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# Addressing COVID-19 Impact under the Russian PPP Legislation. Influence of the UNCITRAL Legislative Guide and Model Provisions on PPPs

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**COVID-19  
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# Russian PPP legislation: progress and continuing reforms

## Concession Agreements Law 115-FZ, 2005

## PPP Law 224-FZ, 2015

**PPP agreements criteria are different to traditional ones** (risk of demand on the public side). In Russia the key differences between PPPA (Federal Law N 224) and concessions (Federal Law N 115):

- The private partner becomes the first owner of the created facility (always the public partner in concessions).
- The obligations (risks) for target operation may be imposed on the public partner (always on private side in Russian concessions).



**Mainly developed but need fine-tuning.** Serious discussion on further adapting PPP legislation to the pressing needs in capital investments - to provide more flexibility and guarantees to the private sector.



**UNCITRAL Legislative Guide and Model Provisions on PPPs** – is a major global legislative guide on PPPs which absorbed vast experience of many jurisdictions. It is a **code of widely accepted principles for the national parliaments and governments**. Its impact as an argument *de lege ferenda* and in lawmaking discussions can hardly be overestimated.



# COVID-19 and other macroeconomic impacts

## Two main macroeconomic factors affecting Russian PPPs



### COVID-19

Government anti-COVID measures (borders closing, stoppage of activities and other epidemiological measures):

- delay in works and services delivery (breach of the PPP contract by private party);
- delay in taking decisions and performance by the public partner;
- additional costs (masks, sanitizers, disinfecting equipment, special work regime);
- loss of revenue (decrease in traffic / demand).



### Russia–Saudi Arabia oil price war

Ruble exchange rate lost 15-30% against EUR and USD

– cost increase for materials and equipment.



# Addressing COVID-19 Impact: contract and legislative instruments in Russia



## Need special provisions in the contract:

- 1) **breach of contract by the public partner** (in case of formulating particular obligations of the public sector in the PPP contract);
- 2) **'special circumstances' explicitly listed in the contract** (mainly being third-party actions or macroeconomic effects) - trigger special obligations of the public partner re. recalculation of time periods, contract adjustment, exemption of the private party from the liability for delays and failures and compensation for losses (both cost increase and loss of revenue);
- 3) **termination of the agreement with a sufficient compensation** provided for in the PPP contract (including, for example, interests on shareholder loans).



## Provided by default in PPP and civil legislation:

- 4) **'material change of circumstances' – hardship provisions** (amendment or termination of the PPP contract);
- 5) **force majeure** (exemption from the contract liability, amendment or termination of the PPP contract).



# Legislative Problems in Russia

## Value of UNCITRAL Legislative Guide and Provisions on PPPs

### Uncertainty of the Russian legislative provisions regarding:

- the possibility of demand / revenue guarantees ('minimal income guarantee' not clearly provided by the PPP and concession laws) – **model provisions 33 and 39**;
- the ability of the contracting authority to indemnify the private partner for and against special circumstances (orders of the public authorities, including of a different level – federal, regional or local) which cannot be considered as a delay or failure to comply with the obligations of the public partner – **model provision 33, subpar. (i) and (l), model provision 44**;
- the losses of the private party that can be compensated upon termination of the project agreement (limited compensation which sometimes cannot cover all investment costs) – **model provision 53**.

These instruments are **widely used in the Russian PPP practice**, but there is **no stable court practice** and sometimes the courts do not enforce such provisions, which is unacceptable for the market.

There is a big discussion in the government over the **amendments that could cure these legislative problems** and the **UNCITRAL Legislative Guide**, other international documents and papers (such as WB and PPIAF) are always top arguments for the country, which tries to attract both domestic and international investments and technologies.



## Other actual problems and needs in Russia addressed by the UNCITRAL Legislative Provisions on PPPs

### Can stimulate investments into the public infrastructure:

**Flexibility of financial arrangements** (namely covering all construction costs by availability payments, demand / revenue / profit guarantees, public demand (procurement) guarantees / exclusivity) – **model provisions 33 and 39.**

**Compensation for proponent expenses incurred in preparing unsolicited proposal**, draft project agreement, financial model and feasibility study (in case of losing the tender, if applicable) – clearly addressed as incentive or other benefit that may be given to the person who submitted the unsolicited proposal - **model provision 27, par. 2; model provision 28, par. 4.**

**Flexibility re. the nature and scope of works to be performed / services to be provided by the private partner as well as ownership to the infrastructure facility** (in Russia for concessions (even without demand risk on the private partner) maintenance of the facility by the private partner without operation and providing services to users is prohibited, BOOT and BOO types are also prohibited for concessions, allowed for PPPAs) – **model provisions 33 and 36.**

**Removal of the exhaustive list of facilities** that can be constructed / created under PPP contract and adopting instead either the list of sectors (wider than the current types of infrastructure) or the list of activities which may not be the object of the PPP contract - will add much flexibility and extend the range of infrastructure for PPP investments – **model provision 4.**





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# Q&A

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