7. PUBLIC PROCUREMENT and PUBLIC-PRIVATE PARTNERSHIPS – PART 1

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COVID 19: A new case of « Force majeure »

• One virus; a multidimensional “Force majeure”

• Creating multiple issues in PPPs, depending on:
  • The type of PPPs (users paid or public paid)
  • The fields/sectors (e.g. IT v. Transports);
  • Phase of the contract (construction v. performance)

• Issues related to the performance of the PPP contract: rising costs (Suspension of performance; health requirements costs & rising price due to shortfall of supplies; fall of demand; debt)
PPP and the COVID crisis: Risks allocation?

• Looking for a balanced answer, taking into account:
  • The Private partner situation AND the Public needs for the continuity of the Service operation
    • Viability & sustainability of the contract?
    • On a short AND long term perspective?

Are risks allocation definitive or adaptable in PPPs?

Based on different legal traditions, the PPP Guide offers a combination of solutions

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UNCITRAL PPP Guide’s answers to crisis:

• Anticipation of the unforeseen Crisis?
  • Anticipation of force majeure issue
  • Anticipation of Imprevisión (hardship issues)
  • Anticipation of “Fait du Prince”: increase of costs due to specific new mandatory requirements by the Public Entity (Model provision 44. Compensation for specific changes in legislation & 33 (j) and (l)),

• Permanent Dialogue between the parties

• Adjustment
UNCITRAL PPP Guide: tools and solutions

Legal tools:

- Amendment, negotiation
- Extension of the duration of the PPP (Model provision 49)
- Termination by the Public entity (Model provisions 50 (a))
- Termination by the Private partner (Model provision 51 (b))
- Termination by either parties (Model provision 53)

Economics tools:

- short term help: requests for contract adjustment (model provision 45)
- long term help: request for contract amendment (Model provision 45)

FLEXIBILITY!!