring party has to prove that it has the financial and technical capabilities to carry on with the project in accordance with the terms and performance indicators set out in the PPP agreement and the other project documents.

Law stated - 29 July 2022

PROCUREMENT PROCESS**Relevant procedure**

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

In most cases, PPP projects are awarded through public bidding procedures, but if the following criteria are met, PPP projects may be procured through an invitation to at least three persons or through direct award when, among others:

- there are not sufficient options for the development of infrastructure or equipment, or only one possible offer exists, or it deals with a person who holds the exclusive ownership of patents, copyrights, or other exclusive rights;
- it is performed exclusively for military purposes or for the army, or its contracting through a bidding procedure would put national security or public safety at risk, in terms of the laws on that subject;
- quantifiable and verifiable circumstances exist that could cause losses or additional important costs; and
- the entity can prove the existence of a strategic alliance with private entities engaged in engineering, research and development and transfer of technology, for purposes of implementing such technological innovations in the national infrastructure.

If the contracting authority and the relevant authorities in charge of authorising PPP projects determine that it is feasible to carry on the project under a PPP scheme, the contracting authority will convene the procurement process for the award of the PPP project and, after receiving the proposals, the contracting authority shall evaluate each one in accordance with any of the following criteria set out in the PPP Act and the PPP Regulation:

- by points and percentages;
- cost-benefit; and
- any other that the contracting authority may provide in the procurement documents, which must be clear, quantifiable and allow for an objective and impartial comparison of the proposals.

Law stated - 29 July 2022

Consideration of deviating proposals

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

The government may consider proposals that deviate from the scope or technical characteristics included in the procurement documentation if such deviations do not relate to essential legal, technical or economic requirements for the solvency of the PPP project in terms of such procurement documentation.

Law stated - 29 July 2022

Unsolicited proposals

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

The PPP Act regulates the submission of unsolicited proposals, by which any interested party is allowed to propose to the contracting authority the development of a new project, without excluding said developer from the possibility of participating in the respective tender if the contracting authority does come to summon.

The interested party shall submit a preliminary feasibility study to the contracting authority for its evaluation, including: (1) a description of the project; (2) a description of the authorisations required for its implementation; (3) an analysis of its legal, economic and financial viability; (4) an estimate of the required investment, whether private or public; (5) the main characteristics of the respective PPP agreement; and (6) analysis on the social profitability and convenience of the PPP model for the project. The contracting authority will have a term of three months, extendable for another three, to issue its opinion on the feasibility of the project and its origin.

Direct awards will not be applicable for unsolicited proposals.

Law stated - 29 July 2022

Government stipend

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

In the event of cancelation of the bidding procedure or if the government party declines to sign the PPP agreement after the award, the government party may reimburse the following non-recoverable expenses incurred by the proponents: (1) the cost of acquiring the procurement documents of the procedure; (2) the cost of the guarantees requested in order to participate in the bidding procedure; and (3) the cost of preparing and integrating the proposals.

Law stated - 29 July 2022

Financing commitments

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

Yes. Under the PPP Act, risks related with the financing of the project are borne by the private party; thus, such party shall procure sufficient financing and contribute venture capital for the project. The financing/venture capital ratio shall be proposed by the private party in the economical section of its proposal.

Law stated - 29 July 2022

Legal opinion

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

The validity and enforceability analysis of the PPP agreement may be a part of the feasibility analysis that governmental authorities shall perform to convene, award and enter into a PPP agreement.

It is not a customary practice for governmental authorities to ask their counsel for a legal opinion regarding the validity and enforceability of the PPP agreement as a separate document from the feasibility analysis; however, the contracting authority may retain third parties to perform said analysis.

Law stated - 29 July 2022

Restrictions on foreign entities

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

There are no restrictions to foreign entities participating in PPP projects or exercising control over the project company; however, contracting authorities must prioritise the award of PPP projects to proponents that, when equal in all other aspects, envisage the use of Mexican human resources, goods or services in their proposals, subject to the provisions of international treaties and the requirements set out in the Foreign Investments Act.

Law stated - 29 July 2022

DESIGN AND CONSTRUCTION IN GREENFIELD PPP PROJECTS

Form of contract

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

Neither the PPP Act nor state PPP laws nor any other Mexican laws provide a particular form of contract to govern design and construction activities.

Contracting authorities may include a pre-approved template of the PPP contract in the procurement documentation. Mexican law is the governing law applicable to the PPP contract.

Law stated - 29 July 2022

Design defect liability

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

No. Mexican PPP laws or other laws governing construction activities do not impose liability for design defects. The

parties must agree on the allocation of such liability on a case-by-case basis.

Law stated - 29 July 2022

Warranties

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

Mexican PPP laws do not require the inclusion of specific warranties nor set out implied warranties where the relevant contract is silent. Normally, such warranties are included in PPP contracts on a case-by-case basis.

Law stated - 29 July 2022

Damages for delay

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

Yes. If the government party caused the delay, the private party may enforce its right to request an extension of the PPP agreement or compensation. On the other hand, if the private party caused the delay, the government party may rescind the PPP agreement without bearing any liability and impose penalties on the private party, subject to the specific terms and conditions set out in the PPP agreement.

Enforcement of penalty clauses in Mexico is limited to the claim and collection of an amount no greater than the amount of the defaulted obligation and these cannot be claimed simultaneously with other penalties such as default interest.

Law stated - 29 July 2022

Indirect or consequential damages

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

Neither the PPP Act nor the state's PPP laws or their regulations impose restrictions on the contractor's ability to limit or disclaim liability for indirect or consequential damages. Normally, such provisions are included in PPP contracts on a case-by-case basis. However, under Mexican general law, the parties to an agreement are not allowed to claim both liquidated damages and damages, as it is deemed that liquidated damages are the pre-determined and agreed damages parties could incur as a breach of their obligations.

Law stated - 29 July 2022

Non-payment

May a contractor suspend performance for non-payment?

Yes. Although PPP laws provide applicable rules for early termination of the PPP contract based on breaches by the contractor. It is common practice to include early termination events attributable to the granting authority – one of them being a payment default, triggering early termination payments.

Law stated - 29 July 2022

Applicable clauses

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

Local law does not restrict 'pay if paid' or 'paid when paid' clauses and it is not a common practice to include such clauses in PPP agreements or agreements entered into and between the private party and subcontractors.

Law stated - 29 July 2022

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

There are no restrictions in local law for the enforcement of 'equivalent project relief' clauses. The private party may share its benefits under the PPP agreement with subcontractors, but the inclusions of these clauses are analysed and agreed upon on a case-by-case basis.

Law stated - 29 July 2022

Expansion of scope of work

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

No. The government party and the private party must negotiate and agree any expansions to the scope of the project. However, for the government party to agree on the expansion of the scope of the project, it shall follow and obtain several authorisations and comply with certain requirements that shall be analysed on a case-by-case basis.

Law stated - 29 July 2022

Rebalancing agreements

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

Under the PPP Act, there are no specific provisions to rebalancing based on unforeseen circumstances. However, Mexican general law entitles the parties to a contract to request a court for a rebalancing of the consideration agreed on when any circumstance unforeseeable at the moment of execution actually occurs. Based on such a general principle, granting authorities may negotiate increases in the payment under the PPP contracts or extensions to the term thereunder with the purpose of rebalancing the transaction.

Law stated - 29 July 2022

Lien laws

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

Local law does not provide statutory liens applicable to construction works performed in connection with a PPP agreement.

Other relevant provisions

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

PPP agreements must also address the following provisions related to design and construction:

- terms and conditions for the preparation of the executive project, if any;
- compliance with environmental laws;
- allocation of construction and technical risks between the parties and allocation of liability in case the construction comes to a halt, suffers material losses, or becomes impossible to complete because of an event of force majeure or act of god;
- characteristics, specifications, technical standards, key performance indicators and targeted quality of the construction works;
- additional installations for the infrastructure works. Such additional installations must be convenient for final users, compatible with the main infrastructure, and suitable for differentiated usage therefrom;
- list of the project assets including real estate, goods and rights, as well as their destination after the termination of the PPP agreement which in any case shall entail: (1) the transfer of essential assets for the operation of the facility to the contracting party; (2) the contracting party's right of first refusal for the acquisition of non-essential assets; and (3) the terms for reimbursement of verified investments made by the private party to acquire such assets;
- term and delivery schedule for the performance of the construction works;
- supervision of the construction works;
- step-in rights of the contracting authority, who may enforce them if the developer breaches the terms of the agreement and in consequence jeopardises the development of the construction works; and
- government permits required for the construction works.

Law stated - 29 July 2022

OPERATION AND MAINTENANCE**Performance obligations**

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

The contracting authority determines and includes the obligations of the private parties for the operating period in the procurement documents, including key performance indicators. These provisions are also set forth in the PPP agreement (often in greater detail).

Law stated - 29 July 2022

Failure to maintain

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

Both the payment of liquidated damages and deductions from availability payments in case the private party fails to

operate and maintain the facility as agreed are possible and customary practices in Mexican PPP agreements. The regime for liquidated damages or deductions for underperformance is determined case by case. Damages are calculated based on direct and effective losses as well as the loss of future earnings.

Law stated - 29 July 2022

Refurbishment of vacated facilities

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

The customary requirement is handing back the facility to the government in the optimal state for the takeover of the facility operation by the contracting authority or the third parties to whom the authority entrusts such operation by entering into a new agreement. It is customary to include such type of provisions in PPP agreements.

Law stated - 29 July 2022

RISK ALLOCATION

Delay

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

The general rule provided in the PPP Act and customary practice is that the private party bears all the risk and will be solely held liable for delays in the commercial or financial closing.

Law stated - 29 July 2022

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

The permits that each party to the PPP agreement must procure to carry out the project are determined on a case-by-case basis depending on the nature of the project; therefore, the risk of delay in obtaining such permits is customarily allocated based on whether the delayed obligation to obtain such permit was attributed in the PPP agreement to the government or the private party.

Law stated - 29 July 2022

Force majeure

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

Force majeure and geotechnical, environmental, and weather risks are customarily borne by the contracting authority to the extent that the private party can demonstrate that the cause of halt or suspension of the construction works or services was indeed the result of an event of force majeure (including acts of the government) or an act of god that the private party could not foresee and it is totally beyond its control.

Third-party risk

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

The risk for acts of third parties, from whom the private party relies on their cooperation for the fulfilment of its obligations under the PPP agreement, is generally borne by the private party. Although in some cases, PPP agreements mandate that the government party ensure cooperation from other government authorities or the holders of rights or assets needed for the execution of the project. It is customary that in certain types of projects, such as the construction and concession of roads, the government entity is responsible for obtaining the corresponding rights-of-way.

Law stated - 29 July 2022

Political, legal and macroeconomic risks

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

Political risk is customarily borne by the private party, but it shall be entitled to request the reimbursement of investments and non-recoverable expenses in the event of expropriation or other unilateral measures for the early termination of the agreement that the government party enforces to assume control of the project assets, to the extent that the enforcement of such measures is not based on a breach by the private party.

Private parties are entitled to request a revision of the PPP agreement in the case of changes to legislation and new taxes or regulations that result in a significant deviation from the original conditions under which the contracting authority awarded the PPP agreement and originate a material negative impact on the economical balance of the project.

The government party may revise the PPP agreement when an economic imbalance arises in the PPP agreement, which implies a higher revenue for the private party than that foreseen in its proposal and in the PPP agreement itself and the private party may request such revision when the economic imbalance arises owing to unforeseen events beyond its control and implies a decrease in revenue for the private party.

Law stated - 29 July 2022

Mitigating events

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

The private party may request extensions if an event of force majeure or other events beyond its control that provide a reasonable cause to extend the terms for the performance of the private party's obligations arise.

On the other hand, the private party may request an extension of the PPP agreement in the event of changes in the material, technological and economic conditions under which the contracting authority awarded the PPP project which results in an economic imbalance of the project.

Law stated - 29 July 2022

What events entitle the private party to additional compensation?

Unforeseen events beyond the private party's control that result in a decrease in revenue or the economic imbalance of the project.

Law stated - 29 July 2022

Compensation

How is compensation calculated and paid?

Compensation is calculated based on the amount of the payment obligation or loss originating from a default of the government party to its obligations under the PPP agreement.

Compensations may be envisaged in PPP agreements on a case-by-case basis to restore the financial balance of the project. The method to calculate this component will remain subject to the parties' negotiation in most cases. The termination payment formulas usually include the equity rate of return when the early termination is attributable to the granting authority.

Law stated - 29 July 2022

Insurance

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

Yes. The PPP Act mandates that private parties acquire all necessary insurance for the project in terms of the procurement documentation and the PPP agreement. Private parties customarily bear the risk of insurance becoming unavailable on commercially reasonable terms.

Law stated - 29 July 2022

DEFAULT AND TERMINATION

Remedies

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

The main remedy available to the government party for breach by the private party is the early termination of the PPP agreement without bearing any liability and to receive payment of any compensations due by the breaching private party under the PPP agreement, which may be collected, among others, by means of withholding availability payments.

Other common remedies include penalty clauses, liquidated damages and administrative fines. However, certain remedies cannot be enforced simultaneously because they would result in a duplication of penalties imposed on the private party, such as penalties and unliquidated damages.

Law stated - 29 July 2022

Termination

On what grounds may the PPP agreement be terminated?

The grounds for the early termination of the PPP agreement are determined on a case-by-case basis depending on the nature of the project; however, the causes for early termination in most PPP agreements are, in general, serious events of default by either party; events outside the parties' control; and termination for convenience.

The PPP Act states that, notwithstanding the other grounds for termination set out in each contract, the following shall be grounds for termination of a PPP contract:

- the cancellation, abandonment or delay in the execution of the work, in the cases foreseen in the contract itself;
- failure to provide the services, their provision in terms other than those agreed, or their unjustified suspension during more than seven consecutive calendar days; and
- the cancellation of permits needed for the project.

In any case, non-compliance will be subject to the provisions of the PPP contract, and any dispute in this regard will be resolved by the federal courts or, when applicable, through an arbitration procedure.

Law stated - 29 July 2022

Is there a possibility of termination for convenience?

Yes. The parties of a PPP agreement may agree to its early termination.

Law stated - 29 July 2022

If the PPP agreement is terminated, is compensation available?

Yes. If the PPP agreement is terminated based on default by the private party or events outside the parties' control, such party may be entitled to compensation such as reimbursement of incurred direct non-recoverable expenses and payments due by the government party at the date of early termination to the private party in terms of the PPP agreement. In these cases, the termination payment formula would not include equity return.

If the PPP agreement is terminated based on default by the government party, the private party will be entitled to receive the compensations described above and the reimbursement of all verified expenses incurred by the private party.

In all cases, the government party will be entitled to receive any amounts from the execution of insurance policies and applicable penalties due by the private party.

The method to calculate and pay compensation in the event of early termination is determined on a case-by-case basis in the procurement documentation and the PPP agreement.

Notwithstanding the above, authorized debt incurred by the project company is protected by the termination payment formulas to ensure the project's bankability.

Law stated - 29 July 2022

FINANCING

Government financing

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

Yes. There are cases in which the government provides debt financing and may agree to a guarantee scheme. Furthermore, the National Bank for Public Works and Services and the National Financial Institution are state-owned banks that have, among others, the purpose of financing infrastructure projects, including those financed as a PPP.

Additionally, the National Infrastructure Fund is a vehicle created by the federal government to boost investment in projects with a positive high social impact and low profitability. Such funds may participate by providing low-cost or long-term financing, as well as grants with no repayment obligation.

Law stated - 29 July 2022

Privity of contract

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

Government parties may enter into direct agreements with lenders on a case-by-case basis. These agreements typically include the lenders' right to receive, directly or through the project trust, certain payments due to the private party under the PPP agreement, such as availability payments for the repayment of the loan.

Direct agreements also grant the lenders a higher level of confidence in the project and the probability of repayment, because such agreements include representations by the government party regarding its acknowledgement of the financing documents and its payment obligations under the PPP agreement that will serve as offtake for the project financing.

Certain government entities are familiar with direct agreements and they customarily enter into such agreements to complete or strengthen the PPP legal and financial structure, whereas other authorities, mainly state and municipal entities, are not familiar with, or prefer to avoid entering into direct agreements.

Law stated - 29 July 2022

Step-in rights

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

Lenders may exercise step-in rights or take over the PPP project and obtain a security interest in the PPP agreement itself if the government party grants its prior authorisation for such takeover or security interest.

The customary mechanism is that the private party contributes all or the majority of its ownership interests in the project company to a security trust in which the lenders are first place beneficiaries, so that in the case of serious breach or default by the private party or project company to the PPP agreement or the loans entered into with the lenders, such lenders may take over the project through the foreclosure of the ownership interest over the project which was contributed to a security trust.

There are limitations on the lenders' step-in rights according to the type of project. For instance, for projects holding

concession titles to provide public services (such as highways), the contractor may not be replaced by the lenders. Therefore, lenders' step-in rights would be exercised by making decisions as shareholders of the project company.

Law stated - 29 July 2022

Cure rights

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

No. Lenders are not provided additional cure periods to those set out in the PPP agreement.

Law stated - 29 July 2022

Refinancing

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

It is common practice to establish in PPP agreements and concessions over public assets that if the private party obtains refinancing under better market conditions than those of the original loan, the private party shall share the benefits with the government party considering the specific conditions of the project and its financing structure. The participation of the government party in such benefits cannot be less than 50 per cent of such benefits.

Law stated - 29 July 2022

GOVERNING LAW AND DISPUTE RESOLUTION

Local law governance

What key project agreements must be governed by local law?

Key project agreements that must be governed by local law, typically comprise: (1) the PPP agreement itself; (2) EPC and O&M agreements (among others depending on the purpose of the project) entered into with subcontractors; (3) project trusts (not necessarily related to financing); and (4) insurance policies.

Law stated - 29 July 2022

Government immunity

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

Contracting authorities are entitled to sovereign immunity. Thus, when a foreign entity participates as a party to a PPP agreement, it will have to waive the protection of its origin country in case any dispute arises under the PPP agreement.

Law stated - 29 July 2022

Availability of arbitration

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

Yes. PPP agreements may include arbitration clauses in some cases although most agreements submit any claim to the jurisdiction of federal courts.

Law stated - 29 July 2022

Alternative dispute resolution

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

Not in particular, but requirements as a condition to seek arbitration or other binding resolution may be determined on a case-by-case basis and set forth in the project agreement.

Law stated - 29 July 2022

Special mechanisms

Is there a special mechanism to deal with technical disputes?

Some project agreements envisage a special mechanism to deal with technical disputes, often named 'revision procedure', but the contracting authority determines the inclusion of these mechanisms or agrees to their inclusion with private parties in the project agreements on a case-by-case basis.

Law stated - 29 July 2022

UPDATE AND TRENDS

Key developments of the past year

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

The president of Mexico and other public officials aligned with his political views, mainly members of his political party Morena, have expressed their disapproval of private sector involvement in the provision of public services and their incursion in governmental matters in general.

This administration of the federal government maintains negotiations with private business groups, in particular with the Business Coordinating Council, an organisation that, among others, promotes and has been negotiating with the federal government the procurement of important infrastructure projects for the country's economic development, as well as the involvement of the private sector in such projects.

So far, the federal government has announced two infrastructure packages because of the Business Coordinating Council's efforts. Furthermore, the Mexican president recently stated that the third package is well underway but his administration is holding up the announcement until they collect certain data to ascertain the country's economic situation and therefrom analyse if the third package should be modified in accordance.

Regardless of the federal government's stance, there are many states and municipalities in Mexico governed by administrations from different political parties, which are more sympathetic to the involvement of the private sector in critical infrastructure projects and the award of PPP agreements to private entities.

Law stated - 29 July 2022

Jurisdictions

	Ghana	AB & David Law Affiliates
	India	Clarus Law Associates
	Japan	Mori Hamada & Matsumoto
	Mexico	Galicia Abogados SC
	Panama	Ivette Martinez Attorney at Law