

THE PUBLIC-PRIVATE  
PARTNERSHIP  
LAW REVIEW

SIXTH EDITION

**Editors**

André Luiz Freire, Thiago Luís Santos Sombra  
and Raul Dias dos Santos Neto

THE LAWREVIEWS

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PARTNERSHIP  
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# CONTENTS

PREFACE.....	vii
<i>André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto</i>	
Chapter 1	ARGENTINA..... 1
	<i>María Inés Corrá and Magdalena Carbó</i>
Chapter 2	AUSTRALIA..... 10
	<i>Andrew Griffiths, Nicholas Carney and Aggie Goss</i>
Chapter 3	BELGIUM ..... 20
	<i>Christel Van den Eynden, Frank Judo, Jan Vreys, Maurits Arnauw and Klaas Goethals</i>
Chapter 4	BRAZIL..... 35
	<i>André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto</i>
Chapter 5	CHINA..... 48
	<i>Jihong Wang and Hongwei Tang</i>
Chapter 6	FRANCE..... 58
	<i>François-Guilhem Vaissier, Louis-Jérôme Laisney, Olivier Le Bars, Diane Houriez and Sacha Ruffié</i>
Chapter 7	GERMANY..... 78
	<i>Jan Bonhage and Marc Roberts</i>
Chapter 8	JAPAN..... 91
	<i>Kiyomi Kikuchi and Kazuyuki Wakasa</i>
Chapter 9	KOREA ..... 104
	<i>Soongki Yi, Joon Man Shim and James Jin Chung</i>
Chapter 10	KUWAIT..... 112
	<i>Ibrahim Sattout and Akusa Batwala</i>

## Contents

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Chapter 11	LEBANON .....	128
	<i>Hadi Melki</i>	
Chapter 12	MEXICO .....	137
	<i>Alejandro Rojas V and David Malagón L</i>	
Chapter 13	NIGERIA.....	148
	<i>Fred Onuobia and Okechukwu J Okoro</i>	
Chapter 14	PORTUGAL.....	159
	<i>Manuel Protásio and Catarina Coimbra</i>	
Chapter 15	RUSSIA .....	171
	<i>Olga Revzina, Roman Churakov and Lola Shamirzayeva</i>	
Chapter 16	SENEGAL.....	184
	<i>Khaled Abou El Houda</i>	
Chapter 17	SERBIA .....	192
	<i>Jelena Gazivoda</i>	
Chapter 18	SPAIN.....	207
	<i>Manuel Vélez Fraga and Ana María Sabiote Ortiz</i>	
Chapter 19	TAIWAN .....	220
	<i>Pauline Wang and Yung-Ching Huang</i>	
Chapter 20	TANZANIA.....	232
	<i>Nicholas Zervos</i>	
Chapter 21	THAILAND .....	241
	<i>Weerawong Chittmitrapap and Jirapat Thammavaranucpt</i>	
Chapter 22	UNITED KINGDOM .....	252
	<i>Mark Richards, Katherine Calder and Alexander Hadrill</i>	
Chapter 23	UNITED STATES .....	275
	<i>Dolly Mirchandani and Armando Rivera Jacobo</i>	
Chapter 24	VIETNAM.....	285
	<i>Kazuhide Ohya, Vu Le Bang and Nguyen Van Trang</i>	

*Contents*

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Appendix 1	ABOUT THE AUTHORS.....	299
Appendix 2	CONTRIBUTORS' CONTACT DETAILS.....	317

# PREFACE

We are pleased to present the sixth edition of *The Public-Private Partnership Law Review*.

Public-private partnerships (PPPs) are increasingly becoming a solution to a gap in public investment that derives from natural budgetary constraints all over the world. Therefore, combining private and public efforts by means of a long-term contract becomes essential for tackling infrastructure matters that require massive investment for upgrading and expanding services' networks.

PPP contracts are a way of delegating the provision of public services and utilities to the private sector. Such practice induces effectiveness by bringing private sector solutions, technologies and investments, without excluding public sector oversight.

The formation of well-adjusted PPP contracts is no simple task, as they are marked by substantial complexity. In a single contract there are elements revolving around engineering, construction, financing, legal and regulatory aspects that must be addressed for the success of a given PPP.

A comparative study comprising practical aspects and different perspectives and viewpoints on PPP issues serves to spread knowledge of this contractual model around the world in the hope of consolidating a relevant benchmark worldwide. For instance, the United Kingdom is known as one of the pioneers regarding the use of PPPs and has structured projects ranging from telecom, power (electricity and gas), water and waste, and logistics (airports and railways). This experience, as well as the experience of other countries, certainly may serve as useful guidelines for the implementation of PPP projects

Therefore the purpose of this edition is to clarify and explain legal and other practical aspects involved in the formation of PPP contracts for disseminating best practices used by private professionals and governmental entities that rely on PPP projects for the provision of key infrastructure and public services and utilities. A comparative study is always useful for anyone who wants to know more about some phenomenon, and this edition will help those interested in PPPs.

The sixth edition brings chapters regarding PPP practices prepared by distinguished law firms from countries such as Argentina, Australia, Belgium, Brazil, China, France, Germany, Japan, Korea, Kuwait, Lebanon, Mexico, Nigeria, Portugal, Russia, Senegal, Serbia, Spain, Taiwan, Tanzania, Thailand, the United Kingdom, the United States and Vietnam.

We hope you enjoy this sixth edition and that it serves as a definitive and comprehensive guide for topics related to PPPs.

**André Luiz Freire, Thiago Luís Santos Sombra and Raul Dias dos Santos Neto**

Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados

São Paulo

March 2020



# THAILAND

*Weerawong Chittmittrapap and Jirapat Thammavaranucupt<sup>1</sup>*

## I OVERVIEW

Public-private partnerships (PPPs) were formally introduced to the Thai legal framework by the promulgation of the Private Participation in State Undertakings Act BE 2535 (1992) (the PPSU Act). For two decades the PPSU Act served as the foundational piece of legislation administering PPPs in Thailand; however, it lacked clear-cut criteria addressing matters of scope, duration and authority with regard to initiating and implementing PPPs.

To remove such ambiguities, the Private Investments in State Undertakings Act BE 2556 (2013) (the PISU Act) was enacted. The PISU Act explicitly remarks that Thailand is in need of infrastructure constructions and various other forms of public services, an imperative that is echoed in many other state publications addressing state policy stated in the Constitution, development goals and plans.

PPPs are beginning to take a stronghold nationally as the government relies on PPPs as the main mechanism in developing the nation's infrastructure. With such growth in the utilisation of PPPs came the official realisation that the framework laid out by the PISU Act needed to be further developed and improved.

With the need for the development of Thailand's infrastructure, the Public-Private Partnership Act BE 2562 (2019) (the New PPP Act) was enacted to replace the PPSU Act to allow PPPs to be conducted in Thailand in accordance with international standards. Notable objectives include attracting high-quality private participation, both locally and abroad, ensuring better consideration of the partnership aspect in the various facets of PPPs, and creating an infrastructure plan that will specify various details of PPP projects. The New PPP Act was approved by the cabinet in December 2018 and was passed by the National Legislative Assembly (NLA) in March 2019 and became effective from then. PPPs can be observed in two different regimes: under the New PPP Act and under the Eastern Economic Corridor of Thailand (EEC). The EEC project will, initially, be focused in three eastern provinces. On the whole, PPP projects generally fall under the regime of the New PPP Act. However, if the project is established in the EEC area, such project has to comply with the EEC regulations.

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## II THE YEAR IN REVIEW

The New PPP Act is composed in such a way that a series of ancillary laws could ensue after its enactment. These can manifest in the form of a Notification issued by the Public-Private Partnerships Policy Committee (the Committee), a Notification issued by the State Enterprise Policy Office (the Office), or a Ministerial Regulation. When prescribed to applicable areas of the New PPP Act, these notifications and regulations serve to clarify some of the rules governing certain procedures in relation to PPPs. Several projects have been implemented under the New PPP Act since its enactment, such as the Bangkok Mass Transit system (BTS) Green Line Extension, Bang Pa-in – Nakhon Ratchasima Intercity Motorway (M6), and Bang Yai – Kanchanaburi Intercity Motorway (M81).

The above-mentioned improvements to the New PPP Act (and its ancillary laws, which are expected to be enacted in 2020) have been based on principles that reflect international standards and touch upon the following points: the applicability criteria of PPP projects; the business case and the development thereof pursuant to guidelines drafted with the aim of ensuring fair risk sharing that does not overburden the state; full consideration of possible and befitting government support measures; transparent procurement procedures inclusive of negotiation; and opening up the option of authority step-in for cases that may be detrimental to national security. These points have been included on 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. Therefore, the EEC regulations reflect the direction of where the PPP regulations, which will be enacted in the near future, will be heading towards. The ancillary laws of EEC are as follows:

- a* Notification of the EEC Policy Committee regarding Rules, Conditions and Procedures for Private Investments BE 2560 (2017);
- b* Notification of the EEC Office regarding the Structure and Details of the Study and Analysis Report of the Project BE 2560 (2017);
- c* Notification of the EEC Office regarding the Rules and Procedures in Market Sounding BE 2560 (2017);
- d* Notification of the EEC Office regarding Non-bidding BE 2560 (2017);
- e* Notification of the EEC Office regarding the Qualifications of Consultants BE 2560 (2017);
- f* Notification of the EEC Office regarding Invitation for Bids, Procedures for Invitation for Bids, Rules regarding Selection Procedures; and
- g* Details of the Documents in Selection Procedures, and Standards to the PPP Contract BE 2560 (2017).

To assist in the proper implementation of the above notifications governing PPPs in the EEC, the EEC Office is in the process of finalising guidelines that reflect best practice standards.

So far, several EEC projects were implemented using the above-mentioned EEC regulations, in which their PPP agreements have been signed, and the projects are being implemented accordingly. These projects include a high-speed rail linking three airports, connecting Rayong province and Bangkok metropolitan city, and Map Ta Phut Industrial Port Development, Phase III. The US\$7.2 billion high-speed rail link is the biggest PPP concession project in Thailand and the first concession granted on a high-speed train project. Moreover, the third phase of the Map Ta Phut Port Project is valued at US\$1.8 billion and is a mega infrastructure project for the petroleum industry.

The total amount of investment for all of the projects in the EEC area exceeds 1.5 trillion baht. Further, there are other projects in the ECC currently under way, including U-Tapao International Airport, with the projected capacity of 60 million passengers annually; Digital Park Thailand, and Laem Chabang Port, Phase III. The principles of these projects have already 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 2019. The project implementation period for these projects is considerably faster compared 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 draft ancillary laws under the New PPP Act, require the collection and analysis of the private sector's opinion acquired through market-sounding procedures.

### III GENERAL FRAMEWORK

#### **i Public-private partnership applicability criteria**

The PISU Act very loosely defines projects that fall under the PPP purview as the state intends for PPPs to serve as a mechanism to develop infrastructure in Thailand indefinitely. According to the PISU Act, any project that falls under the criteria of being both a state undertaking and a public-private joint investment will be eligible for PPP procurement.

In comparison to the PISU Act, the New PPP Act is projected to clarify the applicability criteria and focus and reserve the use of PPPs for infrastructure projects, such as hospitals, roads, schools and trains, to maximise the use of state assets, and the use of state assets is no longer considered as a PPP. Instead, a project that falls under the PPP regime must fulfil the three main criteria, which are:

- a* being an investment project of the state involving an undertaking in respect of which any particular state agency, or several state agencies, has or have duties and powers to carry out under the law or by-law or has or have duties and powers to carry out in accordance with the objects for its or their establishment;
- b* entering into 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* being related to a infrastructure and public services as specified under the New PPP Act, such as roads, highways, express ways, railways, mass transit, or airports.

The New PPP Act does provide flexibility on the PPP applicability, as other infrastructure or public services may be applicable to the PPP regime, subject to the issuance of notification in the Royal Decree. The infrastructure and public services as specified under the New PPP Act also includes other relevant projects which are necessary for the specified project achievement, as prescribed in the Notification of the Committee with the approval of the Cabinet. Up to date, there has been one notification issued, namely the Notification of the Public-Private Partnership Policy Committee re: Relevant Projects Necessary for the Achievement of the Objectives of Airports or Transport by Air.

Once a project fulfils the criteria above and is considered as a PPP, the three main procedures that are involved include: (1) preparation of the project (e.g., conducting a feasibility study); (2) selection of private party; and (3) supervision and control.

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

PPPs in Thailand may take many forms, because under the PISU Act there is no classification for the types of investment undertakings. The type of PPP project is chosen based on the specific conditions of each project and further defined by the functions under the responsibility of the private entity. The most common types of PPP for infrastructure projects are: (1) design–build–operate–maintain (DBOM) where the private entity is in charge of the development and long-term operation and maintenance of the asset, as well as the arrangement of financing; and (2) operate and maintain (O&M) where the private entity is in charge of the operation and maintenance, as well as the arrangement of financing.

For the transfer of the project's assets, PPP projects in Thailand have used the following contractual structures: (1) build–transfer–operate (BTO), where a contract is signed between an authorised state agency and investors to build an infrastructure facility completely, and then the investors transfer the facilities to the authorised state agency and obtain the right to operate such facility commercially for a fixed term (the type of transfer that is most used is the BTO, as the state prefers that the ownership of the state is transferred to them; after the transfer of ownership, the state will grant the private sector the right to possess and operate the project); and (2) build–operate–transfer (BOT), whereby the investor transfers the facilities at the end of the concession. As such, the investors are able to finance, design, construct and operate a facility stated in the concession contract, and this enables the project proponent to recover its investment, operating and maintenance expenses in the project. Regardless of the type of transfer, the end result will always be a transfer of ownership of asset necessary for the project operation to the state for the state to continue with the operation after the end of the PPP agreement.

Although the type of PPPs are disencumbered, some caution must be made to the type of assets that are being transferred and owned by the private entity as the Constitution prohibits the private ownership of infrastructural public utility services that are essential for 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 budgeting the annual government statement of infrastructure for the PPP project.

According to Section 13 of the New PPP Act, the Committee is composed of the Prime Minister as chairman, the Minister of Finance as vice-chairman, the Permanent Secretary for Finance, Director of the Bureau of the Budget, Secretary-General of the Council of State, Secretary-General of the National Economic and Social Development Council, Secretary-General of the Board of Investment, Attorney-General, President of the Board of Trade of Thailand, President of the Federation of Thai Industries, President of the Thai Bankers' Association and not more than five qualified persons appointed by the Cabinet, as members. The Committee has powers and duties mainly to: (1) give approval in principle to a project involving a private investment and the operation of a project; (2) consider and approve principles of a partnership project; and (3) consider and prescribe rules and procedures for

the preparation of a partnership project that has a value below five billion baht or below the value additionally prescribed by the Ministerial Regulation issue 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 shall have the following powers and duties to:

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

As for the EEC region, there are three main authorities: the Cabinet, EEC Policy Committee, and the EEC Office. For the purpose of comparison with the New PPP Act, the aspects of project proposal, result of private party selection, and the public private partnership contract (the PPP contract) will be considered. For the stage of project proposal, the role of the Cabinet is slightly different from that of the New PPP Act, as it is confined to approving the principles of the PPP project and apportioning the state budget, only if the project requires the use of state budget. Similarly to the New PPP Act, the result of the private party selection and the PPP contract will then be considered by the Office of the Attorney-General. After the consideration of the Office of the Attorney-General, however, unlike the process under the New PPP Act where the result of the private party selection will then be sent to the Cabinet for approval, the result will be sent to the EEC Policy Committee under the EEC scheme. As for the EEC Office, the role is quite similar to that of the Office under the New PPP Act.

#### **iv General requirements for PPP contracts**

In general, PPP contracts must conform to the framework of the 2013 PISU Act and the requirements of the Notification of the Office regarding Standard Contract Terms for Public-Private Partnership Contracts BE 2558 (2015) (the SC Notification). A draft PPP Contract must contain the standard contract terms for investment contracts as prescribed by the SC Notification with the approval of the Committee. Generally, PPP contracts must at least contain the following clauses:

- a* duration, provision of services and the implementation of the project;
- b* rights and duties of each party;
- c* the ownership of the project assets and their valuation;
- d* changes to the nature of the provision of services under the project;
- e* changes to a contracting party, contractor, subcontractor and the assignment of claims;
- f* force majeure;
- g* termination of the contract;
- h* step-in rights and details thereof;
- i* dispute resolution; and
- j* the governing law (Thai law).

The above framework under the PISU Act is still in force today. However, further EEC ancillary laws have been enacted to add from such framework to provide the requirements that did not exist under the PISU Act. There will also be ancillary laws enacted under the New PPP Act, which will be similar to that of EEC. The additional requirements under the EEC ancillary laws are as follows:

- a* background, objective, and scope of project;
- b* definition and interpretation;
- c* hierarchy of documents under the PPP contract;
- d* source of fund and investments;
- e* operation, output specification, and level of service;
- f* transfer of knowledge;
- g* hiring;
- h* returns each party is entitled to, and ways to provide such returns;
- i* mechanism to support project;
- j* rights of project owner in using power for public benefit;
- k* governance and monitoring of project operation;
- l* tax, fees, interests;
- m* warranty, disclosed information, payment for damages;
- n* insurance;
- o* changes in laws; and
- p* security and guarantee.

Notably, the PPP regime under the EEC allows the concept of a direct agreement: an agreement to be entered by and between the private entity, the bank and the procuring government agency to increase the bankability factor. The step-in right specified in such agreements protects the banks, and ultimately the project, with the recourse of a capable private entity 'stepping in' to preserve the continuity of a project under distress induced by the collapse of the former private entity.

Apart from the main requirements listed above, it is prohibited for the PPP contract to contain any provisions allowing a unilateral renewal or extension of the duration of the project under the PPP. 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 the 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 are necessary to be in English, may be prepared in English.

## **IV BIDDING AND AWARD PROCEDURE**

### **i Expressions of interest**

The project-handling agency, which is a state agency who intends to enter into partnership, has the duty of preparing a draft invitation for submission to the selection committee, who is appointed during the stage when the Cabinet has granted approval for the operation of a partnership project, for consideration and approval. A selection committee 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 qualification as specified by the Committee, shall be engaged for the preparation of such draft invitation. The project-handling agency must also conduct a market sounding to hear opinions of private sectors concerned and also take such opinions into consideration in facilitation of the preparation of the documents. After the approval of the draft invitation from the selection committee, the project-handling agency can then announce the invitation to bid accordingly.

**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 consideration and approval. The project-handling agency must also conduct a market sounding and take such opinions into consideration for the preparation of such Request for Proposals (RfP) and a draft PPP contract. In addition, a consultant shall also be engaged to facilitate the preparation of the documents.

The selection of private parties shall be made by way of bidding unless the project falls into the case that: (1) the project-handling agency and the selection committee share the opinion that the selection should not be made by way of bidding during the selection of private parties for the purpose of partnership; or (2) it is apparent that the selection of private parties should not be made by way of bidding at the stage of the project feasibility study. 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 Request for Proposals (RfP) and draft PPP Contract, the project-handling agency and the selection committee shall proceed with the selection of a private party. The Request for Proposals (RfP) will be announced to the public for any interested party to submit the proposal. The selection committee has to evaluate the submitted proposals and negotiate with the winning bidder and reflect such negotiated information onto the draft PPP contract. Then, the project-handling agency shall furnish such draft PPP contract to the Office of the Attorney-General for scrutiny and the Office of the Attorney General shall complete the scrutiny thereof and return the same to the project-handling agency.

The project-handling agency shall submit the result of the selection of a 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 consideration and 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 essential terms and conditions of the PPP contract, the project-handling agency shall 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 paired with PPPs that involve commercial development projects.

Another 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 paired with PPPs that involve social development projects.

### **ii State guarantees**

No separate regulation regarding state guarantees exists 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 the rights and benefits under BOI, the right to take a lease of land or immovable property in the partnership project for a term not exceeding 50 years, or other financial or non-financial support, as to be announced by the Committee. The support will likely be in the same direction as that of EEC, therefore, it is helpful to consider the support under the EEC scheme to see the tendency of support the Committee will grant for PPP projects.

Under the EEC regulations, in addition to the benefits under BOI, benefits or support to be granted is considered using several factors, such as how the project benefits and is in line with the success of the EEC development, or how the project may have an economic and technical feasibilities, but lacks financial feasibility to attract private investors or bankability to procure private financial resources. Examples of the supporting measures provided under the EEC scheme include: (1) subsidies, in which the state provides financial support to decrease the financial risks of the private sector; (2) the granting of rights to use the land of the state (e.g., during the duration of PPP agreement, the state may grant the private sector the right to use the asset of the state for commercial purposes to support the financial feasibility of the project; or (3) non-complete clauses.

### **iii Distribution of risk**

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



#### **iv Adjustment and revision**

When a partnership project has been signed, the minister of the responsible ministry shall appoint a supervisory committee consisting of a representative of the responsible ministry, who is a government official in an agency of the responsible ministry other than the project-handling agency and holds not lower than a primary-level executive position, 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 monitor the partnership project to ensure its operation as specified in the PPP contract, suggest the project-handling agency directions for resolving problems arising from the operation of the partnership project, report operation results, progress, problems to the minister of the responsible ministry and furnish a copy of the report and relevant documents to the Office, and provide opinions on amendment of the PPP contract.

Furthermore, the amendment of the agreement may be considered in two situations as follows:

- a* the amendment would not 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 has to be considered by the responsible ministry; and
- 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 has to be considered by the Cabinet.

#### **v Ownership of underlying assets**

Under the New PPP Act and the EEC framework, there is no provision stipulating clearly which contractual party has ownership of the underlying assets. Nevertheless, the PISU Act notes that a standard PPP contract must contain a clause indicating the transferring 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, ownership of project assets is usually provisioned under the PPP contract to be transferred 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 the aforementioned assets will also be specified. As mentioned above, heed must be paid to private ownership of assets that relate to infrastructural public utility services that are essential for the nation's subsistence and security.

#### **vi Early termination**

Although the consequence for early termination is absent in the PISU Act, it is featured in the EEC framework and the New PPP Act. Under the New PPP Act, the project-handling agency has the power to amend or terminate the PPP contract to maintain the 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 severe impacts on the public or the economy or social affairs of the country. In the case where the cause of such public effect is not attributable to the private contractual party, the project-handling agency shall 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 acts or deeds by the private entity, however, the state is entitled to recover its loss arising out of such breach from the private entity.

## **VI FINANCE**

In Thailand, PPPs are generally financed via capital markets or financial institutions. One option is for the concessionaire to list its company with the Stock Exchange of Thailand and to offer its shares to the general public as a means of raising capital (initial public offering). Second, it could be privately financed by setting up an infrastructure fund and offering its fund units to the general public. To give an example of an infrastructure fund established in the past, the BTS Rail Mass Transit Growth Infrastructure Fund (BTSGIF) was established in 2013 to finance its PPP projects. These options do pose some limitations to PPP transactions in that the concessionaires must receive the prior approval of the grantor to be listed on the stock exchange. In addition, any transfer of concessionary rights must also receive the prior approval of the grantor 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 requirements must contain a step-in clause; in case of critical situations the financial institution, as a creditor of the project, shall have rights to step in and take control of the PPP project granted in favour of the financial institution. Thus, the possibility of the financial institution exercising its step-in rights remains open at all times throughout the venture, which, if petitioned, must receive prior approval from the relevant state authority.

There is no restriction under Thai law for seeking cross-border financing; therefore, so far it has been freely employed. BTSGIF was open for sale indiscriminate of borders.

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 the project coming to successful completion. Step-in and step-out rights are available for banks to opt for, which makes it possible for banks to retain steady inflow of compensation for the repayment of loans throughout the life cycle of the projects. The procedures are outlined in the guideline regarding the PPP Contract. Funders' direct agreement was first implemented in the PPP agreement of the High-Speed Rail Project Linking Three Airports.

## **VII RECENT DECISIONS**

A look at recent court judgments indicates a strict adherence to the rules and regulations governing PPPs and suggests a failure to do so would warrant legal and binding consequences.

An example 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 PPSU Act in relation to the procedure of amendment 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 should be void or voidable or automatically terminated or still valid until it is 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 the 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 innovative PPP mechanism as a prominent instrument in the implementation of projects in Thailand, as evidenced by the amount of PPP projects successfully implemented or currently undergoing bidding and procurement procedures.

As the PPP Strategic Plan under the New Act has not been enacted yet, relevant governmental agencies must operate PPPs to full completion under the PPP Strategic Plan 2017–2021, which was enacted under the PISU Act. The total estimated investment cost of projects included in the Public Private Partnership Strategic Plan is 1.4 trillion baht, and currently there are 55 projects in the PPP project pipeline. The next novel piece of legislation of the New PPP Act will be coupled with a more detailed infrastructure plan, which will send rippling effects through infrastructural developments in Thailand where PPPs will be elected as the mechanism.

Apart from the projects currently under way in the EEC, the government is seeking to introduce and increase the number of available projects pursuant to state policies aimed at increasing the interest of foreign investors.

Currently, PPP plans under the New Act are being prepared by the Office before they are submitted to the Committee for consideration and approval. Such plans are expected to be publicly available in 2020, and shall be in a manner consistent with the national masterplan for the development of infrastructure and for social affairs. Pursuant to the New PPP Act, a partnership project preparation plan shall consist of particulars as to the project in respect of which the state intends to enter into partnership with private parties in accordance with the goals, policies and directions specified in the national masterplan for the development of infrastructure and for social affairs as prepared by the Office of the National Economic and Social Development Council. The masterplan prioritises the urgent need for the preparation of the partnership project, objectives of the project, brief information on the project, the project-handling agency, the total investment amount for the project and the time frame for the preparation and operation of the project.

In light of the robust trend in public sector investment projects and the fact that a number of PPP undertakings are being rolled out along with the enactment of the New PPP Act, it is anticipated that the implementation of PPP projects in Thailand will continue to be in significant demand. Accordingly, the PPP market in Thailand will continue to grow in the coming years.

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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.

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