Boiler Plate Provisions

The Infrastructure and Law website of the World Bank presents a number of check-lists and annotated concession agreements and BOTs.

Infrastructure and Law website (UserID and password required; refer "Create account" for free access)
http://web.worldbank.org/external/default/secmain?theSitePK=4817374&pagePK=4710368&contentMDK=21759230&menuPK=5099523&piPK=64860384#sample)

In the following sub-sections, some explanation are provided for certain boiler plate provisions.

Liability and indemnification

Although most road project financing is done on a limited recourse basis, significant liabilities remain among the contractors and the project company that must be allocated among them. The principal contractual liabilities are for unforeseen costs that arise during construction of the road and damage caused to users or the environment once the road is opened. To the extent possible, the parties responsible for fulfilling a contract are usually required to take out insurance to cover damages caused within the scope of the contract. Beyond that, the construction contractor will typically indemnify the project company against damages that occur during construction as a result of the contractor's negligence or omissions under the contract. However, the construction contractor's liability is often capped at a certain percentage of the contract price. Once the road is operating, environmental harms and injury to road users becomes a significant concern. Thus the project company will often seek indemnity from the entities that operate and maintain the road for harm caused by deficient or negligent performance under the Operation and Maintenance contracts. This liability too is typically capped at a percentage of the Operation and Maintenance contract fee.

In cases where the state retains ownership of the road during operation, such as in a Build-Transfer-Operate contract, its protection from tort liability may serve to protect the project company and the contractors from excessive tort damages. Cost overruns and revenue shortfalls are usually dealt with in the contracts through provisions concerning performance, pricing and damages rather than liability and indemnification clauses.

Insurance

The project sponsors will procure all insurance coverage required by applicable law. In addition, the terms of the service agreement and the requirements of lenders often result in the need to obtain a broader portfolio of insurance policies and coverage. Finally, project sponsors may seek additional insurance coverage, such as political risk insurance, to protect their investment.

Before construction completion, the project company is typically required to obtain insurance relating to construction risks, (e.g., contractor's all-risks insurance, third party liability insurance, employer's liability insurance and completion delay insurance).

After construction completion, the project company typically is required to obtain insurance relating to operational risks, e.g., property and casualty insurance, third party liability insurance, business interruption insurance, employer's liability insurance.

The interests of the host government and the project company coincide: they as well as lenders desire to ensure that the project company will have sufficient financial resources, in case of material damage or harm to the project's construction or operations, to satisfy the project company's debt and other obligations.

Dispute resolution

By anticipating the eventuality that a dispute may arise, the parties to the project agreement as well as to the ancillary agreements entered into for the purpose of carrying out the project can ensure that disputes are settled in a fair and efficient manner. Given the web of interrelated contractual relationships involved in an infrastructure project, it may be useful to have some uniformity in the various project agrements on dispute resolution. This choice should however be made on the basis of the specific circumstances of each project.

Refer also to the Dispute resolution section in the Legislative Framework above and to Module 5 -> Amendments to Contracts and Dispute Resolution for description of constraints, tools and methods related to dispute resolution.

The least expensive way to resolve disputes is through direct negotiation. Conciliation and mediation, which amount to negotiation with a neutral third party to oversee and facilitate the discussions, are also cost-efficient. In conciliation the third party tries to bring together the parties to help them reconcile their difference whereas mediation goes further by allowing the mediator to suggest terms for the resolution of the dispute. If such efforts fail to resolve the dispute, there are two common methods for dispute resolution, each with distinct advantages and disadvantages.

Parties may choose either to defer to local ("host country") courts or, contractually agree to abide by the outcome of arbitration.

Host country courts should have a better understanding of local law and are therefore better placed to decide difficult points of law in complex litigation, when local law is the law governing the contract. Litigation in local courts, however, is generally disfavored in transactions involving parties from different jurisdictions. Arbitration is generally preferred to litigation in such cases because it provides for a neutral forum for the resolution of disputes. Moreover, arbitration is perceived to be less expensive and more efficient than litigation because the parties can to some extent choose arbitrators among experts in the area concerned by the dispute. Availability of international arbitration under applicable law is therefore a significant factor in encouraging participation by foreign private investors and lenders in a country's infrastructure development.

Agreements preferably will provide for arbitration under the auspices of an internationally recognized body of arbitral rules, such as the Internation Center for the Settlement of Investment Disputes, the International Court of Arbitration of the International Chamber of Commerce, or the United Nations Commission on International trade law

(UNCITRAL) arbitration rules for ad hoc arbitration. Some countries do not recognize third-party arbitration. The parties to the agreements and the lenders should check that any arbitration award will be enforceable (as a national court judgment) in the project's host country, as well as in the country where the award is rendered. Arbitration awards are generally enforceable in countries that are parties to the New York Convention on Recognition and Enforcement of Arbitral Awards. Also, private parties and lenders should require an effective waiver of sovereign immunity from the governmental party, if any, along with a supporting legal opinion from an independent local counsel confirming the efficacy of such a waiver.

Often, in developing countries which do not have judgment "reciprocity" with a given foreign country, foreign judgments will not be convertible by registration. Thus in certain countries such as Qatar, Oman, Colombia, Venezuela and Vietnam, for example, foreign judgments may not be directly enforced through the local courts without a rehearing on the merits, thereby defeating the purpose of selecting the venue of litigation in a foreign country through a contractual provision.

An effective dispute resolution clause reaches beyond the agreement and promotes the speedy and efficient resolution of disputes to maximize the chances for the success and bankability of the project. The availability of an international dispute resolution mechanism, coupled with an effective enforcement option, will encourage foreign investment and private participation within the host country.

MAIN INSTRUMENTS AND INSTITUTIONS RELATED TO INTERNATIONAL ARBITRATION

Instruments	Procedural rules	Enforcements rules	Institutional support
International Centre for Settlement of investment Disputes Convention and Center (a)	✔	✔	✔
Panama Convention and Inter-America Commercial Arbitration Commissions (b)	✔	✔	✔
International Chamber of Commerce rules and International Court of Arbitration (c)	✔		✔
New York Convention (d) United Nations Commission on International Trade Law Arbitration rules (for ad-hoc arbitrations)	✔		
Domestic law based on United Nations Commission on international Trade Law model law on international commercial arbitration	✔	✔	

Source: Irwin & Klein, 1998

Force Majeure

Force Majeure ("FM") literally means "greater force". A Force Majeure clause is meant to excuse a party from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the contract. Typically, force majeure clauses cover natural disasters or other "Acts of God", such as war or civil disturbances, or the failure of third parties -- such as suppliers and subcontractors -- to perform their obligations to the contracting party. It is important to remember that force majeure clauses are intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.

When negotiating a force majeure clause, one should ensure that it applies equally to all parties to the agreement. Also, it is helpful if the clause sets forth some cases of F.M. that will excuse performance under the contract, such as wars, natural disasters, and other major events that are clearly outside a party's control. Inclusion of examples will help to make clear the parties' intent that such clauses are not intended to apply to excuse failures to perform for reasons within the control of the parties. Typical Force Majeure events include:

- (i) natural disasters (earthquakes, hurricanes, floods);
- (ii) wars, riots or other major upheavals;
- (iii) performance failures of parties outside the control of the contracting party.

Such national calamities as earthquakes, cyclones, hurricanes, and floods often result in damage of infrastructure facilities. Huge additional investment is required to restore the damaged infrastructure and to restore the services to normal. Likewise when supplies cannot be delivered to the project site because of some strikes or other events outside the control of the parties, which cause additional delays and costs. The questions that arise are then to determine who is going to make up for the difference in cost and how will such cost be recovered?

This leads the parties to negotiate what falls within the definition of Force majeure and what does not, as well as the consequences of such an event when one does occur.

For example, disruptions in performance caused by one or more of the following may not necessarily be excused by a Force Majeure clause, depending on what the parties may have agreed:

- server failures,
- software glitches,
- disputes with land owners,
- government labor disputes.

In most cases, Force majeure clauses should include:

- A definition of the scales/events that would qualify as "Force Majeure", under natural disasters, which could include cyclones, earthquakes, floods etc.
- The authority to be responsible for identifying and assessing the damage.
- The procedure for assessment of additional investment requirements, demand projections, cost recovery calculations, etc. by the regulated entities
- The measures required to bring the system back in operation and minimize the recovery period
- The procedures for notification and suspension
- The roles and responsibilities/risk allocation.

The consequences of a force majeure event should be addressed in the risk allocation matrix (Module 2 - Risk) and be carefully negotiated.

Most importantly, if the failure to perform is due to a governmental intervention, then the agreement should address this intervention in the section dedicated to materially adverse governmental action, which should be separate from the Force Majeure clause. In order to preserve the coherence of risk allocation, different project documents should have "back-to-back", uniform Force Majeure clauses.

Assignability / Subcontracting

Subcontracting is a common element in PPPs, in particular when the project involves a very broad scope of work or requires very specific skills that can only be performed by specialized firms. However, since trust in one's partners and in their ability to perform work in a timely fashion is a high priority of such complex deals, there are often restrictions on bringing third parties into the project.

Generally the concession contract will call for the contracting authority to approve the project company's selection of contractors for design, construction, operation and maintenance of the road. Likewise, the project company will reserve the right to approve any subcontractor to the companies it selects to carry out the project.

The contractors will typically remain responsible for all performance obligations under its original contracts. The project company will also reserve rights to assume the contract between the contractor and subcontractor if problems arise during the deal. Assignments are generally permitted only with the permission of the beneficiary of the contract.

Confidentiality

Toll roads inherently involve a significant amount of proprietary technology and documentation for their design and operation. Therefore it is important to include confidentiality provisions in the project documents to protect the intellectual property rights of the respective parties.

The design, construction, and operation contracts in particular typically include provisions that the contractors will retain their intellectual property rights but will agree to license or lease such rights to the project company or other parties as is needed by the project - often free of charge. Parties will also frequently agree to keep all plans, records, or other commercially sensitive information confidential for the life of the project, with standard exceptions for disclosures required by governmental authorities or for the performance of other project documents.

Records and information sharing

Extensive documentation is a feature of any project finance deal and it is essential that information be managed efficiently. Each of the key project documents usually contains clauses on the maintenance of records and information sharing among the relevant parties to each project component.

Provision of adequate information is often a condition precedent to a downstream contractor's work, whereas insufficient or improper plans may excuse performance.

Standard contractual terms are that the contractor or concessionaire must retain all its records throughout and for a fixed period of time after the project and that such records are to be made available for review by the grantor or the project company. Notices are typically required to be given of key milestones, approvals, or the introduction of new participants to the project, including consultants, subcontractors, or assignees.