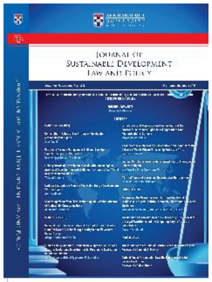

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Addressing the Impacts of the Covid-19 Pandemic on Public-Private Partnership (PPP) Contracts

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The Covid-19 pandemic has significantly impacted the health and economy of the world. The pandemic has also frustrated the execution of public-private partnership (PPP) projects across the world, with economic and legal consequences for contracting parties. The impacts of the pandemic have, and may continue to, result in uncertainties and even project failures. PPPs are underpinned by long term contracts which should ordinarily determine the rights, obligations and remedies arising out of the impact of the pandemic. However, the legal outcomes are never always certain or determinable and might not augur well for any of the parties.
This article examines legal and contractual tools for managing uncertainties and risks arising from the pandemic. It suggests that, as much as possible, parties should rely on extra-contractual arrangements to resolve the issues that are likely to arise out of the pandemic. This article discusses the possible legal outcomes of the pandemic on PPP arrangements and suggests creative ways of mitigating its impacts.

Keywords: Covid-19, Pandemic, Risk, Public-Private Partnerships, Contracts

1. INTRODUCTION

This article examines legal and contractual tools for managing uncertainties and risks to public-private partnership (PPPs) contracts arising from the pandemic. The Covid-19 pandemic has caused an unprecedented health and economic crisis across the globe.[1] In response to the health hazards which the corona virus portends, countries have imposed drastic country wide lockdowns with restrictions on both local and international travels. These global wide actions have had significant impact not only on the transportation sector but the entire economies of most countries.[2]Since the viability of infrastructure PPPs have significant correlations with economic indices, it is not inconceivable that a number of existing PPP projects will be adversely affected. Whilst the full effects of the pandemic on the long-term contracts which underpin PPPs have not completely emerged, there are already signs of stress.[3] This paper takes the proactive measure of evaluating the likely contractual consequences of the pandemic so that parties to PPP contracts can be prepared for possible outcomes. This is not a mere speculative exercise as there are valuable lessons from previous economic crises from which this paper draws upon.[4]

For the purposes of this article, PPPs are defined as long term relationships between public sector agencies and private sector entities under which the responsibility for any or all of the combination of designing, financing, construction, management and operation of public infrastructure and utilities that were traditionally undertaken by the public sector are contractually shared and jointly undertaken by both the public and private sector, usually in proportion to the kind of risks each party can best carry.[5]

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1 See D. Olawuyi & V. Nalule, 'Ensuring Universal Access to Modern Energy Services in Times of Pandemic Related Disruptions: Legal Challenges and Potential Responses' (2021) 12 (1) Journal of Sustainable Development Law and Policy 49-71 < https://dx.doi.org/10.4314/jsdlp.v12i1.3>

2 Across the world, stock markets crashed. Several sectors like tourism, hospitality and aviation were badly hit. Unemployment rates rose across globally, as most countries went into recession. Ibid.

3 A number of PPP projects have already been delayed, suspended or cancelled altogether in the United States. See Baxter, D. and Casady C.B.'A Corona Virus (Covid-19) Triage Framework for (Sub) National Public-Private Partnership (PPP) Programs'. (2020) 12Sustainability, 5253; doi: 10.3390/su12135253.

4 See for example Coelho M. et. al, 'The Effects of the Financial Crisis on Public-Private Partnerships 'International Monetary Fund'(2009)IMF Working Papers, Pg1- 24

5 Hodge, G.A. and Greve C,'Public-Private Partnerships: An International

It is easy to see how the economic downturn caused by Covid-19 pandemic may impact the viability of PPPs. PPP projects are typically financed using project finance structures and therefore parties rely on projected future cash revenues derived from the projects to determine the viability or otherwise of projects. Economic downturns like the type caused by the Covid-19 pandemic negatively affect project cash flows thereby making the underlying investments unviable. This of course has consequences for both the public and private sector parties to the PPP contract. However, the degree of impact of this type of supervening event on the parties is dependent on how project risks, especially revenue risks, are apportioned between the parties. For instance, where the private sector bears the revenue risk, it is likely to be affected more by the pandemic than the public sector party which is relatively insulated from such risk.

However, as we will see in subsequent paragraphs of this paper, even in such cases, the public sector is not completely shielded from the eventuation of the risk. It will most likely be affected due to the obligations arising from either guarantees or other support instruments used in facilitating the projects. Generally, economic downturns often also affect financiers who may make their continued support of projects conditional upon additional government support and guarantees. It definitely also leads to a reduction in private sector appetite for risks.[6]

It is common for contracting parties to try to provide contractually for all possible legal scenarios that are likely to arise during the term of their contracts, including of course for pandemics. PPP contracts are usually drawn wide enough to cover all reasonably foreseeable events that are likely to occur during the lifespan of the contract and usually include force majeure clauses. Force majeure clauses try to cover the

Performance Review' (2007)67 (3),Public Administration Review54555-8;Nwangwu George 'The Legal Framework for Public-Private Partnerships (PPPs) In Nigeria: Untangling the Complex Web', (2012) 7 European Procurement and Public Private Partnership Law Review, Pg. 268-277

5 See the Infrastructure Concession Regulatory Commission, National PPP Policy on Public Private Partnership (PPP), The Presidency, Nigeria.

6 CuttareeVickram and Madri-Perrott Cledan 'Impact of the Crisis on PPP Projects'<https://elibrary.worldbank.org/doi/10.1596/9780821387030CH-05≥, accessed 15 October 2021

rights and obligations of the parties when events which are outside the control of the parties, like pandemics occur. However, as is discussed in detail below, even force majeure clauses have their limitations. They do not really fulfill the objectives of the PPP projects, which primarily is to provide much needed services to citizens.[7]

Pandemics generally create legal risks for businesses. For PPPs, this will include risks that originate from the underlying projects. A legal risk in the context of a PPP undertaking, may be defined as the likelihood that the businesses or project would suffer loss due to the lack of compliance with laws or from uncertainties related to laws regulating the relationship between the parties. The Covid-19 pandemic will inevitably trigger legal risk for PPP undertakings in the form of a wide range of regulatory, transaction and litigation issues. This would most likely arise in the form of contractual disputes which may even extend to investor-state disputes under international investment treaties. This is because for most businesses, the Covid-19 pandemic is unchartered territory, and no one is exactly sure of whether available legal rules and tools are sufficient to meet the challenge that it provides. This paper aims to provide a guide for navigating these unchartered waters.

The limitations arising from contracts underpinning PPP projects do not arise due to deficiencies in the drafting skill of the contracting parties but may rather be ascribed to the incompleteness of PPP contracts themselves. There is no straightforward way to define incomplete contracts.[8]Nevertheless, it may be said to be a contract in which contractual obligations are observable to a certain degree by contractual parties but not verifiable *ex post* by third parties, like a judge or arbitrator whom parties might eventually refer to when disputes arise.[9] A complete contract by contrast is therefore one for which the list of conditions

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7 Force majeure clauses are discussed in greater details below.

8 Patrick W. Schmitz, 'The Hold Up Problem and Incomplete Contracts: A Survey of Recent Topics in Contract Theory' (2001) 53 (1) Bulletin of Economic Research, 1, 1-17.

9 A Nicita and U Pagano, 'Incomplete Contracts and Institutions' in F Cafaggi, A Nicita and U Pagano (eds), Legal Ordering and Economic Institutions (Routledge: London, 2002)145

on which the actions are based is expressly exhaustive.[10] There are slight dissimilarities between how a lawyer and an economist would view an incomplete contract. This difference has been aptly analysed:

"The incompleteness of a contract has a different meaning to an economist than to a lawyer. To a lawyer, a contract may be incomplete in failing to describe the obligations of the parties in each possible state of the world. Should a state of the world materialize that falls within the gap, the enforcing court must choose either to decline to enforce the contract or to fill the gap with a default obligation… Economists use incompleteness in a different sense. A contract is incomplete if it fails to provide for the *efficient* set of obligations in *each* possible state of the world. Such a contract is "informationally incomplete" even though it is "obligationally complete" in the sense that it does not contain any gaps".[11]

Therefore, whilst an economist views a contract as being incomplete or complete from an efficiency viewpoint, a lawyer looks at it strictly as one which has gaps regarding the obligations of the parties. Consequently, due to the fact that PPP contracts are subject to the vagaries of time, like changes in the social and economic environment, they are considered incomplete. In summary, it is therefore nearly impossible for parties to provide for all possible eventualities or scenarios, including the Covid-19 pandemic, in their contracts because these events are never completely predictable.

This article is divided into five sections. After this introductory section, section II discusses the role the contract plays in allocating risks and rewards to the parties in a PPP project. Section III analyses the different legal risks of the pandemic on PPPs contracts, Section IV discusses how these risks can be mitigated. Section V is the concluding section.

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10 Ibid.

11 RE Scott and GGTrantis,'Incomplete Contracts and the Theory of Contract Design', (2005)6(1Case Western Law Review 1,pp.1-15. <http:-//law.bepre-ss.com/uvalwps/olin/art23> accessed 6 October 2012

2. THE ROLE OF RISK IN APPORTIONING LIABILITIES

Contractual risk allocation determines the party that bears the burden of the liabilities arising from the stress or failure of PPP projects and also determines the quantum of that burden. It is trite that one of the major advantages of PPPs over other procurement models is the transfer of risk from the public sector to the private sector.[12] However, the transfer of risks in PPPs is not always total. The essence of the "partnership" in PPP is that parties are able to share the risks and rewards so that the party best able to assume a particular risk shoulders it. Therefore, the advantage from risk transfer is only gained where the right amount of risk is transferred to the right party. Consequently, there is a correlation between the proper transfer and management of risk and the improvement of value for money in projects. The reason for this is probably because parties to the project now take ownership of risks and are therefore better incentivised to reduce either the probability of the risk occurring or the financial consequences if it does, or both.[13]

Risk in this instance may be defined as the exposure or chance of occurrence of events adversely or favorably affecting project objectives as a consequence of uncertainty.[14]From a project management point of view, risk reflects the underlying uncertainty of developing and operating projects. It is when risk is viewed as an uncertain event, that it reflects the possibility of both threats and opportunities.[15]A key element that arises from this definition is that risk is not always negative, it may also provide

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12 Grimsey D and Lewis K (2004),'Public Private Partnerships: The World-wide Revolution in Infrastructure Provision and Project Finance. Edward Elgar Publishing Limited. Cheltenham; Li Bing, etal , The allocation of risk in PPP/PFI construction projects in the UK, (2005) 23International Journal of Project Management, pp. 25-35.

13 Grimsey D and Lewis K (2004), Ibid.

14 J.F Al-Bahar, and K.C Crandall, "Systematic risk management approach for construction projects"(1990) 116(3) Journal of Construction Engineering and Management, pp.533-546.

15 J. Froud, 'The Private Finance Initiative: Risk Uncertainty and the State', (2003) (28)6 Accounting Organizations & Society, pp 567-589.

opportunities.[16]It follows therefore that the manner in which project risks are managed is important in determining whether a project is successful or otherwise. As a general rule, risk should therefore be managed in a way that not only avoids or reduces threats but also embraces opportunities. It follows that where Covid-19 risks are properly managed, it has the potential of not only reducing the effects of the pandemic on projects, but capable of creating opportunities for the business to thrive in manner that would never have been possible but for the pandemic.

The management of risk itself typically involves the following stages:

a) risk identification: the process of identifying all the risks relevant to the project;
b) risk assessment: the determination of the degree of likelihood of the risk and the possible consequences if the risk occurs;
c) Risk allocation: assignment of the responsibility of the consequence of the risk to one or more of the contracting parties; and
d) Risk mitigation: the process of controlling the likelihood of occurrence of the risk and or the consequence of the risk.[17]

It is important to note that the management of risk does not eliminate risk, it only transfers or reduces its impact. A pandemic could potentially trigger a number of risks factors prominent of which are cost and time overrun risks, revenue risk, currency risks and possibly force majeure risk. The way these risks are managed determine whether the project survives the pandemic or not. The next section looks at the potential effects of the pandemic on the PPP Contract.

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[16] The Covid-19 Pandemic has not entirely produced negative consequences for all economic sectors. The ICT sector for instance, has thrived during the pandemic.

[17] Department of economic Affairs, National Public Private Partnership Handbook(Department of Economic Affairs, Ministry of Finance, Government of India, 2006) pg. 1-246.

3. EFFECTS OF THE PANDEMIC ON PPP CONTRACTS

The downturn in the economy occasioned by the Covid-19 pandemic is likely to trigger significant contingent liabilities for governments. Contingent liabilities arise because most PPP contracts are supported with different types of guarantees from governments to private sector investors. Due to the fact that these guarantees secure activities or events that are not certain in terms of their occurrence or severity, the liabilities that arise as consequence of their eventuation are said to be contingent. The most common guarantees typically given in support of PPP projects are political risk guarantees or revenue support guarantees.[18]During the period of an economic crisis, the possibility that revenue guarantees would be triggered is very high.[19]

Two types of contingent liabilities are generally recognized: Explicit liabilities, which are usually based on contractual agreements between the government and another party, for example a Power Purchase Agreement (PPA), which embodies a "take or pay" provision, mandating the government to either take delivery of electric power that is delivered to it, or pay for it. Another type of an explicit liability is the traffic revenue guarantee where government guarantees a private sector party certain level of revenues, which if not met, would require the government to top up the revenues to attain the agreed levels. The other type of contingent liability are implicit liabilities. These are based on a moral or political obligation to give governmental financial or operational support to the project when needed. This may

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18 Political risk guarantees (PRGs) typically cover losses arising from the breach of host government's contractual obligations to private sector investors. In summary, they cover risks such as expropriation, breach of contracts, sovereign debt default and currency transfer or controvertibly risk. Some of the providers are Government export credit agencies (e.g. EDC, OPIC), the World Bank (MIGA) and private insurers (Zurich, AIG etc).

19 However, due to the inter-relatedness of risk it is possible that the eventuation of the revenue risk may also lead to the emergence of political risk.

arise for instance where the government invokes its step-in rights to prevent the collapse of social services.[20] The Covid-19 pandemic is likely to trigger both explicit and implicit contingent liabilities. However, whilst it is easier to budget for explicit contingent liabilities, it is rather more difficult in the case of implicit liabilities.

Revenue risk is tied to the manner in which demand risk is managed by the parties. The principal means through which demand risk is allocated is the payment mechanism specified in the contract. Using the payment mechanism therefore as a basis for classification, there are two main contractual methods for delegating the operation of public services to private operators. These are contracts where the private sector bears no demand risk, known as availability contracts and those where the private sector bears all or some of the demand risk, known as user charge or concession contracts.[21] In availability contracts, services are paid for directly by the public sector procuring agency based on the provision of the services, according to contract specifications.[22] The private sectors' remuneration is in this case is directly related to the quality and quantity of services it provides. Where availability contracts are adopted by the parties, the contingent liabilities triggered by the eventuation of the revenue risk lies directly with the public sector. However, in user charge contracts, the private sector provider of the services sells its services directly to the public and receives remuneration through charges to the end-users. Thus, the private sector's remuneration in this instance is dependent on the demand by the public for the services.[23]In

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20 The application of step-in rights is discussed in greater detail in the subsequent paragraphs of this paper

21 Iossa and Martimot identifies three payment mechanisms in PPPs, these are user charges, usage payments and availability payments. The usage payments are technically variants of the user charge and availability payments. See E. Lossa, E. and D. Martimort, 'The Simple Micro-Economics of Public-Private Partnerships'[2008] Working Paper<http://-papers.ssrn.com/papertaf?abstract_id=1318267≥ accessed on 5 May 2021

22 This is common in PFI Contracts in the United Kingdom and Contrats de partenariat in France. Several other countries have started to use this contract type exclusively, irrespective of the sector.

23 L. Athias, 'Political Accountability, Incentives, and Contractual Design of Public Private Partnerships' (2007) MPRA Paper No. 17089 <http://mpra.-ub.uni-muenchen.de/17089/>accessed on 5 May 2021

the same vein, it is obvious that the economic impact of the pandemic will certainly affect the revenue projections of the private sector investor directly.

The level of demand for a facility or service is very difficult to predict.[24] It is even more testing under long term contracts like PPPs. Due to this unpredictability of demand, the private sector and their financiers are usually wary of participating in projects unless the government pledges guarantees against demand risks.[25] The three most common guarantee mechanisms adopted by the parties to manage demand risk are: "modification of the economic balance" of contracts; traffic guarantee contracts; and, duration adjusted contracts.[26] For example a typical guarantee contract relating to toll roads involves guaranteeing either the traffic or revenue levels in the contract. The failure to reach this minimum levels triggers compensation from the public sector. Many countries such as Korea, Colombia, Chile, Dominican Republic, Malaysia and Spain have used this method.[27] In many contracts the lower limit is often complemented with an upper limit above which the revenues are "clawed back" and shared between the government and the concessionaire. The main problem of using these types of guarantees is that it cannot ignore the strong correlation between the volume of traffic and economic growth; thus, the guarantee can have very negative consequences for the

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24 For example, so many factors may affect the continued use of a tolled road like shift in the use of mass transit, increase in the cost of petrol and the relocation of people from a particular area. Whilst the use of air transport in Nigeria even locally depends on economic conditions as passengers are likely to turn to cheaper forms of transport like using buses in lean times. This is also true in periods after air mishaps, where people abandon air transportation in preference to other competing means of transport.

25 For instance, in Chile, in 9 out of 10 highways franchised, the government provided a guarantee that the revenue will equal 70 % of the construction and maintenance costs. See Engel, E. et al. 'Least Present Value of Revenue Auctions and Highway Franchising', (2001) Vol.109 No.5 Journal of Political Economy pp. 993-1020

26 Transport Research Centre (TRANSYT) 'Evaluation of Demand Risk Mitigation in PPP Projects' (2007), pg.8

27 T. Irwin T. 'Public Money for Private Infrastructure: Deciding when to Offer Guarantees Output based Subsidies and other Fiscal Support'(2003) World Bank Working Paper 10, Washington DC; Transport Research Centre ibid; Vassello, J.M. above.

public budget if a recession occurs as it has during the present pandemic.[28]

Another way in which contingent liabilities are created is through the provision of debt assurance undertakings by the government to the private sector party. These come in the form of guarantees provided by the government to project lenders.[29] The implication is that the government makes an undertaking that it would assume the project company's debt where the private sector is unable to meet those obligations. Where the private sector party defaults, the common method of effecting this obligation is through the novation of the financing agreement to government.

Another contractual clause that gives rise to contingent liabilities is the put and call options. The concept of put and call options in infrastructure contracts is borrowed from real options theory. Real options are themselves a natural extension of financial options theory used in pricing underlying assets or instruments at pre-agreed prices on a stipulated date.[30] An option is the right but not an obligation to take some actions in future. In this instance, a put option is the option the private sector investor in a PPP project has to sell the remainder of the term of the concession back to the government at a certain price, date and under stipulated conditions. The call option would be the reverse, giving the government a right to request that the concession should be sold back to it under certain specified conditions. The concept of put and call options are not new to PPPs, practitioners have always attempted to value the implicit options available to parties when they enter into long-term PPP contracts.[31] This allows the parties price-in the value of the options into project, thereby improving the commercial

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28 Transport Research Centre Supra Note 26.

29 Since the main concession contract between the parties does not create a pri-vity of contract between the public sector party and the financier, this relationship usually arises by virtue of the direct agreement that is signed by the financiers and the public sector party.

30 For a discussion of Real Options see: Zeng S. and Zhang S. 'Real Options Literature Review' (2011)IBusiness, <43-48 doi: 10.4236/ib.2011.31007> published Online March 2021<htpp://www.SciRP.org/journal/ib>

31 See Roberto Pellegrino and NevenaVajdic'Real Options Theory for Risk Mitigation in Transport PPPs', (2013) 13(2) Journal of Built Environment Project and Asset Management, pp. 199-213.

values of projects.[32]The occurrence of a pandemic may provide additional incentives for the private sector party to "put" the project back to the government in which case the government is compelled to buy the project back, usually at great expense and inconvenience. Note however, that a put or call option can only be triggered where the contract permits, and the conditions stipulated within the contract are met.

Finally, the covid-19 pandemic may increase the cost of insurance products that are used to structure projects.The most common of these insurance products typically cover risks such as expropriation, breach of contracts, sovereign debt default and currency transfer or controvertibly risk. These insurance products are particularly useful in the sense that they are used to facilitate projects by ensuring that finance flows into otherwise difficult projects. Some of the providers are government export credit agencies (e.g., EDC, OPIC), the World Bank (MIGA) and private insurers (Zurich, AIG etc). When multilateral institutions offer these instruments, they are usually complementary to the credits offered to the host countries by these agencies. Insurance products have the advantage upgrading the host government's credit rating and lowering financing costs of the project because the premium placed on the insured or guaranteed risk by the private sector when pricing the risk is considerably lower. However, the advent of the pandemic is likely to make its use more expensive since insurers would price in the additional risk when selling the products.

4. LEGAL AND CONTRACTUAL TOOLS FOR MANAGING COVID-19 RELATED RISKS.

The best way to manage contingent liabilities is for the government to recognize the likelihood of contingent

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32 NevenaVajdic and Ivan Damnjanovic 'Risk Management in Public-Private Partnership Road Projects Using Real Options Theory' (2011) International Symposium Engineering Management and Competitiveness, Zrenjanin Serbia. Pg.155-160.

liabilities crystalizing. This will enable them carry out assessments of the magnitude of these liabilities and budget for them in advance. Another management technique is by creating a creating a special reserve fund from which these liabilities are met.

4.1 Force Majeure Provisions

In most legal systems, where there is a change in circumstances that renders contractual obligations impossible to perform, parties to the contract may be exempt from liability of nonperformance.[33]This had been the case for a long time and for most jurisdictions.[34]For example, the common law principle of frustration discharged a contract where "without default of either party a contractual obligation become incapable of being performed because the circumstances in which performance is called for would render it radically different from what was undertaken under the contract".[35]The United States' doctrine of impracticability also exempted the performance of a contract where its performance becomes "impracticable".[36]This is also the case under French law where a supervening event renders performance absolutely impossible.[37] For the purposes of this paper, these types of provisions are referred to collectively as

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33 Schwenzer Ingeborg,'Force Majeure and Hardships in International Sales Contracts' (2008) 39 VUWLR pg. 709; Perillo Joseph 'Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts, (1997) 5Tul.J.Int'L& Comp.5.

34 Initially the concept of pactasuntservanda (sanctity of contract) prevailed in most jurisdictions- whether common or civil law but subsequently exceptions to this strict rule emerged where there was impossibility of performance.

35 Per Lord Radcliffe in Davis Contractors Ltd v. Fareham UDC [1956] AC 696.

36 The doctrine applied to discharge contractual obligations even where the performance of the contract is still technically possible but conditions had materially changed from the time of contract formation. Therefore, unlike under the doctrine of frustration, impracticability allowed the discharge of a contract where it has become unreasonably expensive to perform the contract. See Etemadia F etal'Doctrine of Impracticality Under the Law of Contract: An Overview of its Development' International Journal of Technical Research and Applications. Vol. 2. Special Issue 3 (July- August 2014). Pp.45-48.

37 J. D. Smith, 'Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure' Yale Law Journal, Vol. 45, pp. 452-467.

"impossibility of performance" provisions to distinguish them from modern day force majeure provisions which developed over the years to provide some degree of flexibility in dealing with similar situations.

These impossibility of performance provisions suffer from the limitation of being rigid and subject to the strict interpretation by the courts. For instance, the English doctrine of frustration is difficult to prove since the party relying on it must show that contractual obligations impacted by the frustrating event are fundamental to the contract.[38]The doctrine of frustration also permits of no middle ground in terms of its consequences, in the sense it almost invariably leads to the contract coming to an end.[39]In certain circumstances, parties would prefer the flexibility of contracting out of these strict legal rules. For instance, parties may prefer to keep their agreements alive and merely suspend the performance of the contract to a later date instead of an outright termination. Indeed, whilst the doctrine of frustration or other similar provisions were designed as risk limiting devices, contractual force majeure clauses were preferable, since they are more of risk management devices. It is due to this flexibility that parties to a contract would insert copious force majeure clauses into their contracts, instead of relying on impossibility of performance clauses to manage their risk of nonperformance. The effect of inserting a force majeure clause in a contract is that the courts will defer to it and will no longer import the impossibility of performance provisions into the contract.[40]For instance, a party cannot plead force majeure and frustration at the same time.

In most long-term contracts, like PPPs, force majeure clauses basically address issues of what happens when events occur that make it impossible for a party to meet its obligation under the contract. Also, it also determines how the parties apportion the risk of such nonperformance between themselves. There are three basic conditions that are

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38 See Taylor v. Caldwell [1861-73] All E.R. 24 @ Pg. 27; Davis Contractors Limited v. Fareham U.D.C. Supra

39 See Appleby v. Myers (1897) L.R. 2 C.P. 651.

40 P.J.M DeClercq P.J.M, 'Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability' (1996)15 J.L& Com.

required for the trigger of a force majeure clause: The first is that the force majeure event must have been provided for by the parties. This is why the parties would typically draft the force majeure clause in their contracts as widely as possible with an omnibus provision at the end to capture as much of the anticipated events as possible. This is because force majeure clauses are express terms and the courts would not imply terms into it.[41]Therefore, where an existing force majeure clause in a PPP contract fails to expressly mention the words"Covid-19"[42] or "Pandemic" or "Epidemic" or other similar terms like "Act of God" as part of the applicable events, the affected party might be unable to rely on the force majeure clause to exit undertaken obligations that become impossible to perform due to the Covid-19 pandemic.[43]The applicability of the force majeure clause is dependent on what the parties could have reasonably foreseen as likely to affect their nonperformance and included in their contract.[44]As discussed above, this is very difficult task for the contract draftsman since PPP contracts are incomplete.

Secondly, the event that occurred must have been outside of the reasonable control of the affected party such that it must have caused the inability of that party to perform its obligations under the contract.[45] Therefore even though one of the stipulated force majeure events has occurred, it would be insufficient trigger the force majeure clause unless it also materially responsible for the inability of the party to

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41 See for example Entertain Video Ltd v Sony DADC Europe Ltd [2020] EWHC 972; Force Majeure clauses are generally construed restrictively by the courts. See for example Metropolitan Water Board v Dick Kerr& Co [1918] AC 119.

42 It is very unlikely that any of the contracts that were signed before Covid-19 was discovered in China would have mentioned "Covid-19".

43 A number of these languages have been interpreted by the court. For instance, in Nugent v Smith (1876) 1 CPD 423 Per Cockburn CJ at Paragraph426 defined "Act of God" as "Such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of care and skill resist, so as to prevent its effect"

44 Foreseeability in this instance refers to the possibility of occurrence rather than the probability of occurrence. This is because where a party could have reasonably foreseen the likelihood of the occurrence of an event it is not able to rely on it as a force majeure event.

45 See for instance Seadrill Ghana Operations Ltd v Tullow Ghana Ltd. [2018] EWHC 1640.

perform under the contract. Therefore where there are alternative means of performing a contract available to a party, the force majeure provision may not avail the party seeking to rely on it.[46]

Thirdly, the party relying on the force majeure event must show that the supervening event could not have been mitigated. Thus, where there is evidence that the party seeking to rely on the force majeure clause could have taken steps to ameliorate the impact of the force majeure event, the courts are unlikely to avail the party the protection of the provision. This is similar to the requirement that the force majeure event should not have been reasonably foreseeable by the parties. In respect of the Covid-19 Pandemic, this will mean that the parties at the time they were entering into the PPP contract even though aware that there is the possibility of a pandemic occurring in the future could not reasonably have foreseen the pandemic as being probable.

The main advantage of a force majeure provision over other impossibility of performance provisions is that force majeure clauses enable the parties contractually determine which of them bears the force majeure risk or whether it is shared by the parties. The contract may also stipulate the steps and requisite notices required to trigger the application of the clause. Where those steps are not followed, the party in need of its protection may not rely on it.[47] The applicability of force majeure clauses are also dependent on the efficacy of other contractual clauses like the liquidated damages provisions, the governing law and termination clauses.[48]Also, as a matter of convention and in the interest of fairness, it is not unusual for parties to share the risk of force majeure. Therefore, provisions that stipulate that either party may be excused from performing their obligations under the contract at the occurrence of a force majeure event are not uncommon. Note however that the sharing of risk will not always lead to splitting the loss evenly. For instance, in the event of a prolonged force majeure event, leading to the

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46 Intertradex v Lesieur [1978] 2 Lloyds Report 509; See also Rhodia International Holdings Limited & Another v Huntsman International LLC [2007] EWHC 292.

47 See Sabine Corp v ONG Western, Inc, 725 F.Supp. 1157, 1168-69; See also MWB Business Exchange Ltd v Rock Advertising Ltd. [2018] UKSC 24.

48 note 2 above.

termination of the contract, the contract may require the public sector party to make termination payments to the private sector party.[49]

In the light of the foregoing, it is obvious that the applicability of the force majeure clause to Covid-19 situations is uncertain and certainly does not lead to the equitable distribution of liability for an event that is of no fault to either party. The end result of a prolonged force majeure event is the termination of the contract and the major losers in this case are the end user public that rely on the public services that are likely to be disrupted as a consequence of the trigger of the force majeure clause. It is interesting that most of the legal commentaries around the impact of the Covid-19 pandemic have been around the applicability of force majeure provisions.[50] However, as will be seen below, there are more useful interventions that can be deployed to solve the contractual issues arising out of the Covid-19 pandemic.

4.2 Change in Law

During this period of the Covid-19 pandemic, governments have passed laws to manage the outcome of the pandemic. Some of these laws prohibit the movement of people and goods across borders, which have commercial implications for PPP projects. Where these laws alter the ability of the parties to perform their contract in a sustainable manner, as they often do, it may be considered a change in law event.[51]In regular businesses with limited government regulation, the private sector manages the change in law risk by passing the cost down to its customers. However, in PPPs, tariffs are usually set in a rigid manner either through the contract or using economic regulators. This ensures that the transfer of the costs emanating from the change in law risk to the user public is not as straightforward. Therefore, the parties under a PPP contract must agree upfront on how to manage the consequences of a change in law event.

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49 This is discussed in greater detail under the section on termination below.

50 See for example D. Baxter D. and C. Casady, Note 2 above

51 It is important to note that change in law may also be a force majeure event.

A change of law may either be general or specific. Where it is specific to the PPP project, it is said to be discriminatory. As a general rule, where the change in law is general in the sense that it affects every business in the country, the private sector party in a PPP relationship bears the risk. This is probably because it is assumed to be an ordinary business risk and one which requires the entrepreneurial ingenuity of the investor to deal with. Some examples of a change in law that is likely to affect all of the businesses in a country are changes in tax legislations or environmental regulations. [52] However, where the change in law is discriminatory, in the sense that it is targeted specifically at the PPP project in the manner that affects the viability of the project, it is either wholly borne by the government or shared by the parties.[53]The problem with a change in law event is that it is likely to greatly distort the value for money propositions of the project. This is because the assumptions under which the value for money decisions were made at the inception of the project are altered. Also, disputes are likely to arise between the parties in trying to determine the classification of whether the change in law is general or discriminatory as this distinction is not usually straightforward.

In summary, the Covid 19 pandemic may likely lead to the trigger of the change in law provision in PPP contract, generating increased liability for the public sector party. The best way to deal with this risk is for the public sector party to engage separately with the different private sector parties to understand how some of the economic and public health measures taken during the pandemic have impacted their respective businesses. A "one size fit all" engagement strategy will not work in this situation since the change in law risk is likely to affect each PPP business or project in a different way.

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52 However, even these may affect the PPP project in a discriminatory manner.

53 The allocation of change in law risk is usually done contractually and therefore subject to negotiations between the parties.

4.3 Activation of Step-in rights

Step-in rights in a PPP arrangement may either avail the lenders or the government. In the case of the lenders, the right to step in and take over a project typically arises where the private sector party is in default of its loan obligations and there is a clear sense that there needs to be a change of management of the concessionaire company in other to save the business and the funds of the lenders.[54]Therefore, where a pandemic materially affects the ability of the private sector party to meet its obligations to lenders, it is capable of triggering the right of the lenders to step in. It is important to note however that the right to step in is not automatic since ordinarily there is no privity of contract between the lenders and the government.[55]In order to enjoy this right, lenders would usually ensure that the step-in rights are contained in the direct agreement between them and the government. The exercise of the step-in right is also not automatic as the private sector typically negotiates certain condition precedents into its contract with the lenders to safeguard it against the exercise of this right.

It is a fact that PPPs never really extinguishes the obligation of the public sector to provide infrastructure services for the benefit of its citizens. It merely allows the public sector to delegate that duty to a private sector party to act on its behalf for a specified period of time. The government continues to own the underlying responsibility for the provision of public services. In this case the government is said to be infrastructure providers of last resort. In essence this principal-agency relationship existing between the government and its citizens ensures that the government continues to assume the implicit liability to provide these essential services throughout the term of the PPP contract.[56] The government therefore effectively

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54 This is similar to the right of a lender to appoint a receiver manager to take over all the undertakings of a company in the event of default of loan obligations.

55 Privity of contract simply means that as a general rule, a contract cannot confer rights or impose obligations to anyone, except parties to it.

56 In a representative democracy for instance, the citizens are the principals who delegate rights and confer powers to their agents- the government, to spend their taxes to provide them with infrastructure services It is this

guarantees to citizens that should the PPP contract fail that it would step in and ensure the provision of the previously delegated services. The obligation of the government in this instance is founded on the moral contract between the government and its citizens.

It is clear that the Covid-19 pandemic might create situations where it becomes difficult for the private sector party to continue to operate the asset. For instance, the private sector party may become bankrupt and thereby trigger either the lenders or government's step-in right. The problem with exercising the step-in right is that it would most likely affect the delivery of services to citizens. For instance, it is difficult for a lender to operate an asset after exercising the right to step-in since it lacks the technical capacity to so. The solution would be to appoint a management contractor to operate the assets on their behalf. The procurement process for the appointment of management contractors is tedious and time consuming. Also, whether the government will be in the position to adequately take up the provision of services is difficult to say. This is because at the time of privatization, liberalization or transitioning from public sector to private sector operation of an asset or sector, the public sector basically ceases to maintain appropriate levels of personnel sufficient to operate the asset efficiently. In the event of an occasion arising where the government's step-in right is activated, it becomes extremely costly and time consuming for the government to reassemble the capacity required for the operation of the assets.

In the interest of the project therefore, it is better for the parties to avoid the activation of the step-in rights. The private sector party and the lenders should work towards the restructuring of project loans where the Covid-19 pandemic prevents the private party from meeting its obligations to the lenders. Where possible, the public sector party may come in

delegated power that is subsequently sub-delegated to the private sector under a PPP arrangement. For further discussion of this theory referred to the "stakeholder accountability theory", see: Nwangwu G. 'Stakeholder Opposition Risk in Public-Private Partnerships' (2019) 5 International Journal of Economics and Financial Research, 36.

and mediate between the lenders and the private sector party to find reasonable and practicable solutions to the issue.

4.3 Contract Terminations

A consequence of the Covid-19 pandemic might be the outright termination of the PPP contract. The word "termination" is used in this section of the paper to broadly refer to situations in which a contract comes to an end prior to it being fully performed.[57] A pandemic like Covid-19 could easily trigger termination by default of either of the parties.[58]This will likely arise where the economic realities of the pandemic causes either of the parties to stop the performance of their obligations under the contract, therefore giving the innocent party the right to bring the contract to an end.[59] It is important to note the breach that would usually give rise to termination would be of a condition or fundamental term of the contract.[60]

Termination may occur both as a consequence of the trigger of the force majeure clause in the contract or

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57 This must be distinguished from other common law technical terms of the same species, like "rescission" and "repudiation". While both terms allow the innocent party to an additional right of restitution, rescission is an equitable remedy which specifically deals with situations where an innocent party retrospectively rescinds avoidable contract by demonstrating an intention not to be bound any longer by the terms of that contract: See Elise Bant 'Reconsidering the Role of Election in Rescission'(2012) 32(3) Oxford Journal of Legal Studies See also Johnson v Agnew [1980] AC 367; Leaf v International Galleries [1950] 2 KB 86. Repudiation of contract on the other hand also deals with situations where a party to a contract elects not to perform his obligations under the contract any longer. While It may serve as a remedy for breach of contract, in cases of anticipatory repudiation the aggrieved party may also elect to terminate the contract and sue for damages. See Williston Samuel 'Repudiation of Contracts' Harvard Law Review' (1901) 14, No.5,pg. 317- 331. See also Anderson Arthur 'Repudiation of Contract- The Post- Restatement Cases' DePaul Law Review' Vol.6 Issue 1, Fall-Winter 1956. See also Bettini v Gye (1876) QBD 183; Hong Kong Fir Shipping v Kawasaki Kisen Kaisha [1962] 2 QB 26.

58 This is also known as termination for cause.

59 This will involve situations both within and outside of the ambit of a force majeure event.

60 The law also makes a distinction between a condition and a warranty. Whilst the breach of a condition entitles the innocent party to terminate the contract, a breach of a warranty may not. Note also that the breach of an intermediate term may also entitle a party to a right to terminate the contract as well as claim damages.

otherwise. As already discussed above, where early termination occurs due to a force majeure event, the terms of the PPP contract would normally relieve the parties of any further obligations under the contract.[61] However, where the economic hardship caused by the pandemic is insufficient to trigger the force majeure clause under the contract, then the obligations of the party at fault is not extinguished and the party at fault must bear the burden of such default. [62]

Note that regardless of whether the termination is caused by a force majeure event or otherwise, the termination of a PPP contract carries with its far-reaching consequences for the government. In either event, the government must, as in all cases where the private sector ceases to operate the asset, be compelled to step in as provider of last resort of public services. As mentioned above, this is expensive, risky and usually, the public sector is ill prepared to step in at very short notice. Therefore, whilst termination might help the government maintain the reputation of being a no-nonsense public-sector party, it needs to be handled with care and the right to terminate used only as a last resort.It is in recognition of the risks that the user public might suffer from abrupt termination of PPP contracts, that a more orderly and equitable method of bringing the PPP contract to an end is proposed. It is not uncommon for the contract to provide for a sequence of events and notices that eventually leads to the termination and handover of assets.

A corollary issue that arises as a consequence of the termination of the contract is the requirement to make termination payments. Termination payments are made to the private sector investor regardless of whether it is at fault or otherwise or even where the termination was triggered by the occurrence of a force majeure event. The reason for this is that long term infrastructure contracts, like PPP contracts, usually involve the construction of large infrastructure assets, which are typically sunk costs for the private sector party. These assets cannot be uprooted and taken away by the

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[61] It is important to note that the consequences of a force majeure clause will depend on the wordings of the clause itself.

[62] This may occur where the force majeure clause is not drawn widely enough to cover the pandemic or where even through it covers events such as the pandemic but it remains difficult to prove that the pandemic was the reason for the default. Causation might be very difficult to prove sometimes.

private sector party where the contract comes to an abrupt end. Therefore, where parties to long term contracts make asset or site-specific investments, they protect their interests by ensuring that they receive compensation for their investments in the event of termination. This is why parties to long term infrastructure contracts would in formulating their exit clauses ensure that termination payments provisions are copiously provided for within the contract as far as possible.[63]

Where termination clauses provide for compensation payments, they also create contingent liabilities, as the government is unaware if and when such liabilities would crystalize. The way in which contingent liabilities are managed then becomes very important to economic wellbeing of the country. Therefore, in agreeing to termination payments with potential contingent liabilities, extreme care ought to be taken as experience from several countries has demonstrated that the scale of total contingent liabilities can build up quickly. Where this is the case, any economic downturns or financial crises such that can occur during a pandemic can result in fiscal liabilities from many projects crystallizing together within a short period of time.[64] This has the potential to undermine national macroeconomic policy and to cause significant economic harm.

As mentioned above, termination payments are also made where the contract is terminated as a consequence of force majeure. In this case, the termination payment due to the private sector would be higher than that which it would have received if it had been in default but certainly less than that which it would have been due in the public sector was in default. In financial terms, payments to the private sector party could cover whatever debt and maybe any quasi equity that is outstanding on the project but not any return on the equity.

4.5 Asset Hand Backs

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63 Polinsky Mitchel, 'Risk Sharing through Breach of Contract Remedies' (1983) 12 The Journal of Legal Studies.

64 Ibid.

Typically, the PPP contracts would require the private sector counterparty to handover the asset back to the government at the end of the concession period.[65]However, asset handover may also occur at the early termination of the contract. Therefore, where the Covid-19 pandemic leads to the early termination of the contract, the private sector investor would have a corresponding obligation to hand the asset back to the public sector. At early termination therefore, whilst the obligations of the parties to continue to render services and meet payment obligations cease, the obligation to handover the asset in good condition might still remain.[66] Furthermore, the obligation to handover the asset also affects the calculation of termination payments.

Where the contract requires the handover of the asset, then it must also as best as possible, stipulate the condition in which the asset must be at the point of handover.[67] Where necessary, like where assessment of the assets require some form of technical knowhow, then an independent third party expert may be contracted to do the assessment. It is customary for the contract to impose penalties where the condition of the asset is not in accordance with the stipulated standards at handover and this may involve the forfeiture of any sums remaining outstanding to the benefit of the private sector under the contract. It is important to note that under certain long-term contracts the ownership of the assets remains with the public sector all through the concession period and therefore what is transferred back to the public sector party at the end of the concession period are the rights to use and operate the assets.[68]

4.6 Renegotiations

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[65] This is common in Build Operate Transfer (BOT) Agreements and other similar arrangements. Where the contract is a Build Operate and Own (BOO), there is no requirement for the handover of the asset.

[66] This obligation might have financial implications for the private sector investor who must put the asset in the stipulated condition required under the contract for handover.

[67] This is usually ensured through the constant monitoring of the condition of the asset throughout the period of the concession.

[68] These are arrangements like Build Operate Lease (BOL) and Management Contracts.

The renegotiation of a PPP contract involves a change in the original contractual terms and conditions underpinning the contract, as opposed to mere adjustments that would usually take place under a mechanism provided for this under the contract. An example of a contractual adjustment that would not amount to a renegotiation is where the contract makes provisions for the periodic or triggered adjustment in the payment or tariff elements of the contract.[69] The Covid-19 pandemic is already slowing down economic activities and therefore where there are contractual provisions allowing tariffs to adjust to economic realities or where contracts require increases in the levels of government revenue guarantees, this might not be termed a renegotiation of the contract. However, where the pandemic leads to a complete and radical shift in the underlying conditions under which the contract was negotiated, then it will necessitate a renegotiation of the contract. These are instances where the underlying assumptions upon which the project is based becomes outdated and because the PPP contract is so rigidly structured, it requires a bilateral agreement between the parties to adapt the project to new realities. A good example is where due to the economic realities of the pandemic, the financing cost of the project becomes unsustainable. This may also arise due to a steep devaluation of the local currency where the project loans are denominated in another currency or where the general economic downturn occasioned by a recession leads to a significant decrease in the use of the PPP facility. In all of these cases, the fundamental basis of the contract is destroyed and the issues are best remedied through the renegotiation of the contract.

It is important to note that renegotiations are not necessarily always initiated by the private sector party. The economic realities of pandemic may also force the government into requesting for a renegotiation of the contract. This may occur for instance where the health or

[69] J. Guasch et. al, 'The Renegotiation of Public-Private Partnership Contracts: An Overview of Its Recent Evolution in Latin America"(2014)International Transport Journal Discussion Papers No:2014-18. Prepared for the Roundtable on Public-Private Partnerships for Transport Infrastructure: Michael Burnett 'Renegotiations How to Approach Them and Economic Outcomes (27-28 October) 2014, OECD Press, Paris.

economic realities of the pandemic demands additional investments or a change in the scope of the contract.[70]In the case of the Covid-19 pandemic, some of the contractual terms that would likely be the subject matter of renegotiations are requests for a reduction in the contracted level of services, extension of the contract terms, requests for a deferment of agreed investments and request for a reduction or increase in performance or sovereign guarantees.[71] All these may become useful tools in dealing with the economic outcomes of the pandemic.

One of the major issues with renegotiations is that it may defeat some the cardinal principles on which the success of PPPs are based, which are competition and transparency. A competitive process ensures the attainment of value for money since only the best projects are procured and bidders with the best offers are awarded PPP projects. Another problem with renegotiation of a PPP contract is that it may invariably lead to bargaining between the private sector operator and the government occurring in a non-competitive and non-transparent environment. For instance, the private sector party may take advantage of the fluid nature of the renegotiation process to ask for other concessions from the government by raising other unrelated issues at the risk of damaging the public interest in the project. Marques and Berg contend that renegotiations by their very nature promote opportunistic behaviour.[72] Transparency in the procurement process limits corruption and helps build stakeholder support for projects. The likely absence of these two important elements of the PPP procurement process certainly diminishes the value of the project. It is therefore important that steps are taken to overcome these shortcomings when conducting renegotiations.

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70 Ibid; See also J. L Guasch etal 'The Renegotiation of Public-Private Partnerships Contracts: An Overview of the Recent Evolution in Latin America in Public Private Partnerships for Transport Infrastructure'(Discussion Paper No. 2014-18, , OECD, Paris, 27 – 28 October 2014) pp. 55-77.

71 Ibid.

72 R. Marques and S. Berg, 'Risk, Contracts and Private Sector Participation in Infrastructure' (2010) 11Journal of Construction Engineering and Management 137,pp. 1-16

In a similar vein, renegotiations are also likely to affect the settled rights of different project stakeholders who have made different commitments to the project based on previously agreed project terms. The most obvious of the stakeholders that are affected in this manner are the lenders to the project.[73]To deal with this risk, it might also be useful to include such interested third parties as part of renegotiation process so that their interests are also properly considered in finding solutions.

There are other issues that make renegotiations unattractive. This includes the fact that the process leading up to and during negotiations is susceptible to corrupt practices.[74] Especially in developing countries, parties with superior political connections tend to leverage on this to trigger negotiations and ensure favourable outcomes for themselves. During renegotiations there is asymmetric information that is skewed in favour of the private sector investor since they have been in operation of the assets for a while before the commencement of renegotiations. Also, the private sector investors are typically better trained, prepared and more skilled in negotiations of the complex agreements like PPP contracts than the public sector parties. For this reason, it is therefore advisable that the public sector retains advisers during the renegotiation process as this will help bridge whatever capacity gap exists.

Despite all the shortcomings articulated above, renegotiations of PPP contracts are inevitable in tackling some of the issues that are likely to emanate from this pandemic. The major reason for this is because PPP contracts depend on the economic stability of the host country for

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73 See for example: Nikos Nikolaidis and Athena Roumboutsos 'A PPP Renegotiation Framework: A Road Concession in Greece', (2020) 3 (2) Journal of Built Environment Project and Asset Management,pp. 264-278.

74 See Elisabetta Iossa and David Martimort, "Corruption in PPPs, Incentives and Contract Incompleteness" (2014)SSRN Electronic Journal; See also Luis Guasch and Stephane Straub, ' Corruption and Concession Renegotiations: Evidence from the Water and Transport Sectors in Latin America, Utilities Policy, Volume 17, Issue 2, 2009 pp. 185-190; See also Gonzalo Ruiz D. 'Opportunism and Third Party Influence on Long Term Public Contracts' Documento De Trabajo No. 456 2018. Found Online at <https://www.researchgate.net/publication/324497893_Opportunism_and_Third-Party_Influence_on_Long-Term_Public_Contracts> accessed on 9 December 2018).

their success.[75] Where, like in the present case, countries have suffered economic upheavals, it is possible that the underlying assumptions supporting these contracts have collapsed. Even in normal times it is rare for most countries to experience prolonged periods of economic stability. This makes it imperative that long term contracts need a mechanism for adjustments to respond to the unforeseen circumstances that are most likely to occur during the term of the contract. The alternative would be to terminate the contract in these types of situations. As pointed out above, termination of the contract rarely resolves the issues. It merely provides a contractual solution that is unlikely to benefit both parties or even the user public.

5. RECOMMENDATIONS AND CONCLUSIONS

This article looked at the likely effects of the Covid-19 pandemic on PPP contracts in light of the stress and possible project failures that are expected to occur. Consequently, it evaluated several contractual provisions that are likely to be triggered by the pandemic and discussed in detail their likely effects on the project and the remedial options open to the parties. The article proceeds from the premise that where Covid-19 risks are properly managed, it has the potential of not only reducing the effects of the pandemic on PPP projects, but capable of creating opportunities for the business to thrive in manner that would never have been possible but for the pandemic. The best way to achieve this is through a re-evaluation of the project's risk matrix. Project risks should be re-allocated in accordance with the new realities of the project occasioned by the pandemic. It is important that this exercise does not become one in which the private sector party uses the pandemic as an excuse to dump all project risks on the government. If the risk re-allocation process is done in good faith and with the overall

[75] Sergio Domingues and DejanZlatkovic 'Renegotiating PPP Contracts: Reinforcing the 'P' in Partnership' (2014) 35 Transport Reviews, pp. 204-225.

interest of the project in mind, it has the possibility of creating additional value for all parties including the user public.

It is most unlikely that the PPP contract will provide for all the different eventualities that are likely to occur as a result of the Covid-19 pandemic. It is also likely that in cases where there are contractual provisions dealing with particular outcomes, that they are unable to meet the expectations of the parties. For instance, this article has shown that reliance on the use of in-built contractual provisions like force majeure clauses, termination clauses or change in law clauses to deal with the contractual outcomes of the pandemic might sometimes lead to unpredictable outcomes and in most cases be counterproductive. For these reasons it is suggested that parties to PPP contracts look outside of the contractual provisions for solutions to the disputes that are likely to arise out of the present Covid-19 pandemic. One way of doing this is through contract renegotiations. The legal basis for resorting to renegotiations is that the underlying assumptions upon which the contract was predicated upon has been distorted by the pandemic and therefore no longer exists. Note however, that renegotiations are only possible where the parties are both acting in good faith. Otherwise, it is likely to lead to opportunistic behavior from either of the parties.

Where renegotiations fail, the use of put and call options in PPP contracts may be helpful in providing parties with a clean break from their contractual obligations to each other. The good thing about this arrangement is that the concession is bought or sold back based on terms and assumptions that had been agreed upfront thereby limiting the likelihood for opportunistic behaviors. The use of put and call option agreements make PPP contracts less prescriptive and therefore more flexible. The advantage of this type of arrangement is that the public sector does not need to have recourse to funds from the budget to make these payments; it may raise the money by organizing a subsequent concession for another period of similar duration without the cost of a new construction. It can be done in a manner that allows for new concession fee to cover the exit payment of the first concessionaire.

The goal of every PPP project is the provision of essential infrastructure services to the user public. Therefore, in resolving whatever disputes that are likely to arise as a consequence of the pandemic, the parties must do everything possible to save projects from collapse. The overall success of the PPP project will in the end depend on the commitment of contracting parties to make the project succeed. The long-term nature of PPP contracts demand that the "partners" should always seek a win-win solution that is in the interest of the project whenever issues arise, whether in normal times or during a pandemic.