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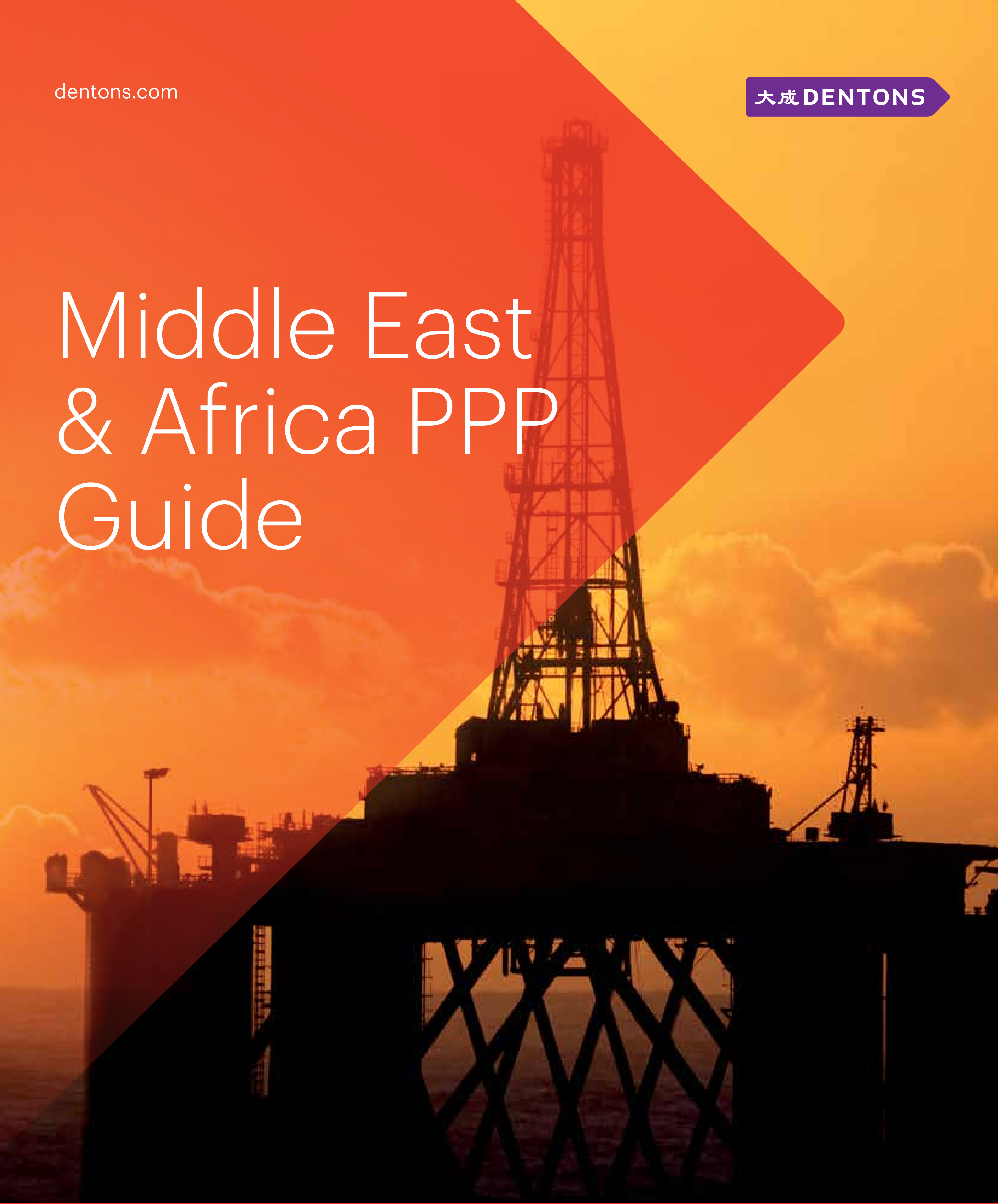
Middle East & Africa PPP Guide



The emergence of Public-Private Partnerships (PPPs) in the Middle East and Africa

May 2018

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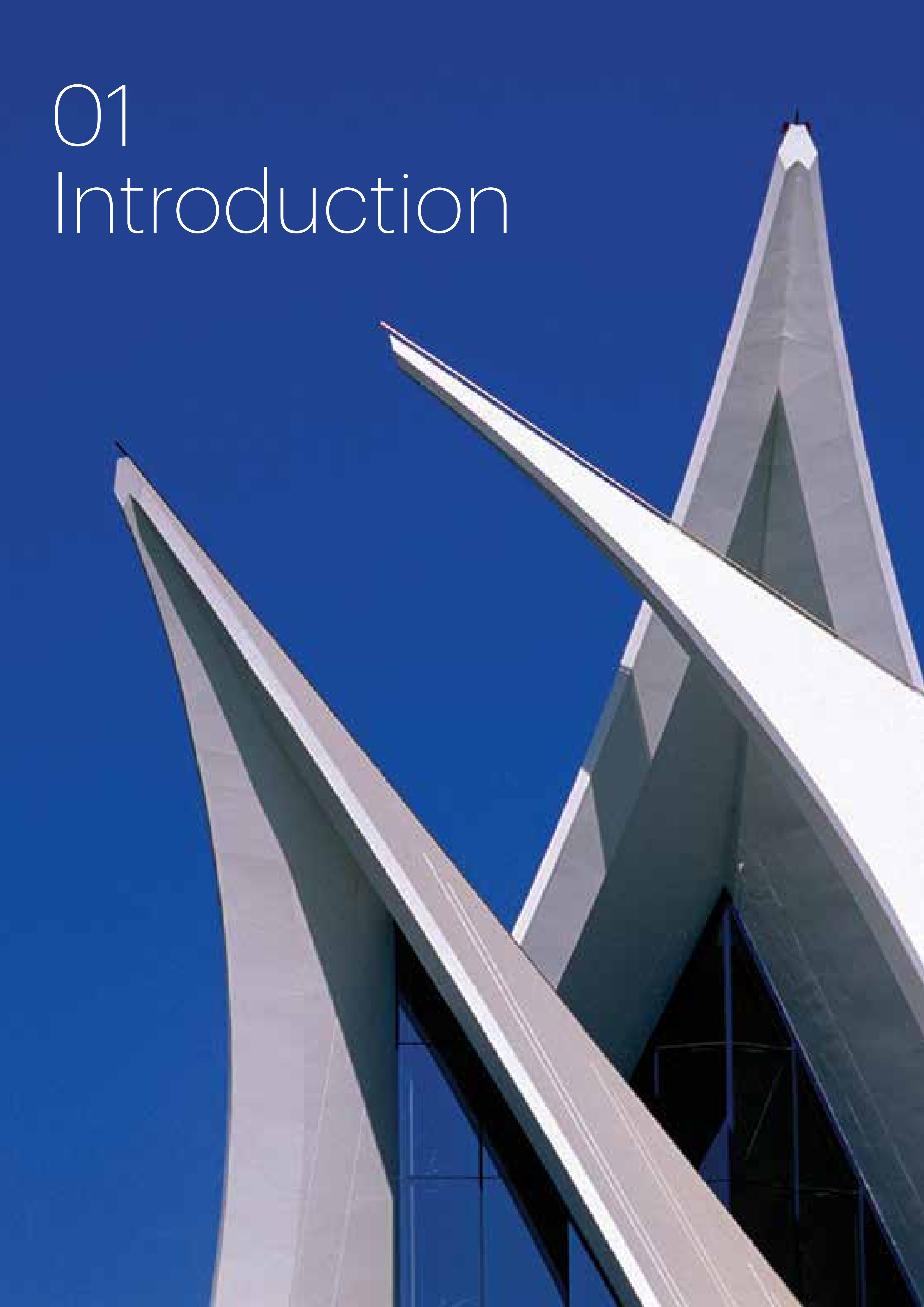
01
Introduction



The purpose of this article is to analyse and summarise the emergence of the public-private partnership (PPP) model in the Middle East context (with a focus on the Gulf Cooperation Council (consisting of Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates) (GCC)) and also in the context of selected emerging markets in Africa that have recently looked to introduce the PPP model. Although Governments and the private sector have a history of working together to procure energy, infrastructure and other projects in these regions, they have largely done so in the absence of codified or other clear PPP legal frameworks of the kind seen in more developed jurisdictions.

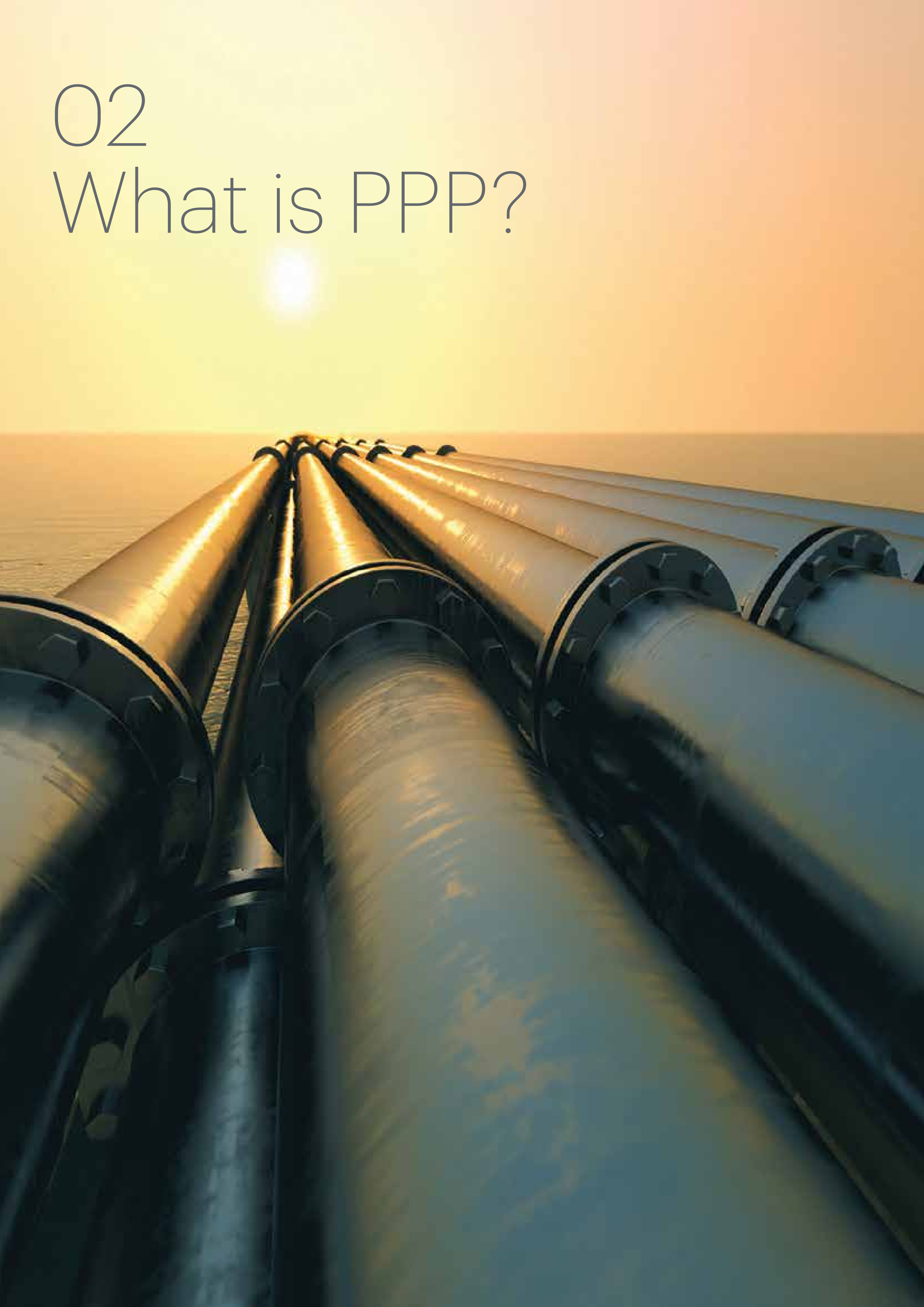
With oil prices continuing to stall and without any obvious signs of recovery, and with fiscal deficits beginning to be seen across the region, Governments in the GCC are looking to step away from their traditional reliance on oil revenues and sovereign reserves in order to continue with their ambitious plans for development. Populations continue to grow and require more sophisticated infrastructure and services, and increasing industrialisation and the recognition of the need for economic diversification all mean that the GCC nations are, like many others, looking to new methods of financing projects. Likewise in Africa, population growth remains staggeringly high and a continuation of budgetary limitations for Governments also means that alterative methods for funding infrastructure and services needs must be found. It is becoming apparent that PPPs lie at the forefront of such alternative methods.

In order to implement this change in direction, certain of the jurisdictions in the GCC and Africa already have, and other jurisdictions are in the process of developing, viable PPP legal frameworks. The rationale for this is not only to provide legal certainty for foreign investors who may be hesitant to invest heavily in markets with under-developed legal systems, but to set out clear boundaries in relation to matters which are important to all project parties, such as risk allocation and mitigation.

This article provides a brief introductory overview of the PPP model generally, its history in the GCC and selected jurisdictions in Africa, challenges which are inherent in its successful implementation and a summary of the implementation of PPP legal frameworks within the GCC and selected jurisdictions in Africa. What will become clear is that although each jurisdiction is at a different stage of developing its own PPP legal framework, there is a distinct political will and necessity to embrace the PPP model which has been largely successful in the wider international projects market.

Reference in this article to "projects" or "PPP projects" (which terms are used interchangeably) are not intended, unless otherwise specified, to be a reference to projects in any particular sector. The broad principles explored in this article can, by and large, be applied to infrastructure, transportation, energy, education, healthcare and other sectors. Likewise, references to "Governments" are intended to mean the relevant Government and/or the relevant procuring Government entities.

02
What is PPP?



The term "public-private partnership" does not have a particular legal meaning per se. It can be used to describe a wide variety of arrangements involving the public and private sectors working together in some way. It is therefore necessary to be very clear about why the public sector is looking to partner with the private sector, what forms of PPP they have in mind, and how they should articulate this complex concept.

Among the key rationale for the use of the PPP model in the context of projects are the following:

a. the utilisation of private sector capital and expertise for the efficient procurement of Government projects;

b. more certainty for project delivery timelines and budgets;

c. the sharing and allocation of risk as between the Government and the private sector parties, to that party best placed to manage such risks; and

d. the easing of Governments' balance sheets and the freeing of capital to be directed towards other needs.

As the name suggests, PPPs are considered a partnership (in the broadest sense) between Governments and the private sector, not a divestment of responsibility. While the Government retains overall responsibility for delivering the particular service, the means and responsibility for such delivery are passed to the private sector. The Government retains control over the means of delivery by way of intricate and detailed payment and performance mechanisms.

The following table compares certain key elements of projects procured using traditional methods, to those procured using the PPP model:

Traditional method	PPP method
Government awards contract to private sector parties.	Government awards contract to private sector parties.
Government pays private sector parties by milestones or upon completion.	Private sector parties arrange upfront financing of the project.
Government responsible for operation and maintenance.	Private sector parties responsible for construction, operation and maintenance for fixed period, e.g. 25 years.
Private sector parties walk away on completion.	Concessionaire recoups upfront costs and makes profit.
Government takes majority of building and operations risk.	Private sector parties incentivised to achieve standards, otherwise penalised.

There is no single or 'standard' form of PPP project or structure.

A PPP project can essentially take whatever form the parties desire in order to meet the objectives of the project in question. However, a few of the more common forms implemented include the following:

a. Build-operate-and-transfer (BOT) – the private party usually undertakes the designing, building and financing of the relevant facility. Once completed, the private party then carries out the operation and maintenance of the facility during which times it is allowed to charge facility users appropriate tolls, fees, rentals and charges not exceeding those proposed in its bid or as negotiated and incorporated in the relevant contracts with the Government. The facility is transferred to the Government at the end of the fixed term; these are sometimes referred to as "DBFO(T)" projects.

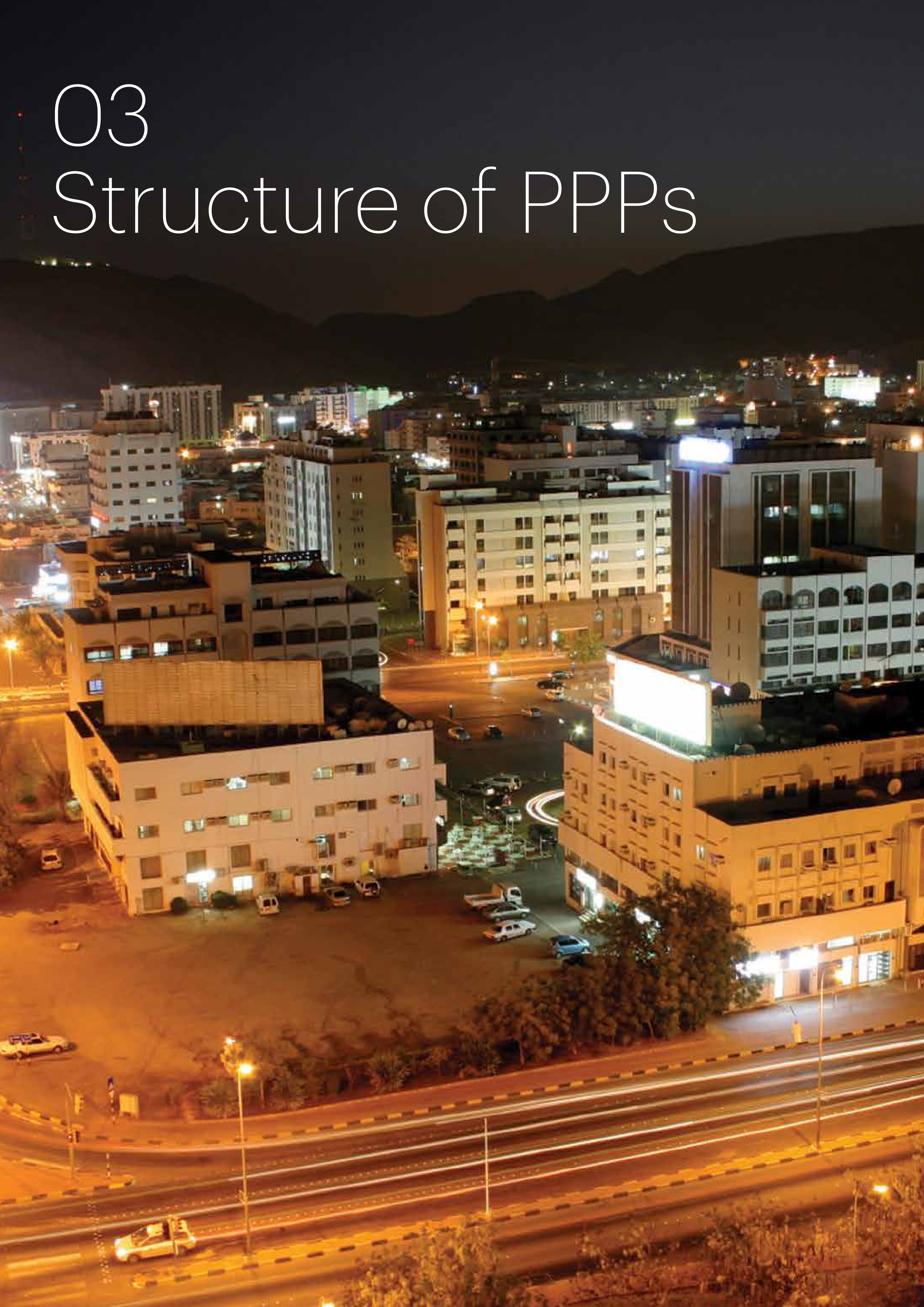
b. Build-own-and-operate (BOO) – this is similar to the BOT arrangement, although the private parties retain ownership of the facility at the end of the fixed term.

c. Build-transfer-and-operate (BTO) – this is another variation of the BTO arrangement whereby title to the facility is transferred to the Government, whilst the private parties retain the right to operate and maintain the facility on behalf of the Government.

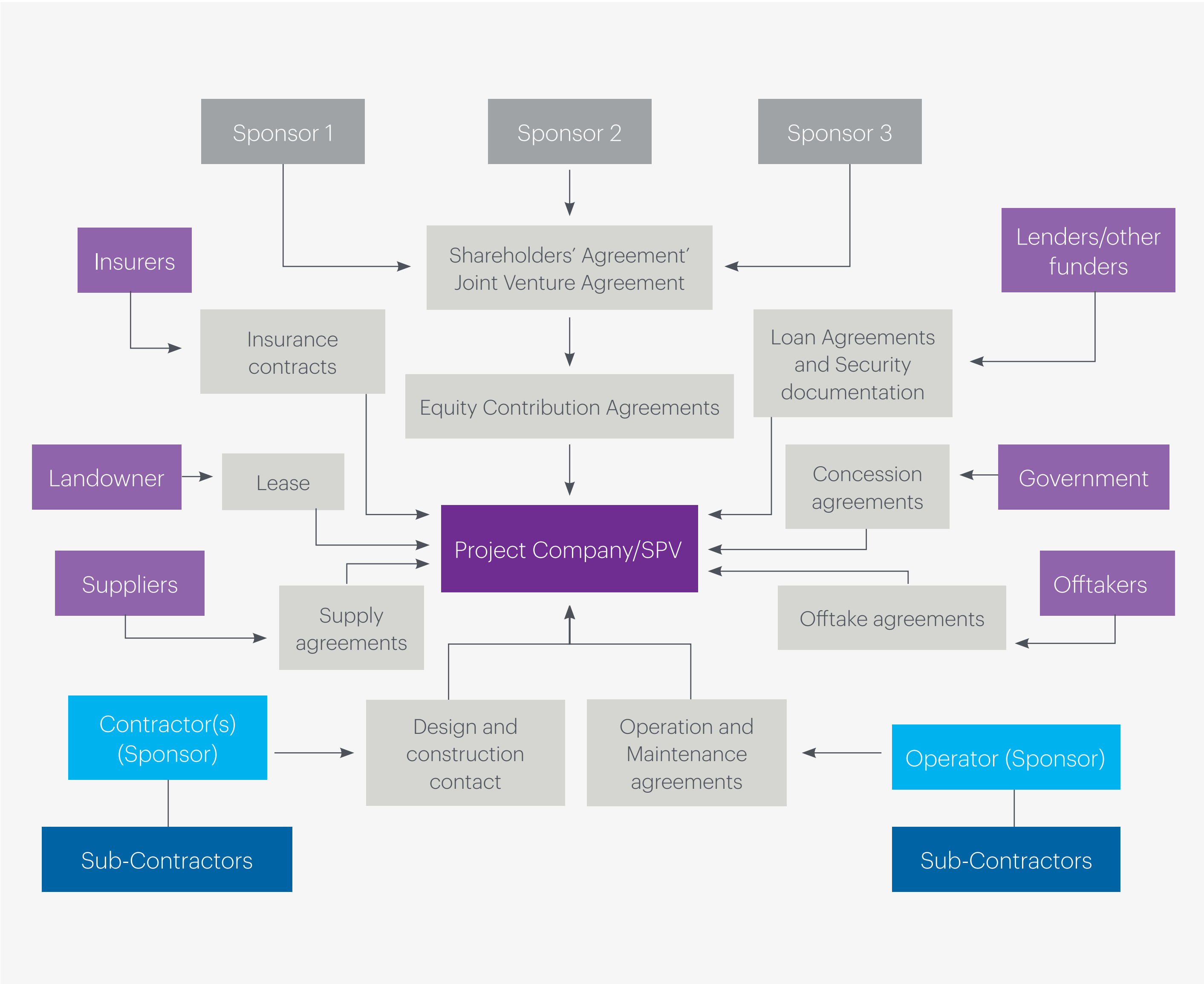
d. Rehabilitate-operate-transfer (ROT) – this is similar to the BTO arrangement; however, it involves the rehabilitation or upgrade of an existing facility rather than construction of a new facility. Following rehabilitation or upgrade, the concessionaire operates the facility in the same way as a BOT and then transfers it back to Government at the end of the agreed period.

e. Lease – this is a model whereby a Government entity leases a public facility or land to a private party. The private party is usually only required to operate a facility or develop land. The private party is required to pay the Government leasing fees and its own revenue stream is user-pay charges.

03
Structure of PPPs



The diagram below sets out the key parties and contracts in a typical PPP project. Note that not all of these parties and contracts will necessarily appear in all PPP projects, depending on the parties involved, project sector, jurisdiction etc. – this diagram is by way of illustration only of what is common/typical.



An in-depth discussion on the role of each party in a PPP project is beyond the remit of this article. However, in order to better understand the purpose and objectives of PPP projects, it is helpful to understand the broad role of the major parties and documents in a typical PPP project. These are:

Government

The Government, as the procurer of the project, is obviously a very central figure in any PPP arrangement. The contract which underpins the relationship between Government and the private parties (which usually act through a special purpose vehicle or special purpose company (SPV) incorporated by the sponsor(s)) is usually a Concession Agreement and/or an Offtake Agreement. A Concession Agreement would be used, for example, in a road project, and sets out the rights, responsibilities and risk allocation for each party and will also set out the basis upon which the SPV will generate its revenues (usually either through availability payments from the Government or the right to charge tolls for use of the road). An Offtake Agreement would be used, for example, for an energy project, and is a long-term agreement whereby the Government entity agrees to make payments to the SPV over the life of the contract for the relevant output such as water or electricity (usually through capacity and output payments).

As the Government has a strong interest in delivery of the project, on time and to the requisite standard, it is common for it to have step-in rights under the relevant agreement(s) in the event the project is not implemented correctly. These step-in rights supplement various other performance controls and penalties agreed between the parties.

Generally speaking, it will also be the Government which is responsible for procuring the project site which would be leased or licensed to the SPV for the period of construction and operation.

Private parties/sponsors

The sponsor(s), acting through an SPV, is the Government's main, and usually only, counterparty to the Concession Agreement and/or Offtake Agreement (although the lenders will usually have an indirect interest through a direct agreement). The SPV bears responsibility for the design, financing, construction, operation and maintenance of the project, although, apart from financing, many of such responsibilities are commonly passed down to contractors and operators (who are often the sponsor(s) themselves or their affiliates) and/or their subcontractors. The SPV is remunerated as set out above.

Lenders

The lenders to the SPV play a critical role in any PPP project. The ability for the lenders to be repaid lies almost exclusively with the success or failure of the project. It is for this reason that the lenders are intimately involved with all aspects of project negotiations and risk allocation. For example, the lenders would need to be comfortable that the Concession Agreement and/or Offtake Agreement is in sufficient form, as it is the SPV's revenue pursuant to such documents which will dictate the ability of the SPV to repay its loan facilities with the lenders.

Part of lenders' recourse usually includes step-in rights in the event the SPV is unable to carry out the project as envisaged. Lenders will also take security over all of the assets of the SPV/project.

04
Risk Allocation in PPPs

In order to help understand one of the key rationale for employing the PPP model (allocation of risk to the party best able to manage it) it is useful to identify some of the key risks in PPP projects. The following are some of the key risks which must be managed in PPPs, how such risks can be mitigated and which party, generally, has the particular risk allocated to it. Depending on the project sector, there may be different risks which are relevant; however, the following are some of the more generic risks which can be applied in some form to most PPP projects:

1. Completion Risk – this is the risk that the project is delayed and does not reach the commissioning stage within the prescribed timeframes. This is of particular importance where the facility is being procured to meet an urgent need for the relevant procuring entity. This risk is typically allocated to the private party with exceptions for where the delay is not attributable to the action or inaction of the private party (for example, due to force majeure or Government variations). This risk is commonly mitigated through the requirement to provide construction bonds/guarantees, insurances (where such risk is insurable) and delay liquidated damages.

2. Force Majeure Risk – this is the risk of occurrence of events beyond the control of both parties and which prevents either party from performing its obligations. This risk is generally shared between the parties; however, to the extent any such risks are capable of being insured against, they are often excluded from the list of force majeure events.

3. Market Demand or Volume Risk – this risk relates to a situation where the forecast demand for use of a particular facility (or the outputs of a facility) is not met. This is a common risk, for example in relation to toll roads, where alternative roads or methods of transport can act to reduce demand for the toll road. The allocation of this risk will often depend on the revenue model for the project. Where the private parties' revenue is based around user-pays charges (such as toll charges for a road), this risk is usually allocated to the private party. However, where the revenue model is on the basis of availability payments, the risk lies with the Government as it is required to continue making payments so long as the facility is operational (at appropriate standards).

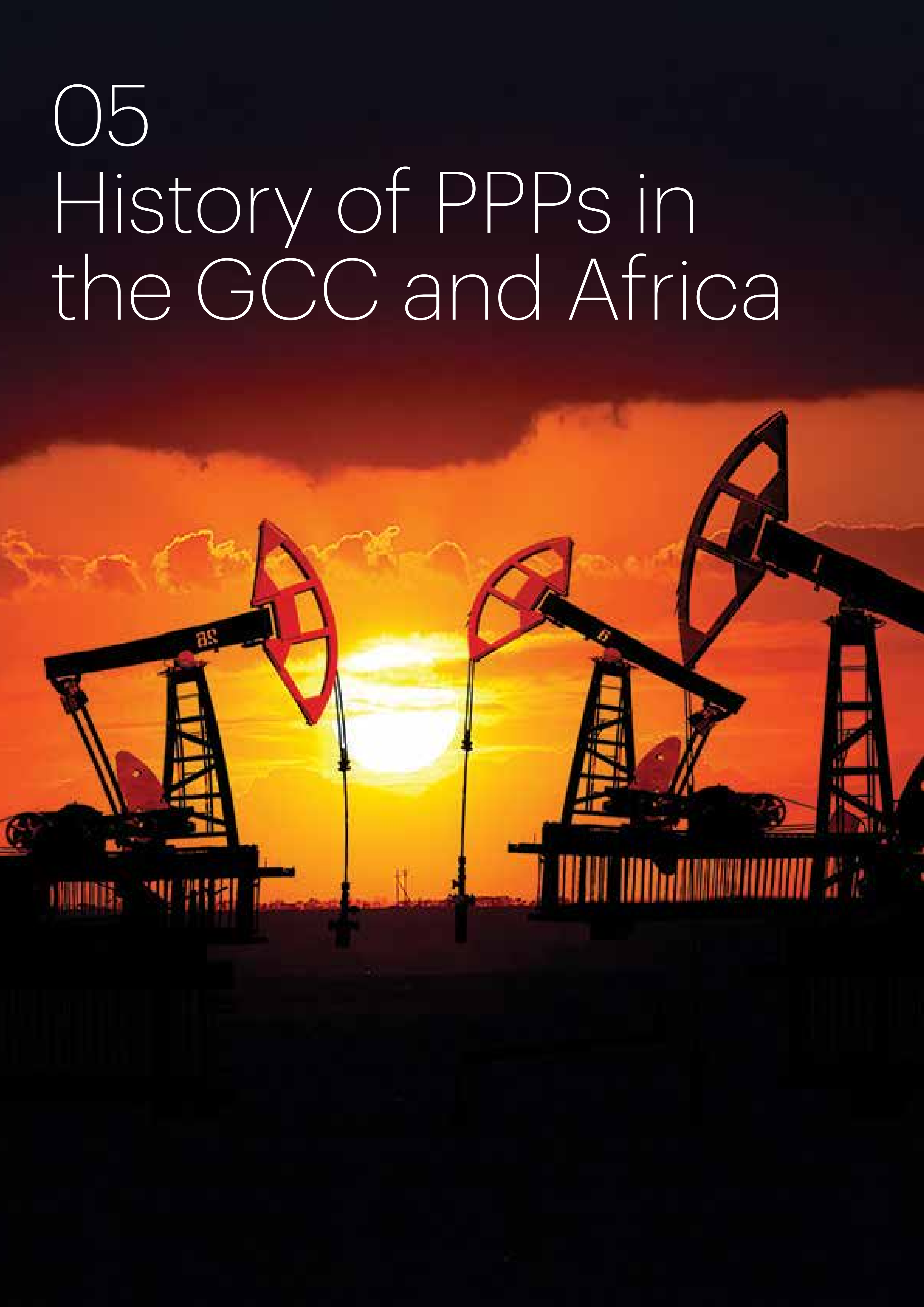
4. Design/Output – this relates to the risk that the capacity or output or performance of the project facility may not meet the agreed design criteria or project specifications. This risk is typically allocated to the private party and can be mitigated through a clear regime in the Concession/Offtake Agreement setting out the required technical parameters (or minimum functional specifications) and performance criteria or standards and a detailed oversight/monitoring mechanism and penalty regimes for failure to meet such parameters, criteria and standards.

5. Finance Risks – that is the availability of financing to develop a project, interest rates, inflation and foreign exchange risks are usually allocated to the private party, although in some emergency markets with a non-transferable currency, the foreign exchange risk (or a part of it) will be assumed by the Government.

6. Cost Overrun Risk – this risk relates to the cost of a project overrunning projected amounts and is firmly allocated to the private party. The private party will usually seek to substantially mitigate this risk by arranging a fixed price lump sum construction contract.

7. Political Risk – this risk is of particular importance in the GCC and Africa. It relates to the taking of action by a Government which negatively impacts on a private parties' ability to complete and/or operate a project. It generally covers matters including acts of war or other conflict, the imposition of sanctions, blockades or embargoes and failures to issue or of renew consents required for a project. To the extent the loss or inability to perform obligations is due to the actions of the Government, the risk lies with the Government.

05
History of PPPs in the GCC and Africa



Although the concept of a prescriptive PPP legal framework is relatively new for most GCC countries, most have a long history of implementing (or attempting to implement) projects using the PPP model and applying PPP principles.

The pioneering project using the PPP model in the GCC was the Al-Manah independent power project (IPP) in Oman in 1994. This was followed by Abu Dhabi's Taweelah A-2 IPP and the Ajman Wastewater Project which reached financial close in 2003. Over time, these became forerunners for strong PPP models utilised by the Abu Dhabi Water and Electricity Authority and Oman Power and Water Procurement Company and other major utility authorities in the region for their power and water infrastructure needs.

Other notable examples include the Prince Muhammad Bin Abdulaziz International Airport (Medina) project which the Civil Aviation Authority of Saudi Arabia closed in 2012. Kuwait closed the Az-Zour North IWPP phase 1 project in 2014 and the project was a forerunner to amendments in Kuwait's PPP law (discussed below).

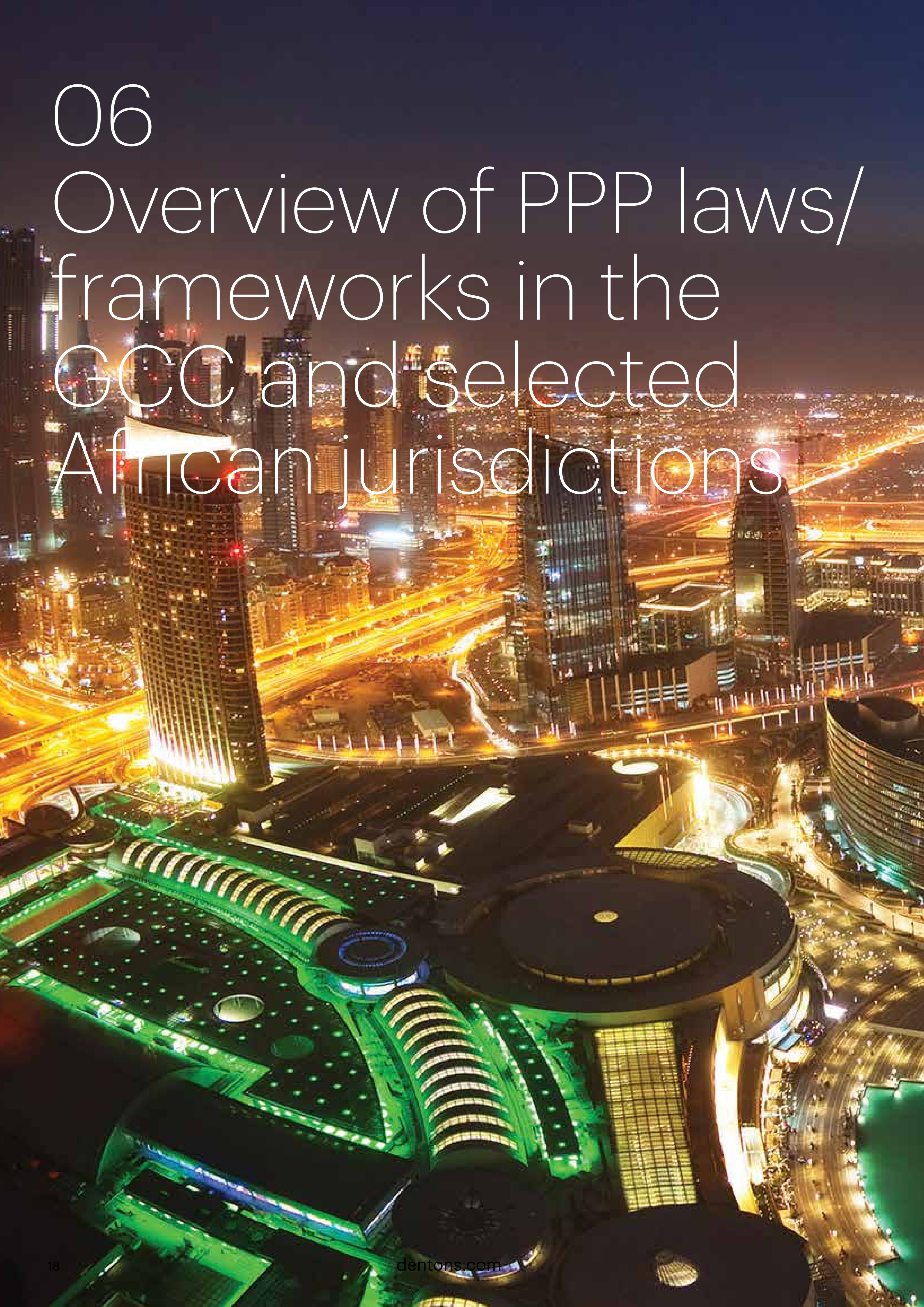
Success of the PPP initiative has also been seen outside the heavyweight energy and infrastructure sectors. In the housing sector, Bahrain has recently finalised plans for the Bahrain social housing project which will house a reported 50,000 on waitlists for affordable housing. The Zayed and Paris Sorbonne university projects in Abu Dhabi were hailed as landmark PPP projects in the UAE for the education sector.

For all the successes the PPP model has had in the GCC, there has also been a fair share of failures and extensive delays which has meant there does exist some scepticism towards the model. This includes the Landbridge project in Saudi Arabia which was originally touted to be completed under the PPP model, but now appears set to proceed as a state-funded project after failing to reach financial close. The Mafraq-Ghweifat highway from Abu Dhabi to Saudi Arabia was also initially envisaged to follow the PPP model. The project was reported to have been cancelled due to teething issues such as high bid costs, unfamiliarity with the PPP structure and the comparatively high cost of private sector finance.

In Africa, perhaps unsurprisingly, South Africa has led the way with a successfully implemented PPP programme. It began regulating PPPs in 2000 and has since successfully closed a large number of PPP projects across all sectors. Highlights include the N4 toll road from Witibank to Maputo in Mozambique in 1997, the Inkosi Albert Luthuli Hospital project in 2001 and the Gautrain Rapid Rail Link project in Johannesburg.

Elsewhere in Africa, the PPP model has successfully rolled out in Kenya across various sectors. Early success includes the Jomo Kenyatta International Airport Cargo Terminal in Nairobi and the Mombasa Grain Terminal both in 1998, the Malindi Water Utility in 1999 and the Kenya-Uganda Railway project in 2006. In Uganda, the Uganda-Kenya rail project from Mombasa to Kampala was considered a landmark rail project for Africa when it closed in 2006, although it later ran into significant troubles. The similarly controversial 250MW Bujagali Hydropower Plant at the Bujagali Falls Dam was the first large hydropower PPP project seen in Africa.

In Nigeria, early projects to launch under the PPP model included the controversial Murtala Muhammed Domestic Airport project in Lagos, the Tinapa business and leisure resort in Cross Rivers State and numerous port terminal concessions have also been granted. However, there have been a number of failed PPPs, including most notably the Lagos-Ibadan expressway project.



06 Overview of PPP laws/ frameworks in the GCC and selected African jurisdictions

6.1. Dubai

On 20 September 2015, Dubai passed a new PPP law, Law No. 22 of 2015 (Dubai PPP Law). The Dubai PPP Law came into force on 19 November 2015 and will facilitate greater collaboration between the public sector and private sector parties looking to do business in the projects space in Dubai.

The Dubai PPP Law is the first piece of legislation in the UAE (either at Federal or Emirate level) dealing specifically with PPPs. It represents an intention to seriously implement a major deviation from Dubai's traditional use of self-funding to procure major infrastructure and energy projects. Dubai is less dependent on hydrocarbon revenues than its neighbours; however, it is no different in its willingness to utilise private sector resources in times of fiscal restraint. With Dubai being the host city for EXPO 2020, it is anticipated that new infrastructure demands will increase exponentially in the coming years, as will energy and other needs. In implementing the new regime, Dubai will certainly be able to benefit from a considerable amount of that global experience due to the multicultural nature of its professional population, which will include those with PPP experience from their home jurisdictions.

The aims of the new Dubai PPP Law are stated to include regulating the partnership between the private and public sectors, procuring the best services at the best prices, increasing productivity, improving the quality of public services and transferring knowledge and experience from the private sector to the public sector, with a focus on UAE nationals. Explicit reference is also made to mitigating the financing burdens on the general budget of the Dubai Government and minimising financial risks to the Dubai Government.

The Dubai PPP Law contains a framework for the tendering and awarding of PPP projects, but we anticipate much of the detail required will be included in the implementing regulations that are yet to be issued. It is hoped that the regulations will address certain key issues which are uncertain and which will need to be addressed or clarified to boost investor confidence. To name a few such issues: the law is silent on the availability of Government guarantees for performance and payment, the requirements for capitalisation of the SPV and any local/foreign ownership restriction for the relevant SPV.

A procedure for fair and transparent tendering and the award of PPP projects is set out in the new Dubai PPP Law. One point of interest is that if only one or no compliant bids are received, or if the project turns out to be more expensive than anticipated or if it is in the public interest to do so, the government entity is entitled to cancel the tender process. The law clearly states that no compensation for bid costs will be payable in such circumstances, a point which potential bidders will need to be mindful of.

A further point to note is that article 14C of the new Dubai PPP law would seem to suggest that the Government may contract directly with a private sector company proposing a PPP structure, without going through a tender process at all. We anticipate more detail will be made available about the tender process (and the law in general) in the implementing regulations to be published in due course.

In summary, whilst it is still early days for 'official' PPPs in Dubai, the intentions of the Dubai Government are clear. There is every expectation that projects will be announced in the coming months, representing a major new opportunity for developers, investors and financiers.

It is to be noted that the Dubai PPP Law obviously only relates to projects by the Dubai Government. It remains to be seen whether other Emirates or the Federal Government follow suit.

6.2. Kuwait

In an attempt to rectify shortcomings in Kuwait's pioneering PPP law, the PPP law (Law No. 7 of 2008) (Old Kuwait PPP Law), and in order to further modernise and align its PPP law with international standards, Kuwait has introduced updated PPP legislation by way of Law No. 116 of 2014 (New Kuwait PPP Law).

From a structural and governance perspective, the New Kuwait PPP Law provides for the establishment of two new bodies:

a. Higher Committee for Public Private Partnerships (Higher Committee) – mandated with, among other things, approving entry into projects using the PPP model, approving the allocation of real estate for PPP projects, approving feasibility studies and deterring attempts by Government entities to terminate PPP projects in the public interest, the Higher Committee will be a key player in any PPP in Kuwait.

b. Kuwait Authority for Partnership Projects (KAPP) – the KAPP replaces the Partnerships Technical Bureau and sits under the Higher Committee. The KAPP's mandate includes establishing public joint stock companies to execute PPP projects, assisting the Higher Committee with assessing feasibility studies, developing contracts and other templates to be used for PPP projects and submitting recommendations to the Higher Committee and following up on the execution of PPP projects.

The key reforms in the New Kuwait PPP Law are set out in the following table:

Old Kuwait PPP Law	New Kuwait PPP Law
Prohibited mortgages on project company assets and limited assignment rights and limited direct agreements.	Permits security over project contracts and assets and share pledges with approval of the PPP Higher Committee.
PPP Higher Committee for Projects with limited power.	New PPP Higher Committee replacing provisions with, amongst others, power to approve procurement of PPP projects, power to approve feasibility studies for projects, land allocation requests.
Partnerships Technical Bureau, old public authority given responsibility for implementing Kuwait PPP projects. No power to incorporate companies to perform PPP projects.	New authority, Kuwait for Partnership Projects, replaced Partnerships Technical Bureau. Greater authority although largely same staff and assets. Overseen by PPP Higher Committee. Power to establish companies for performance of PPP projects. Also powers to assess feasibility studies for PPP projects and developing contract templates.
Restrictions on foreign companies owning project companies.	Project companies can be foreign owned.
More complex approach for establishing project companies.	Addresses issues around timing and responsibility for incorporation.
Restrictions on being able to negotiate PPP agreements and amend PPP agreements during project term.	Permits negotiation of contractual terms and allows amendments to PPP agreements during project term.
Uncertainty around term of usufruct agreements.	Clear that usufruct period to equal investment period.

In addition to the reforms set out in the table above, the New Kuwait PPP Law allows for key new incentives not provided for under the Old Kuwait PPP Law. These include targeted tax exemptions for foreign investors, exemptions from certain customs duties and relaxation of foreign ownership requirements.

The New Kuwait PPP Law heralds a positive step in the right direction for PPP projects in Kuwait. By remodelling the regime which existed under the Old Kuwait PPP Law so soon (relatively) after coming into existence, the Government of Kuwait has clearly signalled open-mindedness to continue developing its PPP laws to align them with international standards and make foreign investment into Kuwait more attractive.

6.3. Oman

Although Oman has a proven track record for utilising private sector expertise and finance in procuring projects (most notably IPPs and IWPs), the flailing oil market has encouraged it too to divert attention to establishing a focused PPP model in the Sultanate. The establishment of the new PPP model is part of the Government's five-year plan to encourage PPPs. Although little is so far known about the direction which this plan will take, the Government has appointed advisers tasked with developing a legal framework for the procurement of PPPs, with a first draft of the PPP legal framework expected to be delivered within the first half of 2016.

Although the formulation of the PPP legal framework in Oman remains to be seen, it is hoped that not only will it build on the experience of other members of the GCC and the wider Middle East region, but it will represent a stable framework for foreign investors used to operating in a well-developed international PPP market.

6.4. Qatar

While to date there have been no PPPs in Qatar, outside the power and water sector, the benefit of employing this type of procurement has been recognised by the Qatari Government. A report on the subject was prepared for the Qatar Ministry of Economy and Finance and the Qatar Financial Centre Authority in February 2012. Further, it is recognised that while Qatar was not required to invest in PPPs due to a lack of government liquidity, risk sharing inherent in this type of procurement provides an incentive for strong performance. Indeed, the Qatar National Development Strategy for 2011-2016 (published in March 2011) expressly stated that, in light of the construction in the lead-up to the 2022 FIFA World Cup, PPP procurement should be considered within the public investment framework and would be of benefit to certain projects.

Notwithstanding this, Qatar is yet to make any significant advancements towards PPP procurement. Qatar currently maintains a strong fiscal outlook (as compared to other jurisdictions in the Middle East) as a result of large oil reserves. However, given the significant value of projects associated with the 2022 FIFA World Cup and the Qatar 2030 Vision, combined with increasing pressure on the country's capital, the Qatari Government may consider following the UAE and seek to implement similar measures to ensure greater risk sharing across infrastructure projects.

6.5. Kingdom of Saudi Arabia (KSA)

Although KSA has long implemented informal PPP projects across various sectors, there are currently no local laws in KSA that specifically govern PPPs. The PPP tender process operates under the KSA Procurement Law in the same way that typical procurements do. That being said, in light of the well-documented fiscal struggles being faced by KSA due to declining oil prices, it remains to be seen whether KSA will more formally embrace PPPs by implementing some form of PPP legal framework.

According to a report in a recent edition of the Middle East Economic Digest (November 2015), the Kingdom is planning to ramp up its PPP projects pipeline and has already released an RFP (request for proposals) for the Taif airport scheme.

6.6. Bahrain

Bahrain does not have a dedicated PPP law, per se. However, the Government did enact legislative decree No. 41, "With Respect to Policies and Guidelines of Privatization" in 2002. This legislation deals largely with privatisation in general but does not specifically apply to PPPs in the mould of, for example, the Dubai and Kuwait regimes.

6.7. Uganda

In July 2014, Uganda joined the list of African countries that have implemented Public Private Partnership or "PPP" laws, by passing the Public Private Partnership Bill 2012 (Uganda PPP Law). As in many African countries, improving Uganda's infrastructure is seen as a key step in unlocking its economic potential. To address this, Uganda has identified a robust pipeline of road, power and social infrastructure projects which offer significant opportunities to both sponsors and lenders.

The Uganda PPP Law adopts a simple approach. It focuses on establishing the framework for a successful PPP programme – it is not over-prescriptive and allows for various structures. This should provide comfort to both potential lenders and sponsors seeking a degree of certainty over process.

The Uganda PPP Law charges the Ministry of Finance with setting up a central PPP unit which will be a useful source of information and to address "deal breaking" issues which can arise where the public sector lacks the requisite expertise. Its remit includes providing guidance and assistance in the development of projects. It will "assess projects for [PPPs] to confirm that they are affordable and that financial commitments are manageable in terms of the debt management policy and that they are within the Government policies". This may be useful for potential investors concerned about affordability or viability. Its role also extends to advising Government on PPPs and training public sector staff on PPPs.

The Uganda PPP Law sets out a detailed procurement cycle process. It also sets out rules on evaluation, disqualification and oversight. In addition, PPP agreements above a threshold monetary value must be approved by the Cabinet.

The Uganda PPP Law also sets out what a PPP agreement must cover. This comprises a list of clauses and risk allocations that an investor or lender would expect to see in any PPP agreement to ensure "bankability". It does not prescribe the drafting of these terms, but the Government may issue more detailed guidance on contractual terms in the future.

The Uganda PPP Law, now separated from general procurement requirements, provides for both competitive (open or restrictive) and non-competitive bidding methods. The latter could involve direct procurement by the Government or (subject to satisfying specified criteria) unsolicited bids from sponsors. However, even where an unsolicited bid is accepted, the proposal remains subject to a competitive bidding process in which "all interested parties" may participate.

Any procurement must be fair, equitable, transparent and competitive, an important and familiar principle in PPP. The successful bid must be "the most economically advantageous, or [have] the lowest price". The key requirement of the Uganda PPP Law is that the proposed project "fulfils the objectives of the National Development Plan".

6.8. Tanzania

Although the PPP model has been utilised in Tanzania for many years in areas such as healthcare, education and water, a lack of a clear legal PPP framework in the country prevented the propulsion of a much needed PPP programme. In 2009 the Prime Minister issued a National Public Private Partnership Policy which culminated in the introduction of the Public Private Partnership Act No. 18 of 2010 (Tanzania PPP Law). The following year, the Public Private Partnership Regulations were published pursuant to the Tanzania PPP Law. In 2014 certain amendments were made to the Tanzania PPP Law by way of the PPP Amendment Act 2014 (2014 Amendments).

At the heart of the Tanzania PPP Law is the establishment of key Government agencies. These included:

a. The PPP Centre (which replaced the PPP Co-ordination Unit after the 2014 Amendments) – the PPP Centre is the first port of call for the vetting of PPP projects. It is charged with assessing potential PPP projects, procuring the approval of the Ministry of Finance and then submitting the project to the PPP Technical Committee once approved by the Ministry of Finance.

b. The PPP Technical Committee (which replaced the PPP Finance Unit after the 2014 Amendments) – this committee is made up of representatives from both the public and private sectors and is charged with approving PPP proposals submitted to it by the PPP Centre.

c. Contracting Authority – which would be the authority which contracts with the private sector (for example, as the counterparty to concession agreements).

A key feature of the Tanzania PPP Law which can be considered unique is the concept of providing for "solicited bids" and "unsolicited bids". The former relates to PPP projects where the Government has initiated the project, whereas the latter relates to projects initiated or proposed by the private sector.

The 2014 Amendments also provided for a new facilitation fund to be set up to further encourage PPP projects in the country. The key objective of the fund is to assist with launching PPP projects which are considered viable and necessary, but which may lack the necessary resources to launch.

6.9. Kenya

The Public Private Partnership Act No. 15 of 2013 (Kenya PPP Law) came into effect on 8 February 2013. It establishes the PPP Committee, the PPP Unit and the PPP Nodes, which play very similar roles as the PPP Centre, PPP Technical Committee and Contracting Authority respectively in Tanzania.

In line with the regime established in Tanzania, the Kenya PPP Law also provides for the private sector to propose/initiate projects and for the Public Private Partnership Project Facilitation Fund.

The Kenya PPP Law provides clear guidance that any project must clearly be needs tested, i.e., is a PPP the best model under which the relevant service can be provided? In addition, it sets out a clear regime pursuant to which PPP projects must be modelled. A PPP cannot be launched without a comprehensive feasibility study being tendered and a strict procurement process being adhered to. It is also required that the benefits of the project be publicised through an electronic media platform.

6.10. Nigeria

Nigeria's foray into the world of PPP regulation began with the Infrastructure Concession Regulatory Commission (Establishment) Act in 2005 (Nigeria PPP Law). Note that the Nigeria PPP Law is a Federal law – individual states are permitted to establish their own PPP laws and a number of them have done so. We focus here only on the Federal level.

The Nigeria PPP Law establishes the Infrastructure Concession Regulatory Commission (ICRC). The ICRC is the mainstay governmental entity in relation to PPPs and maintains overall responsibility of being the key liaison partner to the Federal Executive Council which is the body empowered with approving PPP projects in the country. The ICRC is charged with developing PPP guidelines and procedures and generally assisting with the successful implantation and facilitation of PPPs in Nigeria.

With a booming population and a thirst for new infrastructure and services to match, there were high hopes that the Nigeria PPP Law would be a launchpad for an extensive roll-out of PPP projects in the country. There have been a number of successful closures of PPPs in the country; however, the programme is firmly considered as being under development and far from a refined process. Political instability with frequent changes in Government and/or changes in heads of the relevant Ministries and, the overenthusiastic embracing of PPPs at the cost of properly understanding areas such as risk allocation have meant that PPPs are treated with some scepticism.

07
Challenges for PPPs in the GCC and Africa

For all the indications that a move towards greater use of the PPP model in the GCC and Africa is a big step in the right direction, it is without doubt that there will be various challenges for investors and Governments alike to be mindful of and to address going forward. A few of the key challenges are summarised in the following key categories:

Political

Although the "Arab Spring" and general civil unrest have been far less prevalent (and in some cases, non-existent) within the GCC than other parts of the Middle East, events in Bahrain in 2011 have shown that the GCC is not necessarily immune from political issues which could deter investors from partnering with Governments (and from generally investing in the GCC).

Aside from civil unrest, there are other elements within the wider political landscape which can hinder investor confidence in the region. These include a lack of transparency and accountability, risk of changes in laws and regulations, potential corruption and public perception in relation to the aforementioned. These issues (or, at least, perception of such issues) are particularly prevalent across Africa where allegations of corruption have plagued many projects, although investors who have experience in the region well understand such issues.

It has been noted that in certain jurisdictions there have been difficulties in selling the benefits of the PPP model to decision makers. For those in the GCC who are used to having the financial resources and liquidity to self-fund projects, it is no easy task to justify having to go through extensive tendering and procurement processes, to explain the intricacies of risk allocation and sharing and to understand the boundaries between the interests of the public and private sectors respectively.

Financial

At the heart of any investor's interest in projects is its ability to generate revenue, protect such revenue and be able to repatriate such revenue to its home jurisdiction. It will therefore be important that matters such as foreign exchange risk and transferability risk are adequately provided for in any PPP legal framework which is established. Governments will also need to strongly consider offering sovereign guarantees, bearing in mind investors' and lenders' long-term commitment to projects which can have a lifespan of 30+ years. In most countries, long-term PPP projects simply will not be bankable without such sovereign guarantees.

Also of importance is the need for "buyers" or "procurers" (in most case the Government or one of its entities) to have strong credit ratings, which is particularly relevant for projects where the revenue stream is based on availability payments (also referred to as "capacity payments" in energy projects). Availability payments are, generally, fixed payments which are periodically paid to the private party across the life of the Concession/Offtake Agreement. Such payments are distinct from user-pays revenues where the private party's revenue stream consists of payments received directly from a user of a facility (for example, a toll paid by the user of a toll road). Hence, in order for investors to be confident that they will be paid availability payments, buyers and procurers need to demonstrate low credit risk for the life of a project.

More so in the GCC, the availability of cheap debt finance for Governments, compared to what the private sector can obtain, may also present a challenge going forward although the current very low oil price may well change these dynamics during 2016.

Another issue of significance in some countries is the currency/foreign exchange risk where a country has insufficient foreign currency reserves to be able to price PPP projects in US Dollars and thereby cover the foreign exchange risk for foreign investors. Such countries will be forced to denominate their PPP liabilities in their local currencies which will mean the foreign investors will have to assume the foreign exchange risk of converting the income received into US Dollars (or other foreign currencies). Such a risk will make such projects far less attractive to international investors as it will typically not be bankable and will therefore have to be assumed by the project's sponsors. This problem has arisen most markedly in Egypt.

Legal

As set out above, although there are clear signs supporting the view that robust PPP legal frameworks are being looked at seriously within the GCC and in parts of Africa, we are some way away from being able to point towards legal frameworks which meet international standards. It is without doubt that there is general acceptance that operating within these regions carries certain legal risks. Despite this, in the case of PPPs, private investors will seek the comfort of sound legal platforms for PPPs when determining whether to partner with Governments and invest in a particular market.

It follows that in order for any PPP legal framework to be successfully implemented and serve the purpose of attracting investment and giving comfort, the framework will need to be robust and well thought out. Not only will the framework need to draw on the successes of tried and tested PPP jurisdictions internationally, but they will also need to allay jurisdiction-specific concerns which investors may have. As has been the case in Kuwait and Tanzania, Governments will need to be open-minded in their thinking and willing to reform frameworks where it is clear that they are failing to give investors the right comfort and incentives they require to invest.

The above can be achieved through various mechanisms. Examples include:

a. strict requirements for clarity, transparency and accountability in procurement/bidding processes;

b. the use of standard-form documentation, where possible, to reduce uncertainty for prospective investors; and

c. building a consistent track record of risk allocation in order that investors have the benefit of precedent in the relevant jurisdiction in relation to a particular issue.

08
Future prospects for PPP projects

There are good prospects for major projects across the GCC, the wider Middle East region and Africa, embracing the PPP structure, particularly in the roads, rail and renewable energy sectors, but with other sectors also showing promise due to the vast and varied needs of the different countries.

Rail projects are being implemented across the GCC at different levels: there are more urban transport projects coming online and there are several national railways planned and even cross-border rail is under consideration. A surge in rail investment is forecast, with the GCC countries supposedly ready to invest more than USD200 billion in rail projects across the region. Considering the fate of such rail projects historically, it is most likely that national rail projects will be bankable, with appropriate Government support. From the lenders' perspectives, cross-border projects present considerably more complexity and more risk and this has been a large part of the reason why certain large-scale rail projects have failed to close in the past.

Another promising opportunity across the region is in the renewable energy sector. Again, with the falling oil prices in the GCC and vast electricity shortages in Africa Governments are looking at the renewable energy market (and even the non-renewable energy market) with keen interest. Solar power is rapidly becoming cost-competitive across the world and is ideally suited to the GCC and African markets: plenty of sun and land space, coupled with a growing demand for electricity, which interestingly includes a peak during the daytime and is therefore well matched with solar power energy production. It would also permit hydrocarbon resources to be used increasingly for export or industrial diversification.

09 Conclusion

The PPP model in the GCC and the wider Africa region is clearly in its infancy in the context of how long it has been used around the world.

Although the concept of PPP projects, when simplified, appears to be a "win-win" for all parties involved, it has become clear that there is a process which emerging markets will need to undertake before the model can be as successful as it has been in other more sophisticated markets such as the UK, Canada, Australia and a number of European countries. As with most things new, the process will involve an element of trial and error until all stakeholders are comfortable that the model and its implementation are stable. Structural stability of the PPP legal framework has been identified by investors and lenders as being high on the agenda for renewing confidence in investment. So while new projects are constantly being announced and coming to market across the GCC and Africa, it would seem that those which are able to demonstrate a bedrock of a robust PPP framework and structure will be better placed to attract interest.

Despite the reservations which may exist, what is clear is that the PPP model is being widely embraced across the GCC and certain parts of Africa. In the current economic climate, there is a real appetite for the implementation of the model. As this article has shown, various jurisdictions have the PPP model at the forefront of their development agenda and, although not strictly necessary in order to enable the public and private sectors to partner with each other, various jurisdictions are making a serious attempt to implement meaningful PPP legal frameworks with an aim to give investors certainty and confidence. The experience in Tanzania and Kuwait, for example, where the respective PPP laws have already gone through one round of amendments/reform, illustrates a commitment from Governments to adapt to conditions and learn from mistakes of the past.

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- Euromoney's Guides to the World's Leading Project Finance Lawyers
- Chambers Global Guide to the World's Leading Lawyers
- Chambers Global Guide to the World's Leading Project Lawyers
- The Guide to the World's Leading Project Finance Lawyers
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CSBrand-9135 Middle East PPP Guide EN 03 — 15/05/2018