

THE PUBLIC–PRIVATE  
PARTNERSHIP  
LAW REVIEW

NINTH EDITION

**Editors**

Matthew Job and Tom Marshall

THE LAWREVIEWS

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PARTNERSHIP  
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Matthew Job and Tom Marshall

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# PREFACE

It has been a privilege to contribute to and edit *The Public–Private Partnership Law Review* over the past three years and we are very pleased to present this ninth edition. Doing so has provided an insight into how public–private partnerships (PPPs) are used and perceived around the world and has introduced us to people and opportunities that would otherwise not have arisen for us. Since the publication of the eighth edition a year ago, there have been significant developments in the design and use of PPPs in some parts of the world, while in other parts little has changed. The purpose of this volume is chiefly to report the current state of PPP across a range of jurisdictions around the world.

Twelve months ago the world was finally beginning to look beyond the impact of the covid-19 pandemic and we speculated that PPP might have a role to play in the economic recovery that was then anticipated. In practice, the past year has been dominated by fallout from the war in Ukraine. While the conflict may be geographically limited, the economic consequences have been felt around the world.

Many international businesses have closed down their operations in Russia and most of Europe has been forced to move its supply of natural gas from Russia, resulting in an energy price spike and fears about energy security. Russia's blockade of Ukrainian food exports has resulted in food shortages and higher food prices across the globe. Energy and food prices have triggered global inflation, which many commentators felt was always a latent but inevitable consequence of quantitative easing and covid lockdown support measures. Higher inflation has led to fiscal tightening and higher interest rates, finally calling time on the low (often virtually zero) interest rate environment that has prevailed since the financial crisis in 2008. All in all, the economic background for PPPs could hardly be more different than it was a year ago.

Against that backdrop, PPP continues to be a key procurement tool for both national and local infrastructure projects in a diverse range of countries such as Australia, France, Italy, Pakistan, Saudi Arabia, South Africa, Thailand, the United Arab Emirates and Uzbekistan. PPP legislation has been bolstered in Indonesia and Italy, following on from the new PPP laws that we saw in 2021 in Senegal and Uzbekistan. Indonesia continues to have an ambitious PPP pipeline although progress to implement its national development plan has been slow. Perhaps the most impressive national performance for PPP has been in Uzbekistan – in a year that our contributors describe in Chapter 15 as 'truly pivotal', Uzbekistan has signed 178 PPP projects with a total capital value estimated at US\$4.5 billion.

Meanwhile, PPPs continue to be under examination in a number of jurisdictions, particularly in European countries that have long-established and relatively mature relationships with PPPs (such as the United Kingdom, the Netherlands and Portugal), but also in Latin American countries such as Argentina and Mexico (where some large projects

that were previously slated to be PPPs have been restructured as traditional public works contracts). As ever, the principal case against PPP is the embedding of a private sector cost of capital in place of cheaper sovereign borrowing and the assertion that this makes it an expensive procurement model whatever the benefits in terms of risk transfer and private sector procurement expertise.

Climate change and energy transition has been a global trend for several years, but arguably it has been concerns about energy security as a result of the Ukraine war that have accelerated a push towards new privately financed energy transition projects in Europe, particularly in the United Kingdom and France, which have seen new revenue models and legal structures for new nuclear power, carbon capture and storage and hydrogen projects. PPP projects for renewable energy and grid stability to support renewable energy have also been seen in Australia and South Africa.

So where does this leave the outlook for PPP during 2023 and beyond? Concerns regarding value for money, flexibility and, not least, the validity of the fundamental element of partnership within the PPP model remain. In addition, attention has been given in many places to the most appropriate contractual model for PPPs, and industry consultations have been undertaken as to the extent to which those models remain best suited for the purpose. However, the inclination of many governments to invest in new infrastructure is arguably stronger than at any time in the past 50 years; energy transition alone will require huge infrastructure investment that is largely incremental. The question for those in the industry is how PPP can evolve in order to respond to this opportunity and we are already seeing evidence of this in the United Kingdom in particular.

Furthermore, the advent of inflation and higher interest rates is squeezing growth in many countries, but in particular in Europe. This comes on top of ruinously expensive covid support schemes that have pushed national debt above GDP in many cases and make it less attractive to finance new infrastructure on the national balance sheet. The role that PPP could play in alleviating this remains unclear. In countries such as Germany and, to a lesser extent, the Netherlands and Portugal, there are still concerns as to the suitability of traditional PPP and whether it represents value for money. This has been a particular issue during the past 15 years of very low-cost borrowing for governments and it remains to be seen whether the return of a higher cost of government borrowing will dilute the incremental cost of private sector borrowing in a PPP when compared with sovereign debt.

Meanwhile there is an expectation that infrastructure development will benefit PPP and PPP-like structures in other countries such as Italy, France and the United Kingdom (in those 'consumer pay' sectors where private sector investment in infrastructure is prevalent). In these jurisdictions the prospect of stimulating the economy and delivering new infrastructure, without an immediate cost to the public purse, may be more attractive than ever – especially in sectors where the costs can be routed directly to consumers rather than being a burden on taxpayers and the public finances.

In the United Kingdom we are now seeing the cycle of private finance initiative (PFI) projects from the 1990s turning to hand-back on contract expiry. Although the number of early projects reaching expiry in 2023 will only be in single digits, it rises steadily into double digits over the next two or three years and then continues to rise to a peak of 80 projects scheduled to expire in 2037 alone. Inevitably this begs the question of what will come next and how the government will wish to handle facilities management and refurbishments on a fleet of ageing projects as the existing arrangements come to an end.

Perhaps the most important characteristic of PPP in 2023 and beyond will be its adaptability. PPP in countries as diverse as Argentina, Indonesia and Uzbekistan has never followed the mould of UK 1990s PFI. Elsewhere we have seen the PPP model adapting, for example, in countries such as Norway and the Netherlands where public sector capital contributions on completion reduce the impact of private sector cost of capital over the life of the project, while preserving typical PPP risk transfer and efficiencies during construction. In the United Kingdom and Australia, we have seen the advent of price adjustments and risk sharing based on how the outturn construction cost compares to a target cost; in parallel, the regulated utility model that was traditionally reserved for established operating monopoly networks is increasingly being used to procure new greenfield infrastructure assets.

At Herbert Smith Freehills we are proud of having a long and successful history working within the PPP industry for more than 30 years. We were at the forefront of the market when the PFI model was introduced in the mid-1990s and have followed its evolution around the globe since that time. We continue to believe that PPPs, where used appropriately, are and will remain an important tool for creating the most financially advantageous development, financing, operation and maintenance of infrastructure assets. The use of the PPP model, in addition to financial benefits, imports added scrutiny, rigour and arm's-length contracting practice, which ultimately benefit both the public and private sectors and, most importantly, the consumer and taxpayer. This may prove to be all the more important following the economic shocks of the covid pandemic and the Ukraine war.

In this, the ninth edition of *The Public–Private Partnership Law Review*, our contributors are drawn from the most renowned firms working in the PPP field in their jurisdictions. We hope that you will enjoy and find useful this edition of *The Public–Private Partnership Law Review*. We look forward to hearing any thoughts or comments that you may have on this edition and any thoughts for the content of future editions.

**Matthew Job and Tom Marshall**

Herbert Smith Freehills LLP

London

March 2023

# THAILAND

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

## I OVERVIEW

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

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

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

## II THE YEAR IN REVIEW

The New PPP Act was written in such a way that a series of ancillary laws would ensue after its enactment. Subsequently, new laws were published in the form of notifications issued in 2020 and 2021 by the Public–Private Partnership Policy Committee (Committee) and the State Enterprise Policy Office (Office), and ministerial regulations. These notifications and regulations clarify some of the rules governing certain procedures in relation to PPPs. Several projects have recently been initiated under the New PPP Act: the Bang Pa-in–Nakhon Ratchasima Intercity Motorway (M6), the Bang Yai–Kanchanaburi Intercity Motorway (M81) and the Metropolitan Rapid Transit Orange Line have completed the private party selection process and are currently in the construction phase. The invitation to tender for the Kathu–Patong Expressway has been published. New rest areas projects on the Bang

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<sup>1</sup> Weerawong Chittmittrapap is a senior partner and Jirapat Thammavaranucupt is a partner at Weerawong, Chinnavat & Partners Ltd.

Khun Thian-Bang Bua Thong Intercity Motorway (M9) and the M81 Motorway have been approved by the Cabinet. The Committee has recently approved in principle the addition of Intercity Motorway M9 from Bang Khun Thian to Bang Bua Thong.<sup>2</sup>

The improvements to the New PPP Act are based on principles that reflect international standards and touch on the following points:

- a* business case guidelines drafted with the aim of ensuring fair risk sharing that does not overburden the state;
- b* full consideration of the possible and appropriate government support measures;
- c* transparent procurement procedures including negotiation; and
- d* increasing the bankability of projects.

These points have also been included in the Eastern Special Development Zone Act BE 2561 (2018) and a number of ancillary laws, as the government uses the EEC as a pilot model for PPP regulations. The EEC Office is in the process of finalising guidelines that reflect best practice standards.

To date, several EEC projects have been initiated and executed. These projects include the High-Speed Rail Link to three airports, connecting Rayong province and Bangkok metropolitan city (US\$7.2 billion), the biggest PPP concession project in Thailand and the first concession granted on a high-speed train project, and U-Tapao International Airport, valued at approximately US\$6.4 billion, Thailand's first PPP airport project. The contract for Laem Chabang Port Phase III was signed in 2021; it is valued at approximately US\$4.8 billion and is the largest PPP port project in terms of value. The total amount of investment for all of the projects in the EEC area will exceed 1.5 trillion baht.

Further, there are projects currently under way, such as Digital Park Thailand, which have been approved in principle by the Cabinet. The EEC Smart City project is in the feasibility study phase. The implementation periods for these projects will be considerably shorter in comparison to the implementation of projects under the PISU Act, and public sector involvement in the development of these projects is increasing as the EEC ancillary laws, as well as the ancillary laws under the New PPP Act, require the collection and analysis of private sector opinions acquired through market-sounding procedures.

### III GENERAL FRAMEWORK

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

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

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<sup>2</sup> Committee Resolution 6/2565, 28 November 2022, <https://www.thaigov.go.th/news/contents/details/62109>, accessed 6 January 2023.

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

- a* a state investment project involving an undertaking that any particular state agency has the duty and power to carry out under the law or in accordance with the objectives of its establishment;
- b* a partnership with a private party by any means or authorising a private party to invest alone by way of permission, concession or licensing in any form whatsoever; and
- c* infrastructure and public services as specified under Section 7 of the New PPP Act, such as roads, highways, expressways, railways, mass transit systems or airports.

Under the New PPP Act, the categories of PPP may be stipulated by a royal decree at a later date. The infrastructure and public services specified under the New PPP Act also include projects that are incidental to achieving other projects, as prescribed in a notification of the Committee with the approval of the Cabinet. The Committee's notifications concerning the relevant projects for roads, railways, ports and airports were published in 2020.

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

## **ii Types of public–private partnership and the transfer of the assets used in a project**

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

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

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

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

Caution is required in the selection of the type of assets to be transferred and owned by the private entity as Article 56 Paragraph 2 of the Thai Constitution prohibits the private ownership of infrastructure public utility services that are essential to the nation's subsistence and security.

### iii The authorities

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

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

According to Section 13 of the New PPP Act, the Committee is composed of the Prime Minister as chair and several ministers and heads of relevant organisations. The main powers and duties of the Committee are to:

- a give approval in principle to a project involving a private investment and the operation of the project;
- b consider and approve the principles of a partnership project; and
- c consider and prescribe rules and procedures for the preparation of a partnership project that has a value below 5 billion baht or below the value additionally prescribed by the Ministerial Regulation regarding rules and regulations under Article 9 of the New PPP Act.

According to Article 5 of the Notification of the Committee on the Guidelines for the Procedure of PPP Projects with the Value Below the Amount Specified in Article 9 of the New PPP Act BE 2563 (2020), the relevant ministers have the discretionary power to decide whether the projects should be procured according to the New PPP Act or the Guidelines. However, the power must be exercised in accordance with the reports and studies that are provided in accordance with the Notification of the Office on the Guidelines for Considering the Importance of PPP Projects with the Value of More than 1 Billion Baht but Below 5 Billion Baht BE 2564 (2021).

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

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

In addition to the three main authorities, two ad hoc committees are appointed for projects. During the selection process, a selection committee is to be appointed by the relevant minister in accordance with Article 36 of the New PPP Act. During the period of the project, a supervisory committee is appointed under Article 43 of the New PPP Act to oversee and supervise the project.

#### iv General requirements for PPP contracts

In general, PPP contracts must conform to the framework of the New PPP Act and the requirements of the Notification of the Office regarding the Invitation to Bid, the Request for Proposal and the Core Contract Terms for Public–Private Partnership Contracts BE 2563 (2020). A draft PPP contract must contain the standard contract terms for investment contracts as prescribed by this Notification.

According to Article 6 of the Notification, the usual clauses that must be included are clauses concerning the terminology, the duration of the contract, the rights and duties of the parties including returns to which each party is entitled and the ways to provide such returns. Clauses concerning the termination of the contract, dispute resolution and amendment of the contract including the methods of investment are also required. More specifically, draft contracts are required to include clauses on the operation, output specifications and level of service, investments of the parties as well as the sources of funds, and the ownership and maintenance of the project assets including intellectual property and their valuations. Clauses concerning the rights and powers of the contracting authorities are also compulsory, which are clauses about the governance and monitoring of the project operations, the transfer of technical knowledge to the governmental personnel and the step-in rights of the contracting authority. More generally, the clauses on changes in contracting party, contractor or subcontractor are mandatory. The contracts must provide information on the hierarchy of relevant documents including laws, their changes and effects, as well as the provisions concerning taxes, fees and interests. Clauses concerning governmental support for the contractual performance of the private sector as specified by law are to be included, as the case may be.

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

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

A Cabinet resolution in June 2021 concluded that an integrity pact is to be implemented in PPP projects,<sup>3</sup> i.e., a pledge that the parties will not conduct corrupt actions, such as bribery. Thus, the Notification of the Office on the Guidelines for the Implementation of the Integrity Pact for Projects under the New PPP Act BE 2564 (2021) was issued. The notification requires the relevant parties, such as the contracting authorities, the tender offerors and the observers to sign and follow the provisions of an integrity pact. Later, the Committee approved the establishment of a new subcommittee with the duty to oversee the selection of the private sector parties and provide reports to the selection committees.<sup>4</sup> The subcommittee will consist of officers from the Office, the Office of the National Economic

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3 Cabinet Resolution 29 June 2021, <https://www.thaigov.go.th/news/contents/details/43222>, accessed 6 January 2023.

4 Committee Resolution 3/2565, 18 April 2022, <https://www.thaigov.go.th/news/contents/details/53721>, accessed 6 January 2023.

and Social Development and the Comptroller General's Department, and distinguished individuals with knowledge and expertise on the pact as well as PPP. To date, the Committee has approved the implementation of the pact of four concurrent PPP projects, including the Metropolitan Rapid Transit Orange Line, Chiang Khong Intermodal Facilities in Chiang Rai Province, Kathu-Patong Expressway in Phuket and the management projects of the Map Ta Phut Industrial Port.<sup>5</sup>

It should be noted that, according to Article 3(3) of the aforementioned Notification, the procurement of PPP projects under the notification of the Office concerning the procurement of PPP projects with a value less than 5 billion baht are not required to implement an integrity pact.

PPP contracts and other documents integral to the implementation of a PPP must be prepared in the Thai language. Only parts that are necessary to appear in English (such as technical requirements) may be prepared in English.

#### **IV BIDDING AND AWARD PROCEDURE**

##### **i Expressions of interest**

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

##### **ii Requests for proposals and unsolicited proposals**

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

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

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

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<sup>5</sup> Committee Resolution 5/2565, 21 September 2022, <https://www.thaigov.go.th/news/contents/details/59535>, accessed 6 January 2023.

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

### **iii Evaluation and grant**

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

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

## **V THE CONTRACT**

### **i Payment**

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

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

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

### **ii State guarantees**

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

Under the EEC regulations, in addition to benefits from Board of Investment promotion, the benefits or support to be granted are considered based on several factors, such as how the project benefits and is in line with the success of the development of the EEC, or how a project having economic and technical feasibility, but not financial feasibility, may

attract private investors or be made bankable to procure the financial resources of the private sector. Examples of the supporting measures include:

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

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

### **iii Distribution of risk**

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

### **iv Adjustment and revision**

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

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

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

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

**v Ownership of underlying assets**

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

**vi Early termination**

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

**VI FINANCE**

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

Project financing via financial institutions imposes similar limitations to those mentioned above. Generally, project funding requires a step-in clause: in the case of critical situations, the financial institution, as a creditor of the project, has the right to step in and take control of the project. Thus, the possibility of the financial institution exercising its step-in rights remains open at all times throughout the venture, subject to prior approval of the relevant state authority.

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

Both the EEC framework and the New PPP Act allow the use of a direct agreement to promote bankability and confidence in a project coming to successful completion. Step-in and step-out rights are options available for banks.

## **VII RECENT DECISIONS**

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

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

Recent court judgments indicate that for projects to be considered PPP projects, the private entity must have an interest in whether the project makes a profit or a loss.

## **VIII OUTLOOK**

As a growing nation, Thailand has a tremendous need for investments in infrastructure development and public services to promote the nation's economy, support fast-paced urbanisation and enhance the quality of life of the general public. However, the capacity of the government to provide funds directly to infrastructure and public service projects is limited. Therefore, the government recognises the PPP mechanism as a prominent instrument in the implementation of projects in Thailand, as evidenced by the number of PPP projects successfully initiated or currently undergoing bidding and procurement procedures. In 2021, the Committee ordered the subcommittee to encourage more government projects to be implemented under the New PPP Act.

In April 2020, the PPP Committee announced its PPP Project Preparation Plan to be developed between 2020 and 2027. The PPP Project Preparation Plan outlines the urgent need for partnership projects, the objectives and brief information on such projects, the project-handling agencies, the total investment amount for the projects, and the time frame for the preparation and operation of the projects. The PPP Committee revised the Plan in November 2022. The total estimated investment value is 1.15 trillion Thai baht, which includes 117 possible projects,<sup>6</sup> an increase from 67 possible projects in August 2021. Basic

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<sup>6</sup> Committee Resolution 6/2565, 28 November 2565, <https://www.thaigov.go.th/news/contents/details/62109>, accessed 6 January 2023.

infrastructure projects, including intercity roads and ports, feature prominently among the new projects selected for the updated PPP Project Preparation Plan list in November 2022. In 2022, the Committee ordered the contractual authorities to consider the continuation of the PPP contracts that will expire within the next five years.<sup>7</sup> Moreover, the Committee ordered the relevant government agencies to accelerate the development of high-priority PPP projects under the PPP Project Preparation Plan in accordance with the expected time frame.<sup>8</sup>

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

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7 Committee Resolution 1/2565 19 January 2022, <https://www.thaigov.go.th/news/contents/details/50706>, accessed 7 January 2023.

8 Committee Resolution 2/2565 8 March 2022, <https://www.thaigov.go.th/news/contents/details/52378>, accessed 7 January 2023.

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