

Contracts in international business



- In brief:**
- This brief provides an overview of the main contract types in international business, and outlines the public-private partnership (PPP) process for the public and private sectors.
 - It is intended as a reference document for government officers who are regularly faced with international business contracts.
 - For these officers, knowledge of international norms can help with, for example, drafting contracts for PPPs.
 - This brief may also be useful for government departments that oversee foreign investment in Myanmar's special economic zones – an area of active research for IGC Myanmar.

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Overview

While contract norms vary from country to country, this brief attempts to distil the common elements of contracts across modern legal systems. To explore these elements, we adopt the following structure:

1. Business-to-business
2. Government-to-government
3. Business-to-government

Each of the above three sections refers to a different set of parties between which a contract can be formed. The section on business-to-government (B2G) concentrates on public-private partnerships (PPPs), both from the perspective of the public sector as well as the private sector.

A **contract** is a formal and legally binding agreement, which is either written or verbal. A valid contract must include four elements: (1) an offer; (2) an acceptance; (3) an intention for a legal relationship; and (4) a consideration¹ (often monetary).

Source: Dun & Bradstreet (2018)

Business-to-business

According to Australia's Small Business Development Corporation (2018), business-to-business (B2B) contracts are formed in the context of:

- Purchasing goods and services
- Supplying goods and services
- Partnership between businesses

In Table 1, we give a brief overview of notable contract types for each of these three purposes.

Table 1: Types of B2B contracts

Contract	Purpose	Description
Lease	Purchasing and supplying goods and services	A contract whereby one party agrees to rent property that is owned by another party for a set term.
Quotation	Purchasing and supplying goods and services	A formal statement of the estimated cost for a particular job or service. It is typically preceded by a request for quotation. When a quote is accepted a contract is formed.
Loan agreement	Purchasing and supplying goods and services	A formal contract between a lender and a borrower, which summarises details of the loan such as the principal amount, interest rate and amortisation period ² .
Independent contractor agreement	Purchasing goods and services	A contract used for legal protection, which outlines the roles and responsibilities, and services to be provided by an independent contractor ³ .
Franchise agreement	Supplying goods and services, and partnership	A contract where an established business agrees to provide (supply) to another business its brand, its operational model and required support, in return for a fee and some of the income generated.

¹ A consideration is something of value that is exchanged for the performance or promise of performance of something (itself a consideration) by the other party (Law.com, 2018).

² The amortisation period refers to the total amount of time the borrower has to pay off a loan (BDC, 2018a).

³ In a B2B context, an independent contractor is a business that has been hired by another business to provide services in a freelance capacity (Investopedia, 2018a).

	between businesses	
Equipment hire agreement	Supplying goods and services	A contract where the owner of some equipment agrees to rent out the equipment to another party. ⁴
Joint venture (JV)	Partnership between businesses	Usually refers to a legal partnership between two or more firms where they form a new entity for competitive advantage. ⁵ International JVs, where the business partners in a JV are from more than one national jurisdiction, are seen as a way to quickly enter an overseas market.
Strategic alliance	Partnership between businesses	A legal agreement between two or more independent companies to work towards a common objective. ⁶
Mergers and acquisitions (M&A)	Partnership between businesses	An alternative to the partnerships above is M&A. A merger happens when two firms agree to form a new company that is jointly owned and operated. When one company takes over another, it is known as an acquisition. ⁷
Distributor agreement	Partnership between businesses	A legal agreement between a supplier and a distributor. The distributor may operate in a different country from the supplier. ⁸

Sources: AllBusiness.com (2017); BDC (2018b); BIDC (2017); BusinessDictionary.com (2018a); BusinessDictionary.com (2018b); Investopedia (2018b); LawDepot (2018a); MBO Partners (2017); Oxford Dictionaries (2018); Queensland Government (2018); SEQ Legal (2018); Stewart and Maughn (2011)

Note: This table is not comprehensive – it contains notable examples of contract types, based primarily on Dun & Bradstreet (2018).

Government-to-government

In this section, we provide a brief overview of government-to-government (G2G) contracts, distinguishing treaties from other contract types.

Treaties

Treaties are a notable form of G2G contract, with potentially significant implications for international business. According to the Vienna Convention on the Law of Treaties (1969), a treaty is “an international agreement concluded between states in written form and governed by international law”.⁹

Examples of treaties include trade agreements – such as the bilateral trade agreements Myanmar has with a number of countries, including Bangladesh, Sri Lanka and China – and investment agreements – such as the ASEAN Comprehensive Investment Agreement, which Myanmar is party to (Export.gov, 2017; DICA, 2018).

Other contracts

Some of the B2B contracts outlined in Table 1 can be found in G2G contexts. For example, there are a number of loan agreements between the Japan International Cooperation Agency (JICA) and the Government of Myanmar (JICA, 2017). You can also have a joint venture between the sovereign wealth funds of two countries, such as M+S Pte Ltd – owned 60:40 by Malaysia’s Khazanah Nasional and Singapore’s Temasek Holdings (Temasek, 2018).¹⁰

It is also not uncommon to form G2G contracts between two departments of the same government.

⁴ An equipment hire agreement might take the form of a lease (LawDepot, 2018b).

⁵ See footnote 11 on p. 6 for the basic stages of the JV formation process.

⁶ Unlike in a JV, firms in a strategic alliance do not form a new entity (BusinessDictionary.com, 2018b).

⁷ A merger involves the signing of a merger agreement, whereas an acquisition requires that a share or asset purchase agreement is signed (Barusch, 2010).

⁸ Distributor agreements can be exclusive or non-exclusive (SEQ Legal, 2018).

⁹ Treaties can be bilateral (between two countries) or multilateral (between three or more countries). Multilateral treaties are typically developed with the backing of an international organisation, such as the UN (Department of Foreign Affairs and Trade, 2018).

¹⁰ See footnote 11 on p. 6 for the basic stages of the JV formation process.

For example, Canada makes extensive use of contracts between different levels of government to manage interdependencies between departments and ensure the distribution of responsibilities is clear (OECD, 2007).

Business-to-government

This brief is primarily concerned with B2G contracts. This section gives a brief overview of both PPP and non-PPP contracts (Table 2), before describing in more detail the full spectrum of PPP arrangements (Figure 1). We then turn to the steps of the PPP process for the public sector as well as the private sector. We conclude with an overview of key issues to address in a PPP contract.

Table 2: Overview of B2G contracts

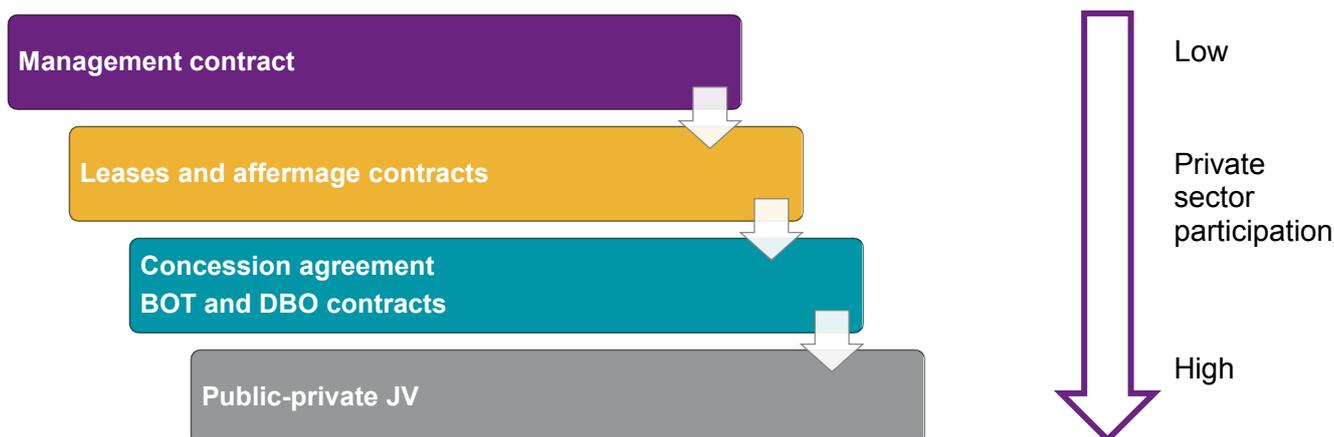
	Public procurement	PPP	Full privatisation
Description	Supply by the private sector of works, goods or services as per the requirements of a public authority.	“A long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance.” – World Bank (2017)	Transfer of a public service or facility to the private sector to be managed in accordance with market forces within the confines of a predefined framework.
Main features	<ul style="list-style-type: none"> • Tender invitations are accompanied by highly detailed technical specifications of the work being procured. • Price quotations are the single most important criterion for evaluating bids. • The private party does not occupy the asset over a longer term. 	<ul style="list-style-type: none"> • The contracting authority establishes specifications but leaves to the private sector the responsibility of proposing the best solutions. • The evaluation of bids attaches importance to both financial arrangements as well as technical solutions proposed (particularly for the operational phase). 	<ul style="list-style-type: none"> • The privatisation authority prepares a plan for the divestment to be undertaken. • The transfer of ownership to the private sector is a complex transaction. Contracts are carefully designed and there is a multi-stage competitive tender process. • Upon privatisation, the public sector typically gives up its role of managing the entity. • Virtually all the risks are borne by the private party.

Sources: Farlam (2005); World Bank (2017)

PPPs: Types of arrangements

Figure 1 illustrates the extent of private sector participation in different types of PPP arrangements. Table 3 describes these arrangements in turn.

Figure 1: Extent of private sector participation in PPPs



Source: World Bank (2016a)

Note: The share of the risk associated with the project that is borne by the private party increases with the extent of private sector participation.

There are broadly four principal roles for the private sector in PPP arrangements:

1. To provide capital
2. To provide management and implementation skills
3. To provide value added for the consumer and the public
4. To better identify needs and optimise use of resources

Source: European Commission (2003)

Table 3: Types of PPP arrangements

Contract	Description
Management contract	Management contracts range from technical assistance contracts, where the private operator is paid a fixed fee to perform specific tasks, through to operation and maintenance agreements, where the private company is delegated the operation, maintenance and often performance management of a project.
Leases and affermage contracts	These are like management contracts except the operators do not receive a fixed fee for their services. Instead, they charge consumers an operator fee. Under a lease, they give a fraction of this fee to the public party and retain the rest. Under an affermage, they retain the full amount but charge an additional surcharge which goes to the public party.
Concession agreement	This gives a company the long-term right to use and earn revenue from public assets conferred under the agreement, including responsibility for operations and some investment. Asset ownership remains with the public party, and the public party is typically responsible for replacement of larger assets.
Build-operate-transfer (BOT) and design-build-operate (DBO) contracts	In a BOT contract, the public party grants to a private company the right to finance, develop and operate a facility or system for a certain period, after which the facility is transferred to the public party. Under a BOT contract, the private operator generally obtains its revenues through a fee charged to the public party rather than tariffs charged to consumers. In a DBO contract, the public sector owns and finances the construction of new assets, while the private sector designs, builds and operates the assets to meet certain agreed outputs.

Public-private JV ¹¹	<p>A public-private JV may take the form of:</p> <ol style="list-style-type: none"> 1. A JV company with a separate legal identity from that of its shareholders, in which the parties participate on the basis of equity and there is a limitation on liabilities¹². 2. A partnership arrangement for profit-sharing, with no separate legal entity created. Each partner bears full legal responsibility for the project, i.e. there is no limitation on liabilities (except in the case of a formal limited partnership). 3. A contractual consortium. In this scenario, there is no sharing of pooled profits. Rather, each party is remunerated for specific services provided to the consortium. No separate legal entity is created and limitations of liability, if any, are set out in the contract.
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Sources: World Bank (2016b); World Bank (2016c); World Bank (2018a); World Bank (2018b)

Steps of the PPP process: The public sector's perspective

Table 4 outlines what the steps of the PPP process from the public sector's perspective might be.

Table 4: PPP process for the public sector

Step	Procedures
Identify and screen project	<ul style="list-style-type: none"> • Prepare pre-feasibility or initial scoping study. • Seek confirmation that the project contributes to a broader sector plan. • Seek confirmation that the project is economically feasible and fiscally responsible. • Submit project documentation for approval.
Appraise project	<ul style="list-style-type: none"> • Prepare a comprehensive appraisal which provides evidence of the project's economic, commercial, technical, environmental and legal feasibility, as well as its affordability. • Conduct a "value for money" assessment of the project's suitability as a PPP. • Prepare procurement strategy. • Submit project documentation for approval by relevant agencies.
Draft tender documentation and project contract	<ul style="list-style-type: none"> • Prepare tender documentation, including qualification criteria, evaluation criteria and proposal requirements. • Prepare risk matrix¹³. • Develop risk management plans. • Draft contract. • Seek approval for contract. • Refine and finalise procurement strategy. • Obtain approvals.
Put project out to tender and award contract	<ul style="list-style-type: none"> • Market the PPP. • Undertake qualification/prequalification of firms. • Shortlist qualified firms. • Issue a request for proposals (RFP) and receive bids. • Evaluate bids. • Select the proposal that offers the greatest value for money. • Sign contract and reach financial closure¹⁴.
Manage contract	<ul style="list-style-type: none"> • Monitor construction. • Manage service delivery against agreed key performance indicators. • Prepare for handback¹⁵. • Communicate issues to central agencies if risk status escalates.

Sources: APMG International (2018a); APMG International (2018b)

¹¹ There are four basic stages in the formation of a JV: (1) determine whether a JV is suitable; (2) identify and conduct due diligence on potential partners; (3) discuss potential structures, arrangements and procedures with the selected partner(s); and (4) draw up and sign a JV agreement (KCAS, 2010).

¹² A situation where the maximum loss that the owner of a company can incur is the amount of capital that he/she has invested (Encyclopædia Britannica, 2018).

¹³ A risk matrix usually: (1) identifies risk factors; (2) assesses their consequences; (3) describes possible mitigation measures; and (4) allocates the management of each factor to the party best equipped to do so cost-effectively (UNESCAP, 2008a; UNESCAP, 2008b).

¹⁴ Financial closure is reached when a project's funding becomes available (APMG International, 2018b).

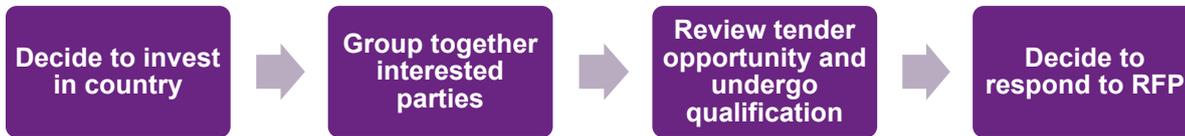
¹⁵ In the case of BOTs and other similar arrangements.

Steps of the PPP process: The private sector's perspective

We turn now to the perspective of the private sector. Figure 2 illustrates the potential steps for a private party to submit a bid for a PPP project.

Figure 2: Steps for a private party to submit a PPP bid

Steps up to decision to bid:



Active bidding steps:



Sources: APMG International (2018a); APMG International (2018c)

As per the Australian Department of Infrastructure and Regional Development (2008), as far as the private party is concerned, the stages of the PPP process after financial closure are typically:

1. Construction
2. Service delivery
3. Contract expiry

The construction stage begins after financial closure is reached, and ends with the commissioning and approval of the constructed asset. It is important for the private party to ensure compliance with construction requirements in the contract for smooth progression to the service delivery stage (APMG International, 2018b).

The service delivery phase sees the start of performance monitoring against the contract, and administration of the agreed payment mechanism¹⁶. Service delivery ends with contract expiry and the handback of the asset to the procuring party (APMG International, 2018b).¹⁷

Key issues to address in a PPP contract

As noted by Singapore's Ministry of Finance (2012), it is important for the PPP contract to spell out the rights and responsibilities of the public and private parties. As such, we conclude with a checklist of key issues that should be addressed in a PPP contract in relation to each of the three stages in the previous section.

¹⁶ Except for in PPPs where construction is co-financed by the public and private parties, in which case payment administration begins with the construction phase (APMG International, 2018b).

¹⁷ It may be necessary for the private party to make additional investments before handback, so as to ensure that the condition of the asset meets the standards specified in the contract.

Issue	Stage		
	Construction	Service delivery	Contract expiry
Tenure and continuing access rights	✓	✓	✓
Commissioning of completion of construction	✓		
Service delivery performance requirements	✓	✓	
Availability of contracted services		✓	
Payment	✓	✓	✓
Performance measurement and monitoring		✓	
Price review and adjustments		✓	
Ownership of land and facility	✓	✓	✓
Intellectual property	✓	✓	✓
Step-in rights ¹⁸	✓	✓	
Insurance	✓	✓	✓
Changes in service requirements	✓	✓	
Technical upgrading and technological obsolescence ¹⁹		✓	
Change management ²⁰	✓	✓	
Ongoing review		✓	
Contingency planning ²¹	✓	✓	
Dispute resolution	✓	✓	
Termination of contract			✓
Arrangements for end of term			✓

Source: Ministry of Finance (2012)

¹⁸ The right of a third party to "step in" in place of a party that fails to fulfil its obligations under the PPP contract (PPP Knowledge Lab, 2018).

¹⁹ Technological obsolescence is a situation where equipment is no longer adequate for providing contracted services (APMG International, 2018d).

²⁰ Change management refers to a structured approach to organisational transition with the aim of ensuring expected benefits (ACMP, 2018).

²¹ The objective of contingency planning is to account for costs incurred by uncertainties in the estimated total cost of a project (Boussabaine, 2007).

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