

afforded within the liability limit tower.

A solution to inadequate CAR limits and/or coverage is to have a stand-alone liability program, separate to the CAR policy for the full required limit often with a single insurer with consistent coverage throughout the program and underwritten by construction liability specialists. The key benefit of coverage being placed with one insurer at a primary (ground up/first dollar) level is that an insured is only communicating with a single insurer in the event of a claim rather than a number of coinsurers under a CAR policy.

For insureds, including project financiers, to obtain the broadest possible liability coverage they should look to their brokers or advisers to arrange a standalone liability policy in lieu of a CAR extension/liability section option. For many years, construction liability has been placed on a standalone basis in Australia, a far more litigious environment than most Asian countries.

A standalone liability policy can be tailored for the project (and every project is different in some way or another) so the insured has a bespoke wording that satisfies the requirements of all parties to mitigate the risks arising from their potential legal liabilities. Most of the major international brokers also have manuscript wordings that are acceptable to the leading construction liability insurers.

For lenders to feel confident that they have the widest possible liability coverage they need to consider important aspects of cover that a standalone liability program can provide that are not standard to all CAR policies. These include the following.

**Maintenance/defects liability period.** Once a project is completed and handed over, the physical damage policy ceases although there is still an ongoing liability exposure during the maintenance/defects period which generally ranges from 12 to 36 months. The contractor will still have obligations to return to the site and rectify any defects plus perform standard maintenance work during this time. If the contractor damages the property during rectification or maintenance or if they cause third party damage or injury a liability policy that includes this coverage will respond to such losses.

**Cross liability.** This ensures that the liability policy applies to each of the insured parties – the contractor and sub-contractors, principal and lenders – in the same manner as if a separate policy had been issued to them in their own right.

**Worldwide jurisdiction.** Few CAR policies are able to offer this. Most exclude the US, Canada and Australia jurisdictions. If a lender or principal has a US parent, a legal action could be brought in the US courts. Without the worldwide jurisdiction a liability policy would not respond to judgments upheld in a US court.

**Terrorism.** It is often the case that a standalone liability policy can remain 'silent' on terrorism, i.e., losses arising from terrorism will not be excluded.

**Damage to existing property.** This is particularly important for expan-

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sion projects where there are existing facilities which will continue to operate throughout the construction period.

**Product liability/completed operations liability.** After completion or handover, all insureds (especially the contractors and lenders) have an ongoing liability exposure during the maintenance/defects period from the property that has been built or started to operate. Many CAR policies exclude liability arising out of the completed operations.

**Defence costs.** A standalone liability policy will provide defence costs in addition to the limit of liability whilst many CAR policies make defence costs part of the overall liability limit.

**Phased handover.** Where part of the project has been handed over and is operational it becomes third party property from the standpoint of the ongoing works, for example, a 4 x 125MW power plant which is being handed over in stages. Standalone liability coverage can provide this essential cover.

**Additional extensions/enhancements not provided under CAR policies.** These include: (i) employer's liability; (ii) incidental professional indemnity – consequent upon injury and/or damage; (iii) incidental marine liabilities; and (iv) environmental impairment liability (EIL), including first party and third party gradual pollution coverage either embedded within the liability policy or separate. This is becoming an increasingly important coverage with increased risks from new legislation on environmental protection and potentially costly site remediation plus third party clean-up for pollution offenders.

Construction liability may not be the major insurance expenditure for energy and infrastructure-related projects but the right coverage is critical for lenders to ensure they are protected in the broadest possible way against potential legal liabilities as project financiers – serious consideration needs to be given to a standalone construction liability policy. ■

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## Investing in Ukraine's infrastructure: progress history, new PPP legislation and development trends

BY SVITLANA KHEDA

One of the most attractive and practically non-competitive investment opportunities in Ukraine is in infrastructure development. Examples around the world show that public-private partnerships (PPPs) are one of the safest, most efficient and successful means of improving public infrastructure.

For more than six years various international organisations have been spreading the PPP concept among Ukrainian public officials. They have

organised the endless PPP related roundtables, discussions and workshops. As a result, the PPP notion became associated with successful infrastructure development, and the words 'public private partnership' appeared on the agendas of the country's major political forces and in the governmental program.

For the past few years a number of draft PPP laws were introduced in the parliament. These attempts to promote PPP in Ukraine failed due to ►►

a misperception of what PPP entails. However, the situation is changing since President Yanukovich supports the idea of using PPP for infrastructure development. Soon after the parliamentary committee on regulatory policy and entrepreneurship held its hearing specifically devoted to the development of PPP and aimed at persuading the members of parliament to pass the PPP law, Ukraine received the long-expected PPP law. On 1 July 2010, the parliament enacted the Law No 2404-VI 'On the Public-Private Partnership' (the 'PPP Law').

The PPP Law is a framework law adopted to declare state policy on PPP and to establish the uniform regulation of concessions, production-sharing agreements and other types of PPP envisaged by the PPP Law. The PPP Law was drafted with the idea that further regulation would be provided by supplemental legislation and PPP agreements themselves, and that pilot PPP projects will push for further legislative and institutional development in the PPP sphere.

This can partially explain why the PPP Law does not fully reflect the world's best practices for regulating PPP. For instance, the main principles of PPP activity stipulated in the PPP Law do not include transparency. The PPP Law also does not contain an anti-corruption clause. Nevertheless, many stakeholders view the PPP Law as an important policy document which could trigger PPP projects.

The PPP Law generally satisfies the fairness criteria declaring, *inter alia*, the principles of open participation and non-discrimination, fair risk allocation, and equal treatment of public and private partners. The PPP Law establishes a general principle of the national treatment of foreign partners, provides private investors with the option of state guarantees, and contains many other important provisions.

The years of debate over the key elements of a successful PPP program in Ukraine resulted in the PPP Law providing for the creation of a specialised PPP governmental body at the national level (the 'PPP Unit') within three months of the PPP Law becoming effective. The PPP Law became effective on 30 October 2010, but no PPP Unit has yet been created.

To make the general provisions of the PPP Law workable the CMU was mandated to adopt a set of supplemental regulations dealing with, *inter alia*, tender procedures for selecting a private partner, PPP project efficiency assessment and PPP project performance monitoring. This work was supposed to be completed by 30 January 2011. However, until now only two governmental regulations were approved: the CMU Regulation No. 232 of 16 February 2011 'On Approval of the Methodology for Identifying PPP Related Risks, Their Evaluation and Determining the Forms of Their Management'; and the CMU Resolution No. 81 of 9 February 2011 'On Approval of the Procedure for Providing Information by a Private Partner to a Public Partner about the PPP Contract Performance'.

A definite win of the PPP Law drafters is Article 1 which expressly states that the public partner shall be the State of Ukraine, Autonomous Republic of Crimea, or territorial communities represented by respective national or local state authorities. This provision is important for private partners (especially foreign) as it enables the state itself to enter into the PPP contract as a public partner (and not one of its national or local state authorities, or public companies).

The PPP Law provides that public procurement for PPP projects shall be regulated by special public procurement laws. Last year the Law 'On Public Procurement' was enacted, which in many respects complies with international standards. For instance, it envisages the prequalification of the tender participants and establishes mandatory qualification criteria for evaluating tender proposals.

The PPP Law does not contain provisions on dispute resolution. The parties are free to choose international institutional or *ad hoc* arbitration. For example, some production sharing agreements contain the arbitration clauses referring all disputes for settlement in the Arbitration Institute of the Stockholm Chamber of Commerce. In practice the prob-

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lems may, however, arise as the public partner feels more comfortable in local courts. It may also be difficult for a private investor to negotiate inclusion of the two-tier dispute resolution clauses in the PPP contracts providing for mediation as a pre-arbitration/pre-court dispute settlement mechanism.

In addition to the PPP Law, there are a number of special PPP related laws and regulations in Ukraine, with the Law 'On Concessions' (the 'Concessions Law') being the key statute. It is not entirely clear whether the PPP Law will prevail over the Concessions Law. However, in case of any contradictions in construing the norms of both statutes the PPP Law could be given a priority as the latest act regulating the entire PPP area.

It seems that concessions will be the most used type of PPP envisaged by the PPP Law and the Concessions Law may become the main statute governing PPP projects for a number of reasons. In particular, the word 'concession' does not repel the public officials who got used to it and even a few projects (road construction and power generation) have been moved forward. Besides, the PPP Law due to its framework and declarative nature is not suited to governing specific issues in the PPP sphere.

After years of political instability Ukraine finally has a PPP program champion in President Yanukovich. Soon after the adoption of the PPP Law the high profile 'III International Investment Summit DID: Public-Private Partnership in the Context of the New Investment Policy of Ukraine' took place in the city of Donetsk under the President's auspices, and the event attracted many international experts and state and local officials.

Now it seems to be the uniform understanding for all stakeholders that to be successful in Ukraine, a PPP development program should include the PPP Law, a PPP Unit and pilot PPP projects (preferably at the local level). Pilot PPP projects will, most likely, be selected in the road construction, alternative energy, utilities, municipal transport, railroads, and some other sectors. The current state of Ukraine's economy suggests that it is too early for schools, hospitals and the other social infrastructure to be developed through PPP.

It still remains to be seen whether PPP will become the preferable way of modernising infrastructure in Ukraine, but it is obvious that the country has achieved much during the past year and is moving in the right direction. ■

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