Legal Issues - Transport PPPs

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What are the key legal issues for PPPs?

- **Legal certainty**
  - licences/approvals, tender process, public policy, enforcement, arbitration

- **Change of law risk**
  - change of law or regulation that adversely impacts on the PPP project

- **Expropriation risk**
  - risk of direct or indirect confiscation of investor or lender assets or rights

- **Foreign Exchange**
  - Availability, convertability, transferability
Legal certainty

- critical for accurate risk allocation – PPP contracts must, as a package, provide for an acceptable allocation of risks to the parties best able to manage those risks and parties need to fully understand what risks they are accepting

Change of law risk

- PPP projects can be very politicized and change of law can be a live issue affecting contractual risk allocation

Expropriation

- again, due to politicization of projects private sector participants need certainty that expropriation will not be an issue for them

Foreign exchange

- international private sector investors will need to know they can get foreign currency (USD) out of the country to recoup costs and pay loans and dividends – risk on this varies between countries

Why are these the key concerns?
Legal certainty

- PPP specific legislation/PPP Units in Government – can help private sector navigate legal requirements and reduce uncertainty by providing a centralised point of contact. Standard form contracts (possibly English or New York law governed) can also be developed and legal opinions obtained as to their enforceability.

Change of law risk

- PPP contracts should include a mechanism as to how change of law is dealt with. Usually this means that the Government will offer compensation to the private sector party to the extent that a change of law impacts on the private sector party’s return.

Expropriation

- Some countries (e.g. Myanmar) have undertakings built into their foreign investment laws guaranteeing that the Government will not expropriate projects which are approved under such laws. However, private sector parties will usually want a contractual undertaking as well so that, if needed, they can raise a dispute through international arbitration.

Foreign exchange

- In some jurisdictions (e.g. Vietnam) Governments have offered guarantees to private sector parties guaranteeing the availability and convertability of foreign exchange. Other countries, such as Thailand and Myanmar, have taken the approach of establishing laws around treatment of foreign exchange.
Australian toll roads – mature PPP market lessons

- Market participants/Governments have had to adapt to changes as lessons have been learned over time (e.g. move from demand risk to availability based structures) – Asian market will likely face the same experiences but in a specific Asian context and likely to vary between countries.

- Political pressure has impacted on projects (e.g. Government has reneged on agreements to close roads, Melbourne East-West Link currently in balance after election) – political pressure cannot be avoided even in more mature markets.

- But, some recent success stories where projects have moved to meet the market and there has been strong political buy-in (e.g. Gold Coast Rapid Transit – light rail project which was entirely funded from foreign investment).
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Questions?

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