

THE PROJECTS AND CONSTRUCTION REVIEW

Project and Construction in South Korea

I. Introduction

In relation to infrastructure projects, Republic of Korea (“Korea”) enacted a law called the “Act on Public-Private Partnerships in Infrastructure” (“PPP Act”). The PPP Act was formerly called the “Private Investment Act for Social Infrastructure” which was enacted in 1994 and has been replaced with its current name in 2005.

The government department in charge of PPP projects for social infrastructure is the Ministry of Economy and Finance (MOEF), which issues a master plan for infrastructure projects (“Master Plan”) every year. As the name “master plan” might suggest, the Master Plan includes not only the policy direction for PPP projects for that year but it also stipulates all guidelines related to PPP projects in the form of legal provisions, although they have no legal effect. While MOEF is the highest-level government agency in charge of PPP projects, the Public and Private Infrastructure Investment Management Center (PIMAC) which has been established under the umbrella of the Korea Development Institute (KDI), a national research institute, conducts research policies and systems related to PPP projects. PIMAC is not only a research institution but it also serves as an advisory body within the government, providing advice related to PPP projects and negotiating on behalf of the government.

As mentioned earlier, since Korea has in place the enforcement law in regards to PPP projects and had Minimum Revenue Guarantee (“MRG”) system, the PPP sector was booming in the early 2000s. In 2005, the BTL method was introduced and the number of PPP projects involving small-sized facilities have increased. However, due to the 2008 financial crisis and the abolishment of the MRG system, the PPP sector has been stagnant since the 2010s. Accordingly, the government has been partially introducing policies to revitalize PPP projects, such as the Korea Green New Deal which is expected to have positive outcomes in the future as explained below.

In Korea, the PPP projects have been concentrated on several types of facilities including roads, ports, railways, schools, military facilities, sewage treatment plants, and sewage pipes. However, the restrictions on target facilities have been lifted in accordance with the 2020 holistic approach, and it appears that PPP projects will be more widely used for the construction and installation of new facilities in the future.

II THE YEAR IN REVIEW

The PPP Act, amended in 2020, deviates from its previously limited list of target facilities. Article 2 of the PPP Act defines “infrastructure” as “fundamental facilities which serve as the foundation of production, increase the efficiency of such facilities, and accommodate the convenience of users and in the lives of the public” and provides examples of such infrastructures. Accordingly, it is expected that PPP projects will be used for new facilities in addition to the aforementioned facilities, such as roads, railroads, ports, environmental facilities, and schools.

Clearly, in 2020, Covid-19 spread worldwide and Korea was also impacted by the effects of the virus.

In an effort to recover from the economic downturn caused by Covid-19, the Korean government in July 2021 announced the Korean New Deal 2.0. The government announced that it would promote new privately funded projects in the total amount of approximately 30 trillion won, including the previously established 10 trillion won in PPP projects, 12.7 trillion won in the Korean New Deal projects, and 7.6 trillion won in other new projects. The other new projects include green smart schools, hydrogen charging stations, seismic reinforcement projects, and replacement of LED lighting.

In the early stages of Korea’s PPP projects, PPP projects focused on large-scale projects such as roads, ports, and railroads, but as small projects have been introduced by the Korean New Deal, the paradigm of PPP projects is expected to change significantly in the future.

A deal worth highlighting in the recent PPP projects is the GTX-A project. Generally, in Korea’s PPP projects, construction companies play a leading role in forming a consortium and financial institutions participate only as financial investors. However, in the GTX-A project, Shinhan Bank, a financial institution, has actively formed a consortium and put forth a business proposal. Consequently, they have acquired business rights and ultimately were able to reach a financial agreement. The GTX-A high-speed commuter rail line project is a large-scale project that connects Paju, Gyeonggi Province and Samseong Station in Seoul. The GTX-A line extends 42.6 km and the total project cost amounts to approximately 2.7 trillion won. GTX-A is the first express railway project in the metropolitan area, and GTX-B and GTX-C projects are also underway.

III DOCUMENTS AND TRANSACTION STRUCTURE

i Transactional structures

The PPP Act lists several implementation schemes, such as BTO (Build-Transfer-Operate) and BTL (Build-Transfer-Lease) which are the forms that are largely used, as well as BOT (Build-Operate-Transfer), BOO (Build-Own-Operate), and BLT (Build-Lease-Transfer).

The definitions of the main implementation methods of PPP projects pursuant to the PPP Act are as below, but other new methods may be allowed by submitting a project proposal.

Method	Description
BTO	The method by which the ownership of the infrastructure is transferred to the State or a local government upon the completion of construction, and the concessionaire has the rights to manage and operate the infrastructure for a specified period
BTL	Same as BTO except that the State or a local government has to rent the infrastructure for a specified period as provided for in an agreement and use and/or make profits
BOT	The method by which the concessionaire assumes ownership of the infrastructure for a specified period after completion of construction, and the ownership is transferred to the State or a local government upon termination of the concession period
BOO	The method by which the concessionaire assumes ownership of the infrastructure upon completion of construction

BTO is usually used for facilities such as roads, tunnels, bridges, subways, ports, sewer treatment facilities. Most of the BTO-type projects are user payment system projects in which user fees are collected from general users of the facilities but in the case of environmental facilities, facility users become the competent authority and the facilities are operated in the form of an absolute payment system.

The BTL method was introduced in 2005 modeled after Private Finance Initiative (PFI) in the UK, and is structured in such a way that a competent authority pays for the private investor's investment in the form of a rent payment. Facilities such as schools, dormitories, barracks or military offices, sewage pipes are the target sectors of BTL projects but there are cases where railroads and telecommunication facilities have been implemented in the form of BTL. Under the aforementioned Korean New Deal, BTL method will be used for smart schools so BTL projects are expected to become more popular going forward.

Relatedly, implementation methods other than BTO and BTL are rarely used. In other words, most of the PPP projects are implemented largely by way of BTO or BTL.

ii. Procurement Process

Korea's PPP projects may generally be distinguished by whether they involve a solicited bid in which the government identifies a PPP project or an unsolicited bid by a third party in which a private company proposes a project to the government. With respect to the former, the government makes a public announcement of a project plan and the bidding process on its own. On the contrary, the latter involves a private company proposing a project plan to the government and the government subsequently evaluating its appropriateness to proceed as a PPP project before making a public announcement.

In the end, all PPP projects follow the following procedure: 1) request for proposal; 2) project proposal 3) evaluation; 4) appointment of preferred bidder; 5) negotiation of concession agreement (explained below in iii.); 6) execution of concession agreement and designation of concessionaire; 7) approval of concession plan; 8) completion of construction and establishment of management and operation rights; and 9) operation. Relatedly, disputes sometimes occur during the evaluation stage which consists of pre-qualification and main qualification evaluations.

iii. Documentation

The starting point of a PPP project and the most important contract involved is the concession agreement (also known as implementation agreement) executed with a competent authority. The PPP Act specifically stipulates that a concessionaire is designated by concluding a concession agreement. Thus, the administrative act of selecting a concessionaire and the execution of a contract in the form of a concession agreement are performed simultaneously. A concession agreement governs the grant of business rights to a concessionaire, matters related to the concessionaire's construction, operation and financing, the project's internal rate of return, measures to compensate the total private investment cost, the distribution of risks, etc.

PIMAC publishes a model concession agreement and most projects are concluded by reflecting the specificity of the project based on the model concession agreement. When the parties finish discussing on the concession agreement, the agreement must undergo a review by PIMAC. Moreover, if a total project cost is in the total amount of 200 billion won or more, all conditions under the concession agreement must be approved by the PPP project deliberation committee affiliated with MOEF. In September 2020, an amendment to the model concession agreement was published for the first time in 10 years, and intense negotiations are expected between the competent authority and concessionaires with regards to the revised provisions in the future.

In other countries, a direct agreement is executed between the lender and the competent authority, but such is not usually the case in Korea. However, in consideration of the lender's position in a concession agreement, a provision enabling the lender to propose an alternative concessionaire and/or a provision

allowing for direct payment to the lender in case of termination are usually established in the agreement.

After a concession agreement is executed with the competent authority, it undergoes a negotiation with the lender before it is final. Ordinarily, when a loan agreement is executed, a shareholders' agreement, a construction agreement, and an operation and maintenance agreement are also executed simultaneously. The loan agreement is similar to those used in the Anglosphere. Depending on the project, fixed rate and floating rate tranches are properly used together. In the case of floating rates, corporate bonds are often used as the base rate for BTO projects, while national treasury bonds are used as the base rate for any BTL project since the base rate of the rent paid by the government is national treasury bond under a concession agreement. In connection with the loan agreement, agreements are typically executed for mortgages over management and operation rights, pledges over shares or other securities issued or owned by the concessionaire, pledges over the concessionaire's deposit claims, insurance claims and other contractual rights. Additionally, credit enhancement agreements for borrowers are often executed in the form of investor agreements, etc.

A shareholders' agreement is executed between the shareholders of the concessionaire. In general, shareholders are comprised of constructional investors, financial investors, and operational investors. In the case of BTO projects, operational investors are rarely involved. The shareholders' agreement governs basic matters concerning the establishment and operation of a company between these investors. Since the project company does not become a party to the shareholders' agreement, the contents of the shareholders' agreement do not directly bind the project company. However, if the contents of the shareholders' agreement are stipulated in the articles of incorporation, the contents become the company norms, and thus the shareholders as well as the project company will be bound by such contents. The main contents stipulated in the shareholders' agreement concern the establishment of the company, each investor's investment obligations, restrictions on stock transfer (ordinarily, stock transfer is restricted during the construction period and right of first refusal is given to the remaining investors), establishment of a nominating authority for directors, resolutions of the board, resolutions of the meeting of the shareholders, order of priority with respect to dividend payment and distribution of residual property (generally, priority is given to financial investors), and cooperation of each investor for project implementation.

Generally, construction agreements and operation and maintenance agreements are executed in a back-to-back manner in which the obligations and risks borne by the concessionaire against the competent authority under a concession agreement are transferred to the contractor or the operation and maintenance company.

Design agreements are usually executed separately from construction agreements. Under a construction agreement, a construction company is obliged to complete the facility at its own risk within a set construction amount during a fixed construction period. Here, both the construction period and the construction amount are determined by agreement based on the amount under the concession agreement. Since changes in the total project cost under a concession agreement are limited to certain cases due to causes attributable to the competent authority, changes in the construction cost under a construction agreement are only acknowledged in exceptional circumstances.

For BTL projects, operation and maintenance agreements are executed in such a way that the operation and maintenance company fulfills the concessionaire's maintenance and operation obligations borne by the project company to the competent authority during the operational period. In the case of the BTL projects, the competent authority pays the fixed operating expenses determined in advance on a quarterly basis taking inflation into account. Operating expenses (excluding some expenses directly paid by the concessionaire such as insurance premiums, agent bank fees, corporate taxes, etc.) are also paid as commissions to the operation and maintenance company.

Unlike BTL projects, the operation and maintenance company in BTO projects usually does not invest in the project company. For instance, in a BTO project involving roads, parties often agree to separately entrust road maintenance and toll collection duties to a third party.

Although there is no standard construction agreement for PPP projects, standard contract forms for government and private projects are published as an example by MOEF, so these forms are often tailored to be used for PPP projects. In regards to construction agreements, they are sometimes executed in the form of EPC (however, even in this case, only the design/engineering cost is included in the construction cost and the actual design/engineering work is performed by a design/engineering company) but most projects are implemented by way of DBB (Design-Bid-Build) which separates design/engineering from construction work.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Since PPP projects are premised on the fact that the private sector is liable for the construction, operation, and financing, the risks related to the above under a concession agreement is borne by the concessionaire. On the other hand, risks caused by the government is borne by the competent authority, and in the case of force majeure, both parties share the risk at a fixed ratio. In cases where risk allocation is not clear between the competent authority and the concessionaire, the general principle is that the entity closer to the risks associated with the relevant incident should bear the risks.

In Korea, the construction company participates as an investor of a project company and executes a construction agreement. Thus, most of the risks related to construction are transferred to the construction company, and if the project involves an operational investor, then operation risks are transferred to the operation and maintenance company.

In regards to demand risks, in a BTL project, the government is the consumer and the competent authority pays rent and operating expenses under a concession agreement. Thus, unless special circumstances apply such as when the rent is deducted as a result of an availability test or the operating cost is deducted as a result of a performance test, the concessionaire is not exposed to demand risks.

In a BTO project involving environmental facilities, the demand risk is also low because the competent authority is the consumer and entrusts the processing volume to the concessionaire. However, in a BTO project involving road infrastructure, there may be direct exposure to demand risks depending on the amount of traffic. In an effort to alleviate this problem, the MRG system was adopted which guaranteed a certain portion of projected operating revenue if the actual revenue fell short of the projected revenue stipulated in a concession agreement executed with a competent authority. Thus, the demand risk was reduced and financing was easier but it also put an enormous burden on the competent authority when the actual revenue was found to be less than the projected amount.

The MRG system has been abolished so the concessionaire must now fully bear the demand risks. To supplement this, the government has proposed modified implementation schemes such as BTO-rs (risk sharing) and BTO-a (adjustment). With the BTO-rs scheme, if the investment risk sharing cost (total private investment cost plus operating cost) deviates from the original estimate, the difference is shared at a ratio agreed on by the parties. With the BTO-a scheme, if the contribution profit (actual revenue – variable cost) is less than the minimum project operating cost (a certain percentage of the total private investment cost + operating cost), the difference is preserved.

In the past, if changes in laws and regulations made a negative impact on the project, it was treated as a cause attributable to the competent authority. However, the amended version of the model concession

agreement stipulates it as an event of force majeure, and thus a controversy is expected to arise.

The model concession agreement classifies events of non-political force majeure and events of political force majeure as below. In principle, the competent authority compensates 80% and 90% of the amount not covered by insurance for non-political force majeure events and political force majeure events, respectively. Changes in economic conditions such as national credit rating, exchange rates, and interest rates are stipulated as non-force majeure events.

Non-Political Force Majeure Events	Political Force Majeure Events
<ol style="list-style-type: none"> 1. disaster caused by an earthquake, a flood, a tidal wave, a fire, a volcanic eruption, a landslide, a typhoon, an aircraft collision, or any other similar event 2. a nationwide, society-wide, or industry-wide strike 3. where a sudden change in the country credit rating, interest rate, or exchange rate, a similar sudden change in economic environment, or a rapid change in the environment for this project makes it impossible to execute a loan agreement or adversely and seriously affects the concessionaire's profitability of this project 4. where an amendment to the PPP Act, the Enforcement Decree of the said Act, the Master Plan for Infrastructure Project, or a change in the policy on public-private partnership for infrastructure has a direct, serious, and unfavorable impact on the concessionaire, provided that the competent authority shall be liable for losses incurred as a consequence of collecting user fees less than the user fees stipulated in this agreement due to a demand or policy of the government 5. other events specified as force majeure events under in paragraph (2) and events regarded as equivalent to such events but similar to those under subparagraphs 1 through 4 	<ol style="list-style-type: none"> 1. war, civil war, enemy invasion, or any other similar event 2. contamination of the project site by nuclear waste, chemical, or radioactivity 3. riot, terrorism, or any other similar event 4. control of money exchange or overseas money transfer or any other similar event

ii Limitation of Liability

According to the Korean Civil Act, compensation for damages is limited to ordinary damages but damages due to special circumstances are recognized only when the obligor knew or should have known such circumstances existed. In other words, losses caused by a breach of contract are, in principle, ordinary damages, and special damages are only recognized if the other party knew or should have known about the special circumstances (the burden of proof on such circumstances is on the claimant). Unlike common law jurisdictions, compensation liability is not excluded solely because the losses are consequential or indirect.

Ordinarily, in order to limit damages caused by a breach of contractual obligations, a scope of damages provision should be included in the relevant contract. However, in PPP projects, such provision is rarely used. The model concession agreement provides, however, that in the event the concession agreement is terminated due to the fault of a competent authority, the competent authority is not be liable for any losses incurred other than the termination payment.

iii Political risk

The concession agreement treats each case differently for war, confiscation, change of laws, and control of overseas remittances, which are usually called political risks. As mentioned above, these political risks are considered as political force majeure events, and the competent authority is obligated to compensate 90% of the amount not covered by insurance for damages caused by such political force majeure events. Changes in laws and regulations are now usually classified as non-political risks, so the competent authority compensates 80% of the uncovered amount, but in the past they were stipulated as causes attributable to the competent authority in the concession agreement. Also, in the shareholders' support agreement provided by the shareholder to the lender, there is usually a provision requiring constructional investors and operational investors to replenish the funds for the remaining amount that the competent authority does not cover for damages caused by force majeure events.

In the case of confiscation, the situation is somewhat more complicated. According to the model concession agreement, if the competent authority confiscates the project facilities or the right to perform the project and the agreement is terminated for this reason, the competent authority has to pay termination payment (usually, the amount reflecting the sum of project's return and the total private investment cost), as it is deemed as the competent authority's breach of the agreement. According to Article 47 of the PPP Act, the competent authority may order a disposition for public interest when it is necessary for public interest such as efficient operation of the infrastructure or a change of circumstances, when it is required for the efficient implementation of the infrastructure works, and when force majeure such as war or natural disaster takes place. Under the PPP Act, when there is a disposition for public interest, it is interpreted that the government can cancel the designation of the concessionaire and revoke the right to perform the project. In light of the foregoing, there are questions as to whether a disposition for public interest can be ordered when a large amount of MRG payment obligation continues to occur in a project with MRG, which imposes heavy financial burden on the competent authority. While issuing a disposition for public interest should be extremely cautioned as it would invalidate the concession agreement that has already been signed, the Master Plan stipulates that the project execution conditions can be adjusted, and provisions allowing the competent authority to intervene and amend the concession agreement have been expanding, such as the provision in the Toll Road Act allowing the government to withhold payment of financial subsidies in case of non-compliance with the request to amend the concession agreement.

Almost all of the BTO and BTL concession agreements compensate the total private investment cost by requiring the competent authority to make termination payments upon termination regardless of the cause of such termination, thereby reducing the risk of the concessionaire.

Under Korean law, foreigners can also acquire real estate with few exceptions, but they must report the acquisition within 60 days from the date of entering into the relevant purchase agreement. In the case of stocks, if a foreigner acquires 100 million won or more of shares in a Korean company and holds 10% or more of equity shares, it must be reported in accordance with FIPA (as defined in Section X below). Acquisition of securities of an unlisted Korean company with less than 100 million won must be reported to a foreign exchange bank in accordance with FETA (as defined in Section X below). Article 23 of the Constitution stipulates that the property rights of all citizens are protected and that if property rights are expropriated, used, or restricted by the state for public necessity, fair and just compensation shall be provided for such state action.

V SECURITY AND COLLATERAL

The types of security used in PPP projects include pledges on shares, pledges on deposit claims, pledges on insurance claims, *yangdo-dambo* (a type of security established by way of transferring legal title to the collateral to the lender) agreements, mortgages on management and operation rights, construction completion guarantees, and credit guarantees by shareholders (usually executed under the name, “Shareholders’ Support Agreement”). The functions of pledges on shares, deposit and insurance claims, and *yangdo-dambo* in Korea are similar to those in international project finance. To establish security rights in such types of security, notification to or consent of the other party of the subject contract (i.e., deposit, insurance, and project-related contracts) is required. Notification and acceptance must be perfected by affixing a fixed date stamp in order to receive priority in case of multiple notifications and acceptances. In the case of shares, if a share certificate is issued, the pledge is perfected by the assignment of the share certificate. If the share certificate has not been issued, the pledge can be perfected by notification to or consent by the debtor for companies that have been established for over six months (electronic registration also available).

Under Korean law, *yangdo-dambo* and mortgages on management and operation rights require special attention. *Yangdo-dambo* is important since it transfers the concessionaire’s contractual rights in the concession agreement to the lender, and this includes the right to claim payment of MRG, the right to claim payment of termination payment, and the right to claim payment of rent and operating expenses in BTL. Since most financial institutions in Korea make loan and investment decisions based on whether the termination payment stipulated in the concession agreement can cover their loan and investment amount, the *yangdo-dambo* agreement, which stipulates transfer of the right to claim termination payment, is probably the most important form of security. In addition, *yangdo-dambo* includes transfer of contractual rights as well as contractual status, so when an event of default occurs, the concessionaire’s contractual status is transferred to the lender with notification to the counterparty and the lender is able to perform the project. Under Korean substantive law, neither a direct agreement between the competent authority and the lender, nor step-in-rights of the competent authority are recognized, but similar effects can be achieved through the transfer of contractual status under the concession agreement. However, since the concession agreement is executed with the competent authority and is governed by public law, even if the security right is exercised pursuant to the *yangdo-dambo* agreement, a separate action from the competent authority re-designating the concessionaire would be required in order for the lender’s rights to perform the project to be recognized.

On the other hand, management and operation rights are recognized as property rights where separate registration is available as in real estate, so both management and operation rights and the mortgage on such rights can be separately established by registering with the relevant registry. Therefore, if the concessionaire defaults, the lender can foreclose on the management and operation rights according to the court auction procedure. However, as in *yangdo-dambo*, it would require approval from the competent authority for the buyer’s management and operation rights to be transferred.

Last but not least, a shareholders’ support agreement by the shareholder who act as a sponsor for the project serves as an important form of collateral. Generally, project finance is called as non-recourse financing because it is based on the cash flows of the project, but project finance in Korea is mostly done on a limited recourse basis under which the shareholder is indirectly responsible for the lender by way of enhancing the borrower’s credit (but, cases where the shareholder guarantees the loan principal and interest themselves are rare). A typical shareholders’ support agreement stipulates that additional funds will be provided by the shareholder when the construction cost of the construction period or the operating cost of the operation period exceeds the original cost (cost overrun), when the loss due to force majeure is not covered by the competent authority or insurance, or when the project is terminated and the termination payment is less than the loan principal and interest. Additional funds are usually

provided by way of deferment of payment of construction or operating costs, extension of subordinated loans, or equity injection.

VI BOND AND INSURANCE

Between the competent authority and the concessionaire, a project performance bond must be submitted under the concession agreement. The performance bond is a sort of performance guarantee for the concession agreement, and the bond amount is 10% of the total project cost. In the project's construction contract, it is common to provide a back-to-back guarantee where the subcontractor provides the concessionaire with 10% of the total project cost or contract price as a bond amount for contract performance. These bonds are issued through local guarantee companies.

Under the concession agreement, the concessionaire is obligated to purchase insurance, and the same is stipulated as a covenant in the loan agreement. A typical insurance package is as follows:

Construction Period	construction insurance, advance loss of profit insurance, employer's liability insurance, third party liability insurance
Operation Period	Property insurance, business interruption insurance, commercial general liability insurance, third party liability insurance

The PPP Act mandates that the Korea Infrastructure Credit Guarantee Fund be established and managed by the Korea Credit Guarantee Fund to secure debts borrowed from financial institutions in connection with the PPP project. Accordingly, in some PPP projects, loans are made with the guarantee of the Industrial Credit Guarantee Fund.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDING

Enforcement of security interests by each type of security adhere to the Civil Execution Act of Korea and security interests over the shares and the management and operation rights are enforced in accordance with the act through a court administered auction. It should be noted that, under the PPP Act, a disposition of the management and operation rights would need approval by the competent authority, even if the management and operation rights were sold by the court auction. The rights of the small lessee and taxes on the security take priority over secured creditors in the auction in accordance with applicable laws, but the occurrence of such a creditor in the first place is highly unlikely in the case of the shares and the management and operation rights in PPP projects because the subject collateral itself is not immovable property. For *yangdo-dambo*, deposit claims, and insurance claims, since monetary claims are pledged, it is likely that the monetary claims will be seized and an assignment or collection order will be issued by the court.

Insolvency proceedings in Korea are divided into bankruptcy and rehabilitation procedures. Since the lender has a security right on the collateral, the lender has priority over general creditors with respect to the collateral—that is, the rehabilitation security right in a rehabilitation case, and the right to foreclose outside bankruptcy in a bankruptcy case. Based on this status, the lender will report his claim and will receive priority in repayment over the proceeds from the sale of the collateral. In rehabilitation proceedings, if the debtor denies the report on the rehabilitation security right, relief can be obtained through a procedure called judgement in claim allowance proceedings.

According to Korea's Debtor Rehabilitation and Bankruptcy Act (hereinafter referred to as the

“Insolvency Act”), in the case of a bilateral contract that has not been performed by neither party, the receiver of the rehabilitation procedure or the bankruptcy trustee in the bankruptcy procedure may choose to continue or terminate the contract. In the Uijeongbu Light Rail Transit case, the district court upheld that the trustee had the right to cancel the concession agreement and claim termination payment when the concessionaire of the PPP project went bankrupt during the operation period. However, in the recent judgement of the Supreme Court, the Court denied the trustee’s right to cancel the concession agreement, finding that the competent authority’s primary obligations under the agreement were fulfilled once the competent authority conferred the concessionaire the rights to manage and operate the project (on the premise that the bilateral contract was not unfulfilled by both parties as the competent authority has completed its material obligations). Accordingly, if the concessionaire enters into a bankruptcy or rehabilitation procedure, the receiver and the trustee may not terminate the concession agreement based on the Insolvency Act, but only the competent authority may cancel the agreement when the concessionaire defaults pursuant to the termination provision in concession agreement.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

PPP projects must undergo an environmental impact assessment and obtain a building permit and an approval for use for construction as in general construction projects. In addition, the PPP Act requires that an implementation plan be approved by the competent authority. Detailed design/engineering documents, documents on financing plan and operation plan must be submitted for approval. Once approved, construction must be carried out in accordance with the approved implementation plan.

ii Equator Principles

The Equator Principles refer to a voluntary agreement by financial institutions that they will not provide financial support to large-scale development projects that may cause environmental destruction or human rights violations of local residents or the socially disadvantaged.

In Korea, the Equator Principles was not a major issue. Rather, in the early 2010s, a large-scale, coal-fueled power plant construction project was successfully ordered and financed. However, with the lead of Korean Development Bank in 2017, Shinhan Bank, Kookmin Bank, Woori Bank, Nonghyup Bank, and Hana Bank all joined the Equator Principles, so loans for projects with environmental issues such as coal-fueled power plants in Korea will likely be limited in the future and project financing for renewal energy and waste treatment facilities are expected to become more active.

In fact, in a waste treatment facility project that we recently advised on, the affirmative covenant clause in the loan agreement included the Equator Principles as a major obligation to be actively complied with and submission of an environmental and social impact report was stipulated as a condition precedent for the first drawdown of the loan, so there will likely be more cases like this in the future.

iii Responsibility of financial institution

In Korea, as interest in the ESG management has recently increased, environmental and social responsibilities such as the 'Principle of Responsible Banking' and 'Principle of Responsible Investment' are being strengthened. In addition, in the case of Korea's infrastructure project finance, funds are playing the role of major lenders and financial investors. Recently, a series of fund incidents by asset management companies has occurred regarding individual investment products, so the government is

tightening its regulatory oversight over the overall asset management industry.

IX PUBLIC PROCUREMENT METHODS

This article has mainly focused on PPP projects based on project finance. However, in the case of infrastructure construction in Korea, government programs in which the central government or a local government directly places orders for construction are still more common than PPP projects.

In this case, if the central government is the ordering agency, the Act on Contracts to Which the State is a Party, and if the local government is the ordering agency, the Act on Contracts to Which a Local Government is a Party, will apply. These laws govern matters concerning the ordering, contracting, and performance of government contracts, including construction contracts. Government contracts must be made through competitive bidding with certain exceptions, a written contract must be executed, and a penalty of 0.5/1000 per day would be imposed for delay in performance. The legal procedure in which the state is a party is applied *mutatis mutandis* to various organizations such as public corporations and public institutions when executing a contract.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

The Foreign Exchange Transaction Act (FETA) and the Foreign Investment Promotion Act (FIPA) are the two overarching statutes governing foreign investment in Korea. FETA applies to portfolio investment (e.g., acquisition of shares and bonds) by foreign investors, and FIPA applies to foreign direct investment meeting requirements set forth in FIPA. Foreign direct investment is subject to reporting requirements set forth in FIPA. Any other large scale foreign investment will be subject to reporting requirements of FETA, unless an exception applies.

FIPA was promulgated by the Korean government for the specific purpose of attracting foreign direct investment in Korea, so it provides a greater level of protection and a wider range of incentives for foreign direct investment than to portfolio investment under FETA.

To qualify as foreign direct investment under FIPA, a foreign investor must invest a minimum of 100 million won in a Korean company and meet one of the following requirements: (1) hold 10% or more of voting shares or (2) assign or appoint an executive to the Korean company. Other types of foreign investment recognized under FIPA include: (1) an overseas parent company's provision of a long-term loan with a maturity of at least five years; (2) a foreigner's contribution to a non-profit organization; and (3) reinvestment of unappropriated retained earnings, which is newly added pursuant to the amendment of FIPA enforced on August 5, 2020.

Some of the key incentives under FIPA include tax reduction and exemption, cash grant (business involving advanced technology and products are now eligible to receive cash grant with the FIPA amendment) and site support (Foreign Investment Zones, Free Trade Zones, and Free Economic Zones, providing location support, reduced rent and tax exemptions, among other benefits). FIPA also protects foreign investors by guaranteeing the remittance of income from acquired stocks, proceeds from sale of stocks, and the principal, interest and service charges paid according to a loan agreement.

However, foreign investment is prohibited and restricted in some business categories. For example, foreign investment is excluded in nuclear power generation, broadcasting and national defense. Also, foreign investment is restricted, generally by restrictions on shareholding ratio, in beef cattle raising business, electrical sales business and air transportation business, among other industries.

i Removal of profits and investment

The Minister of Strategy and Finance under FETA may impose foreign exchange controls and currency regulations, but their reach is kept to a minimum extent to facilitate foreign exchange and cross-border transactions. When it is deemed necessary, the Minister may impose certain restrictions on foreign exchange transactions when confronted with: (1) natural calamities, war, conflicts of arm, grace and sudden changes in domestic and foreign economic conditions; or (2) a serious difficulty in international balance of payments and international finance or serious obstacles in carrying out currency policies, exchange rate policies and other macroeconomic policies. Some examples of restrictive measures that the Minister may impose include temporarily suspending foreign exchange payments, receipts or transactions and imposing obligations to safeguard, deposit or sell the means of payment in or to certain Korean governmental agencies or financial institutions. However, the foregoing restrictive measures by the government will not apply to foreign direct investment that fall under the purview of FIPA because of the explicit guarantee offered by FIPA as explained above.

XI DISPUTE RESOLUTION

i Special Jurisdiction

The PPP Act requires that a PPP project dispute mediation committee be established under the Ministry of Strategy and Finance. The mediation decision of the PPP project dispute mediation committee is not legally binding, but unlike litigation or arbitration, a judgment can be made from a business point of view other than a legal point of view. However, since the final dispute is resolved by litigation or arbitration, PPP dispute mediation is not widely used.

In the past, disputes in the model concession agreement were resolved through arbitration by the Korean Commercial Arbitration Board (KCAB) or by a specific court of jurisdiction if the parties did not agree to arbitration. Faced with criticism that such framework leaves uncertainty as to whether there is a final agreement on arbitration, the recent model concession agreement stipulates the parties to select either arbitration or litigation.

There were cases in the past in which disputes over concession agreements on foreign invested projects were subject to overseas arbitration organizations such as the International Chamber of Commerce even if the governing law was Korean law, but now such cases are rare.

ii Arbitration and ADR

Arbitration and mediation are the two most popular alternative dispute forms used in Korea. For mediation, court-supervised mediation is commonly used where the decision rendered is deemed final and conclusive as a court decision. There are other types of ADR such as private mediation and conciliation proceedings, but they are much less prevalent.

In project finance and construction disputes, arbitration is the most widely used method in Korea. KCAB is the sole arbitration institution in Korea and according to the 2020 annual report published by KCAB, approximately 34% of the cases involved construction disputes. Korea is a member of the Convention on the Recognition and Enforcement of Foreign Arbitral Award (the “New York Convention”) and is also a signatory to the ICSID Convention and other prominent international dispute resolution conventions. The Arbitration Act, which is a separate body of law that governs domestic and international arbitrations in Korea, widely adopts the UNCITRAL Model Law.

Under the Arbitration Act, international arbitration contractual provisions made in writing will be

recognized, and the Korean courts will enforce foreign arbitral awards that are subject to the New York Convention under the rules of that convention. For foreign arbitral awards that are not subject to the New York Convention, the requirements set forth in the Civil Procedure Act and the Civil Execution Act must be satisfied for such foreign awards to be recognized and enforced.

XII OUTLOOK AND CONCLUSION

Korea has been actively conducting PPP projects since the late 1990s, as a country with a separate body of law governing PPP projects. Therefore, participants in various fields such as government agencies, construction companies, financial institutions, accounting firms, and law firms tend to have a high level of expertise and understanding of the PPP business. The government is also making efforts to improve the system by announcing the Master Plan every year and taking complementary measures to prevent the PPP market stagnation. For this reason, it can be said that Korea is more systematically equipped with PPP projects than any other Asian country. Even though investment by foreign companies is concentrated in the early stages of PPP projects and their participation is slow in the present, it can be argued that foreign construction companies and financial institutions would be able to successfully invest in PPP projects in Korea with the help of local players.