



Guidance on PPP Contractual Provisions PPP 合同条款指南

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The Guidance received expert technical support from various World Bank Group staff, including from the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), the International Centre for Settlement of Investor Disputes (ICSID), the Global Infrastructure Facility (GIF), as well as the World Bank's Public-Private Partnerships Group. In addition, special thanks is due to the Global Infrastructure Hub (GIH), the African Legal Support Facility (ALSF), the Inter-American Development Bank (IDB) as well as all those organizations, entities and firms that participated in the public consultations conducted on the contents of the Guidance. 本《指南》得到了世界银行集团众多专家的技术支持，包括国际金融公司（IFC），多边投资担保机构（MIGA），全球基础设施基金（GIF），以及世界银行的公共-私营合作集团。另外，我们对全球基础设施中心（GIH）、非洲法律支持机构（ALSF），和泛美开发银行（IDB）以及所有参与本《指南》内容编制提供公开咨询的组织、实体和公司致以特别的感谢。

With the support of Allen & Overy LLP, the various comments and suggestions from all of the above sources were edited by Christina Paul and Susanne Foerster, lawyers within the World Bank's Public-Private Partnerships Group. 在 Allen & Overy LLP 事务所的支持下，从上述渠道收集的各种评论和建议由世界银行公共-私营合作集团的律师 Christina Paul 和 Susanne Foerster 进行编辑。

INTRODUCTION 简介

Public-Private Partnerships (PPPs) are now being used in many countries to develop infrastructure projects. While PPP transactions in this context typically are based on a network of complex legal agreements, there is normally a PPP Contract at the center of each such transaction, in the form of a concession agreement or similar document, between a public authority (the "Contracting Authority"^a) and a private company (the "Private Partner"^b). 如今，政府和社会资本合作（以下简称“PPP”）模式被众多国家用作基础设施项目的开发。虽然在这种背景下的PPP交易通常需要建立一个复杂的法律协议体系，但是在各个此类交易中均是以PPP合同为核心，该等PPP合同多表现为公共缔约政府部门（以下简称“缔约政府部门”）和私营公司（以下简称“私营合作伙伴”）之间订立的特许协议或其他类似文件。

The complexity and sophistication of PPP transactions, and the fact that they are often heavily negotiated to reflect the characteristics of a given infrastructure project, frequently means that considerable time and expense is involved in preparing and finalizing PPP Contracts. This has led many commentators to ask if it is possible to reduce costs, and shorten the time involved in such processes, by standardizing the provisions found in concession agreements or other PPP Contracts between the Contracting Authority and the Private Partner. In a number of countries efforts have been made to develop complete standardized PPP Contracts for different types of infrastructure projects, such as roads, railways, ports or power generation. To date, however, there is no universally accepted language for such agreements on an international basis. PPP交易错综复杂，且通常需要经过反复的谈判以反映所涉基础设施项目的特点，而这也意味着在准备和完成PPP合同的过程中需要消耗大量的时间和资金。正因如此，许多评论家开始思考有没有可能通过将缔约政府部门和私营合作伙伴之间的特许协议或其它PPP合同的条款标准化，来减少缔约成本并缩短缔约时间。许多国家已经在尝试为不同类型的基础设施项目（如公路、铁路、码头或发电站等等）制定完善的标准化-PPP合同。但是，至今还未就该等合同形成基于国际化背景的通用语境，。

Given the variety of PPP transactions carried out globally; the different legal systems existing in various countries; and the need to have 'tailor-made' provisions to deal with the individual characteristics of specific projects, the development of complete PPP Contracts on an international basis is likely an unrealistic goal. Nevertheless, there may be merit in focusing on certain contractual provisions dealing with particular legal issues encountered in virtually every PPP Contract/structure, such as, for example, the issues of force majeure, termination rights or dispute resolution. 全球范围进行的PPP交易多种多样，不同国家的法律体系五花八门，以及针对特定项目的特点所“定制”特殊的条款，使得制定国际通行的完整的PPP协议似乎成了一个不太现实的目标。然而，针对每个PPP协议/架构基本都会涉及的特定法律事项而制定通用的合同条款似乎是可行的，比如不可抗力条款，合同终止权利条款，或者争议解决条款等。

Against this background, the World Bank Group developed the Report on Recommended PPP Contractual Provisions, 2015 Edition (the "2015 Report") which presented the first attempt by a Multilateral Development Bank to prepare a compilation of "recommended" language in respect of a selection of these typically encountered provisions. Following internal and external consultations on the contents of the 2015 Report, it is in response to the industry feedback

^aContracting Authority: 缔约政府部门。在中国，缔约政府部门通常指政府部门/实施机构，在本指南中缔约政府部门指政府部门/实施机构。

^bPrivate Partner: 私营合作伙伴。在中国，私营合作伙伴通常指社会资本，在本指南中私营合作伙伴指社会资本。

received during those discussions that this new edition has been developed. In this respect, its objective is to assist its target audience, namely Contracting Authorities – and particularly those in emerging PPP markets –, with obtaining a better and more comprehensive understanding of the contractual provisions as outlined in the 2015 Report. Accordingly, this current edition includes, inter alia, detailed commentaries in regard to key considerations relevant for Contracting Authorities due to different levels of PPP transactional experience in a given country or due to the characteristics of different legal systems in order to help them to carefully assess the issues specific to their own PPP project and jurisdiction in developing contractual provisions. With the support of the Global Infrastructure Facility (GIF), this edition also comprises two additional chapters that address contractual considerations related specifically to bond financed and corporately financed PPP transactions. 在此背景下，世界银行集团撰写了2015版《PPP合同推荐条款报告》（以下简称“《2015报告》”），这是首次由一家多边发展银行尝试针对一些常见条款的“推荐”性语言制定文件。经过对《2015报告》内容进行内部和外部的意见征求，我们基于在多方讨论中所汲取的业内反馈，制定了该新版的《指南》。因此，本《指南》致力于协助其目标读者——缔约政府部门（尤其是新兴PPP市场中的缔约政府部门）更好更全面的理解《2015报告》中所列合同条款内容。基于该等目的，新版的《指南》重点涵盖了各国不同PPP交易经验的缔约政府部门，或不同的法律体系的特点所产生的不同问题的详细解说，以帮助他们在制定合同条款时审慎地评估其PPP项目和司法区域的具体问题。在全球基础设施基金（GIF）的支持下，新版的《指南》还包括两个新增章节，详细阐述了在通过债券融资和企业融资进行PPP交易时所需考虑的相关合同问题。

In regard to the sample drafting contained in this document, the authors would like to emphasize that it is neither intended to be exhaustive nor prescriptive - specifically, it is not meant to be mandatory for use in all PPP transactions which the World Bank Group financially supports. Instead, the objective of the Guidance is to set out and analyse contractual language that has formed the basis of many successfully procured PPP transactions, and to describe the rationale for these provisions. In doing so, the authors of the Guidance hope to foster discussion and consensus-building around these provisions and of appropriate contractual language in PPP transactions generally, with a view to helping to reduce the aforementioned time and expense associated with PPP Contract development. 有关本文件中的示范合同条款，作者希望在此强调其目的并非为了详尽规定，也并非为了制定准则，尤其并非为了在世界银行集团所资助PPP交易中强制使用。相反，本《指南》的目的是为了列示和分析那些在许多成功的PPP交易中形成的基础合同语言，并阐述这些条款的合理性。通过这种方式，本《指南》的作者希望推动围绕这些条款和PPP交易中适当的合同语言进行的讨论并达成共识，以帮助减少在PPP合同编制中的时间和资金成本。

As in any document of this type, some cautionary notes should be emphasized. As indicated, PPP transactions are usually very complex, and extensive due diligence - with the assistance of qualified legal, financial and technical specialists - needs to be undertaken by both Contracting Authorities and private parties before concluding a PPP Contract and related agreements. In this regard, the contents of this Guidance should simply be regarded as a suggested starting point and one of many inputs for the contracting parties to consider. 在任何这种类型的文件中，均应特别强调一些注意事项。如前文所述，PPP交易通常十分复杂，缔约政府部门和私营合作伙伴在订立PPP合同和相关协议前需在有资质的法律、财务和技术专家的支持下详细的尽职调查工作。由此，本《指南》的内容应当被简单的视为一种建议性的起点，以及各缔约方考虑的切入点之一。

Also, many of the provisions set out in the Guidance will affect the allocation of risks in a PPP

transaction - and the fairness of the overall risk allocation in a transaction can only be assessed by consideration of the entirety of the PPP Contract and related agreements. Where appropriate, suggested contractual language has been linked to the sample matrices showing the allocation of risks between public and private sectors in typical PPP transactions as contained in the Report on Allocating Risks in Public-Private Partnership Contracts, 2016 edition, developed by the Global Infrastructure Hub. It should likewise be noted that this Guidance primarily focuses on PPP transactions on a project finance basis, as reflected by the attention given to the protection of lenders' rights and the sharing of the benefits of refinancing. 另外，本《指南》中列示的许多条款将影响具体PPP交易中的风险分配，而一项交易的风险分配公平性只有通过PPP合同和相关协议整体考量才可以评估。在适当的情况下，推荐性的合同语言被链接到了全球基础设施中心（GIH）编写的2016版《公共-私营合作合同风险分配报告》中，并作为典型PPP交易中缔约政府部门和私营合作伙伴之间的风险分配样本。同样，还应当注意本《指南》主要关注PPP交易中的项目融资基础，即贷款方的权益保护以及再融资利益分配问题。

This being the second edition, the authors would finally like to stress that this publication is seen as an evolving process. The intention is to develop further iterations of the Guidance once further industry feedback has been collected and as and when new consensus develops around the provisions considered in the document or in connection with an analysis of other contractual language typical of successful PPP transactions. 本《指南》作为第二版，作者最后想在此强调，本次出版应被视为一个持续改进的过程。本次出版的目的是要进一步收集行业反馈，或就文件中的条款和成功的PPP交易中的典型合同语言形成新的一致意见，从而形成新版本的《指南》。

Christina Paul

Washington, DC
华盛顿特区
June 2017
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DEFINED TERMS 术语定义

Capitalized terms in this Guidance have the meanings set out below and additional capitalized terms used in the Sample Drafting sections are defined in those sections.本《指南》中大写的术语定义如下，样例章节中使用的大写术语在该章节另行定义。

Base Case Equity IRR	has the meaning set out in Section 5, Refinancing .
Contracting Authority	means the public authority that enters into the PPP Contract with the Private Partner.
Dutch Model	means Version 4.3 of the Netherlands Standard PPP Contract published in April (accommodation) and June (infrastructure) 2016. See links in Appendix, Additional PPP Resources .
Equity Investors	means, at any time, the Shareholders and/or their parent companies, as the context requires.
Estimated Change in Project Costs	has the meaning set out in Section 3, Change in Law .
Infra Australia PPP Guidelines	means the National Public Private Partnership Guidelines, Volume 3: National Commercial Principles for Social Infrastructure (December 2008) and/or the National Public Private Partnership Guidelines, Volume 7: National Commercial Principles for Economic Infrastructure (February 2011) published by the Australian Government Department of Infrastructure and Regional Development. See links in Appendix, Additional PPP Resources .
Lenders	means the finance parties under the Senior Finance Documents providing senior debt to the Private Partner [and/or the Issuer - see Section g, Bond Financing] for the purpose of the PPP Project (excluding the Shareholders and their affiliates, as providers of equity or subordinated debt).
MAGA	means Material Adverse Government Action as further described in Section 2, Material Adverse Government Action.
Original Base Case	has the meaning set out in Section 4, Termination Payments .
Party or Parties	means the Contracting Authority and/or the Private Partner, as the context requires.
PPP	means Public-Private Partnership. See also definition of "PPP Contract" .
基础情形股权内部收益率（IRR）	定义见 第5章——再融资 。
缔约政府部门	意指与私营合作伙伴签署PPP合同的政府机构。
荷兰模式	意指2016年4月（居住设施）和6月（基础设施）公布的《荷兰标准PPP合同》4.3版本。 相关链接见附录——附加PPP资源 。
股权投资者	意指根据上下文的要求，在任何时间持有股权的股东和/或其母公司。
预计项目成本变更	定义见 第3章——《法律变更》 。

《澳大利亚基础设施PPP指南》 意指澳大利亚政府基础设施与地区发展部发布的《国家公共-私营合作指南》，卷3：社会基础设施国家商业指导原则（2008年12月）和/或《国家公共-私营合作指南》，卷7：经济基础设施国家商业指导原则（2011年2月）。相关链接见附录 —— 附加PPP资源。

贷款方	意指在PPP项目中，根据优先融资文件向私营合作伙伴（和/或发行方——见第9章，债券融资）提供优先债的资金方（不包含提供股权或次级债的股东及其关联方）。
MAGA	意指第2章——重大负面政府行为中所述的重大负面政府行为。
原始基础情形	定义见第4章——终止的费用。
合约方	根据上下文的要求，意指缔约政府部门和/或私营合作伙伴。
PPP	意指公共-私营合作模式。另见“PPP合同”的定义。

PPP Contract	means the long-term agreement between the Contracting Authority and the Private Partner, for providing a public asset or service, in which the Private Partner bears significant risk and management responsibility, and remuneration is linked to performance. ¹
PPP Project	means the underlying project which is the subject of the PPP Contract.
Private Partner	means the private company that enters into the PPP Contract with the Contracting Authority. The Private Partner often takes the form of a special purpose company.
Project Agreements	means the [any offtake agreement, construction contract, the operating and maintenance agreement, the land lease agreement] ² .
Senior Finance Documents	has the meaning set out in Section 4, Termination Payments .
Shareholders	means, at any time, any person holding share capital in the Private Partner [adapt as appropriate to reflect financing and holding structure].
South Africa PPP Guidelines	means South Africa's National Treasury Standardised PPP Provisions: First Issue, published 11 March 2004. See link in Appendix, Additional PPP Resources .
UK PF2 Guidance	means the Standardisation of PF2 Contracts (Draft) guidance issued by HM Treasury in the United Kingdom, launched on 5 December 2012. See link in Appendix, Additional PPP Resources .
PPP合同	意指缔约政府部门和私营合作伙伴之间为提供公共资产或服务而签署的长期协议，大部分风险和管理责任由私营合作伙伴承担，相关回报与项目绩效挂钩。 ¹
PPP项目	意指PPP合同项下的标的项目。
私营合作伙伴	意指与缔约政府部门签署PPP合同的私营公司。私营合作伙伴通常以特殊目的公司的形式参与。
项目协议	意指PPP项目中的任何购销协议、建设合同、运营和维护协议、土地租赁协议等等。 ²
优先融资文件	定义见 第4章——终止的费用 。
股东	意指在任何时候持有私营合作伙伴股权的任何人（根据融资和持股结构进行适当调整）。
南非PPP指南	意指南非财政部于2004年3月11日发布的第一版标准化的PPP条款。 相关链接见附录 —— 附加PPP资源 。
UK PF2指南	意指2012年12月5日英国财政部颁布的PF2标准化合同（草案）指南。 相关链接见附录 —— 附加PPP资源 。

- 1 There is no single, internationally accepted, definition of Public-Private Partnership. This definition is the definition provided in the PPP Reference Guide Version 3.0, dated April 2017. [See link in Appendix, Additional PPP Resources](#). 对于公共-私营合作模式并没有唯一的、国际上普遍接受的定义。该定义是2017年发布的《PPP参考指南》3.0版中的定义。相关链接见附录 —— 附加PPP资源。
- 2 To be tailored on a project-by-project basis to refer to the material contracts entered into by the Private Partner in connection with and relevant for the PPP Project. 需要由私营合作伙伴在具体的PPP项目中根据具体的项目情况而定制并签署的重大合同。

AIM OF GUIDANCE 《指南》的目标

This Guidance is intended to provide Contracting Authorities with an analysis of, and drafting guidance for, specific provisions that are typically included in a PPP Contract and/or its related agreements in order to achieve a successfully financed PPP Project that will deliver the service or asset desired by the Contracting Authority. The Guidance draws on over 20 years' PPP market practice internationally, including guidance published by governmental bodies for Contracting Authorities, as well as the extensive experience of legal advisers supporting Contracting Authorities, Private Partners and different types of funders on PPP Projects, in both developed and emerging markets. This unique and comprehensive perspective enables the Guidance to present a real-world view of contractual issues and outcomes to help Contracting Authorities manage the private sector's expectations, as well as their own, when they have selected PPP as a method of infrastructure procurement.³本《指南》旨在为使用PPP模式的缔约政府部门提供PPP合同和/或其相关协议中使用的典型条款的分析和编写指导,以使PPP项目能够成功地获得融资,并提供缔约政府部门期望的服务或者资产。本《指南》吸取了国际上成熟市场和新兴市场超过20年的PPP市场实践经验,包括缔约政府部门发布的指南,以及支持缔约政府部门、私营合作伙伴和不同种类的PPP项目出资方的法律咨询顾问带来的丰富经验。本《指南》独特且全面的视角使其能够呈现出真实的合同问题及解决方式,有助于缔约政府部门在选择使用PPP模式作为基础设施建设采购方式时,管理其自身和私营部门的预期。¹

Prior to reviewing the detailed analysis and contractual provisions provided in this Guidance, it is key for Contracting Authorities to first understand the overall context in which a PPP Project is being developed. This is because the circumstances of each individual PPP Project will shape and determine the drafting of its PPP Contract and related agreements.在阅读本《指南》中提供的详细分析和合同条款之前,至关重要的是要让缔约政府部门首先了解PPP项目所在总体环境。因为各个PPP项目所在的总体环境将决定和影响PPP合同和相关协议的撰写。

To that end, set out below is a brief overview of why governments establish PPP programmes, what a PPP involves, key aspects of risk allocation between the Parties and approaches to ensure "bankability", as well as an overview of variations in approach that may be encountered in different legal systems, sectors and countries. It is important to take these factors into account in formulating and negotiating the terms of a PPP Contract.基于该等目的,下述内容简要列出了政府实施PPP项目的原因、PPP项目包含哪些内容、各方之间的风险分配所考虑的关键因素、确保项目“可进行银行融资”的方法,以及在不同法律体系、行业部门和国家遇到各种情况所应采取的变通方法概述。这些因素在PPP合同条款的制定和谈判阶段是应当考虑到的。

3 A tool aimed at assessing fiscal costs and risks associated with an envisioned PPP Project, and therefore designed to help governments to make informed decisions as to whether to procure a project as a PPP or not, is the PPP-Fiscal Risks Assessment Model (PFRAM) as developed by the International Monetary Fund and the World Bank in 2016. See link in Appendix, Additional PPP Resources.国际货币基金组织和世界银行在2016年开发了PPP-财务风险评估模型(PFRAM)作为评估拟进行PPP项目的财务成本和风险的工具,设计该工具是为了帮助政府在决定是否使用PPP模式完成项目时有充分的信息准备。相关链接见附录——附加PPP资源。

Also included in this Guidance are links to more detailed sources of information on | these areas, all of which will inform the Contracting Authority's approach towards | developing the specific terms of a PPP Contract for its particular PPP project. See [Appendix, Additional PPP Resources](#). 另外，本《指南》还附有有关这些领域的更多详尽的信息资源链接，这些资源可供缔约政府部门在其特定的PPP项目中制定具体PPP合同条款时参考。详见附录——附加PPP资源。

A. Overview of infrastructure development utilizing PPPs PPP模式用于基础设施开发概览

Increasingly, PPP programmes are being established by governments across the world as a means to deliver and maintain infrastructure, as well as to deliver other assets and services. Common themes encountered include: 世界各地越来越多的政府部门开始使用PPP模式作为提供和维护基础设施及其它资产和服务的方法。其所面临的共同课题包括：

- the need for the public sector to reduce the cost of building and maintaining infrastructure assets without negatively impacting on the quality of public sector services; 政府部门需要在不影响公共服务质量的前提下减少基础设施资产建设和维护成本；
- the need to accelerate delivery of both greenfield and rehabilitation infrastructure and the expansion of brownfield infrastructure; and 需要加快未开发地区和重建地区的基础设施提供，以及已开发地区的基础设施的扩建；以及
- the ability to benefit from private sector expertise in delivering innovative technologies and services. 能够从私营部门提供创新技术和服务的专业性中获益。

B. What does a PPP involve? PPP模式包含哪些内容？

While there is no single, internationally accepted, definition of PPP, the essentials of a PPP arrangement which are encapsulated in a PPP Contract are: 尽管对于PPP模式没有唯一的、国际上普遍接受的定义，但在一份PPP合同中需要涵盖的PPP项目的核心要素包含：

- a long-term contract between a private party (the Private Partner) and a government entity (the Contracting Authority); 私营方（即私营合作伙伴）和缔约政府部门（即缔约政府部门）之间的长期合同；
- for providing a new or existing public asset or service; 为了提供一项新的或现有的资产或服务；
- under which the Private Partner bears significant risk and management responsibility; and 根据PPP合同，私营合作伙伴承担主要风险和管理责任；并且
- where payments received by the Private Partner are linked to performance.⁴ 私营合作

4 See "PPP Contract" definition in [Defined Terms Section](#) and associated footnote. 见[术语定义章节](#)对“PPP合同”的定义和相关的脚注。

伙伴获得的回报与项目履行情况相关²。

The PPP Project functions transferred to the Private Partner - such as design, construction, financing, operation and maintenance - may vary from PPP Contract to PPP Contract⁵ but the inclusion of privately raised finance is key to ensuring that the Private Partner is financially exposed and therefore incentivised to perform.通过PPP合同转让给私营合作伙伴的责任（例如设计、建设、融资、运营及维护）可能因不同PPP合同而有所区别³，但将融资责任纳入其中是确保私营合作伙伴因财务投入而具有履约动力的关键。

C. Finance structures for PPPs PPP模式的融资架构

The Private Partner in most PPP Contracts is a project company specifically formed for that purpose - often called a "special purpose company" or "special purpose vehicle" (abbreviated to "SPV"). The SPV commonly finances the cost of a PPP Project through a combination of equity - provided by its Shareholders - and third party debt provided by its Lenders (who may be commercial banks, bond investors or other finance providers). The choice of third party funder and the cost of such funds will be carefully considered by the Private Partner in its bid preparation.在大多数PPP合同中，私营合作伙伴是一家专门为了该项目而成立的项目公司，该公司一般称为“特殊目的公司”或者“特殊目的实体”（简称为“项目公司”）。项目公司一般通过其股东提供的股本和贷款方（一般为商业银行，债券投资人或其它融资提供方）提供的第三方贷款的组合进行PPP项目融资。私营合作伙伴在进行项目投标准备时会对融资第三方选择和其融资成本进行细致的考量。

Any PPP Project losses suffered by the Private Partner are borne first by its Shareholders, and Lenders are adversely affected only if the equity investment is lost. This means Equity Investors accept a higher risk than debt providers and require a higher return on their investment. As equity is typically more expensive than debt, the aim in reducing the overall weighted average cost of capital of a PPP Project is to use as high a proportion of debt as possible to finance the PPP Project (typically 70 to 95 per cent of total project cost), which in turn should result in a lower priced facility and service for the Contracting Authority. The level of expected equity return will depend on the particular PPP Project's circumstances, but one of the advantages of a competitive bidding process is that bidders will be aiming to find a funding solution which delivers the best value for money for the Contracting Authority.私营合作伙伴实施PPP项目中遭受的亏损将首先由其股东承担，而贷款方只有在股权投资受到损失时才会受到不利影响。这就意味着，股东承担的风险比债权人的风险更大，因此股东方要求更高的投资回报。一般来说，股权成本比债权成本更高，因此尽可能地提高PPP项目融资中债务资金的比例（一般为项目总成本的70%-95%）可降低PPP项目的总体加权平均资金成本，从而进一步减少缔约政府部门为私营合作伙伴提供的设施或服务而支付的服务费用。预期的股权投资回报水平取决于PPP项目的特定环境。但是，通过竞争投标方式选择私营合作伙伴的优势之一是投标方将提供最佳的投融资方案，

5 In this report, for example, a PPP Contract for a hospital may involve the Private Partner designing, building, financing and maintaining the hospital, but only providing certain operational services (such as cleaning, catering etc) and non-clinical services which may continue to be provided by the Contracting Authority. Other types of PPP Contract (e.g. the design, construction, management and financing of a university accommodation block or a tolled highway) may involve more comprehensive operational services.比如，在本报告中，一个医院建设的PPP合同可能涉及私营合作伙伴设计、建造、融资和维护，但其仅提供某些运营性质的服务（比如清洁和餐饮等）而不提供门诊服务，这些服务可能继续由缔约政府部门提供。其他类型的PPP合同（比如大学宿舍区或高速公路收费站的设计、建造、管理和融资）可能涉及更加综合性的运营服务。

以最大化的实现缔约政府部门的物有所值。

From the Equity Investors' perspective, limiting their exposure to a single PPP Project in this way makes it possible to undertake much larger (and potentially more) projects than would otherwise be the case.从股权投资人的角度，以这种方式来减轻他们就某个PPP项目的投资风险可以让他们投资更大（而且可能更多）的项目。

PPP Project financings are typically structured as "non recourse" or "limited recourse" financings. In non recourse PPP Projects⁶, Lenders can be paid only from the Private Partner's revenues, without recourse to the Equity Investors. In the context of limited recourse PPP Projects, Lenders rely primarily on the Private Partner's revenues to repay their loans but have certain additional limited recourse to the Equity Investors. PPP项目融资的一般架构是“无追偿权”或“有限追偿权”的融资。在无追偿权的PPP项目⁷中，贷款方只能通过私营合作伙伴的收入获得清偿，而不能向私营合作伙伴的股东追偿。而在有限追偿权PPP项目中，贷款方主要依靠私营合作伙伴的收入收回贷款，但对于私营合作伙伴的股东也有某些附加的追偿权。

There have been examples of state/procuring entities taking equity stakes in project vehicles, for example, the Building Schools for the Future programme in the UK, the Non-Profit Distributing programme in Scotland and certain Belgian PPPs. Equity interests held by public and private sectors can serve to align incentives and promote co-operation at an operational level, while also giving the public sector a direct stake in the financial success of the PPP Project. However, it is important to design the framework to avoid conflicts of interest and to ensure that decisions necessary for the implementation of the PPP Project can be taken effectively and quickly and free from political influence. A public-private equity structure is therefore likely to be less suitable for PPP Projects in emerging PPP markets, particularly where there is a less stable legal and political environment, as Equity Investors may feel the structure holds too much uncertainty for them. 已经有国家/采购实体对项目公司提供股权投资的案例，比如在未来的学校建筑项目中，苏格兰的非盈利性分配项目，和一些比利时的PPP项目。缔约政府部门和私营合作伙伴共同持有项目公司股权的方式可以将双方的利益统一起来，不仅在运营层面促进双方的合作，而且有了缔约政府部门的直接参与可提升PPP项目融资的吸引力。但是，为防止双方的利益冲突，保证PPP项目决策过程的效率且避免受到政治影响，双方必须合理设计股权结构。由于股权投资方认为缔约政府部门和私营合作伙伴共同持有项目公司股权的架构存在太多不确定性，因此，该中股权架构并不适合新兴的PPP市场，尤其不适合法律和政治环境不太稳定的PPP市场。

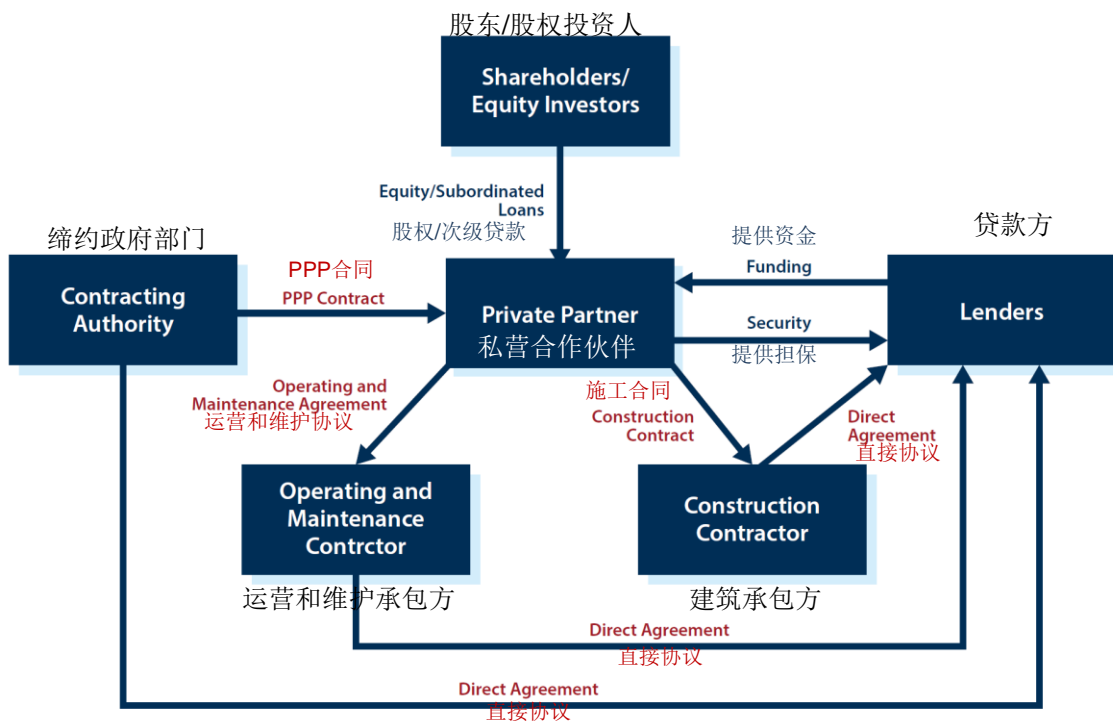
D. Structure diagram 架构图

This diagram shows the key parties and contracts involved in a typical PPP Project. The Contracting Authority contracts with the Private Partner through the PPP Contract and also enters into a separate “Direct Agreement” with the Lenders (see Section 6, Lenders’ Step-in Rights). The Lenders provide funding to the Private Partner and take security over the Private Partner’s assets for the repayment of such funding. The Lenders also enter

6 See Sections 9 and 10 for alternative modes of financing for a PPP Project by means of bond or corporate financing and their implications for the considerations for Contracting Authorities as detailed in Sections 1 to 8 of this Guidance. PPP项目通过债券或企业融资等其它融资模式见第9章和第10章，而缔约政府部门考虑的与之相关的问题见本《指南》第1章至第8章的详细说明。

into Direct Agreements with the Construction Contractor and Operating and Maintenance Contractor typically retained by the Private Partner to build and operate the project as required under the PPP Contract. The Shareholders/Equity Investors own the Private Partner, providing funding to it by means of equity and shareholder loans (the repayment of which is subordinated to the Lenders' funding). 下图包含了典型的PPP项目中涉及的关键合同方和合同体系。缔约政府部门和私营合作伙伴签署PPP合同并与贷款方签署独立的“直接协议”（另见第6章——贷款方的介入权）。贷款方向私营合作伙伴提供资金并以私营合作伙伴的资产作为贷款的担保物。贷款方还与私营合作伙伴基于PPP合同而选择的建筑承包方和运维承包方签署直接协议。股东/股权投资人出资设立项目公司，并通过股权投资和股东贷款为项目提供资金（资金的偿还顺序应劣后于贷款方的贷款）。

TYPICAL PPP STRUCTURE
典型的PPP结构



E. "Bankability" considerations for Contracting Authorities 缔约政府部门的“可融资性”考虑

Due to the high proportion of debt and the limited recourse available outside the PPP Project for debt repayment, third party Lenders undertake rigorous due diligence upfront, prior to funding, to assess whether a PPP Project is "bankable". For a PPP Project to be bankable, Lenders need to be confident that the Private Partner can service the debt raised to carry out the PPP Project. 由于项目公司的高负债率而且仅能就PPP项目行使有限追偿权，第三方贷款方在贷款前需进行审慎的尽职调查以评估PPP项目的可融资性。对于可融资性较强的PPP项目，贷款方需要确保私营合作伙伴有能力偿还PPP项目的负债。

In practice, this means that the Private Partner's operating cash flows need to be high

enough to cover debt service plus an acceptable margin to cover the risk of variation to the cash flows. Lenders will therefore focus on the payment mechanic and any risks which could adversely affect the expected revenue stream. In doing so, they will assess the technical and financial viability of the PPP Project, taking into account all material project risks and how these are allocated between, and managed by, the Parties. 实践中，这也就意味着私营合作伙伴的经营性现金流必须足以偿还债务并保持适当的余额应对现金流的变动风险。因此，贷款方会关注贷款的偿还机制，以及可能影响预期收入的负面事项。在这个过程中，贷款方会评估PPP项目的技术和财务可行性，考虑所有重大的项目风险并审查这些风险如何在合同当事方之间进行分配和管理。

These matters are also key to Equity Investors who are looking to protect their investment and ensure the Private Partner will be able to generate high enough revenues not only to service debt but also to meet their expected equity return. 这些事项对于股权投资方也至关重要。股权投资方不仅关心其投资安全性，而且希望私营合作伙伴可产生充足的收入以偿还债务并满足预期的股权投资回报。

From the Contracting Authority's perspective, the bankability of a PPP Project is key to whether or not it can succeed with its ambitions to procure infrastructure through PPP.⁷ As risk allocation is so crucial to bankability, the Contracting Authority undertakes a difficult balancing act in structuring a PPP Project - ensuring it is bankable, while resisting pressure to accept more risk than is necessary or appropriate. This is the key consideration underpinning the drafting and negotiation of PPP Contract provisions. The involvement of Lenders from an early stage of the procurement process, particularly while competitive tension between bidders exists, will enable the Contracting Authority to inform itself of, and take into account, bankability issues before the PPP Contract is signed. 从缔约政府部门的角度，PPP项目的可融资性也是影响其考虑是否采用PPP⁸模式进行基础设施建设的重要因素。风险分配是决定PPP项目是否可获得融资的关键要素，因此缔约政府部门需要在设计PPP项目架构时尽力平衡风险分配，既保证其可融资性，又力图避免承担不必要或不适当的风险。这也是编制PPP合同条款和谈判时需考虑的关键因素。贷款方从PPP项目采购的早期开始介入，尤其是在各投标方之间存在激烈竞争的阶段就开始介入，可以让缔约政府部门在签署PPP合同之前就知悉该项目是否可获得融资。

F. Risk allocation 风险分配

The underlying principle of a PPP arrangement is that the risks associated with carrying out a PPP Project are allocated to the Party best able to manage - or most incentivized to bear - them. This involves identifying which Party is best able to manage the likelihood that such risks will occur, as well as to manage the impact if they do actually occur. In assessing the likely cost impact, the Parties will look at each other's ability to bear such cost and the related impact on price, as well as whether and how the cost impact could be offset or passed on (e.g. via insurance, increasing the price of the service to the end user (e.g. in a toll road) and/or by spreading the cost across tax payers).⁸ As mentioned in

7 See footnote 3. 见脚注3。

8 For further insight into how and why risks are allocated to particular Parties, see the Risk Matrices in the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition. [See link in Appendix, Additional PPP Resources.](#) 更多有关如何在当事方之间进行风险分配及原因的观点，见全球基础设施中心报告中的风险指标：在公共-私营合作合同中的风险分配，2016年版。[相关链接见附录——附加PPP资源。](#)

Section E. above Lenders will be closely involved in this analysis and the procurement process should be designed so that Lenders' bankability issues are required to be reflected in bid proposals (potentially resulting in modification of the terms), so that these can be evaluated by the Contracting Authority during the competitive process and prior to signing the PPP Contract. PPP模式下风险分配的基本原则是将实施PPP项目中的风险分配给最有能力管理这些风险或者最有动机去承担这些风险的一方。这就需要确定哪一方最有能力管理这些风险，及在风险实际发生时降低所造成的影响。在评估风险可能带来的成本影响时，各方将分析各自承受这些成本影响的能力和对价格的影响以及如何对冲或转移（比如通过保险、提高向终端用户提供服务的价格（比如收费公路项目）和/或通过让纳税人分担风险的方式等等）这些影响⁹。如第E部分所述，上述贷款方将深入参与上述事项的分析。而整个采购流程应要求投标文件中应体现出贷款方的可融资性问题（可能导致条款的变更），以便缔约政府部门在竞争性投标的过程中以及在签署PPP合同之前就能对上述事项进行审查。

If risks are carefully assessed and transferred to the Party best able to control or mitigate them, this should result in a reduction of overall PPP Project cost and thereby improve value for money for the Contracting Authority. Contracting Authorities should therefore consider retaining those risks that are not conducive to pricing or assessment by a Private Partner and which the Contracting Authority is best placed to manage. By doing so, the Contracting Authority avoids having to pay the risk premium that will be charged by the Private Partner if it is required to assume such risks. 如果风险被分配并转移到了最有能力控制或管理这些风险的一方，则将降低整个PPP项目的成本，并随之提升缔约政府部门的物有所值。因此，缔约政府部门应当考虑承担那些不利于私营合作伙伴定价或评估且缔约政府部门更具控制力的风险。如此，缔约政府部门可避免因要求私营合作伙伴承担该等风险而必须支付的风险溢价。

Most importantly, the Parties should strive to achieve a balanced and reasonable risk allocation in the PPP arrangements that will provide an appropriate basis for a long term partnership. This is key because in order to deliver value-for-money, most PPP Contracts need to run for a significant period of time, typically between 15 and 30 years. Because of their long-term and usually complex nature, PPP Contracts cannot specifically provide for the entire range of events that might potentially arise during their lifetime. All stakeholders in a PPP Project will need comfort that situations which are beyond their immediate control and which affect contractual performance will be dealt with in a way that allows them to arrive at a mutually acceptable solution. Reducing uncertainty should also ensure greater value-for-money is achieved as uncertainty typically attracts a risk premium (i.e. the Private Partner will expect a higher price/return). As a result, PPP Contracts need to have flexibility built in to enable changing circumstances to be dealt with as far as possible within an agreed contractual framework. 最重要的是，合同各方应力求在PPP安排中对风险作出平衡、合理的分配，以便为长期的合作提供坚实的基础。这是实现物有所值的关键所在，因为大多数PPP合同期限都很长，一般长达15至30年。由于PPP项目的长期性和复杂性，PPP合同无法详细列明在合同期限内可能发生的所有风险。PPP项目的各利益相关方希望确保那些影响合同履行而又不受其直接控制的情形可以得到妥善处理，从而使各方满意。不确定性通常伴随着风险溢价，因此在减少不确定性的同时还应该始终确保物有所值（例如私营合作伙伴将要求更高的价格和回报）。因此，PPP合同需要保留一定的灵活性以便在各方约定的合同框架内处理不断变化的各种情况。

As risk allocation is achieved primarily through the contractual structure, it is essential for

a Contracting Authority to understand not only how the PPP Contract works, but also its relationship with the related Project Agreements and any other documents to which the Contracting Authority is party (such as the Lenders' Direct Agreement - see Section 6, Lenders' Step-in Rights), or which affect its obligations and liabilities (such as the Private Partner's debt and equity finance documents). As regards the PPP Contract itself, the interplay between the contractual provisions is so carefully balanced that they cannot be considered in isolation of each other - the PPP Contract must be looked at in its entirety 由于风险分配主要通过合同条款予以体现，所以缔约政府部门不仅必须理解PPP合同的结构和运作方式，而且还需理解PPP合同与相关的合作协议、缔约政府部门所签订的其它文件（比如贷款方的直接协议——见第6章，贷款方的介入权），或者影响缔约政府部门权利与义务的其它文件之间的关系。而对于PPP合同本身而言，应当就PPP合同进行整体审查，综合理解各合同条款之间的相互联系，避免孤立的理解个别条款。

It is important to note that risk allocation is influenced by various factors, including the maturity of the market, the experience of the participants and the level of competition between bidders. Emerging market governments and Contracting Authorities may therefore be able to transfer more risk to Private Partners once they establish successful track records in national/sectoral PPP markets, as these markets become increasingly attractive to Equity Investors and Lenders, and therefore more competitive. 需要格外关注的是，风险分配机制将受到多种因素的影响，其中包括市场的成熟程度、参与方的经验，以及投标方之间的竞争程度。因此，新兴市场的政府和负责采购的缔约政府部门如果在国家/行业的PPP市场建立起成功的案例之后，这些市场对于股权投资人和贷款方的吸引力就越大，竞争力自然就越强，因此他们将更有能力将更多风险转移给私营合作伙伴。

G. Alternative PPP payment mechanisms and risk allocation 其它PPP回报机制和 risk allocation 分配机制

As mentioned in Section E above, the payment mechanism and how payments under it may be affected is key to bankability. The model adopted may also influence how certain risks are agreed by the Parties to be managed. There are three main ways the Private Partner can be paid - by collecting fees from service users, by being paid by the Contracting Authority, or by a combination of the two. The common defining characteristic between these approaches is that payment is contingent on performance. 如上述第E部分所述，回报机制和影响回报的因素对于PPP项目融资至关重要。所采用的回报模式也影响着各方如何约定并管理风险。私营合作伙伴的回报模式主要有三种，包括：使用者付费、政府付费或结合上述两种方式即可行性缺口补助方式。上述三种回报模式的共同点为回报与绩效考核相挂钩。

"User pays" model - In PPP Projects using this payment mechanism, the Private Partner provides a service to users and generates revenue by charging users for that service (e.g. some toll roads). These fees (or tariffs or tolls) can be supplemented by subsidies paid by the Contracting Authority, which may be performance-based (for example, conditional on the availability of the service at a particular quality standard), or output-based (for example, payments per user).⁹ Under this approach, the Private Partner and its Lenders

⁹ In some jurisdictions, fees (or tariffs or tolls) under a "user pays" model may also be supplemented by a minimum revenue guarantee provided by the Contracting Authority to make the project commercially viable and bankable. 在某些司法区域，“使用者付费”模式下的费用（或单价或过路费）还可以通过缔约政府部门保证最低需求量的方式予以补充，以确保项目在商业上的可行性和可融资性。

bear the "demand risk" associated with the PPP Project, namely, how many users will pay to use the asset. There may also be some scope for the Parties to agree that costs associated with the occurrence of certain risks may be managed by increasing the user fee commensurately and/or extending the term of the PPP Contract. “使用者付费”模式——使用这种回报模式的PPP项目中，私营合作伙伴通过向用户提供服务并通过向用户收取服务费用产生收入（如收费公路）。上述服务费用（或服务单价，或过路费）可由缔约政府部门基于绩效考核结果（如符合约定服务标准的可用性要求）或项目产出情况（如单位用户付费情况）向私营合作伙伴支付补贴的形式予以补充¹⁰。在该种回报模式下，私营合作伙伴及其贷款方需要承担PPP项目的需求量风险，即需确认有多少用户会使用该资产并为此支付服务费用。合同各方还可约定如发生上述需求量不足的风险时，则可以通过适当提高使用者付费价格和/或者延长PPP合同期限的方式予以补偿。

"Government pays" model - In PPP Projects using this payment mechanism, the Contracting Authority is the sole source of revenue for the Private Partner. This is more usual in PPP Projects where the Private Partner has no influence over user demand (e.g. in the case of a hospital or prison) or where user demand will be too low or uncertain to generate sufficient revenue for the PPP Project to be bankable. Contracting Authority payments are usually conditional on the asset or service being available at a contractually-defined quality regardless of the level of use, and are often termed "availability payments". In this approach, the Private Partner and its Lenders are exposed to the Contracting Authority's credit risk and will assess it carefully. “政府付费”模式——采用这种回报机制的PPP项目中，政府付费是私营合作伙伴收回该项目投资和获取合理收益的唯一来源。这种回报机制适用于用户需求固定而不受私营合作伙伴影响的项目（例如医院或监狱项目），或者用户需求太低或需求不确定而无法产生足够的收入来覆盖该PPP项目的投资成本。政府方通常基于私营合作伙伴提供的项目设施或服务是否符合合同约定的标准而支付服务费用，而不考虑项目设施或服务质量的实际需求，这种模式一般称为“可用性付费”。在这种回报机制中，私营合作伙伴及其贷款方都面临缔约政府部门的信用风险，需对缔约政府部门的信用风险进行审慎评估。

H. Accounting treatment considerations 会计处理考虑

An additional factor for governments procuring PPP Contracts has been the availability of advantageous accounting treatment, in particular the perceived ability to treat such investments as "off balance sheet". However, this has attracted increasing scrutiny from accounting bodies around the globe due to a concern that governments may use PPPs to bypass spending controls (by taking public investment out of the budget and debt off the balance sheet), although they are still bearing substantial risk and significant contingent liabilities. This has resulted in bodies such as Eurostat, the International Monetary Fund and national accounting boards (e.g. in Australia) embarking on measures focusing on the overall risk/reward balance under PPP Contracts for the purposes of determining whether they should be classified as on or off government balance sheets. 缔约政府部门发起PPP项目的另外一个原因是寻求更优越的会计处理方式，尤其是可以将政府投资处理成“表外融资”的方式。但是，这种情况也引起了世界上会计机构的警惕，因为尽管在实质上缔约政府部门仍需承担风险和负债但缔约政府部门可能利用PPP模式进行预算外投资且支出不计入资产负债表下的负债，从而绕开了从预算内支出的限制。对此，欧盟统计局、世界货币基金组织和各国家会计委员会（如澳大利亚）开始寻求应对措施，平衡针对PPP合同项下的总体风险和回报，以确定这些PPP合同项下的融资是否应当归类为表内或者表

外融资。

In the EU, for example, Eurostat currently requires EU governments to follow certain accounting rules for the debt and deficit treatment of PPP Projects (ESA₁₀). These focus on how construction risk, availability risk and demand risk are allocated between the Contracting Authority and the Private Partner to determine the accounting treatment that must be applied. Under these rules (which themselves have given rise to some debate), "user pays" PPP Contracts are by default off balance sheet due to the risk/ reward balance, whereas "government pays" PPP Contracts may not be, depending on the risk allocation. While accounting treatment is not a factor which should drive negotiating approach, it is something Contracting Authorities should be aware of. 如在欧盟，目前欧盟统计局要求缔约政府部门在处理PPP项目负债和赤字时应遵守特定会计处理规则(ESA₁₀)。这些会计处理规则关注如何在缔约政府部门和私营合作伙伴之间分配建设风险、可用性风险和需求量风险，并以此确定采用相应的会计处理方式。根据这些会计处理规则（这些规则本身也存在一些争议），“使用者付费”的PPP项目因为风险/回报的平衡性而被自动按表外融资处理，而“政府付费”的PPP项目则需根据风险分配情况确定是否可按表外融资处理。然而，会计处理方式并不是主导谈判的主要因素，只是缔约政府部门应注意的其中一个因素。

I Country and sector-specific differences 国家和行业差异

As the above highlights, the PPP model is becoming an increasingly global contracting approach for governments. It is important to remember, however, that PPP Project risks vary depending on the country where the PPP Project is located, the nature of the PPP Project and the assets and services involved.¹⁰如前文所述，PPP模式逐渐成为一种全球化的合同模式受到政府主体的青睐。但不可忽视的是，PPP项目的风险根据PPP项目所在的国家、PPP项目的性质和项目涉及的资产和服务¹¹而不尽相同。

A road PPP Project, for example, is very different from a hospital PPP Project which in turn has some very different features to an airport PPP Project. Similarly, a defense PPP Project is likely to involve issues of national security which do not affect other sectors in the same way. The key is to understand where these differences lie and to apply the same principle of allocating each risk to the Party best able to manage it consistently with a view to maximising the value received by the Contracting Authority (measured by overall cost as well as quality of service provided by the PPP Project). 比如，一个公路PPP项目与一个医院PPP项目就有很大差异，而一个医院PPP项目又与机场PPP项目存在十分明显的不同。与此相似地，一个民防PPP项目有可能涉及国家安全的事项，而在其它类型

10 For example, environmental and social risks (such as the risk of damage to the environment and/or local communities due to existing latent environmental conditions) will vary depending on the specific nature of the PPP Project as well as the assets and services it involves. Accordingly, such risks and their impacts may need to be particularly identified and assessed as part of the Parties' due diligence. For specific examples of risk allocation, see the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition, e.g. the Environmental and Social risk entries in Risk Matrix 1: Toll Road (DBFO) and Risk Matrix 2: Airport (DBFO). [See link in Appendix, Additional PPP Resources](#). 比如，环境和社会风险（比如由于现在的环境条件而对环境和/或当地社区的破坏风险）会根据PPP项目的具体性质以及其涉及的资产和服务而有所变化。因此这些风险及其影响可能需要在合同方的尽职调查中进行特别的确认和评估。有关风险分配的具体案例，见全球基础设施中心（GIH）著作的《政府和社会资本合作合同风险分配报告》例如风险指标1：收费道路（DBFO）和风险指标2：机场（DBFO）中的环境与社会风险项。[相关链接见附录——附加PPP资源](#)。

的项目中却不受该等事项的影响。关键是要理解不同行业不同项目的特征，并使用相同的风险分配和管理原则将风险分配给最有能力管理该风险的一方，以此让缔约政府部门获得的最佳的物有所值（通过PPP项目的总体成本和所提供的服务质量来衡量）。

Many resources provide "standard" risk matrices and sample risk allocations, in some cases for specific project types. These can be useful when identifying project risks for a particular PPP Project. However, PPP Projects usually have unique features or circumstances - for example, the particular geological conditions on the route of a proposed road. Moreover, the typical risk allocation position in a developed PPP market in an established jurisdiction may not be appropriate in an emerging PPP market. This means that Contracting Authorities should ensure that experienced advisors identify a comprehensive list of project risks and analyse carefully how such risks should be allocated in the context of each individual PPP Project.¹¹有许多资源提供“标准化”的风险指标和风险分配样例，有些甚至针对某些特定的项目类型。这些资源将有助于识别某个PPP项目的风险。但是，PPP项目通常有着独特的特征和环境，比如拟建的公路沿线特殊的地理环境等。另外，在司法制度完善的成熟PPP项目市场中使用的风险分配方式可能不适用于新兴PPP市场。这就意味着，缔约政府部门应该委托有着丰富经验的咨询顾问全面识别项目风险并基于该PPP项目所处的环境详细分析并确定项目风险分配方案¹²。

J. *PPP Contracts in different legal systems* 不同法律体系中的PPP合同

Common law and civil law are the two main types of legal systems adopted by countries nowadays and some countries have adopted features from both into their legal systems. While the approach to allocating risk under a PPP Contract should be fundamentally the same in both civil law and common law jurisdictions, how such risk allocation is drafted and the extent to which it is negotiable may differ according to the level of freedom the Parties have to enter into bespoke contractual arrangements.现在世界各国采用的法律体系主要有两种类型，分别是英美法和大陆法，此外有一些国家的法律体系甚至融入了这两大体系的特征。PPP合同项下的风险分配方法在大陆法体系和英美法体系中应当基本一致，而拟定这些风险分配方案以及分配方案的可谈判性则可能根据各方在特定的合同安排中的自由度而不同。

An overarching consideration in relation to freedom to negotiate under both systems is whether the applicable procurement processes and rules limit the ability of the Parties to negotiate and amend the terms of a PPP Contract issued as part of a tender process, and whether any changes might give rise to procurement challenges or allegations of corruption. The Contracting Authority should take this into account when formulating the terms of the PPP Contract which will form part of its tender documentation to avoid tendering an unnegotiable, unbankable, PPP Contract.两种法律体系下有关谈判自由度的首要考虑是：采购须知和采购文件是否限制私营合作伙伴对作为采购文件组成部分的PPP合同条款进行谈判和修订，以及任何变更是否可能导致采购困难或出现腐败的情况。缔约政府部门在编制PPP合同条款时应当考虑上述因素，以避免形成不可谈判或不可进行银行融资的PPP合同。

11 For sector specific risk matrices, see the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition. [See link in Appendix, Additional PPP Resources](#). 对于特定行业的风险指标，见全球基础设施中心（GIH）著作的《政府和社会资本合作合同风险分配报告》例如风险指标1：收费道路（DBFO）和风险指标2：机场（DBFO）中的环境与社会风险项。[相关链接见附录——附加PPP资源。](#)

Aside from potential procurement law restrictions, underlying general laws may affect or apply to PPP contractual relationships without express inclusion in the relevant PPP Contract. In jurisdictions where this is the case, the Parties will need to verify whether and to what extent it is legally possible to amend or waive rights and obligations under such laws (taking into account how this may also affect third parties, such as users). Depending on the result of such analysis, the Parties may want to expressly spell out the underlying legal position in the PPP Contract for the sake of certainty. How such issues are addressed will depend entirely on the jurisdiction and Parties concerned and professional legal advice must be sought. Lenders will be equally concerned with this aspect. 除潜在的采购法律规定外，相关的一般法律虽然未在PPP合同中明确但却也可能影响或适用于PPP合同关系。在存在这种情况的法律体系下，合同方需要确认是否或者在何种程度上可以合法地修订或放弃这些法律规定的权利和义务（考虑这些法律可能也会给第三方带来的影响，比如用户）。根据上述的分析结果，私营合作伙伴为了追求确定性，则希望在PPP合同中明确约定其法律地位。如如何处理这些问题将完全取决于该项目所在地司法体系和合同相关方，则应寻求法律专业咨询意见。贷款方也会同样关心这些问题。

Common Law System - In a common law system parties typically enjoy extensive freedom of contract and few provisions are implied into a contract by law. Judicial decisions set precedents which will be followed in the determination of contractual disputes and therefore influence contractual drafting. A consequence of this freedom is that the terms of any contractual arrangements should be expressly set out in the relevant contract. In a PPP context, all arrangements governing the relationship between the Parties therefore need to be expressly set out in the PPP Contract itself. 英美法体系——在英美法体系中，当事方一般享有广泛的合同自由，并且很少因受到法律约束而在合同中写入特定条款。在解决合同纠纷时的主要依据是司法判例，因此以往的司法判例会影响合同的撰写。这种自由性的结果之一就是任何有关合同安排的条款都应当明确地写入相关的合同条款中。因此，在PPP模式下，所有支配合同方之间关系的安排则应在PPP合同中予以明确约定。

Generally speaking, everything is permitted that is not expressly prohibited by law or by contract. If a government is embarking on a PPP programme, it may therefore wish to ensure that certain protections are enshrined in applicable legislation and/or built into PPP Contracts for public policy reasons. For example, it may wish to expressly prohibit the service provider from cutting off the water or electricity supply of delinquent payers, or limit the toll or tariff a Private Partner can charge users, to reflect governmental obligations under relevant international treaties. It may also wish to expressly require that certain documents related to the transaction be disclosed under a freedom of information legislation. 一般来讲，法律或合同没有明文禁止的任何内容都是允许的。如果缔约政府部门计划启动一个PPP项目，那么出于公共利益和公共政策的考虑，缔约政府部门希望在所适用的司法体系中存在某些特定的保护性规定，和/或将这些保护性规定纳入PPP合同。比如，缔约政府部门希望明确禁止私营合作伙伴不得对未缴纳水费、电费的用户断水断电，或者规定私营合作伙伴向用户收取的过路费或其他收费的最高单价，以此来履行政府在国际公约中的义务。缔约政府部门也将希望明确要求私营合作伙伴根据信息自由的法律而披露有关交易文件。

Civil Law System – A civil law system is a codified system of law which is generally more prescriptive than a common law system. Basic rights and duties are enshrined in an overarching constitution under which specific legal codes are promulgated (such as

administrative and commercial legal codes). In addition, in many civil law jurisdictions, underlying principles of good governance and other administrative law rules affect public sector parties, and broad obligations such as “good faith” have an important impact on contract performance. Broadly speaking, legislative enactments are considered binding for all, as opposed to judicial decisions as in common law jurisdictions (although case law may be relevant, for example with regard to financial hardship concepts and force majeure). Codified provisions and underlying principles may be implied into civil law contracts without being expressly included. As a result, less importance is generally placed on expressly setting out all the terms governing contractual parties’ relationships because gaps or ambiguities can be remedied or resolved by operation of law. Accordingly, a civil law contract is often less detailed than an equivalent common law contract.大陆法体系——大陆法体系是一个成文法律系统，与英美法体系相比具有更完善的成文法律规定。宪法总览性的规定了基本的权利与义务，其它法律（如行政法和经济法等）则根据宪法制定。另外，在许多大陆法体系国家中，良好的治理原则和完善的行政法规、以及具有广泛约束力的义务如“诚实信用”原则对于缔约政府部门履行合同有着重要影响。一般来说，成文法对于所有人都具有约束力，而英美法体系中只有司法判例才具有约束力（财务困难或不可抗力等情形下判例法可能也相关）。成文法的规定及其原则可以在大陆法合同中予以体现而无需全部列明这些条款。在合同中无需将所有规范合同各方之间关系的条款全部列明，因为明文法律的规定可以解决或补充合同约定缺漏或不明的问题。为此，相比于英美法体系下的合同，大陆法体系下的合同可略为简略。

As in any jurisdiction, it is key for all Parties to understand how the underlying civil law operates and how it potentially affects the Parties’ risk allocation negotiations. PPP Contracts typically fall under the administrative law umbrella and the Parties will have to take into account underlying administrative law principles which apply to contractual relationships (e.g. in the context of force majeure rights or rights of the Contracting Authority to voluntarily terminate a contract or rights to “economic rebalancing” or compensation for a Private Partner suffering financial hardship as a result of certain changes in circumstance).与任何司法体系一样，合同各方理解大陆法体系中法律的作用以及这些法律对合同各方风险分配谈判结果的影响显得至关重要。PPP合同一般受行政法的约束，因此合同各方必须考虑可能适用于合同关系的行政法原则（例如在不可抗力下的权利，或者缔约政府部门主动终止合同的权利，以及私营合作伙伴因为环境的变化而经历财务困难时获得“经济再平衡”或补偿的权利等。）

Changing or overriding an administrative law principle by contract may or may not be legally possible and this will need to be confirmed on a case by case basis. Some civil law jurisdictions enjoy extensive freedom to contract (e.g. the Netherlands). However, in other jurisdictions, it may not be possible to derogate from certain principles or to completely waive certain rights, so the Parties will need to take this into account in their negotiations. A related issue for the Parties is what to include in the PPP Contract if underlying legal principles apply. Generally speaking, there is an increasing preference in civil law jurisdictions to expressly set out the position so that the PPP Contract is clear on its face and is not relying on implied terms from underlying law. This is partly because this approach will be more familiar to parties from common law jurisdictions, but also because relying on underlying law can be problematic as the meaning of certain terms and rules may not be clear. An alternative, which may also be effective, is to set out expressly in the PPP Contract how an underlying administrative law principle it is to be applied.通过合同约定改变或者凌驾于行政法原则是否合法的问题，需要根据具体情况分别予以确认。在一

些大陆法国家（比如荷兰）中，人们在签署合同时具有广泛的自由权利。但是，在其它司法国家，偏离某些法律原则或者完全放弃某些权利则是不合法的，因此合同各方应在合同谈判中考虑这些问题。与此相关的另一个问题是，当某个法律原则适用于该项目时，合同各方应如何体现在PPP合同条款中。一般来讲，在大陆法体系国家中，合同各方更加倾向于在合同中予以明确约定，如此，合同各方仅需依靠PPP合同的条款内容来履行各方的权利义务，而无需再另行依赖隐含在合同文本下的法律原则。一方面，因为英美法国家的合同方对此更加熟悉，另一方面也因为对某些条款和条件的约定不明而依赖隐含的法律原则可能导致合同履行过程中的争议。还有另一种行之有效的方法，即在PPP合同中明确约定行政法原则的具体适用方式。

K. *Foundations for a successful PPP Contract* 一个成功PPP合同的基础

The existence of a legal and administrative regime which permits PPPs and provides for a clear and transparent procurement process is essential. Without this, private sector parties are unlikely to invest time and resources (both financial and personnel), in participating in a PPP Project procurement process which may be lengthy and ultimately fail. Before any procurement process begins, governments in both civil and common law jurisdictions need to consider what additional legislation may be required in order to facilitate and permit PPP arrangements - this will include ensuring Contracting Authorities have the legal capacity and authority to enter into PPP Contracts (i.e. that they will not be acting "ultra vires" - beyond their powers) and that PPP arrangements in their desired form are legally permitted. Governments will also need to consider whether specific legislation is required to facilitate PPP Projects in a particular sector or (particularly in the case of civil law jurisdictions) is needed to limit the scope of an underlying law restriction which may be preventing or impeding the successful procurement of a PPP Project. This includes assessing any implications as regards potential financing, tax and security arrangements.¹²首先，制定允许采用PPP模式并为PPP模式提供一个清晰透明的采购流程的法律和行政法规制度显得十分重要。如果没有法律和行政法规制度作为基础，私营合作伙伴将不愿意投入时间与资源（从财务和人力两方面）参与到PPP项目采购流程中来，从而导致PPP项目采购流程变得十分冗长并最终导致项目采购失败。在采购流程开始前，大陆法体系和英美法体系中的缔约政府部门都需要思考还需要完善哪些法律体系，以允许和支持PPP项目各项安排（包括保证缔约政府部门在法律体系下有能力且有权签署PPP合同，即不会越权行动），并保证缔约政府部门期望的PPP安排形式已被法律所允许。政府还需要考虑是否需要某项立法来支持某个行业中的PPP项目，或者（尤其是在大陆法体系国家）来限制可能妨碍或阻止PPP项目成功采购的立法，包括对可能影响PPP项目采购的融资、税务和担保安排等相关法律进行评估¹³。

A stable political, economic and legal regime and environment is also desirable. While certain associated risks can be managed under the PPP Contract, ultimately the risk of investing in and lending to a PPP Project where these conditions do not exist may be too high for some private parties, particularly when compared with alternative investment or lending opportunities. The involvement of export credit agencies and multilateral and development finance institutions can give Equity Investors and Lenders greater confidence in certain jurisdictions. This is due not only to their ability to offer more

12 For an overview of as well as specifics on PPP legal frameworks, see the PPP Reference Guide Version 3.0, dated April 2017. [See link in Appendix, Additional PPP Resources](#). 有关PPP法律框架的概述，见2017年4月的《PPP参考指南》3.0版。[相关链接见附录——附加PPP资源](#)。

favourable financing terms or products such as political risk insurance in respect of commercial loans and equity, but also because of the relationships they enjoy at government level. Similarly, the existence of bilateral investment treaties between governments may play a part in the private sector's decision to invest in some jurisdictions. These elements are additional factors in the negotiation of a well-balanced PPP Contract in such jurisdictions, but are not a substitute for a PPP Contract. 一个稳定的政治、经济和法律体系及环境也非常重要。虽然某些相关的风险可以通过PPP合同进行分配和管理，但是如果没有稳定的大环境，最终私营合作伙伴在PPP项目的投资和融资中所需承担的风险就会显得过高，尤其在与其它投资或融资机会相比时。在某些司法区域，出口信贷机构和多边开发融资机构的参与可以为股权投资人和贷款方带来更大的信心。不仅是因为这些机构可以提供更好的融资条款或产品（比如针对商业贷款和股权的政治风险保险），同时也因为这些机构与缔约政府部门的关系良好。类似地，政府之间签订的双边投资协议也可能影响某些司法区域中私营合作伙伴的投资决策。不过，对于风险平衡的PPP合同谈判而言，上述因素仅为附加因素，不能替代PPP合同。

L. Conclusion: the importance of a project-specific approach 结论：具体项目导向方法的重要性

As highlighted at the outset, understanding the whole context of a PPP Project is critical for Contracting Authorities when devising and negotiating the terms of a PPP Contract. Risk allocation has a direct impact on bankability and pricing, which determines whether a PPP Project will be affordable for a Contracting Authority or users and financeable by a Private Partner - and ultimately whether the asset and/ or service will be provided at all by means of a PPP. There is no "one size fits all" PPP Contract and contractual provisions cannot be looked at in isolation due to their close interplay. 在开头已经说明，理解PPP项目的背景对于缔约政府部门编制PPP合同条款的并进行谈判至关重要。风险分配对于PPP项目的可融资性和融资成本具有直接影响，进而决定缔约政府部门或用户能否有足够的财力支付PPP项目的付费，以及私营合作伙伴能否获得融资，最终决定是否可以采用PPP模式来实现资产的可用性和/或服务质量的提升。没有放之四海而皆准的PPP合同，而且不应忽视合同条款之间的相互关系而孤立的看待某个条款。

This Guidance is intended to help Contracting Authorities carefully assess the issues specific to their own PPP Project and jurisdiction in developing contractual provisions. It explains the rationale for the drafting of certain material provisions that have formed the basis of many successfully procured PPP transactions around the globe and which have been developed through detailed risk allocation assessment and negotiation between Contracting Authorities, Private Partners and Lenders. Its goal is to help Contracting Authorities negotiate key aspects of PPP Projects confidently and efficiently and to reduce the time and money being spent negotiating contractual terms which may ultimately result in an unaffordable or unbankable PPP Contract. 本《指南》旨在帮助缔约政府部门在撰写合同条款时仔细研究其PPP项目和其所在的司法区域的特点，同时解释了许多全球范围内成功PPP交易在撰写一些重要条款时的考虑，这些条款在撰写之前都经过了细致的风险评估，以及缔约政府部门、私营合作伙伴和贷款方之间的谈判。本《指南》的目标是帮助缔约政府部门树立信心和高效率的进行PPP项目关键要点的谈判，并缩减合同条款谈判所耗费的时间和资金（避免导致PPP合同执行成本太高或者融资性太差）。

1

FORCE MAJEURE 不可抗力

1.1 KEY ASPECTS 关键方面

1.1.1 *The concept of Force Majeure* 不可抗力的概念

"Force Majeure" was originally a civil law concept, but it is now widely used in commercial contracts, including those governed by the laws of common law jurisdictions. “不可抗力”为源自大陆法系中的概念，现在已广泛应用于商业合同中，这其中也包括适用于英美法系的商业合同。

Force Majeure essentially refers to events or circumstances which: 不可抗力实质上是指符合以下条件的事件或情形：

- (a) are beyond the control of the contracting Parties; and 超越合同签订各方的控制；且
- (b) make it impossible for one Party to fulfil all or a material part of its contractual obligations (i.e. they are prohibitive in nature as far as contractual performance is concerned). 使合同一方无法履行全部或主要的合同义务（比如那些对于合同履行带有阻碍性质的事件）。

1.1.2 *Why do PPP Contracts contain Force Majeure provisions?* 为什么PPP合同需要包含不可抗力条款？

The aim of Force Majeure provisions in a PPP Contract is to allocate the financial and timing consequences of Force Majeure events between the Contracting Authority and its Private Partner¹³. The starting assumption for both Parties should be that the risk of a Force Majeure event occurring is shared because it is outside both Parties' control and neither is better placed than the other to manage the risk of such occurrence or its consequences. 在PPP合同中设定不可抗力条款的目的是为了在发生不可抗力时，在缔约政府部门与私营合作伙伴之间分配所产生的财务和时间上的后果。¹合同双方设定不可抗力条款的前提是双方应当共同承担不可抗力导致的风险，因为不可抗力不受任何一方控制，且不存在一方比另一方更适宜承担不可抗力的发生及后续影响。

While the provisions are typically drafted mutually, the affected party is most likely to be the Private Partner and this raises some important issues for the Contracting Authority which are the focus of this [Section 1](#): 虽然不可抗力条款由双方共同拟定，但是私营合作伙伴通常会受到更大的影响，因此，缔约政府部门在本节中需要关注一些重要问题：

13 See the Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition, e.g. the Force Majeure risk entries in Risk Matrix 1: Toll Road (DBFO) and Risk Matrix 2: Airport (DBFO)). [See link in Appendix, Additional PPP Resources](#). 见全球基础设施中心报告：公私合营模式中的风险分配，2016年版。比如风险指标1：道路收费站（DBFO）中的不可抗力风险；和风险指标2：机场（DBFO）中的不可抗力风险。[相关连接见附录：附加PPP资源](#)。

- (1) what events qualify as Force Majeure events; 什么样的事件是不可抗力事件;
- (2) whether and how the Private Partner should be compensated as a result of a Force Majeure event (e.g. for increased costs and/or loss of revenue); 作为不可抗力事件带来的影响（如成本增加和/或收入减少），私营合作伙伴是否应当获得补偿，如何补偿;
- (3) whether and for how long key milestones under the PPP Contract should be deferred as a result of a Force Majeure event; PPP合同项下的关键时间节点是否因不可抗力事件的影响而顺延，以及顺延多久;
- (4) whether the Private Partner or the Contracting Authority should be relieved from its obligations to perform under the PPP Contract and from the related consequences (e.g. the risk of termination due to default); and 是否应该减轻私营合作伙伴或缔约政府部门在PPP合同项下的义务或因不可抗力导致的后果（比如因不可抗力产生的合同终止的风险）；和
- (5) whether the PPP Contract should be terminated if a Force Majeure event persists for a significant period of time and what termination compensation should be paid, if any. 如果不可抗力持续存在相当长的一段时间，是否应该终止PPP合同，以及应该如何确定合同终止补偿（如有的话）。

CIVIL AND COMMON LAW DIFFERENCES

Many jurisdictions have a concept of Force Majeure under general law¹⁴. In some cases, this can limit the freedom of the Parties to agree alternatives in a PPP Contract as it may not be possible to derogate from the scope of the legal concept. This is particularly the case in civil law jurisdictions. However, most PPP contracts include specific Force Majeure provisions, whether they are civil law or common law governed, as this provides contractual certainty for the Parties and avoids delay in addressing the consequences if Force Majeure occurs. This is essential to make the PPP Project bankable for Lenders and Equity Investors alike and is the recommended approach for all Contracting Authorities.

大陆法与英美法之差异

在英美法系中²，许多国家的司法体系中都有不可抗力的概念。在某些情况下，这可能会限制合同各方在PPP合同中约定替代性条款的自由度，因为合同各方不可以违反该法律概念的范围而进行约定。这在大陆法体系下尤其如此。但是无论是在大陆法体系国家还是英美法体系国家，大多数PPP合同都会包含不可抗力条款，因为这种规定给合同各方带来确定性而且可以避免不可抗力发生时的延迟处理。这对于PPP项目是否能获得贷款方和股权投资人的融资非常重要，而且也是所有缔约政府部门所推崇的做法。

14 In France, for example, the affected party is relieved from its obligations if Force Majeure prevents performance. French jurisprudence has defined the characteristics of a Force Majeure event as (i) beyond the control of the parties, (ii) unforeseeable and (iii) impossible to overcome. 比如在法国，如果不可抗力导致无法履行合同，受影响方一般会有相关救济。法国的法律体系将不可抗力的特点定义为（i）超越合同方的控制，（ii）不可预见，和（iii）不可克服。

1.1.3 Relationship to other types of event 与其它事件类型的关系

In a traditional commercial contract, for example between two private sector entities, shared Force Majeure risk would typically include "acts of God" such as natural disasters and epidemics (often referred to as "natural Force Majeure"), as well as "political" events such as general strikes, nationalisation and a public sector refusal to grant licenses (often referred to as "political Force Majeure"). 在传统的商业合同中，比如两家私营企业之间订立的合同，对不可抗力风险的分担一般包括像自然灾害和瘟疫等“天灾”（一般称为“自然不可抗力”），以及包括像大型罢工、国有化和政府拒绝发放许可等“政治”事件（一般称为“政治不可抗力”）。

In a long-term PPP Contract, where one of the parties is a public sector entity, there is close scrutiny of the type of political force majeure events which may arise during the life of the PPP Contract and how each risk should be allocated. Deciding whether the risk should be borne by the Contracting Authority alone, shared by the Parties, or borne by the Private Partner as a commercial risk may in practice be difficult. It will inevitably depend on the situation in the relevant jurisdiction, the type of event being considered and the level of contingency that the Private Partner would price into its bid to cover the risk if allocated to it. For example, while it is usually accepted that the type of political risk which should lie wholly with the Contracting Authority includes deliberate acts of state such as outright nationalisation of the PPP Project, the position as regards war events will depend on the jurisdiction concerned. If any kind of civil or external war event is highly unlikely, the Private Partner may be comfortable with the risk being treated as a shared Force Majeure risk and any contingency it prices into its bid will be relatively low. In more volatile jurisdictions where the war risk is high, however, the Private Partner may not be prepared to bear any risk at all (or alternatively would price such a high contingency into its bid that the PPP Contract may prove very expensive or even unaffordable). In this instance, such events may be more appropriately treated as Contracting Authority risk, or looked at more individually so that, for example, civil war may be classed as Contracting Authority risk, but external war events classed as shared Force Majeure risk. 在长期的PPP合同中，如果缔约一方是政府部门，则会对PPP合同期限内可能发生的政治不可抗力风险类型进行仔细检查并分析这些风险应该如何分担。在实践中通常很难决定不可抗力是否应该由缔约政府部门独自承担或者由各方分担，亦或者由私营合作伙伴作为商业风险予以承担。这将不可避免地取决于所在司法辖区的具体情况、事件类型，以及在将该风险分配给私营合作伙伴时，在其投标报价中对这一或有事项的考虑。比如，尽管一般认为应该全部由缔约政府部门承担的政治风险包括国家的故意行为，如PPP项目的全部国有化，但是诸如战争等事件的发生则取决于相关的国家的司法体系。如果不太可能发生内战或对外战争，则私营合作伙伴会愿意将战争风险视为应该共同承担的不可抗力风险，从而降低其在投标报价时对任何突发偶然性因素的考虑。但在战争风险较高、不太稳定的司法管辖区，私营合作伙伴则可能不愿意承担任何此类风险，或因考虑到前述风险而提高其PPP合同投标报价，使得价格非常高甚至令政府方无法承受。在这种情形下，更适合将战争因素处理成缔约政府部门的风险或予以更加区别化地对待，比如内战可以划归为缔约政府部门风险，但对外战争则划分为双方共同承担的不可抗力风险。

If there are political risk events to be allocated solely to the Contracting Authority, it is likely that these events will require separate treatment in bespoke provisions. In this Guidance, events in this category are treated as "Material Adverse Government Action" ("MAGA") events. They are given separate treatment in their own contractual provision and are discussed in more detail in [Section 2, Material Adverse Government Action](#). The same type of approach is seen, for example, in recent PPP Contracts in the Philippines and also in certain African power projects (such as the International Finance Corporation's Zambia Scaling Solar Programme). [See Section 2, Material Adverse Government Action](#). 如果只让缔约政府部门承担政治风险，这些事件可能需要在特定条款中进行单独处理。本《指南》将这样的事件称为“重大负面政府行为”（以下简称“MAGA”）事件。在合同条款中通常对该类事件设有单独的规定，我们将在[第2章—重大负面政府行为](#)中详细讨论。采取同样处理方式的案例还有菲律宾最近的PPP合同，以及某些非洲发电站项目中（比如国际金融公司在赞比亚的防垢太阳能发电项目）。见[第2章—重大负面政府行为](#)。

In some jurisdictions (such as Australia and the UK), there is no need for a specific MAGA provision as Private Partners accept that the type of political risks likely to arise are limited and can be dealt with through the Force Majeure shared risk provisions, together with separate provisions dealing with specific events for which risk is allocated either to the Contracting Authority (such as Contracting Authority breach of contract and Change in Law) or to the Private Partner.¹⁵ See also [Section 2.1.3, Material Adverse Government Action](#) and [Section 3.1.3, Change in Law](#). 在某些国家（比如澳大利亚和英国），没有必要特别制定重大负面政府行为条款，因为私营合作伙伴认为发生政治风险的可能性不大，而且即使发生，也可以通过不可抗力的风险分担条款来解决，并且可以设定单独的条款规定特定的事件风险由缔约政府部门承担（比如缔约政府部门违约及法律变更）或者由私营合作伙伴承担。³ 另见[第2.1.3节——重大负面政府行为](#)和[第3.1.3节——法律变更](#)。

There is no right or wrong approach and the fundamental principle remains the same - risks should be allocated to the party best able to control and/or manage them and the PPP Contract should address them in the clearest way possible. 没有任何方式绝对正确或者错误，最根本的原则仍然一样，即风险应该分配给最有能力控制和/或管理该风险的一方，PPP合同应该尽可能清楚地约定这些风险的分配情况。

CIVIL AND COMMON LAW DIFFERENCES

Contracting Authorities should, however, distinguish Force Majeure provisions from so-called "hardship clauses" which deal with unexpected circumstances where

15 This is part of an approach which typically distinguishes between (a) events which entitle the Private Partner to the same type of full relief (namely both cost reimbursement and extensions of time) and sometimes termed "Compensation Events"; (b) events which only entitle the Private Partner to extensions of time (known as "Relief Events"); and (c) "Force Majeure Events" (which are a shared risk but usually have a narrow scope as some political and natural force majeure risks are instead treated as Relief or Compensation Events). See the [Infra Australia PPP Guidelines](#) and the [UK PF2 Guidance](#). 这种方式一般区别了（a）私营合作伙伴有权使用全部类型的救济（即补偿损失及延长期限）并且有时候被称为“补偿事件”；（b）仅允许私营合作伙伴延长期限（称为“救济事件”）；和（c）“不可抗力事件”（处理成共担类风险，但是一般适用范围相对较窄，因为可能将某些政治和自然不可抗力处理成了救济事件或补偿事件）。见《[澳大利亚PPP指南](#)》和《[英国PF2指南](#)》。

performance becomes more onerous for a Party without being impossible. These stem from underlying statutory legal concepts in certain jurisdictions (e.g. France¹⁶) and are not usually found in common law contracts.

Notably, PPP Contracts in civil law countries often derogate from underlying statutory legal hardship provisions in favour of an agreed contractual risk allocation where this is legally effective. This is to provide certainty for the Parties and is the recommended approach for Contracting Authorities where possible under the applicable governing law. See Section J, PPP Contracts in Context.

大陆法与英美法之差异

然而，缔约政府部门应该将不可抗力条款与所谓的“执行困难条款”区别开来，后者针对的是不可预见的情形，比如合同履行对于合同一方来说变得十分困难但并不是根本无法履行。这种规定来自于某些大陆法系国家（比如法国⁴）的法律概念，在英美法系下的合同中并不常见。

可见，大陆法系国家的PPP合同通常不会依赖法律中的执行困难条款规定，而是更愿意在合同中约定在法律上有效的风险分配机制。这是为了给合同方带来确定性，对于在有相关适用法律可用的缔约政府部门来说，也推荐使用这种方法。见第J节——具体情形下的PPP合同。

1.1.4 Force Majeure and related Project Agreements 不可抗力与相关的项目协议

The Private Partner and its Lenders will review Force Majeure provisions in detail and will want to ensure that the Force Majeure provisions in the Project Agreements mirror those under the PPP Contract (both in terms of definition and consequences). The Project Agreements should provide the sub-contractors with no greater protection against the risk of Force Majeure than the Private Partner enjoys under the PPP Contract (so that there is "equivalent project relief"). This is to ensure that the Private Partner does not find itself in a position where it is obliged to give a sub-contractor Force Majeure relief to which it is not itself entitled under the PPP Contract. 私营合作伙伴及其贷款方会仔细审阅不可抗力条款的规定，并希望保证项目协议中的不可抗力条款与PPP合同中的相关条款保持一致（在术语定义及结果方面）。就不可抗力条款来说，项目协议中有关对分包商的保护规定应该不优于PPP合同中私营合作伙伴享受的保护（这样才能实现“平等的项目救济”）。这是为了在发生不可抗力事件时，保证私营合作伙伴给予其分包商的救济不超过其自身在PPP合同项下可获得的救济情况。

- 16 In France, administrative courts will enforce the doctrine of hardship (*imprévision*), which allows a party to claim compensation through an increase in the contract price where the circumstances of the contract have changed in a manner which could not have been foreseen by the parties (i.e. by events that are unforeseeable, beyond the control of the parties and have a fundamental impact on the economic balance of the contract). Unlike Force Majeure, however, performance is not impossible. French PPP Contracts may provide that *imprévision* can be invoked in accordance with case law or may define expressly the financial threshold deemed to trigger the Private Partner's right to claim compensation. 在法国，行政法院会执行困难条款原则(*imprévision*)，在合同条件变化并且合同方无法预见（即不可预见的事件，合同方无法控制，而且对合同的经济平衡带来根本上的影响）时，允许一方通过提高合同定价来要求补偿。但与不可抗力不同的是，在困难条款原则下，合同并非到达了无法继续履行的程度。法国的PPP合同可以规定困难条款原则可以依据判例法而得以援引，或从财务上明确规定触发私营合作伙伴要求补偿权的起点。

Similarly, when the PPP Contract sets out conditions precedent to the Private Partner's entitlement to any Force Majeure protection (e.g. notice requirements and the obligation to supply supporting information), these conditions need to be reflected in the Project Agreements. While this is primarily an issue for the Private Partner and its Lenders, it is in the Contracting Authority's interests to ensure requirements for this flow down are in place to ensure there is no negative impact on the PPP Contract. [See also Section 2.1.4, Material Adverse Government Action and Section 3.1.4, Change in Law.](#) 相同地, 如果PPP合同规定了私营合作伙伴在满足某些条件(比如要求履行通知及提供相关信息的义务)之后才有权主张不可抗力事件相关的保护, 这些条款也需要在项目协议中得到相应地反映。虽然这一问题主要存在于私营合作伙伴和贷款方, 但是缔约政府部门也有必要确保规定这些条款, 以保证其对于PPP合同没有任何负面影响。另见第2.1.4节——重大负面政府行为和第3.1.3节——法律变更。

While following the Force Majeure approach in internationally recognized forms of construction contract¹⁷ may be appropriate for some PPP Contracts, the starting point for a Contracting Authority should always be to consider what the appropriate risk allocation position is for its PPP Contract and for this position to then flow down into (as opposed to up from) the Project Agreements. This may well result in a different approach to construction industry standard forms and mean that the construction sub-contract will be a form of contract that reflects the approach in the PPP Contract and is therefore specific to the relevant project. This is usually the right approach in PPP Projects where financing is on a limited recourse basis and the SPV needs to transfer the risks assumed under the PPP Contract to its subcontractors under the Project Agreements resulting in a construction contract and operation and maintenance agreement that are "back-to-back" with the PPP Contract. Such flow down structures are likely to be critical to the bankability of the PPP Project. 虽然在国际上得到认可的建设合同⁵中的不可抗力条款可以适用于一些PPP合同, 但对于缔约政府部门来说, 出发点仍然是考虑如何在PPP合同中设置合适的风险分配规则, 然后将这种风险分配规则自上而下地延用至(而不是自下而上)项目协议中。这可能意味着所使用的方式与建设行业标准形式不一致, 以及建设分包合同将反映出PPP合同中使用的方式, 因此在具体项目中会有所不同。这种方式对于某些PPP项目是很适合的, 比如融资渠道的追偿权有限, 且项目公司需要把其在PPP合同中承担的风险通过项目协议转嫁给其分包商, 这就使建设合同和运维协议与PPP合同的规定相一致。这种自上而下的机制沿用规则对于PPP项目获得融资的能力至关重要。

1.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

1.2.1 *Defining the events or circumstances that qualify as "Force Majeure"* 对“不可抗力”事件或情形的定义

1.2.1.1 Freedom to contract - Before drafting and negotiating Force Majeure provisions, the Contracting Authority needs advice from its legal advisers about how much

17 For example, the forms of construction contract produced by FIDIC (The International Federation of Consulting Engineers). 比如, FIDIC (国际咨询工程师联合会) 的建设合同版本。

contractual freedom the Parties have under the PPP Contract's governing law to (i) define the concept of Force Majeure in the PPP Contract and (ii) specify its consequences. 合同自由——在拟定和协商不可抗力条款之前，缔约政府部门需要就各方在规范PPP合同的法律下适用合同的自由程度（i. 在PPP合同中定义不可抗力的概念，和ii.说明其后果）寻求其法律顾问的意见。

CIVIL AND COMMON LAW DIFFERENCES

In jurisdictions which have an underlying legal concept of Force Majeure (typically civil law jurisdictions), the Parties' ability to derogate from the legal definition of Force Majeure and amend or create their own definition of Force Majeure and its effects may be limited and must be verified on a case-by-case basis. In France, for example, Force Majeure is defined by French jurisprudence as an event beyond the control of the parties, unforeseeable and impossible to overcome.

In other jurisdictions (typically common law jurisdictions, but also, for example, the Netherlands¹⁸), the Parties will have no restriction on their ability to mutually agree on the scope of Force Majeure and the consequences of an event occurring.

大陆法与英美法之差异

在法律概念中已有不可抗力概念的司法区域（一般是大陆法系国家），各方可以不使用不可抗力的法律定义而在合同对不可抗力的概念进行修订或者创造，而以这种方式规定的不可抗力条款效力可能会受到限制，因此必须针对每个案例的具体情形进行分析而定。比如在法国，法国的司法部门对不可抗力定义为各方都无法控制、无法预见，且无法克服的事件。

而在其它司法区域（一般是英美法系国家，但也包括如荷兰¹⁸这样的大陆法系国家），合同各方具备充分的自由权和能力共同对不可抗力的范围和后果进行约定。

1.2.1.2 Different approaches 不同的方式

There are broadly two main approaches to defining Force Majeure: 总的来说，不可抗力有两种主要的定义方式：

- (a) Approach 1: an open-ended catch-all definition including all events beyond the reasonable control of the affected party which satisfy certain criteria such as foreseeability and avoidability and prevent the affected party performing. Despite such a general approach, it is also common to list specific events considered to be Force Majeure under this definition, recognising that any such list is only illustrative and is not exhaustive.¹⁹ This can be advisable in

18 In the Netherlands, the PPP Contract may typically include wording waiving statutory rights in respect of "unforeseen events" - this type of express approach may be persuasive if such derogation were to be tested in court. 在荷兰，PPP合同一般可能会包括放弃法律规定的有关“不可预见事件”的权利，这种明确的方式在法庭辩论中可能更有说服力。

19 For example, the Parties may want to specify certain types of severe and extreme weather conditions in order to address risks relating to climate change (as they relate to their specific project), recognising that, while the impacts of climate change may have become increasingly foreseeable, it would likely not be in the Affected

jurisdictions where the courts are unlikely to expand upon the contractual definition given by the Parties, to ensure such events are included. See Section 1.2.1.3 and Section 1.4, Sample Drafting 1, Clause (1). 方式1: 涵盖受影响方无法合理控制的所有事件的开放式总括型定义, 且该定义应当满足某些标准, 比如可预见性和可避免性, 以及使得受到影响的一方无法继续履行合同义务。尽管有这样的总括性定义方式, 实践中通常仍会基于该定义而列举一些被认定为不可抗力事件的特定事项, 同时应明确所列举的这些事件仅为陈述说明性质的事项, 而并非穷尽了所有的可能性。⁷这种方式在部分不愿对合同各方所定义进行扩大解释的法院将起到积极作用, 以确保相关事件被涵盖到不可抗力的范围中。见第1.2.1.3节和第1.4节, 草案范本1, 第(1)条。

EMERGING AND DEVELOPED MARKET DIFFERENCES

This catch-all approach is often seen in civil law governed contracts and may be more appropriate in emerging and less stable PPP markets where it may be more challenging to expect a Private Partner to manage the consequences of the type of events which meet the definition criteria. For example, if there are limited available resources in the country itself, more dependence may have to be placed on an external supply chain than in a resource-rich country.

新兴市场与发达市场之差异

这种总括性的方式常见于大陆法体系下的合同, 并且在新兴且没那么稳定的PPP市场中更为适用, 在这些市场中让私营合作伙伴以满足定义的标准管理各种不可抗力事件产生的后果会更加困难。比如, 如果在该国内部的可用资源有限, 则可能会比在一个资源丰富的国家中更加依赖于外部的供应链。

- (b) Approach 2: an exhaustive list of specific events or circumstances which are (expressly or inherently) beyond the control of the affected party and prevent it from performing. These typically include political events (e.g. wars, acts of terrorism, strikes and protests) to the extent treating them as a shared risk is agreed appropriate, natural disaster events (e.g. earthquakes, landslides, floods)²⁰ and events such as nuclear explosions. An example of this is the

Party's power to prevent, avoid or overcome those on its own in most cases. Nonetheless, it should be noted that there currently is no standardized approach for allocating responsibility in PPP Projects to manage Force Majeure versus severe and extreme weather risks. Equally, the Parties should carefully assess whether the legal system in the country, in which their PPP Project is located, allows for inclusion of such events under Force Majeure, and, if not, whether these may be covered by the Private Partner by taking out respective insurance. See also Section 1.2.1.4. 比如, 为了规定有关气候变化的(影响其项目的)风险, 合同方可能会说明某些严酷或极端的天气情况, 以确定尽管现在我们预见气候变化影响的能力越来越强, 但是在多数情形下, 受影响一方可能还是没有能力独立避免或克服气候变化风险。然而, 应该注意的是, 目前仍然没有标准化的方式以明确PPP项目中控制严酷或极端的天气情况的不可抗力的责任分担。同样地, 合同方应该仔细审查PPP项目所在国家的法律是否允许在不可抗力条款下写入这些事件, 并且如果不允许的话, 这些事件的风险是否可以通过由私营合作伙伴购买相应的保险来应对。另见第1.2.1.4节。

20 This may also include other types of severe and extreme weather conditions. In specifying such further events, the Parties may want to particularly address risks relating to climate change (as they relate to their specific project). Nonetheless, see the caveat as noted in footnote 19. 这还可能包括其它严酷和极端的天气条

Dutch Model which sets out a very limited list of Force Majeure events, as do the UK PF2 Guidance (under which the events listed are essentially uninsurable) and the Infra Australia PPP Guidelines. See Section 1.5, Sample Drafting 1A, Definition of "Force Majeure Event". 方式2：列举说明受影响一方（直接或间接）无法控制且会阻碍该方履行合同义务的所有具体事件或情形。这一般包括政治事件（比如战争、恐怖行为、罢工和抗议等等），这类事件的风险适合约定为由合同方共同分担，自然灾害事件（比如地震、滑坡、洪水等等）⁸以及如核爆炸等事件。比如荷兰模式就规定了一个非常有限的不可抗力事件清单，与《英国PF2指南》（在该指南所列举清单内的事件都无法予以保险）和《澳大利亚PPP指南》一样。见第1.5节，草案范本1A，“不可抗力事件”的定义。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Some types of event which might be treated as Force Majeure in emerging markets may be treated in developed markets as "Relief Events" which are at the Private Partner's risk and if they occur only entitle the Private Partner to relief from breach of contract to the extent they cause it to miss a key performance date under the PPP Contract (i.e. "time" relief). The Private Partner has been prepared to take a view on such risks and how best to manage them where markets are developed and predictable.²¹

新兴市场与发达市场之差异

一些在新兴市场中被认定为不可抗力的事件，在成熟市场中则可能被认定为“救济事件”，这样风险就在私营合作伙伴，如果发生这样的事件，私营合作伙伴只能在导致其在PPP合同项下被延误的期间获得合同违约救济（即“时间”救济）。私营合作伙伴已经准备好审查这些风险并想好在成熟和可预见的市场中以最佳的方式去管理这些风险。⁹

(c) Exclusions and qualifications: in relation to both Approach 1 and Approach 2, it is not uncommon to specify events which are specifically excluded from the definition of Force Majeure or which only qualify if they are occur to a sufficient degree. In this case, the drafting focus will shift to what is not Force Majeure as opposed to what is. For example, in countries where certain natural events regularly occur (such as seasonal rains resulting in floods) and which should have formed part of the Private Partner's due diligence when formulating its proposed price, the degree of such events should be specified so that only "exceptional" occurrences qualify as Force Majeure (e.g. floods of a scale that occur not more frequently than once in every [100] years). It may be helpful in certain civil jurisdictions to set out the rationale for excluding certain events, as the courts may have the power to consider them as Force Majeure even though expressly excluded by the Parties. 除外条款和程度要求：有关方式1和方式2，常见的形式是说明明确排除在不可抗力定义之外的事件，或者只有在某一事件发生到了一定程度时才包括。在这种情况下，条款拟定的关

件。在进一步明确这些事件时，合同方会特别地处理有关气候变化（因气候变化与项目相关）有关的风险。然而，见脚注19中的警告内容。

21 This is part of the approach described in the footnote to Section 1.1.3 Force Majeure.这是第1.1.3节——不可抗力中脚注所述方式的一部分。

键就从什么是不可抗力事件变成了哪些不是不可抗力事件。比如，在某些自然事件频发的国家（比如季节性下雨导致洪水），此时私营合作伙伴在确定其拟投标的价格时的尽职调查内容之一就是，应当明确这样的事件达到何种程度才能算作“特别”发生的并且可作为不可抗力事件（比如洪水的程度不超过一百年一遇）。某些大陆法体系国家会规定排除某些事件作为不可抗力事件的原则，在此情形下即使合同各方明确排除了这些事件，法院仍然有权将该等事件视为不可抗力。

Particular sectors may have specific requirements as well - for example, defense PPP Projects might exclude certain events if the PPP Contract is intended to operate during times of war; and environmental PPP Projects or PPP Projects involving chemical treatment may also need to have a narrower definition if the Private Partner is intended to deal with a certain degree of chemical contamination (such as a hospital or defense project). 特定的行业也可能有具体的要求——比如，要使防御PPP工程即使在战争时期仍然继续运行，则可能排除某些事件；而环境类PPP项目或者涉及化学物质处理的PPP项目中，如果私营合作伙伴意图处理某种程度的化学污染（比如医院或防护项目）也可能需要对不可抗力设置范围更窄的定义。

Whichever drafting approach is selected, above all, the Contracting Authority and its advisers must carefully consider the specific nature and individual circumstances of the PPP Project in question to ensure that the definition is appropriate for that PPP Project (and not simply adopted from a previous PPP Project or another sector or jurisdiction). This is particularly the case bearing in mind the consequences of a Force Majeure event and the Contracting Authority's potential liability (e.g. if ongoing payments are required or termination results) 无论选择哪种拟定方式，最重要的事情是，缔约政府部门及其咨询顾问必须仔细考虑具体PPP项目的具体性质和条件，确保相关定义适用于该PPP项目（而不是简单地从以往的PPP项目或其它行业或司法区域中的条款延用过来）。特别需要记住的是不可抗力事件的后果和缔约政府部门的潜在责任（比如需要持续的支付或导致合同终止的结果）。

- 1.2.1.3 Foreseeability and avoidability - To qualify as a Force Majeure event, the definition may also require that an event was not foreseeable, or if it was foreseeable that it could not reasonably have been avoided. Practice varies between jurisdictions and may depend on underlying legal concepts or the nature and extent of the agreed list of Force Majeure events. 可预见性和可避免性——要被认定为不可抗力事件，其定义可能还要求该事件不可以预见，即使可以预见也无法合理地避免。各个司法区的实践不一样，并且可能取决于相关的法律概念，或清单所列举的不可抗力事件的性质和程度。

CIVIL AND COMMON LAW DIFFERENCES

In many civil law jurisdictions, the legal definition of Force Majeure requires that the event is unforeseeable and unavoidable from the point of view of the party whose obligations are affected. Contracting Authorities in these jurisdictions therefore often want to include these requirements in the contractual Force Majeure definition, coupled with a reasonableness test as regards a party's inability to control and/or prevent an event, even if it is in fact foreseeable. See Section 1.4, Sample Drafting 1, Clause (1)(b).

While Section 1.4, Sample Drafting 1 illustrates this civil law approach, PPP Contracts in

common law jurisdictions would not typically include this concept of foreseeability, nor would they in some civil law jurisdictions (e.g. the Netherlands). See Section 1.5, Sample Drafting 1A. However, in some cases the extent to which the impact of the Force Majeure Event could have been reasonably prevented/mitigated may be key in determining entitlement to relief from breach of contract²².

大陆法与英美法之差异

在许多大陆法系国家，不可抗力的定义要求该事件在义务履行受到影响的一方看来是不可预见并且无法避免的。因此，在这些司法区域中的缔约政府部门通常会在合同中的不可抗力定义中包含上述要求，并就一方无法控制和/或避免（即使可以预见）该等事件的合理性进行审查。见第1.4节，草案范本1，第（1）条(b)项。

尽管第1.4节，草案范本1说明了大陆法系下的方式，在英美法系下的PPP合同一般不会特别包含这种可预见性的概念，甚至在某些大陆法系司法区（比如荷兰）也不会包含。见第1.5节，草案范本1A。但是，在确定是否有权获得合同违约救济时¹⁰，不可抗力影响可能被合理地阻止/减小的程度很关键。

- 1.2.1.4 Insurance - Contracting Authorities typically require the Private Partner to insure material project risks (e.g. accidental damage, third party liabilities). In the early days of PPPs, the definition of Force Majeure was often based on whether a particular event could be insured against. If there was insurance for a specific political or natural event, it could not be regarded as Force Majeure. Conversely, "uninsurable" events tended to be treated as Force Majeure. Currently, the relationship between insurability and Force Majeure is less straightforward, although the ability of the Parties to insure against certain risks, and to bear the relevant insurance premium costs, must be considered when defining Force Majeure events and related compensation provisions. It may be appropriate to exclude certain insurable events from the Force Majeure definition as the Private Partner is able to manage the risk thorough insurance (and will have factored the premium cost into its pricing). Equally, if the insurable event is agreed to be a Force Majeure event, this will influence any additional relief that may be agreed by the Contracting Authority. Insurance proceeds paid²³ (other than to compensate third parties) may also be deducted from any termination amount payable. The Contracting Authority should also expect that the costs of insurance will be reflected in pricing - either ultimately being passed on to third party users via the approved tariff or fee (under the "user pays" model) or to the Contracting Authority itself (under the "government pays" model). 保险——缔约政府部门一般要求私营合作伙伴为重大的项目风险投保（比如事故损失和第三方责任等）。在PPP模式发展的初期，对不可抗力的定义基于某个事件是否可以投保而确定。如果针对某个政治或自然事件有保险产品可用，则该等事件不可以被视为不可抗力。相反地，不可予以保险的事件倾向于被认定为不可抗力。现在，可保险性与不可抗力的关系就没有那么明显了，然而在定义不可抗力事件以及相关的补偿条款时，必须考虑合同方是否能够对某些风险

22 For example, see the Infra Australia PPP Guidelines. 比如，见《澳大利亚PPP指南》

23 Or, depending on the jurisdiction, and timing of actual payment by the insurers, payable. 或者取决于司法区域，以及保险公司的实际支付的时间。

投保并承担相应的保费成本。不可抗力定义中可以排除某些可以投保的事件，因为私营合作伙伴可以通过投保来管理这些风险（并将投保成本计算在其投报价格当中）。相同地，如果可保险事件被约定成不可抗力事件，则会影响到缔约政府部门可能同意给予的其他救济。除非为补偿给第三方，保险理赔金¹¹也可以从可支付的终止补偿金额中扣除。缔约政府部门还应该预见保险成本将在投标报价中体现出来——要么通过批准的税费或费用²³（“使用者付费”模式）最终转嫁给第三方用户，要么转嫁给缔约政府部门（“政府付费”模式）。

Generally, uninsurability is addressed in separate provisions, although some J jurisdictions may not recognize the concept of uninsurability or may not typically J address it contractually due to the existence of general law provisions. For further detail see Section 1.3 and definition of "Uninsurability". 通常，不可保险性会通过单独的条款来规定，但有些司法区域可能不会认可不可保险性的概念或者基于已有法律的规定，不再在合同中作出相应规定。更多详情见第1.3节和“不可保险性”的定义。

1.2.2 *Relief for Private Partner non-performance* 对私营合作伙伴不履行合同义务的救济

Contracting Authorities are likely to be asked to consider whether the Private Partner should be entitled to any relief if a Force Majeure event occurs preventing it from performing. Apart from being unable to meet its contractual obligations, the Private Partner may incur additional costs and suffer loss of revenue to the extent it is unable to commence or continue to provide the service. In the construction phase, a delay to completion may also cause the Private Partner to incur additional financing costs (e.g. additional interest during construction) or if it has to reschedule its repayment obligations). In the operating period it is likely to still be incurring fixed costs (in particular debt service costs), which it may be unable to meet and its financial position may be materially affected. This applies whether the "user pays" or "government pays" payment model is being used (see Section G, PPP Contracts in Context). 缔约政府部门可能需要考虑发生阻碍其履行合同义务的不可抗力事件时，私营合作伙伴是否有权获得任何救济。除了不能履行其合同义务以外，私营合作伙伴还可能产生额外的成本支出并因为无法开始或继续提供服务而承受收入上的损失。在建设阶段，竣工日期延后也可能导致私营合作伙伴产生额外的融资成本（比如在建设阶段的额外利息支出或者必须修改其还款计划）。在运营阶段也可能导致固定成本（尤其是债务偿还成本），可能无法支付而使财务状况受到重大影响。这在“使用者付费”模式和“政府付费”模式下都适用。（见第G章——特定情形下的PPP合同）。

While the underlying principle of Force Majeure is that losses lie where they fall and Parties should bear their own costs and damages, different approaches can be taken. The Contracting Authority should assess the extent to which it is prepared to pay compensation to the Private Partner to prevent a payment default under its project or financing agreements while a Force Majeure event subsists (e.g. by continuing to pay an availability payment or other compensation) and/or to enable it to make up lost revenues and costs incurred if the PPP Contract is to resume (e.g. via an extension of the operating period or increased tariff). 尽管不可抗力下的原则是损失止于其所发生之处，合同各方应当承担其自身的成本和损失，但是仍然可以采取不同的方式。在不可抗力持续时，缔约政府部门应评估为了避免其项目的付款违约或违反融资协议，和/或为了让其弥补继续履行PPP合同而产生的收入损失和成本（比

如通过延长运营期限或提高价格)而预期向私营合作伙伴支付的补偿程度(比如继续支付可用性支付或其它补偿)。

Although it is typical for a PPP Contract to expressly include some additional relief (particularly in respect of Force Majeure events occurring during the construction phase), it is impossible to know in advance what will be appropriate following every Force Majeure occurrence as the effects may vary greatly (some may have a greater or longer term impact than others). In practice, if a Force Majeure event occurs, the Parties will be discussing how to facilitate continued performance of the PPP Contract (including agreeing at the time on any additional relief) and a contractual provision reflecting this is often included. [See Section 1.5, Sample Drafting 1A, Clause \(4\)](#).虽然PPP合同一般会明确地规定一些额外的救济(尤其是针对建设阶段的不可抗力事件),但是无法预先知晓发生不可抗力时哪种救济最为适当,因为结果可能千差万别(一些影响可能比其它影响更大或持续时间更长)。在实践中,如果发生不可抗力事件,合同方将会讨论如何促使PPP合同的继续履行(包括约定任何其它的救济方式)而且通常会以书面形式予以落实。见[第1.5节, 草案范本1A, 第\(4\)条](#)。

The availability of insurance will be relevant to the determination of relief ([see Section 1.2.1.4 and Section 1.3](#)), as will the period of time that a Force Majeure event must subsist before either Party may be entitled to terminate the PPP Contract. Not surprisingly, the period of time that must elapse before termination rights arise tends to be shorter in PPP Contracts where no financial compensation is expressed to be payable to the Private Partner during the subsistence of a Force Majeure event.是否可以投保也是确定救济要考虑的因素(见[第1.2.1.4节和第1.3节](#)),如不可抗力事件必须持续多久才能让合同方有权终止PPP合同。不出意外的是,如果PPP合同中没有明确规定在于不可抗力事件持续过程中私营合作伙伴可获得的财务补偿的话,行使合同终止权之前的期间会更短。

It is worth noting in this context that if termination ultimately occurs, the Contracting Authority will most likely pay compensation to the Private Partner (e.g. at a minimum in an amount equal to of outstanding senior debt). [See Section 4, Termination Payments](#).在这种情形下值得注意的是,如果合同最终终止,缔约政府部门很可能向私营合作伙伴支付补偿(比如金额至少应该等于未偿还的优先债务)。见[第4章——解约金](#)。

Typically, the Party claiming relief for a Force Majeure event will be obliged to take reasonable action to mitigate its effects and provide a mitigation strategy to the other Party. Failure to do so may affect its rights to relief. In some cases, the Parties may agree to exclude certain measures from the mitigation requirement.通常,要求不可抗力事件救济的一方有义务采取合理的措施减少不可抗力的影响并向另一方提供一个缓解策略。没有做到的,其救济权将受到影响。在某些情况下,合同方可能会约定将某些措施排除在缓解要求之外。

Types of relief are discussed in [Sections 1.2.2.1 -1.2.2.8](#).有关救济类型的讨论见[第1.2.2.1节至第1.2.2.8节](#)。

1.2.2.1 Relief from breach of contract -The occurrence of a Force Majeure event affecting

the Private Partner's ability to fulfil its contractual obligations will generally allow it relief from its obligations under the PPP Contract so that it is not in breach of contract, but the Contracting Authority should ensure that relief is given only to the extent that the Private Partner's inability to perform its obligations is directly caused by the Force Majeure event. [See Section 1.4, Sample Drafting 1, Clauses \(3\) and \(5\) and Section 1.5, Sample Drafting 1A, Clause \(1\)](#). 违反合同的救济——影响私营合作伙伴履行其合同义务能力的不可抗力事件的发生一般会允许其暂缓履行在PPP合同项下的相关义务，以避免出现私营合作伙伴违约，但是缔约政府部门应该确保给予私营合作伙伴的缓解救济程度与该方因受到不可抗力事件的直接影响而无法履行合同义务的程度一致。

It is also typically accepted that the Private Partner is excused from further performance of its affected obligations under the PPP Contract while the Force Majeure Event is continuing. [See Section 1.4, Sample Drafting 1, Clauses \(3\) and \(5\) and Section 1.5, Sample Drafting 1A, Clause \(1\)](#).

在不可抗力事件持续时，实践中通常认可私营合作伙伴可以免于继续履行受到影响的PPP合同项下的义务。见第1.4节，草案范本1，第（3）条和第（5）条，和第1.5节，草案范本1A，第（1）条。

- 1.2.2.2 Liquidated damages relief - If the Private Partner is liable to pay liquidated damages to the Contracting Authority if it fails to meet certain construction phase milestones (such as the scheduled date for commencing operations), it will typically want to be expressly relieved from such requirement to the extent these relate to the obligations it is unable to fulfil due to the Force Majeure event. Market practice is to expressly provide for such relief upfront in the PPP Contract. 损害赔偿救济——如果私营合作伙伴未能按建设阶段（比如开始运营的日期）完成而必须向缔约政府部门支付违约赔偿，则通常应明确私营合作伙伴可以获得因为不可抗力事件而无法履行其义务相应程度的救济。实践中的做法通常是在PPP合同中提前明确对该类救济予以规定。
- 1.2.2.3 Extension of time for performance - The Contracting Authority usually expressly grants the Private Partner an extension of time in respect of delays to the commencement of operations that are attributable to Force Majeure events during the construction phase. This will include postponing the date on which the construction of the PPP Project should have been completed by the Private Partner (the mechanic for doing this may be set out in another clause dealing more generally with extensions of time). 履行时间的延展——缔约政府部门通常会明确允许私营合作伙伴在项目建设期间因为受到不可抗力事件影响而导致开始运营时间延迟的话，可以获得相应地时间延展。该救济包括延迟私营合作伙伴原本预计PPP项目应该竣工的日期（相关的机制可以在更加细致地规定相关时间延展的条款中进行规定）。
- 1.2.2.4 Increased finance costs pre-completion - If Force Majeure delays completion of the PPP Project asset, the Private Partner will not be able to commence service operations and start earning revenue to meet its debt service obligations. It may incur additional interest and commitment fees and costs of rescheduling its repayment obligations. If the Private Partner adds in some contingency pricing

against this risk, this will have value for money implications for the Contracting Authority. In recent years, PPP Contracts in some jurisdictions (e.g. the Netherlands) have expressly provided for certain compensation in this regard, with mechanics distinguishing between different types of debt and lengths of delay. 竣工前融资成本的增加——如果不可抗力让PPP项目资产无法如期竣工，则私营合作伙伴无法开始运营服务并获取收入以偿还其债务。这样可能导致额外的利息，和重新安排还款计划产生的授信费用和成本。如果私营合作伙伴就此风险产生额外的或有费用，则也将对缔约政府部门的资金价值产生影响。最近几年来，一些司法区域（比如荷兰）的PPP合同已经明确规定针对这种风险的补偿，且将根据不同的负债类型和延后时长而使用不同的机制。

- 1.2.2.5 Continued availability payment - Under the "government pays" model (see Section G, PPP Contracts in Context), it may be appropriate risk sharing for the Private Partner to (a) continue to be paid as if it is performing in full, (b) to be paid an adjusted amount to cover debt service costs (but not the operation and maintenance cost savings that may arise from not performing or lost profit), or (c) not to be paid at all. This will in part depend on the availability of insurance (such as business interruption insurance). Another possibility is to adjust the performance regime in respect of any part of the service that is able to be provided in order to reduce any payment deductions. 持续的可用性支付——在“政府付费”模式下（见第G章——具体情形下的PPP合同），对于私营合作伙伴适当的风险分担包括：（a）按照私营合作伙伴完全履行合同义务而获得持续支付，（b）获得经调整的补偿以覆盖私营合作伙伴的债务成本（但不包括因为不履行义务而节省的运维成本或产生的利润损失），或者（c）完全不能获得支付。这将部分取决于可保险性（比如业务中断险）。另一种可能性是根据可以提供的部分服务而调整履行范围，以此减少任何被扣减的支付。

EMERGING AND DEVELOPED MARKET DIFFERENCES

The extent to which compensation is paid (or relief from deductions under the payment mechanism is granted) during the continuation of a Force Majeure event can vary according to jurisdiction. It is less common in some emerging markets for a Contracting Authority to make additional payments during a Force Majeure Event unless it is a political risk event considered within its control (i.e. a type of MAGA event as described in Section 2.2.1).

In developed markets (particularly some civil law jurisdictions), Contracting Authorities may be more willing to make payments. However, in some jurisdictions, such as the UK, it is more common for the PPP Contract to identify specific risks that the Private Partner cannot bear (such as a volatile raw materials price) and provide expressly for financial relief on their occurrence.

新兴市场与发达市场之差异

在不可抗力持续期间获得补偿（或根据约定的支付机制不被扣减费用）的程度可能因司法区域不同而不同。在某些新兴市场国家，缔约政府部门因为不可抗力支付额外补偿的情形较少，

除非是在缔约政府部门控制能力内的政治风险（即第2.2.1节中所述的重大负面政府行为）。

在成熟市场（尤其是大陆法系国家）中，缔约政府部门可能更愿意支付补偿。然而在某些司法区域，比如在英国，更加常见的实践是在PPP合同中明确私营合作伙伴不承担的风险（比如原材料的价格波动）并明确规定发生这些风险时相应的财务救济。

- 1.2.2.6 **Tariff increases - Where the PPP Contract has a "user pays" model (see Section G, PPP Contracts in Context), the Contracting Authority may allow the Private Partner to be compensated for increased costs and lost revenues by increasing the relevant toll payments or tariffs (for example the tariffs in a concession for a water or waste water network) if the PPP Contract resumes. The Contracting Authority will need to consider any social and political ramifications of this approach in particular in emerging markets where the economic situation may not be stable, as well as if it is legally possible to increase the relevant toll payments or tariffs.²⁴ The PPP Contract may provide upfront that any restrictions on the Private Partner's ability to set the relevant tolls or tariffs are to be lifted as necessary to take account of relevant costs arising from Force Majeure events. However, where tariff increases are subject to an overarching regulatory regime or where such measures would imply a high political risk, it may not always be possible to achieve an increase even if justifiable under the PPP Contract. In this instance the Contracting Authority would have to effect the compensation due by some other means. It should also be noted that Lenders may consider any compensation mechanism involving increased tariffs as increasing the overall risk profile (e.g. if user demand may then decrease) and may accordingly prefer upfront payment by the Contracting Authority.** 增加税费——在“使用者付费”（见第G章——具体情形下的PPP合同）模式的PPP项目中，如果该PPP项目持续的话，缔约政府部门可以允许通过增加相关的收费或税费（比如供水或污水处理的费用）的方式补偿私营合作伙伴增加的成本和收入损失。缔约政府部门需要考虑这种方式相关的任何社会和政治环境，尤其是在经济情况可能不稳定的新兴市场中，以及增加相关的收费或税费在法律上的可行性。¹²PPP合同可能预先规定，如果不可抗力事件导致私营合作伙伴的成本增加，则可以适时撤销对私营合作伙伴制定收费或税费额的限制。但是，如果提高税费受限于监管法律或该等措施可能带来较大的政治风险，则即使在PPP合同下有明确约定，也不一定能够提升价格。在这种情况下，缔约政府部门必须通过其它方式来实现补偿。还应该注意的，贷款方可能考虑提高税费会增加总体的风险预测（比如用户需要可能会相应地降低），因此将更倾向于由缔约政府部门通过预先支付的方式予以补偿。
- 1.2.2.7 **Extension to the operating period - The Contracting Authority may also grant an extension to the operating period if it considers it appropriate to compensate the Private Partner in this way in respect of lost revenues (or costs incurred) due to Force Majeure.** 运营期限延长——如果缔约政府部门认为运营期限延长是对私营合作伙伴因不可抗力而承受收入损失（或产生成本）的适当补偿，则缔约政府部门可允

24 Higher user fees may be commercially viable, but discriminatory under international agreements to which the Contracting Authority/government is party (e.g. International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of Discrimination Against Women, and the Convention on the Rights of the Child). 提高用户费用可能在商业上可行，但在缔约政府部门作为签约一方的国际协议中可能带有歧视性（比如国际经济公约，社会与文件权利，有关消除妇女歧视的公约，和有关儿童人权的公约等）。

许延长运营期限。

- 1.2.2.8 Interim costs compensation - Despite compensation being granted through one or more of the above means (such as by way of an extension to the operating period or increased tariffs), additional costs (e.g. for capital works), may nevertheless need to be incurred by the Private Partner before any actual compensation from the Contracting Authority is received. One way for Contracting Authorities to address this, which is not uncommon in certain developed jurisdictions, is for the Private Partner to have an obligation to seek financing for such additional costs on the best possible terms. If such financing is not available or the Contracting Authority rejects the terms, the Contracting Authority either becomes the lender of last resort or is required to make an upfront payment. 期间成本补偿——尽管可以通过以上一种或多种方式（比如通过延长运营期限或增加税费等）给予补偿，在收到缔约政府部门实际支付任何补偿之前，仍会导致私营合作伙伴产生额外的成本（比如资金成本等）。缔约政府部门可以使用一种办法解决该问题，并且这种方式在某些成熟司法区域很常见，即让私营合作伙伴为该等额外的成本以最佳的条款寻求融资。如果融资失败或者缔约政府部门对融资条款不予认可，则缔约政府部门或者作为最终的贷款方或被要求预先支付补偿款。

1.2.3 Termination 合同提前终止

In many PPP Contracts, a prolonged Force Majeure event (typically in excess of six to twelve consecutive months) will trigger a right for either Party to terminate the PPP Contract if it is unlikely that circumstances will return to normal and the Parties cannot agree a solution within the specified period.在许多PPP合同中，如果持续的不可抗力事件（一般超过连续的6至12个月）使得合同履行无法回归正常，且合同方无法在特定期限内达成协议，将促使合同一方有权终止PPP合同。

As mentioned in [Section 1.2.2](#), where no financial compensation is payable to the Private Partner during the subsistence of a Force Majeure event, the termination right tends to arise sooner - typically when the Force Majeure event has subsisted for 180 days (six months) or more. [See Section 1.4, Sample Drafting 1, Clause \(8\) and Section 1.5, Sample Drafting 1A, Clause \(5\)](#). 如第1.2.2节中所述，如果在不可抗力事件持续期间私营合作伙伴无法获得财务上的补偿，则私营合作伙伴可能会在更短的时间内获得终止合同的权利——通常为不可抗力事件持续180日（6个月）或更长的期间。见第1.4节，草案范本1，第（8）条和第1.5节，草案范本1A，第（5）条。

Some jurisdictions may distinguish between types of Force Majeure event in determining rights to terminate. For example, under the *Infra Australia PPP Guidelines* the Contracting Authority may terminate at any time following the occurrence of an "Uninsurable Force Majeure" event (for which it is insurer of last resort). [See Section 1.3.4](#).在确定合同终止权时，一些司法区域可能会对不同的不可抗力事件类型区别对待。比如《澳大利亚PPP指南》可能规定在发生“不可保险的不可抗力”事件后的任何时间都有权终止合同，因为保险是最后防线。见第1.3.4节。

EMERGING AND DEVELOPED MARKET DIFFERENCES

If the Private Partner has the ability to terminate the PPP Contract on the basis of a

prolonged Force Majeure event, the Contracting Authority may want to include an option to require the PPP Contract to continue, provided that the Private Partner is adequately compensated. Under the Infra Australia PPP Guidelines and the UK PF2 Guidance, for example, the Contracting Authority has the right to prevent termination by the Private Partner after the end of the specified period by paying the Private Partner as if the service was being fully provided (subject to applicable mitigation obligations). This approach is more likely to be encountered in a more established PPP market. See Section 1.5, Sample Drafting 1A, Clause (7).

新兴市场与发达市场之差异

如果私营合作伙伴能够基于受到持续的不可抗力事件影响而终止PPP合同，那么缔约政府部门可能希望规定其可以选择要求继续履行PPP合同，但前提条件是给予私营合作伙伴充分的补偿。比如根据《澳大利亚PPP指南》和《英国PF2指南》，缔约政府部门有权在特定期限之后通过向私营合作伙伴按照其完整提供了服务的方式支付费用（根据适用的缓解义务），以阻止私营合作伙伴终止合同的权利。这种方式在更为成熟的PPP市场更加常见。见第1.5节，草案范本1A，第（7）条。

1.2.4 *Determining the amount of a Force Majeure termination payment* 因不可抗力提前终止合同的补偿金额

If the PPP Contract allows for termination for prolonged Force Majeure, it typically provides that the Contracting Authority pays compensation to the Private Partner reflecting the principle that Force Majeure is neither Party's fault and the financial consequences should be shared. This does not mean that the Contracting Authority should pay "full" compensation (i.e. repayment of all debt, equity and break costs) as this would result in the Contracting Authority bearing all the financial pain. The usual payment amount results in the Private Partner losing all its forecast equity return (i.e. its profit) but being able to repay all of its outstanding senior debt which is sufficient to address bankability concerns. See Section 4.5, Termination Payments and Section 4.7, Sample Drafting 4, Schedule, Clause (3). 如果PPP合同允许因为持续的不可抗力事件终止，则通常会规定缔约政府部门向私营合作伙伴支付补偿，以反映该不可抗力事件是非由任何一方的过错而产生的，而相关的财务后果应该由双方共同承担。这并不意味着缔约政府部门应该支付“全额”的补偿（即偿还所有债务、股权和成本等），因为这会导致由缔约政府部门承担所有的财务后果。一般的补偿金额结果是，私营合作伙伴损失所有的预期股权收益（即其利润）但仍然能够偿还其所有未偿还的优先债务，且额度足以解决其银行可融资性问题。见第4.5节，解约金和第4.7节，草案范本4，附录，第（3）条。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Where certain natural risks are insurable (and would reasonably be expected to be insured against as good operating practice), the Contracting Authority may succeed in negotiating paying no termination compensation in respect of such events (or a reduced amount reflecting insurance payments received (or receivable - see Section 1.2.1.4) by the Private Partner). This to some extent reflects the practice in more developed markets mentioned in Section 1.2.1.2(b) where these type of events may instead be classified as "Relief Events" which are at the Private Partner's risk and entitle it to time relief only (but no ultimate right of termination). This will of course depend on the risk assessment by the Private Partner and its Lenders. Any differing treatment agreed upfront for different types of Force Majeure event should be clearly expressed in the PPP Contract.

新兴市场与发达市场之差异

如果某些自然风险可以投保（并且可以合理的保证正常的运营行为获得保险赔付），则缔约政府部门可以通过协商规定在这种情况下无需进一步支付补偿（或者减少支付相当于私营合作伙伴所收到（或可收到的—见第1.2.1.4节）的保险赔偿款的金额）。这种做法从某种程度上反映了第1.2.1.2节(b)项中所提及的更为成熟的市场实践，这些类型的事件会被视为“救济事件”而应由私营合作伙伴承担风险并且只能获得时间宽限上的的救济（却没有终止合同的权利）。这将取决于私营合作伙伴及其贷款方对风险进行的评估结果。针对不同的不可抗力事件预先约定的任何不同处理方式，都应当在PPP合同中明确地进行体现。

1.3 UNINSURABILITY 不可保险性

1.3.1 *Why do PPP Contracts contain unavailability provisions? PPP合同为什么包含不可保险性条款?*

As mentioned in Section 1.2.1.4, the Contracting Authority should consider what insurances the Private Partner is required to have under the PPP Contract. The availability and cost of, and the obligation to take out, relevant insurances will be relevant to how the risk of certain events is allocated (such as Force Majeure events), as well as to what deductions may be applied to termination payments in respect of insurance proceeds receivable.如第1.2.1.4节所述，**缔约政府部门**应该考虑私营合作伙伴在PPP合同项下需要购买哪些保险。相关保险的可用性和成本，以及购买该等保险的义务影响着在发生某些事件（比如不可抗力事件）时的风险分担方式，以及就可收到的保险赔付款应该在解约金中进行怎样的扣除。

Equity Investors and Lenders may seek protection in the PPP Contract for the Private Partner in case required insurance cover becomes unavailable, less extensive or more costly. Without express contractual protection, unavailability risk will typically lie with the Private Partner (who will also be in breach of its obligations to maintain the unavailable insurance). This is likely to attract a pricing premium (if indeed it is bankable), depending on the circumstances of the PPP Project and the risk assessment conducted by the Private Partner and its Lenders. Some jurisdictions may address unavailability though general law provisions, or may not recognize the concept of unavailability²⁵. The Contracting Authority should therefore take specialist advice on how relevant contractual provisions may interplay with general law.如果所要求的保险变得不可投保，保险覆盖范围收窄或者保费增加，则股权投资者和贷款方会试图在PPP项目合同中对私营合作伙伴提供相关保护。若PPP合同中没有明确的保护条款，则不可保险性的风险一般会由私营合作伙伴承担（对于维持该等不可投保的保险的义务，私营合作伙伴也将面临违约风险）。，依据PPP项目的具体情况以及私营合作伙伴及其贷款方的风险评估情况，这将导致风险溢价（如果保证其可融资性的话）。在某些司法区域，可以通过法律条款的规定来解决不可保险性的问题，或者对不可保险性的概念不予认可¹³。因此，**缔约政府部门**应该就相关的合同条款与法律的相互关系寻求专家意见。

Where there is a known risk of unavailability in respect of a particular required insurance at the time the PPP Contract is being negotiated (for example, insurance against terrorism or vandalism), this may be addressed through bespoke contractual provisions.如果某项必要的保险在PPP合同谈判的时候存在不可保险性的风险（比如针对恐怖主义或蓄意破坏者的保险），则可以通过制定相关的合同条款予以规定。

1.3.2 *Definition of "Unavailability" "不可保险性"的定义*

25 See reference to Bulgaria in Termination and Force Majeure Provisions in PPP Contracts - Review of current European practice and guidance (March 2013) - EPEC/Allen & Overy LLP. See link in Appendix, Additional PPP Resources. 见参考保加利亚《PPP合同中的终止和不可抗力条款——当前欧洲实践回顾和指南》2013年3月，EPEC/Allen & Overy LLP。参见附录——附加PPP资源中的连接。

Uninsurability is therefore a somewhat misleading term as it typically does not mean that insurance is not available at all. The usual definition of uninsurability in respect of a particular risk covers:不可保险性是存在一定误导性的名称，因为它一般并不意味着相关保险产品完全不存在。针对某项特定的风险，一般对不可保险性的定义包括：

- (a) the unavailability of insurance on the international insurance market by insurers of an adequate credit rating/reputable insurers of good standing; and 在国际保险市场上具有足够信用评级/声誉及财务状况良好的保险公司不提供相关保险；且
- (b) where insurance premiums are prohibitively high (not merely more expensive) -for example, at such a level that the risk is not generally being insured against in the worldwide insurance market with reputable insurers of good standing by contractors in the relevant country. 保费畸高（而不仅仅只是更贵）——例如，对于该等级水平的风险，在国际保险市场上，声誉信用状况良好的保险公司一般不会提供相应保险。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Wider reference criteria may be required in certain emerging markets in respect of limb (b) of the definition above - for example, if there is not a sufficient pool of contractors in the relevant country to draw a meaningful market practice comparison.

新兴市场与发达市场之差异

在某些新兴市场中就上述定义中的(b)项可能需要更多的参考标准——比如，如果在相关国家没有足够数量的承包方来形成有价值的市场实践对比。

1.3.3 Consequences of uninsurability不可保险性的后果

Negotiating a solution - The effect of uninsurability provisions are typically that, if a particular risk becomes uninsurable in accordance with the agreed contractual definition (and not as a result of the Private Partner's actions), the Parties will negotiate a mutually satisfactory solution for managing the risk, failing which the Contracting Authority will become the insurer of last resort. Any availability payment will then be reduced accordingly to reflect the premium no longer being paid by the Private Partner. The position as regards third party liability insurance is slightly different because clear responsibility is needed in order for the Private Partner and its employees to continue to operate - the Contracting Authority should have the option to accept the risk itself or to terminate the PPP Contract (on a Force Majeure termination compensation basis). 协商一个解决方案——不可保险性条款的效用一般是，如果某个特定风险根据约定的合同定义（而不是因为私营合作伙伴的行为）变得不可保险，合同各方将协商一个相互都满意的风险解决方案，如果没有，则缔约政府部门将会成为最后兜底的保险人。如此，任何可用性付费将由于私营合作伙伴不再支付保费而相应减少。第三方责任险的情况稍有不同，因为私营合作伙伴及其员工继续经营有赖于明晰的责任划分，而缔约政府部门拥有接受风险或者终止PPP合同的选择权（依据不可抗力解约补偿）。

Relief from breach - The Contracting Authority usually grants relief to the Private Partner from the obligation to insure, but only to the extent the Private Partner's own acts or omission have not caused the insurance to become unavailable. If it has caused the unavailability, the Private Partner will be in breach of the PPP Contract which is likely to give the Contracting Authority a right to terminate for Private Partner default (see Section 4, Termination Payments). 违约救济——缔约政府部门通常授予私营合作伙伴免于投保义务的救济，但仅限于该不可保险性非由于私营合作伙伴自身的作为或者不作为而导致的前提下。如果私营合作伙伴造成了不可保险性，则构成了PPP合同违约，从而可能导致缔约政府部门援引私营合作伙伴违约而终止合同（见第4章，合同终止的补偿）。 Insurer of last resort - If the Contracting Authority accepts becoming insurer of last resort, it will be liable for the consequences of the occurrence of the uninsurable risk. It is therefore important that the Contracting Authority is able to manage the risk transferred to it (for example by taking out insurance policies itself or being otherwise able to manage the potential cost impact). The Private Partner should also be required to periodically approach the insurance market (e.g. once every three months) to see if the risk can be insured again. 兜底保险人——如果缔约政府部门同意成为兜底保险人，则其需要对不可保险性风险发生的后果负责。因此，缔约政府部门能够对抗这一转移给它的风险（例如通过自己承担保单或者能够以其它方式对抗潜在的成本增加的影响）很重要。同时应该要求私营合作伙伴定期地核查保险市场（比如三个月一次）以确认是否可以再次为相关风险投保。

EMERGING AND DEVELOPED MARKET DIFFERENCES

In negotiating an insurer of last resort option, the Private Partner and its Lenders will carefully assess the credit of the Contracting Authority. This type of provision is therefore likely to be seen more in established jurisdictions. In less established jurisdictions there may be more negotiation over whether taking out a particular insurance should be an obligation in the first place, and/or the risk of the event occurring may instead be managed through the Force Majeure provisions.

新兴市场与发达市场之差异

在就兜底保险人方式进行谈判时，私营合作伙伴及其贷款方会仔细地评估缔约政府部门的信用情况。因此，这种类型的条款更常见于成熟的司法管辖区域。而在没有那么成熟的司法管辖区域，可能需要更多进行谈判的是，承担特定保险是否首先应该成为一种义务，以及/或者不可保险性事件发生的风险可以转而通过不可抗力条款进行规定。

1.3.4 Termination 终止

If the Contracting Authority is insurer of last resort and the uninsurable risk occurs, the PPP Contract should provide that the Contracting Authority may either terminate (on a Force Majeure termination compensation basis plus, if applicable, the amount of any third party liability claims) or pay the Private Partner an amount equivalent to the insurance proceeds that would have been payable and continue the PPP Contract. Under the Infra Australia PPP Guidelines, the Contracting Authority's right

to terminate only arises if the uninsurable risk occurs and is also a Force Majeure event (but it can then be exercised at any time).如果缔约政府部门成为兜底保险人并且发生了不可保险的风险，则PPP合同应该规定缔约政府部门可以选择终止合同（基于不可抗力的解约补偿金以及（如果适用的话）任何第三方责任索赔金额）或者向私营合作伙伴支付金额相当于可赔偿的保险金并继续履行PPP合同。根据《澳大利亚PPP指南》，缔约政府部门终止合同的权力只有在发生不可保险风险并且同时构成不可抗力事件才可行使（但终止合同的权利一旦形成可以在其后的任何时间行使）。

Given that uninsurability is beyond both Parties' control, it is generally accepted that if termination occurs the Contracting Authority should pay the Private Partner some level of termination compensation, usually calculated on the same basis as Force Majeure termination compensation.²⁶

由于不可保险性不受双方的控制，在因此出现合同终止情形时，普遍接受的做法是缔约政府部门比照不可抗力解约补偿金计算方法，向私营合作伙伴支付相应补偿金。

26 For more detail on Uninsurability in a developed market and sample drafting, please see the Infra Australia PPP Guidelines, South Africa PPP Guidelines and the UK PF2 Guidance.更多有关成熟市场的不可保险性的信息以及草案范本，请参考《澳大利亚PPP指南》，《南非PPP指南》和《英国PF2指南》。

1.4 SAMPLE DRAFTING 1 草案范本1

(open-ended catch-all definition, including concept of foreseeability) (开放式总括型定义, 包括可预见性概念)

Definition of Force Majeure Event 不可抗力事件的定义

- (1) In this PPP Contract, a "Force Majeure Event" means any event or circumstance or combination of events or circumstances: 在本PPP合同中, “不可抗力事件”是指以下的任一事件、情形或者一系列事件或情形的结合:
 - (a) beyond the reasonable control of the Party affected by such event, circumstance or combination of events or circumstances (the "Affected Party"); 超出受到该等事件、情形或者一系列事件或情形的结合影响一方(即“受影响方”)的合理控制范围;
 - (b) which was not foreseeable or, if foreseeable, could not have been prevented or avoided or overcome by the Affected Party having taken all reasonable precautions and due care; 不可预见, 或者即使可以预见, 受影响方采取了所有合理的预防措施和合理注意也无法阻止、避免或者克服;
 - (c) which directly causes the Affected Party to be unable to comply with all or a material part of its obligations under this PPP Contract; and 直接导致受影响方无法履行PPP合同项下全部或者部分重大义务; 和
 - (d) which is not the direct result of a breach by the Affected Party of its obligations under this PPP Contract or, in respect of the Private Partner, under any other Project Agreement. [obligations should include compliance with Applicable Law] 不是因受影响方违反其在PPP合同项下的义务或者私营合作伙伴违反任何其它项目协议义务而直接导致。[义务应当包括遵守适用的法律]
- (2) Force Majeure Events include but are not limited to the following circumstances, provided that they meet the criteria set forth in Clause (1) above: 在满足上述第(1)项规定的前提下, 不可抗力事件包括但不限于以下情形:
 - (a) plague, epidemic and natural disaster, such as but not limited to, storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tsunami, flood, lightning, and drought; 瘟疫、传染病和自然灾害, 包括但不限于风暴、龙卷风、台风、飓风、暴风、暴雨、地震、火山活动、滑坡、海啸、洪水、闪电和干旱等等;
 - (b) fire, explosion, or nuclear, biological or chemical contamination (other than caused by the negligence of the Private Partner, its contractors, or any subcontractor, supplier or vendor); 火灾、爆炸或者(非因私营合作伙伴、其承包方或任何分包商、供应商或服务商的疏忽而导致的)核污染、

生物或化学污染等；

- (c) war (whether declared or not), armed conflict (including but not limited to hostile attack, blockade, military embargo), hostilities, invasion, act of a foreign enemy, act of terrorism, sabotage or piracy[, in each case occurring outside the Country]; (经宣战或未经宣战的) 战争、武装冲突(包括但不限于敌意攻击、封锁、军事禁运等)、敌对、入侵、外国敌人的行为、恐怖主义行为、陷害或海盗等[各种情形都在该国境外发生];
- (d) civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience[, in each case occurring outside the Country]; 内战、暴力反抗和革命、军事或篡权势力、叛乱、内部动荡或混乱、暴徒生事、非暴力反抗等[各种情形都在该国境外发生];
- (e) radioactive contamination or ionising radiation[, occurring outside the Country]; or 放射性污染或电离辐射[在该国境外发生]; 或
- (f) general labor disturbance such as boycotts, strikes and lock-out, go-slow, occupation of factories and premises, excluding similar events which are unique to the PPP Project and specific to the Private Partner or to its sub-contractors[, and occurring outside the Country]. 一般的劳动者反抗比如联合抵制、罢工、工厂关闭、怠工、占领工厂和场地等等, 不包括PPP项目及私营合作伙伴或其分包商特有的类似事件[在该国境外发生]。

List of events to be negotiated for the specific Project circumstances, taking into account also whether certain political risks should be treated separately as Material Adverse Government Action or not. 针对具体项目情形需要协商不同的不可抗力事件清单, 同时需要考虑某些政治风险是否应该单独视为重大负面政府行为。

Consequences of Force Majeure Event 不可抗力事件的后果

- (3) If a Force Majeure Event has occurred, the Affected Party shall be entitled to relief from its obligations under the PPP Contract if it meets the requirements of Clause (4) below. 如果发生了不可抗力事件且满足以下第(4)项的要求, 受影响方有权免于履行其在PPP合同项下的义务。
- (4) To obtain relief under Clause (3) above, the Affected Party must: 根据上述第(3)项寻求救济, 受影响方必须:
 - (a) as soon as practicable, and in any event within [] (•) business] days after it became aware that the Force Majeure Event has caused or is likely to cause breach of an obligation under this PPP Contract, give to the other Party a notice of its claim for relief from its obligations under the PPP Contract, including (i) satisfactory evidence of the existence of

the Force Majeure Event, (ii) full details of the nature of the Force Majeure Event, (iii) the date of occurrence; (iv) its likely duration; and (v) details of the measures taken to mitigate the effect of the Force Majeure Event. 尽可能快地，在任何情形下应该在其发现不可抗力事件已经导致或者可能导致其无法履行本PPP合同项下的义务后[] (•) 营业]日内，向另一方发送通知说明免除其在本PPP合同项下的义务的要求救济，通知内容包括 (i) 证明发生了该（不可抗力）事件的充分证据； (ii) 事件性质为不可抗力的所有详情； (iii) 事件发生的日期； (iv) 事件可能的持续期限；和 (v) 为减轻该不可抗力事件影响而采取的措施详情。

This period of time needs careful consideration -notice should be timely but allow the affected party a reasonable time to fully develop a mitigation strategy. 这一期间长度需要慎重的考虑——通知应该及时发出但是也要允许受影响方有合理的时间制定一个完整的减轻策略。

- (b) within [] (•) business] days of receipt of the notice referred to in clause (a) above, give to the other Party full details of the relief claimed, as well as information on all actions being taken by the Affected Party to mitigate the consequences of the Force Majeure Event; 在收到上述第 (a) 项所述的通知后[] (•) 营业]日内，向对方提供所请求救济的全部详细内容，以及为减轻该不可抗力事件后果而采取的所有措施的信息；
- (c) demonstrate to the other Party that: 向对方证明：
- (i) the Affected Party, and its contractors, could not have avoided such occurrence or consequences by steps which they might reasonably be expected to have taken, without incurring material cost; 受影响方及其承包方，通过他们在被合理期待范围内采取的措施（未产生高额成本）无法避免该不可抗力及后果的发生；
 - (ii) the Force Majeure Event directly caused the need for the relief claimed; 该不可抗力事件直接造成主张救济的必要；
 - (iii) the relief claimed could not reasonably be expected to be mitigated by the Affected Party, including recourse to alternate sources of services, equipment and materials and construction equipment, without incurring material cost; and 受影响方无法用合理的方式（未产生高额成本）减轻主张的救济，合理方式包括寻求替代性服务、设备和物料以及建筑设备来源；和
 - (iv) the Affected Party is using all reasonable endeavors to perform its affected obligations under this PPP Contract. 受影响方正在采取所有合理的措施尽力履行其在本PPP合同项下的义务。
- (5) If the Affected Party has complied with its obligations under Clause (4) above, then it shall be excused from the performance of its obligations under this PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Force Majeure Event. 如果受影响方遵守了上述第(4)条的义务，则该方应当按其被不可抗力事件阻碍、妨碍或延误的义务履行程度免于履行其在PPP合同项下的相应义务。

- (6) [If information required under Clause (4) above is provided after the dates referred to in that clause, then the Affected Party shall not be entitled to any relief during the period for which the information is delayed]. [如果上述第(4)条中要求的通知超出该条规定的时间后提供, 则受影响方无权获得在信息被延迟期间的任何救济]。
- (7) The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with the applicable obligations under this PPP Contract. Following such notification this PPP Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event. 不可抗力事件结束后或者不再阻碍受影响方履行其在本PPP合同项下的义务时, 受影响方应当尽快通知对方。发出通知后, 应该继续按发生该不可抗力事件那一刻之前既有的条款履行本PPP合同。

Termination due to Prolonged Force Majeure 因不可抗力事件的持续而导致合同终止

If a Force Majeure Event subsists for a continuous period of more than [180-360 calendar] days, either Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect [thirty (30) calendar] days after its receipt. If, at the end of this [thirty (30)/J-day period, the Force Majeure Event continues, the PPP Contract shall be terminated pursuant to clause [insert reference to the clause governing termination] and the Private Partner shall be entitled to the compensation set out under clause [insert reference to Compensation on Termination for Force Majeure clause]. 如果一起不可抗力事件持续的时间超出[180-360个日历]天, 则任何一方都可以自由裁量, 决定通过向另一方发出书面终止通知的形式终止本PPP合同, 该通知在被收到后[三十(30)个日历]日后生效。 [三十(30)个日历]日结束时, 如果该不可抗力事件仍然持续, 则应该根据[填写相关的终止条款]终止本PPP合同, 而私营合作伙伴应当有权获得[填写因不可抗力而终止的补偿相关的条款]规定的补偿。

1.5 SAMPLE DRAFTING 1 A 草案范本1A

(Exhaustive list of specific events, no concept of foreseeability) (对特定事件详尽列举, 不包含可预见性概念)

Required Definition 需要的定义

"Force Majeure Event" means the occurrence after the date of the PPP Contract of: "不可抗力事件"意指PPP合同签署后发生的:

- (a) war, civil war, invasion, armed conflict, terrorism or sabotage; or 战争、内战、入侵、武装冲突、恐怖主义或陷害等; 或者
- (b) nuclear, chemical or biological contamination unless the source or the cause of the contamination is the result of the actions of or breach by the Private Partner or its sub-contractors; or 核污染、生物或化学污染等, 除非导致该等污染的原因是该私营合作伙伴或其分包商的违约行为; 或者
- (c) pressure waves caused by devices travelling at supersonic speeds, 由超音速设备行驶导致的压力波,

which directly causes either Party (the "Affected Party") to be unable to comply with all or a material part of its obligations under this PPP Contract. 直接导致任何一方(即“受影响方”)无法遵守本PPP合同项下的全部或实质性义务。

Consequences of Force Majeure 不可抗力导致的后果

- (1) No Party shall be entitled to bring a claim for a breach of obligations under the PPP Contract by the other Party or incur any liability to the other Party for any losses or damages incurred by that other Party to the extent that a Force Majeure Event occurs and it is prevented from carrying out obligations by that Force Majeure Event. For the avoidance of doubt (but without prejudice to Clauses (5) or (7)) below, the Contracting Authority shall not be entitled to terminate this PPP Contract for a [insert defined term for Private Partner Default] if such [Private Partner Default] arises from a Force Majeure Event. 在发生不可抗力事件并导致受影响方无法履行其义务时, 任何一方都无权因为受影响方无法履行PPP合同项下的义务或者因为受影响方遭受了任何损失或损害而追究该方的责任。为免存疑(但不违背以下第(5)项和第(7)项的规定) 缔约政府部门无权因为不可抗力事件导致的[私营合作伙伴违约]而根据[填写私营合作伙伴违约的相关条款]终止本PPP合同。
- (2) Nothing in Clause (1) above shall affect any entitlement to make deductions or any deductions made as a result of [insert reference to clauses addressing pricing and payment mechanism] in the period during which the Force Majeure Event is subsisting. 上述第(1)条中的任何内容都不得影响任何扣除权或不可抗力持续期间由于[填写定价与支付机制相关的条款]产生的任何扣除。
- (3) On the occurrence of a Force Majeure Event, the Affected Party shall notify

the other party as soon as practicable. The notification shall include details of the Force Majeure Event, including evidence of its effect on the obligations of the Affected Party and any action proposed to mitigate its effect. 在发生不可抗力事件时，受影响方应当尽可能快地通知对方。通知应当说明不可抗力事件的详情，包括受影响方履行合同义务受到影响的证据，以及为减轻影响而拟采取的措施。

- (4) As soon as practicable following such notification, the Parties shall consult with each other in good faith and use all reasonable endeavors to agree appropriate terms to mitigate the effects of the Force Majeure Event and facilitate the continued performance of the PPP Contract. 在收到上述通知后尽可能短的时间内，合同各方应秉持诚实信用原则并且尽到所有合理努力以期达成减轻不可抗力事件影响的适当约定，促进PPP合同的继续履行。
- (5) If no such terms are agreed on or before the date falling [120] days after the date of the commencement of the Force Majeure Event and such Force Majeure Event is continuing or its consequence remains such that the Affected Party is unable to comply with its obligations under this PPP Contract for a period of more than [180] days, then, subject to Clause (6) below, either Party may terminate the PPP Contract by giving [30]days' written notice to the other Party. 如果不可抗力事件发生后[120]日之内无法达成一致约定，并且该不可抗力事件仍然持续或者其后果仍然使受影响方无法履行本PPP合同项下的义务超过[180]日,则任何一方都可以根据以下第(6)条的规定提前[30]日书面通知对方终止本PPP合同。
- (6) If the PPP Contract is terminated under Clause (5) above or Clause (7) below: 如果PPP合同根据以上第(5)条或者以下第(7)条的规定终止:
- (a) compensation shall be payable by the Contracting Authority in accordance with [insert reference to Compensation on Termination for Force Majeure clause]; and 缔约政府部门应当根据[填写因不可抗力而提前终止的补偿相关的条款]支付补偿；且
 - (b) the Contracting Authority may require the Private Partner to transfer its title, interest and rights in and to any [insert defined term of relevant Project assets] to the Contracting Authority. 缔约政府部门可以要求私营合作伙伴将其有关任何[填写相关项目资产的条款]的所有权、利益和权利转移给缔约政府部门。
- (7) If the Private Partner gives notice to the Contracting Authority under Clause (5) above that it wishes to terminate the PPP Contract, then the Contracting Authority has the option either to accept such notice or to respond in writing on or before the date falling [10] days after the date of its receipt stating that it requires the PPP Contract to continue. If the Contracting Authority gives the Private Partner such notice, then: 如果私营合作伙伴根据上述第(5)的规定向缔约政府部门发出通知说明其希望终止PPP合同，则缔约政府部门可以接受该

For example, if the Force Majeure Event occurs during the construction phase, the Parties could agree that relevant milestone dates are postponed by such time as is reasonable, taking into account the likely effect of the delay. 比如，如果不可抗力事件在项目建设阶段发生，则双方应当约定相关的工期可以顺延合理的时间，并考虑工期延迟带来的影响。

通知或者在收到通知后[10]日之内做出书面回应说明其要求继续履行PPP合同。如果缔约政府部门向私营合作伙伴发出了继续履行的通知，则：

- (a) the Contracting Authority shall pay to the Private Partner the [insert defined term for availability payment] from the day after the date on which the PPP Contract would have terminated under Clause (5) above as if the [insert defined term for the service] was being fully provided; and 自PPP合同根据上述第（5）的规定终止次日起，缔约政府部门应当向私营合作伙伴支付[填写可用性支付的条款]，如同完全提供了[填写服务相关的条款]一样；且
 - (b) the PPP Contract will not terminate until expiry of written notice (of at least [30] days) from the Contracting Authority to the Private Partner that it wishes the PPP Contract to terminate. PPP合同只有在缔约政府部门书面通知私营合作伙伴其打算终止PPP合同之日起经过（至少[30]日）后才可以终止。
- (8) The Parties shall at all times following the occurrence of a Force Majeure Event use all reasonable endeavors to prevent and mitigate the effects of any delay and the Affected Party shall at all times during which a Force Majeure Event is subsisting take all steps in accordance with industry good practice to overcome or minimize the consequences of the Force Majeure Event. 各方应当随时注意不可抗力事件的发生，并采取所有合理的努力阻止并减轻任何延迟的影响，同时受影响方应当在不可抗力事件持续过程中根据相关行业良好经验克服或最小化不可抗力事件导致的后果。
- (9) The Affected Party shall notify the other Party as soon as practicable after the Force Majeure Event ceases or no longer causes the Affected Party to be unable to comply with the applicable obligations under this PPP Contract. Following such notification, the PPP Contract shall continue to be performed on the terms existing immediately prior to the occurrence of the Force Majeure Event. 不可抗力事件结束后或者不再导致受影响方无法履行其在本PPP合同项下的义务时，受影响方应当尽快通知另一方。发出通知后，应该继续按发生该不可抗力事件那一刻之前既有的条款履行本PPP合同。

2

MATERIAL ADVERSE GOVERNMENT ACTION 重大负面政府行为

2.1 KEY ASPECTS 关键方面

2.1.1 *The concept of MAGA* 重大负面政府行为（MAGA）的概念

The concept of "Material Adverse Government Action" (or "MAGA"), is applicable to contracts, such as PPP Contracts, where one of the parties is a public sector entity, or government. MAGA events typically:重大负面政府行为（简称“MAGA”）的概念适用于合同一方为公共部门实体或政府的合同，比如PPP合同。MAGA事件通常：

- (a) delay or prevent the private sector party from performing its contractual obligations; and/or使私营合作伙伴延迟或者无法履行其合同义务；和/或
- (b) have a material adverse financial impact on the private sector party; and 对私营合作伙伴造成重大的负面财务影响；和
- (c) are within the public sector entity/government's control or are best managed by the public sector entity/government as compared to the private party, 属于公共部门实体/政府管控范畴，或者相较于私营合作伙伴而言，公共部门实体/政府能更好的进行管理；

and therefore the risks associated with such events are allocated to the public sector entity/government.因此，与该等事件相关的风险由公共部门实体/政府承担。

MAGA events are also referred to as "political risk" or "political force majeure". As described in [Section 1, Force Majeure](#), depending on the specific PPP Project circumstances, some forms of political force majeure may be treated as shared Force Majeure risk (or in some cases even a Private Partner risk). In this Guidance, MAGA events can be clearly contrasted with Force Majeure events as the risk of their occurrence is allocated entirely to the Contracting Authority and they are given separate treatment in their own contractual provision.MAGA事件也被称为“政治风险”或者“政治不可抗力”。如[第1章——不可抗力](#)中所述，根据具体的PPP项目情形，某些形式的政治不可抗力也可能被认定为共担风险的不可抗力（在某些情况下甚至是由私营合作伙伴承担的风险）。在本《指南》中，由于重大负面政府行为的完全由缔约政府部门承担，并且通过独立的合同条款进行单独约定，因此重大负面政府行为事件与不可抗力事件泾渭分明。

2.1.2 *Why do PPP Contracts contain MAGA provisions?* 为什么PPP合同需要约定MAGA条款？

MAGA risks are not within the Private Partner's control but the Private Partner can be adversely affected by their occurrence. Because of the potential impact of MAGA events on the Private Partner's ability to perform its contractual obligations and be paid, the Private Partner and its Lenders will carefully assess the risk of such events | occurring and will expect any significant MAGA risks to be identified and allocated to | the Contracting Authority under the PPP Contract. [See Section 2.2.1.](#) 重大负面政府行为风险不属于受私营合作伙伴的控制，但是私营合作伙伴却可能受到重大负面

政府行为的负面影响。因为重大负面政府行为事件可能会影响到私营合作伙伴履行合同义务和获得付费的能力，所以私营合作伙伴及其贷款方会仔细评估这些事件发生的风险，以期识别出任何可能发生在PPP合同中的重大负面政府行为风险，并从而将其约定为由缔约政府部门承担。见第2.2.1节。

Transferring any MAGA risks to the Private Partner is likely to have two consequences because of the Private Partner's lack of control over the occurrence or management of such events: (i) at a minimum, to attract a high pricing premium (which could render the PPP Project unaffordable), or (ii) simply to make the Project unbankable. 鉴于私营合作伙伴缺乏对于重大负面政府行为事件的发生或应对的掌控能力，所以将重大负面政府行为风险转移给私营合作伙伴将很可能会导致两种后果：(i) 至少会造成较高的溢价（可能致使PPP项目收费价格过高），或者(ii) 仅导致PPP项目无法获得融资。

The purpose of a MAGA clause is therefore to allocate certain agreed types of political risk to the Contracting Authority, address the consequences of such risks occurring and provide the Private Partner with appropriate relief and compensation. 因此，重大负面政府行为条款的目的是将某些约定好的政治风险分配给缔约政府部门承担，以应对此类风险发生所带来的后果并为私营合作伙伴提供适当的救济和补偿。

2.1.3 Relationship to other types of event 与其它类型事件的关系

All PPP Contracts will contain provisions addressing circumstances for which the Contracting Authority is responsible, but these provisions vary depending on the specific PPP Contract and jurisdiction. 所有的PPP合同都会包含有关由缔约政府部门承担责任的情形的条款，但这些条款根据不同的PPP合同和司法区域又有所不同。

EMERGING AND DEVELOPED MARKET DIFFERENCES

In some established, stable, markets, there is typically no need for a specific MAGA provision as Private Partners accept that the type of MAGA risks likely to arise are limited and can be dealt with through the Force Majeure shared risk provisions, together with separate provisions dealing with specific events for which risk is allocated to the Contracting Authority (such as Contracting Authority breach of contract and Change in Law)²⁷. In Australia, however, the Contracting Authority accepts certain risks in relation to environmental/indigenous rights through a MAGA-style regime.

Contracting Authorities in other, typically less established, PPP jurisdictions may find it expedient if the PPP Contract includes MAGA provisions as well as Force Majeure provisions to ensure the PPP Project is viable for the Private Partner (this has been the case in recent PPP Projects in the Philippines). The inclusion of specific MAGA provisions in such jurisdictions may be because of an actual or perceived increased likelihood of certain MAGA events, or be due to a lack of track record in administering successful PPP Contracts over very long periods of time and across political cycles free from political interference.

27 This is part of the approach described in the footnote to [Section 1.1.3, Force Majeure](#). 这是第1.1.3节——不可抗力中脚注所述方式的一部分。

新兴市场与发达市场之差异

在成熟稳定的市场中，由于私营合作伙伴认为发生的重大负面政府行为风险的可能性不大，并且即使发生也可以通过不可抗力风险分担的条款，以及由缔约政府部门承担风险的特定事件（比如缔约政府部门违约以及法律变化等等）的独立条款进行处理¹，因此通常没有必要设置具体的重大负面政府行为条款。但是在澳大利亚，缔约政府部门采纳重大负面政府行为式的规定来应对环境/原住民权利相关的风险。

一般来说，在其它不那么成熟稳定的PPP市场中，缔约政府部门可能认为同时规定了重大负面政府行为条款和不可抗力条款的PPP合同才是保证私营合作伙伴合理履行PPP合同的有效方式（参考最近的菲律宾PPP项目）。这些司法区域实践中更多采用重大负面政府行为条款可能是由于发生重大负面政府行为事件的可能性已经或者预计提高，或者是因为缺少成功管理期限较长并且不被政治干预的PPP合同的经验。

Even where included, MAGA provisions may be structured differently as political risks will vary between jurisdictions. Some Contracting Authorities will also choose to address events such as Change in Law and Contracting Authority default in separate provisions, while others will include them in the MAGA provisions. The South Africa PPP Guidelines, for example, have a MAGA-type provision entitled "Unforeseeable Conduct" which addresses a material effect on the Private Partner's finances of any unforeseeable discriminatory Contracting Authority action, including Change in Law. (Contracting Authority default is more usually dealt with in a separate provision and this Guidance treats Change in Law separately).即使都规定了重大负面政府行为条款，各司法区域的重大负面政府行为条款也可能由于政治风险不同而具有不同的结构。某些缔约政府部门还会选择将法律变更和缔约政府部门违约等事件规定在单独条款中，而其它缔约政府部门则将这些事件写入重大负面政府行为条款。比如《南非PPP指南》就有一个名为“不可预见行为”的重大负面政府行为式条款，以应对来自缔约政府部门不可预见的、歧视性行为对私营合作伙伴的财务带来的重大影响，包括法律变更。（缔约政府部门违约行为通过单独条款予以规定的方式更为常见，本《指南》单独地规定了法律变更事项）。

As a result, while not all PPP Contracts will include MAGA provisions in the precise form set out in [Section 2.3, Sample Drafting 2](#), the key is to ensure that the concepts are included, the risks allocated and the consequences made clear in the PPP Contract to ensure clarity and bankability. [See also Section 1.1.3, Force Majeure and Section 3.1.3, Change in Law](#).因此，尽管并不是所有的PPP合同都会包含第2.3节——草案范本2形式的重大负面政府行为条款，关键在于要确保PPP合同包含了了这一概念，明确风险分配和后果，以确保合同约定明晰和可融资性。[另见第1.1.3节——不可抗力和第3.1.3节——法律变化](#)。

2.1.4 *MAGA and related Project Agreements* *MAGA和相关的项目协议*

As with Force Majeure, the Parties will need to consider how MAGA provisions flow down to other Project Agreements so that the Private Partner is not left with mismatching contractual positions. See also Section 1.1.4, Force Majeure and

Section 3.1.4, Change in Law.与不可抗力一样，各方都需要考虑重大负面政府行为如何自上而下地传导到其它项目协议中，才能使私营合作伙伴的合同地位保持一致。另见第1.1.3节——不可抗力和第3.1.3节——法律变化。

2.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

2.2.1 Defining the events or circumstances that qualify as MAGA 定义重大负面政府行为事件或情形

2.2.1.1 Defined List - The consequences of a MAGA event occurring are borne by the Contracting Authority, so it is vital that the Contracting Authority considers carefully what events qualify and how it can minimize the risk of any occurrence. It is recommended that an exhaustive list of clearly defined events is agreed, with the common factor being that their occurrence has a material adverse effect on the Private Partner's ability to perform its obligations, or on its rights under the PPP Contract, or on its financial status²⁸. However, as far as possible such materiality should be clearly defined to avoid the risk of disputes. See further Section 2.2.1.3 and Section 2.3, Sample Drafting 2, Clauses (1) and (2).定义清单——重大负面政府行为事件发生的后果由缔约政府部门承担，因此缔约政府部门应该慎重地考虑什么事件可以视为重大负面政府行为，以及如何将其带来的风险最小化。建议约定一个定义清晰、完备的事项清单，（这些事项）共同特征是这些事件的发生对私营合作伙伴履行合同义务的能力，或者对其在PPP合同项下的权利，或者对其财务状况²将带来重大负面影响。但是，应当尽可能对重大的程度有清楚的约定以避免产生纠纷。

2.2.1.2 Events - As mentioned in Section 1, Force Majeure, the dividing line between political risk (which is allocated to the Contracting Authority) and certain commercial risks (which the Private Partner is expected to take or share) is, in practice, likely to be a difficult one to draw. It is usually accepted that MAGA events include war related events within the relevant country, as well as deliberate acts of state such as outright nationalisation or expropriation of the PPP Project (including creeping expropriation, which is often carried out indirectly and over a period of time) and a declaration of a moratorium on international payments and restrictions on currency conversions into foreign exchange. MAGA may also include failures by the Contracting Authority or other public entity to grant licenses or comply with certain obligations.²⁹事件——如第1章——不可抗力中所述，在实践中政治风险（由缔约政府部门承担）和某些商业风险（由私营合作伙伴承担或分担）之间的分界线很可能难以划定。通常认可的做法是重大负面政府行为事件包含相关国家的战争相关的事件，

28 A reciprocal position is sometimes seen – for example, the “Unforeseeable Conduct” provisions in the South Africa PPP Guidelines also address cases where there is a beneficial effect on the Private Partner's finances. 有时可以是互惠情况——比如在《南非PPP指南》中的“不可预见行为”条款中也有规定对私营合作伙伴的财务有利的情形。

29 MAGA should not include failure by the Contracting Authority/government to enact laws crucial for the implementation of the relevant PPP Project. If the legal framework is not in place, the PPP Project is unlikely to be bankable and the private sector will be reluctant to spend time and resources bidding. If necessary, this type of issue should be dealt with as a condition precedent to be satisfied before the PPP Contract is effective. 重大负面政府行为不应该包括缔约政府部门/政府未能颁布对于相关PPP项目实施至关重要的法律的情形。如果没有相关的法律框架，PPP项目就很难获得贷款融资而私营方也不愿意耗费时间和资源来竞标。必要时，这类问题应该在PPP合同生效之前作为一个必须满足的先决条件来处理。

以及这些国家的故意行为，如PPP项目的完全国有化或征收（包括通常在一段时间内间接实施的逐步征收），以及宣布暂停国际支付并限制外汇兑换。重大负面政府行为可能还包括缔约政府部门或其它公共部门实体不批准许可或者不履行其某些义务。²⁹

Apart from these more obviously political events, there may be certain risks which result in increased costs and are outside the control of the Private Partner and could have a political aspect to them. For instance, there could be a politically inspired strike, which could force up the price of key raw materials which are obliged to be purchased locally or a dock strike could prevent the importation of materials.除上述明显政治性事件外，还可能存在一些包含政治因素的导致私营合作伙伴的成本升高或无法控制的风险。比如，有可能发生政治性的罢工，导致必须在当地采购的关键的原材料价格上涨，或者码头罢工导致原材料不能进口。

It is worth noting that some MAGA risks will seem more clearly within the Contracting Authority's control than others (e.g. where the event is controlled by it or occurs as a clear result of its actions, as opposed to happening through a higher or more distant arm of government). However, as the nature of these risks is such that they cannot or will not be borne by the Private Partner (or will result in unaffordable pricing), market practice is that these risks are typically accepted by the Contracting Authority. One approach which the Contracting Authority may find helpful is to sub-categorise MAGA events into "fault" and "no fault" events, even though they are both still at its risk.值得注意的是，一些重大负面政府行为风险看起来更多地处于缔约政府部门的控制范畴（比如由缔约政府部门控制或者明显是因该缔约政府部门的行為导致的结果，而非由更高级或更不密切政府部门导致的事件）。但是由于这些风险的性质而导致以私营合作伙伴不能或不愿意承担（或导致项目价格过高），市场实践一般是让缔约政府部门来承担这些风险。在缔约政府部门看来，即使这些事件仍然是缔约政府部门的風險，将重大负面政府行为事件细分成“有过失”和“无过失”事件依然是有益的做法。

The individual circumstances of the PPP Project and jurisdiction will need to be taken into account, e.g. the risk of upstream water pollution in a water sector PPP Project or the building of a competing road (especially a free road), port or airport within a certain distance from the tolled highway, port or airport to be operated under the PPP Contract concerned.PPP项目个案和司法区域独特的风险也需要考虑，比如一个水务行业的PPP项目上游的水污染风险或者在将要在PPP合同下运营的收费高速路、港口或机场某个距离之内修建与之具有竞争性的公路（尤其是免费公路），港口或机场。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Some jurisdictions are more politically volatile than others. If a political event (such as war) is highly unlikely, the Private Partner may be comfortable with the risk being treated as a shared Force Majeure risk. In more volatile jurisdictions, however, certain events may be more appropriately treated as Contracting Authority risk under MAGA provisions. Alternatively, it may be appropriate to differentiate between certain political risks so that they are classified as Force Majeure Events if they occur outside the relevant country and as MAGA events if they occur within the relevant country. The Contracting Authority must consider carefully what distinctions, if any, are appropriate for its jurisdiction and PPP

Project. See Section 2.3, Sample Drafting 2, Clause (2).

新兴市场与发达市场之差异

某些地区相较于其他区域政治更加动荡。如果政治事件（例如战争）发生的可能性极小，私营合作伙伴更愿意将这类风险作为共同承担的不可抗力风险。而更动荡的地区，某些事件作为重大负面政府行为条款下缔约政府部门的风险可能更为适合。另外，可能还有必要区分某些政治风险，在相关国家境外发生的政治风险归类为不可抗力事件，而在该国境内发生的则归类为重大负面政府行为事件。缔约政府部门必须仔细考虑何种区分方式（如有）适合其所在的司法区域和PPP项目。见第2.3节——草案范本2，第（2）条。

- 2.2.1.3 **Materiality** - In defining MAGA events, the Contracting Authority must also consider whether or not all occurrences of the relevant type of events should qualify as MAGA and trigger the contractual consequences. The Contracting Authority may be able to agree certain criteria which an event has to satisfy in order for the Private Partner to be entitled to relief - this could, for example, include a "materiality" threshold related to the effect of the event on the Private Partner. However, the Contracting Authority is strongly advised to define, to the extent possible, any threshold clearly (e.g. by reference to a specific monetary value established by reference to the PPP Project financial model), as any undefined reference to materiality will immediately give rise to a debate over its meaning. The same applies wherever any similar term is used in the PPP Contract. [See Section 2.3, Sample Drafting 2, Clause \(1\)](#). **重大程度**——在定义重大负面政府行为事件时，缔约政府部门还必须考虑是否发生的所有相关类型的事件都构成重大负面政府行为事件并触发合同上的后果。缔约政府部门可以约定一定的标准，相关事件满足该等标准时，私营合作伙伴才有权获得救济——比如事件对私营合作伙伴的影响“重大”程度的基本标准。然而，我们强烈建议缔约政府部门尽可能清楚地确定这种基本标准（比如通过参考PPP项目财务模型建立的具体货币价值），因为如果不对重大程度进行定义就会立即产生对其存在意义的争议。这一方式同样适用于PPP合同中的其它类似条款。见第2.3节——草案范本2，第（2）条。

2.2.2 *Relief for Private Partner non-performance* 私营合作伙伴不履行的救济

As with Force Majeure, the Private Partner will be concerned about both its inability to meet its contractual obligations as a result of a MAGA event and its resulting loss of revenue. The factors mentioned in [Section 1.2.2, Force Majeure](#) will be relevant in determining the Private Partner's entitlement to relief. However, because MAGA risk is allocated to the Contracting Authority, market practice is that the Private Partner should be kept in the position it would have been in had the MAGA event not occurred.与不可抗力一样，私营合作伙伴也会担心因为重大负面政府行为事件而无法履行其合同义务，以及因此带来的收入损失。[第1.2.2节——不可抗力](#)中提及的因素有助于确定私营合作伙伴的救济权。但是由于重大负面政府行为风险由缔约政府部门承担，实践中，私营合作伙伴的利益应被维持在假定未发生重大负面政府行为事件时的状态。

The PPP Contract typically provides that the Private Partner is granted relief from breach of contract and from its obligations to perform under the PPP Contract to the extent it is affected by the MAGA event (including from the requirement to pay delay liquidated damages). If the event occurs in the construction phase, the Private Partner will usually be contractually entitled to an extension of time for meeting key dates such as the scheduled date for commencing operations. [See Section 2.3, Sample Drafting 2, Clauses \(3\)-\(5\)](#). PPP合同一般会规定，私营合作伙伴有权根据受到重大负面政府行为事件影响的程度，免于承担违约责任以及减免履行其在PPP合同项下的义务（包括要求支付延迟违约金）。如果在建设阶段发生了该等事件，则私营合作伙伴一般可以获得关键项目节点的时间宽限，例如预计开始运营的日期。[第2.3节——草案范本2，第（3）-（5）条。](#)

The PPP Contract also often expressly provides that the Private Partner will continue to receive payment from the Contracting Authority under the PPP Contract as if it were still performing, and related deductions under the payment mechanism will be suspended. PPP合同一般会明确规定私营合作伙伴可以如合同仍在持续履行中一样而获得缔约政府部门根据PPP合同支付的款项，而付款方式下相关的扣减项目将被暂停。

The Contracting Authority will typically accept an obligation to compensate the Private Partner for losses and additional costs incurred as a result of a MAGA event. These will include any loss of revenue to the extent the Contracting Authority may not have continued payment since the MAGA event (and financing costs incurred due to any inability to meet payments as a consequence), as well as costs to mitigate and rectify the effects of the MAGA event (i.e. increased PPP Project costs). The Private Partner should still be obliged to mitigate its loss and, as with Force Majeure, its right to relief will be subject to its compliance with its notice and mitigation obligations. [See Section 2.3, Sample Drafting 2, Clauses \(5\) and \(6\)](#). 一般来说，缔约政府部门会承担对私营合作伙伴因重大负面政府行为事件承受的损失和额外成本的补偿责任。这些补偿包括缔约政府部门因重大负面政府行为事件而未继续付款造成的收入损失（以及因此无法偿还贷款而导致的融资成本），以及为了减轻和纠正重大负面政府行为事件影响而产生的成本（即增加的PPP项目成本）。和不可抗力情形下一样，私营合作伙伴有义务采取措施减轻其损失，其救济权应当建立在其遵守了通知和减轻义务的前提上。[见第2.3节——草案范本2，第（5）-（6）条。](#)

If the PPP Contract is able to continue, the Contracting Authority may be able to negotiate compensating the Private Partner through tariff increases and/or an extension of the operating period. [See Section 2.3, Sample Drafting 2, Clause \(5\)](#). 如果PPP合同能够继续执行，缔约政府部门可以协商通过提高价格和/或延长运营期限来补偿私营合作伙伴。[见第2.3节——草案范本2，第（5）条。](#)

The procedures to be followed when a MAGA event occurs are similar to a Force Majeure situation. [See Section 2.3, Sample Drafting 2, Clause \(4\)](#). MAGA事件发生时的应对流程与不可抗力情形下的类似。[见第2.3节——草案范本2，第（4）条。](#)

2.2.3 *Termination* 终止

Similar to the prolonged Force Majeure position, both Parties typically have the right

to terminate the PPP Contract if a MAGA event lasts longer than a certain period of time (generally between 6 to 12 months). See Section 2.3, Sample Drafting 2, Clause (8). How this is expressed in the PPP Contract may vary between jurisdictions. In recent PPP Contracts in the Philippines, termination rights are achieved by defining protracted MAGA as a Contracting Authority default. In some jurisdictions, the Contracting Authority may only be entitled to terminate following MAGA-style events by implementing a voluntary termination. 类似于持续的不可抗力情形，如果重大负面政府行为事件持续时间超过某个期限（一般在6-12个月），合同双方通常均有权终止PPP合同。见第2.3节——草案范本2，第（8）条。PPP合同中类似约定的表述在不同司法区域也有所不同。最近的菲律宾PPP合同将持续的重大负面政府行为事件定义为缔约政府部门违约而导致终止权。在某些司法区域，缔约政府部门只有在重大负面政府行为式的事件发生后通过自愿终止合同。

2.2.4 *Determining the amount of a MAGA termination payment* 因MAGA导致的解约金金额的确定

Consistent with the allocation of risk for MAGA events to the Contracting Authority, the amount payable to the Private Partner on a MAGA termination is typically similar to the termination payment for Contracting Authority default. See Section 4.3, Termination Payments and Section 4.7, Sample Drafting 4, Schedule, Clause (1). 与将重大负面政府行为件的风险分配给缔约政府部门承担一样，在计算因为重大负面政府行为终止合同而支付私营合作伙伴赔偿金时一般也与基于缔约政府部门违约的解约金金额的计算类似。第4.3节——解约金和第4.7节——草案范本4，附录，第（1）条。

It may be possible for the Contracting Authority to negotiate differing levels of compensation according to the particular MAGA event. For example, it may be possible to agree to pay the Contracting Authority Default termination amount for events where there is clear fault (such as outright expropriation or failure to grant a permit), while agreeing on a lesser amount (for example, still covering at least outstanding debt and contributed equity) for events less obviously within its direct sphere of control and influence. This will depend entirely on the circumstances applicable to the individual PPP Project. 缔约政府部门可以根据特定的重大负面政府行为事件协商不同的赔偿水平。比如，在缔约政府部门有明显的过错（比如直接挪用或不给予许可等）时可能同意支付缔约政府部门违约终止赔偿，而支付不在其直接控制和影响下发生的事件的赔偿也将减少（比如仍然至少包括未偿还债务和股权出资）。这将完全取决于具体PPP项目的特殊适用情形。

2.3 SAMPLE DRAFTING 2 草案范本 2

Definition of Material Adverse Government Action 重大负面政府行为的定义

- (1) For the purposes of this PPP Contract, "Material Adverse Government Action" means any act or omission by the Contracting Authority or any relevant public authority [define if necessary] or event set out in Clause (2) below, which occurs during the term of this PPP Contract and which (i) directly causes the Private Partner to be unable to comply with all or some of its obligations under the PPP Contract and/or (ii) has a [Material] Adverse Effect] on its [costs or revenues] [insert defined terms]. 在本PPP合同项下的“重大负面政府行为”意指在本PPP合同期限内，缔约政府部门或任何相关的公共部门实体[如有必须请定义]的作为或者不作为，以及下文第(2)条中的情形中的事件，并且其 (i) 直接导致私营合作伙伴无法履行在本PPP合同项下的全部或部分义务和/或 (ii) 对[成本或收入] [填写特定条款]存在[重大]负面影响。
- (2) For the purposes of Clause (1) above any act or omission shall mean and be limited to the following circumstances: 上述第 (1) 条中的任何作为或不作为应当意指且限于以下情形：
 - (a) failure of any relevant public authority to grant to the Private Partner or renew any permit or approval that is required for the purposes of the Private Partner's proper performance of its obligations and/or enforcement of its rights under this PPP Contract, in each case within the required timeframe under [Applicable Law], except where such failure results from the Private Partner's non-compliance with [Applicable Law]; 对私营合作伙伴申请的任何许可或批准，相关缔约政府部门不授予许可或者不予续期，而这些许可或批准是私营合作伙伴适当履行其在本PPP合同项下的义务并/或行使相关权利而必要的条件，且在各种情形下都应在[适用法律]要求的时间限制内给予或延期，除非是由于私营合作伙伴不遵守[适用法律]而导致；
 - (b) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo or revolution, [occurring inside [name of country]]; 任何（经过宣告或未经过宣告）的战争行为，入侵、武装冲突、外国敌人的行为、封锁、禁运或革命等[在[国家名称]境内发生]；
 - (c) radioactive contamination or ionising radiation, [originating from a source in [name of country]]; 放射性污染或电离辐射[在[国家名称]境内发生]；

Where possible, undefined materiality qualifications should be avoided to minimize the risk of dispute. 在可能的情况下，尽量避免对重大程度的约定不明，使纠纷的风险最小化。

If "material adverse effect" drafting is used it is advisable to define it by reference to a specified monetary impact. 如果使用“重大负面影响”条款，建议参考特定的金钱性影响予以定义。

Define Applicable Law with care if also used in other contexts such as Change in Law - see Section 3.3. 如果该等法律在其它章节下也有使用，比如法律变化条款——见第3.3节，谨慎确定适用法律。

- (d) any riot, insurrection, civil commotion, act or campaign of terrorism, [occurring inside [name of country]];任何暴乱、叛乱、民众骚乱、恐怖主义活动等[在[国家名称]境内发生];
- (e) any strike, work-to-rule, or go-slow which is not primarily motivated by a desire to influence the actions of the Affected Party so as to preserve or improve conditions of employment by the Affected Party, [occurring inside [name of country]] 任何罢工、合法怠工、或者不是主要为了影响受影响方的行为以此来保护或提高受影响方的雇佣和用工条件而发生的怠工, [在[国家名称]境内发生]
- (f) expropriation, compulsory acquisition or nationalization by any relevant authority of any asset or right of the Private Partner, including any of the shares in the Private Partner; 征收、强制收购或任何相关政府部门对私营合作伙伴的任何资产或权利的国有化, 包括私营合作伙伴的股权;
- (g) any act or omission of any relevant authority adversely affecting the legality, validity, binding nature or enforceability of this PPP Contract; and影响本PPP合同的合法性、有效性、约束力或可执行性的任何相关政府部门的作为或不作为; 和
- (h) [add any event specific to the PPP Project such as the construction of certain competing infrastructure (e.g. a free road adjacent to the PPP tolled road) or a pollution event].[添加与PPP合同相关的任何事件, 比如建造某些具有竞争性质的基础设施等(比如在PPP收费道路附近修建免费道路)或污染事件]。

Consequences of Material Adverse Government Action 重大负面政府行为的后果

- (3) If a Material Adverse Government Action occurs, the Private Partner (i) shall be excused from the performance of its obligations under the PPP Contract to the extent that it is prevented, hindered or delayed in such performance by reason of the Material Adverse Government Action and (ii) shall be entitled to compensation under this PPP Contract, in each case subject to and in accordance with the provisions of this Clause [whole clause].如果发生重大负面政府行为, 则私营合作伙伴 (i) 应当按照其被重大负面政府行为阻止、妨碍或延误义务履行的程度免于履行其在PPP合同项下的相应义务, 并(ii)应当有权根据本PPP合同获得赔偿, 在各种情况下都需要遵守第[完整条款]条的规定。
- (4) To obtain relief pursuant to Clause (5) below, the Private Partner must: 为了根据以下第 (5) 条获得救济, 私营合作伙伴必须:
 - (a) as soon as practicable [and in any event within [•] business days] after the Private Partner becomes aware that the Material Adverse Government Action has occurred, give to the Contracting Authority a notice of its claim for payment of compensation and/or relief from its obligations under the PPP Contract, following which the Parties shall consider in good

Insert reasonable time period, e.g. seven business days.填写合理的期限, 比如七个营业日。

faith any option to mitigate the impact of the Material Adverse Government Action; 在私营合作伙伴知晓发生重大负面政府行为后尽可能快地在[[•]个营业日内], 向缔约政府部门发出通知说明其要求获得赔偿并/或减免其在本PPP合同项下的义务履行, 随后各方应该以最大的善意考虑减轻重大负面政府行为影响的任何方法。

- (b) within [•] business days of receipt by the Contracting Authority of the notice referred in Clause (4)(a) above, give full details of (i) the Material Adverse Government Action and (ii) any Estimated Change in Project Costs and/or loss of revenue claimed and/or delay and/or any breach of the Private Partner's obligations under this PPP Contract, 在缔约政府部门收到上述第(4)条(a)项所述的通知后, 应在[•]个营业日内提供以下事项的所有详情: (i) 相关重大负面政府行为和(ii) 项目成本的变化预估和/或主张的收入损失和/或延误和/或私营合作伙伴因此未能履行的PPP合同项下的义务的情况。
- (c) demonstrate to the Contracting Authority that: 向缔约政府部门证明:
- (i) the Private Partner could not avoid such occurrence or consequences by actions which it might reasonably be expected to have taken without incurring [material] costs; 私营合作伙伴无法在不增加[重大]成本的前提下采取合理的措施避免事件及其后果的发生;
 - (ii) the Material Adverse Government Action was the direct cause of the Estimated Change in Project Costs and/or loss of revenue and/or delay and/or breach of the Private Partner's obligations under this PPP Contract; 重大负面政府行为的发生是成本的预估变化和/或收入损失和/或延误和/或私营合作伙伴未能履行的PPP合同项下义务的直接原因;
 - (iii) time lost and/or relief from the obligations under the PPP Contract claimed, could not be mitigated or recovered by the Private Partner; and 私营合作伙伴无法减轻或弥补其所主张的时间损失和/或PPP合同义务的减免;
 - (iv) the Private Partner is using reasonable endeavors to perform its affected obligations under the PPP Contract. 私营合作伙伴正在尽合理的努力履行受到影响的PPP合同项下的义务。

Insert reasonable time period given the level of detail required to be specified in full. 鉴于所要求的需要充分载明的细节的程度之高, 请增加合理的时间。

- (5) If the Private Partner has complied with its obligations under Clause (4) above, then the Contracting Authority shall: 如果私营合作伙伴已经遵循了上述第(4)条中规定的义务, 则缔约政府部门应当:
- (a) compensate the Private Partner for the Estimated Change in Project Costs as adjusted to reflect the actual costs

Drafting to reflect whether the Contracting Authority has continued paying the Private Partner through this process. 条款应反映缔约政府部门是否在这一过程中向私营合作伙伴持续有持续的付费。

reasonably incurred [and loss of revenue]; 补偿私营合作伙伴按发生的实际成本[和收入损失]合理调整所预估项目成本差额;

- (b) give the Private Partner such relief from its obligations under this PPP Contract as is reasonable for such Material Adverse Government Action; and 根据重大负面政府行为的程度, 合理减免私营合作伙伴在本PPP合同项下的义务; 和
 - (c) if the Material Adverse Government Action occurs during the [insert defined term for Construction Period] and causes a delay in achieving the [insert defined term for scheduled services commencement date], such date shall be postponed by such time as is reasonable. 如果重大负面政府行为在[填写建设期限条款]期间发生, 并导致完成[填写预定服务开始日期条款]延误, 则应当合理地顺延相应的时间。
- (6) [In the event that information is provided after the dates referred to in Clause (4) above, then the Private Partner shall not be entitled to any extension of time, compensation or relief from its obligations under this PPP Contract in respect of the period for which the information is delayed]. [如果上述第(4)条中要求的通知在该条规定的时间届满之后发出, 则私营合作伙伴无权获得信息被延迟期间的任何时间延长, 赔偿或PPP合同项下的义务履行减免]。
- (7) If the Contracting Authority and the Private Partner cannot agree on the extent of any compensation, delay incurred, or relief from the Private Partner's obligations under this PPP Contract, as applicable, or the Contracting Authority disagrees that a Material Adverse Government Action has occurred, the Parties shall resolve the matter in accordance with Clause [insert reference to dispute resolution clause]. 如果缔约政府部门和私营合作伙伴不能适当的就任何赔偿、已发生的延误、或私营合作伙伴在本PPP合同项下的义务减免的程度达成一致, 或者缔约政府部门不认可发生了重大负面政府行为, 合同方应当根据[填写争议解决条款]条解决。

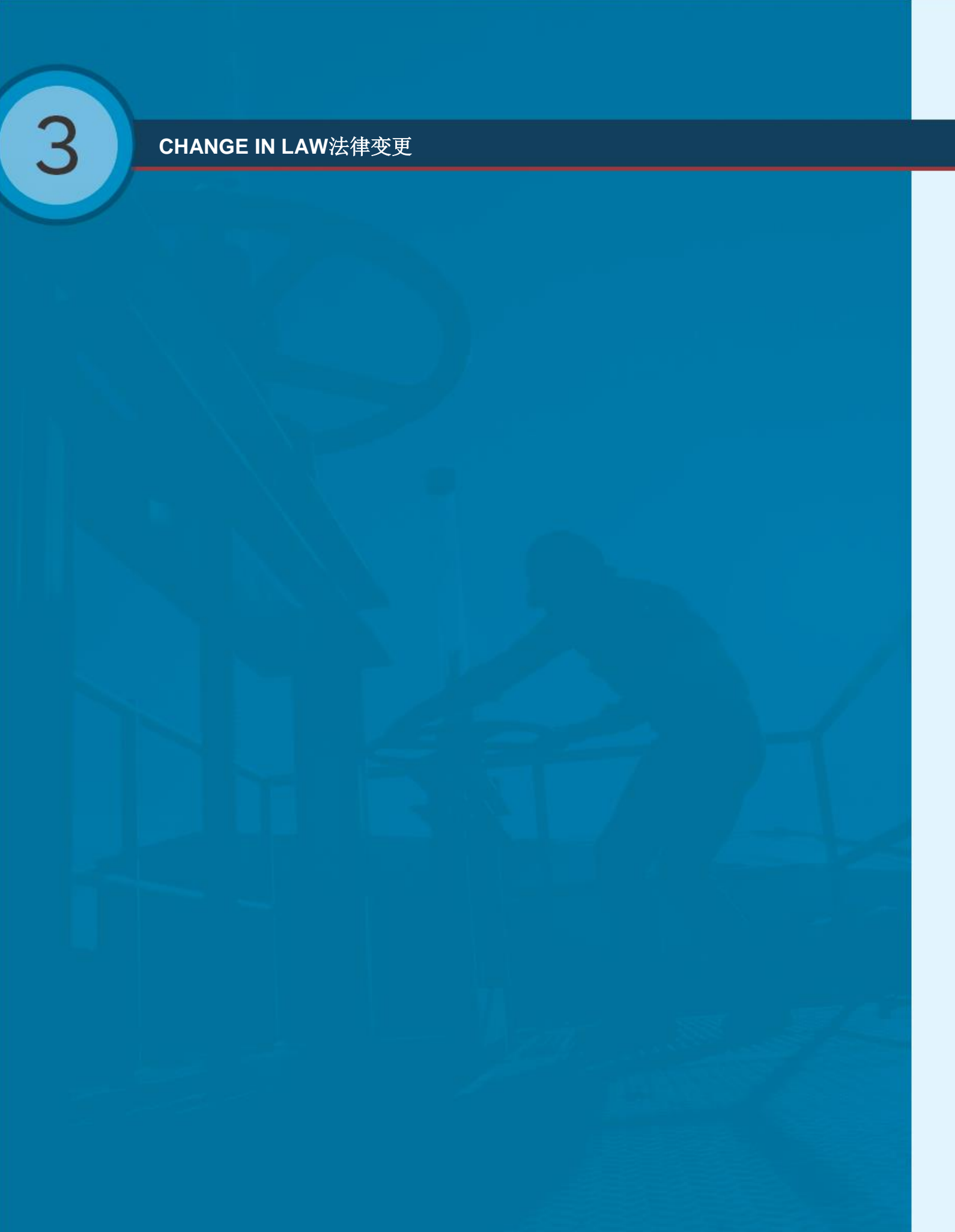
Termination due to Prolonged Material Adverse Government Action 因持续的重大负面政府行为导致的合同终止

- (8) If a Material Adverse Government Action subsists for a continuous period of more than [180-360 calendar] days, a Party may in its discretion terminate this PPP Contract by issuing a written termination notice to the other Party which shall take effect [thirty (30) calendar] days after its receipt. [If, at the end of this [thirty (30) calendar]-day period, the Material Adverse Government Action continues,] the PPP Contract shall be terminated pursuant to Clause [insert reference to clause governing termination] and the Private Partner shall be entitled to the compensation set out under clause [insert reference to Compensation on MAGA termination clause]. 如果一个重大负面政府行为事件持续时间长于[180-360个日历]天, 则任何一方都可以自主酌情决定向另一方发出书面终止通知, 终止本PPP合同, 该通知在对方收到后[三十(30)个日历]日后生效。 [三十(30)个日历]日届满时, 如果重大负面政府行为事件仍然持续, 则应该根据[填写终止相关的条款]终止本PPP合同, 而私营合作伙伴应当有权获

得[填写因重大负面政府行为事件而终止的赔偿相关的条款]规定的赔偿。

3

CHANGE IN LAW 法律变更



3.1 KEY ASPECTS 关键方面

3.1.1 *The concept of change in law* 法律变更的概念

All contracting parties must operate within the law and so must factor the cost, time and any other implications of complying with applicable law into the performance of their contractual obligations. Over a long term contract changes in law may be introduced which were unanticipated at the outset of the contract. These changes may take different forms, such as the implementation of new or amended statutes or the introduction of mandatory codes of practice or new binding case law, and will vary across jurisdictions according to the applicable legislative framework.

所有缔约方必须在法律规定的范围内行事，并且在其履行合同义务的过程中综合考量成本、时间等其他任何影响法律适用的因素。在容易受到法律变更影响的长期合同中，可以增加对合同签订时未能预见的法律变更进行约定。这些法律变更可能是多种形式的，例如颁布实施新的法律、修订既有法律、引入强制性的实践准则或新的有约束力的法律判例等等，并且由于适用不同地域的法律制度而千差万别。

3.1.2 *Why do PPP Contracts contain change in law provisions? PPP合同为什么引入法律变更条款？*

The Private Partner will typically be expressly obliged under the PPP Contract to comply with all applicable law. It assesses how it will carry out its obligations and what price it will charge based on detailed due diligence of the circumstances known to it at the time of bidding, including the existing legal environment. Any risks or uncertainties will attract an appropriate level of contingency pricing.

PPP合同一般会对私营合作伙伴必须遵守的法律进行明确的约定。而私营合作伙伴会通过投标时的情形进行细致的尽职调查，包括当时的法律环境，据此考量其应当履行的义务以及如何报价。任何风险或不确定性都可能导致一定水平的权变定价。

An unexpected change in law may make the Private Partner's performance of its contractual obligations wholly or partially impossible, delayed or more expensive. Through no fault of its own it may find itself in breach of contract, as well as being unable to earn its expected income and also required to incur additional costs to comply with the change. Some changes in law could, for example, entail significant expenditure if additional capital works are required (e.g. to meet new safety or environmental standards or to provide mandatory disabled access) and may also reduce full performance of the service while implemented. Similarly, additional taxes may be levied.

未预见的法律变更可能会导致私营合作伙伴完全或部分无法履行、迟延履行其合同项下的义务或履约成本增加。私营合作伙伴可能在其自身无任何过错的情况下就发生违约，从而无法获得预期收益，甚至可能要为遵守法律变化付出额外成本。譬如，一些法律变更要求一些工程（满足新的安全、环保标准或被强制要求提供无障碍通道等）

就会导致大量增加开支，这样也会减损合同履行的效果。额外的税费增加导致同样的情况。

CIVIL AND COMMON LAW DIFFERENCES

Without specific contractual provisions, in common law jurisdictions change in law risk would lie entirely with the Private Partner because it has contracted to provide a specified service at a specified price, and the scope of its obligations and its pricing can only be changed in accordance with the PPP Contract.

In civil law jurisdictions, Private Partners may sometimes rely on underlying legal principles such as hardship provisions which give relief from adverse financial consequences of certain circumstances (see Section 1.1.3, Force Majeure). However, widespread market practice across civil and common law jurisdictions has shown that the private sector is unwilling to enter into PPP Contracts on such a basis as both Lenders and Equity Investors require express contractual certainty in relation to the potentially significant impact of changes in law.

大陆法与英美法之差异

在英美法系中，如合同中没有关于法律变更的约定，则法律变更风险完全由私营合作伙伴承担。因为私营合作伙伴已在合同中承诺按照约定价格提供特定服务，其义务的具体范围与定价如要变更，也只能根据PPP合同进行变更。

在大陆法系中，私营合作伙伴有时会通过情势变更等法律原则来避免在某些情况下承担不利的财务后果（见第1.1.3节，不可抗力）。然而，不管是大陆法系还是英美法系，普遍的市场实践表明私营合作伙伴签订PPP合同的意愿不强就在于，贷款方和权益投资者都想在合同条款中明确法律变更及其潜在重大影响等事宜。

It is market practice for PPP Contracts in both civil and common law jurisdictions to contain provisions expressly allocating the risk of certain changes in law which occur after a specified date (typically linked to when the Private Partner's pricing is set) and which satisfy certain criteria as regards foreseeability. They also address how the consequences of changes in law are to be managed. They do not (and cannot) prevent changes in law, enactment of which is the prerogative of the relevant governing entity. Change in law provisions generally provide the Private Partner with relief from contractual breach to the extent compliance with the new law affects the Private Partner's ability to perform its obligations and also set out how any resulting costs of compliance or necessary changes to the PPP Contract scope are treated. Treatment may vary depending on the type of change in law and the PPP Project circumstances.

不管是在大陆法系还是在英美法系，市场实践通常是在PPP合同中设置风险分配条款，将某一特定日期之后（通常与私营合作伙伴定价日期相关）发生的符合一定标准、

具有可预见的法律变更所产生的风险进行明确分配，同时也约定法律变更的后果如何处理。法律变更只能由相关的政府部门实施，PPP合同不会（也无法）阻止法律变更。法律变更条款一般会根据私营合作伙伴受到法律变更的影响而不能履行其合同义务的程度免于承担相应的违约责任，同时对相应的合规成本以及PPP合同范围的必要修改等事宜进行处理。根据法律变更类型和PPP项目的具体情形，相应的处理方式也会有所不同。

3.1.3 Relationship to other types of event 与其它类型事件的关系

EMERGING AND DEVELOPED MARKET DIFFERENCES

As mentioned in Section 2.1.3, Material Adverse Government Action, some PPP Contracts include change in law as a MAGA event (as is the case in recent PPP Contracts in the Philippines). This may be appropriate if the treatment agreed for this form of political risk is the same as for other MAGA events, as may be more common in less established markets where legislative change may be a real risk factor. However, it is generally recommended that change in law is addressed in a separate provision, particularly in jurisdictions where the consequences are unlikely to lead to termination or where the provisions involve a detailed approach to risk allocation (e.g. in established markets). In any event, there should be no duplication of treatment under different clauses for the same type of event.

新兴市场与发达市场之差异

如第2.1.3节重大负面政府行为所述，许多PPP合同将法律变更当作重大负面政府行为（例如最近菲律宾PPP合同）。若PPP合同双方同意将对此类政治风险等同于其他重大政府负面行为来处理，则可能较为合适，因为在较不成熟的市场中，立法变化更普遍被认定为真正的风险因素。然而，普遍做法是把法律变更条款作为合同的单独条款，尤其是在法律变更并不会导致合同终止或者合同中已设置详尽的风险分配条款的法域（如在成熟的市场中）。无论如何，合同中不得对于同类事件，在不同的条款下进行重复处理。

Another approach is to have a separate change in law clause, but to have the associated compensation/relief provisions in another clause which provides a single mechanic applicable to various risks for which the Contracting Authority is responsible. This approach is seen, for example, in Australia, the Netherlands and in certain United States markets where change in law and certain other defined events (sometimes called "Compensation Events") typically entitle the Private Partner to the same type of relief (namely both cost reimbursement and extensions of time)³⁰. See also Section 1.1.3, Force Majeure and Section 2.1.3, Material Adverse Government Action.

另外一种方式是制定单独的法律变更条款，但在另外的条款中规定相关的赔偿、救济条款，以建立缔约政府部门应负责的各种风险所适用的机制。这种方式常见于澳大利亚、荷兰及美国部分地区，这些地方规定法律变更和某些其他特定事件（有时称为“补

30 This is part of the approach described in the footnote to Section 1.1.3, Force Majeure. 这是第1.1.3节——不可抗力中脚注所述方式的一部分。

偿事件”)通常能赋予私营合作伙伴同类救济权(即成本补偿及时间宽限³⁰)。请参见第1.1.3节不可抗力及第2.1.3节重大政府负面行为。

As change in law may also affect the scope of the service provided, it is advisable for the PPP Contract to contain a mechanism by which the Parties can discuss and negotiate such matters and implement such variations as are necessary. To avoid duplication, this is typically achieved by using the variation procedure usually included to cater for changes in scope which may be proposed by the Parties during the ordinary course of the PPP Contract.

由于法律变更还影响所提供服务的范围,所以建议在PPP合同中制定一个机制,让合同方可以就该等事件讨论并协商,然后采取必要的变更措施。为避免重复,合同各方在PPP合同的日常履行过程中,在一方提议的范围内就应对相关变化事宜,通过变更程序来实现变通措施。

3.1.4 *Change in law and related Project Agreements* 法律变更和相关的项目协议

As with other provisions in the PPP Contract, the treatment of change in law under the Project Agreements should ensure the Private Partner is not obliged to give its sub-contractors more protection than the Private Partner is entitled to under the PPP Contract. See Sections 1.1.4, Force Majeure and 2.1.4, Material Adverse Government Action.

与PPP合同中的其它条款一样,对PPP协议项下的法律变更的处理应当确保,私营合作伙伴给其分包商的保障,是没有义务多于私营合作伙伴在PPP合同项下所享有的保护。另见第1.1.4节——不可抗力和第2.1.4节——重大政府负面行为。

3.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

There are a number of factors to take into account for any Contracting Authority negotiating change in law provisions:

缔约政府部门在协商法律变更条款时有许多因素需要考虑：

3.2.1 *Understanding market practice* 了解市场惯例

Contracting Authorities may at first resist the idea of granting change in law protection to Private Partners which is unavailable to other businesses and investors in the same country on the basis that it seems preferential and those other parties appear to accept and manage the risk. However, as described above and set out in more detail below, there are a number of reasons why such protection is justifiable in PPP procurement where the key aim is to procure long term private sector financing for infrastructure, including from international participants.

缔约政府部门在开始时可能会排斥给予私营合作伙伴受到法律变更影响而应获取的相关保护，是因为在同一国家内其它公司和投资人可能不能享受这些保护，这样对那些倾向于接受和控制法律变更风险的其它经济主体来说是不公平的。然而，如上所述并在下文中有更多详细描述，有许多原因让这种保护在PPP采购中变得合理，其中关键是为基础设施建设争取长期的私营部门（包括国际参与方）融资。。

- 3.2.1.1 Lack of pricing flexibility - Unlike other businesses which can pass on increased costs to their customers or can take a view on the risk because their contracts are usually much shorter term, the Private Partner will not typically have the same flexibility. It will have priced its proposal to perform the PPP Contract on the basis of the legal framework in effect at the time of pricing and the PPP Contract will typically contain an agreed pricing formula in both the "user pays" and "government pays" payment models (see Section G, PPP Contracts in Context) which will limit the ability to increase pricing. Although these formulae will typically incorporate some form of indexation which will reflect general cost inflation, indexation will not compensate for significant costs (such as capital expenditure) arising from changes in law. The Private Partner will therefore be unable to recover these unless they are expressly addressed under the PPP Contract.

缺乏灵活的定价机制——不像那些能够将增加的成本转嫁给客户或者因为合同期限较短而可以测试风险，PPP模式下的私营合作伙伴缺少灵活性。私营合作伙伴会基于相应的法律框架下履行PPP合同的方案定价，而且PPP合同一般会包含所约定的在“使用者付费”模式和“政府付费”模式下的定价公式（见第G部分——具体情形下的PPP合同），这会限制其提高价格的能力。尽管这些公式一般会纳入一定的指数以反映成本膨胀，但是这些指数并不会补偿因法律变更导致的重大支出（比如资本支出）。因此，私营合作伙伴就无法收回这些成本，除非在PPP合同中有明确的规定。

Even if the payment mechanism is a "user pays" toll or tariff where arguably costs could be passed on to the users of the facility, as highlighted in Section 1, Force Majeure, the Contracting Authority is likely to want to place contractual constraints on any price increases for public policy (and customer protection) reasons. Another

factor against simply increasing the toll or tariff is that significant price increases could undermine users' desire for the service and result in lower PPP Project revenues than forecast by the Private Partner in its Original Base Case.

即使支付机制使用“使用者付费”模式，理论上来说成本可以转移给设施使用者，但是如第1章——不可抗力中所提到的，缔约政府部门可能因为公共政策因素（和消费者保护）而在合同中对提价机制进行限制。之所以说简单地提高收费或税费不可行的另一个因素是重大涨价可能会影响使用者使用服务的愿望，进而导致PPP项目的收入比私营合作伙伴在其最初基础情形中所预计的数额更少。

- 3.2.1.2 Bankability - The starting point for the Private Partner and its Lenders will be that change in law is a form of political risk that it cannot control or manage and should therefore be expressly allocated to the Contracting Authority under the PPP Contract. Even if the Contracting Authority is not directly responsible for the change in law, the Private Partner will argue (with some justification) that as an arm of government it is fair and more appropriate for the Contracting Authority to bear the risk³¹.

可贷款融资性——私营合作伙伴及其贷款方的出发点是，法律变更是其无法控制或处理的一种政治风险，因此应该在PPP合同中应当将法律变更的风险明确分配给缔约政府部门。即使缔约政府部门并不直接对法律变更负责，但是私营合作伙伴会认为（有一定合理性）作为政府的一个部门，缔约政府部门承担这种风险更为合适和公平。³¹

EMERGING AND DEVELOPED MARKET DIFFERENCES

The allocation of change in law risk is a key bankability point and will be particularly relevant in jurisdictions where changes in law are less predictable or more likely due to underdeveloped or less stable legal or regulatory frameworks.

新兴市场与发达市场之差异

法律变更的风险分配是一个决定可贷款融资性的关键点，在法律变更可预见程度较低的法域则更是如此，或者更常见于欠发达地区或法律/监管框架欠稳定的法域。

- 3.2.1.3 Cost to the Contracting Authority - Even if the Private Partner and its Lenders are willing to accept the risk of adverse changes in law over the long life of the PPP Contract, this risk will need to be priced into the contractual price (or tariff). Not only is pricing this risk likely to be a difficult exercise, but the Contracting Authority (or users) may then end up with an unnecessarily expensive PPP Contract if the risk never materializes.

31 See the Global Infrastructure Hub Report: Allocating Risks in Public/Private Partnership Contracts, 2016 edition - e.g. the Regulatory/Change in Law entries in Risk Matrix 2: Airport (DBFO) and Risk Matrix 3: Light Rail (DBFOM). See link in Appendix, Additional PPP Resources.

见全球基础设施中心报告中的风险指标：在公共-私营合作合同中的风险分配，2016年版。比如在风险指标2：机场（DBFO）和风险指标3：轻轨（DBFOM）中的监管/法律变更信息。相关链接见附录——附加PPP资源。

缔约政府部门的成本——即使私营合作伙伴及其贷款方愿意接受长期的PPP合同期间发生的法律不利变更风险，但是也需要测算该风险并纳入合同定价（或税费）中。对法律变更风险的测算不仅很困难，而且如果最终根本没有发生法律变更风险，缔约政府部门（或者用户）最终会承受不必要的昂贵PPP合同。

From the Contracting Authority's perspective, it should be able to obtain a lower priced service from the Private Partner the more change in law risk it accepts as the Private Partner in turn should be able to reduce its contingency pricing. This needs to be weighed against any perceived benefit of transferring change in law risk to the Private Partner - which should include assessing the risk that a drastic change in law may leave the Private Partner financially unable to continue to provide the relevant infrastructure in accordance with the PPP Contract or even unable to obtain financing and sign the PPP Contract at all.

从缔约政府部门的角度来看，缔约政府部门接受的法律变更风险越多，因为私营合作伙伴可以降低其或有定价，提供服务的定价就可能越低。这需要权衡将法律变更风险转移给私营合作伙伴的任何可预见的利益——考虑的因素应该包括重大的法律变更可能让私营合作伙伴从财务上无法继续履行PPP合同项提供相关的基础设施的义务，甚至无法获得融资并签署PPP合同。

The Contracting Authority should also bear in mind that change in law provisions may also address circumstances where a change in law has a beneficial effect on the Private Partner's ability to perform and/or its costs, in which case the Contracting Authority should also benefit (for example, if a costly health and safety legal requirement is reduced or lifted).

缔约政府部门还应该注意，法律变更条款还可以解决的情形是，如果法律变更可以对私营合作伙伴的履约能力或成本可以带来利好，则缔约政府部门据此也应该可以获得利益（比如，减少或取消了成本高的健康和安全的法律要求）。

3.2.2 *Defining what qualifies as "Change in Law" 法律变更的界定*

Although a degree of change in law protection will almost always be required, Contracting Authorities should carefully consider the scope of change in law provisions. The starting point is to define "Change in Law" by agreeing (a) what is law (often termed "Applicable Law"), (b) what constitutes a change in that law, (c) the qualifying date after which such change must have occurred, and (d) foreseeability criteria before that date (i.e. if it was "in the public domain"). These elements are discussed below.

尽管基本上都需要一定程度的法律变更方面的保障，缔约政府部门应该仔细考虑法律变更的范围。界定“法律变更”时，出发点是（a）什么是法律（通常称为“适用的法律”），（b）什么构成法律的变更，（c）法律变更发生的基准日，以及（d）基准日之前的可预见性标准（比如是否为“公众所知晓”）。以下将讨论这些因素。

3.2.2.1 *Applicable Law - The Contracting Authority and its legal advisers will need to carefully consider the definition of "Applicable Law" and how it ties in with other definitions in which it is incorporated (in particular the definition of "Change in Law").*

The definition will depend on the relevant country as the way laws are implemented varies across jurisdictions. The key principle is that it should be limited to obligations with which the Private Partner must legally comply, including:

适用法律——缔约政府部门及其法律顾问需要仔细地考虑“适用法律”的定义，以及其与包含该概念的其他定义（尤其是“法律变更”的定义）之间的联系。因为法律实施的方式在各法域中不一样，其定义也取决于特定的国家。核心原则是应将定义限定在私营合作伙伴依法必须遵守的义务，包括：

- legislation (which must itself be clearly defined);
立法（法律本身必须就其明确定义）；
- case law to the extent that it constitutes binding precedent (for example in some common law jurisdictions);
有约束力的先例构成的判例法（比如在一些英美法系国家）；
- binding judicial or administrative orders or decrees;
有约束力的司法或行政命令；
- international human rights or environmental treaties that are directly applicable in the respective jurisdiction or have been incorporated into its national law;³²
在特定法域直接适用的或者已经纳入国家法律的国际人权或环境条约；³²
- mandatory industry guidelines with which the Private Partner is bound to comply under the PPP Contract; and
私营合作伙伴在PPP合同项下需要遵守的强制性的行业指导原则；和
- international conventions (for example, in sectors heavily regulated by international treaties, such as airports). The Contracting Authority will need to consider whether it is appropriate for these to qualify, as well as the likely impact of change on the Private Partner. See Section 3.3, Sample Drafting 3, Required Definitions, "Applicable Law" definition.

国际公约（比如一些受到国际条约高度监管的行业，如机场）。缔约政府部门需要考虑这些是否适用于构成法律变更，以及可能对私营合作伙伴带来的影响。[第3.3节——草案范本3](#)，需要的定义，“适用法律”的定义。

32 If the Parties agree the Private Partner should comply with institutional or industry standards or principles which are not legally binding, the PPP Contract would typically specify the relevant version to be complied with, e.g. the version in effect at the bid submission (or contract signature) date. Any changes would not usually fall under Change in Law or be required to be complied with. 如果合同方约定私营合作伙伴应当遵守没有法律约束力的机构或行业的标准或原则，则PPP合同一般会说明要遵守的相关版本，比如在投标（或者合同签署）日期实行的版本。并非所有变更都属于法律变更或被要求遵守。

The definition of Applicable Law typically encompasses tax law although this is sometimes included as a separate limb in its own right. The definition should not include governmental approvals or permits which should be treated separately in the PPP Contract. [See Section 2.2.1.2.](#)

适用法律一般会包含税法，尽管它有时候作为一个独立条款进行规定。适用法律不当包括政府的批准或许可，这些应当在PPP合同中单独约定。请参见第2.2.1.2节。

- 3.2.2.2 Change in Applicable Law - Changes will be defined by reference to the qualifying elements of Applicable Law. In some jurisdictions, a change in interpretation of Applicable Law could also have a major impact on the Private Partner's ability to deliver and operate a PPP Project even though the Applicable Law itself has not changed, so the definition of a change should take this into account.

适用法律的变更——法律变更将通过参考适用法律的相关因素进行界定。在一些法域，对适用法律的解释的变化还可能对私营合作伙伴交付并运营PPP项目的能力有很重大的影响，即使适用法律本身并没有变化，因此定义的变化也需要将其考虑在内。

CIVIL AND COMMON LAW DIFFERENCES

Depending on the jurisdiction, it may be appropriate for the definition of change in law also to include any modification in the interpretation or application of any Applicable Law. This is particularly likely in common law jurisdictions. See Section 3.3, Sample Drafting 3, Required Definitions, "Change in Law" definition.

大陆法与英美法之差异

根据司法区域的不同，法律变更的定义也可以纳入对任何适用法律解释或适用方面的变更。这在英美法系更为常见。见第3.3节——草案范本3，需要的定义，“法律变更”的定义。

- 3.2.2.3 Qualifying Date - The Private Partner is expected to have conducted thorough due diligence of the legal framework in determining its pricing and ability to perform its obligations under the PPP Contract. Accordingly, change in law should only include changes which were not "in the public domain" during the period when the pricing was developed and then submitted. This date is key and will usually be no later than the bid submission date. However, a later date may be appropriate if the Private Partner has had the opportunity to amend its pricing before signing the PPP Contract to take into account any changes in law in the interim period. This will be particularly relevant where there is a long period between bid submission and contract signature. In the absence of a bidding process, an appropriate date will similarly need to be identified (and may be the date final pricing is submitted or the date of contract signature). As pricing is not developed overnight, it is customary in some jurisdictions for this date to be set at six weeks prior to submission of pricing so as to permit pricing to be determined on a clear basis. [See Section 3.3, Sample Drafting 3, Required Definitions, "Change in Law" definition, reference to "Setting Date".](#)

基准日——私营合作伙伴在确定定价以及根据PPP合同履行其义务的能力时需要法律进行全面的尽职调查。因此，法律变更仅包括价格确定并报价后并未“为公众所知晓”的变更。该日期很关键，并且一般不得晚于投标日期。然而，如果私营合作伙伴有机会在签署PPP合同之前修改其定价，则最好将日期定得晚一点，以便考虑在过渡期间的法律变更。如果在投标日期至合同签署日期之间有较长时间，日期这一点就尤其重要。在没有投标流程时，也需要确定一个适当的日期（可以是提交最终定价的日期或签署合同的日期等）。由于定价不能在一夜之间很快完成，许多法域的惯例是将此日期设定在提交定价之前六周，以便在一个更加明确的基础之上确定价格。见第3.3.3节——草案范本3，需要的定义，“法律变更”的定义，参考“日期设定”。

- 3.2.2.4 Awareness of change - Classifying what changes in law are "in the public domain" at the relevant time will need to be looked at on a case by case basis because the legislative process varies from one jurisdiction to another. The basic principle as regards legislation is that anything enacted in draft form as at the relevant pricing date qualifies as being in the public domain, so would not constitute a change in law under the PPP Contract once enacted. It may in some circumstances be appropriate to use other "foreseeability" criteria - these should be as objectively ascertainable as possible. If there is a particular concern or uncertainty in relation to the effect of a proposed change in law on the Private Partner's obligations under the PPP Contract (e.g. in relation to its timing of enactment or actual scope), this can be addressed specifically in the PPP Contract. See Section 3.3, Sample Drafting 3, Required Definitions, "Change in Law" definition, limb (b).

变更认知——由于各个司法区域立法程序不同，在特定时间内，判断法律变更是否已经“为公众所知晓”需要结合案例具体问题具体分析。相关立法的基本原则是在相关的定价日期颁布的法律草案即视为“已经公开”，因此在此之后颁布并不会构成PPP合同项下的法律变更。在某些情形下，可能使用其他“可预见性”标准更为合适，这些标准应当尽可能具有客观的确定性。若现有法律变更的提议会对私营合作伙伴在PPP合同项下的义务产生特定的影响或者造成其义务的不确定性（例如有关法律的颁布或实施范围的变化），那么可以在PPP合同中对此情况予以特别地规定。第3.3.3节——草案范本3，需要的定义，“法律变更”的定义，(b)项。

3.2.3 Different risk allocation approaches 不同的风险分配方式

There are several approaches to allocating change in law risk but the ability for a Contracting Authority to share change in law risk with the Private Partner will depend on the risk of legislative or regulatory volatility in the jurisdiction and sector concerned, as well as the maturity of the market. The extent to which any resulting increased costs can be passed on to third party users will also be relevant. See Section 3.2.3.4.

分配法律变更风险有几种方式，但是缔约政府部门与私营合作伙伴分担法律变更风险的能力将取决于在该法域及相关行业中立法或监管的稳定性以及市场的成熟度，同时将增加的成本转移到第三方用户的程度也有关系。请参见第3.2.3.4节。

In some emerging markets, the Private Partner may expect the Contracting Authority to bear all forms of change in law risk, while in others the Private Partner may accept a certain monetary threshold up to which it accepts any change in law risk.

In more mature markets, the Private Partner is able to accept greater general change in law risk but is likely to expect the Contracting Authority to bear the risk of general changes requiring capital expenditure once the asset is built and operational, as well as the risk of changes which are discriminatory against the Private Partner or the PPP Project or the type of services being provided. Contracting Authorities will need to consider what approach will provide the optimum balance between affordability, bankability and risk transfer.

新兴市场与发达市场之差异

在某些新兴市场，私营合作伙伴会指望缔约政府部门承担所有形式的法律变更风险，而在其它地区，私营合作伙伴可能会接受将确定的财政承受限值作为其接受法律变更风险的基准。

在更为成熟的市场中，私营合作伙伴会接受更多的一般法律变更的风险，但同时如在项目建成并运营后法律变更导致其产生了额外的基建建设费用，或是该法律变更的风险对于不同的私营合作伙伴、PPP项目或者是其提供的服务类型而有所不同，则私营合作伙伴会期望缔约政府部门承担该等法律变更风险。缔约政府部门将需要考虑通过何种方式在负担能力、可融资性和风险转移之间寻找适当的平衡。

- 3.2.3.1 Approach (a): All risk borne by the Contracting Authority - In some markets the Contracting Authority typically bears all the risk of change in law and provides full relief to the Private Partner. This may be the only way that private finance can be raised in its jurisdiction for the bankability reasons mentioned above. As mentioned in [Section 3.2.1.3](#), this risk allocation should also enable the Private Partner to offer a more competitive price without the need for contingency pricing.

方式（a）：由缔约政府部门承担所有的风险——在一些市场中，缔约政府部门一般承担所有的法律变更风险，并向私营合作伙伴提供完整的救济。这有可能是因前述的可贷款融资性原因，在该法域内获得私营合作伙伴融资的唯一办法。如[第3.2.1.3节](#)所述，由于不必将或有定价纳入定价，这种风险分配还可以让私营合作伙伴提供的定价更有竞争力。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Although a Contracting Authority may bear all change in law risk at the start of a PPP programme, once a track record and/or legal environment is established in its jurisdiction which gives the private sector greater confidence in the stability and predictability of the regime, Contracting Authorities procuring new PPP Projects may be able to explore some risk transfer to the Private Partner. See Section 3.3, Sample Drafting 3.

新兴市场与发达市场之差异

尽管缔约政府部门在PPP项目初期可能会承担所有法律变更风险，在相关法域积累了相关案例和/或法律环境成熟后，可以在法律体系的稳定性和可预见性上给私营合作伙伴带来更大的信心，此时，进行新的PPP项目采购的缔约政府部门有可能寻求将某些风险转移给私营合作伙伴。见第3.3节——草案范本3。

- 3.2.3.2 Approach (b): Basic risk sharing by the Private Partner - One way in which change in law risk can be allocated between the Private Partner and the Contracting Authority is by setting a minimum cost threshold, generally on a yearly basis, below which the Private Partner will not be compensated. In other words, the Private Partner will only be entitled to compensation to the extent that it is able to demonstrate that the aggregate costs incurred as a result of a change in law exceed the agreed threshold during a specified period in time, e.g. per calendar year. Subject to an appropriate threshold being set, this approach will generally be acceptable to Lenders as it makes the risk quantifiable. Unlike Approach (c) below, there is no distinction between general and discriminatory changes (although changes in tax legislation may have to be discriminatory to qualify). This approach has been seen in recent PPP Contracts in the Philippines and an example is set out in [Section 3.3, Sample Drafting 3](#).

方式（b）：由私营合作伙伴承担基本的风险——让私营合作伙伴和缔约政府部门分担法律变更风险的方法之一是设定一个最小的成本标准（一般按年计算），低于该标准，私营合作伙伴将无法获得赔偿。也就是说，私营合作伙伴只有在证明其在某个特定时期内（比如一个日历年）因为法律变更所产生的总成本超过约定的标准时才有可能获得赔偿。只要所设定的标准合适，这种方式一般会为贷款方所接受，因为它让风险量化了。和后述方式（c）不同的是，方式（b）没有在一般的法律变更和区别性法律变更之间进行区分（尽管税法的变更可能必须带有区别性才可行）。这种方式见于最近在菲律宾的PPP合同中，相关案例见第3.3节——草案范本3。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Contracting Authorities will need to consider whether, depending on their jurisdiction, this basic risk-sharing approach constitutes good value for money as it is likely to attract some contingency pricing.

新兴市场与发达市场之差异

缔约政府部门需要根据所处的法域考虑这种基本的风险分配方式是否物有所值，因为其可能会吸引一些权变定价。

Setting a clear monetary threshold is preferable to the approach seen in some PPP Contracts where "materiality" criteria are included in defining a qualifying change in law but no clear monetary threshold. This does not provide any certainty for the Parties (or the Lenders) and disputes are likely unless it is clearly defined. A sample of this approach is given in [Section 3.3, Sample Drafting 3, Clause \(3\)\(c\) and](#)

Section 3.4, Sample Drafting 3A, Clause (3)(c).

某些PPP合同中，“重大程度”是判断法律变更的标准，但若没有清晰的金钱性标准的话，此时设定一个清晰的标准价是更有利的方式。此类PPP合同中的条款未给各方（或者贷款方）带来确定性，因此除非有清晰的定义，否则很容易产生纠纷。这种方式的范本见第3.3节——草案范本3，第（3）条（c）项，和第3.4节，草案范本3A，第（3）条（c）项。

- 3.2.3.3 Approach (c): More developed risk sharing - Over the last two decades, a more developed approach to sharing change in law risk has been seen in some jurisdictions and has become part of standardised contract templates³³. A version of this approach is set out in Section 3.3, Sample Drafting 3A, and is based on the following risk allocation:

方式（c）：更成熟的风险分担方式——在过去二十几年中，在一些法域出现了更为成熟的法律变更风险分担方式，并且已经成了标准化合同模板的一部分³³。这种方式的一种版本见第3.3节——草案范本3A，基于以下风险分配：

- Discriminatory Changes in Law - these are changes in law which are discriminatory because they apply to the PPP Project and not to similar projects, or to the Private Partner and not to other persons, or to PPP operators and not to other parties.

区别性法律变更——这些法律变更带有区别性，因为它们适用于PPP项目而不适用于类似的项目、适用于私营合作伙伴而不适用于其它人，或适用于PPP运营方而不适用于其它方。

- Specific Changes in Law - these are changes in law specifically impacting the provision of services the same as or similar to the PPP Project services or the shareholders of businesses providing such services (the Contracting Authority will want to clearly define the nature of the services).

特定的法律变更——这些法律变更对PPP项目或与类似于PPP项目的服务或对提供服务的公司股东的服务条款造成影响（缔约政府部门想清晰地定义服务的性质）

Discriminatory and Specific Change in Law risk is allocated to the Contracting Authority to address the Private Partner's concern that laws may be passed that have the effect of singling out itself or private operators of infrastructure in a manner that has an adverse impact on expected equity return. For example, this could be the introduction of a tax or surcharge which only applies to its Project or that is only applicable to its business because it is being operated by the private sector, or the implementation of more significant environmental regulations that are not being imposed on public sector operators of similar assets.

33 See the Infra Australia PPP Guidelines and the UK PF2 Guidance and the definition of "Relevant Change in Law" in the Dutch Model. 见《澳大利亚PPP指导原则》和《英国PF2指南》和荷兰模式中对“相关法律变更”的定义。

区别性和特定的法律变更风险由缔约政府部门承担，以消除私营合作伙伴的顾虑，他们担心可能实施的法律会将其或基础设施私营运营方区别对待，由此可能会对其预期的回报带来不利影响。比如，这种情况可能包括因为相关项目由私营合作伙伴运营，而引入只适用于其项目或只适用于其业务的税收或额外收费；或者实施不适用于类似资产的公共部门运营商的更加严格的环境监管。

- **General Changes in Law requiring capital expenditure in operating period** - these are general changes in law (i.e. excluding Discriminatory Changes in Law and Specific Changes in Law) which require the Private Partner to incur capital expenditure after construction completion during the operating period. The risk of these changes is also allocated to the Contracting Authority as the Private Partner has no means of absorbing potentially significant costs once the PPP Project is operational and the relevant asset built.

要求运营期资本支出的一般法律变更——这些属于一般的法律变更（即不含区别性法律变更和特定的法律变更），将导致私营合作伙伴在项目竣工后的运营期间产生资本费用支出。因为一旦PPP项目投入运营并且相关设施已经建成，私营合作伙伴将无法承担潜在高额成本，因此该等法律变更的风险亦由缔约政府部门承担。

- **Any other Changes in Law** - these are all other changes in law including those which trigger capital expenditure during the construction period (but excluding the categories above). The risk of these changes is allocated to the Private Partner throughout the duration of the PPP Contract on the basis that the Private Partner is able to manage and absorb any price implications. The ability to pass the risk of changes requiring capital expenditure in the construction phase will, however, depend on the length of the construction period and the predictability of the legal regime. A particularly long period and/or less stable regime may make this unbankable and a different risk allocation might be needed.

其它法律变更——上述一般法律变更以外的法律变更，包括项目建设期导致基建建设费用支出的法律变更，其风险在整个PPP合同期间都由私营合作伙伴承担，因为私营合作伙伴能够管理和吸收因此导致的任何价格变化。然而，私营合作伙伴是否具备转移建设期导致基建建设费用支出的法律变更风险的能力，取决于建设期的长度和法律制度的可预见性。工期太长和/或不够稳定的法律制度可能会导致无法获得贷款融资进而可能需要采取其它的风险分配方式。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Under this more developed risk sharing approach the Private Partner will bear some of the general business risk that applies to all businesses. It is considered generally more beneficial to the Contracting Authority, but this approach may not be bankable in every jurisdiction and should be contemplated on a case by case basis.

Even in markets using this approach there will be instances where this risk allocation is not fully achievable due to the nature of the PPP Project and the extent to which the applicable

legal and regulatory regime is settled.

新兴市场与发达市场之差异

根据这种更加成熟风险分配方式，私营合作伙伴将承担所有企业应当承担的一般商业风险。一般认为，此等风险分配方式对缔约政府部门是更有利的，但可能不会在所有法域都能获得融资，因此需要基于个案进行预估。

即使在采用该方式的市场，也有可能因为PPP项目的特质和适用法律与监管规定的实施程度导致风险分配无法完全实现。

- 3.2.3.4 Approach (d): All risk borne by the Private Partner - This is highly unusual and likely to be achievable only in very established legally stable markets where the Private Partner is legally able to pass on any increased costs to third party users via a toll or tariff (i.e. under the "user pays" model - see Section G, PPP Contracts in Context and Section 1.2.2.6) and without adverse impact on user demand. Even so, certain events with a change in law effect are nonetheless likely to be dealt with specifically elsewhere in the PPP Contract (e.g. discriminatory actions such as expropriation and other MAGA types of event).

方式（d）：由私营合作伙伴承担所有风险——这种方式非常少见，并且只有在非常成熟且法律稳定的市场中才可能实现。在此类市场中，私营合作伙伴在法律上可以通过收取费用或征收税费（即“使用者付费”模式，见第G章——特定情形下的PPP合同和第1.2.2.6节）的方式将增加的成本转移给第三方用户，并且不会对用户需求造成不利影响。即使如此，受法律变更影响的某些事件还是需要在PPP合同的其它地方（比如征收等区别对待行为和其它重大政府负面行为）予以约定。

If the PPP Project does allow the Private Partner to transfer the costs of a change in law to its end-users, the protection which the Contracting Authority gives the Private Partner should be more limited.

如果PPP项目允许私营合作伙伴将法律变更成本转移给终端用户，则缔约政府部门给予私营合作伙伴的保护应当有更多限制。

3.2.4 Relief and Compensation 救济与补偿

Relief from breach - The Private Partner should be protected from breach of contract to the extent (a) its performance is prevented or delayed by a change in law it does not bear the risk of and (b) a variation in PPP Project scope is required in order to comply with a change in law (in which case the PPP Contract should include a mechanism for implementing such variation, for example by means of a Contracting Authority requested variation).³⁴. See Section 3.3, Sample Drafting3,

34 In some jurisdictions, due to the type of service involved, the Private Partner may be subject to "public service obligations" under general law which require continuity of service (e.g. in France). Where applicable, the Parties should bear this in mind when drafting/negotiating relief provisions.

Clauses (1), (2) and (3).

违约救济——在下列情形下，私营合作伙伴不应当被认定为违反合同约定，（a）由于受到不由其承担的法律变更风险的影响，导致其无法履行义务或迟延履行义务，和（b）为了符合变更后的法律而被要求改变PPP项目范围（在这种情形下，PPP合同应当包含实施该等变更的机制，比如采取缔约政府部门要求变更的方式）。³⁴第3.3节——草案范本3，第（1）、（2）、（3）条。

Cost compensation - The PPP Contract will need to set out how any compensation to which the Private Partner is entitled is implemented. This will depend on the payment model, but could include:

成本补偿——PPP合同需要规定如何实施私营合作伙伴有权获得的补偿。这将取决于支付模式，可能包括：

- (a) an increase in the availability payment paid by the Contracting Authority; 增加缔约政府部门根据可用性付费模式支付的金额；
- (b) a permitted increase in the toll or tariff paid by the end users; 允许增加由终端使用者支付的费用或税费；
- (c) reducing any fees payable by the Private Partner (as applicable); 减少私营合作伙伴任何应付费用（如适用）；
- (d) a lump sum payment by the Contracting Authority to the Private Partner; or 缔约政府部门向私营合作伙伴一次性支付补偿；或
- (e) an extension to the term of the PPP Contract. 延长PPP合同期限。

Extension of time for performance - If the event occurs in the construction phase, the Private Partner will usually be contractually entitled to an extension of time for meeting key dates such as the scheduled date for commencing operations, to the extent any delay is attributable to the change in law.

履行期限的延长——如果法律变更事件发生在建设期，且在一定程度上工期延误系由法律变更所致，则私营合作伙伴通常有权依据合同约定延长关键工期（比如预先确定的运营开始日等）。

For background to the above see Section 1.2.2, Force Majeure and Section 3.3, Sample Drafting 3, Clause (3) and Section 3.3, Sample Drafting 3A, Clause (3). As mentioned above, change in law relief and compensation may also be addressed under separate Compensation Event clauses (with their own applicable thresholds and caps). 上述内容的背景信息见第1.2.2节——不可抗力和第3.3节——草案范本3，第（3）条和第3.3节——草案范本3A，第（3）条。

在某些地区，根据一般法律规定的服务持续性要求，私营合作部门可能需要根据所涉服务类型履行公共服务义务（比如在法国）。在适用情况下，合同各方在救济条款起草/谈判阶段应当记住此点。

如上文所述，亦可通过单独的补偿事件条款规定（具有其单独的适用条件）法律变更救济与补偿（有独立的适用底限和上限）。

Mitigation - The Private Partner should be required to mitigate any costs or delays it incurs associated with the change in law. See Section 3.3, Sample Drafting 3, Clauses (2) and (3).

减轻损失——应该要求私营合作伙伴减轻因法律变更导致的任何成本增加或延迟。第3.3节——草案范本 3，第（2）条和第（3）条。

CIVIL AND COMMON LAW DIFFERENCES

In civil law jurisdictions it is common to have a specific termination event where performance of the PPP Contract would entail a breach of law that cannot be remedied by a Contracting Authority variation.

This is not usually seen in common law jurisdictions with established legal frameworks as the Private Partner and its lenders are able to take a view that it is highly unlikely that a change in law would result in such drastic consequences without means of holding the government accountable.

大陆法与英美法之差异

在大陆法系下的法域，PPP合同的履行会导致违反法律而无法通过缔约政府部门的变更进行修正，这被视为常见的特定合同终止事件。

这种情况在具有成熟法律体系的英美法系下的法域并不常见，因为私营合作伙伴及其贷款方认为，法律变更导致此等严重后果而无法追究政府的责任是极不可能的。

If termination provisions are considered necessary, similar reasoning applies as for Contracting Authority default and MAGA, resulting in the same compensation scheme. See Section 3.3, Sample Drafting 3, Clause (5) and Section 3.4, Sample Drafting 3A, Clause (5) and Section 4, Termination Payments and Section 4.7, Sample Drafting 4, Schedule, Clause (1).

如果终止条款是必须的，与缔约政府部门违约和重大政府负面行为中类似的理由同样适用，也会导致相同的赔偿方式。见第3.3节——草案范本 3，第（5）条和第3.4节——草案范本 3A，第（5）条和第4章——解约金和第4.7节——草案范本 4，附录，第（1）条。

3.3 SAMPLE DRAFTING 3 草案范本 3

OPTION 1: Protection Against All Changes in Law 选择1: 法律变更影响的防范

Required Definitions "Applicable Law" "适用法律"的定义

"Applicable Law"
“适用的法律”

means any [decree, resolution, law, statute, act, decision, ordinance, rule, directive (to the extent having the force of law), order, treaty, code or regulation or any interpretation of the foregoing by a relevant authority having jurisdiction over the matter in question, as enacted, issued or promulgated by any relevant authority, in each case applicable in [insert jurisdiction in which the PPP Project is located]; [Drafting to be adapted for the relevant jurisdiction - any reference to amendments, modifications, extensions, replacements or re-enactments must not cut across Change in Law definition].

意指任何【由主管当局制定与颁布的法令、决议、法律、法规、法案、决定、条例、规则、指令（具有一定法律效力）、命令、协议、准则、规章制度或具有管辖权的主管当局针对相关问题对上述文件作出的任何解释，上述各项适用于PPP项目所在法域】；【适用于相关法域的方案及其修订、变更或重新颁布均不得超出法律变更的内涵】

"Change in Law"
“法律变更”

means, after the [Setting Date,] any of the following events:

意指任何发生于[约定日期]之后的以下事件：

- (a) the enactment of any new Applicable Law; 颁布任何新的适用法律；
- (b) the repeal, modification or re-enactment of any existing Applicable Law; and/or 对任何现有适用法律的废除、修改或重新颁布；和/或
- (c) a change in the interpretation or application of any Applicable Law, 对任何适用法律的解释或适用的变更，

Which 上述各项

- (i) adversely affects (i) the ability of a Party to comply with its obligations under the PPP Contract or (ii) [the Base Case Equity IRR]; and 对（i）合同一方履行其在PPP合同项下义务的能力或（ii）[基础性股本回报率]将产生负面影响；和
- (ii) was not [published as a draft law] in the [insert applicable publication source for legislation] or in effect at the Setting Date. [Adapt as appropriate for "in the public domain"]. 未在【法定的立法公布平台】或未在约定的日期【以法律草案的形式予以发布】。【调整以适合于“公共领域”】。

This date could be a period of time before bid submissions but is usually no later than the bid date. See discussion under Section 3.2.2.3. 这一日期可以是递交投标文件前的一段时间但一般不晚于投标日期。见第3.2.2.3节中的讨论。

Definition and limbs (i) – (iii) and (b) will need to tie in with the definition of Applicable Law to avoid argument or circularity and will also need to reflect the law making process in the relevant jurisdiction. 定义、第(i) – (iii)项和（b）项需要与适用法律的定义相联系，以避免争议或循环，并且还需要反映相关司法区域的法律制定过程。

"Estimated Change in Project Costs" means the aggregate of any estimated increase in construction costs, operating costs and financing costs less the aggregate of any estimated reduction in construction costs, operating costs and financing costs.
 “项目成本变化预估” 意指建设成本、运营成本和融资成本总预估增加值，扣除建设成本、运营成本和融资成本的总预估减少值后的所得金额。

Occurrence of a Change in Law 法律变更的发生

- (1) If a Change in Law occurs or is shortly to occur, then any Party may, within [thirty (30) business] days starting from the day it was aware (or should have been aware) of the Change in Law, notify the other Party to express an opinion on its likely effects, giving details of its opinion of:

The variations process will be dealt with under a different clause.
 变通程序将在单独的条款中约定。

如果法律已经变更或者即将变更，则合同任何一方应当自知道（或者应当知道）法律变更之日起【三十 (30) 个营业】日内通知另一方，说明法律变更可能产生的影响，并对以下事项发表详细意见：

- (a) any necessary change to the terms of this PPP Contract including any necessary Contracting Authority variation;
 任何对PPP合同条款的必要变更，包括任何必要的缔约政府部门的变更；
- (b) whether relief from compliance with obligations is required;
 是否需要免于履行某些义务；
- (c) whether any deadline under the PPP Contract should be postponed;
 是否应该顺延PPP合同项下的任何截止日期；
- (d) any (positive or negative) estimated change of revenue that will directly result from the relevant Change in Law;
 任何因相关法律变更直接导致的预估收入变化（增加或者减少）；
- (e) any (positive or negative) estimated change in the costs of the PPP Project that will directly result from the Change in Law; or
 任何因相关法律变更直接导致的PPP项目预估成本变化（增加或者减少）；或
- (f) any capital expenditure that is required or no longer required as a result of a Change in Law.
 因法律变更而产生或取消的资本支出。

- (2) As soon as practicable and in any event within [thirty (30) business] days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the matters referred to in Clause (1) above and any ways in which

either Party can, if applicable, mitigate the effect of the Change in Law, including, in relation to the Private Partner:

在任何情况下，自收到受影响的一方当事人发出的通知后【三十（30）个】工作日内，缔约政府部门与私营合作伙伴应当尽快就上述第（1）款所涉事项进行讨论并达成一致，采取措施缓解法律变更造成的影响。其中，私营合作部门可采取如下措施：

- (a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its subcontractors to minimize any increase in costs and maximise any reduction in costs;

举证证明私营合作伙伴已采取合理努力（包括（若可行）采用竞争性报价），以使其分包商保证成本增加值最小化以及成本减少值最大化；

- (b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, foreseeable Changes in Law at that time have been taken into account by the Private Partner;

展示如何通过经济的方式对即将产生的或者可减少的资本支出进行测算，包括说明该等支出在何时产生或应当在何时产生，以及在上述支出产生时或应当产生时，私营合作伙伴已对可预见的法律变更进行了考量；

- (c) giving evidence as to how the Change in Law has affected prices charged by any similar businesses to the PPP Project; and

提供证据证明法律变更如何影响了与PPP项目类似业务的收费；和

- (d) demonstrating that any expenditure that has been avoided on account of the Change in Law has been taken into account in the amount which in its opinion has resulted or is required under Clauses (1)(e) or (1)(f) above, provided that if the Parties cannot agree on the effects of the Change in Law, the matter shall be referred for determination in accordance with clause [insert reference to the dispute resolution clause].

证明基于法律变更而减少的任何支出已被纳入了考量范围，且根据私营合作伙伴的意见计入了上述第（1）条第（e）项或第（1）条第（f）项约定的数额。但若合同各方未能就法律变更的影响达成一致，应当根据【插入引用的争议解决条款】的约定进行处理。

Consequences of a Change in Law 法律变更的后果

- (3) If the Parties have followed the procedure set out under Clauses (1) and (2) above, then:

如果合同各方遵循了上述第（1）条和第（2）条规定的程序，则：

- (a) the affected Party shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance

by reason of the Change in Law;

在合同履行过程中，由于法律变更而导致合同履行受到阻碍或延误的，受影响的一方有权根据其受到影响的程度要求免于履行PPP合同项下的义务；

- (b) if the Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Change in Law; and

如果法律变更发生于服务开始日之前，则基于对法律变更影响的考量，原定服务开始日应当相应顺延；以及

- (c) the Parties shall agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs as adjusted to take into account the actual increase or reduction in costs reasonably incurred as a result of the Change in Law, [provided that no compensation shall be made in relation to a Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Changes in Law that have occurred during [insert relevant period in time, e.g. calendar year] exceeds [insert amount]].

Delete proviso if no materiality threshold is to be included.
如果无具体标准，则删除本条。

合同各方应该就赔偿金额与支付方式达成一致，以表明在对项目成本预估变化值进行调整时，已对法律变更所导致的合理的实际增加或减少成本予以了考虑，【要求赔偿的一方不能根据本条款获得与法律变更相关的赔偿，除非其能证明在【填写相关的时间段，比如日历年】期间发生的所有法律变更造成的损失总额超过了【填写金额】。

- (4) If the notice and relevant information are not provided within the period referred to under Clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

如果未能在上述第（1）条指定的时间内发出通知并提供相关信息，则由于信息延迟，受影响的一方无权获得任何赔偿，亦无权要求免除其在PPP合同项下的义务。

Termination due to a Change in Law因法律变更的合同终止

- (5) If a Change in Law: 如果法律变更:

- (a) results in the Private Partner not being able to achieve the [insert defined term for services commencement date] within [•] months after the [insert defined term for scheduled services commencement date]; or

导致私营合作伙伴在【填写“原定服务开始日”术语】后[•]个月内无法达到【填写“服务开始日”术语】；或者

- (b) prevents a Party from performing its material obligations under this PPP Contract for a period of [•] consecutive days; or

导致合同一方连续[•]天无法履行其在本PPP合同项下的重大义务；或者

- (c) results in performance of the PPP Contract being illegal and such illegality cannot be remedied by a Contracting Authority variation, either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect [thirty (30) calendar] days after receipt of such termination notice. If, at the end of this [thirty (30)] day period, the Change in Law continues, the PPP Contract shall be terminated pursuant to clause [insert reference to the clause governing termination] and the Private Partner shall be entitled to the compensation set out under clause [insert reference to Change in Law termination payments clause].

导致PPP合同的履行被认定为非法，且其非法性无法通过变更缔约政府部门予以补救，则合同任何一方都可自行决定提前发出书面终止通知终止本PPP合同，收到终止通知[三十(30)个日历]日后该终止通知生效。如果在[三十(30)个日历]日到期时，法律变更仍然持续，则应当根据[填写约定的终止条款]条款终止PPP合同，且私营合作伙伴应当有权依据[填写法律变更终止的赔偿条款]获得赔偿。

3.4 SAMPLE DRAFTING 3A 草案范本 3A

OPTION 2: Protection against Discriminatory and Specific Changes in Law and Changes in Law in the operating period requiring capital expenditure

选择2: 对区别性法律变更、特定的法律变更以及要求增加运营期资本支出的法律变更的防范

Required Definitions (see also definitions in Section 3.3, Sample Drafting 3)

所需定义 (另见草案范本3第3.3节中的定义)

"Capital Expenditure" “资本支出”	means any expenditure which is treated as capital expenditure in accordance with generally accepted accounting principles in [insert Country] from time to time. 意指根据【填写国家】各时期通用的会计准则而被认定为资本支出的任何支出项目。
"Discriminatory Change in Law" “区别性法律变更”	means a Change in Law, the terms of which expressly [affect][apply to]: 意指相关法律变更条款明确[影响][适用于]: (a) the PPP Project and not to similar projects; and/or 该PPP项目而非其它类似项目; 和/或 (b) the Private Partner [or its sub-contractors in their capacity as such] and not to other persons; and/or 私营合作伙伴[或者代表其身份的分包商]而非其它人; 和/或 (c) parties undertaking PPP Projects and not other persons. 参与PPP项目的合同各方而非其它人。
"General Change in Law" “一般性法律变更”	means a Change in Law which is not a Discriminatory Change in Law or a Specific Change in Law. 意指区别性法律变更或特定法律变更之外的法律变更
"Qualifying Change in Law" “可认定的法律变更”	means: 意指: (a) a Discriminatory Change in Law; 区别性法律变更; (b) a Specific Change in Law; or 特定法律变更; 或 (c) a General Change in Law which comes into effect during the [insert defined term for operating period] and which involves additional capital expenditure for the PPP Project. 在[填写运营期间术语]期间生效的涉及PPP项目额外资本支出的一般性法律变更
"Specific Change in Law" “特定法律变更”	means any Change in Law which specifically refers to (i) the provision of [services the same as or similar to the services provided under the PPP Contract - define] and/or (ii) the holding of shares in companies whose main business is providing [services the same as or similar to those provided under the PPP Contract - define]. 任何特指如下事项的法律变更 (i) 提供【与PPP合同项下提供的服务相同或类似的服务-定义】和/或 (ii) 持有主营业务为提供【与PPP合同项下提供的服务相同或类似的服务-定义】的公司的股份。

Qualifying Change in Law 可认定的法律变更

- (1) If a Qualifying Change in Law occurs or is shortly to occur, then either Party may, within [thirty (30) business] days starting from the day it was aware (or should have been aware) of the Qualifying Change in Law, notify the other Party to express an opinion on its likely

effects, giving details of its opinion of:

如果可认定的法律变更已经发生或者即将发生，则合同任何一方应当自知道（或者应当知道）可认定的法律变更之日起【三十 (30) 个营业】日内通知另一方，说明法律变更可能产生的影响，并对以下事项发表详细意见：

- (a) any necessary change in the obligations of the Private Partner;

任何对私营合作伙伴义务的必要变更；

- (b) whether any changes are required to the terms of this PPP Contract to deal with the Qualifying Change in Law including any necessary Contracting Authority variation;

是否需要对本PPP合同的条款进行修订以处理可认定的法律变更，包括必要的缔约政府部门的变更；

The variations process will be dealt with under a different clause. 变通程序将在单独的条款中约定。

- (c) whether relief from compliance with obligations is required, including the obligation of the Private Partner to achieve any contractual deadline and/or meet any contractual performance requirement during implementation of any relevant Qualifying Change in Law;

是否需要免于履行合同项下义务，包括私营合作伙伴遵守合同期限的义务，和/或在可认定的法律变更实施期间满足合同履行要求的义务等；

- (d) any (positive or negative) change of revenue that will directly result from the relevant Qualifying Change in Law;

任何因相关可认定的法律变更直接导致的收入变化（增加或者减少）；

- (e) any (positive or negative) estimated change in the costs of the PPP Project that will directly result from the Qualifying Change in Law; or

任何因相关可认定的法律变更直接导致的PPP项目预估成本变化（增加或者减少）估计；或者

- (f) any capital expenditure that is required or no longer required as a result of a Qualifying Change in Law taking effect during the operation period of this PPP Contract.

因PPP合同运营期发生的可认定的法律变更所需要的任何资本支出或不再需要的资本支出。

- (2) As soon as practicable and in any event within [thirty (30) business] days after receipt of any notice from the affected Party, the Contracting Authority and the Private Partner shall discuss and agree the issues referred to in Clause (1) above and any ways in which either Party can, if applicable, mitigate the effect of the Qualifying Change in Law, including, in relation to the Private Partner:

在任何情况下，自收到受影响的一方当事人发出的通知后【三十（30）个】工作日内，缔约政府部门与私营合作伙伴应当尽快就上述第（1）款所涉事项进行讨论并达成一致，采取相关措施缓解可认定的法律变更造成的影响。其中，私营合作部门可采取措施如下：

- (a) providing evidence that the Private Partner has used reasonable endeavors (including (where practicable) the use of competitive quotes) to oblige its sub-contractors to minimize any increase in costs and maximise any reduction in costs;

举证证明私营合作伙伴已采取合理努力（包括（若可行）采用竞争性报价），以使其分包商保证成本增加值最小化以及成本减少值最大化；

- (b) demonstrating how any capital expenditure to be incurred or avoided is being measured in a cost effective manner, including showing that when such expenditure is incurred or would have been incurred, Changes in Law at that time have been taken into account by the Private Partner;

表明私营合作伙伴已经考虑了法律变更的前提下，如何以有效的方式计算产生或者避免任何资本支出，包括说明该等支出在何时产生或应该产生；

- (c) giving evidence as to how the Qualifying Change in Law has affected prices charged by any similar businesses to the PPP Project; and

提供证据证明可认定的法律变更如何影响了与PPP项目类似业务的收费；和

- (d) demonstrating that any expenditure that has been avoided on account of the Qualifying Change in Law has been taken into account in the amount which in its opinion has resulted or is required under Clauses (1)(e) or (1)(f) above, provided that if the Parties cannot agree on the effects of the Qualifying Change in Law, the matter shall be referred for determination in accordance with clause [insert reference to the dispute resolution clause].

证明基于法律变更而减少的任何支出已被纳入了考量范围，且根据私营合作伙伴的意见计入了上述第（1）条第（e）项或第（1）条第（f）项约定的数额。但若合同各方未能就可认定的法律变更的影响达成一致，应当根据【插入引用的争议解决条款】的约定进行处理。

Consequences of a Qualifying Change in Law 可认定的法律变更的后果

- (3) If the Parties have followed the procedure set out under Clauses (1) and (2) above, then:

如果合同各方遵循了上述第（1）条和第（2）条规定的程序，则：

- (a) the affected Party [i.e. the Private Partner] shall be excused from the performance of its obligations under the PPP Contract to the extent it is prevented, hindered or delayed in such performance by reason of the Qualifying Change in Law;

在合同履行过程中，由于可认定的法律变更而导致合同履行受到阻碍或延误的，受影响的一方（如私营合作伙伴）有权根据其受到影响的程度要求免于履行PPP合同项下

的义务；

- (b) if the Qualifying Change in Law has occurred before the services commencement date, the scheduled services commencement date shall be postponed to take into account the effect of such Qualifying Change in Law; and

如果可认定的法律变更发生于服务开始日之前，则基于对法律变更影响的考量，原定服务开始日应当相应顺延；以及

- (c) the Parties shall agree on the amount and payment of any compensation to reflect the Estimated Change in Project Costs as adjusted to take into account the actual increase or reduction in costs reasonably incurred or obtained as a result of the Qualifying Change in Law, [provided that no compensation shall be made in relation to a Qualifying Change in Law under this clause unless the claiming Party can demonstrate that the aggregate impact of all Qualifying Changes in Law that have occurred during [insert relevant period in time, e.g., calendar year] exceeds [insert amount].

Delete proviso if no materiality threshold is to be included. 如果没有规定具体标准，则删除本条。

合同各方应该就赔偿金额与支付方式达成一致，以表明在对项目成本预估变化值进行调整时，已对可认定的法律变更所导致的合理的实际增加或减少成本予以了考虑，【要求赔偿的一方不能根据本条款获得与可认定的法律变更相关的赔偿，除非其能证明在【填写相关的时间段，比如日历年】期间发生的所有可认定的法律变更造成的损失总额超过了【填写金额】。

- (4) In the event that the notice and relevant information are not provided within the periods referred to under Clause (1) above, the affected Party shall not be entitled to any compensation or relief from its obligations under the PPP Contract in respect of the period for which the information is delayed.

如果未能在上述第（1）条指定的时间内发出通知并提供相关信息，则由于信息延迟，受影响的一方无权获得任何赔偿，亦无权要求免除其在PPP合同项下的义务。

Termination due to a Qualifying Change in Law 因可认定的法律变更的合同终止

- (1) If a Qualifying Change in Law: 如果可认定的法律变更：

- (a) results in the Private Partner not being able to achieve the [insert defined term for services commencement date] within [•] months after the [insert defined term for scheduled services commencement date]; or

导致私营合作伙伴在【填写“原定服务开始日”术语】后[•]个月内无法达到【填写“服务开始日”术语】；或者

- (b) prevents a Party from performing its material obligations under this PPP Contract for a period of [•] consecutive days;

导致合同一方连续[•]天无法履行其在本PPP合同项下的重大义务；

- (c) results in performance of the PPP Contract being illegal and such illegality cannot be remedied by [a Contracting Authority] variation, either Party may in its discretion terminate this PPP Contract by issuing a written termination notice which shall take effect [thirty (30) calendar] days after receipt of such termination notice. If, at the end of this [thirty (30)] day period, the Qualifying Change in Law continues, the PPP Contract shall be terminated pursuant to clause [insert reference to the clause governing termination] and the Private Partner shall be entitled to the compensation set out under clause [insert reference to Change in Law termination payments clause].

导致PPP合同的履行被认定为非法，且其非法性无法通过变更缔约政府部门予以排除，则合同任何一方都可自行决定提前发出书面终止通知终止本PPP合同，收到终止通知[三十(30)个日历]日后该终止通知生效。如果在[三十(30)个日历]日到期时，可认定的法律变更仍然持续，则应当根据[填写约定的终止条款]条款终止PPP合同，且私营合作伙伴应当有权依据[填写法律变更终止的赔偿条款]获得赔偿。

4

TERMINATION PAYMENTS 解约金



4.1 KEY ASPECTS 关键方面

4.1.1 *The concept of a termination payment* 解约金的概念

In commercial contracts where compensation on termination for specific reasons is not addressed specifically, the parties will rely on the chosen dispute resolution method for determining the amount of any damages should termination occur. This may involve bringing a court action. Generally speaking, where there is an innocent party, they will be the party seeking damages. However, even a defaulting party may be entitled to compensation under general law to fairly reflect the value of any works or services it has carried out. In certain contracts, rather than relying on general law, there may be a need to agree upfront the level of compensation payable if termination events occur for specific reasons. 如果商业合同没有明确规定因特定原因导致合同终止产生的赔偿金额，在合同终止时，合同当事人可以通过约定的纠纷解决办法来确定损害赔偿金额。在这种情形下可能会引发诉讼。一般来讲，无过错方会寻求损害赔偿。但是，在一般的法律规定下，为了公允地反映合同当事人在合同项下实施的工作或服务的价值，即使是违约方也可以要求获得赔偿。在某些合同中，可能需要合同当事人在事先就针对在特定情形下合同终止而应付的赔偿金额达成一致，而不是依赖于法律。

4.1.2 *Why do PPP Contracts contain termination payment provisions?* 为什么PPP合同包含解约金的条款?

Market practice has shown that Lenders are not prepared to lend to PPP Projects without reasonable assurance that they will be repaid. In carrying out their detailed due diligence, Lenders are keen to ensure that their debt is protected on any early termination of the PPP Contract, regardless of fault and without having to rely on lengthy and potentially uncertain legal proceedings to determine the level of compensation. Equity Investors, similarly, will want to expressly protect their equity investment in circumstances where termination occurs through no fault of their own or of the Private Partner. 市场实践显示，贷款方在没有合理地确保其提供的贷款可以在将来获得偿还前，是不会为PPP项目提供贷款的。在履行贷款方的谨慎勤勉义务时，无论PPP合同因何原因提前终止，贷款方都希望能保证其贷款的安全性，而不愿意依赖于冗长而充满不确定性的法律程序来确定赔偿。同样地，对于股权投资者而言，在合同不是因股权投资者或私营合作伙伴的过程而提前终止时，他们也希望其股权投资能受到明确的保护。

Although legal proceedings may ultimately result in termination compensation being payable by the Contracting Authority, it is the level of certainty provided by express contractual provisions which is key for Lenders in agreeing to commit funding to the PPP Project. Termination payments are therefore a key element of the risk allocation in a PPP Contract and are essential in achieving a bankable PPP Project. This applies across both established and less established PPP markets in both common and civil law jurisdictions, although the precise terms will vary

according to the particular PPP Project circumstances.³⁵即使通过法律程序最终也能让缔约政府部门支付解约金，然而在合同条款中明确规定解约金带来的确定性是贷款方同意为PPP项目提供贷款资金的关键。因此，在适用英美法和大陆法的法域内，无论PPP市场是成熟的或是尚不稳定的，解约金条款是PPP合同中有关风险分配的重要条款，对于PPP项目能否获得融资十分重要，尽管根据具体的PPP项目实际情况具体条款会有变化。³⁵

The grounds for termination and the consequent payments can be complex. They are included in the PPP Contract to give both Parties certainty as to the mechanics and effects of termination. This in turn enables the Lenders to price their debt based on a | lower risk profile as regards repayment risk, which in turn feeds though into the price bid by the Private Partner for the PPP Contract.提前终止的原因和后续赔偿支付可能会很复杂。PPP合同中写入这些条款可以给合同双方就终止机制和影响方面增加确定性。贷款方可以基于较低的偿还风险向私营合作伙伴提供利息更低的贷款，从而让私营合作伙伴在制定PPP合同的投标价格时处于更有利的地位。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Underlying the Lenders' analysis of their likely debt repayment will be an assessment of the strength of the Contracting Authority's covenant to pay (i.e. its ability to pay any termination payment). In cases of weak or uncertain Contracting Authority credit, additional credit support may be sought by the Private Partner and its Lenders. This may be the case, for example, in less stable regimes or emerging markets or where the Contracting Authority is not part of central government. Support may be available via multilateral or export credit agencies or central government.

新兴市场与发达市场之差异

贷款方在分析其贷款是否能够获得偿还时会对缔约政府部门的支付能力进行评估（即，缔约政府部门支付解约金的能力）。如果缔约政府部门的信用度不高或不确定，则私营合作伙伴及其贷款方可能会寻求增信措施。、比如在不太稳定的政权下，或在新兴市场国家，或者缔约政府部门非中央政府时，可以通过多边或信贷输出机构或者中央政府提供增信措施。

4.1.3 *Types of termination event* 终止事件的类型

The list of events which can lead to termination will vary from one PPP Contract to another and should be tailored to take account of the specific risks and obligations involved in the relevant PPP Project..每个PPP合同中导致合同提前终止的事件各不一样，提前终止事件因结合PPP项目具体风险和义务具体考量。

35 See the Global Infrastructure Hub Report: Allocating Risks in Public/Private Partnership Contracts, 2016 edition - e.g. the Early Termination (including any compensation) entries in Risk Matrix 4: Heavy Rail (ROT) and Risk Matrix 5: Port (DBFO). [See link in Appendix, Additional PPP Resources](#). 见全球基础设施中心报告中：在公共-私营合作合同中的风险分配，2016年版。在风险指标4：重轨（ROT）和风险指标5：港口（DBFO）中的提前终止项目（包括任何赔偿项目）。相关链接见附录 —— 附加PPP资源。

CIVIL AND COMMON LAW DIFFERENCES

Each Party should make sure it understands how underlying law may affect certain termination scenarios under the PPP Contract. For instance, in some jurisdictions (more typically civil law) the Contracting Authority may be entitled to terminate the PPP Contract for convenience or on the grounds of public interest even without an express contractual right. Similarly, the Private Partner may be expected to rely on its rights at general law to terminate for Contracting Authority default instead of having an express right (as has been the case in some PPP Projects in civil law France³⁶ and is also usual in common law Australia).

大陆法与英美法之差异

合同各方应该确认其理解PPP合同中相关的法律会如何影响某些终止情形。比如，在一些法域（更多的是在大陆法体系国家），即便合同中明确约定相关权利，缔约政府部门有权因便利或因公共利益而终止PPP合同。同样地，私营合作伙伴可以依据一般法律赋予的权利，在缔约政府部门违约时终止合同，而无需在合同中明确相应的权利（如属于大陆法系的法国就有类似情况的PPP项目³⁶，在属于英美法系的澳大利亚也较常见）。

Early termination events which may be expected to lead to termination compensation include:会产生解约金的提前终止事件包括：

- (a) Private Partner default termination - by the Contracting Authority where the Private Partner fails to comply with its material obligations;因私营合作伙伴违约而提前终止——如果私营合作伙伴未履行其重要的合同义务，则由缔约政府部门提出终止；
- (b) Voluntary termination - by the Contracting Authority at its discretion for convenience or for public policy reasons (also known as termination for public policy); 主动提前终止——缔约政府部门视便利或因公共政策原因（也称为因政策终止）酌情决定终止合同；
- (c) Contracting Authority default termination - by the Private Partner where the Contracting Authority fails to comply with its material obligations (which are primarily payment obligations if under the availability payment model); and 因缔约政府部门违约而提前终止——如果缔约政府部门未履行其重要合同义务（主要是指在可用性支付模式下的支付义务），由私营合作伙伴提出终止合同；和
- (d) Prolonged Force Majeure, MAGA or Change in Law - by either Party where no solution has been agreed to continue with the PPP Contract. See Section 1, Force Majeure, Section 2, Material Adverse Government Action and Section 3, Change in Law. 因持续的不可抗力，MAGA或法律变更导致的提前终

³⁶ In France, where the PPP Contract is silent, the Private Partner would typically be expected to apply to court for the right to terminate the PPP Contract. 在法国，如果PPP合同中明确约定对提前终止事件进行约定，私营合作伙伴可以向法院申请获得终止该PPP合同的权利。

止——如果合同当事人未能就继续履行PPP合同达成协议，任何一方都可以提出终止合同。见第1章——不可抗力，第2章——重大负面政府行为，和第3章——法律变更。

4.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

4.2.1 Certainty 确定性

Simple and objective calculation methods will provide greater certainty for all Parties, minimising the risk of disputes and enabling less risk premium to be costed into the Private Partner's price. Equity and debt elements to be compensated must be clearly defined and understood by all Parties, including any financing breakage costs (e.g. under interest rate hedging arrangements), any "make-whole" payments (e.g. in respect of fixed rate loans³⁷ or bonds) and any default interest. As mentioned above, the inclusion of an express termination payment provision will not necessarily result in any greater liability on the Contracting Authority than would be the case at general law, but the certainty provided is key to bankability.简单而客观的解约金计算方式可以为合同当事人带来更多的确定性，减少产生纠纷的风险，并可以让私营合作伙伴在考虑报价时减少风险溢价的计算。各方对于将获得赔偿的股权权益和债权必须清楚的说明和理解，包括任何融资损失费用（比如涉及利率对冲安排的情形下），任何“提前赎回补偿”（比如涉及固定利率贷款³⁷或债券的情形下）和任何违约利益。如上所述，缔约政府部门在PPP合同明确规定解约金条款的情形下承担的责任并不必然比直接适用一般法律规定情形下承担的责任更多，但在合同中明确约定解约金条款带来的确定性可以提高PPP项目的可融资性。

4.2.2 Understanding relevant agreements 理解相关的协议

Where termination compensation provisions are defined by reference to Lenders' financing agreements (including any hedging arrangements), equity agreements (e.g. subordinated loan documents) or the Project Agreements, the Contracting Authority and its advisers must review and approve the agreements involved. The Contracting Authority should also require approval rights in relation to changes to such agreements which could affect its liability (or the PPP Contract must be clear that any unapproved adverse changes will not be taken into account in calculating the Contracting Authority's liability).如果解约金条款通过参考贷款方的融资协议（包括任何对冲安排），股权协议（比如次级贷款文件）或项目协议而确定的话，缔约政府部门及其咨询顾问必须对其参考的协议进行审查和批准。缔约政府部门还应该要求对那些可能影响其责任承担的协议变更需事先获得缔约政府部门的批准（或者在PPP合同中明确，在确定缔约政府部门责任的时候不得考虑未经其批准的负面变更）。

4.2.3 Deductions 抵扣

The Private Partner may have cash standing in certain bank accounts (e.g. its current account, debt service reserve account, maintenance reserve account or any collateral account into which e.g. bond proceeds are drawn). The Contracting Authority should consider how these cash balances should be treated and whether they should be set off against any compensation due to the party which ultimately receives such cash. Consideration also needs to be given to how to treat insurance

37 Fixed rate debt provided by institutional and non-institutional lenders has become increasingly common over the past five years in developed PPP markets such as the Netherlands. 过去5年间，在荷兰等成熟的PPP市场，由机构或非机构贷款方提供的固定利率贷款已经变得越来越普遍。

proceeds (see Section 1.2.1.4) and any net payments the Private Partner might receive as a result of closing hedging arrangements early, as well as any outstanding claims against, or amounts owed to it by, its counterparties under the Project Agreements. See Section 4.7, Sample Drafting 4, Schedule, definition of "Outstanding Senior Debt". 私营合作伙伴可能在其特定银行账户（比如可以提取债券收益的流动资金账户、债务偿还准备金账户、维护准备金账户或任何担保账户等）中存储有备用现金。缔约政府部门应该考虑如何处理这些现金余额，以及是否应该用它来抵扣应支付给该等现金最终收款方的任何赔偿。还应该考虑如何处置保险理赔金（见第1.2.1.4节）以及私营合作伙伴因提前交割对冲安排而可以收到的净额支付，以及项目协议相对人对其享有或负有的未清偿债权债务。请参见第4.7节草案范本4附表“未清偿优先级债务”的定义。

4.2.4 Framework for negotiation 谈判框架

It is important to note that, in practice, termination provisions provide a backdrop for the Parties (and the Lenders) to initiate discussions about how to continue the PPP Contract where there is a risk of termination. It is usually in all parties' interests to find a way to continue the PPP Project and avoid termination and from the Contracting Authority's perspective, although it needs to protect the use of public funds, it also has a duty to provide public services. Negotiating a way to continue the PPP Contract which works for all parties may be the best way to achieve this and avoids triggering a termination payment liability. 必须要注意的是，在实践中，在提前终止风险出现时，提前终止条款为合同当事人（以及贷款方）预留了就如何继续履行PPP合同的协商机制。一般来说，合同各方都希望找到让PPP项目继续推进的方法而避免提前终止。从缔约政府部门的角度考虑，尽管缔约政府部门需要确保公共资金的使用安全，但其也有提供公共服务的义务。由合同各方共同协商，继续履行PPP合同可能是避免提前终止以及避免因提前终止导致解约金的最佳办法。

4.2.5 Other termination consequences 提前终止产生的其它后果

In addition to the termination payment itself, the Contracting Authority will want to ensure the PPP Contract contains adequate provisions addressing other consequences of termination, such as transfer by the Private Partner of the PPP Project asset, handover arrangements and access to information necessary for continuing to operate or construct the PPP Project.³⁸除解约金本身外，缔约政府部门希望PPP合同中就解决提前终止的其它后果，比如私营合作伙伴就PPP项目资产转让、移交安排以及获得继续运营或建设PPP项目相关的信息的途径³⁸进行充分的约定。

4.2.6 Principles for the calculation of termination payments 解约金费用的计算原则

The amount payable to the Private Partner upon early termination of the PPP Contract will depend on the grounds on which the PPP Contract is terminated, so it is important for the Contracting Authority to understand the different rationale in each case. Section 4.7, Sample Drafting 4 is based on the principles set out below in

38 These aspects are not covered in this Report. For further information, see the Infra Australia PPP Guidelines and the UK PF2 Guidance. 这些方面没有在本报告中细说。更多信息见《澳大利亚基础设施PPP指导原则》和《英国PF2指南》。

[Sections 4.3-4.6](#). 因提前终止PPP合同而应当向私营合作伙伴支付的解约金金额取决于PPP合同终止的原因，因此缔约政府部门必须理解各种提前终止情况下的计算原理。[第4.7节——草案范本4](#)基于[第4.3至4.6节](#)中规定的原则。

4.3 **COMPENSATION ON CONTRACTING AUTHORITY DEFAULT, MAGA, CHANGE IN LAW OR VOLUNTARY TERMINATION** 因缔约政府部门违约、MAGA、法律变更或者主动提前终止而导致提前终止的赔偿

4.3.1 *Market practice* 市场实践

If the PPP Contract is terminated on the grounds of Contracting Authority Default, MAGA, Change in Law or Voluntary Termination, market practice is that the Private Partner should be fully compensated by the Contracting Authority as if the PPP Contract had run its full course. This reflects the principle that these categories of termination event are considered a Contracting Authority risk and responsibility. It also reflects the likely position should the Private Partner instead have to sue for damages on these grounds under general law. 如果PPP合同因缔约政府部门违约、MAGA、法律变更或者主动提前终止而导致提前终止，市场实践的做法是私营合作伙伴应该获得缔约政府部门支付的，相当于该PPP合同完全履行的全额赔偿。这反映的原则是，这些类别的提前终止事件被视为缔约政府部门应承担的风险和责任。同时，也反映出这样一种可能的情形：私营合作伙伴在PPP合同中没有约定解约金条款的情形下必须寻求法律救济而获得赔偿。

In these circumstances, the Private Partner will expect an amount which repays the sums used to finance the Project (equity and debt), as well as compensates for the equity return it had forecast (for a specified number of years to be negotiated between the Parties but typically for (and limited to) the remaining term of the PPP Contract). In order to be left in the same position as if the PPP Contract had not been terminated, the Private Partner will also expect the amount to include compensation for costs payable as a result of the early termination of specified financing agreements and Project Agreements, as well as related employee redundancy payments incurred. If the PPP Project has been funded in the bond markets or by fixed rate loans, a "make-whole" payment may be payable to the bondholders or relevant fixed rate lenders in these circumstances to compensate them for the early repayment of their investment. [See Section 9.4.2, Bond Financing](#). 在这些情形下，私营合作伙伴通常会主张缔约政府部门偿还投入项目的所有资金（包括股权投资和债权投资）偿还，并主张缔约政府部门偿还其预计（年限视合同当事人之间的协商情况，但一般限于PPP合同项下的剩余的合作期限）的股权收益。即使在PPP合同提前终止的情况下，缔约政府部门应保证私营合作伙伴的状态与PPP合同没有终止前一致，私营合作伙伴还会希望赔偿费用中包括因特定的融资协议和项目协议提前终止而导致的应付款项，以及提前终止导致的裁员费用。如果PPP项目通过债券市场融资或者通过固定利率贷款融资，在这种情形下，还需要向债券持有人或相关的固定利率贷款方支付“提前赎回补偿”以补偿他们因提前偿还其投资而导致的损失。[见第9.4.2节——债券融资](#)

As mentioned in [Section 2, Material Adverse Government Action](#), there may be scope for the Contracting Authority to negotiate a slightly reduced level of termination compensation for MAGA events which are less directly within its control

(this payment would still cover at least outstanding debt and contributed equity).如第2章——重大负面政府行为中所述，如果缔约政府部门无法直接控制MAGA事件时，缔约政府部门可以与私营合作伙伴协商稍微地减少因MAGA事件提前终止而产生的赔偿（而即使这样，缔约政府部门支付的赔偿也至少需要包括未偿还负债和股权出资金额）。

CIVIL AND COMMON LAW DIFFERENCES

The Contracting Authority should not be "unjustly enriched" by receiving an asset for which it has not paid the expected contractual price. Some jurisdictions (typically civil law) have an underlying unjust enrichment principle and the Contracting Authority should make sure it understands how this might affect the drafting of any termination provisions in its PPP Contract.

大陆法与英美法之差异

缔约政府部门不应该通过接受应用于支付预期合同价款而未支付的资产而获得“不当得利”。一些法域（一般在大陆法体系中）存在不当得利原则，而缔约政府部门应该确保其理解这一原则对PPP合同中提前终止条款的拟定的影响。

4.3.2 Compensation approach 赔偿方式

There are two "full" compensation methods which the Contracting Authority will need to consider: 缔约政府部门需要考虑的两种“全赔”的赔偿方式：

- (a) Book value compensation: this is based on the investment costs the Private Partner incurs in building the PPP Project. Third party costs would be added on top. This method is not as commonly used and although it is relatively clear and simple, it is generally not recommended as it is not guaranteed to compensate the Private Partner fairly. There is a risk of underpayment (which would create bankability issues for Lenders) or overpayment (which may wrongly incentivise the Private Partner). There may also be problems if accounting rules change during the life of the PPP Contract. It should be noted that the book value of the PPP Project assets is unlikely to take into account their physical state.³⁹账面价值赔偿：该赔偿方式是基于私营合作伙伴在建设PPP项目中投入的投资成本。第三方成本将被叠加进去。这一方法虽然相对来说更加简单和清楚，但并没有被广泛地使用，因为它无法保证私营合作伙伴可以获得公允的赔偿，所以不建议使用。该赔偿方式存在赔偿过少（可能导致贷款方的可融资性问题）或者赔偿过度（可能导致对私营合作伙伴的不当激励问题）的问题。如果在PPP合同期限内会计准则有变动，也可能产生问题。需要注意的是PPP项目资产的账面价值可能无法考虑资产的实际状况。³⁹
- (b) Financing-based compensation: this is based on the financing for the PPP

39 This approach is not in Section 4.7, Sample Drafting 4.这一方式未在第4.7节——草案范本4中提及。

Project (e.g. senior debt (whether in the form of bank or bond finance), subordinated debt and equity), again with third party costs on top. This approach is more common across the PPP market and is the recommended approach in this Guidance. See further detail in Section 4.3.3 and Section 4.7, Sample Drafting 4, Schedule, Clause (1). 基于融资的赔偿：这种赔偿方式基于PPP项目的融资（比如银行或债券融资中的优先级债务，次级债务和股权权益），第三方成本也应该叠加进去。这种方式在PPP市场中更加常见，并且为本指南的推荐方式。更多详情见第4.3.3节，第4.7节，草案范本4，和附录第（1）条。

4.3.3 Components of financing-based compensation 基于融资的赔偿

As mentioned in Section 4.3.2, this type of termination payment is made up of compensation in respect of senior debt (see Section 4.3.3.1), equity (see Section 4.3.3.2) and third party costs (see Section 4.3.3.3). These components are explained more fully below. 如第4.3.2节中所述，这种类型的解约金是由针对优先级债务的赔偿（见第4.3.3.1节），股权赔偿（见第4.3.3.2节）和第三方成本赔偿（见第4.3.3.3节）组成的。以下将详细说明一下这些组成部分。

4.3.3.1 Compensation in respect of outstanding senior debt 针对未偿还优先级债务的赔偿

This payment will typically consist of: 这种赔偿一般由以下部分构成：

- (i) principal outstanding under the senior finance documents (whether bank or bond financing) (which may be capped by reference to forecast amounts in the Original Base Case); plus 优先级债务融资（无论是银行融资还是债券融资）协议中的未偿还本金（金额最多不超过原始基础情形中预期的金额）；和
- (ii) interest, penalties and fees (and make-whole payments on any bond or fixed rate loan); plus 利息、罚款和费用（以及债券或固定利率贷款的提前赎回补偿）；和
- (iii) breakage costs arising under applicable hedging agreements or floating rate loans. 根据适用的对冲协议或浮动利率贷款产生的损失成本。

LESS certain amounts, such as: 扣除某些款项，比如：

- (a) amounts credited to the bank accounts of the Private Partner (which are secured to the benefit of the Lenders); 贷记到私营合作伙伴银行账户的款项（这一款项一定有利于贷款方）；
- (b) net payments received as a result of the termination of the hedging agreements and, in some cases, profits from pre-paying fixed rate loans; 因对冲安排提前终止而收到的净额，和在某些情况下因提前偿还固定利率贷款而获得的利益；
- (a) insurance proceeds received or due to be received before the termination payment date; and 收到或者在解约金支付日期前应该收到的保险理赔金；

和

- (b) generally any other sums recovered by the Lenders before the termination payment date. 贷款方在解约金支付日期前收回的其它款项。

See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(a) and relevant definitions. 见第4.7节——草案范本4, 附录, 第(1)条(a)项以及相关的定义。

4.3.3.2 Compensation in respect of equity 针对股权的赔偿

There are essentially three different options the Contracting Authority should consider in respect of equity compensation. These are all likely to lead to different outcomes so the Contracting Authority should be guided by the key considerations in Section 4.2, as well as by the circumstances of the PPP Project. See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(d).

就股权赔偿方式, 缔约政府部门基本上应该考虑三个不同的选择。这些选择都可能产生不同的结果, 所以缔约政府部门应该参考第4.2节中的关键考虑因素, 以及PPP项目的具体情况。见第4.7节——草案范本4, 附录, 第(1)条(d)项。

- (a) Original Base Case Approach (Option 1(a)): in this approach, the amount payable is determined by reference to the Original Base Case. The Contracting Authority pays a sum which, when taken together with all amounts already paid to the Equity Investors before the date on which the PPP Contract is terminated, will ensure that the Equity Investors recover Base Case Equity IRR. 原始基础情形方式(选择1(a)):这种方式中, 应付金额通过参考原始基础情形来确定。缔约政府部门支付的金额为PPP合同提前终止日期之前已经支付给股权投资方的所有金额的总和, 可以保证股权投资者收回基础情形中预期的股权IRR。

The key benefit of this approach lies in its easy implementation and certainty and the fact that it leaves less room for dispute than other approaches. 这种赔偿方式的关键好处在于, 相比其他方式, 它更容易执行且更具确定性, 因此导致纠纷的可能性较小。

A material drawback, however, is that this option assumes that the Private Partner has been performing as planned in the Original Base Case - it does not take into account the actual performance of the Private Partner under the PPP Contract. From the Contracting Authority's perspective, this may over-compensate the Private Partner if it has been performing worse than expected in the Original Base Case and arguably there may be a stronger incentive on the Private Partner to ensure the PPP Project is terminated. Conversely, if the Private Partner has been performing better than expected it will be undercompensated and arguably may be concerned that this might incentivise, or result in political pressure on, the Contracting Authority to terminate the PPP Contract early. See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(d), Option 1(a). 然而, 这种方式有一个重要的缺点, 即它假设了私营合作伙伴一直都像在原始基础情形里那样按计划履行义务, 而忽略了私营合作伙伴实际履行PPP合同的情况。从缔约政府部门的角度来看, 这种方式在私

营合作伙伴的履约情况比原始基础情形里预期的情况更差的情况下，可能导致对私营合作伙伴的过度赔偿，因此可能对让私营合作伙伴更有动机去提前终止PPP项目。与此相反，如果私营合作伙伴的履约情况比原始基础情形里预期的情况更好，那么这种方式可能使私营合作伙伴获得的赔偿不足，而让缔约政府部门更有动机或因政治压力去提前终止PPP合同。见第4.7节——草案范本4，附录，第（1）条（d）项，选择1（a）项。

- (a) Original Base Case Approach (Option 1 (a))原始基础情形方式（选择1（a））：
- (b) Market Value Approach (Option 1(b)): in this approach, the amount payable is determined by assessing the price which third party investors would be willing to pay for (i) the shares in the Private Partner and (ii) the receivables arising under subordinated debt, subject to certain assumptions (including that the event giving rise to the early termination had not occurred). 市场价值方式（选择1（b））：在这种方式下，应支付的赔偿额可以通过第三方投资者愿意就（i）在私营合作伙伴的股份和（ii）在次级贷款项下产生的应收账款所支付的价格来确定，但受限于一些假设（包括假设合同提前终止事项未实际发生）。

Compared to the Original Base Case Approach (Option 1(a)), this option takes full account of the actual performance of the Private Partner under the PPP Contract so is fairer on that front.与原始基础情形方式（选择1（a））相比，这一方式完整地考虑了私营合作伙伴实际履行PPP合同的情况，因此在这方面更加公允。

However, this method is complex to implement in practice and the result could be undesirable on both sides - the Contracting Authority could pay more than expected under the Original Base Case and the Private Partner's Equity Investors may feel their interests are not sufficiently protected in circumstances that are largely beyond their control. It may be difficult to establish a market value (particularly if no market exists) and this could lead to disputes. See Section 4.7, Sample Drafting 4, Schedule, Clause (1)(d), Option 1(b).然而，这种方式实施起来很复杂，结果可能对双方都不利——缔约政府部门可能会比原始基础情形下预期的支付更多的赔偿，而私营合作伙伴的股权投资者可能会觉得他们的利益在他们基本无法控制的情形下没有得到充分的保护。确定市场价值很困难（尤其是没有相应的市场存在时），而且可能导致纠纷。见第4.7节——草案范本4，附录，第（1）条（d）项，选择1（b）项。

- (c) Adjusted Base Case Approach (Option 1(c)): under this approach, the amount payable is determined by reference to the distributions which Equity Investors would have expected to receive under the Original Base Case, but only from the termination date. The amount payable will be the aggregate amount of distributions forecast in the Original Base Case to be made after the termination date, discounted using the Base Case Equity IRR. 经调整的基础情形方式（选择1（c））：在这种方式下，应支付的赔偿额等于自合同终止之日其股权投资者在原始基础情形方式中可预期获得的分配额的总额。应支付的赔偿额为在终止之日后原始基础情形中预期的加总分配额，并按基础情形股权IRR进行折现。

This approach takes into account the performance of the Private Partner under the PPP Contract up to the termination date. It also provides greater certainty as it does not require a market valuation mechanism and is easier to implement. 这种方式考虑了私营合作伙伴至终止日期前实际履行PPP合同的情况。这种方式不需要市场估值机制所以更加具有确定性，而且简单易行。

However, it does not take into account likely actual performance in respect of the period after the termination date, so (as highlighted under the Original Base Case Approach (Option 1(a)) the Contracting Authority may be over or under-compensating the Private Partner for that period. This will have a greater impact the earlier termination occurs. See Section 4.7, Sample Drafting 4, Schedule, Clause (1) (d), Option 1(c). 然而，这种方式没有考虑到终止日期后的期间内，私营合作伙伴可能的实际履行情况，因此（如原始基础情形方式（选择1（a））所述），缔约政府部门可能就该期间对私营合作伙伴支付过多或者过少的赔偿额。这带来的影响更大，导致提前终止的情况发生。见第4.7节——草案范本4，附录，第（1）条（d）项，选择1（c）项。

4.3.3.3 Compensation in respect of third party costs 针对第三方成本的赔偿

The Private Partner is likely to incur certain other costs as a result of early termination of the PPP Contract, including employee redundancy costs, as well as other costs payable to its sub-contractors in accordance with the terms of the relevant Project Agreements. The general principle is that the Private Partner and its sub-contractors should be no worse nor better off as a result of the early termination. While market practice is for these costs to be included in the compensation payment for this category of termination, the scope may vary depending on the jurisdiction. Key points for the Contracting Authority to bear in mind include 私营合作伙伴可能会因为PPP合同的提前终止而需要承担某些其它的成本，包括裁员成本，以及应当根据相关的项目协议的条款规定向其分包商支付的其它成本。一般原则是，私营合作伙伴及其分包商不应因为提前终止合同受到不良影响或获得不当利益。尽管在这种类型的提前终止情形中，市场实践是将这些成本纳入赔偿费用，但是各个司法区域的纳入赔偿费用的成本范围却不一样。缔约政府部门应当考虑的重点因素包括：

- Reviewing the Project Agreements – as with the financing agreements, before PPP Contract signature the Contracting Authority and its advisers should review the Project Agreements to assess any early termination provisions which may give rise to third party cost compensation. In particular, the Contracting Authority will want to ensure there are no excessive termination payments included in contracts with parties who hold shares in the Private Partner and are sub-contracted to it. 审查项目协议——与融资协议一样，在签署PPP合同之前，缔约政府部门及其咨询顾问应当审查项目协议，对可能导致第三方成本赔偿的提前终止条款规定进行评审。在特定情形下，缔约政府部门会希望确保在与持有私营合作伙伴股权并作为私营合作伙伴分包商的一方所签订的合同中没有不适当的解约金条款。
- Defining and capping liabilities - as far as possible the PPP Contract should set out the precise scope of compensation for third party costs. As third party costs can be significant and fluctuate over time, the Contracting

Authority may wish to seek to cap its liability in this respect, although typically this is achieved by defining the eligible items as opposed to setting a monetary cap. The Contracting Authority should also oblige the Private Partner to mitigate costs. Both liability caps and mitigation obligations should be reflected in the Project Agreements themselves. 对责任进行定义与限定——PPP合同应该尽量细化对第三方成本的赔偿范围。因为第三方成本可能根据时间的不同会有重大的变化，此时缔约政府部门可能需要对其承担的责任做一个限定，一般可以明确适当的责任项目并设定一个金钱上的上限。同时，缔约政府部门应促使私营合作伙伴采取适当措施防止损失扩大。责任限定和防止损失扩大的义务也应该在项目协议中有所体现。

- Compensating for loss of profit - one of the key commercial issues the Contracting Authority will also need to address is the extent to which compensation should cover the loss of future profits for the sub-contractors - this may be achieved by limiting the number of years. 盈利损失赔偿——缔约政府部门还需要解决的另外一个关键的商业问题是对分包商未来盈利的赔偿程度，这可以通过设定年限加以限制。
- Redundancy costs - careful consideration needs to be given to compensation for redundancy of staff employed by the Private Partner and/or its sub-contractors. Such compensation will likely depend on applicable law and the ability to redeploy affected staff. 裁员成本——缔约政府部门还需要对私营合作伙伴和/或其分包商的裁员支出赔偿进行仔细考虑。这一项赔偿同时还会受到适用的法律及其重新安排受影响员工的能力的影响。

See Section 4.7, Sample Drafting 4, Schedule, Clauses (1)(b) and (c). 见第4.7节——草案范本4，附录，第(1)条(b)和(c)项。

4.4 COMPENSATION ON PRIVATE PARTNER DEFAULT TERMINATION 因私营合作伙伴违约而提前终止合同产生的赔偿

4.4.1 Market Practice 市场实践

In the case of termination by the Contracting Authority on the grounds of Private Partner default, market practice is that the PPP Contract should expressly provide for some amount of compensation. While this may at first seem at odds with the reason for termination, there is in fact some strong justification: 实践中,在缔约政府部门因私营合作伙伴违约而提前终止合同的情形下, PPP合同中应当明确规定具体的赔偿金额。虽然这乍一看与合同终止的事由不太相符,但其实是具有充分正当的理由:

- (a) the Contracting Authority could otherwise benefit from a Private Partner default by unjust enrichment (e.g. taking a built asset without having paid for it) and could in theory be incentivised to terminate the PPP Contract. This could result in legal proceedings being brought by the Private Partner which may ultimately result in the Contracting Authority being liable to pay compensation, as well as legal costs incurred; 如果没有明确规定赔偿金额,那么缔约政府部

门可能会因为私营合作伙伴的违约而获得不当得利（比如不支付所建资产的对价），并且可能从理论上诱使缔约政府部门去终止PPP合同。进而导致私营合作伙伴提起法律程序，最终可能使缔约政府部门支付赔偿并承担因此产生的法律成本；

- (b) without the certainty of an express provision, the Private Partner will likely have to price more risk into its bid and therefore the Contracting Authority will be paying more in the ordinary course of the PPP Contract even though termination on these grounds may never happen; 如果没有明确的条款确定赔偿，私营合作伙伴可能会因该风险溢价而抬高其投标的价格，这样的话缔约政府部门必须在PPP合同的一般进程中支付更高的对价，即使因私营合作伙伴违约而终止合同的情形也许根本没发生；
- (c) market practice shows that Lenders are typically reluctant to agree to finance a PPP Project constructed and operated by an SPV where no compensation is expressly payable to them in these circumstances (i.e. the PPP Project will not be bankable). While there is an argument that the risk of no compensation will encourage Lenders to step in and rescue a troubled PPP Project (and there have been some examples of this contractual approach in some early PPP Contracts in the UK, for example), the market has in general moved away from this for the reasons above; and 市场实践显示，如果在这种情况下没有明确规定可获得的赔偿的话，贷款方一般不愿意为SPV所建设并运营的PPP项目提供融资（即PPP项目无法获得银行贷款）。也有观点认为拿不到赔偿的风险会鼓励贷款方介入拯救一个陷入困境的PPP项目（比如在英国早期的PPP合同中就可以找到这种合同约定方式），但是市场还是由于上述原因逐步摒弃了这种方式。
- (d) the Private Partner still usually loses its equity investment and the return on its equity which is its main driver for undertaking the PPP Project in the first place. See Section 4.7, Sample Drafting 4, Schedule, Clause (2). 私营合作伙伴还是常常损失其股权投资以及相关的股权收益，而这些回报恰是其参与PPP项目的初衷。见第4.7节——草案范本4，附录，第（2）条。

The Contracting Authority will want to weigh up the likelihood of the termination payment arising against the benefit of procuring private finance. In doing so, the following factors are relevant: 缔约政府部门会权衡可能产生的解约金费用与获得私人融资的益处。此时缔约政府部门将考量以下相关因素：

- (i) the Contracting Authority has control over serving the termination notice that triggers such payment - this will also be a factor in its favour in bringing all parties to the negotiating table in a potential termination scenario; and 缔约政府部门能决定是否发出会导致赔偿的提前终止通知，这可将所有合同当事方召集起来协商应对潜在的终止情形,对于缔约政府部门来说也是一个有利因素；并且
- (ii) the Contracting Authority has the ability to mitigate against the risk of Private Partner default even before the PPP Contract is signed, by selecting the Private Partner after a thorough and fair procurement process and evaluation

of the soundness of all elements of its bid. 缔约政府部门甚至在签订PPP合同之前就有办法减少私营合作伙伴违约的风险，它可以通过严谨且公平的采购流程并严格评估其投标的方方面面来选择最佳的私营合作伙伴。

4.4.2 Compensation approach 赔偿方式

Although market practice is to pay compensation on Private Partner default termination, the Contracting Authority needs to choose a method which does not result in overly generous compensation. This would not properly incentivise the Private Partner to perform (nor its Lenders to due diligence the PPP Project thoroughly or exercise their rights to monitor and step into the PPP Project); it would also raise value-for-money concerns. The options are outlined below. 尽管在因为私营合作伙伴违约而导致合同提前终止时，市场实践是支付赔偿，但是缔约政府部门需要选择一种不会支付过多赔偿金的赔偿方式。过高的赔偿会给私营合作伙伴履行合同造成不当激励，也会导致贷款方怠于履行其谨慎勤勉义务或行使其监督和介入PPP项目的权利；同时也会产生关于物有所值的问题。以下是几个对策。

- (a) Debt-based compensation: under this approach, the Private Partner (or in reality the Lenders) is compensated based on the amounts payable under the senior finance documents bank or bond (i.e. an amount based on the formula under [Section 4.3.3.1](#)). The PPP Contract must clearly define the debt elements to be compensated and also applicable deductions of amounts available to Lenders (such as proceeds received on close-out of the hedging arrangements, insurance proceeds and amounts in bank accounts which may include e.g. bond proceeds held in a collateral account). 基于债权的赔偿：在这种方式下，私营合作伙伴（或在实际操作中的贷款方）基于银行或债券的优先债融资文件而计算应付的金额（即根据[第4.3.3.1节](#)中的公式计算的金额）支付赔偿。PPP合同必须清楚地规定将获得赔偿的债权要素，以及对于贷款方适用的扣除项目（比如对冲平仓安排而获得的收益，保险理赔金及银行账户内的金额，可能包括抵押担保账户内的保证金收益）。

EMERGING AND DEVELOPED MARKET DIFFERENCES

This debt-based compensation method is the most common approach in emerging markets and "government pays" PPP Projects in France and is also seen in Germany.

新兴市场与发达市场之差异

基于债权的赔偿方式在新兴市场和法国的“政府付费”PPP项目中最为常见，在德国也较常见。

As the main or only beneficiary of compensation upon termination for Private Partner default, Lenders will tend to look for the highest possible recovery rate for their loan and the simplest/most objective solution possible. As a result, debt-driven approaches are likely to be more satisfactory to them. Whether the amount reflects the value of the PPP Project is less clear and the

Contracting Authority will need to consider this in its value-for-money analysis. 在因私营合作伙伴违约导致合同提前终止时，赔偿款的主要或唯一受益人是贷款方，因此贷款方会为其贷款争取尽可能高的违约后可回收率，以及最为简单/客观的解决方案。这样，贷款方会最倾向于使用基于债权的赔偿方式。而至于赔偿金额是否反映了PPP项目的价值就不得而知，缔约政府部门就需要在进行物有所值评价时对此有所考虑。

One major drawback of this method is that Lenders have limited incentive to ensure that the Project performs or to step in to save it. To counter this risk and ensure Lenders have an incentive to conduct proper due diligence and exercise their monitoring and step in rights, in addition to the relevant deductions, the level of compensation usually is a percentage of the total outstanding debt (and not the full amount). This is commonly referred to as a "haircut", though it should be noted that taking the risk of a haircut may not be acceptable to Lenders in all circumstances and will depend on a variety of factors (such as the specific country and sector, in which the PPP Project is conducted). The exact percentage of a haircut (if any) should be assessed on a project-by-project basis. In addition, in the context of a bond financing, consideration should be given as to whether make-whole payments should be included. See Section 4.7, Sample Drafting 4, Schedule, Clause (2). 基于债权的赔偿有一个主要的缺陷就是贷款方可能没有足够的动力去保证项目实现或在项目陷入困境时及时解决。为了应对这一风险并保证贷款方有动力去适当地履行谨慎勤勉义务并行使其监督权和介入权，除了相关的扣除项目外，赔偿标准通常是未清偿债务（而非全额）的一定比例。我们通常称之为“估值折扣”，但应该注意的是，并非在所有情形下贷款方都能接受这种估值折扣带来的风险，而是要看一系列的因素（比如PPP项目所在的具体的国家和行业）。估值折扣（如有的话）的特定比例也应该视不同项目而定。另外，在债券融资中，还需要考虑是否包括提前赎回补偿。见第4.7节——草案范本4，附录，第（2）条。

An alternative (or addition) could be to refer to an amount of outstanding senior debt minus unfunded equity contributions if these are required under the relevant financing documents - the Lenders would then look to recover that amount from the Private Partner/Equity Investors. 替代（或另外的）方法是将赔偿设定为以未清偿的优先级债务减去认缴但未支付的股权（如果相关融资文件要求的话）所得的金额，这样，贷款方就会考虑从私营合作伙伴/股权投资者那里收回该金额。

- (b) Market value: where the PPP market is sufficiently liquid and there is a reasonable prospect of the PPP Contract being retendered, the fairest approach is to calculate the compensation payable to the Private Partner by reference to the market value of the PPP Contract, as determined by a tendering procedure. This ensures, in theory, that the Contracting Authority will not pay the Private Partner more than the remaining value of the PPP Contract. As a result, this calculation protects the Contracting Authority's interests while ensuring that the Contracting Authority does not unfairly benefit from the Private Partner's default. 基于市场价值的赔偿：如果PPP市场的流动性足够充分，拟提前终止的PPP合同就有机会进行再投标，计算对私营合作伙伴的赔偿额最为公平的方式是参考PPP合同的市场价值，而这一价值

可以通过一个招投标流程来确定。理论上讲，这保证了缔约政府部门支付给私营合作伙伴的赔偿不会超过PPP合同的剩余市场价值。因此这种计算方式既保护了缔约政府部门的利益，又确保了缔约政府部门不会因私营合作伙伴违约而不当得利。

The fall-back position if there is no liquid market, or if the Authority chooses not to go down this route for any reason, is that the compensation payment is calculated on the basis of the estimated value that would have been obtained in a retendering, as determined by an independent, third-party appraiser. While seemingly straightforward to implement, setting the parameters may require some negotiation, and it may not reflect the true market value of the PPP Contract. This approach is seen in countries with mature PPP markets (such as Belgium, Australia⁴⁰, the Netherlands and also South Africa). 如果市场没有充足的流动性，或者如果缔约政府部门因某些理由不使用这种方式，那么可以退而求其次，根据在再投标中可获得的估计价值（由独立的第三方评估机构确定）来计算赔偿额。虽然看来起实施难度不大，但设定参数时可能需要协商，而且这样也可能无法反映PPP合同的实际市场价值。这种方式常见于成熟的PPP市场国家（比如比利时、澳大利亚⁴⁰、荷兰以及南非）。

EMERGING AND DEVELOPED MARKET DIFFERENCES

The market value approach is likely to be more suitable for a developed less volatile PPP market where there are likely to be a number of potentially interested purchasers in the relevant sector. Lenders to PPP Projects in certain jurisdictions or in relation to certain assets may be reluctant to rely on a market-based valuation method for fear of undervaluation or underpayment. This is particularly likely to be the case in emerging markets where there is a limited PPP track record and a limited market. The South Africa PPP Guidelines acknowledge this and provide for an additional payment to be made by the Contracting Authority to the extent the market value approach does not yield a certain percentage of outstanding debt.

新兴市场与发达市场之差异

在成熟且稳定的PPP市场中，如果在相关行业可能有众多潜在收购方时，基于市场价值的方式可能更为适合。在某些法域中PPP项目的贷款方或者与某项资产相关的贷款方可能不愿意采用基于市场价值的估值方式，因为他们担心评估价值过小或者赔偿数额过少。在PPP项目经验有限且市场有限的新兴市场尤其如此。《南非PPP指导原则》认可了这一点，并规定，如果基于市场价值的方式确定的估值低于贷款余额的一定比例，缔约政府部门将支付额外的赔偿。

Contracting Authorities should take a view as to whether market-based

40 See the Infra Australia PPP Guidelines (for Social Infrastructure). 见《澳大利亚PPP指导原则》（社会基础设施）。

termination compensation is a viable option on a project-by-project basis.⁴¹ 缔约政府部门应该根据具体的项目情况考虑基于市场价值的解约金是否可行。⁴¹

- (c) **Book Value:** although seen in some European jurisdictions, the calculation of compensation payments based on book value is not the recommended approach in this Guidance as the result may not accurately reflect the reality of the sums owed.⁴² See discussion under Section 4.3.2(a). 基于账面价值的赔偿：尽管在欧洲的一些法域存在这种方式，但是本《指南》不推荐使用这种基于账面价值计算赔偿金额的方式，因为该方式计算出来的结果可能无法准确反映实际的负债金额。⁴²

41 This option is not in Section 4.7, Sample Drafting 4 – for more detail see the South Africa PPP Guidelines, Infra Australia PPP Guidelines (for Social Infrastructure) and the UK PF2 Guidance. 该选项未在第4.7节——草案范本4中说明，更多详情见《南非PPP指导原则》、《澳大利亚PPP指导原则》（社会基础设施），和《英国PF2指南》。

42 A “hybrid” approach may also be considered in some cases e.g. where termination compensation is equal to the lesser of the appraised market value and outstanding senior debt. This approach has been taken by some State authorities in the United States. 在某些情形下还可以考虑使用“综合”方式，比如解约金按估计市场价值和未偿还优先债二者之间以更少者为准。这种方式已经被美国的一些州政府所采用。

4.5 COMPENSATION ON FORCE MAJEURE TERMINATION 因不可抗力而提前终止产生的赔偿

As discussed in [Section 1, Force Majeure](#), each Party should have the right to terminate the PPP Contract as a result of prolonged Force Majeure and compensation is calculated to reflect the principle that Force Majeure is considered a shared risk. In this case, the risk is shared by virtue of the Contracting Authority being liable for a less than full compensation payment and having the right to take over the relevant asset, while the Private Partner loses any return on its equity investment (i.e. the profit element which will have been at the heart of its decision to bid for and undertake the PPP Project in the first place) and possibly some of its invested equity. The potential consequences will incentivise both Parties to find a solution to a prolonged Force Majeure before termination occurs.如第1章——不可抗力中所讨论，各方都有权因持续的不可抗力终止PPP合同，此时赔偿的计算需要遵守的原则是，不可抗力的风险是合同双方共同承担的风险。在这种情况下，风险的分担方式是：由缔约政府部门支付部分的赔偿并接管相关的资产，而私营合作伙伴损失其对PPP项目的股权投资回报（即盈利——私营合作伙伴最初决定投标参与PPP项目的核心因素），甚至可能损失其投入的部分股权。这些可能的结果会让双方都有动力在提前终止发生前去寻求针对持续不可抗力的解决方案。

Subject to adjustments on a case by case basis, the principle is that the Private Partner is paid an amount representing:在不同情形下的对策有所调整，但原则是，私营合作伙伴获得的赔偿金额包括：

- (i) the amount of outstanding senior debt (based on the formula in Section 4.3.3.1 but probably not including a make-whole payment on any bonds); plus 未偿还的优先级债务数额（基于第4.3.3.1节规定的公式计算，但可能不包括债券的提前赎回补偿）；加
- (ii) the amount of equity invested (taking into account any distributions already paid), but not loss of profit (in some cases, for example in Australia, a haircut may also be applied to further reflect the shared risk principle); plus 投入的股权资本额（包括已经支付的股权派息），但不含利润损失（在某些情形下，比如在澳大利亚，可能会纳入估值折扣来反映风险分担原则）；加
- (iii) an amount in respect of redundancy and sub-contractor break costs (based on the principles set out in Section 4.3.3.3) 裁员支出和分包商损失赔偿（根据第4.3.3.3节规定的原则）。

A similar approach is usually followed in any termination for uninsurability. See [Section 4.7, Sample Drafting 4, Schedule, Clause \(3\)](#). It may also be possible for the Contracting Authority to negotiate no or reduced compensation in specific circumstances. See [Section 1.2.4, Force Majeure](#). 因不可保险性而终止也采用类似的方式，见第4.7节——草案范本4，附录，第（3）条。在特定情形下，缔约政府部门也可以就不支付或少支付赔偿进行协商。

While it may seem that the Lenders' exposure is more limited, this comes back to the issue of bankability, and the decision facing Lenders as to where to put their

funds to best advantage. The Contracting Authority will want to weigh up the risk of a Force Majeure termination occurring (again why close attention to the definition of Force Majeure is so important) against the benefit of achieving the private finance it wants, at a reasonable price, having chosen PPP as its procurement method. 尽管贷款方的风险面看似更少，但这需要回过头来看项目的可融资性问题，以及贷款方需要确定将其资金投入哪里才能最好的盈利。既然已经选择了PPP模式作为采购方式，缔约政府部门会在因不可抗力提前终止合同带来的风险（再次说明仔细审查不可抗力定义的重要性）与以合理价格获得私人融资带来的利益之间进行权衡。

4.6 METHOD AND TIMING OF PAYMENT 赔偿支付方式和时间

The method of payment of the termination compensation will also need to be considered by the Contracting Authority. Generally speaking, providing for payment by lump sum in the PPP Contract seems more typical market practice, but there are a number of factors to take into account, including the grounds for termination:⁴³ 缔约政府部门还需要考虑解约金的支付方式。一般来说，典型的市場实践是在PPP合同中规定一次性支付，但有一些因素需要考虑，包括提前终止的理由：⁴³

- Payment capacity - the Contracting Authority will need to assess whether it will be able to pay a lump sum if such a large payment may not be budgeted for or have backing from its government treasury department. Payment over time may be preferable. 支付能力——缔约政府部门需要评估如果没有这样一大笔支付款项的预算，其是否能够一次性支付；或者是否能够从政府的财政部门获得支持。此时，分期支付的方式可能更佳。
- Private Partner/Lender perspective - it is likely that the Private Partner and its Lenders will favour a lump sum payment. This is particularly the case on Contracting Authority default termination as the most likely cause is failure to pay. The Private Partner and its Lenders will typically want to close off their exposure to a terminated PPP Project and avoid Contracting Authority credit risk as soon as possible. The Contracting Authority should in any event try to negotiate a reasonable period of grace long enough to raise the necessary funds. 从私营合作伙伴/贷款方的视角——私营合作伙伴及其贷款方会更偏向于一次性支付。在因缔约政府部门违约导致合同终止的情形下尤其如此，因为最可能的违约原因是缔约政府部门未履行支付义务。私营合作伙伴及其贷款方一般会希望尽快消除因为PPP项目终止带来的风险并避免缔约政府部门的信用风险。在任何情形下，缔约政府部门都应该与私营合作伙伴协商一个合理的宽限期，以便有足够的时间筹集必要的资金。

On Private Partner default termination Lenders are again likely to resist payments over time (and are likely to be the only party receiving compensation). They are also likely to resist payments over a period longer than the remaining life of the loan or bond, especially if to receive such payments on a longer schedule would cause additional break costs (as it might to non-bank funders). 在因私营合作伙伴违约而导致合同终止的情形下，

43 These elements are not included in [Section 4.7, Sample Drafting 4](#). 这些因素没有在 [见第4.7节——草案范本4](#) 中进行说明。

贷款方（并且可能是收取赔偿金的唯一一方）也可能会拒绝分期支付的方式。他们也可能拒绝让支付期限长于贷款或债券的剩余期限，尤其是如果是收取该等款项的时间拉长可能导致额外的损失赔偿时（在非银行出资方的情形下也一样）。

- **Interest - payment over time will incur interest costs for the Contracting Authority, usually from the date the payment is recognized as due until the final payment. If the Contracting Authority does select this method, it will need to consider an appropriate interest rate.** 利息——在分期支付会使缔约政府部门产生利息成本，通常是确认应付款项之日起至最终支付完成之日为止。如果缔约政府部门真的选择这种支付方式，则需要考虑合适的利率。
- **Asset transfer - Lenders may be reluctant to release their security interests on PPP Project assets until compensation payments have been made in full. This may make the transfer of relevant assets back to the Contracting Authority difficult. In certain circumstances, the Contracting Authority may be able to negotiate an interim solution at the time of the termination, such as an arrangement pursuant to which the Contracting Authority has a right to access the PPP Project assets during the period from the termination date until all termination compensation is paid, so long as the Contracting Authority complies with the payment terms with respect to such compensation. This approach is unlikely to be agreed at contract signature and certain issues will need to be clearly addressed (such as liability for damage to the asset while in the Contracting Authority's use).** 资产转移——贷款方在收到全额的赔偿款之前可能不会放弃PPP项目中的担保利益。这使得将相关资产转移给缔约政府部门产生困难。在某些情形下，缔约政府部门可能在合同提前终止时协商约定一个过渡解决方案，比如制定一项安排，让缔约政府部门在合同终止之日至支付完毕所有赔偿金额之日期间有权使用PPP项目资产，只要缔约政府部门遵守赔偿相关的支付条款。在签订合同时可能不会约定这种方式，而且某些事项需要清楚地规定（比如在缔约政府部门使用资产时造成损害的责任承担）。
- **Set-off rights - the Contracting Authority should try to negotiate the right to set off any amounts due to it from the Private Partner under the PPP Contract against any compensation it pays (unless these are already taken into account in the relevant formula). Lenders, however, will in general be reluctant to give the Contracting Authority any set-off rights, particularly where compensation is debt-based.** 抵销权——缔约政府部门应该尽量与合同其他当事人协商获得从私营合作伙伴在PPP项目项下尚欠的款项中抵销其支付的任何赔偿（除非在相关计算公式中已经纳入了这些抵扣项目）的抵销权。然而，贷款方一般不会给予缔约政府部门任何抵销权，尤其是基于债权支付赔偿金时。

4.7 SAMPLE DRAFTING 4 草案范本4

The provisions relating to the calculation of termination payments are generally set out in a Schedule to the PPP Contract. 有关解约金款计算的条款一般在PPP合同的附录中规定。

Schedule [insert number] - Termination Payments 附录（填写数字）——解约金

Required Definitions 所需的定义

"Bonds" “债券”	means the [•] bonds due [•] of the Issuer, issued at [Financial Close], in the aggregate principal amount of [•]. 意指发行人在[财务交割时]发行的[•]债券，本金总金额为[•]
"Distribution" “分配”	means:意指: (a) the payment of a distribution by the Private Partner (whether directly or indirectly) to its Shareholders;私营合作伙伴(直接或间接)向其股东支付的股息分配; (b) any dividend, charge, fee or other distribution (or interest on any unpaid dividend, charge, fee or other distribution) (whether in cash or in kind) declared, paid or made on or in respect of share capital (or any class of share capital) in the Private Partner; 就私营合作伙伴的股权资本(或任何种类的股权资本)而宣布或支付的任何(现金或者实物)股息、费用、收费或其它分配款项(或者就任何未支付股息、费用、收费或其它分配款项而产生的利息) (c) the redemption, repurchase, defeasance, retirement or repayment of any share capital of the Private Partner, including in connection with any merger or consolidation, or any resolution to do so. 对私营合作伙伴的股权资本的赎回、回购、废止、撤回或偿还,包括在任何合并或收购交易中,或在任何决议中如此规定。
"Initial Equity" “初始股权”	means, as at the Termination Date, the initial equity investment disbursed by the Shareholders plus any such other equity contributions approved by the Contracting Authority, less the Distributions paid by the [Private Partner] to its Shareholders as at the Termination Date. 意指在终止日期,股东分配的初始股权投资加上缔约政府部门批准的其它股权出资,减去在合同终止日期[私营合作伙伴]向股东支付的股息。
"Issuer"“发行人”	means [insert company name, registered number and country of registration]. [assuming Issuer is different entity to Private Partner]. 意指[填写公司名称,注册编号和注册国家]。[假设发行人与私营合作伙伴不是同一实体]。
"IRR"	means internal rate of return.意指内部回报率
"Losses" “损失”	means all damages, losses, liabilities, costs, expenses (including legal and other professional charges and expenses), and charges whether arising under statute, contract or otherwise, internal costs or demands. 意指根据法律、合同或其它事项产生的所有的损害、损失、负债、成本、支出(包括法律和其它专业费用和支出)和费用,内部成本或需求。

<p>"Make-Whole Payment" “提前赎回补偿”</p>	<p>means: 意指:</p> <p>(a) in relation to termination of the PPP Contract under Clause [•] (Termination on Contracting Authority Default) [Change in Law] [MAGA], the Make-Whole Payment to be made pursuant to and in accordance with Condition [•] of the Bonds; 在根据第[•]条(因缔约政府部门违约导致的提前终止) [法律变更] [MAGA]的规定提前终止PPP合同时, 根据债券的[•]条而支付的提前赎回补偿;</p> <p>(b) in relation to termination of the PPP Contract under Clause [I] (Voluntary Termination), the modified Make-Whole Payment to be made pursuant to and in accordance with Condition [I] of the Bonds; 和在根据第[I]条(因主动提前终止的规定提前终止PPP合同时, 根据债券的[I]条而支付的提前赎回补偿; 和</p> <p>(c) in relation to termination of the PPP Contract in any other circumstances, zero. 因其它情形提前终止PPP合同时, 为零。</p> <div style="border: 1px solid black; padding: 2px; width: fit-content; margin-top: 10px;"> <p>NB see Section 9.4.2 in respect of emerging markets NB 见第 9.4.2 节中有关新兴市场的说明</p> </div>
<p>"NPV"</p>	<p>means net present value. 意指净现值。</p>
<p>"Original Base Case" “原始基础情形”</p>	<p>means the financial model agreed between the Parties dated [] for the purpose of amongst other things calculating [insert defined term of availability payment in a "user pays" model /Equity IRR etc] [as attached at [Schedule []], as updated from time to time in accordance with the terms of this PPP Contract.</p> <p>意指合同各方于[]日约定的财务模式, 旨在计算[填写“使用者付费”模式下的可用性支付条款/股权内部收益率等][见附录[]], 并根据本PPP合同条款及时更新。</p>
<p>"Outstanding Senior Debt" “未偿还优先级债务”</p>	<p>means the sum of: [See Section 4.4.3] 意指以下金额的总合: [见第4.4.3节]</p> <p>(a) the total amount outstanding at the Termination Date to the Lenders under any Senior Finance Documents and accrued but unpaid interest and including default interest; plus 在合同终止日, 根据任何优先级融资文件未偿还给贷款方的债务总金额, 以及已计提但未支付的利息, 包括未支付款项产生的利息; 加</p> <p>(b) any winding-up costs, prepayment charges [(including any Make-Whole Payments)] [except on termination for Force Majeure or Private Partner Default], costs of terminating any hedging arrangements or other breakage costs, payable by the Private Partner [or the Issuer] to the Lenders as a result of a prepayment of sums due under the Senior Finance Documents, or, in the case of early termination of interest rate hedging arrangement, as a result of termination of the PPP Contract, subject to the Private Partner[, the Issuer] and the Lenders mitigating all such costs [unless the amount, or the formula for determining the amount of such costs is fixed in advance under the terms of the relevant Senior Finance Documents]; 私营合作伙伴[或发行人]根据优先级融资文件的规定提前支付的款项或者因PPP合同提前终止而提前终止利率对冲安排时, 应该向贷款方支付的任何清算成本、提前偿还收费[(包括任何提前赎回补偿)][除了因不可抗力或私营合作伙伴违约而导致的合同终止], 终止任何对冲安排产生的成本或其它损失成本。</p> <p>less (without double counting): (在没有重复计算的条件下) 减去:</p>

	<ul style="list-style-type: none"> (i) all credit balances held on any bank accounts held by or on behalf of the Private Partner [and/or the Issuer] on the Termination Date; 在合同终止之日，私营合作伙伴或代表私营合作伙伴[和/或发行人]在任何银行账户持有的所有信贷余额； (ii) all amounts (including net hedge termination payments) payable by the Lenders to the Private Partner as a result of a prepayment of amounts outstanding under the Senior Finance Documents or termination of the PPP Contract; and 因为根据优先债融资文件或PPP合同的终止而提前偿还余额，贷款方应向私营合作伙伴支付的所有款项（包括对冲终止支付净额）；和 (iii) all other amounts received or due to be received by the Lenders on or after the Termination Date and before the date on which compensation is payable by the Contracting Authority to the Private Partner as a result of enforcing any other rights that they may have. 贷款方在终止日期以及缔约政府部门因为私营合作伙伴行使其它权利而应该向私营合作伙伴支付赔偿之日期之前收到或应该收到的所有其它款项。
<p>"Senior Finance Documents" “优先级融资文件”</p>	<p>means the finance documents entered into between the Lenders and the Private Partner for the purpose of financing the PPP Project, including [insert defined terms for relevant [loan agreements] [bond financing documents to include bond trust deed, subscription agreement (terms and conditions of the bond) and security documents]. 意指贷款方和私营合作伙伴为了PPP项目融资而签署的融资文件，包括[填写相关的贷款协议的特定条款][债券融资文件包括债券委托协议，认购协议（债券的条款与条件）和担保文件等]。</p>
<p>"Sub-Contractor "Breakage Costs" “分包商损失赔偿”</p>	<p>means the value of Losses that have been or will be reasonably and properly incurred by the Private Partner as a direct result of the termination of the PPP Contract, but only to the extent that: 意指私营合作伙伴由于PPP合同终止而已经发生或者将会合理地发生的损失价值，但仅限于：</p> <ul style="list-style-type: none"> (a) the Losses are incurred in connection with the PPP Project and in respect of the provision of services or the completion of works, including: 因PPP项目以及因服务提供或完成工程而产生的损失，包括： <ul style="list-style-type: none"> (i) any materials or goods ordered or sub-contracts placed that cannot be cancelled without such Losses being incurred; 没有产生该等损失时，已经订购的任何材料或货物，或者已经签订且不可撤销的分包合同； (ii) any expenditure incurred in anticipation of the provision of services or the completion of works in the future; 预计未来提供服务或完成工程需要产生的任何支出； (iii) the cost of demobilisation including the cost of any relocation of equipment used in connection with the PPP Project; and 拆除成本，包括转移PPP项目中使用的设备产生的成本；和 (iv) redundancy payments; 裁员费用 (b) the Losses are incurred under arrangements and/or agreements that are consistent with terms that have been entered into in the <div data-bbox="1225 1528 1385 1743" style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <p>This may include, inter alia, insurance proceeds pledged or assigned to the Lenders. 这可能主要包括抵押或转让给贷款方的保险理赔金。</p> </div>

		ordinary course of business and on reasonable commercial terms, excluding loss of profits calculated over a period which is longer than [one (1) year] after the Termination Date; and 造成损失的安排和/或协议与在日常经营过程中签署的条款安排和/或协议一致，并且其中的商务条款合理，该损失不包含终止日期后[一(1)年]以后产生的损益；和 (c) the Private Partner and the relevant sub-contractor have each used their reasonable endeavors to mitigate the Losses. 私营合作伙伴和相关的分包商已经为减少相关损失而付出了合理的努力。
"Subordinated Documents" 次级融资文件	Finance	means any agreements under which the Shareholders make subordinated debt available to the Private Partner. [See Section 4.2.2] 意指股东向私营合作伙伴提供次级债的任何协议。[见4.2.2节]
"Termination Date" “终止日期”		means the date on which the PPP Contract terminates in accordance with Clause [insert relevant clause number]. 意指PPP合同根据[填写相关的条款编号]的规定终止的日期。

Compensation on Contracting Authority Default, Material Adverse Government Action, Change in Law or Voluntary Termination 因缔约政府部门违约、重大负面政府行为、法律变更或主动提前终止导致的赔偿

- (1) If this PPP Contract is terminated for (i) Contracting Authority Default in accordance with Clause [insert], (ii) Material Adverse Government Action in accordance with Clause [insert], (iii) Change in Law in accordance with Clause [insert] or (iv) Voluntary Termination in accordance with Clause [insert], the Contracting Authority shall pay the Private Partner an amount equal to the sum of: 如果PPP项目合同的终止是因为（i）第[填写数字]条规定的缔约政府部门违约，（ii）第[填写数字]条规定的重大负面政府行为，（iii）第[填写数字]条规定的法律变更，或（iv）第[填写数字]条规定的主动终止，缔约政府部门应当向私营合作伙伴支付以下金额的总和：
- Delete (iii) and (iv) if not contemplated in the PPP Contract. 如果没有在PPP合同约定则删除(iii)和(iv)项
- (a) Outstanding Senior Debt; plus 未偿还优先级债务；加
 - (b) redundancy payments for employees of the Private Partner that have been or will be reasonably incurred by the Private Partner as a direct result of termination of this PPP Contract; plus 私营合作伙伴因本PPP合同的终止而直接导致的已经支付或将来会合理产生的裁员费用；加
 - (c) any Sub-Contractor Breakage Costs; plus 任何分包商损失赔偿；加
 - (d) [select from Option (1)(a), (1)(b), or (1)(c) below depending on the required valuation method for the payments due to the equity party] [根据向股权方支付所需要的估值方式，从以下(1)(a), (1)(b), 或 (1)(c)选项当中选择]
 - Option 1 (a): an amount which, when taken together with any Distributions paid, interest paid and principal repaid under the Subordinated Finance Documents on or before the Termination

Date, taking account of the actual timing of such payments, results in a real IRR on the share capital subscribed and amounts advanced to the Private Partner under the Subordinated Finance Documents equal to the Base Case Equity IRR; or 选项1 (a): 金额等于: 加上在终止日期根据次级债融资文件支付的任何分配款项、利息和偿还的本金, 计算该等支付款项的实际时间, 得出所认购股权资本的实际IRR和根据次级债融资文件预付给私营合作伙伴的金额等于基本情形股权IRR; 或者

- Option 1(b): the aggregate amount for which the share capital of the Private Partner and the receivables arising under Subordinated Finance Documents could have been sold on an open market basis, under the assumption that there is no default by the Contracting Authority, that no Material Adverse Government Action or Qualifying Change in Law has occurred, that the sale is on a going concern basis and that no restrictions exist on the transfer of the share capital; or 选项1(b): 私营合作伙伴的股权资本和根据次级债融资文件产生应收账款在公开市场上可以出售的总金额, 假设缔约政府部门没有违约, 不存在任何重大负面政府行为或可认定的法律变更情形, 并且该出售是基于持续经营的前提, 且对于股权资本的转让不存在任何限制; 或者
- Option 1(c): the NPV of forecast Distributions and interest to be paid and principal to be repaid under the Subordinated Finance Documents as at the Termination Date, based on the Original Base Case, each amount discounted back at the Base Case Equity IRR from the date on which it is shown to be payable in the Original Base Case to the Termination Date]. 选项1(c): 基于原始基本情形, 根据次级债融资文件预期的分配款项的净现值加在终止日期将支付和利息和将偿还的本金, 各项金额按原始基本情形中自应付之日起至终止日期的基本情形股权IRR进行折现。

Compensation on Private Partner Default Termination 因私营合作伙伴违约提前终止产生的赔偿

- (2) If the Contracting Authority terminates this PPP Contract for Private Partner Default in accordance with Clause [], the Contracting Authority shall pay to the Private Partner a compensation amount equal to [] % of Outstanding Senior Debt. 如果缔约政府部门因为私营合作伙伴违约而根据第[]条的规定终止本PPP合同, 则缔约政府部门应该向私营合作伙伴支付的赔偿金额为未偿还优先级债务的[]%。

Compensation on Force Majeure Termination 因不可抗力提前终止产生的赔偿

- (3) If this PPP Contract is terminated for Force Majeure in accordance with Clause [], the Contracting Authority shall pay the Private Partner an amount equal to the sum of: 如果PPP合同因为不可抗力而根据第[]条的规定终止, 则缔约政府部门应该向私营合作伙伴支付的赔偿为以下款项之和:

- (a) Outstanding Senior Debt, if any; plus 未偿还优先级债务（如有）；加
- (b) Initial Equity and any outstanding principal under the Subordinated Finance Documents as at the Termination Date [less any Distributions or subordinated debt interest payments already made]; plus 初始股权和次级债融资文件下的任何未偿还本金[减去已经支付的股息或次级债务的利息]；加
- (c) redundancy payments for employees of the Private Partner that have been or will be reasonably incurred by the Private Partner as a direct result of termination of this PPP Contract, plus 私营合作伙伴因本PPP合同的终止而直接导致的已经支付或将来会合理产生的裁员费用；加
- (d) any Sub-Contractor Breakage Costs. 任何分包商损失赔偿。

5

REFINANCING再融资

5.1 KEY ASPECTS 关键方面

5.1.1 *The concept of refinancing* 再融资的概念

Refinancing means changing or replacing the existing terms on which debt obligations have been incurred. Borrowers may refinance existing debt obligations for a number of reasons and in a variety of ways. 再融资是指变更或替换已经产生债务的现有条款。借款人可以因为各种原因、通过各种方式对现有的债务进行再融资。

5.1.2 *Why do PPP Contracts contain refinancing provisions?* 为什么PPP合同需要包含再融资条款?

Financial terms are agreed between the Lenders, Equity Investors and the Private Partner prior to the PPP Contract becoming effective and will take into account market conditions at the time, as well as the risk profile of the Project and applicable jurisdiction. The cost of financing the PPP Project will be passed directly through to the pricing offered to the Contracting Authority under the PPP Contract or the rates charged to users. Given the long term nature of PPP Contracts, over time there will be changes in market conditions, as well as developments in the Project itself, which will affect its risk profile, and the Private Partner may want to change the terms of or replace its financing accordingly. In some jurisdictions it may not even be feasible to put in place long term financing at the outset and refinancing is therefore a necessity for the Private Partner after the initial funding period. 贷款方、股权投资方和私营合作伙伴在PPP合同生效之前约定财务条款，并考虑当时的市场条件以及项目风险面和适用的法律。PPP项目的融资成本将直接传导到基于PPP合同项下向缔约政府部门提出的定价或对用户的收费。因为PPP合同具有期限长的特点，市场条件会随着时间变化，也会随着项目本身的开发过程而改变，这些改变会影响PPP合同的风险面，所以私营合作伙伴可能想要变更或者替换其融资条款。在某些地区，在项目初期获得长期的融资基本是不可行的，因此在初始融资阶段之后私营合作伙伴就必须寻求再融资。

The result of a refinancing may be that the Private Partner's debt costs are reduced, resulting in greater revenue and in turn a higher equity return - this is typically called "refinancing gain". The PPP market has increasingly acknowledged that it would not be fair for the Private Partner to enjoy the entire benefit of refinancing gain where it is not entirely responsible for the availability of the improved financing terms. This is particularly important from the Contracting Authority's perspective given the use of public funds to pay for PPP Projects. Any change in financing terms may also impact other provisions in the PPP Contract that reference the financing terms, such as termination payments for which the Contracting Authority may be liable.再融资的结果可能是减少私营合作伙伴的债务成本，收入增加并进而获得更高的股权回报，这些效果一般称为“再融资收益”。PPP市场越来越多地认为，如果由私营合作伙伴没有完全负责促进融资条款时，独自享受全部的再融资收益是不公平的。这对于缔约政府部门尤其重要，因为缔约政府部门使用了公共资金来为PPP项目付费。融资条款的任何变化还可能影响PPP合同的其它反映融资条款的条款，比如缔约政府部门可

能需要支付的解约金。

Without specific provisions in the PPP Contract, the Contracting Authority will have limited or no ability to share in any refinancing gain received by the Private Partner and the position as regards other contractual terms (such as termination payments) may be unclear. Not all refinancings lead to gains that should be shared, however, and refinancing provisions also typically clarify the circumstances which are exempt. 如果PPP合同中没有特别的规定，缔约政府部门将难以或无法分配由私营合作伙伴获得的再融资收益，而且有关其它合同条款（比如解约金）的情况也可能不清楚。然而，并不是所有再融资带来的收益都应该分配，不分配的情形也一般会通过再融资条款进行明确说明。

5.1.3 *Refinancing grounds* 再融资的基础

The circumstances in which a refinancing of the PPP Project may be sought by the Private Partner are described below and the differing grounds are likely to necessitate different treatment under the PPP Contract. 以下描述了私营合作伙伴可能会为PPP项目寻求再融资的情形，不同情况下PPP合同会有相应的处理方法。

Rescue Refinancing - In adverse circumstances a refinancing may be sought to rescue the PPP Project from default. The Private Partner may be in a distressed situation requiring an increase and/or a rescheduling of their debt repayment obligations. Generally, it will be in the Contracting Authority's and the Private Partner's interests for this form of refinancing to be implemented so that service provision under the PPP Contract can continue and default termination consequences avoided. The Contracting Authority will want to ensure any changes to the financing terms do not adversely affect its contractual position but it should not anticipate any immediate financial benefit. 援救性再融资——在不利情形下，可以通过再融资来使PPP项目免于违约。私营合作伙伴可能会处于要求增加和/或重新安排其债务偿还义务的苦恼境地。一般地，采取这种再融资的形式符合缔约政府部门和私营合作伙伴各自的利益，这样就可以继续根据PPP合同提供服务，也避免了因违约而终止合同的后果。缔约政府部门希望确保对融资条款的任何变更都不会对其合同处境带来任何负面影响，但也不应该期望因此获得任何直接的财务收益。

Mini perm refinancing - In markets where it is not possible (or desirable) to obtain long term financing, the Private Partner may put in place what is sometimes known as a "mini perm" financing. The loan will have a short tenor (e.g. five or seven years), and there is an incentive on the Private Partner and its Shareholders to refinance because the loan terms may provide that the Lenders will sweep all available cash (after reserve account funding) if no refinancing has occurred by the relevant maturity date (and the Lenders may require gradually increasing cost sweeps (e.g. 25%, 50%, 75%) in the years prior to maturity), or (in the case of a "hard" mini perm) that there will be an event of default⁴⁴. The market standard position in Australia, for example, is to put in place five to seven-year debt funding, with assumed refinancings every five years thorough the life of the PPP Project.

44 Hard" mini perm financing structures are not permitted by Contracting Authorities in the Netherlands on the basis that they effectively introduce refinancing risk. “硬式”微型永久融资结构不获荷兰缔约政府部门允许，理由是它们实际上引致再融资风险。

Given the nature of this financing and that replacement will be a necessity envisaged at the start of the PPP Contract, it will be in both Parties' interests to facilitate a refinancing on acceptable terms and it is unlikely to be driven by or to deliver any significant additional financial benefit. Mini perm 微型永久再融资 ——在不可能（或者不愿意）获得长期融资的市场，私营合作伙伴可以代之以有时称为“微型永久”的融资。这种贷款期限较短（比如5年或7年），这样的话私营合作伙伴及其股东就会有动力去再融资，因为贷款条款可能会规定如果在相关的到期日之前还没有获得再融资（并且贷款方还可能要求在到期前的几年逐步提高成本比例，比如25%、50%、75%等）或者（如果是在“硬”微型永久再融资的情形下）将来发生违约事件⁴⁴，则贷款方将（在账户准备金之后）撤回所有可用的现金。比如在澳大利亚，市场实践是规定5-7年的贷款融资，并假设在PPP项目生命周期中每5年进行一次再融资。鉴于这种融资方式的性质，并且在PPP合同初始阶段就会规划替代方案，所以双方之间能够达成可接受的条款对双方都有利，且再融资也不太可能追求或者带来任何重大的额外财务收益。

Bridge to bond financing - Where it is envisaged that initial bank debt financing will be replaced by bond finance, normally after completion of the construction or development phase, this is known as 'bridge to bond' financing. Generally, the bridge financing will contain incentives to refinance, such as progressive increases to the margin and a relatively short tenor. See Section 9 Bond Financing. 债券融资前的过桥贷款 ——一般在完成建设或开发阶段之后，计划将用债券融资替代初始的银行贷款融资，这种方式称为“债券融资前的过桥贷款”融资。通常，过桥贷款融资将会产生再融资的动机，比如逐步提高利润和获得相对较短的贷款期限。见第9章—债券融资。

Realising Value Refinancing - In other circumstances (which are the focus of this Section 5), the effect of changed market conditions and PPP Project developments may be positive and the Private Partner may seek to obtain more favourable financing terms to realise more equity return for its Shareholders. Such terms may be available for a number of reasons, such as: 实现价值再融资 ——在其它情况下（在第5章中着重说明），市场条件的变化和PPP项目的进展可能带来利好影响，而私营合作伙伴则可以寻求更加有利的融资条款以为其股东实现更大的股权回报。以下几个原因可以促成更加有利的融资条款：

- the market may have greater liquidity and the price of debt may have declined (e.g. after a period of financial crisis or where new lenders want to enter the PPP market); 市场流动性可能增强，负债成本可能下降（比如在金融危机之后或者有新的贷款方愿意进入PPP市场）；
- as significant risks are considered to arise during the construction period, once the income-generating asset is built and the PPP Project is successfully operational, the risk profile is reduced and the corresponding risk of inability to service debt repayment obligation is perceived to be lower; 由于项目建设期间可能发生重大的风险，一旦可以产生收入的资产建设完成且PPP项目成功运营，则该风险就会降低，相应地无法履行贷款偿还义务的风险就会降低；
- general market conditions have improved (e.g. the jurisdiction concerned may

have established a good track record in successful PPP Projects and/or the regulatory and political framework may be considered more stable); and 一般的市场条件有所提升(比如相关的法域下出现成功的PPP项目案例并且/或者相关的监管和政治框架更为稳定; 和

- for "user pays" PPP Projects (see Section G, PPP Contracts in Context), demand may be stronger than anticipated and revenues therefore higher, resulting in an opportunity to increase leverage. 对于“使用者付费”的PPP项目(见第G章——具体情形下的PPP合同), 需求比预期更大, 因此产生的收益更多, 进而有可能提高杠杆。

It is this type of refinancing which is more likely to yield a financial benefit for the Contracting Authority if the PPP Contract is correctly drafted and the Contracting Authority will also want to ensure any changes to the documentation do not adversely affect its contractual position.⁴⁵如果PPP合同有适当的规定且缔约政府部门也希望对文件的任何变更都不会对其合同地位带来任何负面影响, 这种类型的再融资更加有可能会给缔约政府部门带来财务上的利益。⁴⁵

5.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

Refinancing provisions can be complex and will differ between PPP projects, according to the different financing structures used. Some PPP Contracts will contain detailed drafting (particularly in developed markets), whereas others include a much shorter provision designed to bring the Parties together to discuss the implications of a refinancing. In either case, key points to bear in mind are set out below.再融资条款可能会很复杂而且根据所使用的融资结构不同, 各个PPP项目再融资条款之间也会不同。有一些PPP合同会有详细的规定(尤其是在成熟的市场中), 而其它市场中相关规定则简短得多, 条款旨在聚集各方讨论再融资的影响。这两种情形中都需要铭记以下几点:

5.2.1 Defining "Refinancing" “再融资”的定义

Establishing a definition which captures all types of potential refinancing can be difficult and the Contracting Authority should aim for a definition which minimizes the potential for circumvention through sophisticated structurings. The recommended approach is to be as generic as possible by reference to the senior finance documents, with a catch-all provision. See Section 5.3, Sample Drafting 5, Required Definitions, definition of "Refinancing".很难规定一个定义囊括所有类型的再融资, 此时缔约政府部门的目标应该是通过复杂的结构使定义能够将潜在的绕行风险最小化。建议的方式是通过引用高级融资文件, 使用总括性条款(使定义)尽可能地宽泛化。见第5.3章, 草案范本 5, 所需要的定义, “再融资的定义”。

A definition of "Exempt Refinancing" is sometimes requested by the Private Partner

⁴⁵ It is also possible to include a provision entitling the Contracting Authority to request the Private Partner to seek terms for a potential refinancing if it feels better financing terms are available (see the Infra Australia Guidelines). 还可加入一条规定, 允许缔约政府部门有权在其认为具备更有利融资条款的情况下要求私营合作伙伴寻求潜在再融资条款(请参见澳大利亚指南)。

to clarify that certain dealings are not intended to be caught by the relevant refinancing provisions. Again, the Contracting Authority should carefully consider what might be included on a case by case basis. For example, in the case of a mini perm financing and a bridge to bond financing, Contracting Authorities should recognize that refinancing is virtually a given so the PPP Contract should envisage this occurrence.有时私营合作伙伴有时会要求对“免除再融资”进行定义，以厘清不希望在相关的再融资条款中出现的某些规定。再次强调，缔约政府部门应该针对不同的情况仔细考虑。比如，在微型永久融资，债券过桥融资中，缔约政府部门应当承认再融资实际上是一种给予，因此PPP合同也应该预计到这种情况。

5.2.2 *Refinancing gain* 再融资产生的收益

The question for the Contracting Authority is what qualifies as refinancing gain and whether all refinancing gain should be shared. As with defining "Refinancing", care needs to be taken in drafting gain calculation and sharing provisions to minimize the Private Partner's ability to circumvent the provisions. It is increasingly common, particularly in developed PPP markets, for a Private Partner to factor in the benefit of a future refinancing into its Original Base Case so that it can offer a more competitive price to the Contracting Authority in its bid. In this instance, the Private Partner would argue that the Contracting Authority is already benefiting from any potential a refinancing gain and should therefore not be entitled to a further share of such gain when the refinancing actually happens. While this argument has some merit, the precise basis of any refinancing envisaged by the Original Base Case would need to be clearly agreed upfront to limit the risk of disputes. See Section 5.3, Sample Drafting5, Required Definitions, definition of "Refinancing Gain".缔约政府部门面临的问题是：什么应该认定为再融资收益以及是否所有的再融资收益都应该分配。跟“再融资”的定义中一样，在拟定收益计算和收益分配条款时需要特别注意尽量让私营合作伙伴无法绕过这些规定。越来越普遍的做法(尤其是在成熟的PPP市场中)是，让私营合作伙伴在其原始基础情形中纳入未来再融资的利益，这样的话私营合作伙伴才可以在投标中给予缔约政府部门更具竞争力的价格。在这种情形下，私营合作伙伴可能会辩称缔约政府部门已经从潜在的再融资收益中获得的利益，因此在实际发生再融资时，应该无权再分配该等利益。尽管这种说法也有一定道理，但是在原始基础情形中设定的任何再融资的具体基础应该事先予以清晰的约定，以限制产生争议的风险。见第5.3节——草案范本 5，需要的定义，“再融资收益”的定义。

Similarly, in a rescue or mini perm refinancing the overall effect may not lead to any increase in equity return compared to the Base Case Equity IRR.类似地，在援救性再融资或微型永久再融资中总的效果可能不会使股权收益比基础情形股权IRR更高。

In all cases it is generally considered to be fair for the Contracting Authority only to share in gain over and above the Original Base Case. The rationale in a rescue refinancing is that due to the distressed scenario, Lenders are unlikely to agree to any refinancing debt being paid to the Contracting Authority. However, this may not always be justifiable where the Contracting Authority has concerns that the Base Case Equity IRR may have been artificially inflated (e.g. due to weak competition during the bidding process).在所有情况下，一般认为缔约政府部门只基于原始基础情形的条件分配收益就已经公平了。其中的原理是，在援救性再融资的情况下，由于

财务上的压力情形，贷款方可能不会同意向缔约政府部门提供任何再融资贷款。但是这也不一定总是合理正当的，因为缔约政府部门可能会顾虑基础情形股权IRR可能已经被人为地夸大了（比如因为在投标过程中竞争力较弱）。

EMERGING AND DEVELOPED MARKET DIFFERENCES

In emerging markets, particularly for "user pays" PPP Projects (see Section G, PPP Contracts in Context), there may be limited scope for the Contracting Authority to negotiate refinancing gain sharing if such gain is a key incentive for potential bidders. This dynamic is currently evident in the Philippines, for example, where refinancing provisions are not typically included in the PPP Contract.

新兴市场与发达市场之差异

在新兴市场中，尤其是在“使用者付费”的PPP项目中（见第G章——具体情形下的PPP合同），缔约政府部门协商再融资收益分配的空间有限，如果该收益是对潜在投标方的关键激励的话。比如，这种情况目前在菲律宾很明显，在菲律宾的PPP合同中一般不会纳入再融资条款。

5.2.3 Right to consent 同意权

The Contracting Authority's right to consent is important as it is what will bring the Private Partner to the negotiating table. As mentioned above, if a particular refinancing is already factored into, or is as contemplated by, the Original Base Case, then it is reasonable for Contracting Authority consent not to be required or to be subject to fewer constraints than other refinancings.⁴⁶ However, its right to consent should be exercised reasonably. The Contracting Authority should bear in mind that a refinancing resulting in gain is likely to benefit it financially and even a rescue refinancing will help save the PPP Project. Nevertheless, the Contracting Authority should only consent if it is confident that the refinancing will not have a negative impact on the PPP Project or on its own liabilities without providing it with sufficient commensurate benefit. This will include assessing any increase in any termination payments for which it is liable as described in [Section 4, Termination Payments](#). See [Section 5.3, Sample Drafting 5, Clause \(3\)](#). 缔约政府部门的同意权很重要，因为这就是将私营合作伙伴带到谈判桌上的筹码。如上文所述，如果在原始基础情形中已经纳入或考虑了具体的再融资情形，则缔约政府部门就有理由同意不被要求或受制于比其它再融资途径更少的限制。⁴⁶但是，缔约政府部门的同意权应当合理地行使。缔约政府部门应当记住带来收益的再融资对其财务有利，而即使是援救性再融资也可以为PPP项目提供资金。然而，缔约政府部门只有在确定再融资不会对PPP项目带来负面影响或者在不向其提供充分相称的利益的前提下对其自身的责任带来负面影响时，才能够表示同意。这将包括评估在[第4章——解约金](#)中所述的其应当支付的任何解约金。见[第5.3节——草案范本5，第（3）条](#)。

5.2.4 Calculating refinancing gain 再融资收益的计算

⁴⁶ In some markets in the United States, rescue refinancings that do not result in an increase in the Private Partner's outstanding debt above a certain percentage threshold may be permitted without the consent of the Contracting Authority, as may refinancings where the Private Partner provides satisfactory evidence that its aggregate debt is no less than a specified percentage of the fair market value of the PPP Contract. 在美国的一些市场，不会使私营合作伙伴的未偿还债务增加到一定比例的援救性融资可以在没有缔约政府部门同意的情况下获得允许，因为私营合作伙伴能够提供充分的证据证明其总负债比PPP合同的公允价值的一定比例更多。

A full understanding and sight of existing and proposed financing structures and documentation is needed for the Contracting Authority to be in a position to calculate any refinancing gain and enforce its rights effectively. Expert legal and financial advice should be obtained (to match the advice the Private Partner is likely to be receiving) to ensure the Contracting Authority is not at any disadvantage in analysing the effect of any refinancing proposal. External expenses incurred by the Contracting Authority when considering a refinancing proposal should be borne by the Private Partner and if the refinancing is implemented they should be deducted from the total refinancing gain amount prior to sharing. [See Section 5.3, Sample Drafting 5, Clause \(7\)](#). 缔约政府部门为了可以计算任何再融资收益并有效地行使其权利，需要对当前的或拟定的融资结构和文件有充分的理解和考虑。缔约政府部门应该寻求专家法律建议和财务建议（以匹配私营合作伙伴可能获取的建议）以保证其在分析任何再融资方案影响时不会处于任何不利地位。缔约政府部门在考虑一项再融资方案时产生的外部费用应该由私营合作伙伴承担，并且如果实施再融资，该等费用应当在分配再融资收益前扣除。见第5.3节——草案范本5，第（7）条。

5.2.5 *Share of refinancing gain* 再融资收益的分配

The Contracting Authority should consider what an appropriate sharing mechanism is. Equal sharing is one option, or staged sharing depending on the amount of the gain and/or how it arises. The basic premise under the Infra Australia PPP Guidelines is a 50% sharing (as it is in the South Africa PPP Guidelines), but recognising that more detailed arrangements and greater proportions may be appropriate.⁴⁷ [See Section 5.3, Sample Drafting 5, Clause \(4\)](#). 缔约政府部门应当考虑怎样的分配机制才合适。一种选择是等额分享，或者根据收益金额以及/或者收益产生的方式进行分段分配。《澳大利亚PPP指导原则》下的基本方式是五五平分（与《南非PPP指导原则》的规定一样），但同时也认可更加详细的安排和更多的分配比例是合适的。⁴⁷见第5.3节——草案范本5，第（4）条。

5.2.6 *Method of payment* 支付方式

The Contracting Authority should typically have the right to choose the method of payment of its share of the refinancing gain and this will depend on the nature of the refinancing and discussions at the time. Options include the Contracting Authority being paid (a) in a lump sum upon the refinancing to the extent the Private Partner receives such amounts at the time of the refinancing, (b) in a lump sum or periodically at the time of receipt of the relevant payments, or the receipt of the projected benefit (in the case of the "user pays" model), (c) via a reduced availability payment (in the case of the "government pays" model) or (d) by a combination of the above. [See Section 5.3, Sample Drafting 5, Clause \(6\)](#). 缔约政府部门一般有权选择其获得再融资收益分配的支付方式，并且这将取决于再融资的性质和当时的讨论结

47 The UK PF2 Guidance draw a distinction between gains arising from a reduction in margin under the senior finance documents (where the Contracting Authority expects 90% of the gain) and other gains (where the Contracting Authority shares on a staged basis between 50 - 70% according to the size of the gain). A staged sharing percentage of 50 - 70% has also become the norm in the Netherlands. 《英国PF2指南》区分了根据优先债融资文件减少保证金而产生的收益（在这种情况下，缔约政府部门预期为收益的90%）和其它收益（在这种情况下，缔约政府部门根据收益额分期获得50-70%的收益）。50-70%的收益分期分配也成为了在荷兰适用的规则。

果。相关选择包括缔约政府部门（a）一次性收取与私营合作伙伴在再融资时收到的金额一样的再融资收益，（b）一次性收取或者分期收取相应的收益，或者收取预期收益（在“使用者付费”的模式下），（c）通过减少后的可用性支付（在“政府支付”的模式下）获得支付或者（d）通过结合以上支付方式获得支付。见第5.3节——草案范本5，第（6）条。

5.3 SAMPLE DRAFTING 5 草案范本 5

The principle of sharing refinancing gain has developed over time out of the experience of early PPP markets such as the UK. For a detailed approach see the UK PF2 Guidance and the Infra Australia PPP Guidelines. Sample Drafting 5 is broadly based on concepts they define. 分配再融资收益的原则已经随着早期的PPP市场（比如英国市场）有所发展。更为详细的方式说明见《英国PF2指南》和《澳大利亚PPP指导原则》。草案范本5大体上是基于上述文件的定义。

Required Definitions 需要的定义

"Base Case Equity IRR" “基本情形股权IRR”	means the Equity IRR set out in the Original Base Case. 意指原始基础情形中规定的股权IRR。
"Distribution" “分配”	means whether in cash or in kind, any: 意指以现金或实物形式的任何： (a) dividend or other distribution in respect of share capital; 根据股权资本派发的股息或其它分配； (b) reduction of capital, redemption or purchase of shares or any other reorganization or variation to share capital; 减资、股份赎回或回购，或者对股权资本的重组或变更； (c) payments under any Subordinated Finance Documents; and 根据任何次级债融资文件的支付款项； (d) the receipt of any payment, contractual arrangement, transfer of asset and other benefit which is not received in the ordinary course of business and on reasonable commercial terms. 收到的任何支付款项，合同安排，资产转让或其它非日常经营过程中基于合理商业条件而收到的其它利得。
"Equity IRR" “股权IRR”	means the projected blended internal rate of return to the Shareholders and any of their affiliates over the entire PPP Contract period, having regard to Distributions made and projected to be made. 意指在整个PPP合同期限内，预期向股东及股东的任何附属企业分配或预期将分配的综合内部回报率。
"Exempt Refinancing" “免除再融资”	(a) any Refinancing fully contemplated in the Original Base Case; 在原始基础情形下完整考量的再融资； (b) a change in taxation or in accounting treatment; 税务规则或会计处理的变更； (c) the exercise of rights, waivers, consents and similar actions which relate to day to day administrative and supervisory matters, and which are in respect of: 与日常行政管理和监督事项相关的权利的行使、弃权、同意及类似的行为，并且有关： (i) breach of representations and warranties or undertakings; 对陈述，保证或承诺的违反； (ii) movement of monies between the project accounts in accordance with the terms of the Senior Finance Documents; 根据优先债融资文件条款的规定在项目账户之间的资金流动； (iii) late or non-provision of information, consents or licenses; 延迟或不提供信息、同意或许可；

	<p>(iv) approval of revised technical and economic assumptions in relation to the Financial Model; 批准有关该财务模式的技术和经济假设的修改;</p> <p>(v) failure by the Private Partner to obtain any consent by statutory bodies required by the Senior Finance Documents; or 私营合作伙伴未取得优先债融资文件中要求的法定主体的同意; 或者</p> <p>(vi) voting by the Lenders and the voting arrangements between the Lenders in respect of the levels of approval required by them under the Senior Finance Documents; 贷款方的投票表决以及贷款方之间对于根据优先债融资文件要求的批准级别的投票安排;</p> <p>(d) any sale of shares in the Private Partner by the Shareholders. 股东出售私营合作伙伴的股权。</p> <p>(e) [any ordinary market dealings in bonds.][关于债券的任何普通市场交易。]</p>	<p>The Private Partner may wish to extend this definition to clarify that changes to certain documents or other types of circumstance will be exempt (e.g. a mini perm refinancing scenario). This should be considered on a case-by-case basis to reflect the particular circumstances of the PPP Project. 私营合作伙伴可能希望将本定义进行扩展以更清楚地说明对某些文件的修改或者其他情况类型将可免除再融资(比如在微型永久再融资情形下)。应该根据不同的情况予以考虑,以反映出具体PPP项目的具体情况。</p> <p>Delete "C" if there are reasons not to agree this – see Section 5.2.2. 如果有理由不考虑C项, 则将其删除——见第5.2.2章。</p>
<p>"Financial Model" “财务模型”</p>	<p>means the financial model [provided by the Private Partner as part of its bid/agreed between the Parties prior the date of the PPP Contract] and as amended from time to time. 意指[私营合作伙伴在其投标中提供的或各方在签署PPP合同前约定的]并不时进行修改的财务模型。</p>	
<p>"Net Present Value" “净现值”</p>	<p>means the aggregate of the discounted values, calculated as of the estimated date of the Refinancing, of each of the relevant projected Distributions, in each case discounted using the Base Case Equity IRR. 意指在相关的分配方式中, 截止至预期进行再融资的日期的总折现值, 在各种情形下折现率使用基础情形股权IRR。</p>	
<p>"Pre-Refinancing Equity IRR" “再融资前股权IRR”</p>	<p>means the Equity IRR calculated immediately prior to any Refinancing, but without taking into account the effect of such Refinancing and using the Financial Model as updated (including as to the performance of the PPP Project). 意指再融资之前计算的股权IRR, 但不考虑该再融资的影响, 并使用最新的财务模型(包括有关PPP项目的业绩)。</p>	
<p>"Qualifying Refinancing" “符合条件的再融资”</p>	<p>means any Refinancing that will give rise to a Refinancing Gain greater than zero that is not an Exempt Refinancing. 意指可以带来大于零的再融资收益的非免除再融资的任何再融资。</p>	
<p>"Refinancing" “再融资”</p>	<p>means:意指:</p> <p>(a) any amendment, variation, novation, supplement or replacement of any Senior Finance Documents; 对优先债融资文件的任何修订、变更、更新、补充或替换;</p> <p>(b) the grant of any waiver or consent, or the exercise of any similar right under any Senior Finance Documents; 根据优先债融资文件提供任何弃权或同意, 或行使任何类似的权利;</p> <p>(c) the creation of or granting of any form of benefit or interest in the Senior Finance Documents, or the creation or granting of any rights or interest in any contracts, revenues or assets of the Private Partner whether by way of security or otherwise; and 在优先债融资</p>	

		文件中设定或给予任何形式的利益或利息，或在私营合作伙伴的任何合同、收入或资产中设定或给予任何形式的利益或利息，以担保或其它形式；和 (d) any other arrangement having been put in place by any person which has an effect similar to any of (a) to (c) above or which has the effect of limiting the Private Partner's ability to carry out any of (a) to (c) above. 由任何一方已经设定的其它具有类似上述(a)至(c)项之效力的，或者限制私营合作伙伴执行上述(a)至(c)项的安排。
"Refinancing Gain" “再融资收益”		means a positive amount equal to $(A-B) - C$, where: 意指 $(A-B) - C$ 所得出的一个正数金额，其中： A = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the PPP Project) so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of the PPP Contract following the Refinancing; A=在再融资之日前计算的在再融资后PPP合同的剩余期限内，分配给各个股东或附属实体的金额的净现值（考虑再融资的影响并使用最新的财务模型（包括有关PPP项目过去的实际业绩）以在再融资前立即可流动）。 B = the Net Present Value of Distributions, as projected immediately prior to the Refinancing (but without taking into account the effect of the Refinancing and using the Financial Model as updated (including as to the actual past performance of the PPP Project) so as to be current immediately prior to the Refinancing) to be made to each Shareholder or affiliate over the remaining term of this PPP Contract following the Refinancing; and B=在再融资之日前计算的在再融资后PPP合同的剩余期限内，分配给各个股东或附属实体的金额的净现值，（但不考虑再融资的影响并使用最新的财务模型（包括有关PPP项目过去的实际业绩）以在再融资前立即可流动）。 C = any adjustment required to raise the Pre-Refinancing Equity IRR to the Base Case Equity IRR. C=为了将再融资前股权IRR提高至基础情形股权IRR而需要进行的任何调整。
"Subordinated Finance Documents" “次级债融资文件”	Finance	means any agreements under which the Private Partner's Shareholders make subordinated debt available to the Private Partner. 意指私营合作伙伴的股东向私营合作伙伴提供次级债相关任何协议。

Delete “C” if there are reasons not to agree this - see Section 5.2.2. 如果有理由不考虑C项，则将其删除——见第5.2.2章。

Refinancing 再融资

- (1) The Private Partner shall promptly provide the Contracting Authority with full details in relation to any contemplated Refinancing, which shall include the proposed changes to the Financial Model, a justification of the assumptions on which it is based, the proposed contractual documentation and any other information that the Contracting Authority may reasonably request in relation to that Refinancing. 私营合作伙伴应该及时向缔约政府部门提供有关任何拟进行的再融资的所有详情，包括拟对财务模型的变更，适用财务模型下假设条

The Contracting Authority should approve these agreements as a condition precedent to the entry into effect of the PPP Contract and any subsequent amendment and/or additional document which would fall under this definition. 缔约政府部门应该批准这些协议，以此作为PPP合同以及本定义内容下的其它任何后续修订和/或附加文件的生效条件。

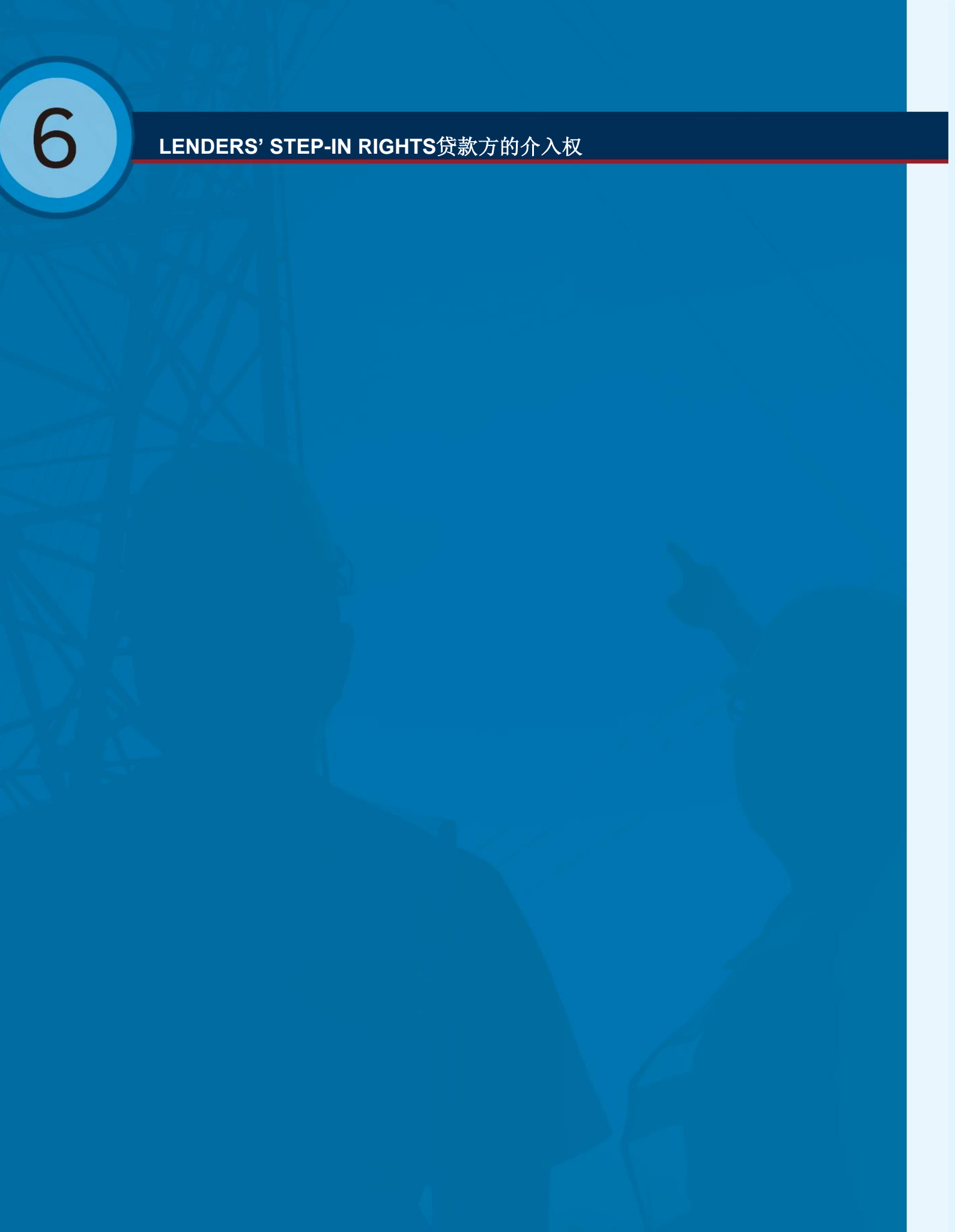
件的理理由，拟定的合同文件及缔约政府部门可能合理要求的与拟进行的再融资相关的任何其它信息。

- (2) The Contracting Authority shall, at all time, have unrestricted rights to audit the Financial Model used (or proposed to be used) in relation to a Refinancing. 缔约政府部门在任何时候都有充分的权利对再融资所使用（或者拟使用）的财务模型进行审计。
- (3) The Private Partner shall obtain the Contracting Authority's prior written consent in relation to any Qualifying Refinancing. 私营合作伙伴应该就“符合条件的再融资”获得缔约政府部门的事先书面同意。
- (4) The Contracting Authority shall be entitled to receive a [fifty per cent (50%)] share of any Refinancing Gain in a Qualifying Refinancing. [Adapt in accordance with agreed sharing mechanism]. 缔约政府部门应该有权获得“符合条件的再融资”中再融资收益的[百分之五十(50%)]. [可根据约定的分配机制进行调整]。
This will not be required in most civil law governed PPP Contracts as good faith obligations are implied. 这在大陆法体系下的PPP合同并不需要约定，因为在大陆法体系下诚实信用是一项义务和原则。
- (5) [The Parties shall act in good faith in relation to any Refinancing or proposed Refinancing (including the manner of calculation of the Refinancing Gain and of payment of the Contracting Authority's share of the Refinancing Gain in a Qualifying Refinancing)]. [在任何再融资或者拟定的再融资中各方应该善意行事（包括计算再融资收益的方式以及向缔约政府部门支付“符合条件的再融资”中再融资收益时）]。
- (6) The Contracting Authority shall have the right to elect to receive its share of any Refinancing Gain in a Qualifying Refinancing as:
 - (a) a lump-sum payment which amount shall not exceed the relevant Distribution made on or about the date of the Refinancing and shall be due on the date immediately after the date of the relevant Distribution; 一次性支付，金额不得超过再融资日进行的股息分配金额，并且应该在分配日期后一日内即可支付；
Drafting to be adjusted to fit the payment structure. See also Section 5.2.6. 需要调整以配合支付结构。另见第5.2.6节。
 - (b) [an increase of any fee payable by the Private Partner to the Contracting Authority over the remaining PPP Contract period / or a reduction of the availability payment to be paid by the Contracting Authority to the Private Partner over the remaining PPP Contract period; or 在PPP合同剩余期限内，增加私营合作伙伴应该向缔约政府部门支付的费用；或者在PPP合同剩余期限内，减少缔约政府部门向私营合作伙伴支付的可使用性款项；或者
 - (c) a combination of both]. 两者的结合。
- (7) The Private Partner shall pay, on behalf of the Contracting Authority, all

reasonable costs of external advisors appointed by the Contracting Authority in relation to a Refinancing or potential refinancing and the calculation of a Refinancing Gain [drafting also to reflect deduction of costs from any Refinancing Gain prior to calculating the amount to be shared if not already factored into the Refinancing Gain formula]. 私营合作伙伴应当代表缔约政府部门支付缔约政府部门为了再融资或者拟定再融资以及再融资收益计算所聘用的外部咨询顾问相关的合理费用[拟定条款还应反映，如果再融资收益计算公式中没有包含成本因素，应该从在计算分配金额之前的任何再融资收益扣除]。

6

LENDERS' STEP-IN RIGHTS 贷款方的介入权



6.1 KEY ASPECTS 关键方面

6.1.1 *The concept of step-in 介入的概念*

In a contractual context, "step in" means the ability of a third party who is not party to the relevant contract to step into the shoes of a defaulting party under the contract. This is usually for a limited timeframe and the aim is to give the party stepping in the opportunity to rectify the default and prevent termination of the contract. 在合同环境下，“介入”是指相关合同当事人以外的第三方取代合同项下违约方地位的能力。介入权通常具有时效限制，其目的是给予介入方纠正合同当事人违约及防止合同被终止的机会。

6.1.2 *Why do Lenders have step in rights in respect of PPP Contracts? 为何贷款方享有 PPP 合同的介入权?*

Most PPP Projects are financed on a "limited recourse" basis (see Section C, PPP Contracts in Context) under which third party lenders loan funds to the Private Partner based on an analysis of the projected cash flows generated under the PPP Contract. 大部分 PPP 项目融资以“有限追索权”为基础（参见第 C 节，PPP 合同环境），第三方贷款方对 PPP 合同项下产生的预期现金流量进行分析，据此向私营合作伙伴提供贷款资金。

As the PPP Contract is usually the sole source of revenue (or basis for revenue in the case of "user pay" PPP Contracts) for debt repayment, the prospect of the Contracting Authority terminating for Private Partner default is of significant concern for Lenders, particularly if the termination occurs before the asset has been completed and the service commenced. This is because even where a termination payment will be made by the Contracting Authority, the amount may not cover the entire debt amount and so Lenders are incentivised to get the PPP Contract back on track so that debt can be repaid as scheduled and in full. 由于 PPP 合同通常是偿还债务的唯一收入来源（或在“使用者付费”PPP 合同情况下，是收入的依据），所以缔约政府部门因私营合作伙伴违约而终止合同的可能性成为贷款方最关心的问题，尤其如果终止是发生在建设期结束和服务期开始前，则更令贷款方担忧。这是因为纵使缔约政府部门将会支付解约金，其金额亦未必足够抵偿全部债务金额，如此将会促使贷款方采取行动争取使 PPP 合同的履行重回正轨，以便债务能够按计划得到全额偿还。

One way Lenders seek to protect themselves against termination of the PPP Contract following Private Partner default is to negotiate step in rights. While their validity and enforceability have rarely (if ever) been properly tested in court in any jurisdiction, the formal existence of step in rights gives Lenders comfort in terms of bankability and provides a framework within which the Parties can come together to negotiate solutions in a default/termination scenario, subject to the impact of mandatory law (for example with regard to receivership, bankruptcy and public procurement rules). Step in rights are typically enshrined in an agreement between the Lenders and the Contracting Authority, often called a "Direct Agreement" or, in

some jurisdictions, a “Consent Agreement.” The Direct Agreement will entitle the Lenders to be alerted to a potential termination and to take steps to prevent it by rectifying the problem. From the Contracting Authority’s perspective, its interest in completing the infrastructure and ensuring adequate service provision and the Lenders’ interests in achieving the same outcome are aligned. Direct Agreements enable Lenders to engage directly to try to save the PPP Contract before the Contracting Authority has to deal with termination and its consequences. 针对PPP合同因私营合作伙伴违约而终止的情况，贷款方寻求自我保护的方法之一是通过谈判争取介入权。虽然介入权的有效性及其可强制执行性极少（即使有的话）在任何法域的诉讼中得到法院的认可，但正式明确赋予贷款方介入权能够让贷款方对项目可融资性感到安心，并在发生违约/终止的情况下，提供一个使各方当事人得以在强制性规定（例如涉及接管、破产、公共采购等法规）下共同商讨解决方案的框架。介入权一般在贷款方与缔约政府部门签署的协议（通常称为“直接协议”，或在某些法域称为“同意协议”）中进行规定。直接协议规定贷款方有权在合同可能终止时收到通知，并采取措施纠正问题以防止合同终止的发生。从缔约政府部门的角度来看，其在完成基础设施建设、确保充足服务供应方面的利益与贷款方在实现同一结果方面的利益诉求是一致的。直接协议使贷款方能够在缔约政府部门不得不终止合同并处理相关后果之前，能直接介入以力求挽救PPP合同。

In a PPP context, direct agreements are executed not only in relation to the PPP Contract but also in relation to the Project Agreements. In the latter case, both the Lenders and the Contracting Authority may have separate direct agreements with the Private Partner’s Project Agreement counterparties (i.e. its main sub-contractors) to ensure that the counterparties grant them similar opportunities to rectify defaults by the Private Partner under the Project Agreements before the counterparties may terminate and also to ensure the counterparties’ continued performance.⁴⁸ This Section 6 focuses on Lenders’ step in rights in respect of the PPP Contract. 在PPP环境下，不但可就PPP合同签署直接协议，而且可就项目协议签署直接协议。在后者情况下，贷款方与缔约政府部门均可分别与私营合作伙伴的项目协议相对人（即其主要分包商）另行签署直接协议，以确保协议相对人在终止项目协议前给予贷款方与缔约政府部门类似的机会去纠正私营合作伙伴在项目协议项下违约行为，同时也确保相对人继续履约⁴⁸。本第6节集中介绍贷款方在PPP合同方面的介入权。

6.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

6.2.1 Authority to execute Direct Agreement 签署直接协议的权限

In certain jurisdictions, there may be mandatory laws preventing the granting or enforcement of Lender step-in rights (in particular, under public policy rules applicable to insolvency procedures and/or public procurement regulations applicable to Contracting Authorities that have not been tailored to PPP Projects).

⁴⁸ In terms of order of exercise, the Lenders’ rights under their Direct Agreement with a sub-contractor will typically take priority over the Contracting Authority’s rights under its Direct Agreement with the same sub-contractor. 在行使权利的优先次序方面，贷款方在其与分包商签署的直接协议项下的权利通常优先于缔约政府部门在其与同一分包商签署的直接协议项下的权利。

Well-drafted PPP laws typically authorise entry by a Contracting Authority into both PPP Contracts and the Direct Agreements that usually accompany them. Accordingly, this should be carefully analysed and addressed by Contracting Authorities before commencing the procurement of its PPP Contract. 某些法域的强制性规定可能禁止贷款方介入权的授予或执行（尤其是根据适用于破产程序的公共政策法规及/或适用于缔约政府部门且并非专为PPP项目而设的公共采购法规）。规定完善的PPP法律通常授权缔约政府部门在签署PPP合同的同时签署相应的直接协议。因此，缔约政府部门在开始PPP合同采购前应仔细分析和解决这个问题。

6.2.2 *Form of Direct Agreement* 直接协议格式

Some jurisdictions have developed standard template provisions which must be used by Contracting Authorities and Lenders (e.g. the Dutch Model, the South Africa PPP Guidelines and the UK PF2 Guidance). The Direct Agreement is usually executed on the same date as the PPP Contract. In some instances, it may be signed at a later date on financial close (as is the case in the Netherlands or the United States). Where this is the case, the Direct Agreement will have been virtually finalised at the time the PPP Contract was signed and such agreed form will be attached as an exhibit to the PPP Contract. Lenders typically will require an executed Direct Agreement as a condition precedent to drawdown under the Senior Finance Documents. From the Contracting Authority's perspective, it is preferable to have agreed on the form of the Direct Agreement in advance at the time of bid and under competitive tension, so that it is not introduced or re-negotiated post award of the PPP Contract. 一些法域已制定出缔约政府部门与贷款方必须使用的标准模板条文（例如荷兰模式、南非PPP指引和英国PF2指南）。直接协议通常与PPP合同同日签署。在某些情况下，直接协议也可于稍后在财务结算时签署（例如荷兰或美国案例）。在此情况下，直接协议实际上在PPP合同签署时已经敲定，且有关协议格式将作为PPP合同的附件。贷款方通常要求签署直接协议作为提取优先级融资文件项下贷款的先决条件。从缔约政府部门的角度来看，最理想的选择是在招投标阶段、在竞争压力下事先就直接协议格式协商一致，而无需在PPP合同授标后引入或重新谈判。

6.2.3 *Scope of Direct Agreement/governing law* 直接协议范围/管辖法律

The Contracting Authority should recognize that the Direct Agreement may be used as a vehicle for the Lenders to alter, clarify or add provisions which go beyond step-in arrangements. While it may in limited circumstances be helpful to include other provisions, the Contracting Authority should beware that this does not undermine the underlying risk transfer position agreed in the PPP Contract unless this is specifically agreed. 缔约政府部门应认识到，贷款方可能利用直接协议作为修改、阐释或增加超出介入权安排以外条款的工具。虽然在少数情况下增加其他条款可能有所帮助，但缔约政府部门应注意，这样做的前提是不得破坏PPP合同约定的潜在风险转移内容，除非另有明确约定。

Given that the operation of the Direct Agreement can affect the Private Partner's rights and obligations under the PPP Contract as well as the Contracting Authority's, it is recommended that the Private Partner should also be party to the Direct Agreement to acknowledge and consent to its terms. It is also advisable for the

governing law of the Direct Agreement and the PPP Contract to be consistent. 鉴于使用直接协议可能影响私营合作伙伴以及缔约政府部门在PPP合同项下的权利义务，建议私营合作伙伴亦应以直接协议当事人身份对直接协议条款表示确认及同意。另外，也建议直接协议与PPP合同在选用管辖法律时最好保持一致。

6.2.4 *Main issues* 主要问题

Timing and duration of step-in - When the Contracting Authority serves a termination notice on the Private Partner it typically agrees to serve the same on the Lenders who then have a certain period to decide whether or not to step in. Lenders will also request this right when they have called a default under their financing agreements and accelerated their debt (in this circumstance the Private Partner will have to be replaced if the PPP Contract is to continue). The step-in period is usually agreed to be a reasonable length of time for the Lenders to try to rectify the problem or find a new Private Partner and will end when the agreed step-in period expires, the Lenders formally step out, a new Private Partner is appointed or termination occurs due to new default events. The Contracting Authority and its advisers should ensure that the time periods under the relevant agreements are correctly aligned so that the whole process can work effectively. 介入的时机和持续时间——当缔约政府部门向私营合作伙伴送达终止通知时，通常应同时向贷款方送达，贷款方可在一定期限内决定是否介入。贷款方亦可在其认为已发生融资协议项下违约行为并使债务加速到期时要求行使此项权利（在此情况下，如要继续履行PPP合同，则私营合作伙伴必须被取代）。介入期通常应约定为一段合理的时间，以便贷款方能够尝试纠正问题或寻找新的私营合作伙伴，当约定介入期届满、贷款方正式撤出、新的私营合作伙伴被指定或合同因新的违约事件而发生终止时，介入期结束。缔约政府部门及其顾问应确保各相关协议项下的期限应相互正确衔接，以便整个过程运作畅顺。

Assumption of liabilities - The Contracting Authority should consider the extent to which it will require the Lenders to assume any liabilities which the Private Partner has already incurred or will incur in return for their step-in right. 债务承担——缔约政府部门应考虑贷款方为获得介入权而应在什么范围内承担私营合作伙伴已产生或将可能产生的任何责任。

It is generally accepted market practice that Lenders are required to pay any known liabilities outstanding at step-in, but the position as regards ongoing liabilities can vary. Where Lenders are required to agree to meet future liabilities in order to step in, they will want a capped amount so that they can quantify their exposure. This approach is seen in some jurisdictions (particularly in earlier PPP Projects in the UK) but there has been some movement away from this requirement in recent years (e.g. because the termination amount may in any event take account of liabilities owed to the Contracting Authority and if, conversely, the PPP Contract is not terminated, such liabilities will still be payable). One approach is that the Contracting Authority can notify the Lenders of subsequent liabilities and if the Lenders choose not to meet them then the Contracting Authority can proceed to terminate the PPP Contract (and the liabilities will again be taken into account in the termination payment). 一种普遍接受的市场惯例是，贷款方应承担介入时已知的任何未偿还债务，但关于正发生的债务的处理则可能有所不同。如果要求贷款方同意清偿未来负债以换取介入权，贷款方会希望约定一个上限金额，以便能够量化风险。这种

方法见于某些法域（尤其是英国早期的PPP项目），但近年来已逐渐比较少提这一要求（例如因为解约金在任何情况下均可将欠缔约政府部门的债务考虑在内，相反，如果PPP合同没有被终止的话，该等债务仍应支付）。一种方法是，缔约政府部门可就后续债务通知贷款方，如果贷款方选择不予清偿，则缔约政府部门接下来可终止PPP合同（且同样地，有关债务可被计入解约金）。

Rectification rights - It is in the Contracting Authority's interests for breaches to be rectified but it also needs to protect itself against failures to remedy and new breaches by ensuring it still has a right to terminate in respect of these new failures that arise during the step-in period. 纠正权——使违约得到纠正，这符合缔约政府部门的利益，但缔约政府部门同时有必要保护自己在未能补救及发生新违约时的权利，确保在介入期内倘若发生新违约时其依然享有终止权。

Other protections - The Contracting Authority may want to try to include certain provisions which restrict the Lenders' exercise of certain rights under the financing documents (e.g. in relation to set off) and to regulate priority of security enforcement between the Contracting Authority and the Lenders (this is the case for example, in Australia). 其他保护——缔约政府部门可能希望尝试加入某些限制贷款方行使融资文件项下特定权利（例如抵销权）的条款，并就缔约政府部门与贷款方之间担保执行的优先次序作出规定（例如澳大利亚案例）。

6.3 SUMMARY OF MAIN PROVISIONS 主要条款汇总

A Direct Agreement should typically include the following main provisions (or their equivalent under the laws of the relevant jurisdiction): 直接协议通常应包括以下主要条款（或符合相关法域区法律的等同表述）：

- mutual obligations on the parties to notify each other, respectively, of (a) a Private Partner default under the PPP Contract which could allow the Contracting Authority to terminate the PPP Contract and (b) key events under the senior finance documents which could impact the Contracting Authority (e.g. such as an event of default or acceleration of debt); 双方负有分别就以下事件相互通知对方的共同义务：（a）私营合作伙伴发生PPP合同违约，可能导致缔约政府部门终止PPP合同的；及（b）发生优先级融资文件项下的重大事件，可能对缔约政府部门产生影响的（例如违约事件或债务加速到期）；
- a standstill period, pursuant to which the Contracting Authority will undertake to notify the Lenders of its intention to terminate the PPP Contract, and will commit not to terminate the PPP Contract for a given period of time (nor to terminate any related agreements); 停顿期，据此缔约政府部门承诺将其终止PPP合同的意向通知贷款方，并承诺不在给定期限内终止PPP合同（亦不终止任何有关协议）；
- appointment of the Lenders' nominee to "step in" and become jointly liable with the Private Partner to perform the PPP Contract and cure any breaches which gave rise to the Contracting Authority's right to terminate (and to "step out"); 指定贷款方代表“介入”并与私营合作伙伴承担连带责任，共同履行PPP合同并纠正导致缔约政府部门有权终止合同的任何违约行为（并“撤出”）；

- consent to the assignment of the PPP Contract and related receivables to the Lenders, as well as consent to assignments to insurers and guarantors upon payment of claims; and同意将PPP合同及有关应收款转让给贷款方，并同意在保险人及担保人代偿债务的前提下转让给保险人及担保人；及
- Lenders' right to novate the Private Partner's rights and obligations under the PPP Contract to a substitute private partner of their choice (subject to the consent of the Contracting Authority and/or to any reasonable and objective criteria) and the Contracting Authority's obligation to enter into a new direct agreement with the Lenders to the new Private Partner on substantially equivalent terms. 贷款方有权将私营合作伙伴在PPP合同项下的权利义务转由贷款方选择（须经缔约政府部门同意及/或符合任何合理的客观标准）的替任私营合作伙伴概括承担，且缔约政府部门有义务按实质等同条款与贷款方针对新的私营合作伙伴签署新的直接协议。

6.4 SAMPLE DRAFTING 起草范本

As indicated above, the terms of the Direct Agreement are normally not outlined in the PPP Contract (although the agreed form may be appended to the PPP Contract) which is why this Guidance does not include proposed drafting.⁴⁹ 如上所述，直接协议条款通常不出现在PPP合同中（但协议格式可随附PPP合同提供），故本《指南》不提供建议起草范本⁴⁹。

49 For further information and sample drafting from a more established PPP market, please see the South Africa PPP Guidelines and the UK PF2 Guidance. 欲了解更成熟PPP市场的更多信息及起草范本，请参见南非PPP指引和英国PF2指南。

7

CONFIDENTIALITY AND TRANSPARENCY 保密性与透明度



7.1 KEY ASPECTS 关键方面

7.1.1 *The concepts of confidentiality and transparency* 保密性与透明度的概念

Most commercial contracts contain provisions by which the parties agree to protect the confidentiality of the contract terms as well as each other's commercially sensitive information (such as pricing and intellectual property) received in connection with the contract. When one of the parties is a public sector entity the interest of the parties in keeping certain information confidential needs to be weighed against the necessity for transparency and disclosure. While both private and public sector parties may want to keep certain information confidential the promotion of transparency and disclosure has increasingly been acknowledged by international⁵⁰ and national law and become a key consideration for governments, non-governmental organizations and international organizations in their activities. The underlying objectives can be multiple, including reducing the level of corruption (as well as complaints of corruption, secrecy or unfairness in procurement processes), reassuring the general public in regard to probity, service standards and costs of public contracts, encouraging competition and facilitating a better informed market. 大部分商业合同规定双方须对合同条款以及因合同获悉的对方商业敏感信息（例如定价及知识产权）进行保密。当其中一方属于公共部门实体时，双方对某些信息的保密利益则需要针对透明度和信息披露的必要性加以权衡。虽然私营及公共部门的当事人均希望对某些信息保密，但促进透明度和披露已日渐得到国际⁵⁰及国内法律认可，并成为政府、非政府组织及国际组织开展活动的主要考虑因素之一。其背后目的可以是多种多样的，包括降低腐败程度（以及采购过程中的腐败投诉、私相授受或不公平），确保公众对公共合同廉洁情况、服务标准及成本放心，鼓励竞争以及建立健全充分知情的市场。

7.1.2 *Why do PPP Contracts contain confidentiality and transparency provisions?* 为何PPP合同设有保密和透明度条款？

Transparency and disclosure is a high priority for PPP Projects as the Contracting Authority is a public sector entity or agency. It has become increasingly common for Contracting Authorities⁵¹ to require a presumption in favor of transparency and disclosure in PPP Contracts to ensure that information on PPP Projects, PPP Contracts and related documents can be shared by them, to the fullest extent possible, with the public at large. Multiple factors have influenced this development. The main drivers in the PPP context are to reduce the risk of corruption, increase private sector involvement in infrastructure investment, increase public confidence and awareness and achieve value for money. As with any infrastructure project, PPP Projects may also involve social and environmental, public interest and human

50 The right to freedom of information is e.g. enshrined in Article 19 of the International Covenant on Civil and Political Rights as interpreted in paras 18 – 19 of the General Comment no. 34 of the Human Rights Committee, CCPR/C/GC/34 of Sept. 12, 2011. 自由知情权被写入《公民权利和政治权利国际公约》第19条，经2011年9月12日联合国人权事务委员会一般性意见第34号（CCPR/C/GC/34）第18段至第19段解释。

51 See A Framework for Disclosure in Public-Private Partnerships, World Bank 2016. See link in Appendix, Additional PPP Resources. 参见《公私合作伙伴关系披露框架》，世界银行，2016年。参见附录《更多PPP资源》中的链接。

rights considerations, and these are additional factors in favour of enhanced transparency and disclosure. PPP项目应高度优先考虑透明度和信息披露，因为缔约政府部门属于公共部门实体或机构。缔约政府部门⁵¹要求PPP合同有利于透明度和披露的想法变得越来越普遍，目的是确保关于PPP项目、PPP合同及相关文件的信息能够在可能的最大限度内与广大公众分享。有多项因素影响了这方面的发展。PPP环境下的主要驱动因素是降低腐败风险，促进私营部门参与基础设施投资，提升公众信心和意识，以及实现物有所值。正如任何基础设施项目一样，PPP项目亦可能涉及社会和环境、公众利益和人权方面的考虑，而这些正是支持增加透明度和披露的额外因素。

Given commercial sensitivities as well as public interest-related limitations, however, transparency and disclosure obligations in a PPP Contract are typically subject to a number of exceptions in order to protect commercially or otherwise sensitive information relating to the Parties, the PPP Contract and the PPP Project. In most cases it is the Private Partner who has the most information to protect as it will not want its competitors to gain access to information which could give them a commercial advantage. However, the Contracting Authority may also wish to keep certain information confidential, for example if the PPP Contract is in the defense sector. In some highly sensitive projects, the Contracting Authority may require the Private Partner and other parties and individuals directly involved in delivering the service to sign a written undertaking to be bound by national security legislation. In some jurisdictions (e.g. in the EU), there are also data protection obligations which apply to the Parties and which are likely to be addressed in a specific clause.然而，鉴于商业敏感性以及公共利益相关限制，PPP合同的透明度和披露义务通常受制于一些例外，以便保护与当事人、PPP合同及PPP项目有关的商业或其他敏感信息。在大部分情况下，私营合作伙伴需要保护的信息最多，因为它不希望竞争对手获得这些可能给其带来商业优势的信息。然而，缔约政府部门亦可能希望对某些信息保密，例如，当PPP项目发生在国防领域时。在一些高度敏感项目中，缔约政府部门可能要求私营合作伙伴及其他直接参与交付服务的当事人及个人签署同意接受国家安全法约束的书面承诺。在一些司法管辖区（例如欧盟），对当事人加诸了数据保护相关的义务，且该等义务可能体现于具体条款。

EMERGING AND DEVELOPED MARKET DIFFERENCES

新兴市场与发达市场之差异

While the maturity of a jurisdiction's PPP market may be a factor in the level of transparency and disclosure sought under PPP Contracts, the World Bank's Framework for Disclosure in Public-Private Partnerships 2016 ("WB Disclosure Framework 2016") also suggests that practice relating to PPP disclosure may have developed more rapidly in emerging markets, perhaps due to the pressing need for new infrastructure. An additional relevant factor to such development may be if the PPP Contract has to satisfy the disclosure policy requirements of other relevant bodies (such as multilateral agencies) in order for those bodies to support the PPP Project.

虽然一个司法管辖区的PPP市场成熟程度可能是PPP合同透明度和披露水平的一项影响因素，但《2016年世界银行公私合作伙伴关系信息披露框架》（“《2016年世行信息披露框架》”）亦表明，与PPP信息披露有关的实践在新兴市场可能发展更快，这可能是由于对新增基础设施的迫切需求所致。影响发展的另一项相关因素是，PPP合同是否需要满足其他相关机构（例如多边机构）的信息披露政策要求以获得该等机构对PPP项目的支持。

7.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

7.2.1 *Duty of disclosure* 披露义务

For public policy reasons, many jurisdictions have policies, laws or regulations imposing disclosure obligations on Contracting Authorities and/or ensuring the public have access to public procurement information. Mandated proactive disclosure can either be incorporated into the country's freedom of information (FOI) legislation⁵², PPP policies, laws and regulations⁵³, procurement legislation, public financial management (PFM) legislation⁵⁴, sector-specific legislation as well as legislation relating to budget transparency. Some jurisdictions have even developed standard clauses related to transparency and confidentiality in PPP Contracts.⁵⁵ A comprehensive overview of existing frameworks, good practice cases and jurisdictional studies is given by the WB Disclosure Framework 2016 and the

52 For example, Chile's Access to Public Information Law (2008), India/Karnataka's Right to Information Act (2005) and New South Wales' Government Information (Public Access) Act (2009). 例如，智利的《获取公共信息法》（2008年）、印度/卡纳塔克邦的《知情权法》（2005年）和新南威尔士的《政府信息（公众知情权）法》（2009年）。

53 For example, Kenya's PPP Act (2013); Brazil, Minas Gerais PPP Law (2003), India Draft PPP Policy (2012), UKPF2: for details and further information see Table 3 PPP Legislation and Transparency Elements in: WB Disclosure Framework 2016. [See link in Appendix, Additional PPP Resources](#). 例如，肯尼亚的《PPP法》（2013年）；巴西米纳斯吉拉斯州《PPP法》2003年）、印度《PPP政策草案》（2012年）、英国UKPF2：更多详情及进一步信息，请参见《2016年世行披露框架》表3“PPP立法及透明度要素”。[参见附录《更多PPP资源》中的链接。](#)

54 For details see Table 3 PPP Legislation and Transparency Elements in: WB Disclosure Framework 2016. [See link in Appendix, Additional PPP Resources](#). 更多详情，请参见《2016年世行披露框架》表3“PPP立法及透明度要素”。[参见附录《更多PPP资源》中的链接。](#)

55 Examples with short summaries are provided in Table 11 of the WB Disclosure Framework 2016. [See link in Appendix, Additional PPP Resources](#). 示例和简短摘要请参见《2016年世行披露框架》表11。[参见附录《更多PPP资源》中的链接。](#)

companion jurisdictional and case study volumes⁵⁶. Clauses dealing with transparency, disclosure and confidentiality should always be drafted following an analysis of the legal and policy framework, and it is for the Contracting Authority to decide whether contractual obligations should go beyond what is legally required. It is usual to include specific reference to any such laws and regulations.出于公共政策原因,许多司法管辖区设有要求缔约政府部门履行披露义务及/或确保公众能够获得公共采购信息的政策、法律或法规。强制主动披露可纳入国家的信息自由(FOI)法⁵²、PPP政策和法律法规⁵³、采购法、公共财政管理(PFM)法⁵⁴、行业特定立法以及与预算透明度有关的立法。一些司法管辖区甚至制定了与PPP合同透明度和保密有关的标准条款⁵⁵。关于现有框架、良好实践案例和司法研究的综合概述,请参见《2016年世行披露框架》及相关司法和案例研究卷⁵⁶。起草涉及透明度、信息披露和保密的条款前,始终应先进行法律和政策框架分析,并由缔约政府部门决定应在法定义务之上设定更严格的合同义务。通常的做法是在合同中加入对任何该等此类法律法规的具体引述。

As mentioned above, there may also be international financial institutions and multilateral agencies supporting the PPP Project which, as a condition of their support, require Contracting Authorities to comply with their own policies on transparency. The information required to be disclosed under such policies does not, however, usually include disclosure of commercially sensitive or proprietary information.如前所述,PPP项目还可能有国际金融机构和多边机构的支持,而作为支持的条件之一,就是要求缔约政府部门遵守这些机构自己制定的透明度政策。然而,该等政策要求披露的信息通常不包括商业敏感信息或专有信息。

7.2.2 *Scope of the transparency and disclosure undertaking* 透明度及披露承诺范围

A disclosure and transparency provision typically deals with how all announcements relating to the PPP Contract and the PPP Project are to be managed. The Contracting Authority will want to control how all information relating to the PPP Project is publicly communicated and will require prior approval of any media announcements and communications. See Section 7.3, Sample Drafting 7, Clauses (1) and (2).信息披露及透明度条款通常涉及如何管理关于PPP合同和PPP项目的所有公告。缔约政府部门希望对关于PPP项目的所有信息如何公开进行控制,并要求任何媒体公告及通讯均须经过事先批准。请参见第7.3节草案范本7第(1)条及第(2)条。

Some jurisdictions (for example, Belgium) may not address public communications in the way outlined in Section 7.3, Sample Drafting 7 and may simply treat the information as confidential and require the Contracting Authority's prior consent to press releases and other public announcements by the Private Partner.一些司法管辖区(例如比利时)未必按第7.3节草案范本7所述的方式处理公共通讯事宜,而是直接将有关信息视为保密信息,并要求私营合作伙伴必须取得缔约政府部门事先同意后,方可发布任何新闻稿及其他公告。

56 Disclosure in Public-Private Partnerships: Jurisdictional Studies, World Bank 2016 and Disclosure in Public-Private Partnerships: Good Practice Cases, World Bank 2016. [See link in Appendix, Additional PPP Resources](#).世界银行2016年《公私合作伙伴关系中的披露:司法研究》以及世界银行2016年《公私合作伙伴关系中的披露:良好实践案例》。参见附录《更多PPP资源》中的链接。

In jurisdictions with disclosure frameworks it has also become best practice to require the posting of important project and contract information in the public domain. The Contracting Authority may therefore also want to ensure that it has the right under the PPP Contract to make public the terms of the PPP Contract as well as related information (subject to applicable confidentiality restrictions) by its preferred means. This may include publishing on the internet. The level of information available for it to disclose regarding the progress of the PPP Project will be dependent upon the Private Partner's compliance with reporting provisions elsewhere in the PPP Contract which oblige the Private Partner to disclose certain information (such as performance data) to the Contracting Authority. See Section 7.3, Sample Drafting 7, Clauses (3)-(5). 在设有信息披露框架的司法管辖区，在公共领域公开发布重要项目和合同信息已成为最佳做法。因此，缔约政府部门亦希望确保其在PPP合同项下有权以其选择的方式公开PPP合同条款及相关信息（受限于适用的保密限制）。公开可包括在互联网上发布。有关PPP项目进展信息的可披露程度取决于私营合作伙伴遵守PPP合同中其他报告条款的情况，这些报告条款规定私营合作伙伴有义务向缔约政府部门披露某些信息（例如绩效数据）。请参见第7.3节草案范本7第（3）条-第（5）条。

While some Contracting Authorities may not specifically be required to publish the PPP Contract by legislation, in both common and civil law jurisdictions the public are increasingly using FOI legislation to gain insight into the terms of PPP Contracts. Specific provision can be made in the PPP Contract in this regard although some Contracting Authorities use less extensive clauses than Section 7.3, Sample Drafting 7, and, for example, may rely on the carve out under Section 7.3, Sample Drafting 7, Clause (9)(d) so far as it relates to responding to requests under freedom of information legislation and other statutory disclosure obligations. 虽然一些缔约政府部门未必被法律明确要求发布PPP合同信息，但无论是英美法系还是大陆法系的司法管辖区，越来越多公众借助信息自由法来查阅PPP合同条款。在PPP合同中可约定这方面的具体条款，但一些缔约政府部门采用了比第7.3节草案范本7约定简略的条款，例如，在回应依照信息自由法及其他法定披露义务提出的请求方面，依赖第7.3节草案范本7第（9）（d）条的除外条款。

7.2.3 *Scope of the confidentiality undertaking* 保密承诺范围

The need for transparency and disclosure should be balanced against the legitimate interests of the Private Partner and the Contracting Authority in keeping certain information related to a PPP Project confidential. 在追求透明度和信息披露的同时，应注意平衡私营合作伙伴及缔约政府部门对PPP项目特定信息进行保密的合法利益。

In the context of a PPP Project, confidential information is typically information the disclosure of which would be likely to prejudice a party's commercial interests. This will include information contained in the PPP Contract terms or supporting documents, such as trade secrets, commercially sensitive intellectual property rights and know-how and personal data. Key financial information, such as pricing elements and methodology and the Private Partner's financial model, including details of the costs of financing through debt and equity and other aspects, are also typically treated as confidential information. See Section 7.3, Sample Drafting 7,

Clause (6). From the Contracting Authority's perspective, confidential information will include information which it is not in the public or national interest to disclose (e.g. defense, national security and custodial matters). 在PPP项目环境下，保密信息通常是那些一旦披露则可能损害一方商业利益的信息。这包括PPP合同条款或配套文件所含的信息，例如商业秘密、商业敏感知识产权和技术诀窍、个人数据等。主要财务信息，例如定价要素和方法，以及私营合作伙伴的财务模型，包括债权和股权融资成本及其他方面详情，通常亦被视为保密信息。请参见第7.3节草案范本7第(6)条。从缔约政府部门的角度来看，保密信息包括假如披露则不符合公众或国家利益的信息（例如国防、国家安全及羁押事务）。

Confidential information in the context of a PPP Project should be the exception rather than the rule and should be justified by reference to principles of confidentiality in applicable underlying transparency and disclosure policies and legislation. Concerns relating to particular information should be addressed specifically in the drafting. Any disclosure of such information should be clearly justified and made in accordance with the terms of the confidentiality provisions in the PPP Contract. Certain categories of information are typically excluded from confidentiality undertakings, such as information already in the public domain or received legitimately from another source. Confidentiality undertakings also do not usually apply where a Party is obliged to disclose information, for example as part of a legal, regulatory or judicial process. 在PPP项目环境下，保密信息应是例外，而不应是常态，且应引述适用透明度及信息披露政策法律规定的保密原则以证明其合理性。与特定信息有关的事项，应通过起草特定条款作出规定。对该等信息的任何披露，均应明确说明其合理性并根据PPP合同保密条款的规定作出。某些类别的信息通常被排除在保密承诺范围外，例如已存在于公共领域的信息，或从其他来源合法获得的信息。保密承诺通常亦不适用于一方依照法律、监管或司法程序要求有义务披露信息的情况。

7.2.4 Approach方法

Section 7.3, Sample Drafting 7, which is based on the UK PF2 Guidance model, can be viewed as representing a good balance between protecting the Private Partner's commercially sensitive information and complying with the Contracting Authority's legal obligations (and policy aspirations) as regards greater public transparency. A similar approach is followed in the Infra Australia PPP Guidelines and the South Africa PPP Guidelines. 第7.3节草案范本7以英国PF2指南模式为基础，可被视为保护私营合作伙伴商业敏感信息与遵守缔约政府部门实现更大公众透明度的法定义务（及政策诉求）之间取得良好平衡的代表。澳大利亚PPP指引和南非PPP指引均采用了类似方法。

EMERGING AND DEVELOPED MARKET DIFFERENCES

新兴市场与发达市场之差异

While the approach to drafting taken in this Guidance is representative of an established market, it would also be appropriate for emerging market PPP Contracts, particularly in jurisdictions where governments may wish to implement transparency measures during the life of the PPP Contract (or have already done so). The terms will also be familiar to international private sector parties.

虽然本《指南》采纳的起草方法是成熟市场的典型代表，但它亦适合新兴市场的PPP合同，尤其是那些希望在PPP合同期限内落实透明度措施（或已经如此做）的相关司法管辖区政府。这些条款亦为国际私营部门参与方所熟悉。

7.3 SAMPLE DRAFTING 7 草案范本7

Public Relations and Publicity 公共关系及宣传

- (1) The Private Partner shall not by its directors, officers, employees or agents, and shall procure that its sub-contractors shall not, communicate with representatives of the press, television, radio or other communications media on any matter concerning the PPP Contract without the prior written approval of the Contracting Authority. 未经缔约政府部门事先书面批准, 私营合作伙伴不得通过其董事、高级管理人员、员工或代理人, 且应促使其分包商不得与报刊、电视、广播或其他通讯媒体代表沟通有关PPP合同的任何事宜。
- (2) The Private Partner may not represent the views of the Contracting Authority on any matter, or use the name of the Contracting Authority in any written material provided to third parties, without the prior written consent of the Contracting Authority.

未经缔约政府部门事先书面同意, 私营合作伙伴不得在任何事宜上代表缔约政府的观点, 不得在提供给第三方的任何书面材料中使用缔约政府部门的名称。

Publication of the PPP Contract in the public domain 在公共领域中发布PPP合同

- (3) The Parties agree that the provisions of this PPP Contract [and insert any other relevant documents defined as the Project Agreements] shall, subject to Clause (7) below, not be treated as Confidential Information and may be disclosed without restriction and the Private Partner acknowledges that the Contracting Authority, subject to Clause (7) below, is entitled to: 双方同意, 受限于下文第(7)条的规定, 本PPP合同[及填入任何其他被定义为项目协议的相关文件]不应被视为保密信息, 可以不受限制地进行披露, 且私营合作伙伴可在符合下文第(7)条规定的情况下缔约政府部门有权:
 - (a) publish this PPP Contract [and some of the Project Agreements] on a website; and 在网站上发布本PPP合同[及部分项目协议]; 及
 - (b) publish (on the internet or otherwise) a summary of the PPP Contract [and the Project Agreements and any associated transaction document] which shall include (i) the terms and conditions of the PPP Contract [and the Project Agreements and any associated transaction document] and (ii) any document or information arising out of or connected to the PPP Contract [and the Project Agreements and any associated transaction document], including performance of the PPP Contract [and the Project Agreements and any associated transaction document]. (在互联网上或其他地方) 发布PPP合同[及项目协议及任何相关交易文件]的摘要, 内容包括 (i) PPP合同[及项目协议及任何相关交易文件]的条款及条件, 及 (ii) 因PPP合同[及项目协议及任何相关交易文件]而产生的或与之有关的任何文件或信息, 包括

See Section 7.2.2 regarding the effectiveness of limb (ii). 关于第(ii)小点的有效性, 请参见第7.2.2节。

PPP合同[及项目协议及任何相关交易文件]的履行情况。

- (4) The Parties agree that Base Case Equity IRR information shall not be treated as Confidential Information and the Private Partner acknowledges that the Contracting Authority intends to publish such information on a website. 双方同意基础情形股权内部收益率信息不应被视为保密信息，且私营合作伙伴确认缔约政府部门有意在网站上发布该等信息。
- (5) The Parties agree that information in respect of any direct or indirect change in ownership which has actually taken place shall not be treated as Confidential Information. 双方同意关于已实际发生的任何直接或间接所有权变动的信息不应被视为保密信息。

Confidentiality 保密

- (6) For purposes of this PPP Contract, Confidential Information means: 就本PPP合同目的而言，保密信息是指：
 - (a) information (however it is conveyed or on whatever media it is stored) the disclosure of which would, or would be likely to, prejudice the commercial interests of any person, trade secrets, commercially sensitive intellectual property rights and know-how of either Party, including all personal data and sensitive personal data; and 一旦披露将损害或有可能损害任何人士商业利益的信息（无论以何种方式传达或以何种介质保存），任何一方的商业秘密、商业敏感知识产权及技术诀窍，包括所有个人数据及敏感个人数据；及
 - (b) the sub-set of Confidential Information listed in Column 1 of Part I - Commercially Sensitive Contractual Provisions and Column 1 of Part II - Commercially Sensitive Material of Schedule [insert reference to the Commercially Sensitive Information Schedule] in each case for the period specified in Column 2 of Parts I and II of such Schedule ("Commercially Sensitive Information"). 附表[引述商业敏感信息附表]第一部分第1列-“商业敏感合同条款”及第二部分第1列-“商业敏感资料”所列的那部分保密信息，分别在该附表第一及第二部分第2列规定的期限内（“商业敏感信息”）。
- (7) Clause (3) above shall not apply to Confidential Information which shall, subject to Clause (9) below, be kept confidential for the periods specified in Schedule [insert reference to the Commercially Sensitive Information Schedule]. 在符合下文第（9）条规定的前提下，上文第（3）条规定不适用于附表[引述商业敏感信息附表]规定期限内应予保密的保密信息。
- (8) The Parties shall keep confidential all Confidential Information received by one Party from the other Party relating to this PPP Contract [and any Project Agreements] or the PPP Project and shall use all reasonable endeavors to prevent their employees and agents from making any disclosure to any person of any such Confidential Information. 双方均应对其从对方处接收的与

本PPP合同[及任何项目协议]或PPP项目有关的所有保密信息予以保密,并尽一切合理努力防止其员工及代理人对任何人士披露任何该等保密信息。

- (9) Clauses (7) and (8) above shall not apply to:上文第(7)条及第(8)条不适用于以下情况:
- (a) any disclosure of information that is reasonably required by any person engaged in the performance of their obligations under the PPP Contract for the performance of those obligations;参与履行PPP合同项下义务的任何人士为履行该义务而作出的任何确有必要的信息披露;
 - (b) any matter which a Party can demonstrate is already, or becomes, generally available and in the public domain otherwise than as a result of a breach of this Clause [Confidentiality];一方能够证明在没有违反本条款[保密]规定的情况下已经属于或成为公众所知及存在于公共领域的任何事项;
 - (c) any disclosure to enable a determination to be made under Clause [insert reference to Dispute Resolution clause] or in connection with a dispute between the Private Partner and any of its sub-contractors;为能对根据条款[引述争议解决条款]或针对私营合作伙伴与其任何分包商之间的争议作出决定而进行的任何披露;
 - (d) any disclosure which is required pursuant to [insert reference to legislation containing public disclosure obligations] as well as any other statutory, legal (including any order of a court of competent jurisdiction) or Parliamentary obligation placed upon the party making the disclosure or the rules of any stock exchange or governmental or regulatory authority concerned;根据[引述含有公开披露义务的法条], 及根据披露方负有的任何其他法定的、司法的(包括任何有管辖权法院的命令)或议会制度的义务, 或根据任何相关证券交易所、政府部门或监管机构的规则而必须作出的任何披露;
 - (e) any disclosure of information which is already lawfully in the possession of the receiving Party, prior to its disclosure by the disclosing Party;所披露的信息在披露方披露前已由接收方合法持有;
 - (f) any provision of information to:向以下对象提供信息:
 - (i) the Parties' own professional advisers or insurance advisers; and/or双方各自的专业顾问或保险顾问; 及/或
 - (ii) the Lenders or the Lenders' professional advisers or insurance advisers or, where it is proposed that a person should or may provide funds (whether directly or indirectly and whether by loan, equity participation or otherwise) to the Private Partner to enable it to carry out its obligations under the PPP Contract, or may wish to

Consideration should also be given to having a general provision for the disclosure of information that is 'required in the public interest'. See also Clause (9)(j)(ii). 还应考虑针对“符合公众利益所需的信息披露作出一般规定。请参见第(9)(j)(ii)条。”

acquire shares in the Private Partner in accordance with the provisions of this PPP Contract to that person or their respective professional advisers but only to the extent reasonably necessary to enable a decision to be taken on the proposal; and/or 贷款方或贷款方的专业顾问或保险顾问，或如果某一人士已经动议应当或可以向私营合作伙伴提供资金（无论是直接还是间接，无论是通过贷款、参股或其他方式）以使其能够履行其在PPP合同项下的义务，或可能希望依照本PPP合同条款取得私营合作伙伴的股份，则将信息提供给该等人士或其各自专业顾问，但信息提供应以帮助其就该项动议作出决定而确有必要为限；及/或

- (iii) international or bilateral financial institutions involved in the PPP Project as Lenders, political risk insurers or guarantors. 作为贷款方、政治风险承保人或担保人参与PPP项目的国际或双边金融机构。
- (i) any rating agency which may be engaged to provide a rating or rating assessment in relation to any Senior Debt. 受聘对任何高级债务提供评级或评级评估的任何评级机构。
- (g) any disclosure by the Contracting Authority of information relating to the design, construction, operation and maintenance of the PPP Project and such other information as may be reasonably required for the purpose of conducting a due diligence exercise, to any proposed new private partner, its advisers and Lenders, should the Contracting Authority decide to retender the PPP Contract or undertake any market testing; 如果缔约政府部门决定对PPP合同重新招标或进行任何市场测试，缔约政府部门可向任何拟议的新私营合作伙伴、其顾问或贷款方披露与PPP项目设计、施工、运营及维护有关的信息或为开展尽职审查工作而合理所需的其他信息；
- (h) any registration or recording of the required permits and property registration required; 所需许可的任何登记或记录，及所需财产登记；
- (i) any disclosure of information by the Contracting Authority to any other relevant authority or their respective advisers or to any person engaged in providing services to the Contracting Authority for any purpose related to or ancillary to the PPP Contract; or 为实现与PPP合同有关的或附带的任何目的，缔约政府部门向任何其他有关政府部门、其各自顾问或参与为缔约政府部门提供服务的任何人士披露信息；或
- (j) any disclosure for the purpose of: 为以下目的而作出的任何披露：
 - (i) the examination and certification of the Contracting Authority's or the Private Partner's accounts; 检查及核实缔约政府部门或私营合作伙伴的账目；

- (ii) any examination pursuant to [insert reference to any auditing obligations for public contracts] of the economy, efficiency and effectiveness with which the Contracting Authority has used its resources;根据[引述适用于公共合同的任何审计义务]检查缔约政府部门使用资源的经济性、效率及效能;
- (iii) complying with a proper request from either Party's insurance adviser, or insurer on placing or renewing any insurance policies; or回应任何一方的保险顾问或保险人就办理任何保单或续保事宜而提出的适当请求; 或
- (iv) (without prejudice to the generality of Clause (d) above) compliance with [insert reference to any laws requiring disclosure (e.g. environmental laws)]. (在不影响上文第(d)条规定普适性的前提下)遵守[引述有披露要求的任何法律(例如环境法律)]

Many jurisdictions require audit reports to be prepared in respect of transactions to which a Contracting Authority is a party. Where applicable, this provision should also address the issue of public disclosure of these audit reports. See also Clause (9)(d). 许多司法管辖区要求对缔约政府部门身为一方当事人的交易编制审计报告。在适用情况下, 此项规定亦应解决该等审计报告的公开披露问题。请参见第(9)(d)条。

- (10) When disclosure is permitted under Clause (9) above, other than Clauses (9)(b), (d), (e), (h) and (j), the Party providing the information shall ensure that the recipient of the information shall be subject to the same obligation of confidentiality as that contained in this PPP Contract. [The Private Partner shall expressly inform any person to whom it discloses any information under this Clause [Confidentiality] of the confidentiality restrictions set out in this Clause [Confidentiality] and shall procure its compliance with the terms of this Clause [Confidentiality] as if it were party to this PPP Contract and the Private Partner shall be responsible for any breach by any such person of the provisions of this Clause [Confidentiality].]根据上文第(9)条规定允许披露时, 除第(9)(b)、(d)、(e)、(h)及(j)条外, 提供信息的一方应确保信息接收人受到本PPP合同所含保密义务的同等约束。[私营合作伙伴应将本[保密]条款规定的保密限制明确告知作为其在本[保密]条款项下任何信息披露对象的任何人士, 并确保其遵守本[保密]条款规定, 犹如该人士是本PPP合同的一方当事人, 且私营合作伙伴应就该人士违反本[保密]条款规定的任何行为承担责任。]
- (11) Where the Private Partner, in carrying out its obligations under the PPP Contract, is provided with information relating to [end users], the Private Partner shall not disclose or make use of any such information otherwise than for the purpose for which it was provided, unless the Private Partner has obtained the prior written consent of that [end user] and has obtained the prior written consent of the Contracting Authority.如果私营合作伙伴在履行PPP合同项下义务过程中获悉关于[最终用户]的信息, 私营合作伙伴不得为提供信息所为目的以外的目的而披露或使用任何该等信息, 除非私营合作伙伴已取得该[最终用户]事先书面同意并取得缔约政府部门事先书面同意。

- (12) On or before the expiry date, the Private Partner shall ensure that all documents or computer records in its possession, custody or control, which contain information relating to [end users] including any documents in the possession, custody or control of a sub-contractor, are delivered up to the Contracting Authority.在届满日或之前，私营合作伙伴应确保其持有、保管或控制的包含[最终用户]相关信息的所有文件或计算机记录，包括由分包商持有、保管或控制的任何文件，全部交还缔约政府部门。
- (13) The provisions of this Clause [Confidentiality] are without prejudice to the application of [insert any relevant law governing official secrets or national security information].本[保密]条款的规定不影响[引述任何关于官方机密或国家安全信息的法律]的适用。

SCHEDULE [•]
附表[•]

Commercially Sensitive Information
商业敏感信息

Part I - Commercially Sensitive Contractual Provisions
第一部分-商业敏感合同条款

COLUMN 1 第1列	COLUMN 2 第2列
Commercially Sensitive Contractual Provisions 商业敏感合同条款	For a period ending on date below 保密期至以下日期届满

Part II - Commercially Sensitive Material
第二部分-商业敏感资料

COLUMN 1 第1列	COLUMN 2 第2列
Commercially Sensitive Material 商业敏感资料	For a period ending on date below 保密期至以下日期届满

8

GOVERNING LAW AND DISPUTE RESOLUTION 管辖法律及争议解决

8.1 KEY ASPECTS 关键方面

8.1.1 Overview 概述

This Section 8 discusses the importance of governing law and dispute resolution considerations and provisions in PPP Contracts. As explained further below, the choice of governing law determines the substantive law that will be applied to determine the rights and obligations of the Parties under the PPP Contract. This includes resolution of disputes arising out of the PPP Contract. However, the choice of governing law does not determine the means by which any dispute will be resolved; for example, whether this is by a court of a particular country, or by arbitration. This must be specified in the dispute resolution clause in the PPP Contract. For example, the Parties might select English law as the governing law of the PPP contract, and international arbitration as the means of dispute resolution. This would mean that any dispute arising out of the PPP Contract would be resolved by an arbitral tribunal applying English law. 本第8节探讨PPP合同中管辖法律及争议解决考虑因素及条款的重要性。正如下文进一步详述，管辖法律的选择决定了用于确定PPP合同项下双方权利义务的实体法，它包括PPP合同争议的解决，但不能决定争议的解决方式；例如是通过特定国家法院还是通过仲裁解决。这些问题必须在PPP合同争议解决条款中具体规定。举例而言，双方可能选择英国法律作为PPP合同的管辖法律，并选择国际仲裁作为争议解决方式。这意味着，因PPP合同产生的任何争议将交由仲裁庭依照英国法律解决。

This Section 8 first explains the concepts of governing law and dispute resolution provisions and then explains some key considerations for Contracting Authorities, including how Parties might select a dispute resolution provision, and what the key elements of such a provision are. Particular guidance is given on important considerations where arbitration is selected as the dispute resolution mechanism. Finally, some guidance on alternative dispute resolution and the use of independent experts for technical disputes is provided. 本第8节首先解释管辖法律及争议解决条款的概念，其次介绍缔约政府部门的一些关键考虑因素，包括双方应如何选择争议解决条款，以及争议解决条款的关键要素。针对选择仲裁作为争议解决机制时的重要考虑因素给予了特别指导。最后，在替代争议解决方式及技术争议采用独立专家方面也提供了一些指导。

8.1.2 *The concept of a governing law provision* 管辖法律条款的概念

All PPP Contracts should contain an express choice of governing law. The system of law specified in the governing law provision governs most aspects of the PPP Contract, e.g. its interpretation and validity. The objective of a governing law clause is to achieve certainty (insofar as it is possible to do so) between contracting parties as to the nature and scope of their respective rights and obligations. If the governing law is not expressly chosen, a court will decide it, with consequent possible unpredictability. 所有PPP合同均应设有关于选择管辖法律的明确约定。管辖法律条款规定的法律体系管辖了PPP合同大部分方面的问题，例如合同解释及效力。管辖法律条款目的是为了在缔约方之间获得关于其各自权利义务性质及范围方面的确定性（在

可能的程度上)。如果合同双方未对管辖法律的选择作出明确约定，将由法院裁定，因而可能存在不可预测性。

The Contracting Authority typically wishes to choose the domestic law of its own jurisdiction as the governing law of the PPP Contract, but the Parties should be aware of the factors which typically influence choice of governing law, including: 缔约政府部门通常希望选择其所在司法管辖区的国内法作为PPP合同的管辖法律，但双方应注意影响管辖法律选择的一些典型因素，其中包括：

- non-legal preferences, such as market acceptability⁵⁷, familiarity and convenience, relative cost; 非法律偏好，例如市场接受程度⁵⁷、熟悉程度及方便程度，相对成本；
- avoidance of a detailed investigation into an unfamiliar system of law; 避免需要详细研究不熟悉的法律体系；
- commercial orientation, stability and predictability of the chosen legal system; 所选法律体系的商业取向、稳定性及可预测性；
- insulation of the contract from legal changes in a counterparty's country (e.g. local legislation imposing a moratorium on foreign obligations, reduction of the interest rate by legislation, the imposition of a requirement that repayment must be made in local currency to a local custodian and/or exchange controls). This is often one of the most important reasons for the choice of an external (foreign) system of law for investors. Investors in certain jurisdictions may be concerned that if the governing law is the local law of the contracting government entity, it may subsequently pass legislation which adversely impacts the contract. In PPP Contracts, however, this is typically addressed through change in law or MAGA provisions; See Section 3, Change in Law and Section 2, Material Adverse Government Action. 保护合同免受相对方国家法律变化的影响（例如要求暂停履行外债的当地立法，下调利率的法律，规定必须以当地货币向当地托管人偿还债务，及/或实施外汇管制）。这通常是投资者选择域外（外国）法律体系的最重要原因之一。某些司法管辖区的投资者可能担忧，如果管辖法律是缔约政府部门的本国法，政府可能会在日后通过对合同产生不利影响的法律。然而在PPP合同中，这个问题通常可以借助法律变化或MAGA条款得到解决；请参见第3节法律变化及第2节重大不利政府行为。
- a desire to coincide the governing law with the dispute resolution forum (i.e. the courts which will hear any dispute arising in connection with the contract). Legal unpredictability may result if the court is called upon to apply a foreign law with which it is not familiar; 希望管辖法律与争议解决裁判场所（即审理合同争议的法院）相一致。如果法院被要求适用其不熟悉的外国法律的话，可能导致法律不可预测性。

57 This may include whether the respective choice of governing law would affect the Lenders' ability to obtain political risk insurance from multilateral or bilateral development agencies (or private insurers), which would be particularly important for PPP Projects reliant on this type of support to be bankable. 这可包括相关管辖法律选择是否将影响贷款方获得多边或双边发展机构（或私营保险公司）政治风险保险的能力，这对于依赖此类支持的PPP项目尤为重要。

- the ability to use lawyers who have special experience in the type of contract concerned;能够使用拥有相关合同类型专业经验的律师;
- language;语言;
- the desire for a single body of law to apply to the PPP Contract and each of the Project Agreements (which will facilitate consolidation in a single forum); and希望PPP合同与各项目协议适用同一法律体系(方便由同一裁判场所合并审理); 及
- local law may prohibit or restrict a government entity from contracting under an external (foreign) law. Local law advice may need to be sought to clarify the position if a Contracting Authority is considering this approach.当地法律可能禁止或限制政府实体依照域外(外国)法律签署合同。因此可能需要寻求当地法律意见,以弄清缔约政府部门是否应该考虑这种做法。

Governing law clauses are generally straightforward to draft. The selection should be clearly specified in the PPP Contract, usually next to, or as part of, the Dispute Resolution provision (see below). The governing law specified should be the system of law of a country, not to a collection of principles or general concepts. Split governing law clauses and conditional governing law provisions should be avoided, as they add undesirable complexities.起草管辖法律条款时通常应直截了当。所选择的管辖法律应在PPP合同中明确约定,一般而言,应紧邻争议解决条款或作为争议解决条款的一部分(参见下文)。约定的管辖法律应是一国的法律体系,而不是罗列一堆原则或通则。应避免拆分管辖法律条款及附条件的管辖法律条款,因为它们可能增加不可取的复杂性。

Many PPP Contracts now also include a choice of governing law in respect of "noncontractual obligations". This term, found in EU legislation, is understood to include torts such as negligence or pre-contractual misrepresentations. If the Contracting Authority or Private Partner were to bring a tortious claim that they were induced to enter into the PPP Contract by a misrepresentation made by the other Party, a choice of non-contractual governing law should indicate to the relevant court that this claim should be determined under the chosen governing law. Such a provision in commercial contracts would be generally effective in EU Member State courts under European legislation (EU Regulation, Rome II) but the position may vary in other jurisdictions. However, over the last five years, the trend in many international commercial contracts across global markets is to include a governing law choice for non-contractual obligations to add certainty. There is little or no downside in doing so. It makes sense for all obligations relating to the PPP Contract to be governed by the same law. Any other approach would introduce unnecessary complexities. Accordingly, the choice of governing law for non-contractual obligations should match the choice for contractual obligations.目前,很多PPP合同还加入了针对“非合同义务”的管辖法律选择。非合同义务一词出现在欧盟法律中,可被理解为包括过失或先合同虚假陈述等在内的侵权行为。如果缔约政府部门或私营合作伙伴要提起侵权纠纷之诉,指其由于对方虚假陈述而被诱使签署PPP合同,则其应选择非合同管辖法律,以向有关法院说明该纠纷应依照所选择的管辖法律裁判。商业合同中的这种条款,根据欧盟立法(欧盟法规,罗马二)在欧盟成员国法院一般是有

效的，但其他司法管辖区的情况可能有所不同。然而在过去的五年里，加入非合同义务的管辖法律选择以增加确定性，已成为全球各地国际商业合同的趋势。这种做法几乎可以说是百利而无一害。与PPP合同相关的所有义务都受同一法律管辖是有道理的。任何其他方案只会引起不必要的复杂性。因此，非合同义务的管辖法律选择应与合同义务的管辖法律选择相一致。

Section 8.3, Sample Drafting 8, Clause (1) includes a contractual and non-contractual governing law provision. This guidance and Section 8.3, Sample Drafting 8 are intended to be of general application, and to be used by Parties from civil and common law jurisdictions, irrespective of whether the selected law is a civil or common law system of law. 第8.3节草案范本8第(1)条包括了合同及非合同管辖法律规定。本节指南及第8.3节草案范本8旨在针对一般适用，且旨在供来自大陆法及英美法司法管辖区的当事人使用，而不论所选择的法律是大陆法系还是英美法系。

8.1.3 *The concept of a dispute resolution provision* 争议解决条款的概念

As explained above, the governing law provision determines what system of law governs any dispute arising out of the PPP Contract, but a dispute resolution provision is then needed to determine what forum will apply that law to resolve any such dispute and, in the case of arbitration, the procedure pursuant to which such dispute will be heard and resolved. 如上所述，管辖法律条款决定了管辖PPP合同争议的法律体系，而接下来则需要争议解决条款决定适用该法律来解决任何该等争议的裁判场所，以及在仲裁情况下据以审理及解决该等争议的程序。

A dispute resolution clause sets out a pre-agreed mechanism for the resolution of any disputes that may arise out of the PPP Contract. All PPP Contracts should include a dispute resolution clause to provide as much certainty as possible about where and how disputes will be resolved. Such a clause aims to ensure that parties stick to the agreed mechanism and helps reduce the risk of their wasting time and costs arguing about where a claim can be heard. A good dispute resolution clause will also reduce the risk of duplicative proceedings being commenced, and irreconcilable decisions being issued, by different courts or tribunals. These clauses may be called "jurisdiction clauses", "choice of court" or "forum selection" clauses. 争议解决条款规定了一个事先约定的PPP合同争议解决机制。所有PPP合同均应设有争议解决条款，以便在争议解决的地点及方式方面提供尽可能多的确定性。争议解决条款旨在确保当事人遵守约定机制，帮助当事人减少因争论纠纷在何地审理的问题而浪费时间及金钱的风险。好的争议解决条款还可减少不同法庭或仲裁庭启动重复法律程序以及作出不相容裁判的风险。这些条款可被称为“司法管辖条款”、“法庭选择”或“裁判场所选择”条款等。

EMERGING AND DEVELOPED MARKET DIFFERENCES

新兴市场与发达市场之差异

If there is no contractually agreed dispute resolution clause specifying how disputes are to be resolved, there will be uncertainty about where disputes under the PPP Contract should be referred. The Parties' preferred courts may not accept jurisdiction over a dispute if there is no contractual clause specifying they are to determine disputes. Disputes may be commenced and heard by unreliable courts. This can be a particular risk in new and

untested markets, where local courts may be unfamiliar with resolving complex commercial disputes in a timely way. There may also be a lack of confidence in the impartiality of the process.

如果合同对如何解决争议的问题未约定争议解决条款，那么在处理PPP合同争议的地点方面将带来不确定性。双方选定的法院可能不受理合同条款未明确指定由其行使管辖权的争议。争议可能因此而由不可靠的法院启动及审理。这在新兴及不成熟市场可谓是一项特殊风险，因为当地法院可能不具备及时解决复杂商业纠纷的经验。当事人对过程的公正性亦可能缺乏信心。

The enforceability of the eventual decision will also be an important factor for Equity Investors and Lenders (see below). Given that disputes under PPP Contracts are likely to have some form of financial impact on the Private Partner and the choice of forum can impact enforceability of the respective decision, the inclusion of a workable dispute resolution clause is a key element in any assessment of the bankability of the PPP Project by the Private Partner and its Equity Investors and Lenders. See Section E, PPP Contracts in Context. 最终裁决的可执行性亦是股权投资者及贷款方的重要考虑因素之一（参见下文）。鉴于PPP合同争议可能对私营合作伙伴产生某种形式的财务影响，且裁判场所的选择可能影响有关裁决的可执行性，因此，是否设有可行的争议解决条款是私营合作伙伴及其股权投资者及贷款方评估PPP项目可行性的关键要素。请参见第E节PPP合同环境。

As with the governing law guidance, the guidance outlined below on selection and drafting of dispute resolution provisions and Section 8.3, Sample Drafting 8 is intended to be of general application, and to be used by Parties from civil and common law jurisdictions, irrespective of whether the selected court is a civil or common law jurisdiction or the arbitration is seated in a civil or common law jurisdiction. 如同管辖法律指南，下文所载的争议解决条款选择及起草指南及第8.3节草案范本8旨在针对一般适用，且旨在供来自大陆法及英美法司法管辖区的当事人使用，而不论所选择的法院或仲裁地是大陆法还是英美法司法管辖区。

8.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

This Section 8.2 begins with a short overview of the key elements of any dispute resolution provision at Section 8.2.1. Section 8.2.2 then explains factors a Contracting Authority should consider when selecting a dispute resolution provision, i.e. factors relevant to choosing between court litigation (whether before local courts or the courts of an "offshore" jurisdiction) or arbitration. It also includes some important guidance as to whether a Contracting Authority is able to refer disputes to particular fora, for example for reasons of public policy. The guidance then discusses a number of the key elements of a typical dispute resolution provision in a PPP Contract. Key points covered include when an investor may want to move away from local courts, when Parties may select international arbitration as the dispute resolution mechanism, specific drafting issues in relation to arbitration clauses, when Parties might include alternative dispute resolution mechanisms such as expert determination and mediation, and finally some guidance on waivers of any immunities and privileges that a Contracting Authority (and other sovereign/quasi-sovereign entities) may have. 本第8.2节首先简单概述一切争议解决

条款的关键要素（第8.2.1节）。接下来的第8.2.2节介绍缔约政府部门在选择争议解决条款时应考虑的因素，即关于法院诉讼（是诉诸当地法院还是“海外”司法管辖区法院）与仲裁之间进行选择的考虑因素。还包括缔约政府部门能否将争议提交特定裁判场所（如出于公共政策原因的考量）等问题的一些重要指南。接下来探讨PPP合同典型争议解决条款的一系列关键要素。重点包括什么情况下投资者可能希望排除当地法院管辖，什么情况下当事人可选择国际仲裁作为争议解决机制，关于仲裁条款的具体起草问题，什么情况下当事人可加入替代争议解决机制，例如专家审理及调解，最后是关于缔约政府部门（及其他主权/半主权实体）放弃可能享有的任何豁免权及特权的一些指南。

What are the key elements of a dispute resolution provision? 争议解决条款的关键要素是什么？

In a PPP Contract, a dispute resolution provision typically specifies: 在PPP合同中，争议解决条款通常包括以下规定：

- (1) the governing law of the PPP Contract (if not specified in a different clause); PPP合同的管辖法律（除非已另设管辖法律条款）；
- (2) an obligation to attempt to reach a quick and amicable settlement; 尝试通过快捷、友好方式解决争议的义务；
- (3) a provision for the resolution of specific technical disputes by an independent expert; 由独立专家解决特定技术争议的规定；
- (4) a recourse to either (a) the courts that will have jurisdiction to determine the dispute or (b) international arbitration to finally determine all disputes not informally resolved or resolved by expert determination. An arbitration clause should specify the "seat" of arbitration and usually also incorporates by reference institutional procedural rules. It may also set out certain bespoke procedural rules to govern the arbitration process and joinder and consolidation provisions in the event the dispute concerns multiple related contracts and/or multiple parties and where arbitration selected; 对于未正式解决的或以专家审理方式解决的所有争议，通过以下其中一种途径进行终局解决：（a）诉诸对争议具有司法管辖权的法院，或（b）国际仲裁。仲裁条款应明确“仲裁地”，且一般而言还应通过引用而并入机构程序规则。还可就仲裁过程规定某些定制的程序规则，以及在争议涉及多份相关合同及/或多方当事人的情况下规定合并审理条款及仲裁地选择；
- (5) an obligation to continue performance of the PPP Contract during the resolution of the dispute; 争议解决期间继续履行PPP合同的义务；
- (6) where appropriate a waiver of sovereign and other immunities and consent to enforcement and execution; and 在适当情况下，对主权豁免及其他豁免权的放弃，以及对执行的同意；及
- (7) the allocation of costs. 费用的承担。

8.2.2 *Selecting an appropriate dispute resolution provision and public policy* 选择适当的争议解决条款及公共政策

8.2.2.1 Local courts - A Contracting Authority may prefer to select its local courts as the forum for the resolution of any disputes under the PPP Contract. This selection may be made for a variety of reasons including familiarity, compatibility with any concession/PPP legislation, and because the PPP Contract is governed by local law. The costs of litigating before local courts may also be much lower than before certain "offshore" courts or the costs involved in an international arbitration. See Section 8.3, Sample Drafting 8, Clause (12) Option 1. 当地法院——缔约政府部门可能倾向于选择其所在地的当地法院作为解决PPP合同项下任何争议的裁判场所。作出这一选择可能基于各种不同的原因，包括熟悉程度、与任何特许经营/PPP立法的相容性，以及因为PPP合同受当地法律管辖等原因。向当地法院起诉的成本亦可能大大低于向某些“海外”法院起诉或国际仲裁涉及的成本。请参见第8.3节草案范本8第（12）条方案1。

8.2.2.2 Offshore courts - In some situations, however, Private Partners may be reluctant to agree to have disputes determined by local courts. For example, they may be concerned that the courts in the Contracting Authority's country are (or might become) unreliable, potentially more favourable to the local parties/the Contracting Authority, inefficient and prone to significant delays when a speedy resolution is needed. In these circumstances, Private Partners may push for the inclusion of an external (i.e. "offshore") jurisdiction (or choice of court) provision in the PPP Contract and seek to select a court or courts with a reputation for resolving complex international disputes in a fair and predictable manner. Offshore courts may be the preferred choice for Private Partners even where the PPP Contract is governed by a different (i.e. local) law. Courts in certain jurisdictions regularly determine commercial disputes arising under contracts governed by different laws (e.g. the English courts often determine disputes arising under foreign (non-English) law and do so by hearing expert evidence on that foreign law although this can increase costs). See Section 8.3, Sample Drafting 8, Clause (12) Option 1. 海外法院——然而在一些情况下，私营合作伙伴可能不愿意接受当地法院审理争议。例如，他们可能担心缔约政府部门所在国家的法院不可靠（或可能变得不可靠），倾向于偏袒当地的当事人/缔约政府部门，工作效率低，在需要迅速解决时容易出现重大拖延等。在此情况下，私营合作伙伴可能要求在PPP合同中加入域外（即“海外”）司法管辖（或法院选择）条款，并力争选择能够以公平及可预测方式解决复杂国际争议的一个或多个有威望的法院。海外法院可能是私营合作伙伴的优先选择，即使在PPP合同受不同的（即当地的）法律管辖的情况下亦然。某些司法管辖区的法院经常审理受不同法律管辖的合同项下产生的商业争议（例如英国法院经常审理外国（非英国）法律项下产生的争议，审理时通过听取该外国法律的专家证据进行，尽管这样做可能增加成本）。请参见第8.3节草案范本8第（12）条方案1。

Offshore court litigation may be preferred as the dispute resolution mechanism for Private Partners if they perceive particular courts as being transparent, efficient and with a judiciary consisting of highly regarded commercial lawyers with experience of disputes under PPP Contracts. Further reasons for selecting offshore courts may be the possibility of obtaining injunctive relief from those courts or the ability to obtain "summary" judgment (the early determination of a dispute without a full

hearing). It is a procedure available in some courts but is less common in arbitrations.如果私营合作伙伴认定某些海外法院能够做到透明、高效且审判团队由具备PPP合同争议经验的高水平商业律师组成，则海外法院诉讼可能是私营合作伙伴的首选争议解决机制。选择海外法院的另一些原因是，能够从该等法院获得禁令救济或获得“简易”判决（对争议进行简便快速审理而无需适用整套庭审程序）的可能性。一些法院设有简易程序，但在仲裁中则不常见。

From the Contracting Authority's perspective, even if offshore courts might not be its preferred option, there may be circumstances where this option needs to be considered as a necessary compromise in order to ensure the PPP Project is bankable. See Section E, PPP Contracts in Context.从缔约政府部门的角度来看，尽管海外法院未必是其首选方案，但在某些情况下，为确保PPP项目具有可融资性，这一方案作为必要让步仍值得考虑。请参见第E节PPP合同环境。

- 8.2.2.3 Arbitration - Most commonly, Private Partners may suggest arbitration as a dispute resolution mechanism. Arbitration is a contractually agreed method of dispute resolution that is an alternative to litigation before the courts. Broadly, the parties agree that one or three individual arbitrators will determine their dispute rather than a court. See Section 8.3, Sample Drafting 8, Clause (12) Option 2.仲裁——最常见的情况是，私营合作伙伴可能提议仲裁作为争议解决机制。仲裁是由合同约定的代替法院诉讼的争议解决方法。概括而言，当事人约定由一名或三名个人仲裁员审理其争议而不是由法院来审理。请参见第8.3节草案范本8第（12）条方案2。

Arbitration may also be selected if there is a desire to keep the dispute confidential. Unlike court proceedings, arbitration proceedings often take place in private (but not always and the approach varies depending on the jurisdiction and any institutional rules). Private Partners concerned about the enforceability of any decision made in respect of a dispute under the PPP Contract may seek to include an arbitration clause rather than a court (litigation) clause because arbitration awards tend to be more widely enforceable than court judgments. Arbitration can, however, be expensive and sometimes as time-consuming as court proceedings. However, the Parties can include provisions in their arbitration clause for summary judgment or expedited procedures and certain institutional rules also include provisions in this regard. The Parties have to pay for the arbitrators' time and may also have to pay for an institution's administrative costs. See Section 8.2.3.如果当事人希望对争议保密处理，亦可选择仲裁。与法院诉讼不同，仲裁程序通常私密进行（但不总是如此，且具体方式取决于司法管辖区及任何机构规则而有所不同）。私营合作伙伴如果担心有关PPP合同项下争议的任何裁决的可执行性，可寻求加入仲裁条款，而不是法院（诉讼）条款，因为仲裁裁决通常比法院判决具有更广泛的可执行性。然而，仲裁可能非常昂贵，有时甚至与法院诉讼一样耗时。然而，当事人可在仲裁条款中加入简易判决或快速仲裁的规定，而某些机构规则亦已包含这方面的规定。当事人需要支付仲裁员所花的时间成本，亦可能需要支付机构的管理成本。请参见第8.2.3节。

- 8.2.2.4 Local limitations on forum selection - Before selecting a foreign court or choosing an offshore arbitration as the dispute resolution mechanism in any PPP Contract, it is important to establish that, under all applicable laws, the Contracting Authority is able to agree to refer disputes to a foreign court or be subject to international arbitration (related to this it is also important to establish it can agree to be subject

to a "foreign" law). For example, a Contracting Authority may be required under local laws relating to concession arrangements to refer all disputes relating to a PPP Project to the local courts (and/or to contract only under local law). 关于裁判场所选择的当地限制——在选择外国法院或选择海外仲裁作为任何PPP合同争议解决机制前，重要的是确认在所有适用法律下，缔约政府部门有权同意将争议提交外国法院处理或接受国际仲裁（与此有关，同样重要的是确认其有权同意接受“外国”法律约束）。例如，根据与特许安排有关的当地法律，缔约政府部门可能被要求将涉及PPP项目的一切争议提交当地法院处理（及/或仅可依照当地法律签署合同）。

There may also be general prohibitions or limitations under local law in relation to a Contracting Authority's ability to agree to an offshore jurisdiction clause or foreign seated arbitration clause (or agree to a foreign law). For example, under local law sovereign entities may need specific waivers and approvals to agree contractually to arbitrate offshore, or to select a foreign jurisdiction clause and/or to contract under foreign laws. It will also be important to establish that under local law the Contracting Authority can contractually agree to waive immunity (see Section 8.2.6). Specific permissions may be required and certain formalities may need to be followed. Issues of capacity and authority may arise in this regard. 当地法律亦可能设有关于缔约政府部门同意海外司法管辖条款或外国仲裁条款（或同意外国法律）的一般禁止或限制性规定。例如，根据当地法院，主权实体可能需要特别豁免及批准，才能够在合同中约定海外仲裁或选择外国司法管辖条款及/或依照外国法律签署合同。同样重要的是确认在当地法律下，缔约政府部门有权通过合同约定放弃豁免（参见第8.2.6节）。这可能需要特别许可，并需要履行特定手续。这方面可能产生资格及权限问题。

These are important points to establish at the outset of negotiations. Private Partners may require local law opinions to address these issues. 以上是开始谈判时需要确认的要点。私营合作伙伴可寻求当地法律意见来解决这些问题。

- 8.2.2.5 General considerations - Given the long term nature of the PPP Contract, it can be in the Parties' interests to have a dispute resolution process which supports their long term relationship. Generally, a dispute resolution provision in a PPP Contract should also include a clause imposing a time limited obligation to attempt to resolve a dispute informally (amicably) in the first instance. There are various alternative dispute resolution options which are discussed further below. See Sections 8.2.4 and 8.2.5. 一般考虑因素——鉴于PPP合同的长期性质，建立有利双方长期合作关系的争议解决程序将符合双方利益。一般而言，PPP合同争议解决条款还应纳入一项规定，即要求当事人有义务在一定期限内尝试首先通过非正式（友好）方式解决争议。各类不同的替代争议解决方案将在下文进一步探讨。请参见第8.2.4节及第8.2.5节。

The relative merits of arbitration against litigation before a particular court or courts will need to be assessed carefully for each project. If the Parties intend to instead choose an offshore jurisdiction clause, the drafting of such a clause is generally more straightforward than the drafting of an arbitration clause, which tends to be more bespoke. In all cases, the selection of a forum must be clear and unambiguous. 针对每个项目，应仔细评估仲裁相对于向一个或多个特定法院起诉的好处。相反，如果当事人有意选择海外司法管辖条款，起草该条款通常比起草仲裁条款更直截了当，仲裁条款倾向于更多定制的内容。不管在什么情况下，裁判场所的选择

必须明确而不含糊。

8.2.3 Key steps if selecting arbitration 选择仲裁的关键步骤

STEP 1: Choosing arbitration and selecting the rules of established independent arbitration institutions 步骤1: 选择仲裁, 并选择既有独立仲裁机构的规则

If the Parties decide to select arbitration as the dispute resolution mechanism for the PPP Contract, it is recommended that institutional (administered) arbitration is chosen. While there is a form of ad hoc (non-administered) arbitration, this is not the recommended approach for the reasons highlighted below. 如果当事人决定选择仲裁作为PPP合同争议解决机制, 建议选择机构(常设)仲裁。虽然还有一种临时(特设)仲裁形式, 但这种方式不值得推荐, 原因如下。

(1) Institutional Arbitration. Instead of drafting an overly long arbitration clause containing bespoke procedural rules, it is preferable for the Parties to incorporate the procedural rules of an established independent arbitration institution. For consistency, all dispute resolution processes under the PPP Contract and the related Project Agreements should apply the same institution's rules. The PPP Contract drafting will therefore vary to some extent according to the institutional rules selected. 机构仲裁。与起草含有定制程序规则的冗长仲裁条款相比, 理想的做法是在合同中纳入既有独立仲裁机构的程序规则。出于一致性考虑, PPP合同及相关项目协议项下所有争议解决过程应适用同一机构的规则。因此, PPP合同起草将根据所选择的机构规则不同而存在一定程度的差异。

Reference to the rules of the arbitral institution usually incorporates the assistance of an institution, which may act as an appointing authority (if required) during the constitution of the tribunal, deal with the payment of arbitrators' fees during the proceedings and make arrangements for the respective hearings and issuance of the award. 关于仲裁机构规则时, 通常包括机构提供的协助, 例如在仲裁庭的组成上充当指定仲裁员的机关(如有需要), 仲裁过程中处理仲裁费用的支付问题, 进行相关庭审安排及作出裁决。

A variety of institutional rules and of institutions are available for commercial arbitration. The rules of the ICC ("ICC Rules") are frequently used⁵⁸. Other common options include the London Court of International Arbitration ("LCIA") rules, the Hong Kong International Arbitration Centre rules or the Singapore International Arbitration Centre rules. See Section 8.3, Sample Drafting 8, Clause (12), Option Two. See Section 8.3, Sample Drafting 8, Clause (12), Option 2. 商业仲裁中有多家仲裁机构及仲裁规则可供选择。国际商会仲裁规则(“国际商会规则”)较为常用⁵⁸。其他常见选择包括伦敦国际仲裁院(“LCIA”)仲裁规则、香港国际仲裁中心仲裁规则或新加坡国际仲裁中心仲裁规则。请参见第8.3节草案范本8第(12)条方案二。请参见第8.3节草案范本8第(12)条方案2。

58 For illustration purposes, Section 8.3, Sample Drafting 8, Clause (12), Option 2 onwards is based on a choice of the ICC Rules. This drafting is for guidance only and will need review/adaptation when using an alternative institution's rules. 为说明目的, 从第8.3节草案范本8第(12)条方案2起均以选择国际商会规则为基础。该草案仅供参考, 如果采用其他机构规则, 必须相应审查/修改。

In addition, there is a dispute settlement mechanism specifically designed for disputes between foreign private investors and States (or their agencies or subdivisions) created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"). ICSID arbitration is available when the home State of the Private Partner and the host State of the project differ in nationality, and both States are party to the ICSID Convention (currently 153 States). As with the incorporation of any other institutional arbitration clause, both the Contracting Authority (the host State or its agency or subdivision) and the Private Partner may resort to ICSID arbitration for breach of the obligations set forth in the PPP Contract.此外,《解决国家和他国国民之间投资争端公约》(“《ICSID公约》”)还有专为外国私营合作伙伴与国家(及其政府机构或次级行政区)之间争议而设立的争议解决机制。私营合作伙伴母国与项目东道国属于不同国家,且两国均为《ICSID公约》缔约国(目前有153个缔约国)时,可选择ICSID仲裁。与纳入任何其他机构仲裁条款一样,缔约政府部门(东道国或其政府机构或次级行政区)与私营合作伙伴均可在发生PPP合同违约时申请ICSID仲裁。

While recourse to ICSID arbitration provides some comfort to the Parties as to the enforceability of awards, it might not always be an option for a PPP Contract. This is because the ICSID Convention establishes essential jurisdictional conditions for access to ICSID arbitration and the Parties would need to include a fall back clause in the PPP Contract in case a dispute is determined not to meet these requirements. This may render the drafting of the dispute resolution provision more complex. ICSID arbitration may also be viewed as more slow-moving than standard commercial arbitration. Nevertheless, Contracting Authorities should be aware of the possibility of claims under this regime.虽然ICSID仲裁在裁决可执行性方面为当事人提供了某种程度的安慰,但它未必总是PPP合同的选择方案。这是因为《ICSID公约》确立了使用ICSID仲裁的基本管辖条件,且当事人需要在PPP合同中加入后备条款,以防争议被认定为不符合这些条件时仍有退路。如此一来可能使争议解决条款的起草工作变得更为复杂。ICSID仲裁也可能被认为比标准商业仲裁过程更缓慢。尽管如此,缔约政府部门仍应注意这一机制下发生纠纷的可能性。

- (2) Ad Hoc arbitration. If the Parties incorporate an arbitration clause in their PPP Contract without referring to the arbitration rules of a particular arbitral institution, and without expressly agreeing to have the assistance of an arbitral institution to administer the proceedings, they will be agreeing to a non-administered or ad hoc arbitration. In those cases, the Parties would need to include a detailed procedure for the conduct of the proceedings, including, for example, the process for the selection of the tribunal deciding the case, its powers and the issuance of J awards (see Step 3). This is not advisable as the Parties may omit to agree on crucial elements of the arbitral process which can result in procedural stalemate once the dispute arises.临时仲裁。当事人在PPP合同中规定了仲裁条款,但不指明具体仲裁机构的仲裁规则,又不明确约定由仲裁机构协助管理仲裁程序的,这便是所谓的特设或临时仲裁。在此情况下,当事人需要加入仲裁程序的详细操作步骤,例如包括如何选择审理案件的仲裁庭、仲裁庭的权力及裁决的作出等(参见步骤3)。不建议采用这种做法,因为当事人可能因为遗漏未就仲裁过程的重要环节达成一致,一旦争议发生则可能导致陷入程序僵局。

The Parties may also choose a particular set of arbitration rules that do not necessarily include the selection of an arbitral institution that will assist in the administration of the case. This is the case, for example, if the PPP Contract incorporates a reference to arbitration under the rules of the United Nations Commission on International Trade Law (“UNCITRAL Rules”). The UNCITRAL Rules are often used in commercial disputes involving a public and a private entity, and are also commonly incorporated in international investment agreements (see Schedule 2). There is no institution specialized in administering UNCITRAL arbitrations, but they constitute an intermediate step to pure ad hoc arbitration, in the sense that they already include provisions governing each step of the arbitration process. Many institutions, such as the Permanent Court of Arbitration, the LCIA, the International Chamber of Commerce (“ICC”), the International Centre for Settlement of Investment Disputes (“ICSID”), the American Arbitration Association and the Stockholm Chamber of Commerce are available to provide institutional support for proceedings under the UNCITRAL Rules, should the Parties agree to such institutional support. It is advisable for such agreement to be explicit in the arbitration clause in the PPP Contract, although the Parties can in theory agree this once a dispute has arisen. 当事人亦可选择一套具体的仲裁规则，其中不一定有对于协助管理案件的仲裁机构的选择。例如，在PPP合同中指明依照联合国国际贸易法委员会的规则（“《UNCITRAL规则》”）进行仲裁。《UNCITRAL规则》经常用于涉及公共与私营实体的商业争议，亦经常被列入国际投资协议（参见附表2）。UNCITRAL仲裁并不由专门的机构管理，但由于它已经包含了处理仲裁过程每个环节的条款，因此在这个意义上可以说是纯粹临时仲裁的中间步骤。诸如常设仲裁法院、伦敦国际仲裁院、国际商会（“ICC”）、国际投资争端解决中心（“ICSID”）、美国仲裁协会及斯德哥尔摩商会等很多机构均可在当事人有约定的情况下提供《UNCITRAL规则》仲裁程序的机构支持。建议在PPP合同仲裁条款中明确这一约定，但理论上当事人亦可在争议发生后就此进行约定。

EMERGING AND DEVELOPED MARKET DIFFERENCES

新兴市场与发达市场之差异

The selection of an established arbitral institution and of institutional procedural rules is of particular importance in many developing countries, where PPP Projects are unlikely to be bankable if recourse to acceptable arbitration arrangements (or courts) is not agreed. Specialist advice should be taken by Contracting Authorities.

选择既有仲裁机构及机构程序规则在许多发展中国家尤为重要，因为在这些国家如果没有约定可接受的仲裁安排（或法院）救济，PPP项目就可能不具有可融资性。缔约政府部门应咨询专家意见。

STEP 2: Choosing the seat of arbitration⁵⁹ 步骤2: 选择仲裁地⁵⁹

If the Parties select arbitration⁶⁰ (as opposed to court litigation) as their dispute resolution mechanism, it is absolutely critical to specify a seat of arbitration. The importance of the seat (typically a major city) is that it places the arbitration within

59 Choosing the seat may be the Parties' first step in forum selection but this may coincide with the selection of institutional rules (see Step 1). 选择仲裁地可能是当事人选择裁判场所的第一步，但这可能与机构规则的选择重合（参见步骤1）。

60 This does not apply to ICSID arbitration which is de-localized. 此项规定不适用于不受地域限制的ICSID仲裁。

the legal framework of a particular jurisdiction (regardless of where any hearings in the arbitration are physically held). See Section 8.3, Sample Drafting 8, Clause (15). 如果当事人选择仲裁⁶⁰（与法院诉讼相对）作为其争议解决机制，则必须指明仲裁地，这一点绝对至关重要。仲裁地（通常是大城市）的重要性在于，它决定了仲裁程序被置于哪一特定司法管辖区的法律框架下（而不管仲裁过程中的任何庭审实际在哪里开庭）。请参见第8.3节草案范本8第（15）条。

There are three key reasons why the Parties should carefully consider the choice of seat: 当事人应仔细考虑仲裁地选择的主要原因有三个：

- (1) The national courts at the seat have "supervisory" jurisdiction over the arbitration. This can be significant because those courts can influence the arbitral process by, for example, staying concurrent court proceedings or granting injunctive relief to protect assets subject to the arbitration. It is also the courts of the seat that will generally be competent to hear applications to set aside an arbitral award. It is important to choose a seat of arbitration in a jurisdiction where the local courts are supportive of the arbitration process and are not excessively interventionist. 仲裁地的国家法院对仲裁享有“监督”权。这一点很重要，因为法院可以通过并行法庭诉讼或发出禁令救济以保护仲裁标的资产等措施来影响仲裁过程。而且通常亦只有仲裁地法院才有权审理撤销仲裁裁决的申请。选择仲裁地时，应选择那些当地法院能为仲裁过程提供支持而又不过度干预仲裁过程的司法管辖区。
- (2) Most national arbitration laws incorporated through selection of the seat include mandatory procedural provisions (e.g. regarding rights of appeal or the power of the courts to remove arbitrators) which will apply regardless of any contrary stipulation in the parties' arbitration agreement. A careful assessment of such laws is therefore important. 通过仲裁地选择并入合同的大多数国家仲裁法律含有强制程序规定（例如关于上诉权或法院对仲裁员的罢免权），这些规定必须予以适用，而不管当事人的仲裁协议中有无相反约定。因此，认真查阅有关法律非常重要。
- (3) An arbitral award is often only as good as the ability to enforce it effectively. Companies operating internationally typically hold assets in many jurisdictions. Before concluding an agreement providing for arbitration, it should be verified that the chosen seat of arbitration, as well those countries in which enforcement of any award may be sought (which may or may not be the State of the Contracting Authority), are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Usually referred to as the "New York Convention", there are now 156 State parties to this Convention. An arbitral award rendered by a tribunal "seated" in a New York Convention State should be enforceable in all other New York Convention states without a review of the merits, although it should be noted that there are limited grounds on which a court may refuse enforcement and local advice should always be sought as to the practices of the courts where enforcement is likely to be sought. 仲裁裁决的效用通常取决于其得到实际执行的能力。跨国经营的公司通常在许多司法管辖区持有资产。在达成仲裁协议前，应核实所选择的仲裁地以及仲裁裁决的拟申请执行地所在国家（可能是也可能不是缔约政府部门所在国家）是

《承认及执行外国仲裁裁决公约》的缔约方。《承认及执行外国仲裁裁决公约》通常又称“《纽约公约》”，目前共有156个缔约国。“设于”《纽约公约》缔约国的仲裁庭作出的仲裁裁决无需进行案情审查即可直接在所有其他《纽约公约》缔约国得到执行，但应注意有少数情形下法院可拒绝执行，故应就拟申请执行地法院的做法寻求当地法律意见。

CIVIL AND COMMON LAW DIFFERENCES

大陆法与英美法之差异

The courts in civil and common law jurisdictions often have different approaches to dispute resolution. However, where resolution of disputes is by arbitration then, generally speaking, it does not matter whether the arbitration has its seat in a civil law or a common law jurisdiction (nor does it matter whether the parties are from civil or common law jurisdictions).

大陆法与英美法司法管辖区的法院通常有着不同的争议解决方法。然而，如果选择通过仲裁解决争议，则一般而言，仲裁地是位于大陆法国家还是英美法国家已不重要（同理，当事人是来自大陆法国家还是英美法国家亦不重要）。

As highlighted above, the key selection factors are whether a jurisdiction is considered to be "arbitration friendly" (the national arbitration law and local courts are supportive of the arbitration process and will not interfere with arbitral proceedings unnecessarily) and whether it is a signatory to the New York Convention.

如上所述，关键的选择因素是有关司法管辖区是否被视为“仲裁友好”（国家仲裁法律及当地法院支持仲裁过程，而又不对仲裁程序施加不必要的干预）以及是否属于《纽约公约》缔约国。

STEP 3: Determining the method of constituting the arbitral tribunal and selecting the arbitrators - number, qualifications and nationality 步骤3: 确定仲裁庭组成方法并选择仲裁员——人数、资格及国籍

The Parties should agree whether the arbitration clause will specify the number of arbitrators as well as the method by which such arbitrators will be appointed. In this context, it should be noted that most institutional arbitration rules will contain default provisions in the event the Parties fail to agree on the number of arbitrators and/or method of constituting the tribunal, or fail to appoint the agreed number of arbitrators. 双方应协商确定仲裁条款是否应指明仲裁员人数以及仲裁员指定方法。在此情况下，应注意大部分机构仲裁规则均规定了当事人未能就仲裁员人数及/或仲裁庭组成方法约定一致时或未能按约定数量指定仲裁员时的默认条款。

Typically, for large value contracts parties would choose to have three arbitrators, even though this will make the resolution of any dispute more costly as the parties must pay the fees of three arbitrators. This is because a three arbitrator tribunal is less likely to reach a maverick decision than a sole arbitrator and so reduces unpredictability. See Section 8.3, Sample Drafting 8, Clause (13). 通常对于大额合同而言，当事人会选择三名仲裁员，尽管由于当事人必须支付这三名仲裁员的费用而使任何争议的解决成本更为高昂。选择三名仲裁员的原因在于，三人仲裁庭达成专断裁决的可能性比独任仲裁员为小，如此一来可减少不可预测性。请参见第8.3节草案范本8第（13）条。

Some arbitration clauses may specify particular expertise or other requirements as to qualifications arbitrators should have, for example that an arbitrator should be a lawyer experienced in a particular type of transaction. It may be helpful to specify that all or the majority of arbitrators are legally qualified in the governing law. Parties should, however, avoid being too prescriptive, as this may narrow the pool of potential arbitrators available. 一些仲裁条款可能规定仲裁员应具备的具体专业或其他资格要求，例如仲裁员应是对某类事务具有丰富经验的律师。规定全体或大部分仲裁员具备管辖法律承认的执业资格这一点可能有帮助。然而，当事人应避免规定得过细，因为那样做可能限缩潜在仲裁员的选择范围。

Sometimes Parties wish to specify that none of the arbitrators can be of the same nationality as any of the parties to the arbitration. This may be relevant to PPP Contracts as the Private Partner may have concerns that an arbitrator who is a national of the Contracting State may not be impartial. Certain institutional rules include provisions relating to the nationality of arbitrators, and these should be checked. 有时候，当事人希望规定全体仲裁员均不得与仲裁任何一方当事人的国籍相同。这可能适用于PPP合同，因为私营合作伙伴可能担心身为缔约国国民的仲裁员无法做到公平公正。某些机构规则设有关于仲裁员国籍的规定，这些应予核实。

STEP 4: Consolidation and joinder - related contracts/related parties 步骤4：合并审理——关联合同/关联当事人

The PPP Contract will be part of a wider "network of agreements" between various parties. The Private Partner may, for example, enter into a PPP Contract with the Contracting Authority regarding the underlying facility, but all cash flows may be governed by a separate agreement between an off-taker and the Private Partner⁶¹. When this is the case, the Private Partner may require that all the related Project Agreements contain a similar dispute resolution provision, together with consolidation and joinder language whereby all parties to the related contracts agree to submit disputes to the same arbitral tribunal, under the same rules. For greater efficiency, it is recommended that all agreements contain similar dispute resolution clauses under which there is pre-agreement to consolidation of related disputes and the joinder of related parties to any arbitration⁶². However, the same principle does not always apply with regard to many agreements concluded with sub-contractors, as disputes arising under those contracts can be the sole responsibility of the Private Partner and it may be appropriate to keep the dispute processes separate. This will avoid the Contracting Authority getting dragged into expensive and time consuming peripheral disputes. On the other hand, there may be areas of overlap, e.g. where the counterparty to a Project Agreement is claiming on the basis of a provision that has been passed down from the PPP Contract, participation in a consolidated dispute resolution process may be desirable and so limited joinder arrangements may be appropriate. Any assessment of the need for joinder provisions is likely to be fact dependent. See Section 8.3, Sample Drafting 8, Clause (20). PPP合同属于多方当事人之间更广泛“协议网络”的一部分。例如，私营合

61 Other examples include government support agreements and direct agreements. 其他例子包括政府支持协议及直接协议。

62 The ICC Rules provide some assistance in this regard in any event: see Articles 7-10. 《国际商会规则》提供了这方面在任何情况下的一些协助：参见第7条至第10条。

作伙伴可就标的设施与缔约政府部门签署PPP合同，但所有现金流则由私营合作伙伴与承购人另行签署协议进行规定⁶¹。在此情况下，私营合作伙伴可能要求所有相关项目协议均包含类似的争议解决条款，以及关于合并审理的规定，即所有相关合同当事人同意将争议提交同一仲裁庭依照同一规则处理。为提高效率，建议所有协议均加入类似的争议解决条款，据以事先约定关联争议的合并审理以及关联仲裁当事人的并案处理⁶²。然而，同一原则未必总是适用于与分包商签署的多份合同，因为该等合同项下发生的争议可能是私营合作伙伴应独自承担责任，故适宜保持争议的分别处理。这有助缔约政府部门避免陷入昂贵而耗时的外围争端中。另一方面，亦可能出现重叠区域，例如，当项目协议相对人根据可追溯自PPP合同的规定提出权利请求时，那么参加合并审理的争议解决过程是可取的，因此适宜作出有限并案处理安排。评估是否需要并案条款时，应根据实际情况决定。请参见第8.3节草案范本8第（20）条。

Generally, consolidation and joinder is less of a concern with jurisdiction clauses where courts often will order consolidation of proceedings before it (and the Parties often can otherwise apply to the relevant courts for removal/transfer from one jurisdiction to another) or the joinder of parties under local procedural rules or inherent jurisdiction. 一般而言，合并审理较少关注管辖权条款，法院通常会裁定将诉讼程序合并（且当事人通常可向有关法院申请从一个司法管辖区转换/转移至另一个司法管辖区），或依照当地程序规则或固有管辖权将当事人并案处理。

8.2.4 *Informal (alternative) dispute resolution - negotiation, mediation and alternatives* 非正式（替代）争议解决——谈判、调解及替代方案

Given the long term nature of many PPP Contracts and the desirability of maintaining an on-going relationship between the parties, the inclusion of an informal (alternative) dispute resolution mechanism in the dispute resolution clause is often helpful. There are many forms of alternative dispute resolution ("ADR"), ranging from informal meetings of senior executives (see Section 8.3, Sample Drafting 8, Clause (4)) to mediation, the use of a panel of senior representatives and the appointment of an external Disputes Board (see Section 8.3, Sample Drafting 8, Schedule 1, Options 1,2 and3). Some of these are discussed further below. 鉴于PPP合同的长期性以及当事人维持长远合作关系的愿望，在争议解决条款中加入非正式（替代）争议解决机制往往有利无害。替代争议解决（“ADR”）形式多种多样，从高管非正式会议（参见第8.3节草案范本8第（4）条）到调解，从组成高级代表小组到委任外部争议委员会（参见第8.3节草案范本8附表1方案1、方案2及方案3）。下面详细探讨部分内容。

The inclusion of an ADR clause can encourage the informal resolution of disputes, at a relatively early stage, before significant amounts of time and costs have been spent in any formal arbitration or court proceedings and, importantly, before relationships have deteriorated. 加入替代争议解决条款可鼓励当事人在较早期阶段通过非正式方式解决争议，防止因任何正式的仲裁程序或法院诉讼而耗费大量时间和成本，以及更重要的是，防止关系恶化。

The dispute resolution clause should specify if the recourse to ADR is mandatory and a condition precedent to commencing arbitration (or court proceedings) and whether the result of the ADR is binding or non-binding. If ADR is mandatory, the

Parties may also wish to provide that they are free to seek urgent (including injunctive) relief from the arbitral tribunal or court if needed prior to or during the ADR process. Parties must always ensure, however, that there is a fall back disputes clause (whether arbitration or litigation) if ADR fails to resolve the dispute. 争议解决条款应规定，寻求替代争议解决是否属于强制及提起任何仲裁（或法院诉讼）的先决条件，以及替代争议解决结果是否具有约束力。如果替代争议解决属于强制，当事人还可规定其有权在替代争议解决开始前或过程中根据需要向仲裁庭或法庭寻求紧急（包括禁令）救济。然而，当事人必须始终确保当争议未能通过替代争议解决方式得到解决时，仍有后备争议条款（仲裁或诉讼）可供依赖。

- 8.2.4.1 Mediation - It may be desirable to add a requirement for the Parties to attempt to settle their disputes through mediation. Mediation is a settlement process involving an external "mediator" who acts as a neutral facilitator to help parties try to arrive at an negotiated settlement of their dispute. The use of external mediators is increasingly seen in commercial disputes in the United States, in the UK and parts of continental Europe, in Turkey, in parts of the Middle East and in some parts of South East Asia. Mediation can be a useful means of getting parties together and helping to forge a commercially acceptable settlement, before legal costs escalate - this could prove particularly worthwhile in large transactions such as PPP Projects. On the downside, unproductive mediation may simply cause delay in the final resolution of the dispute and increase costs (if the prospect of a negotiated settlement is very low). There have also been concerns about the impartiality of mediators and confidentiality breaches in the process. Parties are always free to agree to resolve a dispute by mediation even if there is no contractual clause requiring them to do so. [See Section 8.3, Sample Drafting 8, Schedule 1, Option 1.](#) 调解——建议增加一条要求当事人尝试通过调解来解决争议的规定。调解是一种邀请外部“调解员”参与的争议解决过程，调解员作为中立的协调人，帮助双方当事人努力通过谈判达成和解。使用外部调解员在美国、英国、欧洲大陆部分地区、土耳其、中东部分地区及东南亚部分地区的商业争议中越来越常见。调解是在产生不断上涨的法律费用前，将各方当事人召集在一起共同制定商业上可接受解决方案的有效途径——事实证明这对于PPP项目等大型交易尤其物有所值。缺点方面，没有效果的调解只会拖延争议的最终解决并增加成本（如果谈判和解的可能性很低）。在调解员公正性及调解过程泄密方面亦存在担心。即使在合同条款未作相关规定的情况下，当事人亦可随时约定通过调解解决争议。请参见第8.3节草案范本8附表1方案1。
- 8.2.4.2 Disputes Board - A Disputes Board is a more formal mechanism usually involving the appointment of a panel of external individuals at the commencement of a contract to whom disputes can be referred throughout the life of the contract. This process is common in construction contracts and usually requires the parties to pay for the retention of external experts. A key consideration is whether its decision will be final and binding;⁶³ the dispute may have to be re-tried before an arbitral tribunal

63 For example, the ICC Dispute Board Rules give parties a choice between three different types of Dispute Boards: (a) Dispute Review Boards (which issue non-binding recommendations); (b) Dispute Adjudication Boards (which issue contractually binding decisions); and (c) Combined Dispute Boards (which issue non-binding recommendations but may issue binding decisions if the Parties so request). [Section 8.3, Sample Drafting 8, Schedule 1, Option 3](#) illustrates type (a). 例如，《国际商会争议委员会规则》为当事人提供三类不同的争议委员会选择方案：（a）争议审查委员会（作出不具有约束力的建议）；（b）争议裁决委员会（作出具有合同约束力的决定）；及（c）联合争议委员会（作出不具有约束力的建议，但在当事人有所要求的情况下亦可作出具有约束力的决定）。第8.3节草案范本8附表1方案3对（a）类作了说明。

(or the courts) if the parties do not give effect to the board's decision. Disputes Boards lack the consensual approach of mediation (or a panel of the Parties' senior representatives) and there continues to be a debate about the efficacy and costs of this mechanism. If the decision of the Disputes Board is binding, there is little difference as compared with the arbitration process (therefore the process may be redundant given the inclusion of the arbitration clause). If the recommendation is not binding there may be little difference with the obligation to try to reach amicable settlement - the involvement of and decision by experts may, however, be helpful in steering the Parties towards a resolution. See Section 8.3, Sample Drafting 8, Schedule 1, Option 3. 争议委员会——争议委员会是较为正式的机制，通常是在合同开始时委任一个外部专家小组，凡在合同有效期内发生的争议，均可提交该委员会处理。这种方式在建设施工合同中较为普遍，通常情况下当事人必须支付外部专家留任费用。关键考虑因素是委员会决定是否为终局决定及是否具有约束力⁶³；如果双方不认可委员会决定的效力，争议可能需要交由仲裁庭（或法院）重新审理。争议委员会缺乏协商一致的调解方式（或各方当事人的高级代表小组），且关于这一机制的有效性及其成本仍存在争论。如果争议委员会决定具有约束力，则与仲裁程序相比区别不大（因此既然已有仲裁条款，此程序便显得多余）。如果其建议没有约束力，则与尝试达成友好和解的义务相比区别不大——然而，专家的参与及决定可能有助于指导当事人达成解决方案。请参见第8.3节草案范本8附表1方案3。

8.2.5 *Independent experts for technical disputes* 独立专家解决技术争议

As noted in Section 8.2.1(3), PPP Contracts typically include a clause providing that "technical disputes" be referred to an independent expert or panel of experts for determination. For example, valuation issues or accountancy issues are regularly referred to expert determination because Parties may believe it is advantageous for the individual determining the dispute to have detailed knowledge of a particular market/area. 如第8.2.1(3)节所述，PPP合同通常设有“技术争议”交由独立专家或专家小组决定的条款。例如，估值问题或会计问题通常提请专家决定，因为当事人相信争议处理人具备特定市场/领域深厚知识对解决争议有利。

Parties will also need to think carefully about the definition of “technical disputes” so as to avoid, as far as possible, a dispute about scope. One option is to list particular clauses of the PPP Contract and specify that disputes under such clauses will be considered “technical disputes” unless otherwise agreed. To encourage efficiency, it is recommended that the clause specifies that the determination of the expert should be final and contractually binding, except in the case of manifest error or fraud. This approach should, however, be confirmed by local counsel, as certain jurisdictions may not give effect to an expert determination clause, even if this is specifically agreed in the PPP Contract.⁶⁴ 当事人还应认真考虑“技术争议”的定义，以便尽可能避免关于范围的争议。一种选择方案是列出PPP合同特定条款并指明除非另有约定，否则该等条款项下发生的争议应被视为“技术争议”。为促进效率，建议条款

64 For example, it is understood that, whilst in theory there is scope for courts in the PRC to enforce an expert determination clause on the basis of general principles set out in PRC contract law, in practice there is a risk that the court may consider such a clause as contrary to public policy. In Thailand there is a risk that expert determination clauses may also be ineffective. 例如，据了解，虽然理论上中国法院有权根据中国合同法通则执行专家决定条款，但实践中存在法院认为该条款有违公共政策的风险。在泰国，亦存在专家决定条款可能无效的风险。

指明专家决定应为终局决定且具有合同约束力，但存在明显错误或欺诈的情况除外。然而，这种方法应向当地法律顾问确认，因为即使PPP合同已作明确约定，但某些司法管辖区仍可能不承认专家决定条款的效力⁶⁴。

An expert determination is generally not "enforceable" in the same way as a court judgment or arbitral award. This means if the expert determination is not complied with voluntarily the Parties will need to resort to arbitration (or court litigation) in any event to resolve the dispute and obtain an enforceable award or judgment. For example, a Party may have to bring a claim for breach of the PPP Contract in respect of a failure to comply with the expert's determination. Accordingly, even if Parties choose to include an expert determination clause they must also include an arbitration clause (or a jurisdiction clause) as a fall back to cover a situation where there has been a failure to comply with a determination. It is also important that matters outside the scope of the expert determination clause, as well as situations where something has gone wrong with the expert process itself, can be referred to arbitration (or the courts). See Section 8.3, Sample Drafting 8, Clauses (6)-(11). 专家决定通常不具有与法院判决或仲裁裁决相同的“执行效力”。这意味着，如果专家决定未能得到自觉履行，当事人将需要诉诸仲裁（或法院诉讼）以解决争议并获得具有执行效力的裁决或判决。例如，一方当事人可能需要就对方未能履行专家决定而提起PPP合同违约之诉。因此，即使当事人选择加入专家决定条款，他们仍必须加入仲裁条款（或管辖权条款）作为后备，以防在专家决定得不到履行的情况下有据可依。同样重要的是，专家决定条款范围外的事宜以及专家程序本身出现问题的情况均可提交仲裁（或法院）。请参见第8.3节草案范本8第（6）条-第（11）条。

8.2.6 Waiver of immunities 放弃豁免权

As highlighted in Section 8.2.1, one of the key negotiation points for a Contracting Authority to consider is whether and to what extent the dispute resolution clause in a PPP Contract should include a waiver of any privileges and sovereign immunities which the Contracting Authority enjoys before local and foreign courts (such as immunity from any suits by the Private Partner).⁶⁵ The Contracting Authority should seek advice on the nature and extent of any immunities early in the process. Generally speaking, a PPP Contract is expected to be fully enforceable and Private Partners and Lenders are therefore likely to have a policy of seeking a "clean" and wide-ranging waiver of sovereign immunity clause in commercial contracts with sovereigns or quasi sovereigns. The Contracting Authority will then need to assess whether it is bankable to resist a waiver entirely or whether negotiating limitations is an acceptable compromise. 如第8.2.1节所述，缔约政府部门需要考虑的谈判要点之一是PPP合同争议解决条款是否应规定放弃缔约政府部门在当地及外国法院享有的任何特权及主权豁免（例如豁免被私营合作伙伴起诉），以及放弃的范围⁶⁵。缔约政

65 This does not apply to ICSID arbitration as a State or Contracting Authority that consents in writing to ICSID arbitration is already waiving its immunity from being sued by the Private Partner and must therefore recognize an ICSID award and enforce the pecuniary obligations under it as if it were a final judgment of a local court. However, the same does not apply to "immunity from execution". The concrete measures taken to execute the pecuniary obligations of an ICSID award will be governed by law of the State in which execution is sought, which includes that State's rules on sovereign immunity. 这不适用于ICSID仲裁，因为书面同意ICSID仲裁的国家或缔约政府部门已经放弃了其不受私营合作伙伴起诉的豁免权，因此必须承认ICSID裁决并执行裁决规定的金钱义务，犹如它是当地法院的最终判决一样。然而，这不适用于“执行豁免权”。执行ICSID裁决金钱义务采取的具体措施受申请执行地所在国家的法律管辖，包括该国的主权豁免规则。

府部门应及早就任何豁免的性质和范围寻求意见。一般而言，PPP合同被期望应是可完全执行的，因此私营合作伙伴及贷款方在与主权或半主权实体签署商业合同时，可能有寻求“清洁”和大范围放弃主权豁免条款的政策。因此，缔约政府部门需要评估完全拒绝弃权情况下项目能否得具有可融资性，或就限制条款进行谈判的让步是否可接受。

Immunity is a complex legal area but, in short, a wide ranging waiver would usually cover both a waiver from any court proceedings connected to the resolution of the dispute (if an arbitration clause is used this relates to any court orders needed to assist the arbitration) and recognition of any award/judgment. It would also include an agreement by the sovereign entity to execution/enforcement against its assets (or certain of them) and an agreement to certain forms of relief e.g. asset freezes. The precise ambit of any waiver in a PPP Contract is likely to depend on relevant laws and the Parties' bargaining power in the relevant real life contractual negotiations. An illustration of the scope of a wide ranging waiver is set out in [Section 8.3, Sample Drafting 8, Clause \(22\)](#). 豁免权是复杂的法律领域，但简而言之，大范围弃权通常包括放弃受到与争议解决有关的任何起诉（如果采用仲裁条款，则指协助仲裁所需的任何法院裁定）及承认任何裁决/判决。它还包括主权实体同意针对其资产（或其特定部分）的执行，及同意特定救济形式，例如资产冻结。PPP合同中任何弃权的确切范围可能取决于有关法律及当事人在有关实际合同谈判中的谈判实力。大范围弃权的范围说明详载于[第8.3节草案范本8第（22）条](#)。

The Parties should also make sure they understand whether or not it is legally possible for the Contracting Authority to waive its privileges and immunities as a matter of local law (whether under constitutional arrangements, public policy or otherwise). In this regard it should be noted that under some laws an agreement to arbitrate is deemed to be a waiver of immunity from suit and a sovereign is not immune from suit where a dispute relates to both commercial activities and is not a sovereign act. Ultimately, a Contracting Authority may find it has more scope to resist or negotiate limits to any waiver in respect of recognition or enforcement of judgments or awards. 当事人亦应确保其了解根据当地法律（无论是根据宪法安排、公共政策或其他），缔约政府部门是否有可能合法放弃其特权及豁免权。这方面应注意，根据一些法律，同意仲裁即被视为放弃免受起诉的豁免权，当争议涉及商业活动且属于非主权行为时，主权政府不能豁免受起诉。最后，缔约政府部门可能发现在关于承认或执行判决或裁决的任何弃权方面拥有更多的拒绝或限制谈判余地。

8.3 SAMPLE DRAFTING 8 草案范本8

Governing Law 管辖法律

- (1) This PPP Contract and any non-contractual obligations arising out of or in connection with it, are governed by and shall be construed in accordance with the laws of. 本PPP合同及因本PPP合同产生的或与本PPP合同有关的任何非合同义务均受[国家]法律管辖并依其解释。

Dispute Resolution 争议解决

- (2) If any dispute arises out of or in connection with this PPP Contract including any dispute concerning any non-contractual obligations arising out of or in connection with it (a "Dispute") it shall be resolved in accordance with this Clause []. 因本PPP合同产生的或与本PPP合同有关的一切争议，包括因本PPP合同产生的或与本PPP合同有关的一切非合同义务争议（“争议”），应依照本第[]条解决。

- (3) Either Party may by notice in writing to the other Party, at the address for sending of notices under this PPP Contract and in a manner provided by Clause [], give notice that a Dispute has arisen ("Notice"). The Notice shall set out brief details of the nature of the Dispute. 任何一方均可书面通知对方争议的发生，通知应按第[]条规定方式发送至本PPP合同规定的通知送达地址（“通知”）。通知应简要说明争议的性质。

Negotiation 谈判

- (4) The Parties shall attempt to settle any Dispute referred to in a Notice by good faith negotiation. Each party shall be represented in any negotiation by that party's [CEO/a person with authority to settle the Dispute]. Such negotiation shall take place within fifteen (15) days of the delivery of the Notice. Any negotiations shall be confidential and shall be conducted without prejudice to the rights of the parties in any future proceedings. 双方应尝试通过善意谈判解决通知提及的任何争议。双方应分别指派其[首席执行官/获授权解决该争议的人士]作为谈判代表。谈判应在通知送达后十五（15）日内进行。谈判应保密进行，且不影响双方在任何未来法律程序中的权利。

- (5) Nothing in [Clause (4)] will prejudice the right of a Party to seek urgent injunctive or declaratory relief or other urgent relief in respect of a Dispute. [第（4）条]规定不影响任何一方就争议寻求紧急禁令或确权救济或其他紧急救济的权利。

Expert Determination 专家决定

Careful consideration should be given to the governing law selected in any PPP Contract, as this determines the legal system whereby the rights and obligations under the PPP Contract will be determined. A well-established and predictable system of law should be selected. Split governing law clauses should be avoided as they can result in complications. Investors may be concerned if the Contracting Authority's national law is selected because they may fear that the local law may change in a way that adversely affects their interests. 应仔细考虑任何PPP合同选择的管辖法律，因为管辖法律决定了用于确定PPP合同项下权利义务的法律体系。应选择成熟且可预测的法律体系。应避免拆分管辖法律条款，因为这可能引起混乱。如果选择缔约政府部门的本国法，投资者可能会担心，因为他们害怕当地法律可能会发生对其利益产生不利影响的变化。

The clause could alternatively provide for a two stage negotiation process, with senior representatives only being required to be involved at the second stage. 作为替代选择，本条款可规定分两阶段进行谈判过程，第二阶段仅可由高级代表参与。

- (6) Any Dispute arising out of or in connection with Clauses [insert reference to every clause where a Dispute is considered a Technical Dispute] (a "Technical Dispute") which is not resolved amicably in accordance with Clause [reference], shall be resolved in accordance with Clauses []. In any other case, the Dispute shall be resolved in accordance with Clauses [reference to Jurisdiction or International Arbitration clause as appropriate].因条款[引述争议被视为技术争议的每一条款]产生的或与之有关的任何争议（“技术争议”），如果无法依照条款[引述]友好解决，则应依照条款[]解决。在任何其他情况下，争议应依照条款[引述管辖权或国际仲裁条款，视情况而定]解决。
- (7) A Technical Dispute shall be referred, at the request of either party, to an independent expert for determination. The Parties shall agree on the appointment of the expert and shall agree with the expert the terms of his/her appointment. If the Parties are unable to agree on the identity of the expert, or if the person proposed is unable or unwilling to act, then, within [seven] days of either Party serving details of a suggested expert on the other or the proposed expert declining to act, either Party shall then be entitled to request that an expert be appointed by [the ICC] on the application of a Party. All costs of and associated with the request for the appointment of an expert by the [ICC] shall be borne equally between the Parties.经任何一方请求，技术争议应提交独立专家决定。双方应就专家的委任事宜协商一致，并与专家就其委任条款达成协议。如果双方无法在专家人选上达成一致意见，或如果提议的人选不能或不愿担任，则在一方方向对方送达建议专家人选详细信息或建议专家人选拒绝担任之日起[七]日内，任何一方均有权请求由[国际商会]依该方申请指定专家。因申请[国际商会]指定专家而产生的一切有关费用由双方平均分担。
- (8) The expert appointed may be an individual, partnership, association or body corporate and shall be generally recognized as an expert in [specify field] and shall have [X] years of experience in that field.所委任的专家可以是个人、合伙企业、协会或法人，且应被公认为[说明领域]的专家并拥有该领域[X]年的经验。
- (9) The expert shall act on the following basis:专家应在以下基础上行事：
- (a) [on his/her appointment, the expert shall confirm his/her neutrality, independence and the absence of conflicts in determining the Technical Dispute] / [no person shall be appointed as an expert who at the time of appointment (or at any time before he/she gives his/her determination under such appointment), is a director, officeholder, employee or [] of

An alternative approach is to list individual experts on an agreed list and select from that list. However, the selection of individuals at the transaction stage may be a time consuming distraction at a stage when the Parties are trying to complete the deal. Further, when a dispute arises there is a risk the experts identified may not be available or may be conflicted, especially in a long term PPP Contract.另一种方案是从事先约定的专家人选名单上选择。然而，在交易阶段选择人选可能是一项既耗时又令人分心的工作，尤其是在双方均努力尝试达成交易的阶段。此外，所确定的专家可能无法到位或可能存在利益冲突，尤其是在长期PPP合同的情况下。

It is essential to include an appropriate appointing body in case the Parties are unable to agree on an expert. If there is no appointing authority, the clause may fail altogether. The ICC offers three services whereby it will (1) put forward the name(s) of one or more experts or neutrals upon a request from one or more parties, a court or an arbitral tribunal, (2) make a binding appointment if the parties request this, or (3) supervise the entire expert proceedings if necessary. Alternatively, a number of professional bodies are willing to assist in selecting appropriate experts in their fields, so a relevant professional body could be named here.有必要加入适当的委任机构，以防当事人无法就专家人选达成一致意见。如果没有委任机构，整个条款可能形同虚设。国际商会提供三项服务，包括（1）应一方或多方当事人、法庭或仲裁庭请求，提出一位或多位专家或中立人士名单，（2）如果当事人有所请求，作出具有约束力的委任，或（3）如有必要，对整个专家程序进行监督。此外还有不少专业机构愿意协助选择其领域内的适当专家，故可在此指定一个相关专业机构。

Parties should consider whether they want to provide that the expert may not be connected with any particular companies or organisations due to the possibility of conflicts arising.当事人应考虑是否需要规定专家不得与任何特定公司或组织有关联，因为有可能发生利益冲突。

[]];[于接受委任时，专家应确认其在决定技术争议时的中立性、独立性及不存在利益冲突] / [于委任时（或于其决定接受委任前的任何时候）身为[]董事、高级管理人员、员工或[]的人士，不得被委任为专家];

- (b) the expert shall act as an expert and not as an arbitrator;专家应以专家身份而非仲裁员身份行事;
- (c) the expert's determination shall (in the absence of manifest error) be final and binding on the Parties and not subject to appeal;专家决定（在不存在明显错误的情况下）应为终局决定，对双方具有约束力，且不得上诉;
- (d) the expert shall decide the procedure to be followed in the determination in accordance with this PPP Contract [and in consultation with the Parties] [and shall be requested to make his/her determination in writing, with reasons, within [30] days after his/her appointment or as soon as practicable thereafter];专家应依照本PPP合同[并与当事人协商]确定其作出决定应遵守的程序[且应在接受委任后[30]日内或接受委任后尽快作出书面决定并说明理由];
- (e) any amount payable by one Party to another as a result of the expert's determination shall be due and payable within [seven] days of the expert's determination being notified to the Parties or as specified within the determination;根据专家决定应由一方当事人向另一方支付的任何金额，应在当事人收到专家决定之日起[七]日内或专家决定指明的期限内支付;
- (f) any action required by the expert determination shall be implemented within [14] days following the expert determination being notified to the Parties or as specified within the determination;根据专家决定应采取的任何行动，应在当事人收到专家决定之日起[14]日内或专家决定指明的期限内实施;
- (g) the expert may, if he/she thinks fit, award interest at the rate of [] on any amount which is determined to be payable (excluding costs) by one Party to the other from the date of [the Notice] referred to in Clause [];专家可在其认为合适的情况下，裁决对应由一方当事人向另一方当事人支付的任何金额（不含费用）自第[]条所述[通知]之日起按[]的利率计算利息;
- (h) the costs of the determination, including the fees and expenses of the expert (but excluding the Parties' own costs which shall be borne by the Party incurring those costs), shall be borne equally by the Parties;决定费用，包括专家费用及支出（但不包括当事人各自的费用，这些费用应由招致有关费用的一方当事人承担），应由双方平均分担;
- (i) the expert determination and all matters connected with it shall be held in complete confidence by each of the Parties and shall not be disclosed to any other person except:双方应对专家决定及与之有关的一切事宜严格保密，不得披露给任何其他人士，但以下情况除外:

- (i) to the auditors and to the legal advisors of that Party to whom the confidentiality obligations set out in this agreement shall extend; or 披露给负有本协议规定保密义务的一方当事人的审计师及法律顾问; 或
- (ii) where that Party is under a legal or regulatory obligation to make such a disclosure, but limited to the extent of that legal obligation; or 当事人负有作出披露的法定或监管义务的, 但披露仅以该法定义务为限; 或
- (iii) to the extent that it is already in the public domain (other than as a result of a Party's breach of this agreement); or 如果有关信息已存在于公共领域 (非因当事人违反本协议所致); 或
- (iv) with the prior written consent of the other Party to this agreement [such consent not to be unreasonably withheld]. 经本协议另一方当事人事先书面同意[无正当理由不得拒绝同意]。

(10) The Parties agree to take all reasonable steps to make their employees and agents aware of the terms of [Clause (9)(i)] and to instruct them to observe those terms. 双方同意采取一切合理措施使其员工及代理人了解[第(9)(i)条]条款, 并指示他们遵守该等条款。

(11) If the Parties fail to agree: 如果双方未能就以下事项达成一致意见:

- (i) whether or not a Dispute is a Technical Dispute within fifteen (15) days of service of the Notice; 通知送达之日起十五(15)日内未能就争议是否属于技术争议达成一致意见;
- (ii) whether the Expert's Determination was in manifest error or fraudulent; or 专家决定是否存在明显错误或欺诈; 或
- (iii) whether a Party has failed to implement fully the Expert's Determination, 一方是否未能完全履行专家决定,

then the matter shall be resolved in accordance with Clauses [reference to Jurisdiction or International Arbitration clause as appropriate]. 则有关事项应依照条款[引述管辖权或国际仲裁条款, 视情况而定]解决。

Option 1: Jurisdiction [delete if choosing arbitration - Option 2] 方案1: 管辖权[如选择方案2 - 仲裁, 则本条删除]

(12) The courts of [] shall have exclusive jurisdiction to determine any Dispute and any matter provided by Clause [(11)]. The Parties irrevocably submit to the courts of [as above] and agree not to argue they are an inconvenient forum. [] 法院对第[(11)]条规定的一切争议及一切事项具有专属管辖权。双方不可撤销地

Broadly, this means that only the chosen court is competent to take jurisdiction over disputes, although this is usually subject to certain standard exceptions. It may be preferable to have certainty as to which courts will have jurisdiction by identifying the chosen court in this way. Other options exist and specific advice should be sought. 从广义上讲, 这意味着只有选定的法院才有权对争议行使管辖权, 尽管这方面通常有某些标准例外情况。如果想在有管辖权法院方面获得确定性, 最好是按这种方式明确所选定的法院。存在其他方案, 应寻求具体意见。

Where there is a US nexus, insert a "jury waiver" provision. Further, where proceedings need to be 'served' to be formally initiated then a process agent provision may be added. 如果与美国有关系, 则加入"放弃陪审团"规定。此外, 如果法律程序需要"送达"才能正式提起, 则可增加法律文书送达代理人条款。

接受[上述]法院的管辖，并同意不以非方便法院地原则为由对其提出管辖权异议。

Option 2: International Arbitration [delete if choosing court jurisdiction - Option 1]方案2: 国际仲裁[如选择方案1 - 法院管辖, 则本条删除]

- (12) Any matter provided by Clause [(11)] and any Dispute which is not a Technical Dispute and has not been resolved amicably between the Parties in accordance with Clause [(4)] shall be referred to and finally resolved by arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce ("ICC Arbitration Rules") which are deemed incorporated by reference into this PPP Contract.⁶⁶第[(11)]条规定的一切事项以及不属于技术争议的一切争议，如果双方无法依照第[(4)]条友好解决，则应依照《国际商会仲裁规则》（“《ICC仲裁规则》”）提交仲裁进行终局解决。《国际商会仲裁规则》被视为通过引述而并入本PPP合同⁶⁶。
- (13) The number of arbitrators shall be three (3) appointed in accordance with the ICC Arbitration Rules (the "Arbitral Tribunal").仲裁员人数应为三(3)名，依照《国际商会仲裁规则》指定（“仲裁庭”）。
- (14) The arbitrators shall be fluent in [English and other relevant language]. The language of the proceedings shall be [English] and all documents submitted in such proceedings shall be in [English or accompanied by a certified English translation].仲裁员应通晓[英语及其他相关语言]。仲裁程序语言为[英语]，仲裁程序中提交的所有文件应采用[英语或附具经核证的英译本]。
- (15) The seat of arbitration shall be [insert choice]. [This agreement to arbitrate is governed by and shall be construed in accordance with the laws of [country]].仲裁地应为[填入选择]。[本仲裁协议受[国家]法律管辖并依其解释。]
- (16) The Parties undertake to keep confidential all awards in any arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another Party in the proceedings not otherwise in the public domain - save (i) with the permission of the Arbitral Tribunal or (ii) to the extent that disclosure may be required of a Party by legal duty or regulatory obligation or to protect or pursue a legal right, or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority. 双方承诺对任何仲裁的所有裁决、仲裁程序中为仲裁目的而制作的所有资料以及对方在仲裁程序中编制且不属于公共领域的任何其他文件予以保密，但以下除外：(i) 经仲裁庭许可，或(ii) 一方出于履行法定义务或监管义务，或出于保护

Consider if this is potentially too restrictive.注意此项规定是否可能限制过多。

As noted, the seat of arbitration is key and requires careful consideration. See Section 8.2.3. It should be noted that arbitral hearings can physically take place in another location than the seat of arbitration. If the place of hearings (the venue) is important for the Parties, it should be agreed upon at an early stage of negotiations.如上所述，仲裁地是关键，须予仔细考虑。请参见第8.2.3节。应注意，仲裁庭审的实际开庭地点可与仲裁地不同。如果庭审地点（开庭地点）对双方很重要，则应在谈判早期阶段达成协议。The parties may wish to add a provision specifying the law applicable to the arbitration agreement. To keep matters simple it is often helpful to specify the same law as for the seat. 双方可能希望加入仲裁协议适用的法律规定。为使事情简化，通常最好是指定与仲裁地相同的法律。

⁶⁶ For illustration purposes, Option 2 drafting is based on a choice of the ICC Rules. It will need review/adaptation when using an alternative institution's rules.为说明目的，方案2的起草乃以选择国际商会规则为基础。如果采用其他机构规则，必须相应审查/修改。

或寻求法定权利，或出于向国家法院或其他司法机关提起善意法律程序以执行或质疑一项裁决等需要而进行披露。

- (17) The Arbitral Tribunal shall issue a reasoned award in writing and shall endeavour to do so within [sixty (60) calendar] days from the date of the close of the arbitration hearing. The award of the Arbitral Tribunal shall be final and binding upon the Parties from the date it is made. 仲裁庭应作出附有理由的书面裁决，并尽可能在仲裁庭审结束之日起[六十（60）个日历]日内作出。仲裁庭的裁决是终局裁决，自作出之日起对双方具有约束力。
- (18) Judgment on the award of the Arbitral Tribunal may be entered and enforced by any court of competent jurisdiction. 可向任何有管辖权的法院申请对仲裁裁决进行效力认定，并申请执行仲裁裁决。
- (19) Unless otherwise determined by the Arbitral Tribunal, the Arbitrators' fees and associated institutional costs shall be split equally between the Parties. 除非仲裁庭另有决定，仲裁费用及相关机构费用应由双方平均分担。

Consolidation 合并审理

- (20) In order to facilitate the comprehensive resolution of related disputes, in the event that more than one arbitration is commenced under this PPP Contract and under [add related agreements], (the "Related Agreements"), the Private Partner and the Contracting Authority consent to the consolidation of arbitrations as follows: 为方便对相关争议的综合解决，如果本PPP合同项下及[填入相关协议]（“相关协议”）项下提起了多于一件仲裁，私营合作伙伴及缔约政府部门同意按以下规定对仲裁进行合并：

See discussion under Section 8.2.3, Step 4: Consolidation and Joinder - related contracts/related parties. 请参见第8.2.3节步骤4的探讨：合并审理——关联合同/关联当事人。

- (a) For the purposes of the Rules, the arbitration agreement set out in this PPP Contract and the arbitration agreement contained in each Related Agreement shall together be deemed to be an arbitration agreement that binds each Party to this PPP Contract and each party to each Related Agreement. 就仲裁规则而言，本PPP合同规定的仲裁协议与各相关协议包含的仲裁协议应共同被视为对本PPP合同各方当事人及各相关协议各方当事人均具有约束力的仲裁协议。
- (b) Any party to this PPP Contract or any Related Agreement may, in accordance with the ICC Arbitration Rules, be joined to any arbitration commenced under this PPP Contract or any Related Agreement. 本PPP合同或任何相关协议的任何一方当事人均可依照《国际商会仲裁规则》被并入本PPP合同或任何相关协议项下提起的任何仲裁中。
- (c) In accordance with the ICC Arbitration Rules, Disputes may be resolved in a single arbitration together with Disputes (as defined in any Related Agreement) arising out of any such Related Agreement. 本合同项下争议可依照《国际商会仲裁规则》与任何该等相关协议项下产生的争议（定义

参见相关协议) 合并在同一仲裁中解决。

- (d) Pursuant to Article 10(a) of the ICC Arbitration Rules, the Parties agree to the consolidation of any two or more arbitrations commenced pursuant to this PPP Contract and/or the arbitration agreement contained in any Related Agreement into a single arbitration, as provided for in the ICC Arbitration Rules.根据《国际商会仲裁规则》第10(a)条, 双方同意将依照本PPP合同及/或任何相关协议所含仲裁协议提起的任何两件或以上仲裁依照《国际商会仲裁规则》规定合并为同一仲裁。
- (e) Each Party waives any objection, on the basis that a Dispute has been resolved in a manner contemplated in this Clause [], to the validity and/or enforcement of any arbitral award made by an arbitral tribunal following the Dispute being resolved in that manner.在争议按本第[]条规定方式得到解决的基础上, 双方放弃在争议按该方式得到解决后对任何仲裁庭作出的任何仲裁裁决的有效性及/或可执行性提出任何异议。

Continuing Obligations 持续义务

- (21) Performance of this PPP Contract shall continue during arbitration proceedings or any other Dispute resolution mechanism pursuant to this Clause [].在本第[]条规定的仲裁程序或任何其他争议解决机制进行过程中, 双方应继续履行本PPP合同。

There may be circumstances in which a provision along these lines would not be appropriate. (e.g. if the PPP Project is not time critical and/or the Dispute is fundamental) 某些情况下含有该等表述的规定并不适当。(例如在PPP项目的履行时间并非关键因素及/或争议属于根本性质的情况下)

Waiver of Immunities 放弃豁免权

- (22) [To the fullest extent permitted by law the Contracting Authority irrevocably and unconditionally]: [在法律允许的最大限度内, 缔约政府部门不可撤销且无条件地]:

- (a) submits to the courts of any jurisdiction in relation to the recognition of any judgment or order of the courts of [jurisdiction of arbitration seat] in support of any arbitration in relation to any Dispute and in relation to the recognition of any arbitral award and waives and agrees not to claim any sovereign or other immunity from the jurisdiction of any court in relation to the recognition of any such judgment or court order or arbitral award and agrees to ensure that no such claim is made on its behalf.对于[仲裁地所在司法管辖区]法院为支持任何争议仲裁及承认任何仲裁裁决而作出的任何判决或裁定, 接受与该等判决或裁定承认有关的任何司法管辖区法院的管辖, 并放弃及同意不针对与任何该等判决或法庭裁定或仲裁裁决承认有关的任何法院主张任何主权或其他管辖权豁免, 并同意确保其代表亦不提出该等主张。

This clause is a wide ranging waiver which a Contracting Authority is likely to want to resist or limit, in particular subclause (b). 此条款属于大范围弃权, 缔约政府部门可能希望予以拒绝或限制, 尤其是子条款(b)。

- (b) [consents to the enforcement of any order or judgment in support of arbitration or any award made or given in connection with any Dispute and the giving of any relief in the courts of any other jurisdiction whether before or after final arbitral award including, without limitation: (i) relief by way of interim or final injunction or order for specific performance or recovery of any property; (ii) attachment of its assets; and (iii) enforcement or execution against any property, revenues or other assets whatsoever (irrespective of their use or intended use) and waives and agrees not to claim any sovereign or other immunity from the courts of any other jurisdiction in relation to such enforcement and the giving of such relief (including to the extent that such immunity may be attributed to it), and agrees to ensure that no such claim is made on its behalf]. [对于为支持仲裁而作出的任何裁定或判决，或与任何争议及任何其他司法管辖区法院在最终仲裁裁决之前或之后授予任何救济有关的任何裁决，同意该等裁定或判决或裁决的执行，包括但不限于：（i）临时或最终禁令救济，或任何财产的特定履行或恢复令；（ii）资产扣押；及（iii）针对任何财产、收入或其他任何类型资产的执行（而不管其用途或拟具有的用途），并放弃及同意不针对与该等执行或救济有关的任何其他司法管辖区法院主张任何主权或其他豁免（包括该等豁免可归因于此的范围），并同意确保其代表亦不提出该等主张]。

Contracting Authorities may choose to concede immunity from suit waiver language because as a matter of applicable law such immunity is deemed to be waived, for example because it is a commercial transaction. Specialist legal advice should be sought. 缔约政府部门可选择放弃诉讼豁免权，因为根据适用法律，该豁免权已被视为放弃，例如因为它是一项商业交易。应寻求专业法律意见。

SCHEDULE 1 - FURTHER DRAFTING OPTIONS 附表1 - 其他起草选择方案

In addition to the informal negotiation provision included in [Section 8.3, Sample Drafting 8, Clause \(4\)](#), the Parties may decide to include some or all of the informal dispute resolution provisions below. When considering these further options, reference should be made to [Section 8.2.4](#). For illustration purposes, the drafting is based on a choice of the ICC Rules. This drafting will need review/adaptation when using an alternative institution's rules.除第8.3节草案范本8第(4)条规定的非正式谈判条款外,双方可协商决定加入以下部分或全部非正式争议解决条款。在考虑这些进一步选择方案时,应参考第8.2.4节。为说明目的,草案乃以选择国际商会规则为基础。如果采用其他机构规则,本草案须予相应审查/修改。

Option 1 may be useful to encourage informal resolution at an early stage in the dispute.方案1可能有助鼓励在争议早期阶段通过非正式方式解决争议。

Option 1 - Mediation 方案1 - 调解

- (1) If the Parties are unable to negotiate the settlement of a Dispute referred to in a Notice within [15] Business Days of the date of the Notice (or such further period as is agreed in writing between the Parties before the expiry of that [15] Business Day period), [either/any] Party may refer the Dispute to mediation by notice in writing to the other [Party/Parties] [at the address given for the sending of notices under this agreement at Clause [reference] (Notices), and in a manner provided for in that Clause] (a "Mediation Notice"). If a Party refers a Dispute to mediation in accordance with this Clause [Mediation] [both/all] Parties to the Dispute shall be obliged to follow the procedure below.如果双方无法在通知之日起[15]个营业日内(或双方在该[15]个营业日届满前书面同意的延长期限内)通过谈判解决通知所述争议,[任何]一方均可书面通知[对方/其他各方]将争议提交调解,[通知应按本协议条款[引述](通知)规定的方式发送至该条款规定的通知送达地址]("调解通知")。如果一方依照本条款[调解]将争议提交调解,争议[双/各]方均有义务遵守以下程序。
- (2) The mediation shall be conducted by a single mediator who shall be appointed by agreement in writing between the Parties. If the Parties are unable to agree on the identity of a mediator within [five (5)] Business Days of the date of the [Mediation Notice], or if the mediator agreed by the Parties is or becomes unable or unwilling to act, the mediator shall be appointed by [the ICC] on the application of [either/ any] Party.调解由一名调解员进行,调解员由双方经书面协议指定。如果双方无法在[调解通知]之日起[五(5)]个营业日内就调解员人选协商一致,或如果双方约定的调解员不能或不愿担任,应由[国际商会]根据[任何一]方的申请指定调解员。
- (3) The mediation shall be conducted in [place] and in the English language under the [ICC Mediation Rules]. Each Party shall be represented at the mediation by an individual with authority to settle the Dispute.调解应依照[《国际商会调解规则》]在[地点]以英语进行。双方应各自指派一名负责解决争议的授权代表参加调解。
- (4) Save for the purposes of implementing and/or enforcing a written legally binding settlement agreement or as otherwise required by law, the mediation

shall be conducted without prejudice to the rights of the Parties in any future proceedings.除非为了履行/执行具有法律约束力的书面和解协议或依照法律规定，调解的进行不影响双方在任何未来法律程序中的权利。

- (5) The costs of the mediation, including the fees and expenses of the mediator (but excluding each Party's own costs, which shall be borne by the Party incurring those costs) shall be borne equally by the Parties, unless otherwise agreed in writing.调解费用，包括调解员费用及支出（但不包括双方各自的费用，这些费用应由招致有关费用的一方承担），应由双方平均分担，除非另有书面约定。

Option 2 - Escalation to a panel of senior representatives **方案2 - 呈交高级代表小组**

Option 2 is often seen in construction disputes, but can add costs and delay final resolution.方案2常见于建设工程施工争议，但可能增加成本及延误最终解决。

- (1) As soon as is practicable after the effective date of this agreement, the Contracting Authority and the Private Partner will establish a panel of senior representatives of the Parties. The Senior Panel will meet and attempt to resolve informally any Disputes referred to the Senior Panel by notice for resolution ("Senior Panel Notice").缔约政府部门与私营合作伙伴应在本协议生效后尽快派员组成高级代表小组。该高级小组负责召开会议并尝试通过非正式方式解决任何以通知形式提交高级小组的争议（“高级小组通知”）。
- (2) The Senior Panel will comprise [four members], [two] appointed by each of the Contracting Authority and the Private Partner. Each Party is entitled to terminate the appointment of a representative designated by it to the Senior Panel and to appoint a replacement.高级小组由[四名成员]组成，缔约政府部门与私营合作伙伴各自指派[两名]。任何一方均有权终止对其所指派代表的委任，并指派替代代表。
- (3) The representatives on the Senior Panel will be duly authorised to make decisions on behalf of, and to bind contractually, the Party appointing such representative in relation to the Dispute referred for determination.高级小组的代表应获得正式授权代表其指派方就提交处理的争议作出对指派方具有合同约束力的决定。
- (4) [At any meeting the Senior Panel may, by unanimous resolution, elect to appoint a mediator to assist them in resolving a Dispute on such terms as they may then agree].[在任何会议上，高级小组可经一致决议选择委任一名调解员来协助他们解决争议，调解员任期由高级小组届时协商确定]。
- (5) The Senior Panel must meet and attempt in good faith to resolve any Dispute referred to the Panel by negotiations within [fifteen (15) business] days of the date on which the Senior Panel Notice was delivered. If the Senior Panel fails to meet within this timeframe, and no extension is agreed by Parties then either Party may submit the Dispute to arbitration or in the case of a Technical Dispute, an expert in accordance with Clause [Expert Determination].高级小组必须在高级小组通知送达之日起[十五（15）个营业]日内召开会议并尝试通过谈判善意解决任何提交小组处理的争议。高级小组未能在该期限内召开会议，双方

又未同意延期的，则任何一方均可将争议提交仲裁，或在技术争议的情况下，依照条款[专家决定]提交专家处理。

- (6) Senior Panel Notices convening meetings of the Senior Panel will specify the nature of the Dispute.关于召集高级小组会议的高级小组通知应说明争议的性质。
- (7) Meetings of the Senior Panel will be held in [insert name of City or address] unless otherwise agreed by the Parties.高级小组会议应在[填入城市名称或地址]举行，除非双方另有约定。
- (8) The quorum of any Senior Panel meeting will be [at least one representative of each of the Contracting Authority and the Private Partner]. If a quorum is not present within 30 minutes after the time appointed for commencement of the meeting, that meeting will be adjourned to a time, day and place agreed upon by the representatives of both Parties. In the event there is no agreement concerning the adjourned meeting or there is no quorum at the adjourned meeting, either Party may submit the Dispute to arbitration in accordance with Clause [Arbitration] or in the case of a Technical Dispute, an expert in accordance with Clause [Expert Determination].任何高级小组会议的法定人数应为[缔约政府部门与私营合作伙伴至少各有一名代表]。如果会议指定开始时间后30分钟内达不到法定人数，该次会议应押后至双方代表同意的时间、日期及地点举行。如果双方未能就押后会议达成协议或押后会议仍达不到法定人数，任何一方均可依照条款[仲裁]将争议提交仲裁，或在技术争议的情况下，依照条款[专家决定]提交专家处理。
- (9) The Senior Panel will attempt to resolve the Dispute within [ten (10) business] days, following the date on which the Senior Panel initially convenes pursuant to Clause (5), above. If the Senior Panel is unable to resolve the Dispute within that period, either Party may immediately submit the Dispute to arbitration or expert determination as required pursuant to Clause [Expert Determination] or Clause [Arbitration].高级小组应尝试在其首次依照上文第(5)条规定召集会议之日起[十(10)个营业]日内解决争议。如果高级小组未能在该期限内解决争议，任何一方均可依照条款[专家决定]或条款[仲裁]规定立即将争议提交仲裁或专家决定。
- (10) At any meeting of the Senior Panel, voting on any decision relating to the Dispute will be by unanimous resolution, with each representative having one vote. Duly passed resolutions of the Senior Panel will be final and contractually binding on the Contracting Authority and the Private Partner provided that they are in writing and signed by all members of the Senior Panel.在高级小组的任何会议上，对与争议有关的任何决定进行表决时须经全体代表一致决议，代表实行一人一票。正式通过的高级小组决议为终局决议，对缔约政府部门及私营合作伙伴均具有合同约束力，前提是决议应采用书面形式并由高级小组全体成员签署。
- (11) If the Dispute is not resolved by amicable settlement between the Parties or through a resolution by the Senior Panel, as evidenced by the signing of its written terms, within [thirty (30) calendar] days of delivery of the Senior Panel

Notice provided in Clause (1) above], any Party may submit the Dispute to arbitration in accordance with Clause [Arbitration] or in the case of a Technical Dispute to an expert in accordance with Clause [Expert Determination]. 如果争议未能在上文第(1)条规定的高级小组通知送达之日起[三十(30)个日历]日内通过双方友好协商或高级小组决议得到解决(以签署书面决议条款为准),任何一方均可依照条款[仲裁]将争议提交仲裁,或在技术争议的情况下,依照条款[专家决定]提交专家处理。

Option 3 - Disputes Review Board Clause 方案3 - 争议审查委员会条款

Option 3 is often seen in construction disputes, but can add costs and delay final resolution. 方案3常见于建设施工争议,但可能增加成本及延误最终解决。

- (1) Failing an amicable settlement on a Dispute that is not a Technical Dispute pursuant to CLAUSE [insert reference to the amicable settlement clause] above within [thirty (30) calendar] days of the receipt of the notice provided therein, any such Dispute shall be referred by either Party for resolution by the dispute review board ("Dispute Review Board") in accordance with this Clause []. 如果未能依照上文条款[引述友好解决条款]在收到该条款规定通知之日起[三十(30)个日历]日内友好解决技术争议以外的争议,任何一方应将任何该等争议提交争议审查委员会("争议审查委员会")依照本第[]条规定解决。
- (2) The Parties hereby agree to establish a Dispute Review Board in accordance with the Dispute Board Rules of the International Chamber of Commerce (the "ICC Dispute Board Rules"), which are incorporated herein by reference. 双方特此同意依照《国际商会争议委员会规则》("《ICC争议委员会规则》")成立争议审查委员会,《国际商会争议委员会规则》在此通过引述而并入本协议。
- (3) The Dispute Review Board shall be comprised of three (3) members, each of whom shall be fluent in [English] with professional experience in the matters with respect to contractual obligations in projects similar to the PPP Project, appointed in accordance with the ICC Dispute Board Rules. 争议审查委员会由三(3)名成员组成,每名成员均应通晓[英语],具备与本PPP项目类似的项目合同义务相关事项的专业经验,并依照《国际商会争议委员会规则》指定。
- (4) All Disputes arising out of or in connection with this PPP Contract shall be submitted, in the first instance, to the Dispute Review Board in accordance with the ICC Dispute Board Rules. For any given dispute, the Dispute Review Board shall issue a recommendation in accordance with the ICC Dispute Board Rules. 因本PPP合同产生的或与本PPP合同有关的一切争议,均应首先依照《国际商会争议委员会规则》提交争议审查委员会处理。对于任何特定争议,争议审查委员会应依照《国际商会争议委员会规则》作出建议。
- (5) If any Party fails to comply with a recommendation when required to do so pursuant to the ICC Dispute Board Rules, the other Party may refer the failure itself, without having to refer it to the Dispute Resolution Board, to arbitration in accordance with Clause [insert reference to the arbitration clause]. A Party that has failed to comply with a recommendation when required to do so pursuant to the ICC Dispute Board Rules shall not raise any issue as to the merits of the

recommendation as a defense to its failure to comply without delay with the recommendation. 如果任何一方拒不依照《国际商会争议委员会规则》规定遵从建议，另一方可就该拒不遵从本身径行依照条款[引述仲裁条款]提交仲裁，而无需先行提交争议解决委员会。拒不依照《国际商会争议委员会规则》规定遵从建议的一方，不得以建议本身的对错问题作为其拒不及时遵从建议的抗辩。

- (6) If any Party sends a written notice to the other Party and the Dispute Review Board expressing its dissatisfaction with a recommendation, as provided in the ICC Dispute Board Rules, or if the Dispute Review Board does not issue the recommendation within the time limit provided in the ICC Dispute Board Rules, or if the Dispute Review Board is disbanded pursuant to the ICC Dispute Board Rules, the Dispute shall be finally settled under arbitration in accordance with Clause [insert reference to the arbitration clause]. 如果任何一方依照《国际商会争议委员会规则》规定向另一方及争议审查委员会发出书面通知表示其不满意建议，或如果争议审查委员会未能在《国际商会争议委员会规则》规定期限内作出建议，或如果争议审查委员会依照《国际商会争议委员会规则》规定解散，则争议应依照条款[引述仲裁条款]提交仲裁进行终局解决。

SCHEDULE 2 - ASSESSING WHETHER THE PRIVATE PARTNER MIGHT HAVE RECOURSE TO AN INTERNATIONAL INVESTMENT AGREEMENT 附表2 - 评估私营合作伙伴是否可能享有国际投资协定救济权

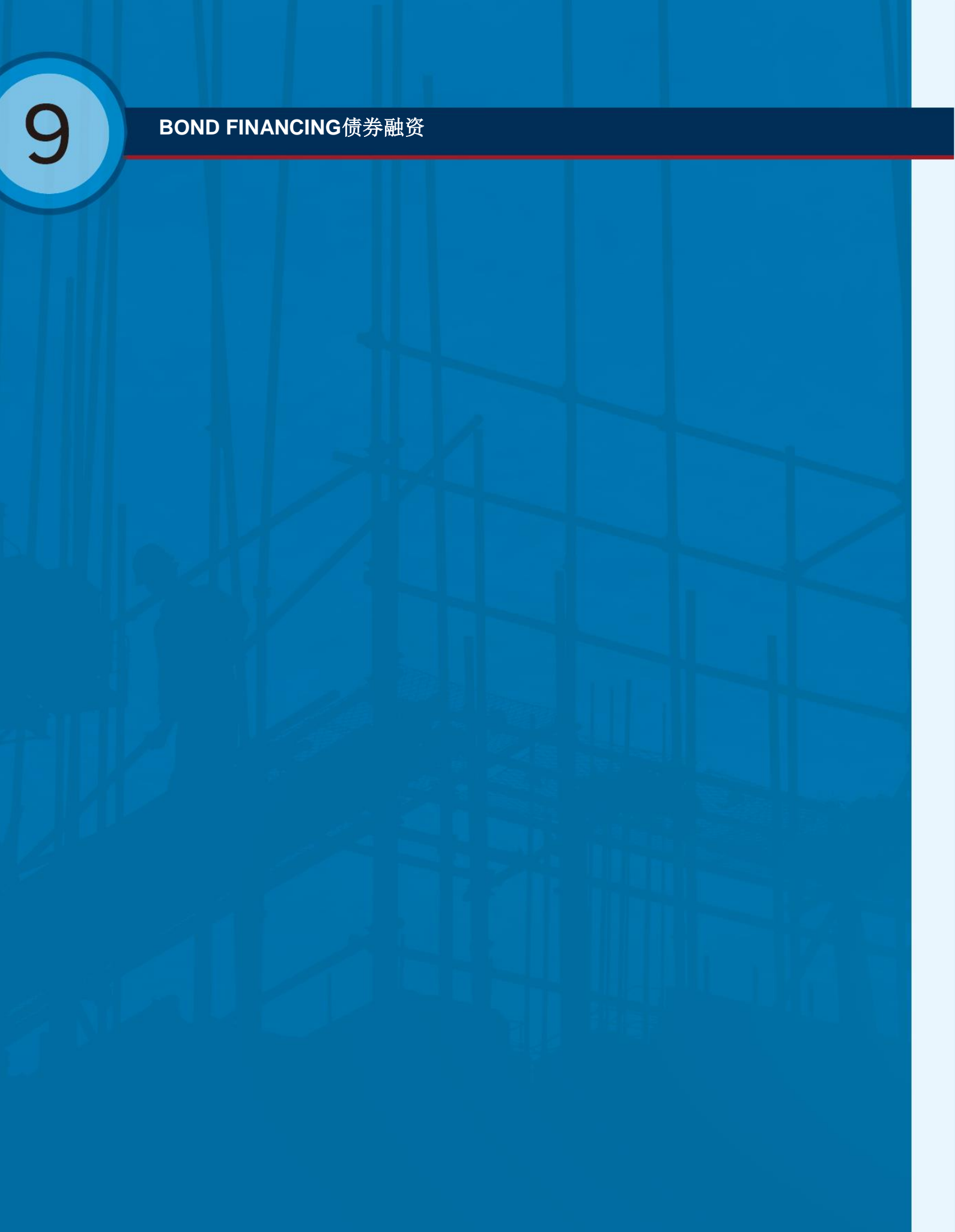
The Parties should consider whether the Private Partner may, in addition to its contractual rights, at some point have recourse to an international investment agreement ("IIA"), which could be either a Bilateral Investment Agreement ("BIT") (of which more than 3,000 have been signed globally), a multilateral investment treaty (such as the Energy Charter Treaty) or the investment chapter in a Free Trade Agreement ("FTA"). These IIAs provide investors with a number of substantive protections against State measures, such as arbitrary and discriminatory treatment, expropriation without adequate and prompt compensation or failure to provide fair and equitable treatment and full protection of security. The majority of IIAs also provide investors with the right to refer investment disputes to binding arbitration against the host State in which they have invested. 当事人应考虑私营合作伙伴是否可能在其合同权利以外，还享有国际投资协定（“IIA”）赋予的某方面救济权，国际投资协定可以是双边投资协定（“BIT”）（全球已签署超过3000份双边投资协定）、多边投资协定（例如《能源宪章条约》）或自由贸易协定（“FTA”）的投资章节。这些国际投资协定为投资者提供了一系列实质保护，以使投资者免于受到无理或歧视对待、征用而无充分及时赔偿、未能提供公平公正对待及全面安全保障等国家措施影响。大部分国际投资协定还赋予投资者将其与投资东道国的投资争议提交具有约束力仲裁的权利。

If the home States of the Private Partner and the Contracting Authority are both parties to an IIA, the Private Partner might, under certain circumstances, be able to bring claims for breaches of substantive protections set forth in the respective IIA, and which relate to the PPP Contract, under the arbitration mechanism established in the IIA. Very often, the mechanisms envisaged in this respect will be arbitration under the UNCITRAL Rules, ICSID arbitration or the ICSID Additional Facility Rules (an additional set of arbitration rules that apply to the settlement of disputes that do not meet the jurisdictional requirements set forth under the ICSID Convention). 如果私营合作伙伴母国及缔约政府部门所在国家均为国际投资协定缔约方，私营合作伙伴能够在特定情况下依照国际投资协定确立的仲裁机制，针对违反相关国际投资协定规定的实质保护且与PPP合同有关的违约行为提起索赔。这方面采用的机制往往是《UNCITRAL规则》仲裁、ICSID仲裁或《ICSID附加便利规则》仲裁（《附加便利规则》是一套附加仲裁规则，适用于解决不符合《ICSID公约》规定管辖权要求的争议）。

It is important to note that generally the right to bring a claim pursuant to an IIA exists independently of, and may be in addition to, any contractual claims under the PPP Contract. 重要的是应注意，依照国际投资协定提起索赔的权利是除PPP合同项下的任何索赔权利之外的、独立存在的索赔权利。

9

BOND FINANCING 债券融资



9.1 KEY ASPECTS 关键方面

9.1.1 *The concept of Bond Finance* 债券融资的概念

In the general corporate world, instead of borrowing from a bank, companies may choose to raise private finance by issuing bonds which are purchased by investors. Bonds in this context are debt instruments and may provide more certain, longer-term financing than bank debt. The company which issues the bond pays interest to the bondholders periodically, most commonly at a fixed rate but also potentially at a floating or index linked rate and repays the principal amount either in full on final maturity or in scheduled instalments. As with a bank loan, specific documentation is required for a bond issue and there is an established process to follow. 对于一般的公司，相较于向银行借款，公司也可能选择通过发行债券然后由投资者购买的方式募集资金。在这种情况下，债券是一种债务工具，并且可以提供比银行贷款更加稳定和长期的融资资金。发行债券的公司向债券持有人定期支付利息，利率通常为固定利率，但亦可能采用浮动利率或指数挂钩利率，并在债券到期时一次性全额偿还本金或按计划分期偿还本金。与银行贷款一样，发行债券也需要特定的文件，也有一套既定规则需要遵守。

Bond issues may be public (listed on a stock exchange) and freely tradeable between investors. Alternatively, bonds may be issued by private placement (offered to a very limited number of investors) in which case they may be subject to transfer restrictions. The restrictions will depend on the relationship between the issuer and the investors. A privately placed transaction can be listed or unlisted. If a bond is publicly listed, the issuer will have to comply with the listing authority's detailed rules on the level of information it must disclose to prospective investors about its business and also will be subject to securities laws which will dictate the specifics of the disclosure. 债券可以公开发行（在证券交易所挂牌）并在投资者之间自由交易。此外，债券也可以私募发行（仅向极有限数量的投资者发行），在此情况下债券可能受到转让限制。这些限制取决于发行人和投资人之间的关系。私募发行交易可以挂牌也可以不挂牌。在挂牌债券的情况下，发行人必须遵守挂牌机构有关发行人必须向潜在投资者披露其业务信息的程度方面的详细规则，并且还需要遵守证券法对该等披露的相关规定。

A public bond issue is usually assigned a credit rating by at least one rating agency. A private placement may or may not have a credit rating. This provides an independent assessment of the underlying credit of the issuer and is a guide to investors as to the likelihood of the issuer meeting its principal and interest payment obligations under the bonds. Some investors may only (for regulatory or policy reasons) invest in 'investment grade' issuances (i.e. those rated at least BBB- by Standard & Poor's or Fitch or Baa3 by Moody's). 公开发行的债券一般至少会有一家评级机构为其确定一个信用评级。私募债券则非必须进行信用评级。信用评级为发行人的信用提供了独立的评估，投资者也可以将其作为发行人将来履行债券还本付息义务的可能性的参考。一些投资者（因为监管或者政策原因）只投资评级为“投资级别”的债券（如标准普尔或惠誉BBB-或以上评级，或者穆迪Baa3或以上评级）。

As bonds can be issued with long maturity dates, they suit the investment profile of institutions seeking predictable long term investments to match their maturing liabilities, such as pension funds and insurers. 由于债券的期限可以很长, 因此它们适合那些寻求长期可预期投资以匹配其到期债务的投资机构, 比如养老基金和保险公司。

9.1.2 Why are PPP Projects bond financed? PPP项目为什么使用债券融资?

Prior to the 2008 global financial crisis, most PPP Projects were successfully financed through long term commercial bank debt borrowed by the Private Partner. More recently, as a result of the financial crisis and ensuing banking regulation⁶⁷, the volume of bank debt available for large infrastructure projects has reduced and loan tenor has shortened with a corresponding effect on pricing and the introduction of refinancing risk if debt cannot be obtained for the whole project period. In addition, comparing bids with different tenors has proved challenging, with questions around the non-compliance and comparability of bids without full term committed pricing. 2008年全球金融危机之前, 大多数PPP项目可以通过私营合作伙伴向商业银行获取长期的贷款进行融资。最近几年来, 在金融危机和银行业监管趋严的影响下⁶⁷, 大型的基础设施建设项目获得的银行贷款额度有所下降, 而且贷款期限也相应地缩短, 进而导致, 如果无法获得整个项目期限内的贷款, 该项目将面临能否获得再融资及融资定价的风险。另外, 因没有完整期限内的定价, 投标人提交的投标文件中提供的银行贷款期限不尽相同, 则将给评标工作带来极大难度, 会导致不合规和投标无可比性等问题。

This has meant that in some PPP markets (e.g. particularly Europe and Australia), both bidders and Contracting Authorities have had to consider alternative forms of finance - on the bidders' side to ensure that their bids can be financed and remain competitive, and on the Contracting Authorities' side to ensure that value for money is obtained from the range of financing options procured by bidders (e.g. by requiring non-bank financing solutions to be submitted as part of bids. 这就意味着一些PPP市场(尤其是在欧洲和澳大利亚), 投标方和缔约政府部门必须考虑各种融资渠道, 一方面对于投标方来说需要保证其标的可以获得融资并具有竞争力; 另一方对于缔约政府部门来说需要保证在投标方提供的可选融资渠道(比如通过非银行融资方案)下均物有所值。

Even in markets where liquidity is not such a concern, there are also other reasons to consider bond financing as an alternative financing method. In some circumstances, bond finance - private or public - can offer long term finance for PPP Projects at a more affordable price than bank debt. Recent examples of this in developed markets include the projects funded under the EIB's Project Bond Credit Enhancement programme. Due to the longer term repayment profile of bonds, scheduled repayments may be lower than bank loan repayments and, in such cases, this should feed through to a lower priced PPP Contract for the Contracting Authority (or end user). From the Private Partner's perspective, it may also result in more cash being available for distribution to its equity investors during the repayment term than would be the case in a bank financing. The long term (and

67 For example, the Basel III capital adequacy requirements imposed on banks. 例如, 《巴塞尔资本协议III》对银行的资本充足率的要求。

generally fixed rate) nature of bond financing also enables the Private Partner to fix its financing costs for the life of the PPP Project (or the remaining life if after a refinancing) without the need for separate interest rate hedging arrangements, giving it certainty and reducing the likelihood of a subsequent refinancing. However, as discussed in Section 9.3.2, bond financing is unlikely to be suitable for all PPP Projects, particularly those of smaller value due to the relative size of transaction costs.即使在流动性良好的市场，仍然有其它理由考虑使用债券融资作为融资渠道之一。在某些情况下，债券融资（无论公开发行还是私募）可以为PPP项目带来长期的资金，而且融资成本比银行贷款更低。在成熟的市场中，最近的案例包括欧洲投资银行（EIB）的项目债券增信计划。因为债券的偿还期限更为长久，所以各项还款额可能比银行贷款的还款额低，这样对于缔约政府部门（或终端用户）来说，可以降低PPP合同的价格。从私营合作伙伴的角度看，这种融资方式相对于银行融资来讲，在整个还款期内可以有更多的现金可以分配给股权投资者。债券融资的长期性（通常利率固定）可以让资金具有确定性并缓解后续再融资的需求，让私营合作伙伴能够在PPP项目的全生命周期内（或者进行再融资后的剩余期间内）的融资成本固定，而无需进行单独的利率对冲安排。然而，如第9.3.2节所述，债券融资不一定适合所有的PPP项目，考虑到其交易成本，债券融资并不适用于规模相对较小的项目。

Investor appetite is another reason to consider bond financing. Non-bank financial institutions (such as insurance companies and pension funds) are becoming increasingly interested in investing in PPP Projects because they recognize that the long term predictable returns in PPP Projects can provide a hedge to the profile of their long term liabilities. Facilitating the entry of such institutions to the PPP debt market widens the lender base and increases liquidity. With more private finance available, Contracting Authorities should in turn be able to procure more PPP Projects and at more competitive pricing.⁶⁸投资者的需求是考虑进行债券融资的另一原因。非银行金融机构（比如保险公司和养老基金等）对PPP项目抱有越来越大的兴趣，因为他们认为对于PPP项目的长期投资可以产生可预期的收益，为其长期负债提供有效的对冲作用。促进这些非银行金融机构进入PPP贷款市场能够扩充投资者群体并且增强了流动性。随着越来越多的私募融资的产生，缔约政府部门也能够以更具竞争力的价格开展更多的PPP项目。⁶⁸

Bond financing of PPP Projects does have its own challenges, however, which are described further in this Section 9. One key factor is that, particularly for a public bond, the pricing of the bond may not be finally committed until shortly (e.g. five business days) before financial close. This may cause difficulties for the Contracting Authority in the evaluation of bids, given that the choice may be between a bid with committed financing and one where the financing may be notionally more competitively priced, but on an uncommitted basis.⁶⁹ A bond financing process also has certain timing implications which need to be factored into the procurement process. Some PPP Projects may also require credit enhancement in order to

68 A number of institutions have produced resources on bond financing as an alternative to bank financing of infrastructure projects. Please see links in Appendix, Additional PPP Resources - these have been drawn on where appropriate in compiling this Guidance.许多机构通过债券融资获得资金作为基础设施项目银行融资的一种替代方式。请参见附录——附加PPP资源中的连接，本《指南》采纳了其中适当的内容。

69 It should be borne in mind, however, that even in a bank financing, certain elements of pricing are only fixed at financial close - see Section 9.3.4. 然而，应当牢记，即使是通过银行融资，某些价格因素还是只能在融资交割时才能确定——见第9.3.4节。

achieve a successful bond financing - this is discussed further in this Section 9 and is particularly relevant in projects with specific risks (whether political, technological or developmental). In such cases, Contracting Authorities should consider engaging with potential credit enhancement providers early on in the procurement process if there are likely to be benefits in widening the field of possible financing options. See Section 9.5.然而，PPP项目的债券融资本身有着诸多挑战，将在本第9章中详细分析。其中的一个关键因素是债券的定价只有在融资交割前很短的时间内（比如5个营业日）才可以最终确定，公开发行的债券尤其如此。这就可能导致缔约政府部门在评估投标时面临困难，因为面对着两个选择：一个承诺融资额的投标，而另一个融资定价更有竞争力但是非承诺融资额的投标。⁶⁹债券融资流程的时间因素也需要考虑到采购流程中去。一些PPP项目可能还会要求采取增信措施，以保证债券融资的成功完成，尤其对于存在某些风险（政治、技术或开发性风险等）的项目更是如此，这将在第9章详细说明。在这样的情况下，如果有利于拓宽融资渠道，缔约政府部门应该考虑在采购流程的早期就与潜在的增信机构接洽。见第9.5节。

In some cases (e.g. due to the type of risks mentioned above or constraints such as timing), PPP Projects may be financed by other means (e.g. bank debt) at financial close but refinanced by bond financing at a later stage (usually after construction completion). This Section 9 focuses primarily on bond financing at financial close but also touches on the refinancing approach.在某些情况下（比如因为存在上述的风险或时间等限制条件时），PPP项目可以在融资交割时通过其它渠道融资（比如银行贷款），而随后通过债券融资进行再融资（通常在建设竣工后）。第9章主要关注在融资交割时的债券融资问题，但同时会简要提及再融资的方法。

The guidance in this Section 9 gives an overview of the bond financing process in a PPP Project, highlights the factors a Contracting Authority will want to take into account in assessing whether bond financing could be a suitable option for its PPP Project and (if it decides that it is) what considerations are then relevant both during the bid phase and ultimately in reaching successful close with a bond financed bid. The key point for the Contracting Authority is that it would need to be prepared to adapt its approach to facilitate bond financing where appropriate - this should not require the Contracting Authority to take on more risk or responsibility than under a bank financing.本《指南》第9章概述了PPP项目的债券融资流程，着重说明了缔约政府部门在评价债券融资是否适合其PPP项目时可能需要考虑的因素；如果确定债券融资最为适合，那么在投标阶段和在债券融资的情况下最终成功完成交割需要考虑哪些 问题。对于缔约政府部门来说，最关键的是需要作好准备在债券融资最为适用的情况下作出调整，这种调整不应使得缔约政府部门承担比银行融资更大的风险或责任。

9.2 UNDERSTANDING PROJECT BOND FINANCING 理解项目债券融资

9.2.1 *Overview of bond process* 债券发行流程概览

Bonds issued in a PPP Project financing context are commonly known as "project bonds". The Private Partner may be the issuer of the project bonds itself, but it is common for the bonds to be issued by a special purpose entity (the "Issuer"), separate from the Private Partner, who on lends the proceeds to the Private Partner. This may be for reasons of convenience, or for regulatory or tax reasons. Commonly, the Issuer and the Private Partner will be sister companies. Issuers,

like Private Partners, must ensure they comply with their constitutional documents, applicable legislation and regulations and obtain all necessary internal and external authorisations. PPP项目融资中，发行债券一般称为“项目债券”。私营合作伙伴可能就是项目债券发行人，但是更为常见的情况是通过独立于私营合作伙伴的特殊目的实体作为债券发行方（以下简称“发行人”），然后由该特殊目的实体将融得的资金贷款给私营合作伙伴。这可能是为了便利，也可能出于监管或税务原因。一般来讲，发行人和私营合作伙伴是关联公司。发行人跟私营合作伙伴一样，必须保证遵守他们的公司章程文件，适用的法律和法规，并获取所有必要的内部和外部的授权。

The process for issuing the bonds will depend on whether they are to be publicly issued or privately placed. The timing depends on a range of issues and due diligence requirements, such as the time required for due diligence and credit review by rating agencies and investors, preparation of disclosure documents such as an offering memorandum or prospectus, the listing process (if applicable), the opening of bank accounts, planning and implementation of a roadshow marketing process and preparation of final transaction documentation. 债券发行的流程取决于是公募发行还是私募发行。发行时间安排取决于待处理的问题范围和尽职调查要求，比如进行尽职调查需要的时间和评级机构和投资者进行信用审核的时间，发行说明书或发行说明书等披露文件的制备时间，挂牌流程(如适用)，开立银行账户，计划和开展路演推广活动和准备最终的交易文件等等。

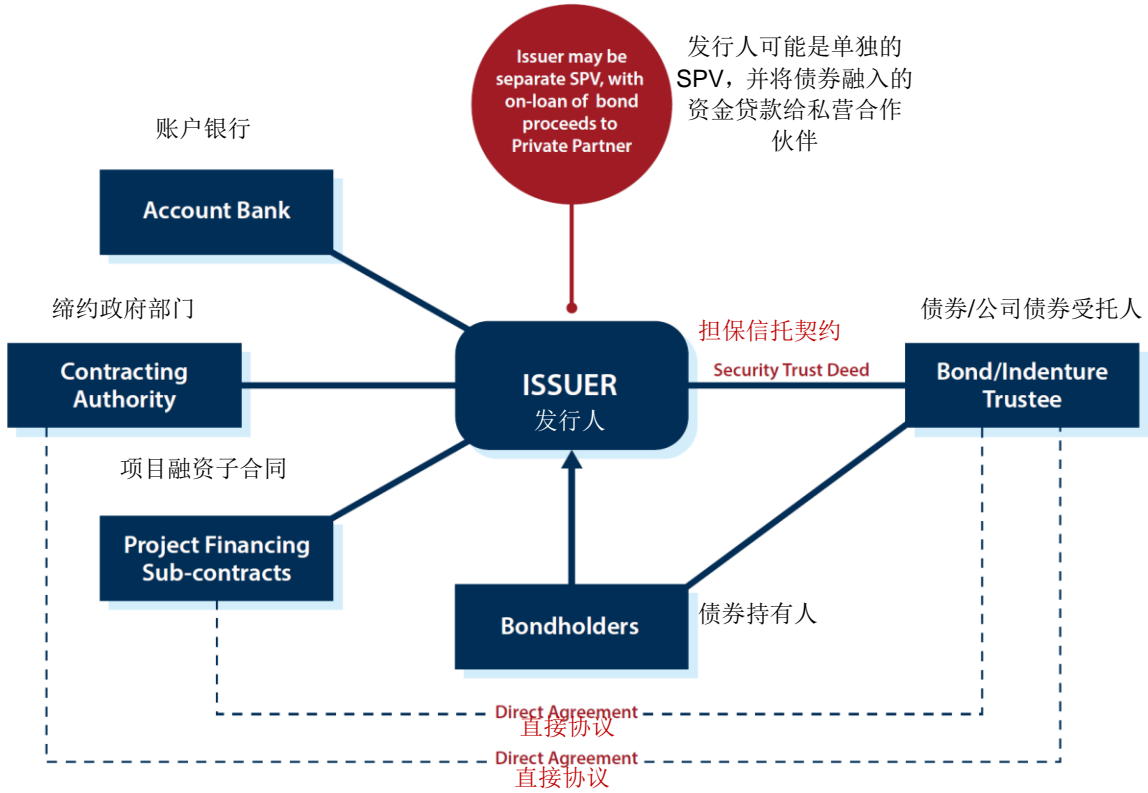
The arranging bank and Private Partner representatives usually go on an investor roadshow at which they will present the Issuer, the PPP Project, the management of the Private Partner, the proposed financing and the risk mitigation features, and give the investors the opportunity to ask for more information. In the case of a private placement, a similar but more targeted process aimed at individual investors would take place. 安排行和私营合作伙伴代表一般会参与投资者路演，介绍发行人、PPP项目、私营合作伙伴的管理团队、拟定的融资和风险缓释特征，并给投资人询问和了解更多信息的机会。私募的过程与之相似，但是过程因面对各个确定的投资方而更加具有针对性。

Project bonds are repaid in instalments which may be equal or sculpted and/or a 'balloon' (larger) principal repayment at final maturity. Interest is typically paid regularly and is known as the bond "coupon" - this is the investors' return. 项目债券是分期偿还的，各次偿还金额可以相等或者不相等，和/或在债券到期时偿还更多的本金。利息一般是定期支付，称为债券“息票”，即投资人的收益。

9.2.2 *Project Bond structure - single source financing* 项目债券架构——单渠道融资

If a PPP Project is financed solely by bond financing, the structure will resemble this: 如果一个PPP项目只依靠债券融资，相关架构可能如下：

PROJECT BOND STRUCTURE - SINGLE SOURCE
项目债券架构——单渠道融资

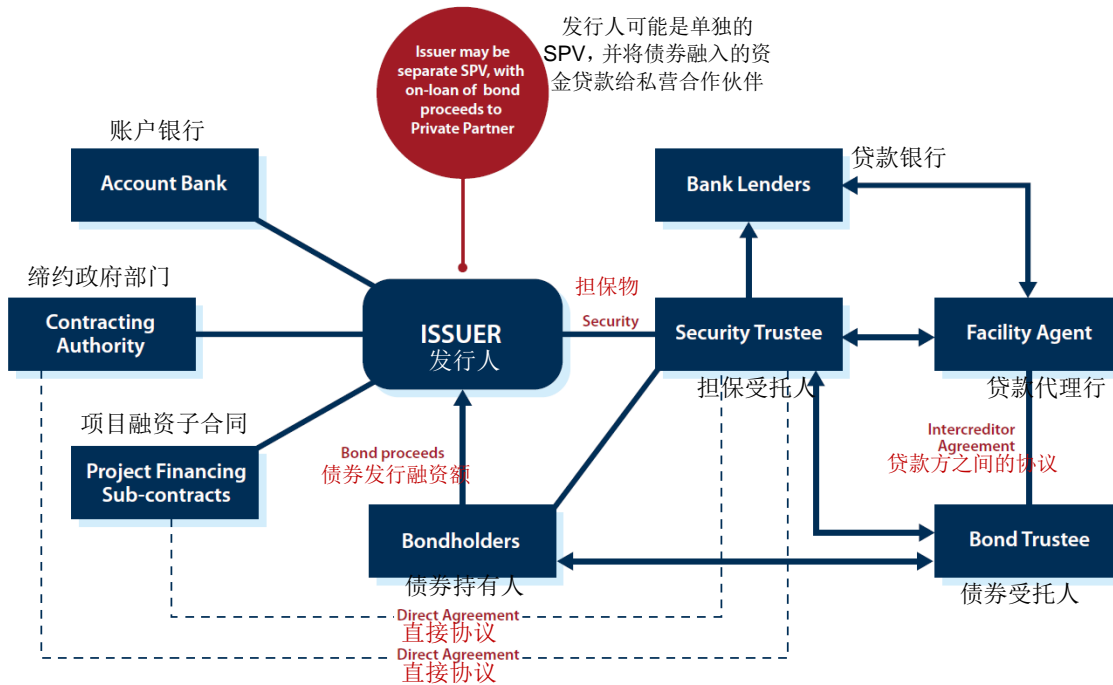


9.2.3 Project bond structure - multi source financing 项目债券架构——多渠道融资

Many large project financing transactions include both commercial bank facilities and project bond financing. This multi-source approach may be used for a variety of reasons, including the diversification of financing sources, the use of bank financing as a temporary bridge while awaiting optimal capital market financing conditions and the need for revolving working capital finance, which realistically can only be provided by banks. 许多大型的项目融资交易采用了商业银行贷款融资和项目债券融资渠道。采用这种多渠道的方式原因有多个，包括融资渠道多样化，使用银行融资作为临时的过桥资金而等待最佳的资本市场融资条件成熟，以及对流动资本融资的需求（实际上只能由银行提供）。

If the PPP Project is to be financed by a mixture of bond and bank finance, the structure is likely to resemble the following:如果PPP项目通过发行债券和银行融资相结合的方式获得资金，相关架构可能如下：

PROJECT BOND STRUCTURE - MULTI SOURCE
项目债券架构——多渠道融资



9.2.4 Parties 债券参与各方

The key parties in a project bond financing are the Issuer, the bondholders and, for a public bond, the arranger and the bond trustee. In a private placement there may be a representative for bondholders, but this is not universal.项目债券融资中的关键参与方是发行人、债券持有人，和公开发行债券中的安排方和债券受托人。在私募发行中，可能会有债券持有人代表，但不是每个私募项目中都存在。

As in a bank-funded project, a security trustee or agent will hold security interests for the bondholders.和银行融资的项目一样，担保受托人或代理人将代表债券持有人持有担保权益。

9.2.5 Documentation 文件

The bond-specific documentation will depend on the transaction, but a bond issue generally requires the following:各个债券特定的文件取决于交易情况，但是债券发行一般要求以下文件：

- A form of offering memorandum – this must contain all information and disclosure which an investor needs to make an informed investment decision.

The standard of disclosure will be mandated by the rules of the relevant stock exchange and/ or applicable securities laws. The Issuer is responsible and liable for the accuracy of this document both under securities laws and contractually under indemnities given to the arrangers under the subscription arrangements for the bond. The offering memorandum sets out risk factors relating to the bonds and information on the Issuer's business, the project (including any risk mitigation), the Issuer, the Private Partner, any guarantor and the use of the bond proceeds. For a PPP Project, it also discloses the nature of the PPP Contract the Private Partner has with the relevant Contracting Authority. A public bond issuance will always involve an offering memorandum; a private placement may have a (less formal) information memorandum. In each case, as well as its legal and contractual relevance, the offering memorandum is a marketing tool, used by the arrangers to sell the bonds. 发行说明书——该文件必须包含能使投资人做出投资决定的所有信息和披露内容。披露的标准由相关的证券交易所和/或适用的证券法规定。发行人应当根据证券法的要求和有关债券认购安排向下安排行承担赔偿责任的合同约定对该文件的准确性负责。发行说明书陈述了与债券相关的风险、发行人的业务信息、项目介绍（包括任何风险缓释）、发行方介绍、私营合作伙伴信息、担保人信息和融资所募资金的用途等信息。在PPP项目中，发行说明书还会披露私营合作伙伴与缔约政府部门之间签署的PPP合同的性质。公开发行债券总是需要公开发行说明书；而非公开发行债券则是可能会有（不太正式的）信息说明书。在两种发行方式中，以及在相关的法律和合同方面，发行说明书是安排人用于债券销售的一种营销工具。

- For a public bond issuance, a Subscription or Purchase Agreement - between the Issuer and the Arranger by which the Arranger subscribes for the bonds. 在公开债券发行中的认购协议——由发行人和安排人订立，约定安排人认购债券。
- A Trust Deed (or Indenture for New York law bonds) - between the Issuer and the Bond Trustee. The bonds are constituted under this document and it may contain the covenant package (if there is more than one source of finance, a common terms agreement may be used). 信托契约（或者是纽约法律债券契约）——由发行人和债券受托人订立。债券根据本文件成立，可能包含契约组合（如果有多于一种融资渠道的，可能使用一般条款协议）。
- For private placements, a Note Purchase Agreement or Note Subscription Agreement - under which the privately placed bonds will be constituted and the initial holders will agree to buy the bonds. 在私募债券发行中的特别认购协议或特别申购协议——私募债券根据该文件成立，初始持有人将同意认购债券。

As with a bank financing, there will also be security, equity and intercreditor documents, and the concession agreement will usually require some limited amendment as described in Section 9.3.9 below. 跟银行融资一样，债券融资也有担保，股权和债权人之间的有关文件，而且特许经营协议通常会需要一些带限制条件的修订，详见以下第9.3.9节。

9.2.6 Public bond issuance 公开发行债券

As mentioned in Section 9.2.1, public bonds may be issued either by the Private Partner, or by a separate (usually sister) company incorporated to issue the bonds and on-lend the proceeds to the Private Partner. An Issuer may choose to distribute its project bonds through either an arranger (typically a bank) or a syndicate of banks (in which case the arranger will be the "lead manager" or "lead arranger"). The arranger serves as an advisor, structures the transaction, and subscribes for the bonds pursuant to a Subscription Agreement (or less commonly underwrites the bonds via an Underwriting Agreement). In practice however, the arranger will only enter into the agreement to subscribe for the bonds a few days (normally five business days) prior to the closing date, and prior to doing so the arranger will have entered into back-to-back arrangements with investors whereby investors commit to buying the bonds from the arranger. If this arrangement is not honoured by the investor, the arranger remains bound to subscribe for (or underwrite) the bonds pursuant to the terms of the Subscription (or Underwriting) Agreement. 如第9.2.1节所述, 公开发行债券可能由私营合作伙伴发行, 或者由单独成立的公司(一般为私营合作伙伴的关联公司)发行融资而后贷款给私营合作伙伴。发行人可能选择通过安排人(一般为银行)或者银团(这种情况下, 安排人为“主管理人”或“主安排人”)进行项目债券分销。安排人担任咨询顾问的角色, 负责安排交易架构并根据认购协议认购债券, 或者在少数情况下通过承销协议承销债券。然而在实践中, 安排人只有在融资交割日期前几天(一般是5个营业日)才会签署认购协议, 而在此之前安排人会与投资人签署背对背安排, 投资人承诺向安排人购买债券。如果投资人不兑现其购买承诺, 安排人仍然必须根据认购协议(或者承销协议)认购(或者承销)该债券。

9.2.7 *Private placement issuance* 私募发行债券

The debt private placement process is similar to the public bond process but more straightforward. No arranger is appointed, but rather a placement agent who will facilitate but not underwrite the placement. No syndicate of banks is required as the debt will be privately placed to a small number of select investors. The terms and conditions of the bonds, will be negotiated directly between the Issuer and the investors (similar to the negotiation process for a bank loan). Similarly, the flow of due diligence information will be directly between the Issuer and the investors. An agent will probably still be required to carry out administrative tasks, such as making the payments of principal and interest to investors. 私募债券的流程与公开发行债券的流程相似, 但特点是更加直接。这一过程中没有安排人, 而是由私募代理人推动发行流程, 但非承销。由于债券会以非公开的形式向少数选定的投资人募集, 所以也不需要银团介入。债券的条款和条件由发行人和投资人直接谈判确定(类似于银行融资的谈判)。相同地, 尽职调查的信息也将直接由发行人提供给投资人。私募代理人可能还需要执行一些行政类的事务, 比如向投资人支付本金和利息。

9.2.8 *Types of non-bank bond investor* 非银行债券投资人的种类

Non-bank capital market investors are typically insurers, specialist fund managers, pension funds and sovereign wealth funds. Traditionally, some of these investors have tended to invest in project equity as opposed to debt, but they are now looking increasingly at the debt side. Their investment strategies vary and various factors influence their approach, such as market trends, investment beliefs, regulation, risk appetite, liability considerations, cultural factors, governance structures, tax issues,

jurisdiction and, ultimately, domestically available assets. Some may require investments to have an investment grade credit rating or security, or to be listed. Others can hold non-investment grade or unrated instruments. The return they expect on bond investments will depend on the risks involved and how easily they can liquidate their investment. As with commercial banks, they will have competing demands on their funds and only invest if risks are mitigated to their satisfaction.非银行资本市场投资人通常是保险公司、专业的基金管理人、养老基金和主权财富基金等等。一般来说，相对于债权投资，这些投资人更加倾向于对项目进行股权投资，而现在这些机构也逐渐关注债权投资。他们的投资策略呈现多元化，而且影响他们投资方式的因素也有许多，比如市场趋势、投资理念、监管环境、风险偏好、负债情况、文化因素、治理架构、税务因素、司法因素，以及本身可用的资产等等。一些投资机构可能会要求投资级别评级的投资，或者有担保或将要上市的投资。另一些投资机构则可以持有非投资级别评级或没有评级的投资工具。投资机构对于投资回报的期望取决于投资所承担的风险以及流动性。与商业银行一样，投资机构的投资资金存在不同的投资需求，只有在风险可以减缓到他们的要求和情况下才会投资。

The two main challenges for institutional investors looking to invest in PPP Projects are understanding the risk profile of the asset and the need for extensive interaction with creditors. These are discussed further in Sections 9.3.8 and 9.5.1.准备投资于PPP项目的机构投资者所面临的两大挑战是了解资产的风险面，以及他们需要与债权人进行密集的互动。这些将在以下第9.3.8节和第9.5.1节讨论。

9.2.9 Drawdown of Bond Finance 债券融资的提款

Bond proceeds are usually received in a lump sum at Financial Close, but as the PPP Project's expenditure profile may vary, the Private Partner will need to invest these proceeds until they are actually required by the PPP Project over its construction period⁷⁰. This typically results in a "negative carry" because the interest received by the Private Partner is generally lower than that paid to the bondholders (although this may be mitigated by an overall lower cost of funding). This contrasts with traditional bank financing where funds are drawn over the construction period as and when required.发行债券融入的资金一般会在融资交割时一次性取得，但是由于PPP项目的支出项目不尽相同，在PPP项目建设期间需要实际使用该资金前⁷⁰，私营合作伙伴可能需要将融入的资金先进行投资。这种情况一般会导致“负利差”，因为私营合作伙伴收到的利息通常比支付给债券持有人的利息低（尽管可以通过总体的低融资成本进行抵消）。这不同于传统的银行融资中，在建设期间按需要随时支取贷款的情况。

In some circumstances (more likely in private placements), the bondholders may agree to staged drawdown of the bond proceeds (more in line with the PPP Project's expenditure profile). This means that bonds are only issued and subscribed for effectively as and when the funding is needed, rather than all being issued at financial close. While this may reduce the risk of negative carry, bondholders may require a higher return on their investment because they have to

70 In a bond financing, the proceeds are often deposited with a highly rated bank until required, through a fixed-rate deposit, to reduce the cost of servicing unutilised debt. 在债券融资中，融入的资金一般会以固定利率存入评级较高的银行直到需要时使用，以此来减少未使用债务的成本。

keep those funds available and are not able to freely invest them elsewhere. A staged drawdown structure will generally limit the universe of potential investors as only certain investors can cope with it. This is one reason why PPP Projects have been bank financed during the construction period and then refinanced by project bonds once financing is fully drawn and construction has completed so cash flow is being generated.在某些情况下（更多在私募债券发行中），债券持有人可能会同意分阶段支取债券融入资金，让资金的使用与PPP项目的支出情况保持一致。这就意味着，只有在需要资金的时候才使债券的发行和认购生效，而不是在融资交割时一次性全部发行。尽管这种方式可以减少负利差的风险，但是债券持有人可能会要求更高比例的投资回报，因为他们必须随时准备好这些资金而不能自由地将该笔资金进行其它投资。分阶段提款的架构一般会限制潜在投资者的范围，因为只有少部分投资人才会接受这种方式。这也是PPP项目在建设期间进行银行融资，然后在银行融资全部提款完毕且建设竣工并持续产生现金流后再发行项目债券进行再融资的原因之一。

EMERGING AND DEVELOPED MARKET DIFFERENCES

A staged drawdown structure is less likely to be workable in an emerging market PPP Project. Similarly, while alternative solutions to reduce/avoid negative carry have been tried in developed markets, these are likely to be highly bespoke and only feasible for a certain class of investor in an established market.

新兴市场与发达市场之差异

分阶段提款的架构在新兴市场中的PPP项目中不太可行。类似地，虽然成熟市场中尝试了其它减少/规避负利差的方法，但这些方法很多具有高度定制化且只针对某些类别的投资者才可行。

9.2.10 Credit rating信用评级

As stated above, bond issuances (especially public issuances) often carry a credit rating from an external credit rating agency. Many investors will, for regulatory, capital adequacy or policy reasons only be able to invest in rated instruments. A credit rating is used as a tool during the marketing of the bond to investors.如上文所述，债券发行（尤其是公开发行）通常会由外部信用评级机构进行信用评级。许多投资者因为监管、资本充足率或政策原因，只能投资于有评级的投资工具。信用评级在向投资者推介债券时可以作为一种推广工具。

Typically, each rating agency would also publish a 'pre-sale report', setting out its rating rationale for the PPP Project and assigning a provisional rating (denoted by a "[P]" in front of the rating). Information from the pre-sale report will typically be used to facilitate the roadshow phase. A definitive rating is typically assigned once the bonds have been issued and following the agency's review of final documentation.一般地，各个评级机构也会发布一份“售前报告”，报告中会说明其对PPP项目的评级理由，并给出一个临时的评级（在具体评级前以符号"[P]"表示）。售前报告中的信息一般会用于路演阶段。债券发行完成后，信用评级机构会对最终文件进行审阅，然后确定最终的信用评级。

9.3 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的

主要考虑因素

9.3.1 *Advisors* 咨询机构

If bond financing is under consideration, the Contracting Authority should ensure it engages legal and financial advisers with the requisite experience in project bonds (as well as other financing options) as early as possible. Such advice will be essential in assessing suitability of financing, formulating bid requirements, evaluating bids, assessing pricing and deliverability, reviewing the relevant financing documents and understanding how the bond financing impacts the PPP Contract provisions and mechanics. As flagged in Section 4.2.2, Termination Payments, understanding the relevant agreements is also key to limiting the Contracting Authority's liability under any compensation provisions linked to the financing documents.如果缔约政府部门考虑使用发行债券融资，应当保证尽早聘任有项目债券发行（或其它融资渠道）相关经验的法律和财务专业咨询顾问。这样的专业建议在评估融资适当性、制定招标要求、评标、价格和可交付性、审阅相关财务文件以及理解债券融资如何影响PPP合同条款和机制等事项将至关重要。如第4.2.2节——合同终止的费用所述，理解相关协议对于限制缔约政府部门在补偿条款下与融资文件相关的责任也十分重要。

9.3.2 *Suitability of financing* 融资适当性

If the Contracting Authority wishes bidders to be able to submit the best value financing available, the bid process should, where appropriate, allow for financing approaches other than bank debt. At project preparation stage, the Contracting Authority should therefore assess the suitability of the key features of its proposed PPP Project for bond financing and, if it is considered suitable, publicise this to bidders when the PPP Project is first launched. In such circumstances, bid documentation and procurement rules should be drafted accordingly.如果缔约政府部门希望投标方能够提供最佳价值的融资，那么(在适当的时候)投标流程应当容许除银行贷款融资以外的融资渠道。在项目准备阶段，缔约政府部门应当对拟进行债券融资的PPP项目的主要特征进行评估以确定是否适合采用发行债券融资。如果认为适合于发行债券融资，则应在最初启动PPP项目时就向投标方公布。在这种情况下，投标文件和采购规则也应据此拟定。

While the Private Partner will ultimately decide on its financing approach, the Contracting Authority's role is to be neutral as to the financing method to the extent appropriate for its PPP Project, but to facilitate, where appropriate, different financing methods. Selecting the right type of financing will depend on a PPP Project's particular characteristics. Both Sponsors and Contracting Authorities will need to take into account a range of factors and assess how these compare under different financing approaches (e.g. bank or bond financing – whether public or private placement). These include the flexibility to accommodate changes to circumstances over the life of the PPP Project, the degree to which the tenors and interest rate structures offered by finance parties lending through each type of financing best suit the requirements of the PPP Project's revenues and debt profile, the nature of the transaction risk and the risk appetite of the target investors, the importance of confidentiality (in the context of the level of disclosure which may be required), the all-in cost effectiveness and economics of the method chosen and the

consequent value for money.最终确定融资方案的是私营合作伙伴，缔约政府部门对于融资方案的立场应是中立的，只要融资方案适合相关的PPP项目即可，但是缔约政府部门在适当的时候可以推动采取不同的融资方案。选择正确的融资渠道将取决于PPP项目的具体特征。发起人（投资人）和缔约政府部门都需要考虑一系列因素并在不同的融资方案（比如银行融资或债券融资、公开发行业务或私募发行债券）下对这些因素进行评估。这些因素包括：方案在PPP项目全生命周期中各种情形的适应性和灵活性；各种融资方式中，融资方提供贷款的贷款期限及利率结构与PPP项目的收入和负债情况最为契合；交易风险的性质和目标投资人的风险偏好；保密的重要性（在可能要求的信息披露程度下）；所选方案的全部成本、经济效益、相应的物有所值。

Contracting Authorities should bear in mind that bond financings involve significant preparatory costs (e.g. obtaining a credit rating, preparing the bond documentation and marketing). Legal costs can be significant especially in the case of publicly listed issues. Because of their costs, complexity and investor appetite, bond financings are typically best suited to PPP transactions of a significant size (e.g. involving bond financing in excess of USD200 million). Whilst public offerings may suit larger transactions, private placements, given the more flexible information flow and the less rigorous disclosure requirements, are potentially more suited to the PPP market. In addition, the universe of private placement investors is growing and therefore liquidity is enhanced.缔约政府部门应该认识到：债券融资需要大量的前期准备性投入（比如获得信用评级、准备债券文件和推广等）。法律咨询成本可能很高，公开发行业务尤其如此。因为成本、复杂性和投资者偏好等原因，债券融资一般最适合于大型的PPP项目交易（比如债券融资额超过2亿美元）。相较于适合较大交易的公开发行业务，私募发行具有更灵活的信息流且信息披露的要求不那么严格，可能更加适合PPP市场。另外，私募投资者的数量正在不断扩大，因此流动性也会相应地提高。

If public authority bidding procedure rules require certainty of financing this may limit the choice to a degree. As explained above, in a public bond solution, the pricing and availability of the financing will as a rule only be committed very shortly prior to closing, although, as noted, elements of a bank-funded solution are similarly uncommitted until closing. In certain jurisdictions, the choice of financing for public authorities may also be shaped by practice rather than by law. See Section 9.3.6.如果政府部门的招标规则对融资的确定性有要求，可能在一定程度限制可选的融资渠道。如上文所解释，在公开发行业务的过程中，融资价格和融资金额只有在融资交割前较短一段时间内才能确定；但上文也有所提及的是，在银行融资中有些因素也是只有在融资交割时才可以确定的。有一些司法区域中，政府部门的融资渠道选择可能由实践主导，而非法律。见第9.3.6。

9.3.3 Comparing bids 评标

Comparing bids can be more complex where different financing solutions are presented and bid documentation should be drafted to facilitate a transparent comparison of all finance solutions or categories of solutions. 在提出不同的融资解决方案和投标文件时，评标过程可能会更复杂，以促进对所有融资方案和融资种类的透明化比较。

One option for the Contracting Authority may be to require bidders to submit a

compliant bid based on specific terms (e.g. bank debt), but to permit variant bids as well (e.g. bond financing). The Contracting Authority should bear in mind that preparing two financing offers is costly for bidders and bidders are likely to want to select a financing approach as the bid process reaches the latter stages and a fully developed solution is typically required. As is the case for any tenders that require significant bidder investment, the Contracting Authority may wish to consider whether it is appropriate to reimburse part of the costs associated with preparing financing proposals. 缔约政府部门可以选择要求投标方根据具体的条款（如银行贷款）提供符合其规定的投标，但仍应允许其它方式投标（比如债券融资）。缔约政府部门应记住：准备两个融资方案对于投标方来说成本很高，当投标流程进入后期时，投标方可能会只选择一种完备的融资方案进行投标。如果投标过程需要投标方很大的成本投资，那么缔约政府部门可能需要考虑是否可以对准备融资方案产生的成本进行一定补偿。

As flagged in Section 9.3.1, specialist expertise is essential to assist in bid evaluation and, as regards bond solutions specifically, to assess differences in placement capability, pricing levels, pricing features and means of managing pricing risk - a process which can be more complicated in bond financings due to the pricing process. See Sections 9.1.2, 9.3.4 and 9.3.5. 如第9.3.1节所述，专业的知识对于评标非常重要，尤其是对债券融资方案来讲，需要评估募集能力、定价水平、定价条件及管理定价风险的方法等。采用债券融资的评标程序因为定价流程原因可能更加复杂。见第9.1.2节、9.3.4节和9.3.5节。

9.3.4 *Assessing deliverability* 评估可交付性

The deliverability and pricing of public bonds are normally only firmed up shortly before actual issuance (i.e. a few days prior to financial close) as the underwriting of bonds by their arrangers is not common practice. An element of deliverability risk will therefore remain with the Contracting Authority in a way which would not be the case in a bank financing. The position can be different in the private placement market, although this will depend on investors being willing to hold pricing during a bidding process. Contracting Authorities will often find it difficult to seek fully committed bond financing offers at bid or final offer stages and commitments obtained from banks at bid or final offer stages may be - or appear to be - stronger than those obtained for bond solutions. It should however be borne in mind that, whilst margins for bank debt may be fixed and commitments (which will generally have a certain level of conditionality attached) can be obtained from banks in relation to the margin, the underlying swap rate which will affect the all-in cost payable by the Contracting Authority will only be fixed at financial close. Therefore, whilst deliverability risk may be somewhat greater in a bond solution, elements of the final cost of a bank solution equally remain a Contracting Authority risk until financial close. 由安排人承销债券的实践并不常见，因此公开发行债券的可交付性和价格一般只能在实际发行前很短的时间内（即在融资交割之前几日）才能确定。所以，在采用非银行融资的情形下，对于缔约政府部门来说仍然存在可交付性的风险。私募市场的情况有所不同，但取决于投资者是否愿意在投标流程中保持价格。缔约政府部门通常会发现：在投标或最终报价阶段获得全额的债券融资非常困难，而相对来说在投标或最终报价阶段从银行获得全额授信可能（或显得）更加容易。必须记住的是：即使与银行债务相关的保证金已经确定并且可以就该保证金从银行获得承诺额度（一

般会有一些附加条件），缔约政府部门最终应支付的整体融资成本仍然受到掉期利率的影响，并且也是只有在融资交割时才能确定。因此，虽然债券融资方案中的可交付性风险可能大一些，但是银行融资方案的最终成本要素风险在融资交割前对于缔约政府部门来说也同样存在。

Contracting Authorities can obtain some comfort that a public bond solution can be delivered by requiring bond arrangers to provide letters of support at bid or final offer stages and relying on the expert opinion of the Contracting Authority's adviser. The terms of the bond arranger support letters should therefore be set with care. In addition, at final offer stage, to help in mitigating the deliverability risk, it is advisable that the Contracting Authority require bidders to obtain a "pre-rating" on their proposed financial structure. The Contracting Authority may also ask bidders to (i) submit evidence that a minimum rating sufficient to drive investor demand is achievable (e.g. investment grade - that is, BBB- or higher, or even A) and (ii) accept the risk of any price increases associated with failing to eventually secure the targeted rating. As flagged in Section 9.3.3, Contracting Authorities may need to compare bond proposals from several bidders. 使用公开发行业务的方案可以在投标或最终报价阶段要求债券安排人提供支持函，而且可以依赖缔约政府部门的专业顾问的意见，这能使缔约政府部门获得一些信心。因此，债券安排人应该谨慎地拟定支持函。另外，在最终报价阶段，为了帮助减少可交付性风险，建议缔约政府部门要求投标人对其制定的融资结构进行“预评级”。缔约政府部门也可要求投标人（1）证明可以获得推动投资需求的最低评级水平（比如投资级，即BBB-或更高至A级）并且（2）接受不能最终达到目标评级而导致的价格上升的风险。在第9.3.3节中已有所述，缔约政府部门可能需要对比好几家投标人的债券融资方案投标。

9.3.5 *Assessing price* 价格评估

In order to be able to carry out a proper comparison of financing offers, the Contracting Authority should set out in the tender documents clear minimum requirements and evaluation criteria to facilitate a correct comparison of (uncommitted) bond financed bids as against committed bank or corporate financed bids. The same complexity occurs when bidders are allowed to submit offers with mixed financing. The Contracting Authority may also wish to include requirements relating to rating (both the level and the identity of the agency or agencies providing the rating). In addition to assessing price (which may be difficult without a firm pricing commitment), it is key to assess the risk and robustness of the pricing methodology used by bidders for any proposed bond solution (detailing the various pricing components). The pricing methodology should refer, to the extent possible, to market prices for similar bond issues or basket of bond issues or, where such comparators are not available, sovereign issuances or issuances by government agencies or parastatal organisations could potentially be used as reference points. When seeking final offers, the Contracting Authority may consider providing indicative bond pricing data or benchmark yield curves on which bidders can base their offers. Bidders would use such pricing in their financial models to derive the price of their offer. Such pricing data should break down information according to different rating outcomes and other key features of the financing. The Contracting Authority could consider setting a pricing range within which the PPP remains affordable and the bonds would be issued and reserving the right not to close the transaction if pricing falls outside this range. 为了有效地对融资方案进行比较，缔约

政府部门应该在招标书中清晰地规定最低要求以及评标标准，以便能够对（未确定融资额的）债券融资方案、银行融资方案和企业融资方案进行正确对比。如果允许投标方提交混合融资渠道方案会同样复杂。缔约政府部门也可能希望提出信用评级（提供评级的代理机构的水平和身份）的要求。除了价格评估（没有确定的定价承诺的话可能会很困难）外，审查投标人在（详细说明定价组成）债券融资方案中使用的定价方法风险和稳健性也很重要。定价方法应该尽量参考类似债券发行或债券组合发行，如果没有可用的参照，也可以参考使用主权债发行、政府代理机构或半国营机构债发行的定价。在确定最终报价时，缔约政府部门可以考虑向投标人提供指导性的债券定价数据或基准收益率曲线供其投标参照。投标人在其融资模式中使用这些定价参考来得到他们的投标价格。这些定价数据应该根据不同的评级结果和融资的其它关键特点将信息进行拆分。缔约政府部门可以考虑制定一个价格范围，在该范围内，PPP项目融资成本可被接受，债券可以发行，而且如果超出该价格范围也有权不再继续完成交易。

9.3.6 *Price fluctuation between preferred bidder and financial close* 优选投标定价和融资交割价格之间的变动

As mentioned in Section 9.3.4 , the pricing of public bonds (and in some cases private placements) is only confirmed a few days prior to actual issuance and final public bond pricing is largely market-driven, so there is a risk of price fluctuation between final offers and financial close. In order to help eliminate any potential uncertainty in price between the bid stage and final pricing, at an early stage of the procurement process the Contracting Authority and the bidders should discuss a risk sharing mechanism for allocating the risk of price fluctuations. Depending on the jurisdiction, this will often result in bidders providing a firm upfront commitment, with the fluctuation risk being assumed as agreed - usually by the Contracting Authority but sometimes by all (or a combination) of the sponsor, the bidder, the investors and the Contracting Authority. Such mechanisms may also be left to the bidders' discretion as part of their bid strategy.如第9.3.4节所述，公开发行（以及一些非公开发行的情况）债券的定价只有在实际发行前几天才可以确定，而且公开发行债券的最终定价是由市场决定的，所以最终报价和融资交割时的定价会有变动风险。为了帮助消除投标阶段与最终定价之间的不确定性，缔约政府部门和投标人应该在采购流程的早期就针对价格波动的风险分担机制进行商讨。不同的司法辖区中，投标人可能先提供一个确定的融资承诺，而缔约政府部门通常会同意价格变动的风险，有些情况下发起人（投资人）、投标人、投资者和缔约政府部门都会同意。这种风险机制也可能作为一种投标策略，由投标人自己决定。

Following appointment of preferred bidder, the Contracting Authority should also require the preferred bidder to track pricing movements and inform it on a regular basis up to financial close.在选定优选投标人之后，缔约政府部门还应该要求该投标人跟踪价格趋势并定期向其汇报，直到融资交割完毕。

Contracting Authorities should also ensure that the mechanics of the closing fit with national (public) law rules on budget approvals (as the preferred bidder announcement or award may take place for a price that will only be determined after the award and may need to be conditional).因为宣布优选投标人或授标流程中的价格只有在授标后才可以确定，而且可能附带某些条件，所以缔约政府部门还应该保证

交割机制符合国家（公共）有关预算审批的法律规则。

CIVIL AND COMMON LAW DIFFERENCES

France's public procurement rules oblige the Contracting Authority to agree on a total cost of the PPP Project at an early stage - an approach generated by practice rather than law. This may steer the transaction towards bank financing and private placements because the price in a public bond issue is only set at the 'pricing' stage (a few days before issuance) which creates uncertainty in the exact total cost of the PPP Project.

Belgian market practice, and to a large extent public law, is in many ways similar to that in France, but a bond financed road project proved possible through a combination of innovative tender and contract rules, including measures whereby the Contracting Authority could assess and approve maximum expenditure prior to contract award.

大陆法与英美法之差异

法国的公开采购规则规定缔约政府部门有义务在采购流程的早期就约定PPP项目的总成本，这种方法是惯例而非法律规定。这可能将交易引向银行融资和私募发行，因为公开发行债券只有在定价阶段（发行前几日）才可以确定发行价格，导致PPP项目具体总成本的不确定性。

比利时的市场实践，乃至公共法律，在许多方面与法国类似，但是实践证明可以通过将创新的招投标流程和合同规则结合起来，通过债券融资进行道路建设项目。通过这些方法，缔约政府部门便可以在合同授予前对最大支出额进行估计和审批。

9.3.7 Timing时间安排

Contracting Authorities need to be aware that bond solutions generally require more time to prepare than bank solutions as there is usually a need to obtain credit ratings, prepare the bond placement documentation, market the bonds with investors and meet regulatory requirements. The procurement timetable will need to cater for this. 缔约政府部门必须明白：债券融资方案一般会比银行融资方案需要更多的准备时间，因为债券融资通常需要获得信用评级、准备债券发行文件、向投资者推广债券并满足监管要求等等。采购时间表也需要考虑这些因素。

As flagged in Section 9.2.10, a pre-rating may be required at final offer stage and a final rating at financial close. A rating process typically lasts for at least four weeks - longer for a more complicated transaction. However, the preparation of the required supporting material needs to track the progress made in developing a bid. As a result, the process of seeking a pre-rating can only start once the deal structure (e.g. risk sharing, other key terms of the PPP Contract) is stable and is unlikely to change materially. Likewise, a final rating can only be sought once the PPP Project documentation is virtually finalised. Overall, once a preferred bidder has been selected and the PPP Project documentation is finalised, seeking a final rating and marketing the bonds may take four to six weeks longer than financial close in a bank financing. 在第9.2.10节已有提及，在最终报价阶段可能需要预评级，并且在融资交割时需要进行最终信用评级。一次信用评级流程一般会持续至少四周时间，交易越复杂所需的时间越长。然而，必要文件的制备需要跟踪制作投标文件的进度。这样，

进行预评级的流程只能在交易结构（比如风险分担和PPP合同的其它关键条款）稳定且不会产生重大变化时才可以开始。同样，最终的信用评级只有在PPP项目的文件基本上定稿后才可以进行。总之，一旦选定投标方，PPP项目文件定稿后，进行最终的信用评级和债券推广可能比银行融资中的融资交割多花费四至六周的时间。

9.3.8 *Bondholder decision making* 债券持有人的决策

Holding project bonds requires more resources than holding sovereign or corporate bonds due to the need to respond efficiently to the numerous waivers, change consents and other issues which will inevitably arise during a PPP Project's construction phase. A key difference to bank lenders is that institutional investors may not have the same capacity to be actively involved with the Issuer and the Private Partner, however, particularly in Europe, there are more and more active private investors who will wish to be - and be capable of being - closely involved with a PPP Project on an ongoing basis. The Contracting Authority and its advisers need to be aware of this and check that the bondholder decision making mechanisms in place will not inhibit the Private Partner's ability to perform the PPP Contract. 持有项目债券比持有主权债券或企业债券需要更多的资金，因为在PPP项目的建设阶段，需要有效地回应许多弃权声明、变更同意书和其它不可避免的问题。与银行贷款方最为不同的是：机构投资者可能没有能力去积极地与发行人和私营合作伙伴沟通。但是，尤其是在欧洲，越来越多的私募投资者主动地——而且有能力持续地、紧密地参与到PPP项目中。缔约政府部门及其咨询顾问需要认识到这一趋势并确定债券持有人现有的决策机制不会阻碍私营合作伙伴履行PPP项目的能力。

In monoline-guaranteed bonds, this risk was mitigated by the monoline acting as "controlling creditor" and taking decisions on behalf of the bondholders. This structure has, however, caused problems where monolines have been downgraded, but still continue to be entitled to take such decisions, despite not offering tangible credit enhancement. There are other mechanisms, known as monitoring advisers or similar, designed to facilitate effective decision-making, although these have not met with universal acceptance in the market since the monitoring adviser does not provide credit and therefore has no risk position alongside the bondholders to protect in its decision-making. Credit enhancement structures may achieve a similar result where there is a "credit provider". See Section 9.5. 在单一险种保险公司担保的债券中，保险公司作为“控制债权人”代表债券持有人决策可以减少上述风险。但是，如果保险公司评级被下调，在没有提供实质性的增信措施的情况下仍然可以有权进行上述决策，则这种结构也会产生问题。还有另外一种机制，称为监督咨询顾问或类似机制，可以促进有效的决策，然而这些机制还没有得到市场的广泛接受，因为监督咨询顾问不提供信贷所以在决策过程中没有与债券持有人相一致的风险。如果存在“信用提供方”，增信措施架构也可以达到相似的结果。见第9.5章。

9.3.9 *Changes to documentation* 对文件的变更

If a PPP Project is to be bond financed, the PPP Contract drafting must reflect the structure, parties and documentation involved. The key point to bear in mind is that in practice the drafting will not require much amendment. Broadly speaking, the main provisions affected are: 如果一个PPP项目进行债券融资，那么草拟PPP合同必须反映将涉及的架构、参与方和相关文件。需要记住的是在实践中，草拟的合同不需

要许多修订。宽泛地说，受到影响的主要条款是：

- **Definition of the financing documents (e.g. “Senior Finance Documents”) – this will need to include the bond finance documentation (but not any on-loan documents between the Issuer and the Private Partner).** 融资文件的定义（比如“优先融资文件”）——这需要提供包括债券融资文件（并非发行人和私营合作伙伴之间的转贷款协议文件）。
- **References to the relevant parties - the Issuer may need to be referred to if separate from the Private Partner, the definition of Lenders may need adapting.** 对相关方的说明——如果发行人独立于私营合作伙伴，那么可能需要说明，贷款方的定义可能需要调整。
- **Termination payments - these need to reflect the bond mechanics. See Section 9.4.** 提前终止的费用——这些规定需要反映债券机制。见第9.4章。
- **Confidentiality – apart from facilitating the disclosure around the PPP Project in the offering memorandum, the provisions will also need to permit details of the PPP Project to be disclosed to potential investors where the bonds are transferable.** 保密——除了在发行说明书中对围绕PPP项目的信息进行披露外，如果债券可以转让，那么相关条款还需要允许向潜在投资者披露PPP项目的详情。

In addition, as well as the initial disclosure in the offering memorandum of the project arrangements, including details of contracts, securities laws will generally require ongoing public disclosure of project performance, especially of significant underperformance. This should both be borne in mind by project participants and be reflected in the Project Contract. 另外，项目安排的发行说明书中，除了初始信息披露外，还包括详细合同。证券法一般会要求对项目进程信息的持续披露，尤其是披露项目存在的重大不良情况。项目参与方应该牢记这些并将其写入项目合同。

- **Refinancing – the provisions need to permit ordinary trading of the bonds without triggering the refinancing provisions (e.g. by adapting the definition of “Exempt Refinancing”).** 再融资——合同条款应该允许一般的债券交易，但不会引发再融资条款（比如通过调整“排除再融资”的定义）。

The same applies to ensure the Direct Agreement works effectively (see Section 6, Lenders' Step-in Rights). Additional changes may be required to reflect certain bond mechanics (e.g. different reporting requirements/timing) and more than one party may want the rights normally afforded to the Agent (e.g. both the Credit Provider and the Security Trustee would normally receive all notifications usually provided to an Agent). 同样的方法也可以让直接协议更为有效（见第6章——贷款方的介入权）。另外可能还需要其它变更来反映债券机制（比如不同的报告要求/时间），而且不只一方（比如一般向代理中介发送通知时，贷款提供方和担保受托人一般也会收到）可能会想要一般给予代理中介的权利。

In considering amendments to documents, a Contracting Authority wishing to attract the full range of financing options will want to avoid making bond-specific

amendments beyond those strictly necessary to ensure that it is not making other finance solutions less attractive to bidders and/or discouraging bank debt providers from participating. It will also want to ensure that any solution-specific amendments are objectively and duly justified.在考虑修订文件时，缔约政府部门为了吸引尽量多的融资渠道，可能会避免不必要的针对债券的修订，以保证不会使得其他的融资渠道方案对于投标人具有更低的吸引力/或阻止其他银行贷款提供者参与。缔约政府部门可能还想确保针对任何特定的方案的修订有客观合理的理由。

Where the PPP Project is being financed through other means (e.g. bank debt) at financial close, but a bond refinancing is envisaged upfront, contract provisions should be drafted with this in mind. This may entail drafting provisions appropriately in the PPP Contract signed at financial close (e.g. as regards refinancing), as well as potentially scheduling amendments designed to come into effect when the bond refinancing is implemented. If a bond refinancing has not been contemplated in the PPP Contract, appropriate amendments will need to be agreed at the time when discussing consent and related matters. See Section 5, Refinancing. PPP项目在融资交割时通过其它方式融资（比如银行贷款）的，但是提前预期将来会通过发行债券进行再融资，在起草PPP合同条款时需要记住这一点。这就需要适当地撰写将在融资交割时签署的PPP合同条款（比如有关再融资的条款），并且可能还需要设计在实施债券再融资时才会生效的修订条款。如果PPP合同已经对债券发行再融资有所规定，那么在讨论同意和相关事项时则需要约定适当的修订内容。见第5章——再融资。

9.4 TERMINATION PAYMENT CALCULATION 合同终止的费用的计算

9.4.1 *Calculation of Outstanding Senior Debt* 未偿还优先债务的计算

Only bonds that have been issued and purchased at financial close should count as Outstanding Senior Debt. Bonds which have been issued but are being held by the Issuer to be sold to raise further financing at a later stage (e.g. to cover the cost of certain changes required under the PPP Contract) should not count until they have actually been purchased. Only the actual amount paid for the bonds should be taken into account - if they are not issued "at par" (i.e. at their face value) but at a premium or a discount, careful consideration will be needed as regards their treatment. 只有在融资交割时发行和购买的债券才能计入未偿还优先债。已经发行并由发行人持有并打算在将来出售进行进一步融资的债券（比如为了支付PPP合同产生的变更成本）只有在实际被购买后才可以计入未偿还优先债。只有为购买债券而实际支付的金额才可以纳入计算，而如果债券没有按面值（即按票面价值）发行而溢价或折价发行，在处理时需要格外小心。

9.4.2 *Make-whole payments* 提前赎回补偿费

The terms and conditions of project bonds usually include break cost provisions where there is an early repayment of the bonds to compensate bondholders for the loss of yield over the remaining life of the bonds. The bond terms will therefore generally call for the payment of a prepayment fee to put bondholders in an equivalent position as if the bonds had not been prepaid. This is known as a "make-whole" payment and is calculated according to a specified formula which applies a particular discount rate (which will be based on the yield on a government

bond with a maturity equivalent to the average life of the bonds), reflecting the fact that the payment is received early. Essentially, the make-whole amount would notionally allow the investor to invest the amount received in early redemption in a government bond and receive the same yield as if it had remained invested in the project bond. Contracting Authorities may wish to consider imposing more risk on investors by adding a margin to the government bond yield to produce the discount rate.项目债券的条款和条件一般会规定提前赎回条款,在提前偿还债券时补偿债券持有人不能获得债券剩余期限的收益。因此,该债券条款一般为要求支付提前赎回补偿费,让债券持有人所得的利益如同债券没有被提前赎回一样。这种规定被称为“提前赎回补偿”,其计算是根据使用特定折现率(将基于与债券期限相同的政府债券收益率)的公式,以反映出提前进行了支付。从本质上看,提前赎回补偿金额将从名义上让投资者将在提前赎回时收到的资金用于投资政府债券,从而获得跟仍然投资于项目债券一样的收益。缔约政府部门可能考虑通过增加政府债券收益率的形式,将更多投资风险转嫁给投资者。

It may not be appropriate for the Contracting Authority to include such break costs in the termination compensation calculation for every termination situation. The recommended approach in some jurisdictions (e.g. the UK and Belgium) has been for the Contracting Authority to pay the full make-whole amount on termination for Contracting Authority Default⁷¹, a reduced amount on Voluntary Termination, and no payment on any other termination (including Force Majeure and Private Partner Default termination) although Contracting Authorities should consider whether a full make-whole payment is required in any circumstances. However, in emerging markets, for example, there may be justifications for including a make-whole amount in more termination scenarios (e.g. Force Majeure or potentially Private Partner Default, although - particularly in the latter case - the value for money question would have to be addressed). In relation to private placements, some investors (particularly US investors) will insist on currency swap breakage payments on early termination of non-USD instruments, since such investors fund themselves only in US dollars. Contracting Authorities will need to consider the value for money questions inherent in funding such payments. See Section 4, Termination Payments.但是,缔约政府部门如果将这样的提前赎回补偿条款适用于每种终止情形的补偿计算就不太合适了。在一些司法区域(如英国和比利时)的建议处理方法为:如果是缔约政府部门违约,则由缔约政府部门在终止时支付全部的提前赎回补偿⁷¹;主动终止时减少支付的金额;因其它事项(如不可抗力 and 因私营合作伙伴违约终止)终止的则不支付。然而缔约政府部门需要考虑是不是在任何情形下都需要全额支付提前赎回补偿。但是,在新兴市场中,可以会在更多的情形(比如不可抗力或私营合作伙伴违约,尽管仍然必须要解决资金价值的问题,尤其是在私营合作伙伴违约时)中用到提前赎回补偿条款。在私募发行中,一些投资者(尤其是美国的投资者)在非美元债券提前终止时会坚持货币交换补偿,因为这些投资者只用美元出资。缔约政府部门在支付这些补偿时则需要考虑物有所值的问题。见第4章——终止的费用。

9.4.3 Fees and other costs 费用和其它成本

71 By extrapolation, other termination events for which the Contracting Authority bears the risk (e.g. MAGA and Change in Law) might follow a similar approach. 由此推断,在其它由缔约政府部门承担风险的终止事项(如MAGA和法律变更等)的也可以使用类似的方法。

As with bond break costs, the Contracting Authority will also want to ensure that other bond-related fees and costs are only included in the termination compensation calculation if appropriate and that there is no double counting between the various financial instruments. There may also be fees associated with guarantees or other credit enhancement products.跟债券提前赎回补偿一样，缔约政府部门还会希望其它债券相关的费用和成本只计入终止补偿中（如适用的话），并且不同的融资工具之间不存在重复计算。担保或其它增信产品也可能产生费用。

9.5 CREDIT ENHANCEMENT增信

9.5.1 *Benefits of credit enhancement*增信的好处

Credit enhancement can be helpful for PPP Projects that face challenges in long-term financing, or might otherwise not be financeable at all. It is also useful for large PPP Projects where liquidity may be an issue. While credit enhancement is not always essential, it is likely to be extremely useful, if not vital, in successfully financing PPP Projects with particular risks (e.g. political, technological or development). The Contracting Authority needs to be alive at an early stage of the procurement process to where credit enhancement and particular credit ratings are likely to be required by investors and how this could benefit it by possibly lowering the cost of financing and resulting in a more competitive price and better value for money. The Contracting Authority should be prepared to engage early on with potential credit enhancement providers. See Section 9.2.10.增信对于面临长期融资困难或者如果没有增信措施根本无法融资的PPP项目来说是有利的。而且它对于存在流动性问题的PPP项目也是用处良多。虽然增信并不一定起到根本性作用，但是对于存在特定风险（比如政治、技术或开发风险）的PPP项目的成功融资来说非常重要。缔约政府部门需要在采购流程的早期就应该了解投资者可能会需要增信措施或者一定的信用评级，以及这些措施通过降低融资成本，实现更具竞争力的价格和更物有所值将如何让缔约政府部门获利。因此缔约政府部门应该尽早准备潜在增信提供方的介入。见第9.2.10节。

One example of a key challenge in achieving a successful bond financing at financial close is construction risk. The bond market has traditionally been averse to investing prior to construction completion, due to the perceived risk of the asset not being built and being unable to start earning income to meet principal repayments under the bonds.⁷² There are signs that investor attitudes are slowly changing as the investors begin to understand PPP Project risk better. Studies of infrastructure projects (e.g. by Moody's⁷³) have shown that the default rate in PPP Projects is relatively low (perhaps because of the level of due diligence typically carried out by all parties before PPP Contract signature, the in-built checks and balances in the project and finance documentation and the mutual desire of all parties to ensure the PPP Project starts generating income). However, credit enhancement can also help

72 As in a bank financing, a bond financing is typically structured so that interest payments during construction are met out of drawdowns. 跟银行融资一样，债券融资一般是结构化的，这样在建设期间支付利息可以分阶段支取。

73 Moody's Investors Service Data Report (6 March 2017): Default and Recovery Rates for Project Finance Bank Loans, 1983-2015 穆迪的投资者服务数据报告（2017年3月6日）：《银行贷款项目融资的违约和收回率》，1983-2015。

mitigate this risk to encourage non-bank investors' appetite.在融资交割时实现成功的债券融资面临的关键挑战之一就是建设风险。传统意义上，由于建设的资产可能无法建成而无法获得收入，进而无法偿还债券本金可能带来的风险，债券市场在建设竣工前会避免投资。⁷²随着投资者开始更深入地理解PPP项目风险，他们的对此的态度也慢慢有松动的迹象。对基础设施项目的研究（比如穆迪的研究⁷³）显示PPP项目的违约率相对较低，原因可能是签署PPP项目合同之前各方一般会进行详细的尽职调查，项目与融资文件之间内在的制衡，以及各方都有共同利益希望PPP项目产生收入）。但是，增信措施仍然可以帮助减少这一风险并鼓励非银行机构投资者的投资需求。

Credit enhancement usually has the effect of taking the "first loss", insulating bondholders against a certain level of loss in a default or termination scenario, and/or providing liquidity in times of cashflow stress. This can provide reassurance to potential investors as well as potentially resulting in a higher credit rating. Depending on the form of credit enhancement, it may also result in the credit provider being the controlling creditor for decision-making purposes. See Section 9.3.8.增信措施的一般作用是首当其冲地承担风险，在发生违约或合同终止的情形下，让债券持有人免于承受一定程度的损失，并且/或者在现金流不足时提供流动性。这可以对潜在投资者提供保障并可能赢得更高的信用评级。采用的增信措施形式可能会使信用提供方成为有决策权的债权人。见第9.3.8节。

EMERGING AND DEVELOPED MARKET DIFFERENCES

The institutional investor market for infrastructure in Europe has evolved to the extent that there is now a ready supply of institutional capital for robust PPP Projects in stable countries. Credit enhancement is not always needed. However, it will continue to be needed to facilitate the use of non-bank funding in PPP Projects with technology risk, unusual development or construction risk, significant demand risk or in challenging jurisdictions.

新兴市场与发达市场之差异

欧洲基础设施的机构投资市场已经发展到这样的水平了，在稳定的国家，良好的PPP项目总是有充足的机构资本参与投资，而不一定都需要增信措施。但是，对于存在技术风险、不正常开发或建设风险、重大需求风险或在存在挑战的司法管辖区，还是需要增信措施促进PPP项目的非银行融资。

9.5.2 *Types of credit enhancement* 增信种类

Project bonds can be credit enhanced in whole or in part through various means, including:项目债券可以总体或部分增信，方法多样，包括：

- **Guarantee:** a guarantee of the Private Partner's obligations might be provided by a sponsor (if it has a suitably high credit rating), a bank or a multilateral agency. In some cases, a guarantee might equate to wholesale credit substitution (as distinct from enhancement).担保：发起人（投资人）（如果有足够高的信用等级的话）、银行或多边机构可以提供担保，保证私营合作伙伴的义务履行。在某些情况下，担保可能相当于批发信用的替代（与增信不同）。

- **Wrap:** this is the provision of insurance by a highly rated private sector financial guarantor (often a 'monoline' insurer), insuring the underlying principal and interest payments on a bond in return for a fee. Although not uncommon in Europe before the financial crisis, only one major international monoline insurer continues to operate. The insurer's credit rating is key to the rating of the bonds. 第三方保证：这种担保条款是由高评级的私营财务担保公司（通常是单一险种保险公司）提供，担保债券的本息支付并收取担保费用。这种方式在金融危机之前的欧洲很常见，但现有只有一家主要的单一险种保险公司还有这荐业务。保险公司的评级对于债券的信用评级是关键。
- **Sovereign Guarantee:** in some circumstances, it may be value for money for governments to provide a guarantee (typically in return for a fee). This may be part of a concerted programme to facilitate infrastructure investment. 政府担保：在某些情形下，缔约政府部门提供担保（通常会收取担保费用）可能会物有所值。这种担保方式也是促进基础设施投资的协同方案的一部分。
- **Multilateral product:** the World Bank, MIGA and IFC have a long track record in providing guarantees for bonds.⁷⁴ These guarantees generally focus on specific risks which the private sector is unable to manage (such as adverse government action) and are available to World Bank and IDA countries. MIGA insurance focuses on political risk. More generally, since the financial crisis, bodies such as the EIB and the Asian Development Bank⁷⁵ have been considering ways to boost liquidity and incentivise capital markets investors to invest in infrastructure in both developed and emerging markets. Multilateral funding agencies and development banks are the ideal channel for this type of support because they have both the credit quality and the political influence to stimulate investor appetite. 多边产品：世界银行、多边投资担保机构（MIGA）和国际金融公司（IFC）在提供债券担保方面已有很长历史了。⁷⁴ 这些担保项目一般关注的是私营部门无法管理的风险（比如存在负面影响的政府行为），世界银行和（联合国）国际开发协会（IDA）成员国可以获得这些担保业务。MIGA 保险则主要关注政治风险。从更广泛的范围来看，自金融危机以来，像欧洲投资银行（EIB）和亚洲开发银行⁷⁵等机构一直在寻求提升流动性的方法，鼓励资本市场投资者在成熟市场和新兴市场投资基础设施。多边融资机构和开发银行就是这种支持的理想提供者，因为它们都有良好的信用及充分的政治影响力，从而刺激投资者的需求。

The EIB Project Bond Credit Enhancement Programme (PBCE) was launched to provide support for capital markets financing of infrastructure and to broaden the investor base for infrastructure projects. It offers credit enhancement in two forms: funded (internal) involving EIB as an internal party investing in the capital structure, and unfunded (external). The unfunded form involves the provision of a standby letter of credit in favour of the bond trustee for 20% (now 30%, following the pilot phase) of the value of the bond. This allows the bondholders to draw down cash from the EIB which can be used to make principal and interest payments to the senior debt holders as well as financing a cost overrun or, in some cases, a revenue

74 <http://treasury.worldbank.org/documents/GuaranteesMatrix.pdf>

75 In 2015, Asian Development Bank provided a 75% guarantee to a Philippine project bond. 2015年，亚洲开发银行向一个菲律宾项目债券提供了75%的担保额。

shortfall. The Private Partner pays interest on any drawdown and a commitment fee to the EIB. EBRD and MIGA have recently successfully partnered on a risk mitigation product used on a Turkish project. EBRD provided a liquidity facility for construction cost overruns and to keep debt payments current during operation and MIGA provided political risk insurance to insulate the project from the risk of certain adverse government action.启动EIB项目债券增信计划（简称PBCE）是为了向资本市场对基础设施项目的融资提供支持，也是为了拓宽基础设施项目的投资者范围。这一计划通过两种方式提供增信：一是出资（内部），将EIB纳入项目本身作为内部的一方投资到该资本结构中，另一种不出资（外部），作为第三方（外部）提供担保。不出资形式涉及提供以债券受托人为受益人的备用信用证，额度为债券价值的20%（试行阶段后变成了30%）。这就让债券持有人可以从EIB支取现金，用于向优先债权人支付本息，并用于成本超支、或者（在某些情形下）收入不足。私营合作伙伴则根据支取额向EIB支付利息和授信费用。最近EBRD和MIGA在一个土耳其项目的风险缓解产品中合作成功。EBRD对建设成本超支的情况提供流动性贷款，并保证运营阶段持续的债务偿还，而MIGA则提供了政治风险保险，让项目免于遭受负面政府行为带来的风险。

Ten projects involving the PBCE were successfully bond financed in its pilot phase. Moody's Investors Service⁷⁶ reported that this demonstrated the effectiveness of project bond credit enhancement in improving projects' risk profiles, including in these cases by mitigating country-specific risk by achieving project ratings at or above the rating of the host sovereign⁷⁷ (which the EBRD/MIGA product also achieved). Both the PBCE and the EBRD/MIGA products have therefore had the effect of making the project bonds into an investment as safe as, or indeed safer than, government bonds.在PBCE的试行阶段，有十个项目成功地拿到了融资。穆迪的投资者服务⁷⁶报告称这意味着项目债券增信措施可以有效地优化项目的风险面，包括缓解具体的国家风险以获得等于甚至高于该国的评级⁷⁷（EBRD/MIGA产品也可以做到）。因此，PBCE和EBRD/MIGA产品可以让项目债券比投资政府债券更加安全。

76 Moody's Investors Service Sector In-depth (14 April 2016): Infrastructure Renewal and Investment - Europe project bond market set for growth after pilot initiative endorsed穆迪的投资者行业深度报告（2016年4月14日）：《基础设施更新与投资——欧洲项目债券市场在试行阶段后看涨》

77 As shown by the rating Moody's assigned the N25 in Ireland (Baa1 positive) and CAV in Italy (Baa2 stable). 如评级机构穆迪对爱尔兰N25的评级（Baa1正面）和意大利CAV的评级（Baa2稳定）。

EMERGING AND DEVELOPED MARKET DIFFERENCES

Credit support like the PBCE could be used to mitigate sovereign and macroeconomic risks as well as project-specific risks. It could benefit PPP Projects which are higher risk in stable creditworthy countries, as well as PPP Projects in countries with weak or challenging credit profiles. Many such credit enhancement tools are already available for this purpose from multilateral and bilateral institutions and their use is being gradually mainstreamed and increased.

Credit support can also overcome basic unfamiliarity with non-bank funding for infrastructure even in more developed financing markets (e.g. the first Belgian project bond was a PBCE pilot project).

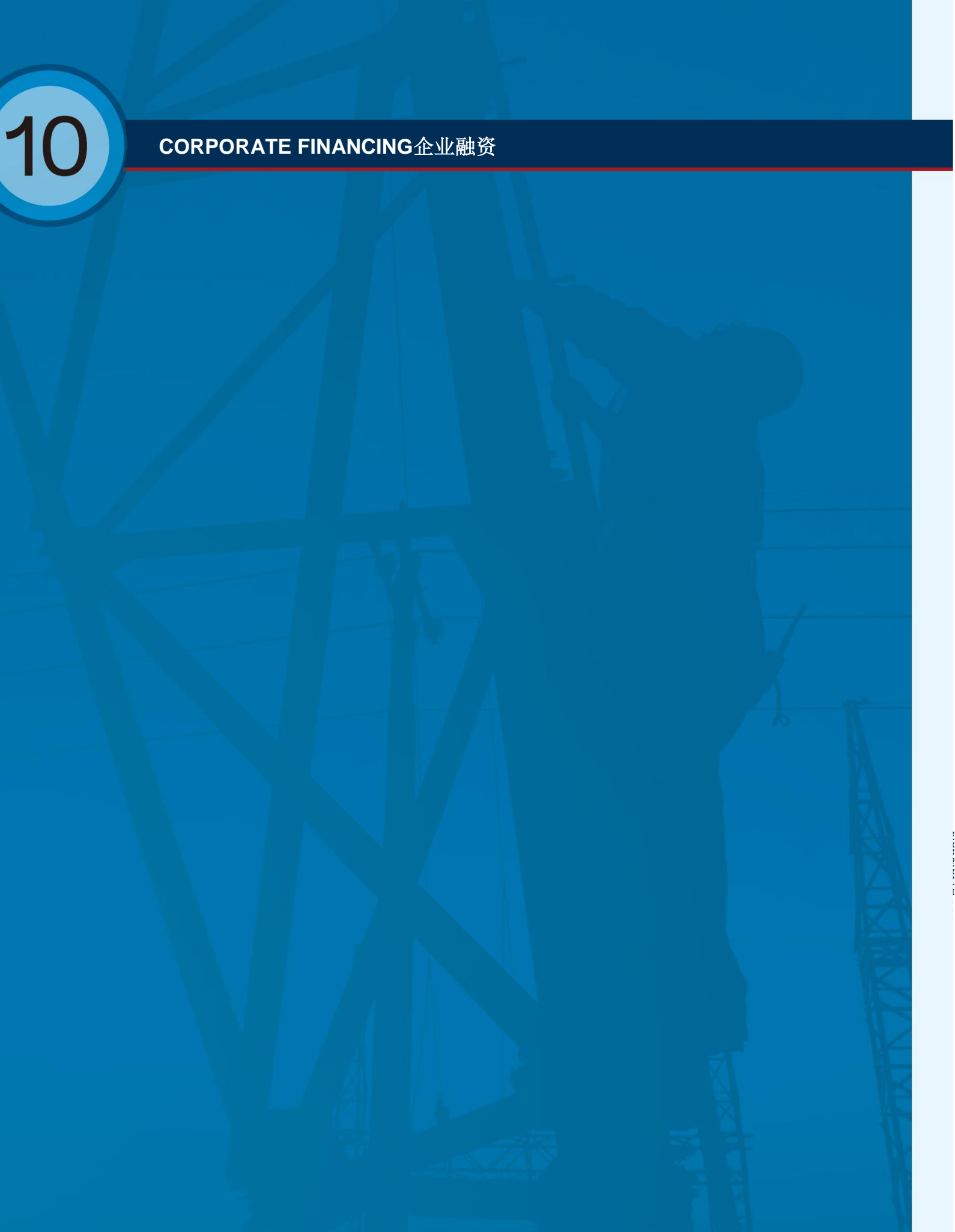
新兴市场与发达市场之差异

像PBCE一样的信用支持手段可以用于缓解政府和宏观经济的风险，以及具体项目的风险。在稳定且信用度高的国家，它对于风险较高的PPP项目有利；在经济薄弱或信用面不足的国家，它也有利于PPP项目的增信。多边和双边机构已经为此目的提供了许多类似的增信工具，并且这些工具已经逐渐地增长成为主流。

信用支持手段还可以克服甚至在发达国家金融市场仍然存在的对于基础设施非银行融资不熟悉问题（例如比利时首个项目债券发行就是一个PBCE试点项目）。

10

CORPORATE FINANCING 企业融资



10.1 KEY ASPECTS 关键方面

10.1.1 *The concept of Corporate Financing* 企业融资的概念

Corporate entities typically use a range of financing means to fund their daily business needs across their corporate group. They will have credit facility arrangements with their relationship banks and may also raise finance through bond issues (public or private). They may also have multiple operating assets already generating revenue. If a new investment opportunity arises (such as a PPP Project), some corporate entities may prefer to put in place additional finance on a corporate basis instead of going down an investment-specific route (such as project finance). The strength of the corporate entity's balance sheet (potentially alongside consortium partners, parent companies or key subcontractor(s)) will be key to its ability to do this, as generally the lenders or investors involved in the new corporate financing will have recourse to the whole corporate entity, not just the specific asset being financed. Depending on the size of the corporate entity relative to the size of the investment in question, the lenders or investors may in fact be less concerned with the asset itself, and more focused on the performance of the corporate entity as a whole. 企业实体一般使用一系列的融资手段为其整个企业集团日常的经营活动需要提供资金。它们可能与往来银行有信贷融资安排，也可能通过公开或者非公开发行债券融资。它们也可能已经有几个已进入运营的资产并产生了收入。如果有新的投资机会出现（比如一个PPP项目），一些企业实体可能会以企业的名义增加融资，而不是走项目融资的路线。该企业健康的资产负债表（以及其协助合作方、母公司、或重点分包方）将成为增加融资的关键，因为一般来说，参与到新的企业融资的贷款方和投资人对于整个企业（而不是接受融资的某个项目资产）都有追索权。此时相对于标的投资资产的规模，贷款方和投资人可能更加关心整个企业实体的规模，以及整个企业实体的业绩表现。

Some corporates may not even need to enter into specific additional financing arrangements for particular investments as their balance sheets are so strong that they have sufficient financial reserves to finance the investment in question. 一些企业可能根本不需要对某项投资增加融资安排，因为其资产负债表很健康，有充足的资金储备用于该项投资。

The funding of investments in this way is called corporate financing and is also known as "on balance sheet" financing. 以这种方式获得投资资金称为企业融资，又称为“表内”融资。

10.1.2 *Why are PPP Projects financed "on balance sheet"?* 为什么PPP项目需要“表内”融资？

As described in [Section C, PPP Contracts in Context](#), PPP Projects are typically funded through limited recourse project financing of an SPV owned by sponsor parties. This is both because of the need to bring together different sponsors to build and operate an asset (e.g. financial investors would not have the technical capability to build the required asset) and possibly because the amount of finance required is

usually beyond the balance-sheet capacity of an individual sponsor. Project financing is usually classified as “off balance sheet” which may be useful from an accounting perspective for the parties involved and can often have a lower cost of capital than corporate financing because of the high gearing of cheaper third party debt to more expensive equity. 在[第C章——具体情形下的PPP合同](#)提到，PPP项目一般由项目发起人（投资人）所有的SPV通过有限追索权项目融资提供资金。这既是因为需要将不同的发起人（投资人）团结起来建设并运营一项资产（比如财务投资者没有建设资产所需的技术能力），也可能是因为某一单独的发起人（投资人）的资产负债表不足以提供所需要的资金。项目融资通常被划至“表外”，从项目参与方的会计角度来说这种方式是有利的，而且比企业融资的资金成本更低，因为它让低成本的第三方贷款与高成本的股权可以高度配合。

However, although not commonly used, corporate/on balance sheet financing can play a role in PPP-type projects and may be suitable in a number of circumstances. These include where a bidder is the sole sponsor, has a strong balance sheet and typically uses corporate finance for new projects as part of its normal business model or where it may be more cost-effective to use balance sheet financing to reduce transaction costs (e.g. on smaller transactions). A bidder may wish to finance through equity rather than limited recourse financing for tax reasons or because it is willing to take more risk than third party lenders are prepared to take in a particular market (particularly if it has access to export credit or other support) or simply because it is an overall less expensive form of funding. From the Contracting Authority's perspective, if a project is to be financed on balance sheet, the key is to ensure that an appropriate risk allocation is maintained between the Contracting Authority and the Private Partner, following the same principles as in a project financing (and as outlined in this Guidance). Ideally the procurement process should accommodate bids using corporate and other types of financing, as well as a mix. It is important to ensure that, the tender and (if applicable) draft- contract documentation works for different financing scenarios. In some circumstances, it may also prove simpler, faster and more cost-effective - e.g. because of the fewer parties (and advisers) involved and simpler documentation and debt mechanics. 然而，尽管企业/表内融资没有被广泛使用，这种融资方式对于PPP项目仍然起着重要作用，而且可以适用多种情形。比如投标方是唯一发起人（投资人）且有着健康的资产负债表时，一般会在新项目中使用企业融资作为其常规的业务模式，或者使用表内融资的方式对于降低交易成本（比如在小规模的交易中）更为有效。因为税务原因，或者因为比第三方贷款方更愿意承担更大风险并准备好了进入某个市场（尤其当其可以使用外部增信或其它支持的时候），或者只是因为权益融资的成本更低，相对于有限追索权的融资，投标人可能更愿意进行权益融资。从缔约政府部门的角度，如果一个项目要进行表内融资，关键是保证缔约政府部门与私营合作伙伴之间适当的风险分配，这一原则在项目融资中也一样（本《指南》中已有说明）。理想的情形是，采购流程可以允许投标人使用企业融资和其它融资方式，以及混合融资方案。重点要保证招标书和（如适用的话）合同草案适用于不同的融资方式。有些情况下，这可能更加简单、快速和有效，因为介入方（和咨询顾问）更少，文件和负债机制都更加简单。

It is also possible that PPP Projects may be financed by a combination of project and corporate finance and the procurement process and documentation will need to be adapted appropriately. For the purposes of this [Section 10](#), the assumption is that the PPP Project is to be wholly corporate financed. 另外，PPP项目也可以通过

项目融资和企业融资结合的方式进行融资，而采购流程和文件也需要作相应的调整。本《指南》第10章中，我们假设PPP项目将全部通过企业融资。

10.2 KEY CONSIDERATIONS FOR THE CONTRACTING AUTHORITY 缔约政府部门的主要考虑因素

10.2.1 *Advisors* 咨询顾问

If corporate financing is an option, the Contracting Authority should (as with any form of financing under consideration) ensure it has engaged legal and financial advisers with relevant expertise as early as possible in the procurement process. Specialist advice will be needed in relation to formulating bid requirements, evaluating bids and assessing how the corporate financing impacts the PPP Contract provisions and mechanics. Understanding the overall contractual structure will also be key in formulating any compensation provisions and limiting the Contracting Authority's liability under the PPP Contract appropriately. 如果企业融资是一种选择，缔约政府部门应该（与考虑范围内的其它融资形式一样）保证在采购流程的早期就让专业的法律和财务咨询顾问介入。在制定招标要求，评标和评估企业融资对PPP合同条款和机制的影响时需要专业的意见。理解总体的合同架构对于制定补偿条款和合理地限制缔约政府部门在PPP合同中的责任也十分重要。

10.2.2 *Procurement implications* 采购流程因素

As highlighted in [Section 9, Bond Financing](#), if the Contracting Authority wants bidders to be able to submit the best value financing available, the bid process must allow for a range of financing approaches. The Contracting Authority should consider from the start of the procurement process the implications of a corporate financed bid as compared with a limited recourse project financed bid. The procurement documentation should make clear whether such bids are permitted and what the bidder will need to address in its bid in terms of minimum requirements (e.g. regarding price commitment and contract terms), and in particular in place of bank commitment letters. The bid documentation should also spell out transparently how bids will be evaluated and how different solutions will be compared. Not only will this facilitate alternative financing solutions, but it will also mitigate the risk of non-compliant bids. Setting sufficiently ambitious prequalification/selection criteria (including as regards financial standing) and - if consortia are allowed - requiring (a mix of) joint and several liability, performance bonds, maintenance guarantees and/or parent company guarantees may be necessary. 在[第9章——债券融资](#)中有所提及，如果缔约政府部门想让投标方提交最物有所值的融资方案，那么招标流程就必须允许多种融资方法。缔约政府部门从采购流程的开始就应该考虑企业融资投标与有限追索权项目融资投标所涉及的因素。采购文件应该清楚地说明是否允许这样的投标，并说明投标方在其标书中需要响应的最低要求（比如有关价格承诺和合同条款等），以及具体的银行授信函件。招标文件还应该明确评标方式，以及如何对不同的方案进行比较。这不仅有助于获得替代的融资方案，还可以减少不合规定的投标。制定足够严格的资格预审/筛选标准（包括财务状况等）和（如果允许联合体投标的话）要求承担连带责任、支付履约保证金、提供担保和/或母公司担保（如必要的话）。

10.2.3 *Due diligence* 尽职调查

In a project financing, there are usually several parties carrying out due diligence on the PPP Project from the private sector side: the Private Partner, its sponsors and the lenders, as well as all their advisers. As mentioned in [Section E, PPP Contracts in Context](#), the lenders go through a rigorous process to satisfy themselves that the PPP Project is bankable and this can give the Contracting Authority additional comfort in terms of its own (and its advisers') assessment of the Private Partner's ability to successfully deliver the PPP Project. In a corporate financed PPP Project, this level of third party due diligence may not happen, so the Contracting Authority may have to rely solely on its own (and its advisers') evaluation of the financial and technical robustness of the Private Partner, its bid and its sub-contractors (who may or may not be part of the same corporate group). 在项目融资中，私营合作伙伴方面通常会有几方参与PPP项目的尽职调查：私营合作伙伴、其发起人（投资人）和贷款方，以及其咨询顾问。在[第E章——具体情形下的PPP合同有说明](#)，贷款方会走严格的审查流程确认PPP项目具有可融资性，这可以在缔约政府部门自行（和其咨询顾问）评估私营合作伙伴是否有能力交付项目的基础上，增强缔约政府部门的信心。在进行企业融资的PPP项目中，可能不会有这种第三方尽职调查，这样缔约政府部门就必须仅依靠自身（和其咨询顾问）对私营合作伙伴的财务和技术情况，其投标和分包方（可能属于也可能不属于同一个企业集团）进行评估。

10.2.4 *Creditworthiness of Counterparty* 交易相对方的信用

A project-financed PPP Project necessarily involves an SPV which is party to carefully structured sub-contract arrangements and financing involving third party lenders, sponsor equity and guarantees or similar support at requisite levels (e.g. of equity or sub-contractor obligations). The SPV's income and expenditure are relatively transparent and its financial robustness assessable. 项目融资的PPP项目必须设立一家SPV，作为签署经过仔细拟定的分包合同的一方，并根据要求程度与第三方贷款方、股权出资方、担保方，或者提供类似的支持（比如股权或分包方义务）。SPV公司的收入和支出都相对透明，且便于评估其财务稳健性。

In a corporate financed PPP Project, this level of transparency may not be automatically present where the financing and sub-contracting arrangements are being kept within the relevant corporate group and no third party funding is involved. The Contracting Authority needs to be able to satisfy itself that its Private Partner in this scenario is at least as financially robust as it would be expected in a project financing (which would be largely ring-fenced from external factors). 在进行企业融资的PPP项目中，在融资和分包安排在相关的企业集团内部且没有第三方资金介入时，则信息透明度不会很高。缔约政府部门需要确认在这种情况下，私营合作伙伴的财务状况至少能够达到缔约政府部门在项目融资方案中的预期（可能受到外界因素的限制）。

As described in [Section 10.2.2](#), at the bid stage, the Contracting Authority will need to consider what comfort it requires from the bidder to show that the relevant corporate funding will be forthcoming as there will be no third party lenders to provide the type of commitment letter typically required in a project financed bid. If the Private Partner is not demonstrably creditworthy in its own right (e.g. with a

satisfactory credit rating), the Contracting Authority may need to request specific information about the proposed financing and/or require a form of guarantee or commitment letter from | a creditworthy company in the corporate group (typically a parent company as its -5 credit rating/financial standing will be the determining factor), or from a third party | subcontractor or key supplier. If the bidder is a consortium, the Contracting Authority will want the consortium members (or appropriate parent companies) to take on joint and several liability under any credit support (this may be a requirement rather than an option in a public procurement process where entities have formed a consortium to meet minimum financial standing requirements). 如第10.2.2节所述, 在招标阶段, 缔约政府部门需要考虑投标方能从多大程度上确定能够实现企业融资, 因为企业融资没有第三方贷款方提供一般在项目融资方案里才有的资金承诺。如果私营合作伙伴自身没有可靠的信用度(比如有足够高的信用评级), 缔约政府部门则需要要求提供融资方案的相关信息和/或要求企业集团中信用度较高(一般是母公司, 因为其信用评级/财务状况将是决定性因素)的公司, 或第三方/分包方/重要供应商(如果投标方是联合体投标的情况)提供某种形式的担保或资金承诺, 缔约政府部门将会要求联合体成员(或合适的母公司)对信贷支持承担连带责任(在公开采购流程中, 在由几家实体组成联合体以满足对财务状况的要求时, 这可能是必须项而非选择项)。

10.2.5 *Price fluctuation between preferred bidder and financial close* 优选投标定价和融资交割价格之间的变动

Unlike in a project financing, a corporate financed bid may be able to offer a fixed price bid (without variation for funding costs, as its costs of funding will not be as directly affected by interest rates that may move between bid and financial close as in a bank financing, or by the price fluctuation risk in a bond financing). This certainty may be of particular value to the Contracting Authority, depending on the PPP Project circumstances, and encouraging bidders that are raising third party debt to pre-hedge may not be feasible. 与项目融资不同的是, 企业融资投标可以提供一个确定的价格(没有融资成本变动, 因为融资成本不会像银行融资中的利率在投标时和交割时会变动一样受到利率变动的直接影响, 或者债券融资中的价格波动风险)。这种确定性对于政府来说, 在不同的PPP项目情形中具有特别的意义, 而且还可以鼓励那些无法使用第三方贷款进行预先对冲的投标人。

10.2.6 *Transparency* 透明度

Section 10.2.4 highlights that there may be less transparency regarding price and cost in a corporate financed bid where the sub-contracting and financing elements are kept within the corporate group. For example, group overhead costs and return on intra-group loans may be factored into the price in a way which would not be possible in a project financing and the true level of equity return may not be easily ascertainable. The Contracting Authority should try to obtain a level of transparency equivalent to a project financed bid and in doing so should require a financial model as part of the bid submission so that it has sufficient information to understand the bidder's proposed flow of funds and capital structure. 第10.2.4节提到了在企业融资投标中, 如将分包合同签署和融资因素限制在企业集团内部进行, 则会降低定价和成本的透明度。比如, 集团的管理费用和集团内部贷款的收益可能会被纳入价格当中, 而这种情况在项目融资中是不可能的, 而且也很难确定股权投资的真实收益。缔约政

府部门应该尽量获取与项目融资中相同的信息透明度，所以应该要求投标人提交方案的同时提供一个财务模型，这样缔约政府部门才会有充分的信息去理解投标人建议的资金流动和资本结构。

The same applies during the life of the PPP Project. The Contracting Authority will want to ensure that it is able to obtain the same level of financial and technical information that it would expect in a project financing, particularly where relevant to its own liability under the PPP Contract.这种方式在整个PPP项目的全生命周期中都适用。缔约政府部门希望能够获得与项目融资中相同透明度的财务和技术信息，尤其是与其自身在PPP合同项下的义务相关的信息。

As mentioned in [Section 7, Confidentiality and Transparency](#), governments in many jurisdictions are increasingly moving towards greater transparency in relation to public procurement and the use of public funds and this is also a factor in accessing support from multi-lateral agencies. It may therefore also be important from a policy perspective for the Contracting Authority to ensure that a sufficient level of detail is obtainable.在[第7章——保密性与透明度](#)中提及，在许多司法区的政府在公开采购、使用公共资金中越来越透明化，这也是从多边机构获得支持的一个因素。因此，从政策的角度而言，政府确保可以获取充分的详细情况也很重要。

10.2.7 *Addressing poor performance* 业绩不佳的解决途径

The Contracting Authority should bear in mind that in a corporate financed structure involving only one sponsor group, poor performance may not realistically be able to be addressed in the same way as it can be in a structure where more than one corporate group is involved, as well as possibly third party lenders. There will be a different dynamic without parties who would insist on contractual arrangements being put in place to enable a poorly performing sub-contractor (and/or Private Partner) to be replaced before the PPP Contract is terminated (e.g. as would be the case in a typical project financing). Similarly, Direct Agreements with sub-contractors are unlikely to be of much benefit if the whole PPP Contract is essentially being delivered by one corporate group and failure to perform is likely to be indicative of a systemic failure within the group as a whole.缔约政府部门应该认识到，与有多家发起人（投资人）（或者可能是第三方贷款方）参与的企业融资架构相比较，在只涉及一家发起人（投资人）的企业融资架构中，业绩不佳的问题可能没有办法同样地得到实际解决。与典型的项目融资相比，企业融资中则没有其他相关方坚持落实合同安排，要求替换掉业绩不佳的分包商（和/或私营合作伙伴）以避免PPP合同终止。类似地，如果整个PPP合同基本上由一家企业集团交付，与分包商签署的直接合同就没有多大用处，而且违约情况可能昭示着整个集团系统性的违约。

As there are no third party lenders, there will be no Direct Agreement either (see [Section 6, Lenders' Step-in Rights](#)). While this means the Contracting Authority has fewer constraints on its ability to terminate the PPP Contract in default circumstances, the lack of third party lender involvement removes one line of defense to rescue a PPP Project in trouble.因为不存在第三方贷款方，也不会有任何直接协议（见[第6章——贷款方的介入权](#)）。而这意味着发生违约情形时，缔约政府部门终止PPP合同受到的限制会更少，没有第三方贷款方的参与让陷入困境的PPP项目少了一道防线。

The Contracting Authority should consider what alternative protection to seek in these circumstances - e.g. requiring certain guarantees or payment retention rights, direct rights against key suppliers or rights to appoint third parties to remedy defaults at the cost and risk of the Private Partner. 在这些情况下，缔约政府部门应该考虑寻求其它保护措施，比如要求提供某些担保或延迟支付权利，对重要供应商的直接权利进行限制，或者指定第三方对违约情形进行补救，费用和风险由私营合作伙伴承担。

10.2.8 Flexibility 10.2.8 灵活性

A corporate financed Private Partner may have greater flexibility when it comes to agreeing significant changes to the scope of work/services under the PPP Contract if it does not have to involve third party lenders in the process. 在企业融资模式下，因第三方贷款方并非必须参与PPP项目，因此当PPP合同项下的工作范围/服务出现重大变更时，其调整的灵活性会更大。

10.2.9 Changes to documentation 对文件的变更

If a PPP Project is being corporate financed and there is no prospect of a refinancing/ introduction of senior debt post commencement, then logically various adjustments should be made to the PPP Contract terms to reflect the structure, parties and documentation involved. These will include: 如果PPP项目使用企业融资方案，而且在项目开始之后很可能不会进行再融资/引入优先债务，那么应该对PPP合同条款进行合理的调整，以反映出涉及的架构、当事方和文件的特点。包括：

- (a) References and provisions relating to financing documents (e.g. Senior Financing Documents) - there will not be Senior Finance Documents as in a project financing context. Advice will be needed as to the extent that relevant definitions and provisions should be adapted to take into account the corporate finance structure and any credit support required (such as parent guarantees). Some of these are explored further below. 关于融资文件的索引和条款（如优先债融资文件）-在项目融资中不会有优先债融资文件。在调整相关定义和条款以考虑企业融资结构和信用支持（比如母公司担保）时，应该寻求建议。以下就此进一步分析。
- (b) References and provisions relating to relevant parties - e.g. there will not be any third party lenders. 相关方的索引和条款——比如不会有任何第三方贷款方。
- (c) Pricing adjustment provisions - PPP Contracts typically provide for an adjustment to pricing in certain circumstances (e.g. to cover the cost of implementing a qualifying change in law or the cost of certain delay events which are not the Private Partner's fault). In a project financing, the adjustment may be measured by reference to restoring senior debt cover ratios or Equity IRR. As there is no senior debt, this will need to be adapted (e.g. by providing for a lump sum payment(s) or using other criteria as a reference instead). 定价调整条款——PPP合同一般会规定某些情形下（比如为了支付因法律变更而导致的实施成本，或者非私营合作伙伴导致的延误事项）

的价格调整。在项目融资中，该等调整可以通过参考优先债收回比率或股权IRR进行衡量。由于没有优先债，这可能需要调整（比如通过规定一次性支付或使用其它标准作为参考）。

- (d) Insurance provisions - in a corporate financing, insurance cover may be provided via corporate group policy arrangements as opposed to by project-specific policies. This may feed through to a cheaper bid price but will also mean that the type of insurance provisions typically seen in a project financed project may need adapting as the policies and premia will not necessarily be project-specific nor the terms as transparent. Advice will be needed to ensure the Contracting Authority has equivalent (or satisfactory) protection in terms of uninsurability, placing of insurances, size of deductibles, indemnity cover, endorsements, notice of policy changes, loss payee provisions and premium risk sharing. In addition, as there are no third party lenders, there should be no need to have a threshold above which g; insurance proceeds are applied against debt as opposed to reinstatement of the PPP Project. 保险条款——与项目融资的保险政策不同，在企业融资中，可以通过企业集团政策安排投保。这可以通过降低投标价格实现，但同时也意味着一般在项目融资中使用的保险条款可能需要调整，因为保单和保费可能不一定针对具体项目而且条款也不一定具有相同的透明度。因此，需要寻求专业意见以确保缔约政府部门在不可保险性、买保险、免赔额、赔偿范围、批单、保单变更通知、赔款受益人和保费风险分担等方面有相当（或充分）的保护。另外，由于不存在第三方贷款方，也应该不需要制定一个阈值，高于该阈值时保险收益适用于负债，而不是PPP项目的恢复。
- (e) Refinancing - these provisions should be tailored appropriately to reflect the fact that there will not be any third party financing (or none being planned) but also to cater for a possible future change in financing which should require Contracting Authority consent and which may give rise to a form of refinancing gain (e.g. from a corporate financing to a project financing). If this is envisaged at Financial Close then relevant amendments should be agreed as a schedule to the PPP Contract - if not, the changes and the sharing of the refinancing gain will need to be negotiated as part of the Contracting Authority consent process. 再融资——这些条款应该经过适当定制化，以反映出没有任何第三方融资（或没有打算任何第三方融资），并且需要适就将来可能发生的，需要缔约政府部门同意并且可能产生再融资额外收益的融资变化（比如从企业融资变更为项目融资）。如果打算在融资交割时进行这种变更，那么应当在PPP合同中约定相关的变更事项；如果没有，则需要对相关变更和再融资收益的分配进行协商并经过缔约政府部门的同意。
- (f) Termination payments - in a corporate financed PPP Project with no third party debt the funding is being provided by the parent group and is in principle equity. However, it is likely that the principles relating to compensation set out in [Section 4, Termination Payments](#) will still need to apply in order for the parent group to be prepared to commit the level of funding required for the PPP Project. Appropriate adjustment to the calculation formulae will be required to reflect that there is no Senior Debt but instead just equity. See [Section 10.3](#). 终止的费用——在没有第三方贷款的企业融资PPP项目中，资金

由母公司以股本的形式提供。但是，第4章——终止的费用中规定的补偿原则在此可能仍然适用，这样母公司才会针对PPP项目的需求提供授信额度。需要对计算公式进行适当的调整，以反映出不存在优先负债而只有股权。见第10.3节。

As mentioned in Section 10.2.7, there is no need for a Direct Agreement if there are no third party lenders. The Contracting Authority should consider whether any alternative step-in/direct agreement-type contracts with other parties/parent companies might be appropriate in the proposed structure, including in relation to ensuring oversight of corporate documentation and any joint and several arrangements.如第10.2.7节所述，如果没有第三方贷款方，则直接协议没有存在的必要。缔约政府部门应该考虑在拟定的结构中是否需要与其它方/母公司订立替代的介入/直接协议式的合同，包括对企业文件及附件以及一些安排的监督。

10.3 TERMINATION PAYMENT CALCULATION 合同终止的费用计算

10.3.1 Contracting Authority Default, MAGA, Change in Law or Voluntary Termination 因缔约政府部门违约、MAGA、法律变更或双方协商一致而终止

Following the market practice described in Section 4.3.1, Termination Payments, in a corporate financing the Private Partner is still likely to expect full compensation if the PPP Contract is terminated early for Contracting Authority Default, MAGA, Change in Law or Voluntary Termination. A form of financing-based compensation approach as described in Section 4.3.3 (consisting of senior debt plus equity plus third party cost elements) can be adopted, but will need to take into account that there is no senior debt. Options are set out below.根据第4.3.1节——终止的费用中描述的市场实践，在企业融资模式中，如果因缔约政府部门的违约、MAGA、法律变更或主动终止导致PPP合同提前终止，私营合作伙伴仍然可能会要求全额补偿。可以采用第4.3.3节中描述的一种基于融资的补偿方式（由优先债加股权加第三方成本因素），但是这种方式需要考虑没有优先债的事实。以下列出了可选方式：

- (a) As the equity element represents the full PPP Contract funding, if the Private Partner's sole business is the PPP Project, it is possible to choose any of the three Options described in Section 4.3.3.2 in place of the senior debt plus equity element. Third party costs (e.g. redundancy and sub-contracting break costs) should be added as described in Section 4.3.3.3. 因为PPP项目的全部融资均来自股东资金，如果私营合作伙伴的唯一业务就是该PPP项目，那么可能选择第4.3.3.2节中描述的三个方案之一以代替优先债加股权的融资方式。第三方成本（比如裁员和提前终止分包合同违约成本）也应按第4.3.3.3节的描述在计算提前终止补偿中予以考虑。
- (b) If the PPP Project is not the Private Partner's sole business, the Options in Section 4.3.3.2 will not be appropriate and one approach is to use the value of the PPP Contract as the basis for compensation - i.e. the amount which the PPP Contract could be sold on the open market (assuming no termination). Again, third party costs should be added. This reflects the approach described in Section 4.4.2(b). 如果PPP项目并非私营合作伙伴的唯一业务，则第4.3.3.2节中描述的选择都不适合，而另一种方法是使用PPP合同的公允价值作为补偿基础，即按PPP项目在公开市场售价（假设没有终止）计算。再次强调，第三

方成本应在计算提前终止补偿金时予以考虑。这种方式在第4.4.2 (b) 项中有所描述。

- (c) An alternative to (b) is to base compensation on the net present value of future payments which would have been due under the PPP Contract from the termination date, less future operating costs and capital expenditure (in each case as shown in the Original Base Case and discounted at the pre-tax Base Case Project IRR). Third party costs should again be added. (b) 项的一种替代方式是基于自提前终止日起至合同正常届满之日止的期间内，缔约政府部门所需支付的服务费用（在PPP合同终止日时支付）减去期间的运营成本和资本性支出的净现值来支付补偿（各种情形如原始基础案例所示，并按税前基础案例项目的IRR进行折现）。第三方成本仍应在计算提前终止补偿金时予以考虑。

Approaches which are based on a market value may prove hard to implement in practice on the basis that a market is unlikely to exist in some of these termination circumstances, particularly in an emerging market with a limited market anyway. An estimated value may have to be used instead. 基于市场价值的方式在实践中可能难以实现，因为在这些终止情形下可能不存在那样一个市场，尤其是在新兴市场中本身的市场就有限。这时可以使用估计价值。

In a corporate financing, the Private Partner may be able to more effectively mitigate costs to the Contracting Authority, particularly on a Voluntary Termination, in a way which proves less expensive to the Contracting Authority than in a project financing. One reason for this is that, with reasonable notice, resources and investment may be capable of being redeployed in other areas around the group on termination, reducing break costs. 在企业融资中，私营合作伙伴也许能够更加有效地减少缔约政府部门的成本（尤其是在主动终止的情形下），这比项目融资的模式更有利于缔约政府部门。其中一个原因是，在合理通知后，在终止时，私营合作伙伴可将资源和投资重新配置到集团的其它领域，从而减少了提前终止成本。

With any of these scenarios, the Contracting Authority will want to ensure that termination fees under any sub-contracts are not so disproportionate as to result in excessive compensation of intra-group companies who are sub-contractors. 在上述情形下，缔约政府部门会希望任何分包合同项下的终止费用不应不适当，导致作为分包方的集团内部公司的过度补偿。

10.3.2 *Private Partner Default Termination* 因私营合作伙伴违约而终止

In a Private Partner Default Termination, the debt-based option mentioned in [Section 4.4.2\(a\)](#) will not be applicable as there is no senior debt. The appropriate method of calculating any termination payment should be determined on a case by case basis and will depend entirely on the particular circumstances of the PPP Project and the nature and source of the corporate funding. Possible alternatives include: 在因私营合作伙伴违约而终止的情形下，因为不存在优先债，则第4.4.2 (a) 项中以债务为基础的提前终止补偿计算方式则不适用。应当根据PPP项目的特殊情况，以及企业融资的性质和来源，区分情况以确定合适的提前终止补偿费用的方法。可供选择的方法包括：

- (a) basing compensation on the market value of the PPP Contract if retendered, as highlighted in [Section 4.4.2\(b\)](#) and [Section 10.3.1\(b\)](#). As bidders may want to bid on a project financed basis, the PPP Contract drafting should allow for this. As stated above, the market value approach is uncommon generally and more difficult to implement in emerging markets and therefore careful consideration should be given to the justification for using this approach.按PPP合同再出售的市场价值计算补偿，如[第4.4.2 \(b\) 项](#)和[第10.3.1 \(b\) 项](#)所述。因为投标人的方案可能基于项目融资，所以撰写PPP合同时应该允许项目融资。如上所述，市场价值的方式并不常见而且在新兴市场很难实施，因此在使用这种方式时需要仔细考虑。
- (b) using the related and more feasible alternative to (a) of estimated market value as described in [Section 4.4.2\(b\)](#). However, again such approach may be difficult in emerging markets, and the Contracting Authority may need to consider agreeing a "top up" or baseline amount.使用与(a)项相关但更具可行性的估计市场价值的方法，如[第4.4.2 \(b\) 项](#)所述。但是，这种方式在新兴市场中仍然可能发生困难，而且缔约政府部门可能需要考虑约定一个封顶额度或底线额度。
- (c) following a similar approach to Force Majeure (see [Section 10.3.3](#)) and calculating capital and operating expenditure up to the termination date (as shown in the Original Base Case), subtracting payments up to that date and adding some element of third party costs.根据与不可抗力（见[第10.3.3节](#)）中类似的方法，并计算截止至终止日的资本性支出和运营成本（如原始基础案例所示），减去截止至该终止日所需支付的款项，并加上对第三方补偿的成本。
- (d) basing compensation on the equity investment cost, e.g. if financed by intercompany loans by reference to the coupons on those loans.按股权投资成本计算补偿，如通过公司间贷款融资的，参考该等贷款的利息。

In any event, Contracting Authorities should bear in mind the principles set out in [Section 4.4.1](#), particularly in respect of unjust enrichment.在任何一种情况下，缔约政府部门应该记住[第4.4.1节](#)规定的原则，尤其是有关不当得利的情形。

10.3.3 *Force Majeure Termination* 因不可抗力导致的合同终止

On a Force Majeure Termination, any compensation will again need to reflect that there is no senior debt. This can be done by calculating capital and operating expenditure up to the termination date (as shown in the Original Base Case), subtracting payments up to that date, and adding third party costs. As in any type of financing, the Contracting Authority will want to ensure that termination fees under subcontracts are proportionate to avoid disproportionate compensation of intra-group companies acting as subcontractors.在计算因不可抗力导致提前终止的补偿费用时，需要反映出不存在优先债的特点。这可以通过计算截止至终止日的资本性支出和运营成本（如原始基础案例所示），减去截止至该终止日所需支付的款项，并加上对第三方补偿的成本。如同使用任何融资种类一样，缔约政府部门会希望任何分包合同项下的终止费用要适当，以避免作为分包方的集团内部公司的过度补偿。



APPENDIX: 附录



ADDITIONAL PPP RESOURCES 附加 PPP 相关资源

Public-Private Partnership in Infrastructure Resource Center 基础设施资源中心的公共-私营合作模式

<http://ppp.worldbank.org/public-private-partnership/>

PPP Reference Guide Version 3.0, dated April 2017 2017年4月《PPP参考指南》3.0版本

<https://pppknowledge.org/guide/>

Public-Private Partnerships Fiscal Risk Assessment Tool (April 2016) 《公共-私营合作模式的财务风险评估工具》(2016年4月)

<http://www.worldbank.org/en/topic/publicprivatepartnerships/brief/ppp-tools#T2>

Public-Private Partnerships Fiscal Risk Assessment Model User Guide (April 2016) 《公共-私营合作模式的财务风险评估模型用户指南》(2016年4月)

<http://pubdocs.worldbank.org/en/422531461874706371/PFRAM20160401-Guidance-Note-for-PFRAM-March-28-2016.pdf>

A Framework for Disclosure in Public-Private Partnerships, World Bank 2016 《公共-私营合作模式的信息披露框架》世界银行 2016年

<http://pubdocs.worldbank.org/en/14367146g5587g722g/FrameworkPPPDisclosure-071416.pdf>

Disclosure in Public-Private Partnerships: Jurisdictional Studies, World Bank 2015 《公共-私营合作模式的信息披露：司法研究》世界银行 2015年

<http://pubdocs.worldbank.org/en/g103114482gg077g46/Disclosure-in-PPPs-Jurisdictional-Studies.pdf>

Disclosure in Public-Private Partnerships: Good Practice Cases, World Bank 2015 《公共-私营合作模式的信息披露：最佳实践案例》世界银行 2015年

<http://pubdocs.worldbank.org/en/6105814482g2161621/Disclosure-in-PPPs.pdf>

Infra Australia PPP Guidelines 《澳大利亚基础设施PPP指导原则》

<https://infrastructure.gov.au/infrastructure/ngpd/files/Volume-3-Commercial-Principles-for-Social-Infrastructure-Dec-2008-FA.pdf>

<https://infrastructure.gov.au/infrastructure/ngpd/files/Volume-7-Commercial-Principles-for-Economic-Infrastructure-Feb-2011-FA.pdf>

South Africa PPP Guidelines 《南非PPP指导原则》

http://www.ppp.gov.za/Legal%20Aspects/Standardised%20PPP%20Provisions/National%20Treasury%20PPP%20Practice%20Note%20No%201%20of%202004;%20Standardised%20PPP%20Provisions;%20First%20Issue;%2011%20March%202004_1.pdf

UK PF2 Guidance 《英国私募融资2指南》

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207383/infrastructure_standardisation_of_contracts_051212.PDF

UK Private Finance 2 (and related materials) 《英国私募融资2》以及相关材料
<https://www.gov.uk/government/publications/private-finance-2-pf2>

Dutch Model (DBFM infrastructure and DBFMO accommodation) 《荷兰模式》(DBFM基础设施和DBFMO)
<https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/06/01/dfbm-overeenkomst-rijkswaterstaat>

<https://www.rijksoverheid.nl/onderwerpen/publiek-private-samenwerking-pps-bij-het-rijk/documenten/richtlijnen/2016/04/01/rijksbrede-modelovereenkomst-dbfmo-huisvesting-rijksva-stgoedbedrijf-versie-4-3>

France FIN INFRA guidelines 《法国FIN基础设施指导原则》
<http://www.economie.gouv.fr/ppp/clusier-type>

Termination and Force Majeure Provisions in PPP Contracts - Review of current European practice and guidance (March 2013) - EPEC/Allen & Overy LLP
http://www.eib.org/epec/resources/Termination_Report_public_version

European PPP Expertise Centre Library 《欧洲PPP专业中心图书馆》
<http://www.eib.org/epec/library/index.htm>

Global Guide to Public-Private Partnerships (March 2010) and Asia Pacific Guide to Public-Private Partnerships (March 2012) - Allen & Overy LLP 《全球公共-私营合作模式指南》2010年3月, 和《亚太公共-私营合作模式指南》2012年3月, Allen & Overy LLP

Global Infrastructure Hub Report: Allocating Risks in Public-Private Partnership Contracts, 2016 edition 《全球基础设施中心报告: 公共-私营合作合同中的风险分配》2016年版
<http://globalinfrastructurehub.org/allocating-risks-in-ppps/>

Bond financing resources: 债券融资资源:

EPEC: Financing PPPs with project bonds - Issues for public procuring authorities 欧洲PPP专业中心(EPEC): 《PPP项目发行项目债券融资——缔约政府部门采购的问题》
http://www.eib.org/epec/resources/publications/financing_ppps_with_project_bonds_en_11_11_2013

<http://www.eib.org/epec/resources/financing-ppps-project-bonds-in-germany-july-2013pdf1.pdf>

AFME: Guide to infrastructure financing 欧洲金融市场协会(AFME): 《基础设计融资指南》
<https://www.afme.eu/en/reports/publications-and-data/publications/guide-to-infrastructure-financing/>

OECD: 亚太经合组织:
<https://www.oecd.org/finance/Financing-infrastructure-international-trends2014.pdf>

Infra Australia: 澳大利亚:
http://infrastructureaustralia.gov.au/policy-publications/publications/files/Review_of_

Infrastructure_Debt_Capital_Market_Financing_2014_03_28.pdf

Canada: 加拿大:

<http://www.pppcouncil.ca/>

