

# GLOBAL PUBLIC - PRIVATE PARTNERSHIP (PPP) GUIDE

Belarus	Kyrgyzstan
Bosnia & Herzegovina	Latvia
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Japan	Turkmenistan
Jordan	United Kingdom
Kazakhstan	Uruguay
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2016

# GEORGIA



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### GENERAL

1. **Is the PPP model commonly used to develop infrastructure projects in your jurisdiction? If yes, what types of PPP models (such as Build-Operate, Build-Operate-Transfer, Transfer of Operation Rights, Build-Lease-Operate-Transfer, etc.) are used?**

Despite having no PPP law or comprehensive Concession law, PPP model is still quite frequently used to develop infrastructure projects in Georgia.

As the practice shows, Build Operate Transfer and Build Own Operate types of PPP model are the most commonly applied ones. In sport infrastructure development Build Transfer Operate scheme is also applicable.

2. **Which sectors apply a PPP model to develop infrastructure projects?**

So far BOT agreements have been used for development of transport infrastructure (such as sea ports and airports); BOO is mainly used for power generation (mainly including HPPs) while BTO is considered to be applied for development/rehabilitation of sport infrastructure. In addition to transport, energy and sport infrastructure, PPP model has recently been applied for the development of

healthcare infrastructure; however, the project is on an early stage at the moment.

### LEGISLATION & REGULATION

3. **What are the principal laws and regulations? Is there a framework PPP Law?**

There is no framework PPP law however such law is in drafting process. Law of Georgia on the Procedure for Granting Concessions to Foreign Countries and Companies which was adopted in 1994 is less operative and is not usually applied for PPP projects as described above. The law defines concessions as “long-term lease agreements” and seems to be limited to natural resources and activities related thereto. Moreover, the law contains very few provisions regarding the selection of the concessionaire and provides for the adoption of regulations in this respect. Despite this, no regulations can be identified. Despite the existence of certain positive elements, the law does not constitute a sufficiently solid legal ground for the development of PPP.

Due to this, almost all PPP projects implemented or initiated so far are regulated by the resolutions of the government of Georgia adopted mainly on case-by-case basis. Despite this, for certain fields where number

of PPP projects has been implemented, the government has adopted framework resolutions providing rules applying to PPP projects in those particular fields only. For example, resolution N 214 of the Government of Georgia dated August 21, 2013 approved the rules for expression of interest in technical-economical examination, building, owning and operation of electric plants in Georgia.

Power of the government to take decision on disposal of state-owned property for the means of implementing PPP projects is derived from the Law of Georgia on State Property.

Recently the government repeatedly expressed its willingness of development of PPP in Georgia by adopting PPP Policy Document on June 6, 2016. The Policy Document explains the background of application of PPP concept in Georgia and need of further development of thereof. The Document provides the models of public-private partnership, the main principles of such cooperation and the means of state support of such projects. According to the Policy Document, PPP projects will be implemented according to the predefined procedures, including the stage of project initiation, preparation of project, bidding procedures or making direct agreements.

**4. What are the principal regulatory bodies for PPP? Is there a centralized PPP Authority?**

There is no principle regulatory body for PPP however in practice it is the government of Georgia in cooperation with the respective ministries (agencies) which regulates PPP matters and designates bodies (or special commissions) for the particular large PPP projects.

According to the recently adopted Policy Document, there shall be developed institutional system for the purpose of

identification, forming, assessment, approval, financing and monitoring of PPP projects. The new centralized authority will be accountable to the government and will have a leading role in management of PPP projects.

**5. Are there any restrictions for foreign investors to develop/operate PPP projects?**

There are no such restrictions.

**6. Does the legislation or the project agreements envisage a long-stop date for the completion of construction?**

Usually dates for the completion of construction are prescribed in the project agreements. Moreover, in most cases the long-stop dates are envisaged in the requests of expression of interest on the particular project.

**7. How are force majeure events defined, and what are the consequences of their occurrence?**

There is no pre-defined or model force majeure clause. Thus, there is no uniform definition of force majeure events.

Rather standard clause envisaged in one of PPP project agreements reads as follows:

*“Party shall be deemed not to be in default or in breach of any obligation under this Agreement if and to the extent that such failure is caused by any Force Majeure Event. ... The affected Party shall use all reasonable efforts to mitigate and minimize the effects of any occurrence or re-occurrence of any Force Majeure Event on the performance of its obligations under this Agreement... The affected Party shall promptly notify the other Party of any Force Majeure Event and any relief from performance claimed by the affected Party. The affected Party shall promptly notify the other Party of the end of any Force Majeure Event and the effects thereof upon the performance of the affected Party, and of the steps taken in accordance with Clause XXX and progress with those steps. If it is agreed or*

*determined that a Force Majeure Event has occurred and that Force Majeure Event (or the consequences thereof) has existed for a continuous period in excess of eighteen (18) months, and is still continuing then either Party may, for as long as the circumstances referred to in Clause XXX continue, terminate this Agreement by notice to the other and such termination shall take effect on a date one (1) month thereafter unless during that one (1) month notice period the circumstances referred to in Clause XXX cease to apply (in which case the notice shall be treated as null and void). ...”*

**8. How are the political and legal risks (e.g. expropriation, change in law, adverse court decisions, etc.) allocated between the parties, and what are the consequences of their occurrence?**

As mentioned, until the adoption of PPP law, there is no comprehensive legal framework for most of the matters particularly for PPP projects. Thus, allocation of risks is either provided in the project agreements or they are regulated according to the general rules applicable to protection of ownership (Constitution and Civil Code of Georgia) as well as by the Law of Georgia on Promotion and Guarantees of Investments.

The law provides that “*during implementation of investment and entrepreneurial activities, rights and guarantees of foreign investors may not be less than rights and guarantees enjoyed by natural and legal persons of Georgia*”. The law further provides:

*“1. Investments shall be fully and unconditionally protected by the legislation of Georgia*

*2. Deprivation of an investment may take place only in cases directly determined by law, by court decision and upon urgency determined by the organic law and only with appropriate compensation.*

*3. Decision on deprivation of investments as well as terms of compensation may be appealed to the courts of Georgia unless otherwise provided in the agreement between the parties or in the international agreements of*

*Georgia.”*

In practice as well, PPP project agreements provide for compensation in case of expropriation.

As concerns the change in law, one of PPP project agreements provides the following:

*“if [investor] suffers damages, losses or cost overruns that are directly attributable to a Change in Law, [investor] shall be entitled to payment of such damages, costs or losses, or [public body] avails to [investor] such other protection that leaves [investor] in no better and no worse a position following such Change in Law, at [public body’s] sole discretion. [Investor] shall notify [public body] of its right to claim pursuant to this Clause promptly and, in any event, within 6 months of becoming aware of the act, omission or circumstance that gives right to make such Claims.”*

As concerns the adverse court decisions, both the law and project agreements are usually silent on this.

**9. Is a reinstatement test envisaged, under the legislation or the project agreements, to determine whether the insurance proceeds would be used to reinstate the facilities or to repay the debt to lenders?**

The law is silent on this. This matter is regulated by project agreements to certain extent. For example, one of the project agreements reads as follows:

*“[Investor] shall procure that any Lenders shall agree not to prevent the utilisation of Insurance Proceeds in reinstatement and/or replacement, subject only as provided in the Lender Direct Agreement. If any Lenders exercise their rights under the Lender Direct Agreement to use the Insurance Proceeds in discharge of any indebtedness under the any other funding document approved by [public body] for the purposes of this Agreement, [public body] shall have the right to terminate this Agreement by notice with immediate*

*effect to enable it to comply with its obligations to reinstate in accordance with paragraph XXX.”*

**10. Is the concept of ‘uninsurability’ recognized in the project agreements?**

Yes. Usually uninsurable risks are defined as the Insured Risks in respect of which insurance cover is no longer available in the worldwide market.

**11. Does legislation allow the relevant public authority or the lenders to take control of the PPP projects through step-in and/or substitution mechanisms in case of default of the project company?**

Yes, such option is prescribed by the law. Project agreements also provide for the right of step-in.

**12. Is international arbitration available to settle disputes under the project agreements and direct agreements with lenders? Is it possible to have foreign law as the governing law of these agreements?**

Yes, international arbitration is available for the settlement of disputes under the project agreements and direct agreements with lenders. Most frequently ICC option is applied.

As concerns the application of foreign law as the governing law, it is negotiable on case-by-case basis; however, to our best knowledge Georgian law is a governing law for most of the agreements.

**13. Is a regular market testing procedure envisaged under the legislation or the project agreements to procure the services to be provided by the project company?**

The law does not envisage the procedure of market testing and we are not aware of any

project agreement providing for it.

**14. How is the acceptance of the facilities performed? Is an independent technical adviser or the project company involved in the acceptance process or is it solely done by the public authority?**

As the law does not provide general framework for this, method of acceptance of the facilities is worked out on case-by-case basis; however, in practice independent technical advisers as well as project companies are involved in the acceptance process and it is not performed only by the public authority.

**15. Are there any expected changes or reform to the existing legislation?**

Yes. As mentioned above, the government of Georgia in cooperation with EBRD and other international financial institutions is currently working on draft PPP law which is expected to provide comprehensive legal framework for PPP projects.

## FINANCING & INCENTIVES

**16. How is the payment mechanism regulated for PPP projects? Does the relevant legislation provide inflation and/or foreign exchange protection?**

While the law is silent on payment mechanisms, inflation and/or foreign exchange, these matters are regulated on case-by-cases through the project agreements.

**17. Is there a guaranteed rate of return or a cap on the rate of return for the project company or sponsors?**

There is no guaranteed rate of return or a cap on the rate of return, as far as we are aware.

**18. Is there any payment guarantee provided by the relevant public authority for PPP projects (e.g. service payment guarantee, availability payment guarantee, Treasury guarantee etc.)?**

There is no such payment guarantees prescribed by the law; however, payment options may vary on case-by-case basis through the project agreements.

**19. Do the obligations of the relevant public authority qualify as State (Treasury) obligations? If not, does the Treasury provide separate guarantees to the concessionaire or the lenders?**

It much depends on the structure of the project and which public sector representative (public authority/public company/fund) is the party to the project agreement. There is no unified approach towards the matter.

**20. Are deductions from the service and availability payments subject to a cap?**

They may be; however again, it is agreed on case-by-case basis, depending on the nature of project and the sector in which the project is implemented.

**21. Are variations that the public authority may request at the construction and operation stages subject to a cap?**

Yes.

**22. Is there a requirement to share any gains arising from refinancing of the PPP project-with the public authority?**

There is no fixed requirement; however, it may be in specific projects.

**23. Do the lenders sign a direct agreement with the relevant public authority? If yes, what rights do the lenders typically have under such agreements?**

We are not aware of a project where the lenders signed a direct agreement with the relevant public authority. One of the project agreements provided for the following: “[public body] will enter into a Direct Agreement with Lenders (if any) for the purpose of financing the relevant part of the Works if reasonably required by the Lenders” however to our best knowledge, no such agreement has been signed.

**24. Is there a debt assumption mechanism, whereby the public authority undertakes to assume the debts of the project company to the lenders in the event of termination of the project agreement? If yes, does it cover the full amount of the equity, and is it payable in all termination scenarios including project company default terminations?**

The law does not provide such mechanism. As concerns the practice, we are not aware of a case when the public authority undertook to assume the debts of the project company to the lenders.

**25. What are the payments to be made by the relevant public authority to the sponsors, the project company and the lenders in case of termination of the project agreement and are they payable in all termination scenarios including project company default terminations?**

Again, there are no unified rules for such occurrences however in one of PPP project agreements it is provided as follows:

*“If the agreement is terminated due to the breach by the public authority, the private investor will be entitled to terminate the agreement and will receive the payment the Debt Amount; Hedging Amount; the Adjusted Equity Amount; and Termination Liabilities less the Termination Deductions.*

*If the agreement is terminated due to the force majeure, termination payment will be the Debt Amount + the Hedging Amount + ((Existing Equity Amount + the Initial Works CAPEX) \* XXX% - Termination Deductions - any Rectification Costs).*

*If the agreement is terminated due to the breach by private party, the Termination Payment shall be a positive amount equal to the aggregate of the Debt Amount and the Hedging Amount less the Termination Deductions.”*

**26. Is there an incentive for domestic (local) manufacturing of equipment or materials used in the construction of PPP projects?**

Generally, there are no rules regulating this matter at this stage of development of PPP laws in Georgia; however, such specific terms may be prescribed for particular projects and be envisaged in government resolutions and/or in EOI document.

**27. Are there tax advantages available to PPP projects?**

At this stage no tax advantages are available; however, as per our knowledge, tax advantages may be prescribed by the PPP law which is to be adopted.

**28. What are the other incentives available to PPP projects?**

At this stage no particular incentives are available; however, as per our knowledge, certain incentives may be prescribed by the PPP law which is to be adopted.

You can also find various incentives for the development of particular projects on case-by-case basis according to the government resolutions.

**29. What are the number, investment amounts and sectors of the PPP projects developed in your jurisdiction during 2015?**

There is no official statistics separately for PPP projects. As noted, the most frequent PPP projects are implemented in sphere of energy and infrastructure. Total amount of investments for the ongoing and already implemented projects is more than USD 1 billion.

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