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THE NEW WAVE OF FRENCH AIRPORT PRIVATISATIONS:

Ready for take-off

BY JACQUES DABRETEAU

UK infrastructure: Innovations in government support

BY PHILIP VERNON AND KRISTA PAYNE

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An overview of this issue

I am delighted to introduce this seventh issue of **Infra**Read, our biannual publication covering a range of legal and transactional issues within the transport and infrastructure space.

If you are a regular reader, you may notice that we have given **Infra**Read a new look, as part of an overall brand "refresh". We hope you like it.

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THE NEW WAVE OF FRENCH AIRPORT PRIVATISATIONS:

Ready for take-off

by Jacques Dabreteau

The bidders are ready, the legal framework has been fine-tuned, the regional elections have taken place and national elections are not due before 2017. In other words, conditions are finally ripe for the French Government to launch the long-awaited sale of its 60 per cent stake in Lyon and Nice airports.

The privatisation of France's main regional airports – Bordeaux, Nice, Lyon and Toulouse – has been in the offing for a number of years. The process was initially expected to begin in 2011 but was shelved until after the national elections in 2012 as it had become too politically sensitive.

However, the stars are finally in alignment for the sale of Nice and Lyon airports. The sale in early 2015 of 49.99 per cent of the French State's stake in the share capital of *Aéroport de Toulouse-Blagnac* (ATB), which operates the eponymous airport, has paved the way. In addition, a new piece of legislation, adopted in summer 2015, expressly authorises the transfer of the majority of the share capital of the Lyon and Nice airports concessionaires (namely the *société Aéroports de Lyon* and the *société Aéroports de la Côte d'Azur*) to private sector operators.

The privatisation processes for these two public-owned companies was finally launched on 10 March 2016 by the French Government. The two procedures are being run concurrently, which had not been expected.

This article gives an overview of the context and objectives of these privatisations, describes the lessons learned from the Toulouse airport transaction, and sets out details of the process and expected timing for these privatisations.

Context and objectives

The long-awaited privatisation of Lyon and Nice airports is the product of a lengthy process initially triggered by various reforms adopted more than ten years ago in the French airport sector.

It was first decided in 2004 to "decentralise" 150 "minor" aerodromes owned by the French State, in other words to transfer their ownership to local authorities and specific public co-operation authorities (*établissements publics de coopération intercommunale*).[1] Major regional airports (in other words, airports of national or international interest), such as those in Bordeaux, Lyon, Nice and Toulouse-Blagnac, remained under the ownership of the French State and were still operated by the relevant public entities (the *Chambres de commerce et d'industrie* or CCI) who acted as concessionaires under concession contracts entered into with the French State.[2]

The second, and more important, airport reform occurred the following year when, in 2005, the Government decided, among other measures, to transfer the operation of regional airports operated by

1 Under article 28.I of law No. 2004-809 dated 13 August 2004 relating to local freedoms and responsibilities (*loi n°2004-809 du 13 août 2004 relative aux libertés et responsabilités locales*).

2 The *Chambres de commerce et d'industrie* have historically been entrusted with the management and operation of major provincial airports on the basis of the law dated 20 June 1933 which added airports to the list of business activities that the *Chambres de commerce et d'industrie* were authorised to set up and to manage.

the CCIs to specific public sector companies held by the French State, the relevant CCI and, as the case may be, local authorities who had expressed an interest in becoming shareholders (the *Sociétés Aéroportuaires Régionales* or SARs, i.e. regional airport companies). A law, dated 20 April 2005, provided that if a CCI so requested, "*the administrative authority may authorise the transfer of the airport concession to a company whose initial shareholding is wholly owned by public entities, including the CCI holding the transferred concession*".[3] Almost a dozen regional airports operators became subject to this new legal framework, i.e. those operating the airports of Bordeaux-Mérignac, Lyon-Saint-Exupéry and Lyon-Bron, Marseille-Provence, Aix-Les Milles and Marignane-Berre, Montpellier-Méditerranée, Nice-Côte d'Azur and Cannes-Mandelieu, Strasbourg-Entzheim, Toulouse-Blagnac, Cayenne-Rochambeau, Fort-de-France-Le Lamentin, Pointe-à-Pitre-Le Raizet and Saint-Denis-Gillot.

The rationale behind the reform was the need for the concessionaires of major regional airports to benefit from having a suitable corporate structure in place, one which was more appropriate for a liberalised market and for coping with competition from foreign airport hubs, at a time when the growing traffic at these airports represented approximately 30 per cent of the total air passenger traffic in France (the remaining air traffic being allocated between the Paris airports operated by *Aéroports de Paris* (57 per cent) and the minor "decentralised" airports (13 per cent)).

The implementation of the reforms has taken time: the transfer of the ownership of minor airports to local authority control was completed in March 2007 and the setting up of the first SARs occurred in 2007 (Bordeaux, Lyon and Toulouse), followed by Nice in 2008 and Montpellier in 2009.

The shareholding of the SAR was initially split between the French State (60 per cent), the relevant CCI (25 per cent) and the "interested" local authorities (15 per cent), as had originally been announced by the Minister in charge of transportation during the parliamentary debate in 2005. However, as was also clearly signalled by the Government during the debate, the objective of the 2005 reform was, ultimately, to open the share capital of the SAR to private sector investors in order to benefit from their experience in the management of airports and to diversify the funding sources of major regional airports (with the aim of financing new investments in airport infrastructure). The time-frame for this was not however disclosed, for obvious political reasons.

In 2010, the French Government announced plans to sell a portion of its stake in the share capital of four SARs, namely those operating the airports of Bordeaux, Lyon, Montpellier and Toulouse. The plan was to sell off slightly less than 50 per cent of the share capital, with the public sector (the French State, CCI and local authorities) keeping a majority stake. This position was in line with the informal commitment made by the State to the *Union des aéroports français* (French airports trade union) pursuant to which it had agreed that a majority public shareholding would be kept in the SAR until the end of 2013.[4] That was also probably a way to circumvent and avoid any potential debate and criticism around privatisation which, under French law, requires the transfer to the private sector of more than 50 per cent of the share capital of a publicly-owned company.

The political sensitivity of the issue certainly explains why the process was not launched until after the presidential election of May 2012 and the ensuing national elections of June that year. In addition, it is understood that local authorities had been hoping to acquire the stakes themselves, while the Government favoured selling the shares to private investors.

Lessons learned from the Toulouse airport acquisition transaction

It took another three years before the French State finally decided to launch the sale of a portion of its stake in the Toulouse airport operator.

Clearly, the Toulouse airport acquisition transaction was being used as a pilot for airport privatisations, as the next wave of French airports privatisation are all, in essence, based on the same principle. In each case, the French State only sells/transfers its shares in the company operating the airport (i.e. the SAR). However, the acquisition transaction for Toulouse was not, strictly speaking, a privatisation (in contrast with the proposed share sales for Lyon and Nice), as the French State only sold 49.99 per cent of its stake in the share capital of ATB, with a "put" option on another 10.01 per cent at its sole discretion. On this specific point, the French Economics Minister has, since the closing of the acquisition, insisted that the French State does not intend to exercise the put option. In any case, according to the shareholding agreement entered into between the buyer and the State,[5] the put option can only be exercised on the expiry of a three-year period following the transfer, and during a six-month period, renewable on one occasion.

This will obviously differ from the Lyon and Nice airports transactions, as it has already been announced by various ministerial authorities that 60 per cent of the share capital of the SARs operating those airports is to be sold to private companies (in fact, 70 per cent or more in the case of the Nice airport operator[6]). For this reason, the transfer to the private sector has been expressly authorised by the *Macron* law[7] dated 6 August 2015, in accordance with the provisions of the ordinance of 20 August 2014 which states that transactions in which the State sells the majority of the share capital of a publicly-owned company to the private sector must be authorised by law, if the number of employees exceeds 500 or its

3 Article 7.II of law No. 2005-357 dated 20 April 2005 relating to airports (*loi n°2005-357 du 20 avril 2005 relative aux aéroports*).

4 See *Cour des comptes, rapport public thématique, Les aéroports français face aux mutations du transport aérien*, page 50.

5 This is also confirmed in article 1 of the order dated 15 April 2015 establishing the conditions of the transfer to the private sector of a stake held by the State in the share capital of the company *Aéroport Toulouse-Blagnac* (*arrêté du 15 avril 2015 fixant les modalités de transfert au secteur privé d'une participation détenue par l'Etat au capital de la société Aéroport Toulouse-Blagnac*).

6 In the case of Nice, an additional share of at least ten per cent currently held by the CCI is also being sold.

7 Derived from the name of the Economics Minister who has presented the bill before the Parliament.

turnover exceeds €75m.[8] On this last point, as a result of the Toulouse airport transaction, the *Macron* law has modified the ordinance of 20 August 2014 to provide that the privatisation of any companies operating airport (or motorway) facilities must be authorised by law irrespective of the number of employees or their turnover, in order to strengthen State control over these sensitive transactions.

However, notwithstanding this change in law, the French State continues to have a strong influence over the business activities of airport operators, irrespective of whether they are "privatised" or not, as it remains, in each case:

- the owner of all the airport infrastructure and equipment, at least those that are necessary to operate the airport public service (i.e. the runways, buildings, land, etc.);
- the supervisory authority (*autorité concédante*) of the airport; i.e. the State defines the long-term airport development strategy and controls the operation of the airport by the concessionaire, in accordance with the terms and conditions of the concession contract;
- the entity in charge of safety, security and air navigation (e.g. opening of new routes);
- the competent body for establishing and modifying the legal framework applicable to airports; and
- the competent authority for the regulation of tariffs and fees paid by airlines to airport concessionaires.

As a result, notwithstanding the option for private sector companies to invest in the shares of SARs, the State keeps very tight control over the business of airports concessionaires and the operation of its regulatory powers.

Other important lessons have been learned from the Toulouse experience in terms of the tender process and the award criteria. At the time, there was a public outcry at the decision of the French Government to award preferred bidder status to a Chinese consortium.[9] The main criticism was that the tender process and award criteria were, in the main, if not exclusively, driven by financial considerations, and did not take into account other equally important objectives such as, for example, the experience or capacity of the candidates/bidders in airports operation/development.

In order to avoid or minimise similar criticisms on future transactions, the *Macron* law expressly provides that:

- the terms of reference of the call for tenders (*cahier des charges de l'appel d'offres*) must be approved by the Minister in charge of civil aviation, who shall specify the criteria in relation to the protection of essential national interests in air transportation, and the attractiveness, and economic and touristic development, of the area where the airport is located. The terms of reference must also set out the obligations of the concessionaire to ensure the development of the airport in co-operation with local authorities as well as with other "public shareholders";
- the candidates must give details in their bid of the conditions under which they will meet the requirements of the terms of reference referred to above; and
- the candidates must have experience as airport operators or as shareholders of a company operating airports. They must also demonstrate at the bidding stage their ability to perform the tasks set out in the airport concession contract, this ability being assessed by the signing authority of the contract (i.e. the Minister in charge of civil aviation).

This amended legal framework clearly highlights the greater consideration which will now be paid by public authorities to the professional/operational standing of the candidates/bidders for airport privatisations. It aims to rebalance financial and operational award criteria and to ensure better protection of "local interests" represented by the other "public shareholders" (CCIs, local authorities) of the SARs.

These changes probably explain why the anticipated bidders for the Lyon and Nice airport privatisations are composed of investment funds and companies currently operating airports (according to press reports, some ten consortia are hovering with interest, including Cube infrastructure/Geneva airport, Vinci concessions/Predica/CDC Infrastructure, Ferrovial/Meridiam and Atlantia/ EDF Invest).

Process and timing

The launch of the sale process for the Nice and Lyon airport concessionaires has been delayed by a number of months due to regional elections, the terror attacks in Paris, and also perhaps a wish to avoid inadvertently competing with the ongoing sale of London City Airport.

The sale process is now finally underway, with the publication on 8 March 2016 of the decrees providing for the transfer to the private sector of the majority of the share capital of the two SARs, in accordance with the provisions of article 191 of the *Macron* law and article 22 of the ordinance of 20 August 2014.

In addition, two tender notices (one for each airport) in relation to the privatisation process were issued on 10 March 2016; the notices specify that the calls for tender/ specifications are available on the website of the *Agence des participations de l'Etat* (APE)[10] and that Expressions of Interest must be received by the APE by noon on 24 March 2016 at the latest.

Indeed, the bidding process will largely be driven by the APE, with the assistance of the Minister in charge of civil aviation, by virtue of the provisions of the *Macron* law mentioned above.

The call for tenders identifies the general terms and conditions of the bidding process, the pre-qualification phase and the corresponding selection criteria, the indicative offer stage (content

8 Article 22.I of ordinance No. 2014-948 of 20 August 2014 with respect to governance and share capital transactions of publicly-owned companies (*ordonnance n°2014-948 du 20 août 2014 relative à la gouvernance et aux opérations sur le capital des sociétés à participation publique*).

9 The consortium Symbiose, comprising China's Shandong Hi-Speed Group and Friedmann Pacific Asset Management, was selected by the French State as the preferred bidder on 4 December 2014. Canadian developer SNC Lavalin provided technical expertise and support to the consortium although it was not a member of the consortium.

10 i.e. the specific holding of the French State depending on the Minister in charge of finance and Minister in charge of economy which oversees the national public-owned companies and the companies in which the French State is a shareholder.

“The privatisations of the Lyon and Nice airports operators will be two of the largest privatisation transactions initiated by the French Government for some time.”

and timing),[11] the access conditions to the data room for the selected bidders, the binding offer stage (content and timing)[12] and the award criteria. On this last point, despite the rebalance between financial and operational considerations, it is highly likely that the proposed price will play a key role, as was the case for Toulouse, given that the estimated corporate value of the *société Aéroports de la Côte d’Azur* is in the region of €1.8bn and that of the *société Aéroports de Lyon* is around €1.4bn.

In addition, the acquisition transactions in Lyon and Nice will be subject to the specific regulations applicable to privatisation of publicly-owned companies.

This will, in practice, imply the following steps:

- Once the preferred bidder has been selected, the French Economics Minister will seek the opinion of the *Commission des participations et des transferts* (CPT)[13] on the transaction, in accordance with article 26.II of the ordinance dated 20 August 2014.

  The CPT will determine the corporate value of the company or, as the case may be, certain aspects of the transaction. In addition, the CPT must issue an opinion on the transaction process (which must ensure the protection of the interests of the public sector), with details of the name of the purchaser(s) as well as the purchase conditions proposed by the Economics Minister (article 27.II of the ordinance dated 20 August 2014).

  In its assessment, the CPT must take into account, among other factors, the corporate value of the company, the statutory and contractual rights granted to the public sector, the nature of the transaction, the price, the characteristics of the purchaser(s) and the industrial and strategic project in connection with the transaction.
- The authorisation of the transaction will be granted by decree, which decree must comply with the opinion of the CPT.
- The price of the transaction will be set out in an order of the Economics Minister and it cannot be less than the assessment made by the CPT. This ministerial order must be made within thirty days of the date on which the opinion is issued by the CPT, which period may be extended by the CPT in specific circumstances.

Conclusion

Long in the pipeline, eagerly anticipated, finally on the market: the privatisations of the Lyon and Nice airports operators will be two of the largest privatisation transactions initiated by the French Government for some time. If these transactions are successful, it will lend support to the plans by public authorities to roll out the process to other sectors, and to access the share capital of publicly-owned companies acting, for example, in the energy sector, as was announced several months ago by the Economics Minister, and which has just been confirmed in relation to the possible opening up of the share capital of RTE (the transmission grid operator). We therefore await the outcome of these deals with interest.

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11 28 April 2016 for Nice and 12 May 2016 for Lyon.
12 20 June 2016 for Nice and 4 July 2016 for Lyon.
13 The CPT is an independent administrative authority in charge whose remit includes determining the corporate value of publicly-owned companies whose portion of the share capital is subject to a transfer to the private sector.

UK INFRASTRUCTURE:

Innovations in government support

by Philip Vernon and Krista Payne

The nature of government support available for infrastructure projects in the UK has seen significant development in recent years following the global financial crisis through initiatives such as the UK Guarantee Scheme. The contingent financial support provided to the Thames Tideway Tunnel Project continues this innovation and is an example of the diverse range of potential forms of government support that could be provided to encourage and facilitate private investment in infrastructure in the UK.

This article looks briefly at the types of government support that have recently been developed for the infrastructure market in the UK, and also summarises the features and benefits of the innovative and multifaceted government support package provided for the Thames Tideway Tunnel Project.

Forms of government support

Infrastructure development in the UK was traditionally based on a model of public procurement and spending public funds. That changed in the 1980s, with more private sector involvement in public services. A decade later, the private finance initiative was developed, heralding a huge increase in private sector involvement in the construction, operation and financing of key public infrastructure in the UK. However, more recently, the global financial crisis has had an impact on that involvement, increasing the need for new private investment in key public assets but at the same time constraining the availability of capital. Further, there has been the much-heralded "flight to quality" seen in the investment market, and overall there has been a reshaping of the private sector's appetite for risk. During that period, we have also seen the collapse in the monoline market, changes in the credit rating agencies business, and the withdrawal of a large number of commercial banks from long-term lending in infrastructure. Investment cases have become more sensitive to regulatory and political risk, changing requirements around accounting standards, and certainty of cash flow (sometimes because of a lack of historical information about the performance of the infrastructure asset).[1] Against this background of a changing debt and equity market, we have seen the development of new forms of government support available to the private sector for infrastructure projects.

Technically speaking, "government support" can take (and has taken) many forms in the UK and across the world. At a policy and organisational level, many governments have sought to improve the management and delivery of their key

1 OECD report "Private Financing and Government Support to Promote Long-Term Investments in Infrastructure", September 2014.

projects and there has been more direct support to projects. Some examples in the UK market include grants, provision of public assets to contribute to a project (for example, free access to publicly owned land), revenue subsidies (such as those available in the renewable energy sector), minimum volumes for transport PPPs, minimum rent for student accommodation PPPs, public co-investment as equity or debt, and state guarantees.[2] Therefore, government support can come in many forms, including creating better governmental and regulatory environments for private investment, as well as providing financial contributions or assurances to a project to encourage private investment in infrastructure projects.

Recent developments in government support for infrastructure projects in the UK

In recent years, the UK Government has developed a number of measures to support investment in infrastructure in the country. The UK Guarantees Scheme and the creation of the Green Investment Bank are two key examples of these measures.

Under the UK Guarantees Scheme, the Treasury may provide support to infrastructure projects across a wide range of sectors for greenfield construction projects and for the acquisition, conversion, improvement, operation and repair of existing infrastructure assets. Government support comes in the form of an unconditional and irrevocable financial guarantee of scheduled principal and interest in favour of the relevant lender or investor, and on behalf of the borrower for the project. The flexibility of this scheme to apply to a range of financial structures and project structures is one of its main advantages. The scheme was implemented in response to the adverse credit conditions faced by infrastructure projects flowing from the global financial crisis. In this context, the scheme has generally been an effective tool in assisting projects to obtain access to funding and getting off the ground. However, the scheme does not provide support for obtaining investor funding for high-risk projects.

The Green Investment Bank was created in 2012 to back green projects on commercial terms and to help fund the creation of new, modern, green infrastructure across the UK. The Green Investment Bank's involvement in projects also attracts investment from the private sector in the projects with which it is involved. With the Government as the sole shareholder and having committed an initial £3.8bn of capital to invest, the Green Investment Bank is a useful form of government support by providing a source of debt and capital for infrastructure projects in the UK.

Other examples of recent government initiatives include:

- the establishment of Infrastructure UK within the Treasury and the Major Projects Authority to support major infrastructure projects involving public sector capital (and the more recent merger between Infrastructure UK and the Major Projects Authority to create the Infrastructure and Projects Authority);
- the planning permission framework for approvals for "Nationally

2 Ibid.

Significant Infrastructure Projects" intended to speed up the planning process; and

- the Pensions Infrastructure Platform (which is an independent infrastructure investment adviser, set up to encourage and facilitate UK pension funds to invest in UK infrastructure).

However, while these initiatives arguably "support" infrastructure projects in the UK, it is noted that they do not provide actual financial contributions or risk management/mitigation.

Importantly, each of these government support initiatives focuses on a specific element or risk of an infrastructure project or the infrastructure market. For example, the UK Guarantee Scheme focuses on the ability to obtain finance; the Green Investment Bank is centred around debt and equity investment in specific infrastructure sectors; and the planning process for "Nationally Significant Infrastructure Projects" focuses on reducing the risk around delays in obtaining planning approval.

In contrast, the government support package for the Thames Tideway Tunnel Project provided a multifaceted approach to public support for a "private" infrastructure project by focusing on a range of exceptional project risks and providing a support package in order to encourage private investment and achieve better value for money for customers.

Thames Tideway Tunnel Project – government support package

The Thames Tideway Tunnel Project (the Project) will be 25 kilometres long, pass through 12 London boroughs, up to 7.2 metres in diameter and run up to 65 metres below the River Thames. On 24 August 2015, a project licence was awarded by Ofwat to Bazalgette Tunnel Limited as the "infrastructure provider" to design, build, finance, operate and maintain the Project. The Project is important in supporting economic growth in London and in significantly improving the River Thames and the surrounding environment by protecting the river from further sewage discharges. It will be funded by the customers of Thames Water and privately financed by a consortium of investors making up Bazalgette Tunnel Limited. However, the Government acknowledged that there were some risks in the Project that were unlikely to be borne by the private sector at a viable cost.

On this basis, the Secretary of State for Environment, Food and Rural Affairs entered into a government support package (GSP) with Bazalgette Tunnel Limited to provide contingent financial support under Section 154B of the Water Industry Act 1991 for extraordinary project risks where this offered best value for money for customers and taxpayers. The GSP provides support in relation to a range of risks across six key agreements designed to support the Project should exceptional, low-probability but high-impact risks occur, which the private sector could not cover at an acceptable cost, or at all:

- *Insurance risks:* based on expected capacity in the commercial insurance market, it was considered that the financial limits of commercial cover might not be sufficient to cover all potential losses that might be sustained by the Project, and that commercial cover may become unavailable at subsequent renewals. Accordingly, the Supplemental Compensation Agreement provides financial support in respect of loss suffered in excess of the insurance policy limit and in respect of claims that would have been covered under unavailable insurance. The coverage provided under this limb of GSP relates to low-probability events but the occurrence of such events could be potentially catastrophic for the Project.
- *Disruption in the debt market:* where the infrastructure provider relies on the debt capital markets for its senior

debt finance, any sustained periods of disruption in those markets risk turning a liquidity issue into a solvency issue. If the Project is not able to raise debt due to an identified and defined "market disruption event" resulting from certain national or international economic or political events, the Secretary of State will provide a back-up temporary liquidity facility under the Market Disruption Facility Agreement (subject to satisfaction of certain conditions).

- *Cost overruns:* due to the size and complexity of the Project, the potential for cost overruns created a significant risk for investors and for the success of the Project. To mitigate this risk, while the Project will continue to have the obligation to raise finance to complete the Project, existing shareholders will not be obliged to provide such additional finance. Rather, the Government will inject sufficient equity to enable the Project to reach completion under the Contingent Equity Support Agreement (subject to the right to elect to discontinue the Project – see below). While the risk of cost overruns is remote, the assurance that the private sector will not be required to invest additional equity mitigates this risk and encourages investment.
- *Public sector shareholders:* where the Government injects equity pursuant to the Contingent Equity Commitment Agreement, it will become a shareholder in the Project. In this regard, the Shareholders Direct Agreement then creates a contractual link between the Secretary of State and the private sector shareholders, and provides a framework for the Government's involvement in the Project when it is in this distressed situation.
- *Insolvency:* special administration under the Water Industry Act 1991 applies when water undertakers, sewerage undertakers or certain qualifying licensed water suppliers become insolvent or fail to carry out their statutory functions. Under the Special Administration Offer Agreement, the Secretary of State will either make an offer for the equity and debt instruments issued by the infrastructure provider or discontinue the provision of the GSP in accordance with the Discontinuation Agreement, should the infrastructure provider remain in special administration for more than 18 months. This is intended to provide greater certainty to debt and equity in the event of special administration of the infrastructure provider.
- *Termination:* the GSP is intended to provide the support necessary to ensure that the Project can weather extraordinary circumstances and continue to completion. However, where certain significant, prescribed events occur, the Secretary of State will be entitled to elect to discontinue the provision of the GSP and pay compensation to debt and equity providers under the Discontinuation Agreement. This protection is required in order to avoid potentially unlimited liabilities, but the Discontinuation Agreement provides comfort to debt and equity regarding their return should the exceptional project risks occur.

The GSP will remain in place throughout the construction period of the Project, but will expire on completion and acceptance, subject to the Secretary of State's right to elect to discontinue the Project, or early expiry of the GSP in accordance with its terms.

Benefits of multifaceted government support

The approach taken to government support for the Thames Tideway Tunnel Project differed from previous approaches to support in a range of ways. Arguably, the main difference is the concept of "bundling up" a variety of different types of support to create a package which mitigates a range of risks across the project.

This approach potentially has a range of benefits when compared to the other types of support available for infrastructure in the UK which tend to focus on dealing with, or mitigating specific risks in, an infrastructure project. Examples of such benefits include:

- encouraging the project participants to assess at any early stage of the project the barriers or risks it presents, and to work with government and other stakeholders to customise the support required to deal with these identified risks;
- highlighting the fact that there are a variety of reasons on account of which infrastructure projects might not get off the ground or why the private sector might be reluctant to get involved, and seeking to address these reasons rather than exclusively focusing on a single risk, such as cost of finance;
- increasing the likelihood that the supported project will successfully complete by mitigating significant project risks; and
- creating a risk "envelope" for private sector debt and equity providers which optimises risk pricing, thereby improving value for money for taxpayers and customers.

Importantly, it should be recognised that the GSP was specifically developed for, and tailored to, the Thames Tideway Tunnel Project to address Project-specific risks, to fit in with the unique delivery model adopted for the Project, and to complement the regulatory framework in which the Project will be completed. Accordingly, the direct application of the GSP to other projects may not be appropriate. Nonetheless, the use of the GSP as an example of multifaceted and bespoke government support should serve to encourage the public and private sectors to explore different approaches to supporting private sector investment in a bid to encourage private investment, achieve better value for money, and boost the infrastructure market in the UK.

Ashurst advised Defra on the Thames Tideway Tunnel Project and the Government Support Package.

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HIGH-SPEED, MEDIUM-SPEED AND URBAN TRANSPORT:

Where next for rail in South East Asia?

by Matthew Rickards and Anna Hermelin

Rail projects in Asia have made political headlines in recent months as the competition between sponsor countries, in particular China, Japan and South Korea, intensifies. Numerous long-distance rail projects are now under discussion across South East Asia, including in Singapore, Malaysia, Thailand, the Philippines and Vietnam. Many are being mooted as potential candidates for high-speed rail, but this will not always be the right option.

With South East Asia seeing rapid urbanisation, governments are also facing increasing demands to build new and/or expand existing light rail and metro systems to ease the traffic gridlock facing many cities in the region. In the short term, projects are expected to come to market in the Philippines and Thailand and, in the medium term, Indonesia and Vietnam are also looking to develop urban rail projects in their major cities.

In this article, we consider the short- to medium-term long-distance rail and urban rail project opportunities in South East Asia, the structuring and financing options, and the key challenges to be resolved.

Upcoming rail opportunities in South East Asia: full speed ahead?

A number of countries in South East Asia are seeking to modernise their ageing long-distance rail networks, or to build new lines where none currently exist, in order to reduce travel times and increase domestic and cross-border options for travel between major cities. These long-distance rail proposals are in part linked to wider plans for improving trade links within South East Asia and beyond; for example, as part of UNESCAP's "Trans-Asian Railway" (TAR) programme – which was initiated as long ago as the 1960s with the aim of providing a 14,000 km continuous rail link between Singapore and Istanbul – and China's "One Belt, One Road" Silk Road initiative, which aims to develop economic routes to the Middle East and Europe.

There has been much talk of the use of high-speed rail for these long-distance projects over the past year, especially as China and Japan both seek to promote their own high-speed rail technologies and increase political influence within the region. China, for example, recently won a US$5bn deal to export high-speed rail to Indonesia (the Jakarta-Bandung line), while Japan recently won a US$15bn deal to build a high-speed rail line between Mumbai and Ahmedabad in India. However, there is some concern that the costs of high-speed rail projects may outweigh the benefits for many countries in the region, and there is an expectation that some of those still under discussion will be restructured as medium-speed networks following further assessment of the economics of the projects.

Outside of long-distance rail, the urban transport systems in many South East Asian countries are struggling to

Myanmar
- Dawai SEZ rail project
- Dry Ports rail project

Thailand
- Kae Rai-Min Buri Pink MRT line
- Lat Phrao-Samrong Yellow MRT line
- Hau Lamphong-Bang Sue MRT line
- Various high-speed rail

Vietnam
- Estimated that the local railway industry will need some US$8.5bn to build and upgrade its system during the 2016-2020 period

Philippines
- LRT6
- LRT4
- North-South Railway Project
- Mass Transit System Loop

Indonesia
- Soekarno-Hatta Airport Express Link
- Jakarta-Bandung rail project
- Various urban transit rail projects

Malaysia
- Singapore to Kuala Lumpur High Speed Rail

keep up with the rapid urbanisation of their populations, and many readers will be familiar with the traffic gridlock that can occur in major city centres such as Bangkok, Manila and Jakarta. Recognising that this gridlock is hampering economic growth and the mobility of labour, governments are focusing attention on developing new and expanding existing metro and light rail systems.

Country-specific opportunities

- In **Thailand**, the Government has been in talks with both China and Japan to source investment for the expansion of its long-distance rail network. In December 2015, it was announced that China and Thailand had agreed the construction of two medium-speed lines from Nong Khai to Map Ta Phut in Rayong via Kaeng Koi district in Saraburi, and another route from Kaeng Koi to Bangkok (both of which were initially expected to be high-speed rail projects). Japan, meanwhile, has been in discussions on two east-west corridor routes (from Kanchanaburi to Sa Kaeo, and Tak to

Mukdahan) and a high-speed rail link from Bangkok. In relation to urban rail, the Government recently announced that three mass rapid transit (MRT) line projects are to be fast-tracked under the Government's public private partnership (PPP) programme: Kae Rai Min-Buri Pink Line, Lat Phrao-Samrong Yellow Line and Hua Lamphong-Bang Sue Line (although the Government has since back-tracked and indicated that part of this line will now be directly procured).

- In **Vietnam**, numerous long-distance rail projects are in discussion, with an estimated US$8.5bn required to be invested in the country's ageing single track rail lines alone in the period 2016–2020. In particular, the Government is expected to move forward on a North-South high-speed rail line. In urban rail, although Vietnam currently has no city metro rail system in operation, networks are in development in both Ho Chi Minh City and Hanoi.
- In **Myanmar**, the most immediate opportunities are likely to be in industrial rail, such as the Dawei special economic zone rail project and the dry ports rail project.
- In the **Philippines**, the country's largest PPP project to date has recently opened to the market in the form of the North South Rail Project (South Line), as described in more detail below. In urban rail, the Government has recently invited international and local firms to bid for the light rail transit (LRT) 6 project under its PPP programme. The project involves the design, construction, operation and maintenance of a 19 km rail line connecting the Bacoor City and Dasmarinas City areas. Interested parties are required to submit pre-qualification documents by 4 March 2016. The LRT 4 project has also been approved by the Government for procurement under its PPP programme and is expected to be opened to pre-qualification prior to the change of administration in mid-2016. Given the institutionalisation of the Philippines' procurement laws (and that the laws governing the procurement of PPP projects are expected to be further

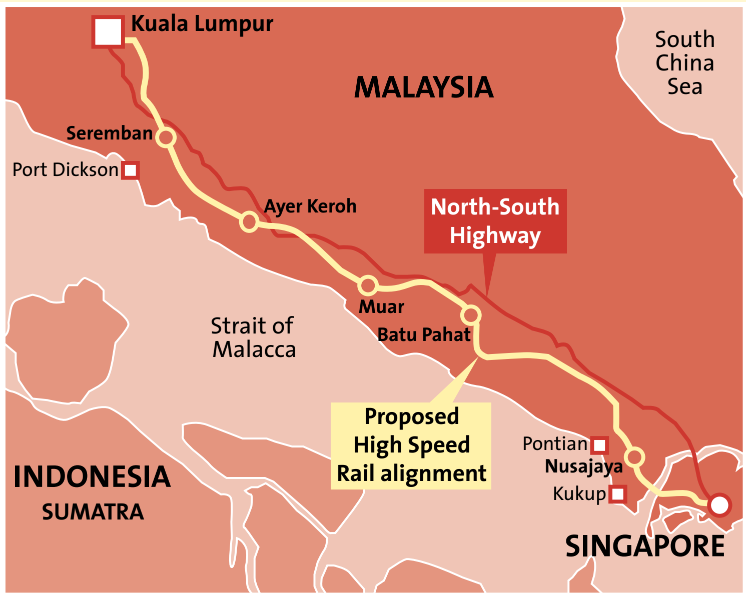
A focus on the Singapore-Kuala Lumpur High Speed Rail Project

In early 2013, the Prime Ministers of Malaysia and Singapore agreed to proceed with the long-discussed high-speed rail link between Kuala Lumpur and Singapore. The current proposal for the project includes:

- terminal stations in Kuala Lumpur and Singapore, with a further five transit stations in Malaysia, covering a route of around 350 km;
- passenger trains running at approximately 300 km/hour;
- an express journey time of 90 minutes and a transit journey time of 120 minutes; and
- double track passenger-dedicated lines on standard gauge using proven high-speed rail technology.

The structure and procurement arrangements have yet to be finalised. Given the size of the estimated capital costs (over US$12bn), it would likely be very challenging to procure the project on a fully integrated PPP basis, not least because of the difficulties a single concessionaire would have in raising sufficient private finance. It is more likely that the infrastructure procurement will be split into smaller work packages and for there to be a separate rolling stock tender.

The current target operational date is 2022 and the project is gathering momentum, with the Singapore and Malaysia procuring authorities conducting a joint market-sounding exercise in late 2015, in which operators from France, Germany, Spain, Canada, China, Japan and South Korea are understood to have participated.



"In early 2013, the Prime Ministers of Malaysia and Singapore agreed to proceed with the long-discussed high-speed rail link between Kuala Lumpur and Singapore."

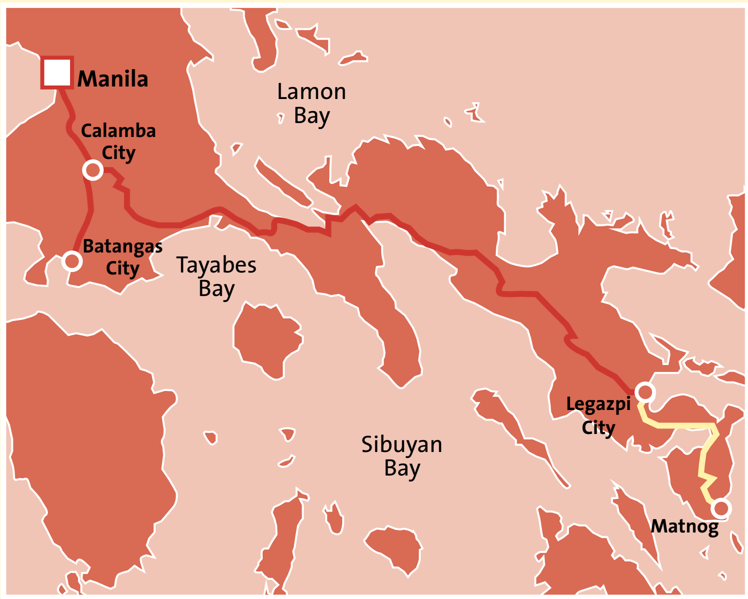
A focus on the North South Rail Project (South Line), Philippines

The US$3.8bn North South Rail Project (South Line), which is being procured by the Philippines' Department of Transportation and Communications and Philippine National Railways, will connect Metro Manila to Southern Luzon and incorporates:

- long-haul passenger operations from Manila to Legazpi City in the Bicol Region, with extensions to Batangas City and Matnog in Sorsogon (478 km main line, with 175 km for extensions); and
- commuter rail operations from Manila to Calamba City in Laguna (56 km).

At present, the transaction is structured as a 34-year concession, with a four-year construction period and 30-year operation and maintenance period. The concessionaire will be required to design and construct the entire system, including provision and operation of the rolling stock, with construction milestone payments from the Government. Availability payments are to be provided by the Government during the first 11 years of operations, and the concessionaire will additionally have access to farebox and other commercial revenues.

Initially, the project was intended to be awarded before the change of administration in mid-2016 but this is unlikely now that the deadline for submission of the pre-qualification documents has been postponed to 31 March 2016, following feedback from the market.



> *"The challenge for procuring agencies is to select the appropriate structure for their jurisdiction and the specific features of the project in question."*

strengthened prior to the change of administration) in addition to the clear need for investment in the rail sector, the change of administration is more likely to delay, rather than halt, the rail investment programme in the Philippines.

- In **Singapore** and **Malaysia**, all focus is on the planned Singapore-Kuala Lumpur High Speed Rail Project, which is described in more detail below.
- In **Indonesia**, fresh from signing the high-speed rail project from Jakarta to Bandung, which is to be developed and financed by China, the Government also has plans to develop the much-needed Soekarno-Hatta Airport Express Link. In the mid-term, further investment will be required to improve freight and passenger access to regional cities. In urban rail, the first phase of the Jakarta MRT is already under construction, and urban transit rail projects are also planned for other major cities including Bali, Bandung, South Sumatra, Surabaya and Surakarta.

Structuring and financing options

Rail projects, whether urban rail or long haul, and the structures used to implement them are complex, with a number of different approaches and options available to governments. The challenge for procuring agencies is to select the appropriate structure for their jurisdiction and the specific features of the project in question. The structure needs to work for all parties and, unfortunately, the right choice is not always made.

At one end of the scale of structuring options is the *fully public sector rail project*, where the public sector is responsible for directly procuring (or undertaking itself) all aspects of each and every element of the project. The benefit to the public sector is that it has total control and therefore flexibility for change. The disadvantages for the public sector include the need to directly source funding, minimal risk transfer, and minimal opportunities for taking advantage of private sector efficiencies and operations. Within South East Asia, this model has been adopted where governments have been able to access official development assistance

(ODA) funding in the form of direct grants or "soft" loans. Examples include Jakarta MRT in Indonesia and the first phase of the wider North South Rail Project in the Philippines (as referred to above), both of which are largely being funded by Japan. This structure has also been used in Singapore, where the Government has, for the most part, chosen to directly fund and procure its MRT network.

At the other end of the scale, is the *full PPP structure* where all of the design, construction, financing, operation and maintenance is passed to a private sector vehicle which raises third party commercial debt to realise the project. Rolling stock may be delivered by the project company or separately procured. The advantage of this structure for the public sector is that it maximises risk transfer and the upfront funding requirement is primarily a private sector issue. The disadvantages for the public sector is that PPP projects can take longer to structure and procure, and the Government risks selecting a consortium which includes a "best-in-class" construction company but a sub-optimal operator, or vice versa. This structure also brings a lack of flexibility in operations, and extensions or changes may also be harder to implement. In South East Asia, this structure was used in Thailand for the Bangkok Skytrain and in the Philippines for the LRT Line 1 extension project, and is a popular option for governments in the region who are typically operating on budget deficits and who are keen to take advantage of both international best practice in delivering rail projects and private sector finance.

A myriad of structures lie between these two extremes, including those that separate design, construction and maintenance functions from the operation of the system and procurement of rolling stock. Other structures go a step further and also separate design and construction into discrete packages, with each discrete section being operated by a separate franchisee and rolling stock being delivered by the operator or separately procured by the public sector. This last structure is suited to large-scale projects (such as the upcoming Singapore-KL high-speed rail project), as it can help to scale down the project into more manageable-sized packages for the market. It can also increase competition among contractors. The disadvantages are that, although the individual packages are made simpler, the deal as a whole is arguably more complex due to the interfaces created between the various packages.

As mentioned above, as many countries in the developing South East Asia market face budgetary constraints, directly procured rail projects are generally only possible through the provision of ODA and so-called "soft" loans. Such loans may be tied to the use of the technologies of the granting state and therefore not all such projects will be fully open to competitive bidding. However, a number of projects have been announced under the PPP model, with foreign bidders being actively encouraged to bid so as to benefit from international best practice. Finance will therefore need to be sourced for such projects. The availability of funds is not in itself expected to be an issue, with multilaterals such as ADB and AIIB, as well as export credit agencies, being keen to invest in infrastructure projects across the region, and commercial lenders indicating that they have sufficient liquidity to lend. From the perspective of potential financing parties, the issue is more one of a lack of bankable, well-structured rail projects coming to market.

Challenges to be resolved

The fundamentals for growth of the rail industry in South East Asia are very strong. The populations and economies of many countries within the region are growing fast and the strain on the existing transport infrastructure is increasingly apparent. The drivers for an increased focus on rail solutions are clear: improved economic performance, improved quality of life, increased labour movements, and improved regional trade and political links.

However, rail projects, both long-distance and urban rail, are technically and structurally complex to implement wherever in the world they are located and the challenges for implementing the planned pipeline of projects in South East Asia also remain apparent:

- **A structure that works for all:** the most appropriate structure for a particular project is not always selected due to political pressures, past precedent, lack of experience and/or public preconceptions. In order to attract best-in-class operators, private finance (if required) and increase the chances of the project running to time and budget, the structure (and risk allocation) selected for each project needs to work for all stakeholders, whether public or private.
- **Looking to the long term:** rail projects need to be structured to work in the long term in the context of the overall long-term transport strategy. It is very likely that extensions will happen and existing systems will need to interface with new lines. Variation mechanics and, for those projects structured as PPPs, the ability to buy out equity at certain fixed points or tied to particular events, may need to be considered. Where high-speed rail is contemplated, the high operating and maintenance costs means that long-term traffic projections need to be sufficiently resilient to support those costs.
- **Transparency in procurement:** transparency in procurement remains a challenge in a number of jurisdictions in South East Asia although some, such as the Philippines, have made great strides recently in establishing transparent procurement procedures and in gaining the trust of the international investor community.
- **Land acquisition:** long-distance greenfield rail projects will typically require extensive land acquisition. Even where the host government is willing (as it generally should) to accept the risk of land acquisition and the required laws are in place to effect such acquisition, delays may still occur due to public opposition or time-consuming judicial processes. Where projects are being built along existing lines (as is the case in the North South Rail Project in the Philippines), the land acquisition risk is minimised, although due diligence will still need to be conducted so as to identify any local settler issues. For urban rail, careful planning of the proposed alignment and early identification of the key stakeholders along the proposed route is key.
- **Managing local government risk:** for a long-distance rail project that crosses through a number of local government jurisdictions, conflicting policies between central and local government (this is not uncommon, for example, in Indonesia) can cause delays to the procurement of the project. Investors may also be exposed to local change in law risk and disproportionate local taxes, unless these risks are retained by the procuring authority.
- **Government capacity:** if central government and/or regional leaders, as well as local private sector developers or investors, are implementing a long-distance (especially high-speed rail) or urban rail system (as is the case in the metro systems being developed in Vietnam, for example) for the first time, this can increase the challenge and risk of delay for a project.
- **Local partner capacity:** even where bids from foreign investors are encouraged, local laws in the region will typically require some local content as a condition to any bid. However, there may be a limited number of candidate local partners with the requisite skills and experience in the rail sector, and early identification of, and discussions with, potential local partners can therefore be crucial.
- **Payment structure:** where the financing risk is with the private sector, a key issue for the bankability of rail projects in the region is the payment mechanism to be applied. It is typically difficult to finance revenue risk in a new-build scenario, although some governments in the region are keen to transfer revenue risk and which they justify on the basis of the clear need and passenger base. Others have proposed hybrid structures, such as that proposed for the North South Rail Project (South Line) project in the Philippines, as described above.
- **Sufficiently developed legal system:** while many countries in the region now have in place some form of legal framework to institutionalise the contractual arrangements for the procurement of infrastructure projects, including rail, in some jurisdictions these laws are relatively untested (as in Vietnam) or lack detailed implementing regulations (as in Indonesia and Thailand). Private participants will also need to consider the local laws relating to the ability to grant security over the assets (if private financing is required), employment and unionisation of staff, FOREX, and the repatriation of profits and the ability to elect foreign arbitration as the dispute resolution mechanism (this is not always allowed; for example, the Thai Government has a policy of not allowing international arbitration as a dispute settlement mechanism for foreign contractors, and in the Philippines construction-related disputes are required to be referred to the Filipino Construction Industry Arbitration Commission).

It remains to be seen how many of the projects highlighted above will come to market in the time-frames announced and how many will be truly opened up to competitive international bidding. Notwithstanding the challenges, the medium-term pipeline looks strong. Many of the governments in the region are keen to hear from international private operators, investors and lenders as part of formal market-sounding exercises, and more broadly and through such mechanisms, international operators may help shape the structure of the future project pipeline in South East Asia.

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INSOLVENCY RIGHTS:

The new rules for Spanish PPPs

by Manuel López and María Echániz

In recent years, a number of projects in the Spanish infrastructure sector have had to deal with the spectre of insolvency, the most significant being the insolvency of several toll road concessionaires. At the time of writing, eight toll roads are subject to insolvency proceedings. This has prompted changes to both Spanish public law procurement and Spanish insolvency law, as this article will describe.

Since 6 September 2015, amended insolvency legislation has been in force: public authorities are now permitted to standardise the restructuring of all concessions, and concessionaires undergoing insolvency proceedings can be referred to a specialist judge in a dedicated insolvency court, with standardised restructuring arrangements in place.

When dealing with an insolvent Public Private Partnership (PPP) project, three of the main issues which need to be considered are as follows:

(i) what restrictions will apply to new financial contributions made by the Government post-contract award;

(ii) what impact the insolvency will have on the granting of new security, in addition to that granted in the original financing; and

(iii) what compensation will be payable by the Government to the sponsors of the project in the event of a termination of the concession agreement (termed as the "financial liability" of the Public Administration, or RPA).

As a consequence of uncertainties surrounding these three issues, in October 2015 the Spanish Government passed Law 40/2015 which modifies Royal Legislative Decree 3/2011 on Public Sector Procurement.[1] This law was published in the Official Gazette on 2 October 2015 and amends various articles of the Public Sector Procurement Act, as well as introducing new articles 61.bis, 271.bis and 271.ter. The main purpose of the amendments have been to clarify the position of the Government in the event that a concessionaire becomes insolvent.

These new rules will have a major impact on the distribution of risk in Spanish PPP projects, especially in relation to their financing, as described below.

1 *Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público* (the Public Sector Procurement Act).

Restrictions on new financial contributions by the Government post-contract award

In the past, if a PPP concessionaire experienced financial difficulties, the Government generally stepped in to provide additional funding, in order to save the project. The main incentive for the Government to make contributions before a default situation arose was to avoid paying an RPA indemnification to the sponsors of the project if the project went into default. This approach did not sit well with public opinion, however, particularly when it related to high-profile projects.

The new regulation has amended article 254 of the Public Sector Procurement Act to restrict the making of new contributions by the Government. The new wording states that the Government is not permitted to make new contributions in excess of a maximum limit set out in the tender conditions for the concession agreement.

Paragraph three of article 254 states that the possibility of the Government making new contributions to the project must be foreseen at the time of the concession award, and that the tender conditions must specify this amount, which then cannot be increased post-contract award. This restriction applies to various types of securities, guarantees (*avales*) and other measures intended to support the financing of the concessionaire.

New rules on securities

Before this legislative reform came into force, article 261 of the Public Sector Procurement Act stated that all assets and rights linked to a concession could be subject to a mortgage, provided that the mortgage had been previously authorised by the government body in charge of the procurement (*órgano de contratación*). The new clause retains this provision but adds a new third paragraph, which foresees the possibility of granting a pledge over all credit rights arising from the termination of a concession (i.e. a pledge on future credits).

According to the new regulation, in order to grant a pledge over the credit rights arising from the termination of a concession agreement, the following requirements must be met:

(a) the pledge can only be granted in order to secure obligations which are connected with the concession;
(b) the government body in charge of procurement must authorise the pledge; and
(c) the granting of the pledge must be published in the relevant state's Official Gazette or in other regional official gazettes.

Consequences of the termination of the concession agreement

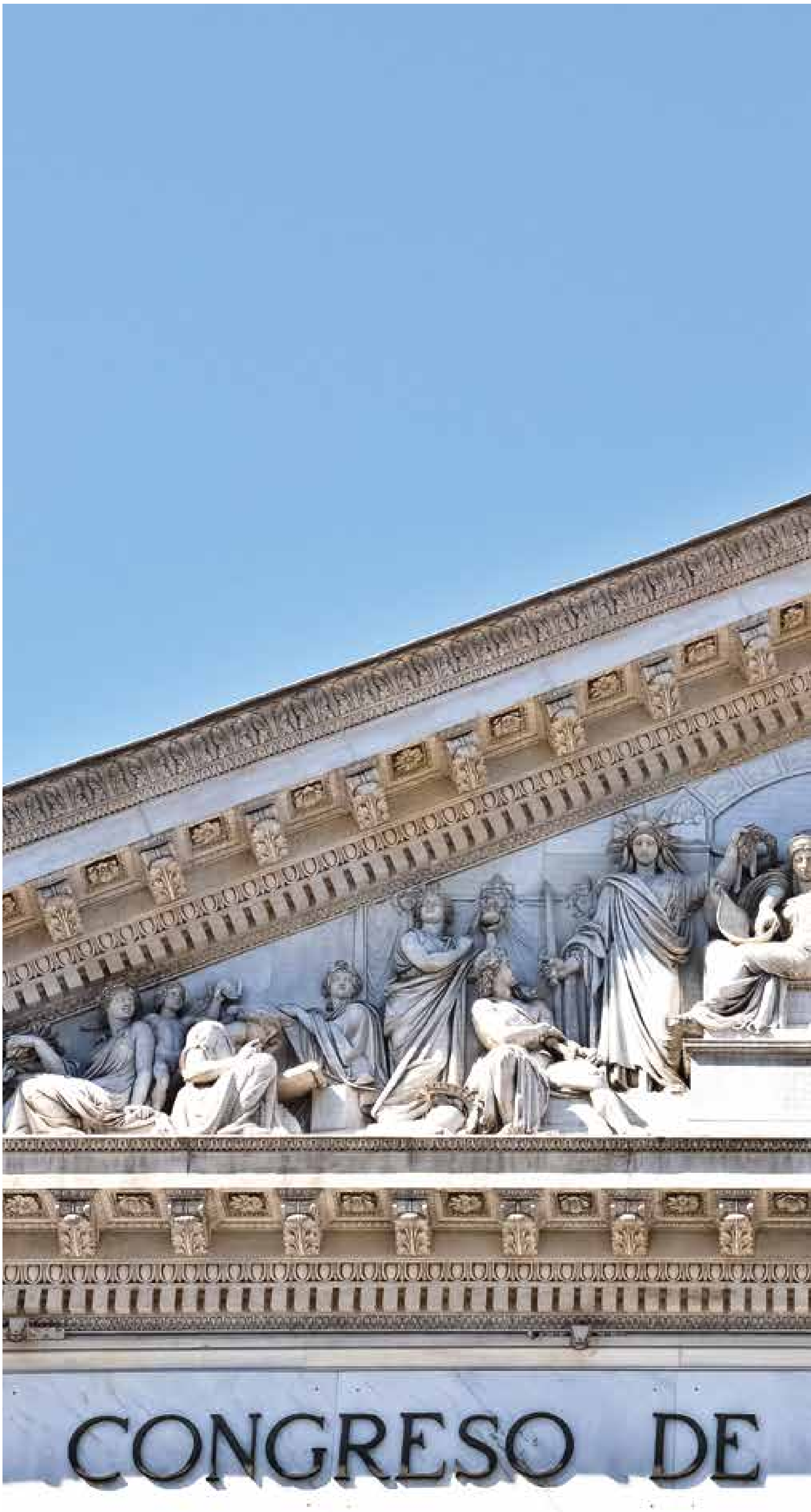
The most significant amendment introduced by this new regulation is the one contained in article 271, relating to the consequences of the termination of a concession agreement. When a concession is terminated, that may give rise to a financial liability on the part of the public administration or RPA.

For the purpose of calculating the RPA indemnification which the Government must pay to the sponsor, different rules apply depending on the cause of termination of the concession agreement (i.e. whether the cause is attributable to the Government or not).

(a) If the concession has been terminated for a reason which is attributable to the Government, the concessionaire has the right to be indemnified under the following heads of entitlement: (i) the investment made for the expropriation of land; (ii) the cost of the construction works; and (iii) the cost of acquisition of the necessary properties to enable the project to proceed. In order to calculate the value of the acquired properties, the Government applies depreciation on a straight-line basis.

In order to compensate the sponsor for the investment it has made, the Government uses its own criterion, known as a "recognised investment" (*inversión reconocida*). The Government's "recognised investment" will not necessarily be the same figure as the actual investment which the concessionaire calculates it has made: in practice it is actually very common for these two figures to differ. In order to calculate the investment for the purpose of the RPA indemnification, the Government uses a straight-line depreciation basis, taking into account the time elapsed between the end of the construction works and the overall term of the concession.

In addition, there are three situations in which the concessionaire will have the right to compensation for damages, which will then be added to the compensation figure as calculated above. These three cases are: (i) bail-out compensation (*rescate*); (ii) public interest cancellation; and (iii) impossibility of exploiting the project due to other



agreements executed by the Government post-concession.

This additional compensation is calculated by taking into account all future benefits that the concessionaire would have earned (calculated on the basis of the average pre-tax profits made by the concessionaire over the remaining years of the concession period) and the loss in value of all works and infrastructure which are not due to be returned to the Government.

(b) If the concession has been terminated for a cause that is not attributable to the Government, the concessionaire will still have the right to be indemnified for the cost of land expropriation, the carrying out the constructions works and acquiring all necessary properties. However, this indemnification is not capped at the value of the concession, but rather calculated in accordance with the rules of article
271.bis, which has been introduced by the present reform.

Article 271.bis states that, when a concession is terminated for a cause which is not attributable to the Government (in other words, a cause which is attributable to the concessionaire), the government body in charge of procurement must initiate a new process to award the concession to a new concessionaire. The concession will be awarded to the highest bidder provided that this is in excess of a minimum bid figure, which is calculated according to rules set out in article 271.ter. The value given to the concession – and thus the value of the indemnity cap – is the amount for which the new concession agreement is being awarded. In the event that there are no bidders, the government body in charge of procurement will call for a second process in which the minimum bid figure will be 50 per cent of that of the first process. If there are still no bidders in the second process, the value of the concession will be the minimum bid figure for this second process.

In any case, if the concessionaire becomes insolvent, it will be deemed to be a cause of termination which is not attributable to the Government.

Entry into force of the new rules

The new amendments of the Public Sector Procurement Act entered into force on 22 October 2015. The RPA regime applies to all concession contracts whose tender procedures (*expediente de contratación*) started after the entry into force of the Act. Note that those concessions awarded prior to 22 October 2015 – or whose tender procedures began before 22 October 2015 – will be governed by the previous legislation and are therefore not affected by these changes.

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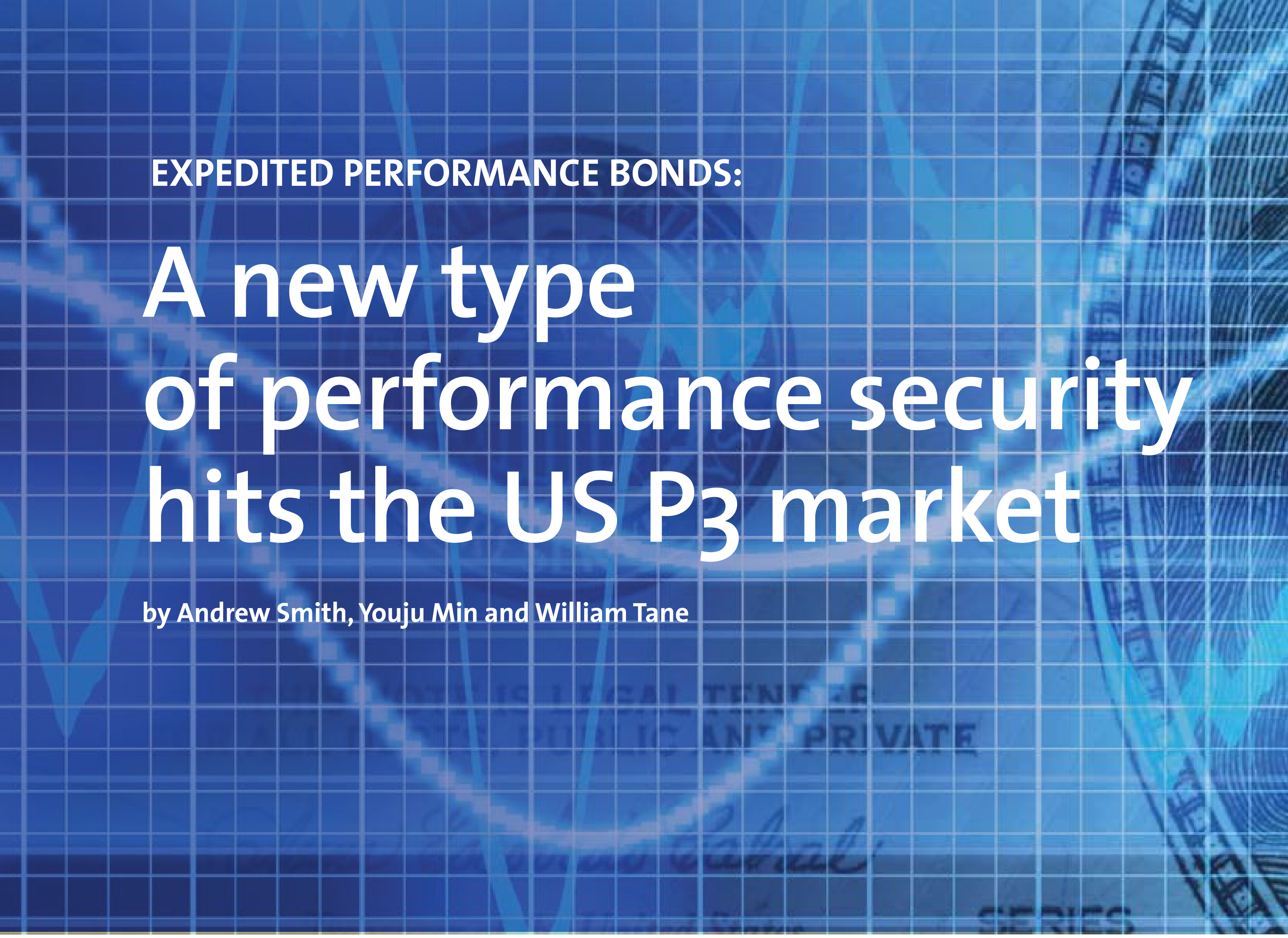


EXPEDITED PERFORMANCE BONDS:

A new type of performance security hits the US P3 market

by Andrew Smith, Youju Min and William Tane

In March 2015, the Pennsylvania Rapid Bridge Replacement Project reached financial close, and broke records as the largest private activity bond financing of a P3 in US history (US$721.5m) and the largest road project in Pennsylvania's history.

A less well-publicized fact is that the project was the first to use a type of performance bond that had not previously been used in the US P3 market – what the American insurance company Travelers call "Expedited Dispute Resolution Performance Bonds". This type of performance bond enables a much quicker and more well-defined resolution from the surety than the traditional performance bonds, and is therefore treated as a more credible form of performance security by lenders and ratings agencies.

This article briefly explains the general use of performance security in construction projects and discusses what Expedited Dispute Resolution Performance Bonds (referred to hereafter as EDR Bonds) are, why they may be attractive for developers and contractors to include in a performance security package, and the use of similar performance bond products in other markets.

An introduction to performance security

Before going into detail on EDR Bonds, it is worth briefly explaining the purpose of performance security in a construction project, and the manner in which performance bonds fit into this framework. The purpose of performance security is to give the awarding authority, project company and lenders comfort that they will have recourse following default by the contractor, particularly if direct action against the contractor may not be practical because the contractor has a low credit strength or may be insolvent. See the box on the next page for further details.

The structure of a performance security package will be driven by a number of factors and will vary from project to project. In some jurisdictions, legislation requires that contractors provide performance bonds in relation to certain government construction projects. In the US, the Miller Act mandates that prime contractors involved in the construction of any large federal public works project post both payment bonds (which ensure the subcontractors and material suppliers will be paid) and performance bonds. The Little Miller Act refers to state statutes that require prime contractors on certain types of state government contracts to satisfy conditions similar to those set out in the Miller Act.

In addition, project finance and P3 lenders and ratings agencies will also have certain requirements for the performance security package which will primarily

focus on the ability of the performance security to cover debt service and other project costs during a delay period or (in a worst-case scenario) during the replacement of the contractor. Therefore, creditors will be more interested in liquid forms of security such as letters of credit and retention security. The credit strength of the contractor and its parent company guarantor is an important factor in the structuring of performance security for the lending community because a contractor or guarantor with a strong credit rating is better equipped to fund and resolve a potential default scenario.

A critical consideration in the structuring of a performance security package is that different forms of performance security will come with different costs, and the cost of the performance security package will be passed down to the project company through the cost of the construction contract. As such, the more efficiently the performance security package can be structured, the cheaper the cost of construction will be.

In the US market, the performance security package for a project will typically consist of a combination of the following:

- Performance bonds – this is a guarantee given by a surety of the contractor's obligations under a construction contract. The surety will be required to have a strong credit rating. *(As noted below, the term "performance bond" can have a different meaning and format in other markets, such as in the UK.)*
- Parent Company Guarantee (PCG) – this is a guarantee of the contractor's obligations under a construction contract, granted by the contractor's parent company. The parent company will be an entity with a stronger credit rating than the subsidiary contractor.
- Letter of Credit (LC) or Demand Guarantee – these are on-demand instruments which can be drawn down promptly following any non-payment by the contractor (e.g. non-payment of liquidated damages under a construction contract). This type of security is more expensive than performance bonds or PCGs, and a contractor will also be more limited in its ability to raise LCs/demand guarantees than performance bonds.
- Retention security – this is a cash retention withheld (or retained) from the payment due to the contractor which acts as security in the event of a default or non-payment by the contractor. The retention amount will be released to the contractor following expiry of the construction and/or warranty period.
- Subcontractor Default Insurance (SDI) – this is an insurance policy which specifies that the insurer will compensate the developer for losses resulting from a subcontractor's default, and also provides coverage for indirect losses that result from a default, such as liquidated damages. However, SDI has deductibles and therefore may not be used in P3 projects as it fails to satisfy the requirements of the Miller Act and the Little Miller Act *(see further below)*.

Performance bonds, letters of credit and "on-demand" instruments in the US market

Having discussed performance security generally, it is also worth focusing in more detail on the difference between performance bonds and on-demand guarantees/letters of credit. This distinction can be confusing because the terms are not used consistently across markets and industries, and different terms can have the same implications in practice.

In the US market, the key distinction between these types of instruments is that a performance bond will guarantee the performance obligations of the contractor and is a secondary obligation – meaning that the surety will perform or pay under the performance bond *only if* the surety has investigated the default claim and validated that the contractor is in default. An "on-demand" instrument, such as a letter of credit or bank guarantee, is a primary obligation and the bank does not require proof of the contractor's breach: the only requirement for payment of an on-demand instrument is that a compliant demand is made in accordance with the terms of the instrument. A typical performance bond, on the other hand, may entail protracted litigation if parties disagree, and the surety is entitled to assert numerous defenses including those available to the contractor. Therefore, from a beneficiary's perspective, the critical difference between letters of credit and performance bonds is the ease and speed with which the beneficiary can resolve a claim for an amount due by the contractor under the construction contract.

On-demand instruments are also known as bank guarantees, letters of credit, on-demand guarantees, and on-demand bonds. Secondary obligation-style instruments are also known as conditional bonds, surety bonds, completion guarantees, completion bonds, etc. Terminology differs across markets and industry sectors. In practice, it will be necessary to check the instruments' terms to determine the type of performance security. In this article, we refer to "letters of credit" or "LCs" when we mean an on-demand/primary obligation performance security, and to "performance bonds" when we mean a guarantee/secondary obligation performance security.

What is an Expedited Dispute Resolution Performance Bond?

In the US market, an EDR Bond is a performance bond with a contractually determined maximum period for resolution of any dispute in the event the surety contests the contracting entity's call of default before the surety is obliged to perform or pay under the bond. Setting a maximum period of resolution adds certainty and timeliness to the bond, providing comfort to the beneficiaries that the surety will perform its obligations (including payment obligations) under the EDR Bond within the agreed period of time. Therefore, EDR Bonds are seen by creditors as a more beneficial form of performance security – a hybrid solution sitting between letters of credit and a typical performance bond. Even though the concept of an EDR Bond has been under discussion in the US P3 market for several years, the Pennsylvania Rapid Bridge Replacement Project was the first P3 project to successfully utilize EDR Bonds, which were developed by Travelers and The Walsh Group, in co-operation with Granite.

The length of the expedited dispute resolution procedure referred to in the bond may vary from transaction to transaction. On the Pennsylvania Bridges Project, the maximum period was 82 days (see the box on the next page for further details) and the terms of the dispute procedure were set out in the EDR Bond itself (although the bond could alternatively refer to an expedited dispute resolution procedure set out in the construction contract or elsewhere). If the contractor or the surety want to appeal the decision following the conclusion of the expedited dispute procedure, then they can do so, but the surety is obliged to perform or pay under the bond in accordance with the adjudication decision notwithstanding that an appeal may be contemplated.

Also of note is that Travelers issued a letter to Standard & Poor's regarding EDR Bonds, confirming that they would treat the obligation to pay in accordance with the decision reached through the dispute resolution as a hard obligation crystalizing at the end of the 82-day period (and thereby acknowledging that failure to pay could have an impact on the surety's own rating).

Time-frames for EDR Bond on Pennsylvania Rapid Bridge Replacement Project

The expedited dispute resolution procedures referred to in an EDR Bond will have clear timelines for reaching a decision. The procedure on the Pennsylvania Rapid Bridge Replacement Project was limited to a maximum of 82 days from the date that the beneficiary notified the surety of the default. The table below sets out the procedure between claim and payment under the EDR Bond used on the Project.

Beneficiary notifies surety of default
(Surety has 15 days to pay or elect to refer to dispute resolution).

If surety agrees with claim → **Payment or performance by surety**

If surety disputes claim ↓

Each party has ten days to file a statement setting out the legal and factual issues of the claim.

↓

Adjudicators are appointed within three days of such statements being filed. This is the "**Adjudication Commencement Date**".

↓

The adjudicators have 30 days to come to a decision (which may be extended by up to 14 days if required).

↓

Each party has up to five days to request clarification on the decision.

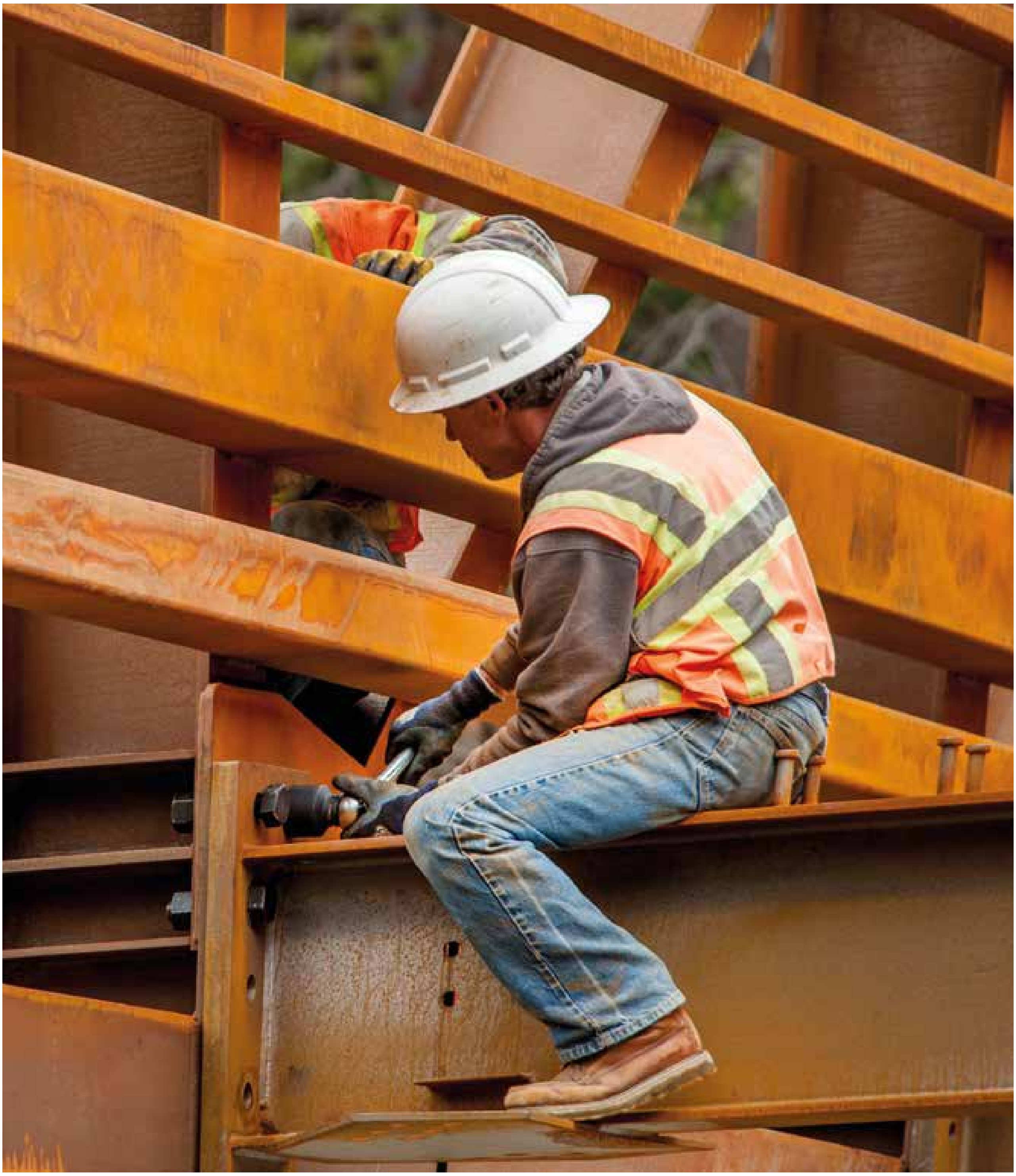
↓

The adjudicators respond within five days.

→ **Payment or performance** – if the adjudicators decide in favor of the obligee, the surety must make payment or perform immediately.

↓

Note that the parties have the right to appeal although payment must still be made by the surety in accordance with the decision of the adjudicators.



Liquid security and the benefits of Expedited Dispute Resolution Performance Bonds

Creditors, ratings agencies and LTAs will examine the liquid security available under the performance security package and will want to see sufficient liquidity to cover debt service and project costs in the event that construction is delayed and/or the contractor is replaced. The aggregate liquid security requirement varies from project to project depending on the type and complexity of the specific project.

In the case of Standard & Poor's, the liquid security requirement is determined through an analysis of the likely downside scenario, and with reference to the creditworthiness of the contractor or its guarantor compared to the construction rating of the project. In sizing the liquid security amount, Standard & Poor's will consider contractor replacement only if the creditworthiness of the contractor is lower than the preliminary construction phase stand-alone credit profile (also known as "construction rating"). If sufficient liquid security is not available for contractor replacement (if applicable), then the project credit rating will be capped at the rating of the contractor (or its guarantor). Standard & Poor's will count any cash reserves or LCs as liquid security but do not give any credit to typical performance bonds because there is no certainty as to how quickly they will pay out.

On the Pennsylvania Rapid Bridge Replacement Project, Standard & Poor's gave the EDR Bond ten per cent credit as liquidity security following the expiration of the maximum dispute resolution procedure period. The EDR Bond accounted for 100 per cent of the construction contract value (US$899m) and Standard & Poor's assessed that there would be US$89.9m of liquid security available after 82 days of delay. Therefore, the project structured the transaction such that LCs and cash covered only the first 82 days of delay.

There are two key benefits of EDR Bonds. Firstly, they can enable the performance security package to be structured more efficiently while still satisfying the requirements of project creditors and the public sector; secondly, they can marginally reduce the LC requirements for the project which thereby frees up the contractor's LC capacity to be used elsewhere in its business (and, in some cases, will allow contractors to bid for projects from which they would otherwise be precluded due to limited LC capacity – most US contractors will have a much larger surety capacity than LC capacity).

In the US market, although EDR Bonds are typically more expensive than traditional performance bonds, they are significantly cheaper than LCs and can be utilized separately from the limited line of credit a contractor has in providing LCs. Therefore, on the Pennsylvania Bridges Project, it was economical for the sponsors and the contractors to include an EDR Bond in the performance security package, as it marginally reduced the overall LC requirement and enabled the contractor to provide a robust and affordable security package to support an investment-grade rating from Standard & Poor's.

EDR Bonds have the additional benefit of balancing the need of the contractor for protection against the beneficiary's potential abuse of letters of credit, on the one hand, and the rating agencies and creditors' requirements for assured liquidity on the other hand: for this reason, using EDR Bonds will be more attractive to contractors, compared to providing liquid security with only cash and LCs. This is particularly relevant in the US P3 market, where international contractors are often supported by large lines of credit from foreign banks, compared to domestic contractors who do not have as significant a line of credit for LCs.

Although some states have excluded P3 projects from the requirements of the Little Miller Act on the basis that private sector creditors will require a robust performance security package, EDR Bonds would still satisfy this legal requirement to post bonds if these requirements were to apply to a project. This would prevent potentially overlapping performance bonds and large amounts of additional liquid performance security from increasing the cost of the performance security package.

Use of EDR Bonds in other markets

In the UK, the concept of an EDR Bond has been around for some time and these bonds are known as "adjudication bonds". In the UK projects market, it is quite common for an adjudication bond to be used as a compromise between a more liquid "on-demand" bond and a simple guarantee, which is drafted as a secondary obligation. Adjudication bonds are typically structured as an on-demand bond where the only condition is that a compliant demand is made in accordance with the terms of the instrument. Usually the instrument will require a demand to contain an adjudicator's decision confirming that the contractor is in breach of the underlying construction contract. Another feature of UK adjudication bonds is that, typically, in the event of the contactor's insolvency, they will become truly "on-demand", as the instrument will not require an adjudicator's decision in order to make a compliant demand.

The popularity of adjudication bonds in the UK is linked to the UK Housing Grants, Construction and Regeneration Act 1996 (the Act). Under the Act (with limited exceptions), parties to all contracts for the carrying out of construction operations or for the provision of professional services in respect of such operations have a statutory right to refer disputes under the contract to adjudication, and the Act requires that the adjudicator's decision be made within 28 days of referral. Therefore, the speed with which a UK adjudication bond may be called will typically be driven by this statutory 28-day period but may be longer depending on the agreed procedure for making compliant demands under the bond. This statutory period can provide beneficiaries with more certainty as to the potential time delay for calling on a bond.

In South East Asia, the use of EDR Bonds or adjudication bonds is not common, and instead it is more typical for performance security to be provided in the form of on-demand bonds. Both Australian and Middle Eastern P3 markets utilize performance bonds without the expedited dispute resolution process.

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NORTHERN AUSTRALIA:

Unlocking the "economic powerhouse" potential

by Tony Denholder, Clare Lawrence and Libby McKillop

The top half of Australia is easily recognisable on any map. Sparsely populated, Northern Australia is rich in terms of natural resources (minerals, gas, water) and agricultural land, but without the necessary infrastructure to fully exploit what is there.

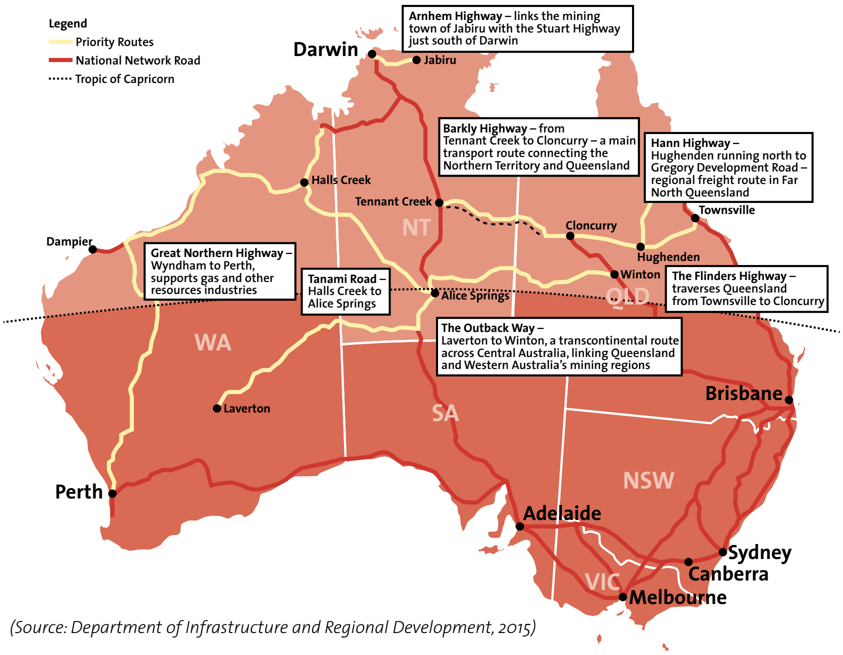
On the doorstep of the Asia Pacific region, the Australian Commonwealth Government has recognised the strategic importance of doing more to develop Northern Australia. Increasingly, infrastructure investors and developers are also considering the development opportunities in this region.

The Commonwealth Government recently released a blueprint outlining a vision for unlocking the potential of Northern Australia to develop into an "economic powerhouse". In parallel, the Northern Territory Government currently has 16 resources and infrastructure projects with "Major Project" status.[1]

With an abundance of project opportunities, coupled with regulatory and policy reform, government co-operation and concessional loan opportunities, Northern Australia is more attractive than ever from an investment perspective.

What is "Northern Australia"?

Northern Australia is broadly defined as the region above the Tropic of Capricorn which includes the whole of the Northern Territory and parts of Queensland and Western Australia.



(Source: Department of Infrastructure and Regional Development, 2015)

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1 The Northern Territory Government, Department of the Chief Minister reported the following projects as having "Major Project" status as at September 2015: Darwin LNG Expansion, Ichthys LNG, Options for Blaydin Point Expansion (Trains 3–6), Prelude Floating LNG, Bonaparte Gas, Roper Bar Iron Ore, Roper River Iron Ore, Wonarah Phosphate, Nolan's Bore Rare Earths, Mount Todd Gold Mine, Mount Peake, Casuarina Square Expansion, Ord Development – Stage III, Chandler Salt Mine, North East Gas Interconnector to Eastern States and Project Sea Dragon (aquaculture project).

Northern Australia fast facts

Northern Australia accounts for over **40%** of Australia's land mass

Northern Australia accounts for only **5.6%** of the Australian population

In 2013, Northern Australia generated over **11%** or **AU$178bn** of Australia's GDP

A flight from Darwin to Singapore takes just over **4** hours

Northern Australia's location, in close proximity to regions of increasing economic and population growth in South East Asia, provides Northern Australia with access to a number of high-demand markets, and provides these markets with valuable links to Australia's vast resources.

The White Paper

Encouraging innovation, fostering connections with investors and reducing red tape are key themes in the Australian Commonwealth Government's White Paper[2] which includes a vision for a more welcoming investment environment in Northern Australia. The White Paper describes Northern Australia as a developing "trade gateway" at the intersection of Asia and the Tropics.

The White Paper identifies key strategies to:

- enable greater use of natural resources;
- create a more attractive investment environment;
- invest in infrastructure, including road, rail and air services;
- reduce barriers to employment; and
- improve governance arrangements.

The Government has proposed a concessional loan scheme to fund major infrastructure projects such as rail, roads, ports, pipelines and energy projects.

Recognising the importance of Northern Australia, the Prime Minister in September last year appointed the Hon. Josh Frydenberg MP as Minister for Resources, Energy and Northern Australia. More recently, an additional stand-alone portfolio was created for Northern Australia, which is held by Senator the Hon. Matt Canavan. Each of these appointments is a strong sign of the Government's commitment to the development of the economy of Northern Australia.

Commonwealth Government investment in infrastructure

Unsurprisingly, the most significant financial commitments in the White Paper relate to improvements to infrastructure.

An audit undertaken by Infrastructure Australia in 2015[3] identified 180 infrastructure needs in Northern Australia. The report identified infrastructure gaps across sectors including airports, communications, energy, ports, rail, roads and water. The audit also acknowledged that a range of funding and financing solutions would be needed to deliver the projects to meet these needs.

Concessional loan scheme

The Commonwealth Government has announced the establishment of the Northern Australia Infrastructure Facility (NAIF) which will provide up to AU$5bn in concessional loans from the Commonwealth Government, to complement private sector and State and Territory investment.

An exposure draft of the Northern Australia Infrastructure Facility Bill 2016 was released on 28 January 2016. The Government has indicated that it is incorporating feedback received on the exposure draft into a Bill that will be introduced to Parliament in March 2016. The Government intends the legislation to commence on 1 July 2016 with funds to be available from that date.

2 The White Paper, entitled "Our North, Our Future: White Paper on Developing Northern Australia", was released on 18 June 2015 (White Paper).

3 Infrastructure Australia was commissioned to undertake an audit (the "Northern Australia Audit – Infrastructure for a Developing North Report") which was released in January 2015.

The NAIF loans will be used to finance major infrastructure projects such as rail, roads, ports, pipelines and energy projects. The NAIF aims to expedite infrastructure construction, and to enable infrastructure projects which would not otherwise obtain sufficient funding.[4]

The goal of the NAIF is "*not to crowd out private investment; rather … to offer just enough assistance for projects to attract the equity they need to proceed. NAIF loans will only fund projects that are financially viable, and the extent of their concessionality will be carefully calibrated to the needs of specific projects*".[5]

The Investment Mandate has not yet been finalised and will be subject to separate consultation in coming months. The Northern Australia Infrastructure Facility Consultation Paper[6] indicated that the eligibility criteria for funded projects would include:

- the project involves construction or enhancement of economic infrastructure (i.e. roads, rail, public transport, water, energy, ports, airports and communication networks);
- the project will be of public benefit (i.e. capable of serving multiple users and producing benefits beyond those capable of being captured by the project proponent);
- the project would be unlikely to proceed, or will only proceed at a much later date, without NAIF assistance;
- the project is located in, or will have a significant benefit for, Northern Australia;
- Commonwealth loan monies are not the majority source of project funding; and
- the loan will be able to be repaid.

In addition, preference will be given to projects which meet at least one of the following non-mandatory criteria:

- the NAIF financing component for the proposed project is for an amount of AU$50m or more;
- there is an identified need for the proposed project; and
- the proposed project has State or Territory endorsement.

Direct funding

In addition to providing concessional loans for infrastructure projects, the Commonwealth Government proposes to allocate:

- AU$600m for road projects including consideration of the Great Northern Highway, Arnhem Highway, Flinders Highway, Barkly Highway, Hann Highway, the Outback Way and the Tanami Road; and
- AU$5m for analyses of freight rail projects with an initial focus on a pre-feasibility study of the proposed Mount Isa to Tennant Creek Railway.

Furthermore, the Commonwealth Government is also proposing to invest AU$3.7m to develop an "infrastructure projects pipeline" to provide businesses with information on potential projects. This pipeline is intended to provide investors with information on infrastructure needs

4 White Paper, page 86.

5 Department of Industry, Innovation and Science, Australia Government website (industry.gov.au).

6 *Northern Australia Infrastructure Facility Consultation Paper*, November 2015 released by the Department of Industry, Innovation and Science on 9 November 2015.

Key features of the exposure draft of the Bill	
AU$5bn in financial assistance to the **States and Territories** for the construction of **Northern Australia economic infrastructure**	The NAIF will provide grants of financial assistance to the **States** and **Territories** for the construction of **Northern Australia economic infrastructure**. This is infrastructure that: • provides a basis for **economic growth** in Northern Australia; and • stimulates **population growth** in Northern Australia. AU$5bn will be appropriated from Consolidated Revenue for this purpose. There is a five-year time limit on decisions.
Establishment of an **Investment Mandate** and powers of the Minister	The Minister for Resources, Energy and Northern Australia will give directions to the NAIF in the **Investment Mandate** (comprising a legislative instrument made under the Act). The Investment Mandate: ✓ may include directions about the objectives of the NAIF, strategies and policies to be followed, loan characteristics, eligibility criteria for financial assistance and risk and return parameters; ✗ must not direct the NAIF to provide loans for particular infrastructure or to particular persons. The Minister must be notified of all proposals for financial assistance. There is a power for the Minister to reject a proposal (i.e. instruct the NAIF not to provide financial assistance) if the Minister is satisfied that providing the financial assistance would: • be inconsistent with the objectives and policies of the Commonwealth Government; • have adverse implications for national or domestic security; or • have an adverse impact on Australia's international reputation or foreign relations.
Establishment of an independent **NAIF Board**	The NAIF Board will be responsible for decisions under the NAIF. The NAIF Board will consist of between five and seven members, and will act in accordance with directions given by the Minister under the **Investment Mandate**.

and plans in Northern Australia in order to streamline development and ensure cost-efficiency for all parties.[7]

Northern Territory Government driving infrastructure projects

Deloitte Access Economics estimate that the Northern Territory economy will grow by an average annual rate of 4.2 per cent, which is anticipated to be the highest average annual growth rate of all Australian jurisdictions.[8]

As mentioned above, the Northern Territory Government currently has 16 resources and infrastructure projects with "Major Project" status. The Department of the Chief Minister is responsible for working with other government agencies to administer these projects. It has been estimated that the collective value of at least ten of these projects is AU$45bn.

The Department of the Chief Minister has been actively promoting infrastructure concessions. In 2014, it commenced the competitive bid process for the development of a pipeline connecting the Northern and Eastern Australia Gas Markets, known as the "North East Gas Interconnector" Project (NEGI).

Jemena was recently announced as the successful bidder in the competitive bid process to proceed with the NEGI Project. The pipeline will be 623 kilometres long and link Tennant Creek to Mount Isa. Construction of the NEGI is expected to be completed by 2018. This project is valued at approximately AU$800m.

The NEGI will support further exploitation of the Northern Territory's vast untapped unconventional gas reserves. It is estimated that more than half of Australia's oil shale resources are in the Northern Territory, centred on the McArthur Basin.

It has been suggested that onshore shale and tight gas production has the potential to drive significant growth in the Northern Territory economy. Deloitte Access Economics estimate that, under an "Aspirational" scenario, it could provide a cumulative AU$22.4bn increase in Gross State Product between 2020 and 2040 in net present value terms.[9]

Challenges

Despite Northern Australia's geographic location and abundant natural resources, the cost and service challenges inherent in the region, climatic factors such as the wet season, and land tenure and native title arrangements have historically affected investment.

The White Paper observes that development can be impeded by complex native title processes and inadequate land administration frameworks in indigenous communities. To address these challenges, the White Paper has proposed measures including:

- working with the Council of Australian Governments to streamline native title processes, with a view to resolving all existing claims within ten years;
- allocating AU$20.4m to support effective engagement between native title stakeholders and potential investors;
- consulting with stakeholders to support the use of exclusive native title rights for commercial purposes; and
- investing AU$17m to improve land administration in the Northern Territory and support the negotiation of 99-year township leases on Aboriginal land.

7 White Paper, pages 9, 92.
8 Deloitte Access Economics, December Quarter 2014: Northern Territory Government Economic Brief.
9 Deloitte Access Economics, "Economic Impact of Shale and Tight Gas Development in the NT", 14 July 2015.

Infrastructure investment case studies

Mount Isa to Tennant Creek Railway Project

Location: Link between Mount Isa (Queensland) and Tennant Creek (Northern Territory)
Length: 600 kilometres
Government commitments: The Northern Territory Government has committed AU$1m in funding for studies for the project. The Northern Territory Government, Queensland Government and Commonwealth Government are working co-operatively on the project. The Commonwealth Government has committed funding for the pre-feasibility studies for the project.
Status: The tender for a scoping study of the project has been awarded.

Port of Darwin

Location: Darwin, Northern Territory
Status: In late 2015, the Northern Territory Government announced that it had entered into a 99-year lease of the Darwin Port to the Landbridge Group. The Territory is expected to receive AU$506m in proceeds from the lease of the Port.

Conclusion

As noted in the White Paper, Australia's reputation for quality and sound governance present undeniable "brand advantages" for potential investors.[10] Australia is also politically and economically stable, with an impressive international credit rating and a history of encouraging private infrastructure investment.

The Commonwealth and Northern Territory Governments, as well as the relevant State Governments, have made it clear that they are keen to work closely with infrastructure providers to identify, evaluate and possibly support opportunities in this region.

10 White Paper, page 2.

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Global award and ranking highlights

The annual PFI Awards are considered one of the most prestigious in the global project finance calendar. At the PFI Awards 2015, which took place on 3 February 2016 at the Hilton Park Lane in London, a number of market-significant projects, on which Ashurst advised, received awards. These included the £4.2bn Thames Tideway Tunnel Project (European Infrastructure Deal of the Year), the AU$2.2bn Sydney Light Rail Project (Asia-Pacific PPP Deal of the Year) and the AU$1.6bn Toowoomba Second Range Crossing Project (Asia-Pacific Road Deal of the Year).

Ashurst's US team has followed up on its first inclusion in the "PPP – Nationwide" category of Chambers US 2015 directory by being ranked as **#1 P3 advisor in the US** for 2015 by both InfraDeals and IJ Global, achieved in part through our work on the Pennsylvania Rapid Bridge Replacement Project which received the "North America PPP Deal of the Year" award at the P3 Awards 2015 in October. In addition, Ashurst has been ranked as Band 1 in Chambers UK 2016 for *PFI/PPP, Rail Franchising, Rail Projects & Infrastructure* and *Rail Rolling Stock*.

At the IJGlobal Awards for 2015, held in London on 10 March 2016, deals on which Ashurst advised were awarded "Europe Water Deal of the Year" for the Thames Tideway Tunnel Project, "Europe Roads Deal of the Year" for the M11 Gorey to Enniscorthy PPP, and "Europe Biomass Deal of the Year" for the Cramlington Biomass Project.

In January, Milan-based counsel Umberto Antonelli (left), who specialises in project finance acting for both lenders and sponsors, won "Emerging Lawyer of the Year" at the Energy Legal Community Awards. Umberto's practice spans a range of industries including transport and infrastructure (toll roads, ports, airports and hospitals) and energy (waste-to-energy, biomass, wind and solar) both in Italy and abroad.

In terms of our other global activity, in the recent InfraDeals 2015 Global Market Trends and Activity Report, Ashurst was ranked **#1 in the UK** on legal advisory work by volume and **#4 globally** on legal advisory by value.

Our expanding team

Ashurst has a market-leading position advising clients in the infrastructure, energy and resources sectors. The firm is consistently broadening its talent pool by welcoming new joiners to the team. In November last year, **Michael Harrison** and **Richard Guit** joined our Ashurst Australia practice, Michael in Sydney and Richard in Perth. Michael is one of Australia's leading projects lawyers, with extensive experience working for clients (including government clients) in the transport (ports, shipping, rail and road), waste and water industries (including PPPs). Richard specialises in advising on infrastructure development, operation and divestment – acting for governments, sponsors, lenders and investors on all aspects of these transactions. He is active across all sectors and has extensive experience in PPPs, having advised on major economic and social PPPs in both the UK and Australia. In addition, our Frankfurt office will soon be welcoming a new partner, **Dr Max Uibeleisen**, who specialises in advising on energy (production facilities, grids) and industrial major projects, with a particular focus on environmental risks and regulatory issues in the energy and healthcare sectors. Max is recommended as one of the leading experts in environmental law (energy and industrial projects) by Who's Who Legal 2015.

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