



PUBLIC-PRIVATE PARTNERSHIPS

Legal & Institutional Frameworks in Africa

A comparative analysis



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It was prepared by Andrea Stucchi, ALSF PPP Consultant. The ALSF team that worked on the Brochure was co-led by Maude Vallée and Primah Atugonza. Members of the core team included Shaina Salman and Cynthia Kankindi. The ALSF is also grateful to current colleagues, former colleagues, and interns for their involvement in this project, specifically for compiling and drafting the PPP Country Profiles. These current and former colleagues include Nicole Kearsse, Manuela Dieng, César Vamos Ver, Joël Sanon, Rajneesh Seeras, Hélène Nse-Eyene, Rita Madeira, Sarah Sameur, Sabine Yahante Patte, Hibo Beile, Damien Tanoh, Johannes Maronga, Ronald Chari, Hamidou Dramé, and Kevin Rugamba.

This Brochure was drafted by Andrea Stucchi and designed by Stéphanie Tailleux.

The data used in this Brochure is derived from the PPP Country Profiles, an online repository of information regarding the legal and institutional PPP frameworks of African countries. The PPP Country Profiles are the result of a collaboration between the ALSF and the World Bank’s Public Private Partnership Legal Resource Centre (PPPLRC). They are available on the ALSF’s website <https://www.alsf.int/countryprofiles> as well as PPPLRC’s website <https://ppp.worldbank.org/public-private-partnership>.

PPPLRC provides easy access to a wide range of sample legal materials. These materials can assist governments in planning, designing, and legal structuring of any infrastructure project, especially projects involving a PPP.



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Defined Terms

Contracting Authority - means a government entity that procures a PPP project and enters a PPP contract with a Private Partner.

Direct Agreement - means a tripartite agreement between the Contracting Authority, a Private Partner, and a Private Partner's lenders. This type of document is common in a project finance context. Lenders and Contracting Authorities typically enter into other tripartite/direct agreements with Private Partners and entities they contract with (e.g., a Private Partner's construction and operation/maintenance contractors).



PPP Legal and Institutional framework - consists of the policies, procedures, institutions, and rules that together define how PPPs will be identified, procured, monitored, and accounted for and who will be responsible for these tasks.

PPP or Public Private Partnership - in some instances, the Brochure refers to a PPP definition used in a particular jurisdiction. When this is not the case, in this Brochure, a PPP means a long-term contract between one or more Contracting Authorities and a Private Partner for providing a public asset or service in which the Private Partner bears significant risk and management responsibility and where remuneration may be linked to performance.

PPP Contract - means a long-term agreement entered between a Contracting Authority (or in some cases, Contracting Authorities) and a Private Partner, which governs and regulates the relationship between the parties in a PPP project.

PPP Project - means the underlying project, which is the subject of the PPP contract.

PPP Unit - means a specialised government entity within the structure of government that is responsible for facilitating PPP projects.

Private Partner - means the private sector entity that enters into the PPP contract with the Contracting Authority (often in the form of a special purpose vehicle).

Request for Proposals - means a request for proposal issued by a Contracting Authority, which includes the technical, financial, legal, and environmental and social requirements of a project, in response to which bidders submit proposals.

Step-in - means the government's or the lender's option to assume the contractual responsibilities of a project party through managing their contract in cases when that party is not meeting its obligations under such contract.

Unsolicited Proposal - means a proposal made by a private party to undertake a PPP project, submitted at the initiative of the private party, rather than in response to a request from the government.

Message from the Director



Dear Readers,

As part of the African Legal Support Facility's (ALSF) mandate to provide legal advice and technical assistance to African countries, we develop knowledge products

and resources, including academic and legal material, standardised documents, training platforms and publications that contribute to support our mission in the ALSF's sector focus areas.

The ALSF Infrastructure and PPP portfolio aims to support governments in developing bankable and sustainable PPP projects, through the acquisition of the requisite skillset.

Thus, the ALSF organizes capacity building workshops, develops knowledge tools and produces adapted documentation to ensure PPP projects are well prepared, implemented and successful. The sectors we have supported African countries in with respect to PPPs include airports, ports, roads, and housing, to name just a few.

The ALSF constantly takes into account the evolving needs of its member countries in the area of PPPs to update its portfolio and practices.

This is further attested by our Medium-Term Strategy 2023-2027, which places emphasis on critical considerations for PPPs structuring such as climate change and the energy transition, digitalisation, and illicit financial flows.

In 2016, the ALSF published the first version of the PPP Country Profiles, an online repository of information, which is regularly updated and describes the PPP legal and institutional frameworks of all countries in Africa (the "PPP Country Profiles").

Based on this work, the ALSF is pleased to present this study, a new resource that provides a comparative and comprehensive analysis of the data that was retrieved from the PPP Country Profiles.

This updated study shows that there are different approaches to implementing PPPs, and that the options available often depend on the legal and regulatory instruments in force in the country concerned.

Some of these PPP projects can also be (and have been) implemented on a project-by-project basis without any specific PPP legal and institutional framework. However, it is now widely accepted that in order to implement comprehensive PPP programs that generate value for money in the long run, it is essential to establish a relevant PPP framework.

While international organizations have developed several guidance materials for good governance in PPPs, there are few Africa-wide specific knowledge products on existing PPP legal and institutional frameworks.

It is against this background that we are pleased to share this new practical resource for the benefit of African governments, development agencies and international organisations. This resource will help them better understand how different countries in Africa are regulating their legal and institutional PPP frameworks.

Finally, we wish to express our gratitude to our funders and partners for the opportunity to collaborate in creating this important resource.

Wishing you a pleasant and enriching reading!

Setounkpatin Olivier Pognon,
Director and CEO, ALSF

Introduction



There is unprecedented interest amongst African countries to attract private investment in infrastructure and services to meet growing national demand. However, although public procurement regulation is well established in the global legislative landscape, the development of modern and secure legal and institutional Public-Private Partnerships (PPP) frameworks is progressing gradually throughout the continent.

The responsibility of building legal and institutional PPP frameworks also falls on governments that must be able to identify and select appropriate projects, issue transparent tenders, structure robust contracts and have checks in place to ensure the proper execution of PPP projects.

The ALSF developed the PPP Country Profiles as a tool to assess the level of development of the PPP legal frameworks of each country in Africa.¹ The ALSF also collected data and undertook a comparative analysis of the existing African legal and institutional PPP frameworks.

This Brochure reveals that out of the 54 countries in Africa, 42 issued legislation on PPPs. Of these 42, 24 are of civil law tradition, 13 have a common law legal system and 5 have a mixed legal system. To ensure effective implementation of PPPs through their various phases, most countries in Africa have established a PPP Unit, typically attached to the Ministry of Finance.

The objective of this Brochure is to compare the legal and institutional PPP frameworks present across the African jurisdictions surveyed. In particular, this Brochure examines (i) how common and civil law jurisdictions in Africa tend to regulate PPPs through specific PPP laws and regulations and public procurement regimes; (ii) the criteria used to define PPPs on the continent; and (iii) project identification and preparation activities and PPP procurement processes used. Finally, the way in which African governments tend to regulate the contractual relationship between the public sector entity and the Private Partner is also explored.

This Brochure is intended primarily for African governments who have included, or wish to include, PPPs as a method for delivering public assets and services. In particular, national authorities and legislative bodies may refer to this Brochure when working on PPP legal frameworks or reviewing the adequacy of existing ones. International financial

institutions and private sector investors who would like to understand better how legal PPP frameworks operate across various African jurisdictions may also benefit from this Brochure.

Finally, the authors would like to stress that just as the signing of a PPP contract is not an end, but rather the beginning of a new endeavour, the adoption of a PPP legal and institutional framework will not directly translate to increased deal flow. 42 countries in Africa have already implemented PPP legislation. However, the number of financially closed PPP projects on the continent has been relatively limited so far. The PPP market in Africa is also concentrated in a handful of countries, including South Africa, Morocco, Nigeria, Egypt, and Ghana. These countries account for more than half of all PPPs in Africa by value.

Once a PPP law is enacted, African governments must take clear and concrete actions to establish credibility and significance for their PPP frameworks. Governments will need to prioritize the development of a pipeline of bankable and socially responsible projects to attract investors. In addition, governments will have to continue working to delineate as clearly as possible the roles and responsibilities of the relevant government entities responsible for delivering the projects.

The comparative work leading to this Brochure can assist governments in this process, particularly by enabling them to identify the characteristics of the legal and institutional framework of countries with the highest number of PPP projects.

Finally, we are particularly proud to publish this Brochure after several years of gestation. We hope that, like the PPP Country Profiles, it will be a valuable addition to the existing literature on PPPs. This being the first edition, we want to emphasize that this publication, and the PPP Country Profiles, are considered an evolving process. We intend to develop further iterations of this Brochure and the PPP Country Profiles as governments adopt or modify their legal and institutional frameworks for PPPs.

1. The African Legal Support Facility PPP Country Profiles can be accessed at <https://www.alsf.int/countryprofiles>

Maude Vallée,
Division Manager & Head of Operations,
ALSF

Methodology



This Brochure aggregates the data present in the PPP Country Profiles that were developed by the ALSF.

When providing examples on a country basis, both civil and common law jurisdictions were reviewed and samples were provided on a regional basis, to bring case studies from the Central, Northern, Southern, Eastern and Western Africa regions. When relevant, a distinction is also made between Anglophone, Francophone, and Arabic-speaking countries in Africa. It is also worth noting that the examples presented are intended to illustrate a legislative position adopted by a country, without excluding that another country, although not cited in the example, may have adopted the same approach in its legislation.

In the context of this Brochure, “PPP legal and institutional frameworks” consist of the policies, procedures, institutions, and rules that together define how PPPs will be identified, procured, monitored, and accounted for and who will be responsible for these tasks. In particular, “PPP legal frameworks” include the relevant laws and regulations (e.g., specific PPP laws and PPP regulations as well as relevant public procurement and public financial management legislation) as well as other legal and regulatory instruments such as PPP policies, model transaction and procurement documents and PPP operational guidelines.

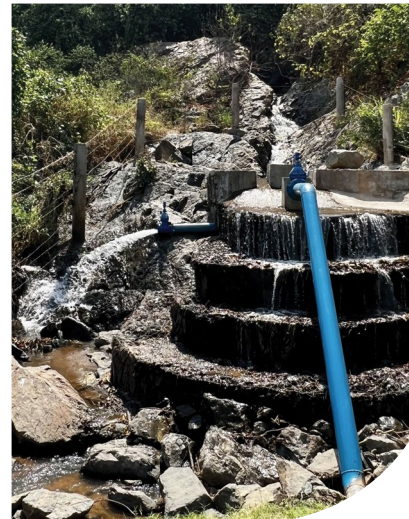
Prominent resources that supported the preparation of this Brochure include the Benchmarking 2020 Infrastructure Development Report by The World Bank, the PPP Reference Guide and the World Bank’s 2022 Guidance on PPP Legal Frameworks. Reports from other international organisations were also consulted,

including UNCITRAL’s Model Legislative Guide on Public Private Partnerships and the African Development Bank’s PPP Strategic Framework 2021-2031.

The overall aim of this Brochure is to highlight some key findings that arise from analyses of the relevant data pertaining to the PPP legal frameworks of the countries surveyed. Given the level of detail within PPP legal and institutional frameworks, the findings presented in this Brochure are necessarily limited and intended only to give a flavour of the type of analyses and comparisons that are possible. The analyses are also limited to the provisions in the applicable legislation, without a detailed analysis of the related implementing regulations. No further on the ground research was carried out for the purposes of this Brochure.

Furthermore, the applicable legislation noted in this Brochure includes relevant legislation available as of 30 June 2023. As a result, any regulatory reforms or changes that may have occurred after that date are not taken into account.





Chapter 1

Legal and Institutional PPP Frameworks

A country's "PPP framework" consists of the policies, procedures, institutions, and rules that collectively define how PPPs will be identified, procured, monitored, and accounted for and who will be responsible for these tasks.

This chapter provides an overview of the legal and institutional PPP frameworks in the African jurisdictions surveyed by the ALSF. It assesses how common and civil law jurisdictions regulate PPPs in Africa through specific PPP laws, regulations and public procurement regimes. It additionally analyses some of the enactment trends in the countries that have adopted a PPP law and concludes by providing an overview of the main government entities responsible for promoting, facilitating, or assessing PPP projects across the African Continent.

PPP Legal Frameworks in Africa

Civil and common law are the main current legal systems in Africa. Both legal systems were exported by European countries to African countries during the 19th and 20th centuries. French-speaking African countries mostly follow the civil law tradition, while English-speaking African countries mainly inherited the common law system from England.

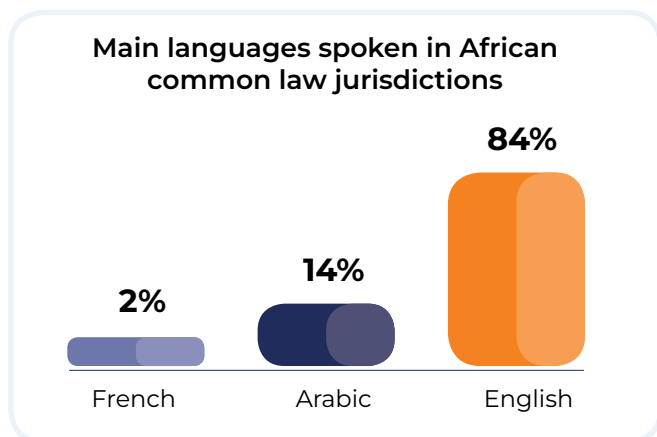


Figure 1: Main languages spoken in African common law jurisdictions

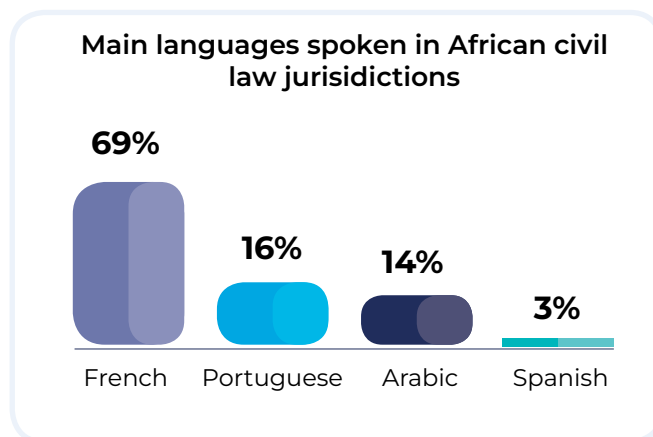


Figure 2: Main languages spoken in African civil law jurisdictions

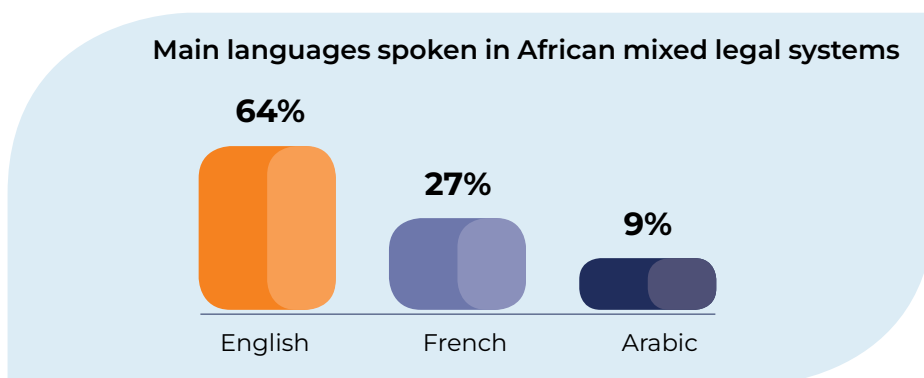


Figure 3: Main languages spoken in African mixed legal systems

Given that legislation in common law jurisdictions is generally uncodified, common law countries tend to govern PPPs through policy statements, guidance materials, and contract law, while civil law countries are more inclined to develop specific PPP laws.

The PPP Country Profiles developed by the ALSF show that 42 of the 54 African countries have a law on PPPs.² Of these 42 countries, 24 are of civil law tradition, 13 have a common law system, and 5 have a bi-jural system.

2. The African Legal Support Facility PPP Country Profiles can be accessed at <https://www.alsf.int/countryprofiles>

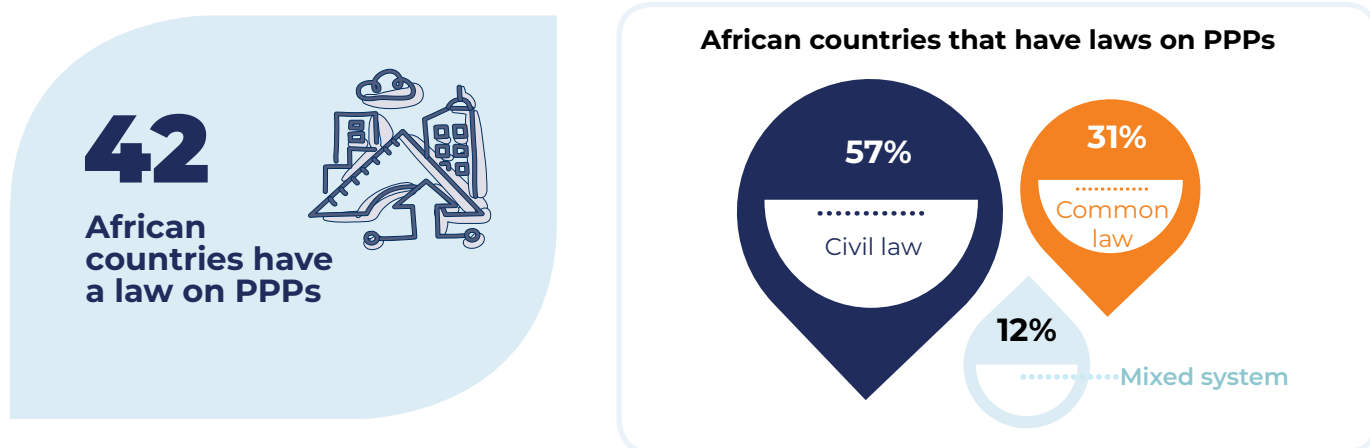


Figure 4: African countries that have laws on PPPs

List of countries that have enacted a PPP law and year of adoption

Country Name	Year of Adoption
Mauritius	2004
Nigeria	2005
Cameroon	2006
Zambia	2009
Egypt	2010
Liberia	2010
Tanzania	2010
Malawi	2011
Mozambique	2011
Niger	2011
Côte d'Ivoire	2012
Burkina Faso	2013
Morocco	2014
Sierra Leone	2014
Burundi	2015
Cabo Verde	2015
Madagascar	2015
Somalia	2015
Tunisia	2015
Uganda	2015
Zimbabwe	2015

Country Name	Year of Adoption
Benin	2016
Gabon	2016
Mali	2016
Rwanda	2016
Chad	2017
Djibouti	2017
Guinea	2017
Mauritania	2017
Namibia	2017
DRC	2018
Ethiopia	2018
Sao Tome & Principe	2018
Angola	2019
Central African Republic	2019
Ghana	2020
Guinea Bissau	2021
Kenya	2021
Senegal	2021
Sudan	2021
Togo	2021
Congo	2022

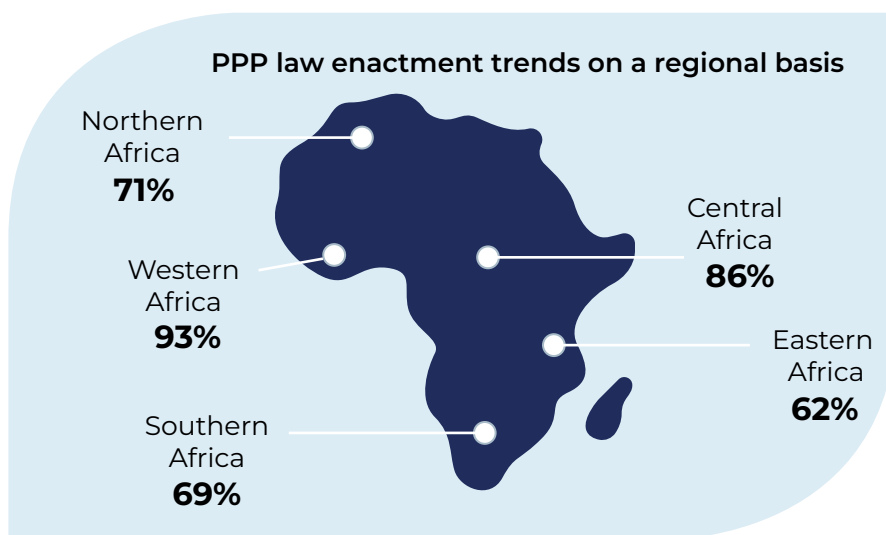
Figure 5: List of countries that have enacted a PPP law and year of adoption

In the 42 countries that have enacted laws for Public Private Partnerships, some regional variations emerge. **Western and Central Africa have the largest proportion of economies that have enacted specific PPP laws.** Indeed, except for The Gambia and Equatorial Guinea, all Western and Central Africa countries have enacted such laws.

Western and Central Africa have the largest proportion of economies that have enacted specific PPP laws.

On the other hand, countries in Eastern and Southern Africa have enacted the least specific PPP laws. **Of the 12 countries that comprise the Southern Africa region, 4 remain without a PPP law**, namely Botswana, Lesotho, South Africa, and Eswatini. Other African countries that have not enacted specific PPP laws include Comoros, Eritrea, Seychelles, South Sudan in East Africa, and Algeria and Libya in North Africa.

Out of the countries that have not enacted a PPP law, at the time of writing, The Gambia was considering a draft PPP legislation. In South Africa, a review exercise of the PPP legal framework was undertaken but the recommendations are yet to be implemented. Seychelles, worked on a draft PPP law in 2017, but this has yet to be adopted. Figure 6 below provides an overview of PPP law enactment trends on a regional basis. The number of economies that have enacted a specific PPP law in each region are expressed as percentages.



In terms of yearly enactment trends, the period between 2015 and 2017 marked the highest rate, with **16 countries enacting PPP laws over a three-year period.**

The first country to enact a specific PPP law in Africa was Mauritius in 2004 while the latest is the Republic of Congo in 2022.

16/42 countries enacting PPP laws over a three-year period.

Figure 6: PPP law enactment trends on a regional basis

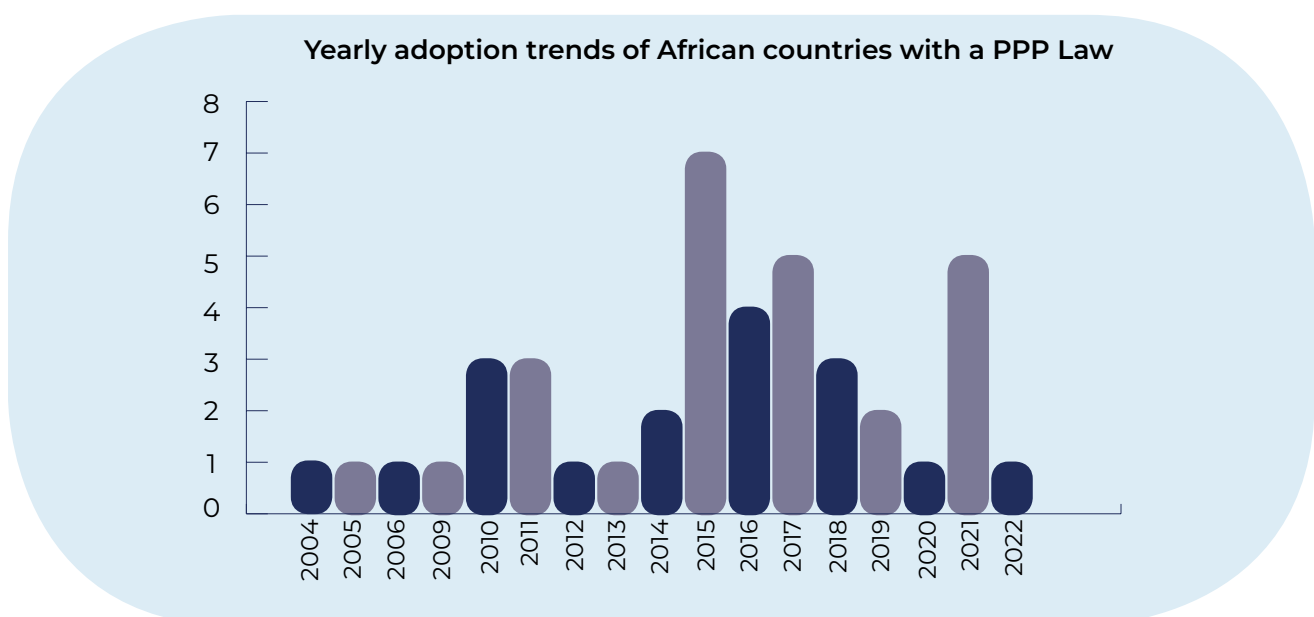


Figure 7: Yearly adoption trends of African countries with a PPP Law

43%

African countries govern PPPs through their public procurement regimes



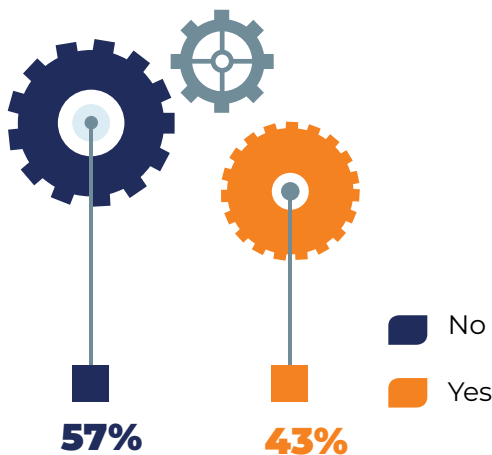
Countries without specific PPP legislation tend to govern PPP contracts through their public procurement regime.

Since PPPs are an essential format for procuring and financing infrastructure projects in Africa, **countries without specific PPP legislation tend to govern PPP contracts through their public procurement regime.** This is the case in countries like Botswana, Comoros, Lesotho, Seychelles, South Sudan and Eswatini.

In other countries, laws specific to PPPs may coexist alongside the public procurement regime. This is the case in countries like Burkina Faso, Burundi, Mali, Mauritania, Mauritius, and Morocco. In South Africa, instead, PPPs are governed by the Public Finance Management Act.

Overall, 43% of African countries govern PPPs through their public procurement regimes. They do so by directly governing PPP contracts or by regulating more specific aspects of the PPP process, such as penalties or enforcement regimes, through their public procurement laws and regulations.

Proportion of countries that govern PPPs through their public procurement regime



It is also worth highlighting that the Western African Economic and Monetary Union (UEMOA) issued a directive (Directive N. 01/2022/CM/UEMOA) on the legal and institutional framework for PPPs.

This directive is currently being implemented in member states. The Central African Economic and Monetary Community (CEMAC) is also working on a directive that will specifically include PPPs as a form of public procurement.

Figure 8: Proportion of countries that govern PPPs through their public procurement regime

PPP Institutional Frameworks in Africa

To ensure the effective implementation of PPPs, most countries in Africa have a PPP Unit typically attached to the Ministry of Finance. PPP Units may be set up as departments within government ministries or agencies and are composed of government teams focused on PPPs. Their functions vary, but when attached to Ministries of Finance, they usually perform gatekeeping functions by advising on the overall approval process of PPP projects. It should be noted that PPP Units do not have to be entirely dedicated to PPPs. For example, in Liberia, where concessions are used, the Public Procurement and Concessions Commission exercises its supervisory powers over concessions and all forms of public procurements.

41 of the jurisdictions have one or more dedicated PPP Units

According to the PPP Country Profiles data, **41 of the jurisdictions surveyed have one or more dedicated PPP Units**. Some are independent institutions with full legal personality akin to other government departments, such as South Africa's Government Technical Advisory Centre (GTAC) and Nigeria's Infrastructure Concession Regulatory Commission (ICRC). In other cases, PPP Units are either attached to Ministries of Finance, within Prime Ministers' offices, in Presidents' offices or in other technical ministries. The table below displays the African countries with existing PPP Units broken down by supervising authority.

Country name	Breakdown by supervising authority
Nigeria	Dedicated PPP Agency
Liberia	
South Africa	
Rwanda	
Mauritius	
Botswana	
Zambia	
Egypt	Ministry of Finance
Tanzania	
Malawi	
Burkina Faso	
Morocco	
Burundi	
The Gambia	
Cabo Verde	
Madagascar	
Somalia	
Uganda	
Djibouti	
Guinea	
Mauritania	
Namibia	
Ethiopia	
Sao Tome & Principe	

Country name	Breakdown by supervising authority
Angola	Ministry of Finance
Ghana	
Guinea Bissau	
Kenya	
Sudan	
Zimbabwe	
Cameroon	Ministry of Economy
Senegal	
Egypt	Prime Minister's Office
Niger	
Côte d'Ivoire	
Burkina Faso	
Mali	
Mauritania	Office of the President
Liberia	
Tanzania	
Sierra Leone	
Somalia	
Tunisia	
Benin	
Chad	Technical Ministry
Gabon	
Democratic Republic of Congo	

Figure 9: PPP Units in existence in Africa, as per the applicable legislation, broken down by supervising authority



Figurative breakdown of PPP Units by supervising authority

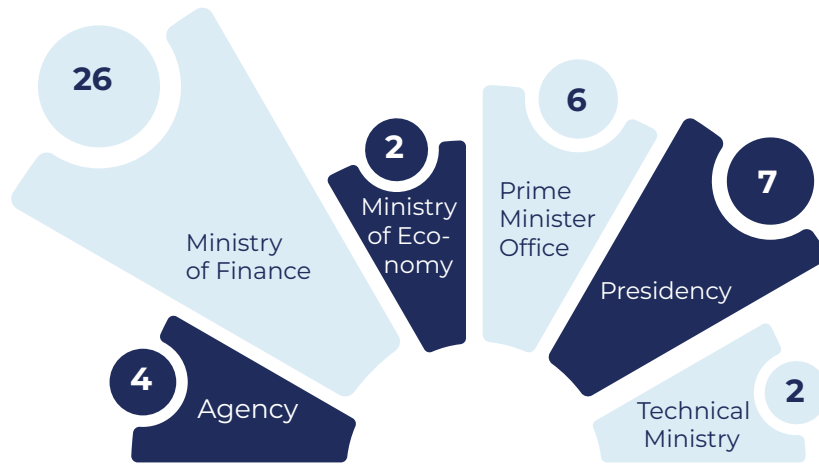


Figure 10: Figurative breakdown of PPP Units by supervising authority

The PPP Units in Africa with project approval functions are commonly located within Ministries of Finance, whereas PPP Units that provide technical assistance may be housed centrally. Instead, PPP Units with a promotion focus are typically part of investment promotion entities.

The table below assigns typical functions to PPP Units based on their location. Wherever a PPP Unit is located, it is important to appreciate that PPP Units may perform more than one of these functions.

PPP Units functions and location

Location	Policy formulation	Project approvals	Technical assistance	Standardization and dissemination	PPP promotion
Dedicated Agency	✓		✓		✓
Ministry of Finance		✓		✓	
Prime Minister's Office		✓	✓		
President's Office	✓	✓	✓		
Technical Ministry			✓	✓	✓

Figure 11: PPP Units functions and location



Box 1. Country Snapshot

Senegal's Public Private Partnerships Unit

In Senegal, the Directorate of Finance and Public Private Partnerships (DFPPP) serves as the primary operational unit within the Ministry of Finance for managing PPPs. The DFPPP participated in the development of state policies, guidelines, instructions, and dissemination of best practices for the financing, design, implementation, and management of PPP projects. DFPPP advised and assisted the departments of Ministries, local authorities, national companies, public limited companies, agencies and public institutions in the preparation, implementation and monitoring of PPP transactions.

In March 2021, a new law named Public Private Partnerships Contracts Law was adopted in Senegal (the “PPP Act”). The PPP Act repeals Act No. 2014-09 of February 2014 related to PPP contracts.

One of the main innovations in the PPP Act relates to the establishment of a new National PPP Support Unit, which will provide advisory opinions on PPP projects. More generally, the role of the National PPP Support Unit will consist of assisting and advising contracting authorities in the identification, preparation, negotiation, and monitoring of PPP transactions.



In most of the jurisdictions surveyed, Ministries of Finance also play a key role in supporting a PPP program. They do this by identifying infrastructure priorities within the national budget and public investment management constraints. Additionally, they ensure that PPP projects meet relevant financial criteria.

Other key governmental stakeholders involved in PPPs include Contracting Authorities, being the entities empowered by the legal framework to enter into PPP arrangements with Private Partners. Contracting Authorities in the African jurisdictions surveyed include government Ministries, Departments, and Agencies, and in some cases local authorities, municipalities and state-owned enterprises.

Chapter 2

Criteria for Defining Public Private Partnerships (PPP) in Africa

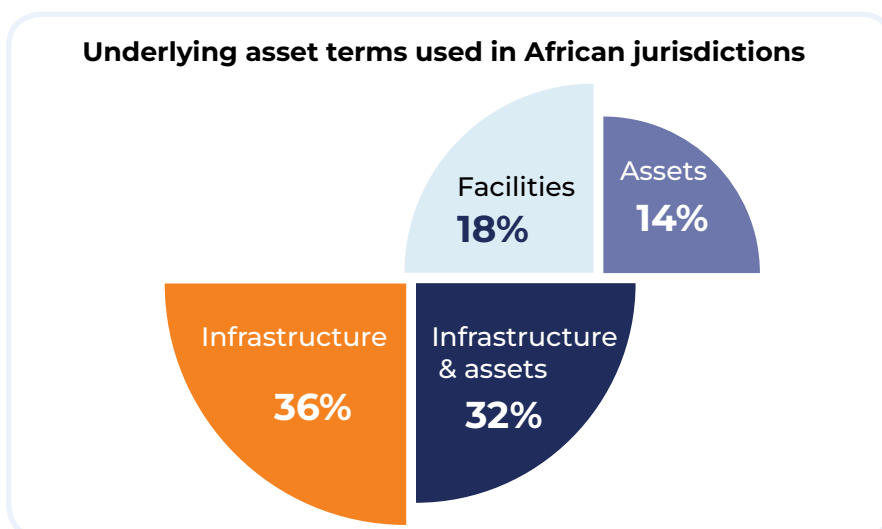
The term “Public Private Partnership” (PPP) is used to refer to a wide variety of contractual arrangements through which the public and private sectors collaborate towards a common purpose. Given that there is no internationally accepted definition of a PPP covering all possible variants, the term is usually assigned different meanings depending on the jurisdiction in question. In South Africa, a PPP is defined as a contract between a public-sector institution and a private party, where the private party performs a function that is usually provided by the public sector and/or uses state property by agreement.

In Nigeria, a wide range of contract forms fall within the scope of a PPP. It can be said to include outsourcing and partnering, performance-based contracting, design - build, finance - operate (or build - operate - transfer) contracts and, sometimes, concessions.

In civil law jurisdictions, when an entity other than a public authority provides a “public service”, it usually requires an authorisation by the relevant governmental body. In these jurisdictions, governments often differentiate between two types of PPPs – concessions and partnerships. Concessions involve the concessionaire primarily generating revenue from payments made by service users. On the other hand, partnerships, involve the public authority paying a fee to the Private Partner in exchange for the performance of a service.

Public assets and services

Central to the definition of a PPP is the description of the underlying public asset or infrastructure facility. In most African jurisdictions surveyed, the PPP legal frameworks use the term “infrastructure”, meaning infrastructure in the broad sense, as the type of public asset normally procured under a PPP. PPPs may also be defined by reference to the infrastructure sector in which they occur. In South Africa, for instance, PPPs are encouraged in the transportation, energy, water, and social infrastructure sectors. Some countries, on the other hand, identify specific sectors in which PPPs may not be used. In Senegal, for instance, the PPP law of 2021 establishes that PPPs may not be used in the energy, mining, and telecommunications sectors. Figure 12 identifies the terms used to refer to the underlying public asset in the African jurisdictions surveyed.



PPP is used to refer to a wide variety of contractual arrangements through which the public and private sectors collaborate towards a common purpose

Figure 12: Underlying asset terms used in African jurisdictions

With regards to the definition of “service”, some countries establish that PPPs can be used for the development of a “public service”, rather than just a “service”. Approximately 65% of the surveyed jurisdictions adopt this approach.

In Ghana, for instance, the PPP Act of 2020 defines a PPP as a form of contractual arrangement to provide “public infrastructure” or “public services”. The interpretation of “public service” is narrower than “service”. Public services can be seen as services that the government considers its responsibility to provide, including utilities, passengers’ transportation, and water supply to homes, amongst others.

The applicable laws also clarify whether PPPs may be used for the construction and operation of new infrastructure facilities (greenfield projects) or the maintenance, repair, refurbishment, expansion, and operation of existing infrastructure facilities and systems (brownfield projects).

Overall, approximately 80% of the countries that have implemented a specific PPP law include provisions for procuring new and existing infrastructure facilities and systems while the remaining 20% of the countries cover one or the other.

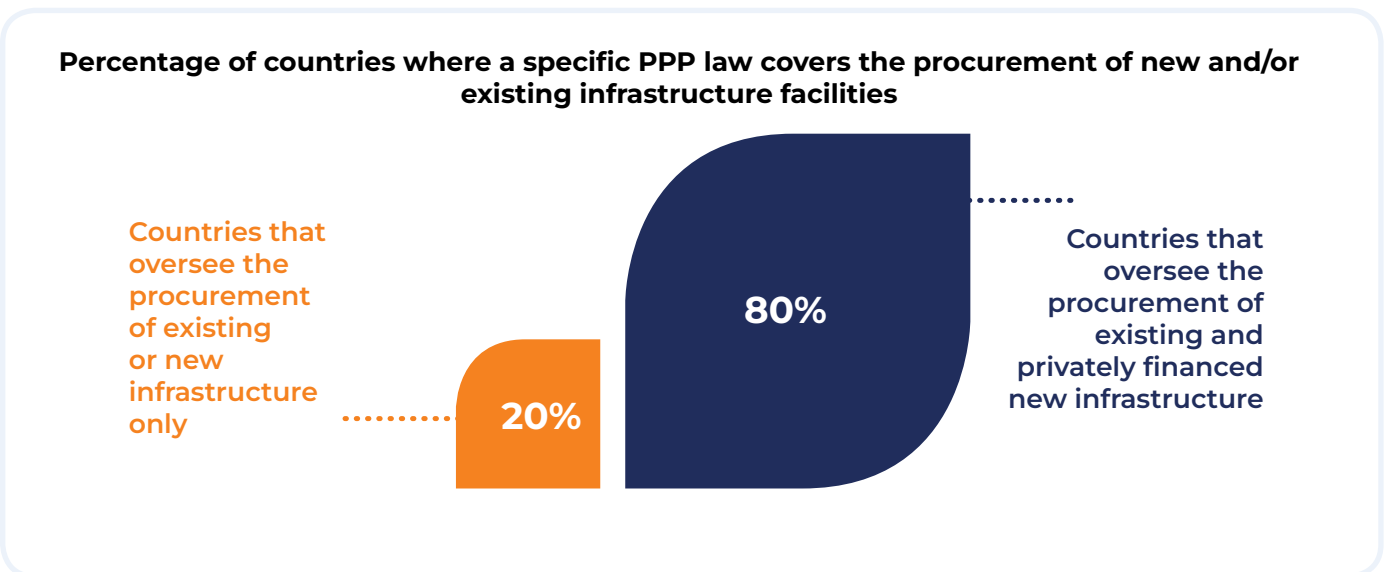


Figure 13: Percentage of countries where a specific PPP law covers the procurement of new and/or existing infrastructure facilities

Finally, it is important to note the increasing use of PPPs for technological advancements. In Africa, PPPs are a solution to the lack of investments in the Information, Communication and Technology sector. They have been used to create fiber optic backbone systems, satellite systems, mobile mast networks and video and telephony services, amongst others.

Remuneration of a Private Partner

Another defining feature of PPPs consists in establishing how the Private Partner is remunerated. In Africa, like elsewhere, Private Partners are remunerated by collecting fees from service users, by government or both. The payment mechanisms are normally structured so that remuneration is linked to performance.

Figure 14 shows the percentage of African economies that distinguish between government pays-PPPs and user pays-PPPs.

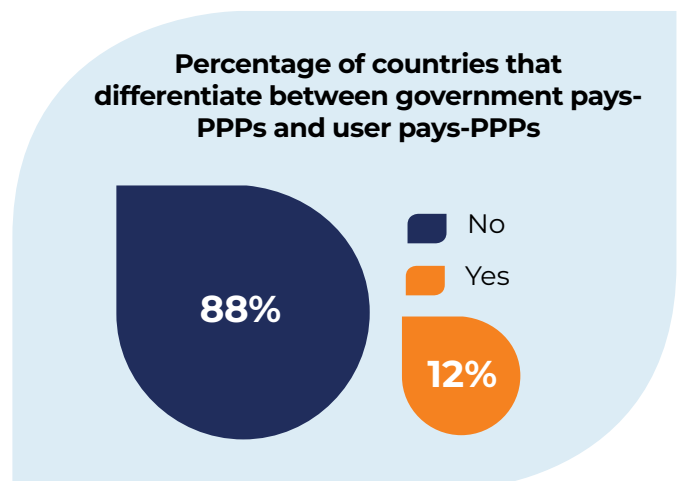


Figure 14: Percentage of countries that differentiate between government pays-PPPs and user pays-PPPs

Common law countries tend to distinguish between government pays-PPPs and user pays-PPPs arrangements through a common definition of PPPs, by establishing that Private Partners may receive compensation from Contracting Authorities or collect tariffs or fees from service users.

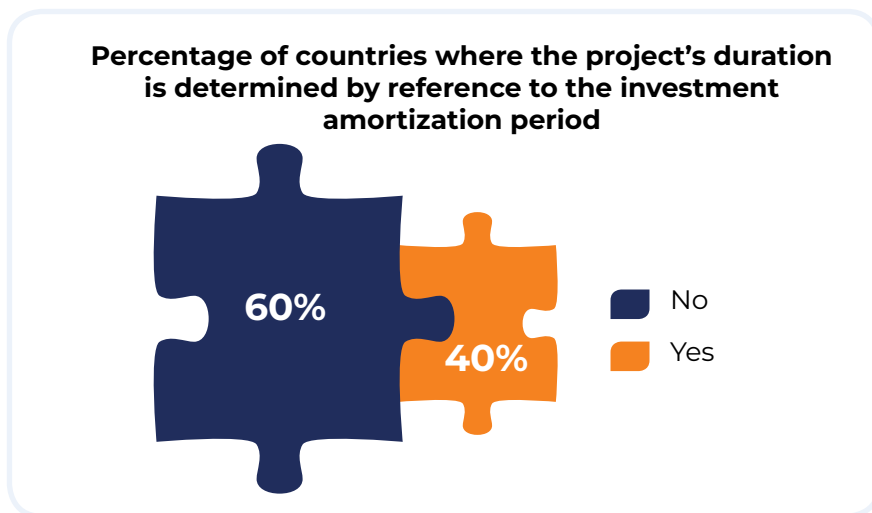
Civil law jurisdictions, where a legal distinction exists between government-pays PPP and concessions or user-pays PPPs, may subject the two types of arrangements to different laws.

In Benin, for example, law 2016-24 establishes the legal framework for PPPs, while the public procurement code (law 2009-02) establishes the framework for concessions and the delegation of public services.

PPP Project Duration

Most PPP projects present a contractual term between 20 and 30 years; others have shorter terms and in some cases PPP projects may last more than 30 years.

By way of illustration, in Lesotho, the PPP Policy establishes that PPP arrangements can take the form of short-term (1-3 years) service contracts or longer-term (7-35 years) agreements such as concessions. In Kenya, the PPP Act of 2021 establishes that contracting authorities are not to enter into PPP arrangements for a period exceeding 30 years. In Eswatini, the PPP Policy specifies that concessions are typically for periods of over 20 years.



Rather than specifying a project duration, some countries require the period to be determined depending on the amortization period of the Private Partner's investment. This is the case in countries like Benin, Chad, and Mauritania.

In Senegal, the duration of PPP contracts is fixed not only depending on the amortization period of the PPP investment but also by reference to the nature of the services requested, the time needed to achieve the Private Partner's objectives and the associated performance commitments.

Figure 15: Percentage of countries where the project's duration is determined by reference to the investment amortization period

PPPs in African Civil Law Jurisdictions

In civil law countries, where the operations of government are codified through administrative law, PPP agreements tend to be governed by specific administrative law provisions.

The countries that govern PPP agreements through administrative law provisions include Burkina Faso, Guinea, Mali, and Togo in Western Africa; Burundi, and Djibouti in Eastern Africa; Mauritania in Northern Africa, Madagascar in Southern Africa, and the Central African Republic, Congo, and the Democratic Republic of Congo in Central Africa.

However, not all civil law jurisdictions frame PPP agreements through administrative law provisions as PPP agreements are sometimes also treated as private law arrangements.



Percentage of civil law jurisdictions that govern PPP agreements through administrative law provisions

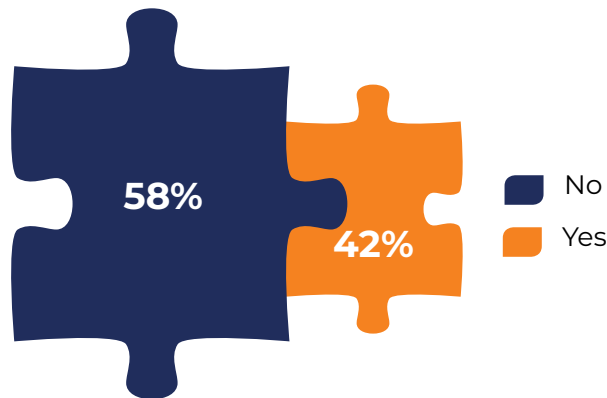


Figure 16: Percentage of civil law jurisdictions that govern PPP agreements through administrative law provisions

DID You Know?

Civil law jurisdictions PPPs usually display the following characteristics:

- The **Contracting Authority** exercises control over the performance of the PPP agreement, in accordance to primary and secondary legislation and the PPP agreement.
- PPP agreements must adhere to the principles of **equality, continuity, and adaptability** of the public service.
- **When an unforeseeable event occurs**, defined as an event external to the parties that temporarily upsets the balance of the contract, **the private party may be entitled to financial compensation under the conditions specified in the contract.**
- When a case of **force majeure** occurs, defined as an event external to the parties, and unforeseeable, **the parties are excused from fulfilling the obligations** that are affected by the event, as specified in the contract.
- When a **"fait du prince"** occurs, defined as a measure taken by a public sector entity, in a capacity other than that of a party to the contract, unforeseeable at the time of the conclusion of the contract and having the effect of making its execution more difficult, **the private party, who continues to perform the service, may benefit from financial compensation** under the conditions specified in the contract.
- The Contracting Authority may unilaterally **modify the contract for reasons of general interest**, without upsetting the contract's economic balance.
- The **Contracting Authority may unilaterally terminate the contract** in accordance with the situations specified by the law and, if applicable, by the contract.
- The **Private Partner is entitled to compensation** under the conditions provided by the legislation and, if applicable, by the contract.

Other Defining Features of PPPs

Other defining features of PPPs include the range of PPP contracts and the size of projects (e.g., in terms of capital expenditure or whole life cost).

In Ghana, the PPP Act of 2020 specifies the types of PPP contracts that can be entered into. A wide range of PPP contract types are included such as Build, Operate, Transfer (BOT); Design, Build, Finance, Maintain and Operate (DBFMO), Operate and Maintain (O&M).

To maintain flexibility and the ability to adapt to changing needs more easily, the Ghanaian PPP Act of 2020 establishes that the listed contract types are indicative and may evolve to suit the specific circumstances of each project.

When determining the size of a project, the laws sometimes establish a minimum investment threshold to ensure that a project delivers value for money. On some occasions, laws also establish a threshold for small-scale projects and empower PPP Units to grant exemptions from implementing any specified procedure. In Ghana, the threshold for small-scale projects is set at US\$ 2 million. Tanzania sets a much higher threshold for small-scale projects, at US\$ 20 million.



Chapter 3



Project Preparation

The project preparation stage begins with the identification of projects that may be implemented as PPPs. Potential PPP projects should be compared with other public investment priorities based on an integrated infrastructure plan.

In Kenya, under the PPP Act of 2021, Contracting Authorities must prepare a list of projects that can potentially be carried out as PPPs for the PPP Directorate's approval. Any project on the list, must be part of the National Development Agenda.

In Rwanda, according to the PPP Operational Guidelines of 2018, contracting authorities identify projects by conducting a sector assessment. Contracting authorities can also select projects from national and sector level development plans, or through a needs assessment for a given service.

Once a project has been identified as a candidate PPP, several preliminary assessments are typically carried out. **For the purposes of this Brochure, the criteria that governments consider to determine whether a project can succeed as a PPP have been categorized in five main groups.**

1. Identification, assessment, and preemptive allocation of project risks	2. Feasibility and economic viability: including an assessment of whether a project makes sense from a technical, legal, social, financial and economic perspective	3. Environmental impact assessments	4. Comparative assessment with the traditional procurement option (also known as a value for money assessment)	5. Fiscal affordability assessment: which includes checking a project's fiscal costs and assessing whether these can be accommodated within a government's budget
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The figure below displays the assessments required during the project preparation stage in the African jurisdictions surveyed. The economies in the Africa region that legally mandate each assessment are also shown and expressed as percentages.

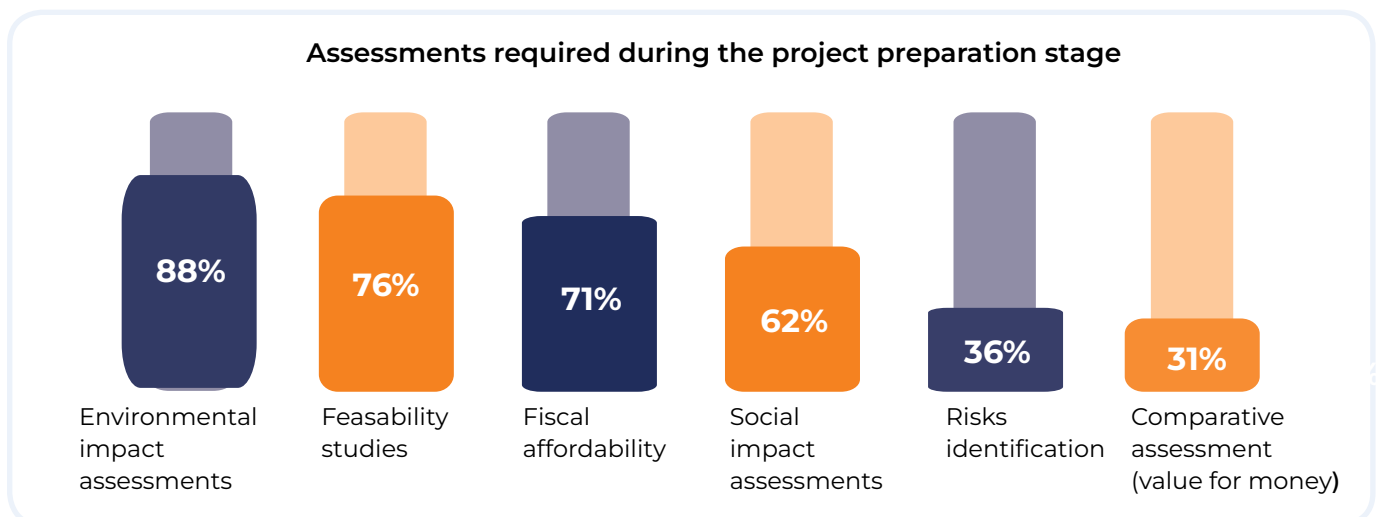


Figure 17: Assessments required during the project preparation stage

Environmental Impact Assessments

The data compiled in this Brochure identifies environmental impact assessments (EIAs) as the most commonly required type of assessment. In so far as PPP legislation is concerned, **a legal requirement to conduct an EIA (or other type of environmental study) is present in 86% of the jurisdictions surveyed.** The complementary social impact assessment, instead, is required in 62% of the jurisdictions surveyed.

A legal requirement to conduct an environmental impact assessments is present in **86%** of the jurisdictions surveyed

As shown in the figure below, **60% of the countries that legally mandate environmental studies are civil law based**, 34% are of common law tradition and 6% of the countries have a mixed legal system.

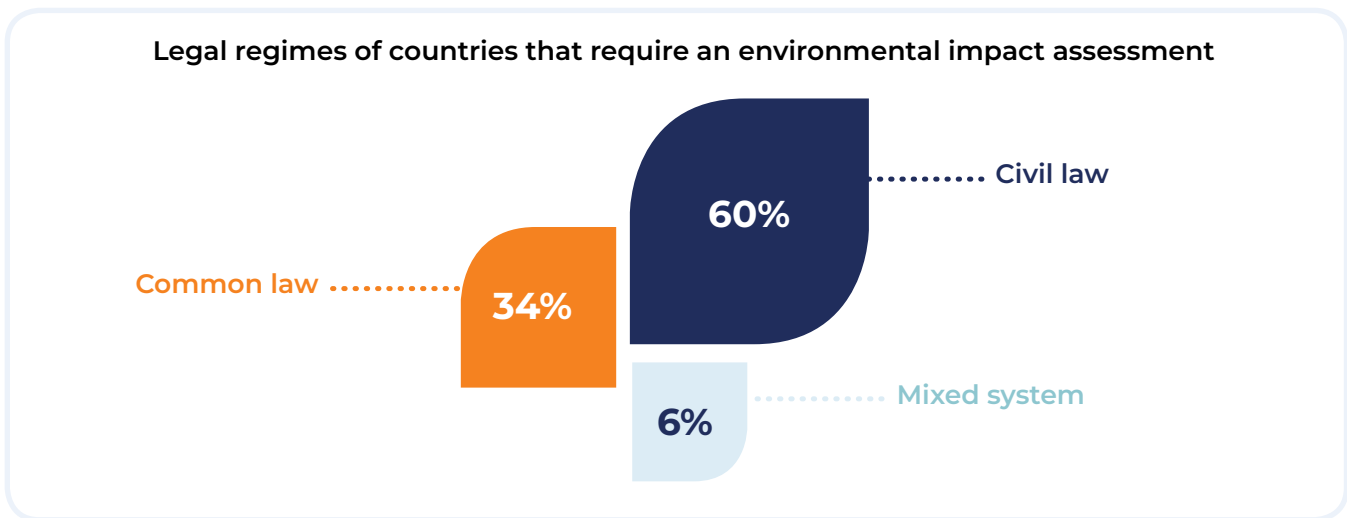


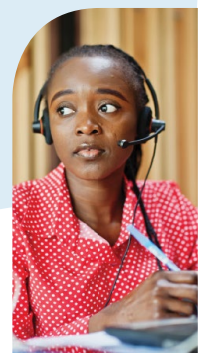
Figure 18: Legal regimes of countries that require an environmental impact assessment

PPP Feasibility Analysis

The second most required type of assessment are PPP feasibility analyses. **PPP feasibility analyses (or other forms of generic studies to assess a project's viability) are required in 76% of the jurisdictions surveyed.**

PPP feasibility analyses should constitute the basis for the decision by a Contracting Authority to proceed with procurement and project implementation. Despite the importance of this assessment, not all countries in Africa require Contracting Authorities to conduct a feasibility study.

76% of the jurisdictions surveyed require PPP feasibility analyses



Some countries on the continent cite the lack of funding as the main reason for not conducting PPP feasibility analyses. **One way to address this problem is by establishing project development funds.** Project development funds can be designed to meet the upfront costs of developing a PPP, providing a framework for effective project preparation. **Project development funds can also be used to finance feasibility studies for unsolicited proposals, especially when the Contracting Authority leads the project development process.**

Case Study

Ghana's Project Development Facility

In Ghana, the PPP Act of 2020 establishes a project development facility as a revolving fund within the Ministry of Finance. The sources of funding for the fund include loans and grants from development partners, as well as fees paid by winning bidders at financial closure. Under the PPP Act of 2020, the project development facility is mandated to finance project structuring and preparation activities.

Identification and Assessment of Project Risks

Although not as common, some African countries also require the **identification, assessment, and preemptive allocation of project risks during the project preparation stage.**

In South Africa, for instance, under Treasury Regulation 16, issued under the Public Finance Management Act 1999, PPP feasibility analyses must set out the proposed allocation of financial, technical, and operational risks between the institution and the private party.

In Rwanda, the PPP Guidelines specify that key project risks must be identified and allocated through the risk allocation matrix as part of the pre-feasibility and feasibility studies.

Value for Money Assessments

As far as primary legislation is concerned, the least required form of assessment in Africa is the Value for Money assessment. 31% of the surveyed economies prescribe it. However, it is worth highlighting that **many African countries set out detailed requirements for Value for Money analyses in secondary instruments, rather than primary legislation.** In South Africa, for instance, the Value for Money analysis is outlined in the South African PPP Manual and the Municipal Service Delivery and PPP Guidelines.

31% of the surveyed economies prescribe a Value for Money assessments

In some countries, the criteria applied in a Value for Money assessment involves a financial or economic comparison based on a predominantly quantitative basis. In others, the scope is a broader mix of quantitative and qualitative criteria.

In Ghana, under the PPP Act of 2020, Contracting Authorities are required to conduct a qualitative and quantitative assessment of Value for Money as part of the feasibility study. The assessment, which should be repeated at each stage of the project development process, must demonstrate that there is greater Value for Money than the best realistic public sector project designed to achieve similar service outputs.

In Kenya, the PPP Act of 2021 mandates that Contracting Authorities must assess the value for money proposition of a proposed project before initiating the tender process. Lesotho has implemented a similar requirement through its PPP Policy.

Case Study

Delivering Value for People: Public Private Partnerships 2.0

Rather than solely focusing on delivering Value for Money, PPP projects should also prioritize delivering value for people, to contribute to the achievement of the United Nations Sustainable Development Goals. Value for people refers to establishing whether the net benefits directly linked to a particular PPP project (economic, social, environmental, and other broader benefits in the territory) are enough to offset the financial burden that users or taxpayers will experience during the life of a project.

Fiscal Assessments

PPP legal frameworks should prescribe methodologies for assessing the fiscal commitments that a PPP project will generate, determining whether they are affordable, and specifying how they will be accounted for.

In this Brochure, approximately **70% of the countries surveyed assess fiscal risks from PPPs** by requiring approval from the Ministry of Finance (or other central budgetary authority) before a project goes to tender or by requiring Contracting Authorities to clarify the fiscal obligations that a project will generate within government's budgets.

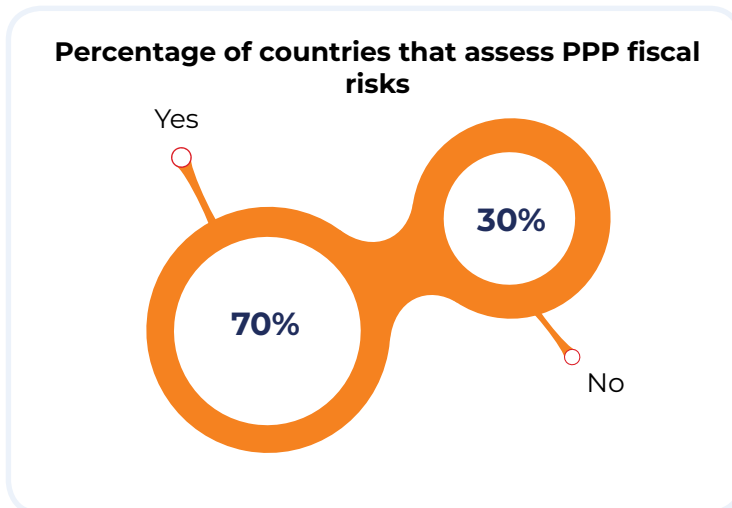


Figure 19: Percentage of countries that assess PPP fiscal risks

In South Africa, the National Treasury's PPP Manual sets rigorous risk assessment standards that government will use to make affordable project choices that best leverage private investments. During project preparation, a signed letter from the relevant treasury stating that a project is affordable must accompany the submission of the feasibility analysis.

In Kenya, government entities are required to consider a project's affordability during the feasibility assessment, while the Cabinet Secretary is responsible for approving a limit on any PPP contingent liability that may be incurred.

Tanzania and Ghana have institutions and provisions in place for the monitoring of PPP fiscal risks and in Angola, the PPP law requires that PPPs conform to the government's fiscal program.

Direct and Contingent Liabilities

The wide range of fiscal commitments that a PPP project can generate can be categorized as direct and contingent liabilities.

Direct liabilities are liabilities that are expected to materialize in the normal course of a project such as availability-based payments.

Contingent liabilities are payments that will only be made if certain future events occur, such as payments that may have to be made under a minimum traffic guarantee.

PPP legal frameworks should prescribe methodologies for valuing both direct and contingent liabilities. These risk management methodologies are typically outlined in secondary instruments.

In South Africa, the National Treasury utilizes a four-stage approval process to ensure the acceptability of contingent liabilities and monitors these liabilities on an ongoing basis. A PPP manual and a set of standard contractual terms guide the development of PPPs. As a result, the contingent liabilities that Contracting Authorities can incur are limited.



Fiscal Assessments Across Different Regions in Africa

Out of the countries that assess fiscal risks from PPPs some regional variation emerges. **60% of the countries that assess PPP fiscal risks are from French West Africa; 30% from English speaking Africa and 10% from African Arabic speaking countries.**

However, while most of the countries require an approval by the Ministry of Finance (or central budgetary authority) before embarking on the procurement process, not all countries require a second approval by the same authorities before the PPP agreement is entered into.

Accounting and Disclosure Treatment of PPPs

Although not strictly relevant to a project's preparatory stage, another area that would deserve attention by policymakers is the accounting treatment of PPPs. **PPP projects should be clarified within the government's budget and in accordance with the accounting standards adopted by the government in question.**

The budgetary treatment of PPP liabilities can take different forms, but in general, it should recognize the long-term impact of PPP liabilities.

Sierra Leone has adopted the International Public Sector Accounting Standard Financial Reporting System (IPSAS). Under IPSAS, most PPP projects are expected to impact a country's aggregate public debt. According to IPSAS, PPP-related assets and liabilities should be included in a government's balance sheet if the government retains control of the service provided and has a residual interest in the project.

Disclosing PPP Liabilities

Like other jurisdictions worldwide, most countries in Africa should improve their disclosure system in relation to PPP fiscal commitments and contingent liabilities. **Disclosing PPP liabilities involves publishing clear reports on the fiscal commitments generated by a PPP project.**

An example in this regard is provided by Kenya, where the PPP Act of 2021 requires government entities to publish key information about project agreements, including any government support measures provided and the amounts of any public funds committed to a project.

Nigeria, through the Infrastructure Regulatory Commission, has also developed a PPP disclosure framework to ensure that PPP projects are managed as transparently as possible.

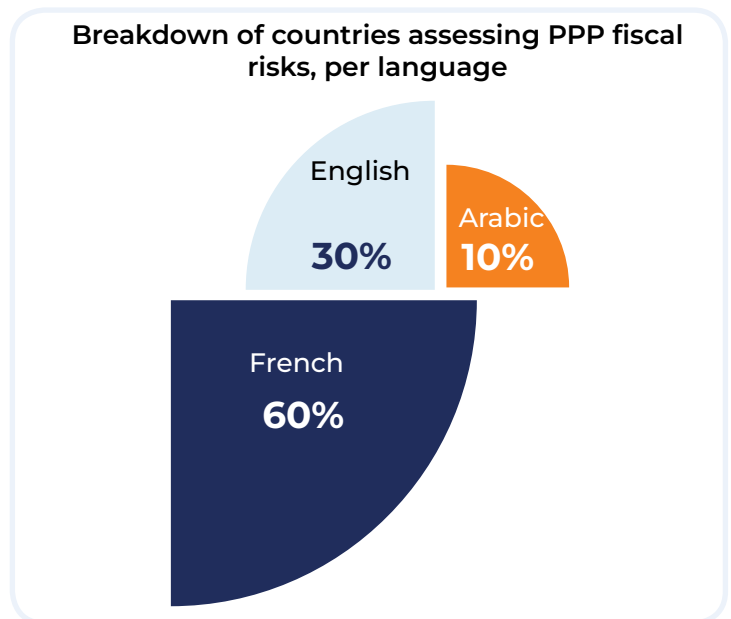


Figure 20: Breakdown of countries assessing PPP fiscal risks, per language

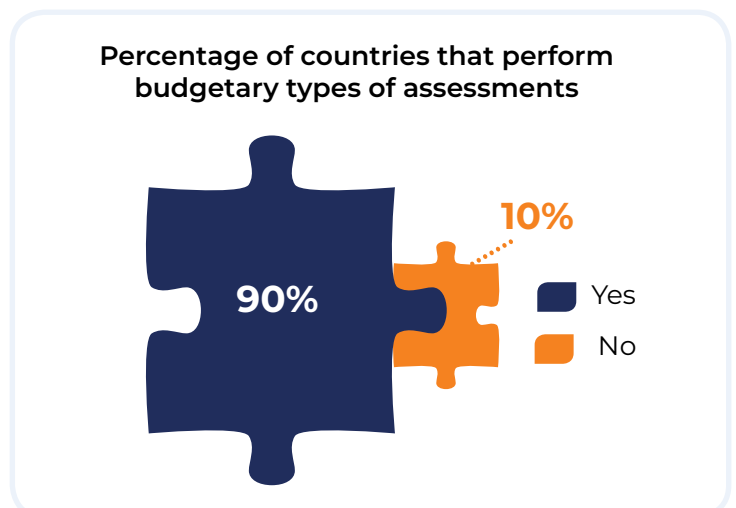


Figure 21: Percentage of countries that perform budgetary types of assessments

Chapter 4

PPP Procurement Methods Used in Africa

In the PPP Country Profiles, data was collected regarding the availability of two common procurement methods: two-stage and restricted tendering. In a **two-stage tendering process**, bidders are invited to pre-qualify before the issuance of the request for proposals, while in a **restricted tendering process**, bidders are typically qualified simultaneously with the bidding process. Data has also been collected in relation to limited competitive processes, such as **competitive dialogues and negotiated procedures**, as well as non-competitive processes, including direct procurement.

Overall, the restricted tendering process is the more commonly used PPP procurement method. **87% of the surveyed economies prescribe it. Two-stage tendering, instead, is currently used in 59% of the surveyed economies.**

It is worth highlighting that most of the surveyed economies tend to give an option between the two procurement methods, which are set as default procurement methods rather than just being made available.

The competitive dialogue process, instead, is an option in certain jurisdictions. **Overall, 37% of the surveyed economies prescribe it.** In a competitive dialogue process, pre-qualified bidders are invited to participate in a dialogue to determine the means best suited to satisfy the Contracting Authority's needs. Of the countries that offer competitive dialogues as a procurement option, 68% of the jurisdictions are civil-law based, 16% are common-law based and 16% have a mixed legal system. Some countries also allow various forms of negotiated procurement processes to take place. In a negotiated procurement process, Contracting Authorities enter into negotiations with one or more Private Partners to reach a mutually agreed position. In Gabon, negotiations (with or without prior advertising) are allowed for reasons related to emergencies, national security, or when the operator has exclusive capacity to deliver a project.

With regard to the direct procurement process, this is utilized in 69% of the jurisdictions surveyed. In the African jurisdictions surveyed, direct procurement is a method of sole source procurement used when competition is not feasible.

Restricted tendering process is the more commonly used PPP procurement method: 87%

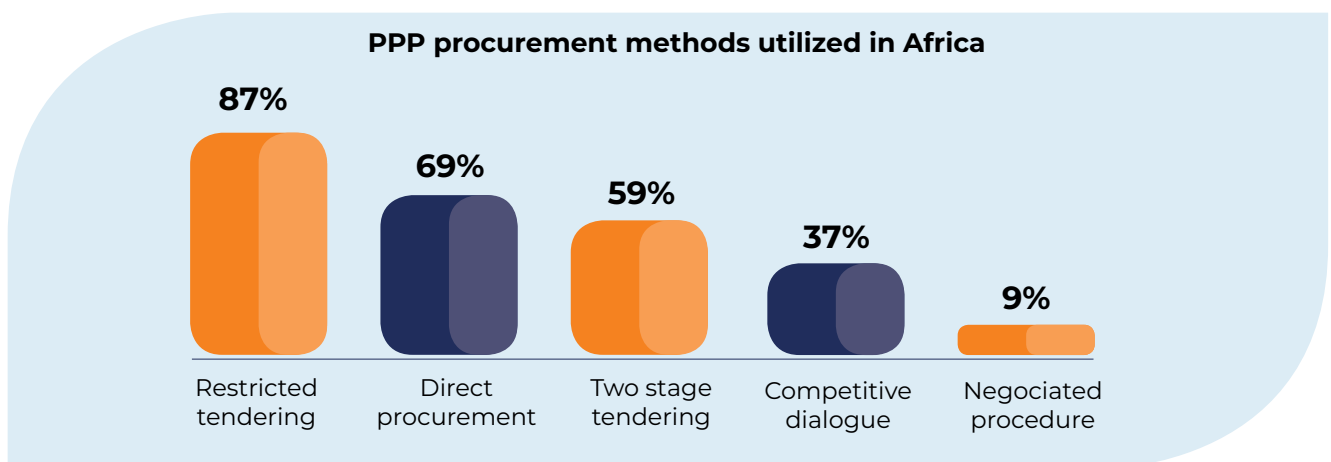


Figure 22: PPP procurement methods utilized in Africa

Some countries in the region also allow their procurement processes to align with those of international organizations. In Madagascar, the PPP Act of 2015 establishes that if an international organization participates in financing a PPP project, the procedure for awarding the PPP contract may be adjusted to consider the procurement process of the international organization in question.

Finally, prior to commencing a PPP procurement process, it is essential to ensure that the relevant project is adequately advertised. In Nigeria, invitations for bids are advertised in accordance with the Infrastructure Concession Regulatory Commission Act 2005 and the Public Procurement Act 2007. Advertisements are published in at least two national newspapers, one relevant international publication and on the websites of the procuring authority, the Bureau of Public Procurement and the procurement journal.

Non-competitive Procurement/Tendering Methods

Whenever a government allows direct procurement, the justification and associated criteria should be clearly spelled out in the PPP legislation.

A widely used justification for direct procurement is emergencies. Overall, 50% of the surveyed jurisdictions prescribe this. The protection of intellectual property rights, the exclusive capacity of the operator, national security, and national public interests are also widely utilized justifications for direct procurement.

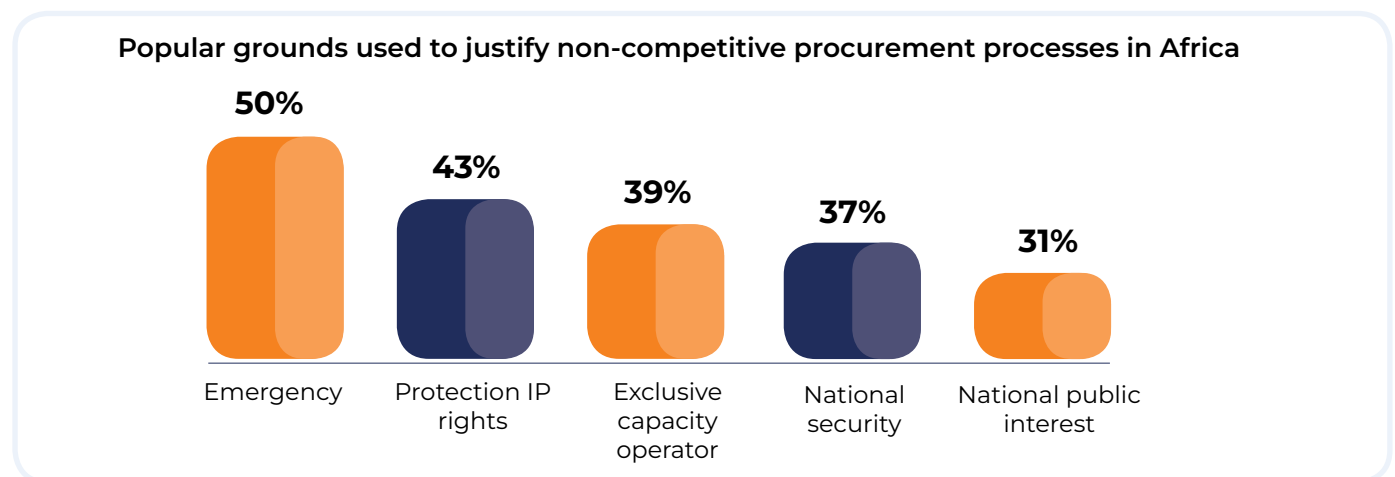


Figure 23: Popular grounds used to justify non-competitive procurement processes in Africa

In Congo, the PPP Act of 2022 allows for direct procurement following a non-objection from the PPP Technical Committee if the project implementation presents a strategic urgency related to national defense and security. The PPP Act of 2022 also allows for direct procurement when the Private Partner has already carried out similar projects on behalf of the public entity or when the Private Partner has exclusive experience in the field of the project. Less utilised grounds to justify non-competitive procurement processes in Africa include ensuring the continuity of the public service, unsatisfactory tendering results, and low value for money thresholds.

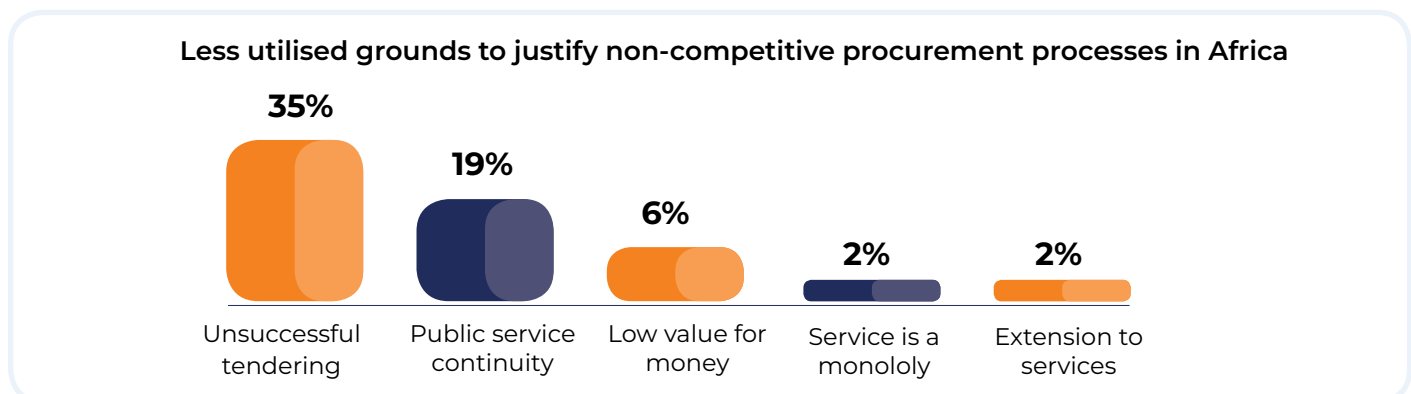


Figure 24: Less utilised grounds used to justify non-competitive procurement processes in Africa

Whatever the circumstance used to justify a non-competitive procurement process, it is important to highlight that these routes should only be used in exceptional situations. **A competitive selection process is always the recommended route for PPP projects.** If conducted fairly and transparently, competition increases the value for money in a project because it allows Contracting Authorities to select the best proposals.

Based on these considerations, some countries do not expressly allow non-competitive procurement processes. In Ghana, the PPP Act of 2022 does not mention the types of non-competitive procurement processes discussed above. Instead, a project may be procured through the Ghana Infrastructure Investment Fund, a fund used to catalyze private sector investments in infrastructure projects, if the competitive procurement method proves unsuccessful or if there is an urgent need to execute the project to serve a strategic national interest.

Unsolicited Proposals

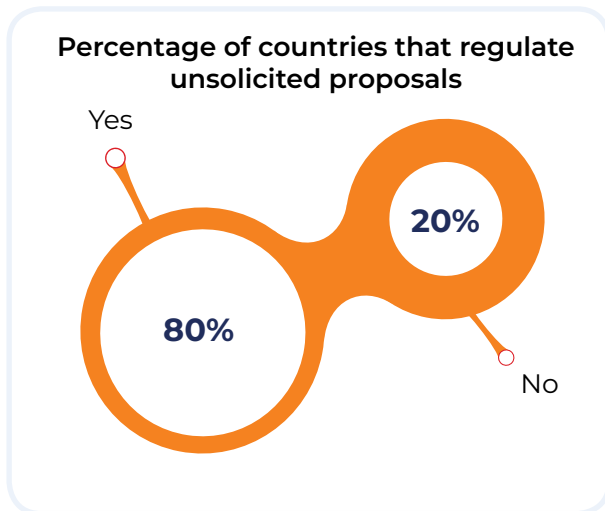


Figure 25: Percentage of countries that regulate unsolicited proposals in Africa

Overall, **80% of the surveyed African jurisdictions regulate unsolicited proposals (USPs).** One reason often cited for regulating and potentially allowing USPs, is to address an infrastructure need that a Contracting Authority has not yet identified. In Ethiopia, Contracting Authorities may review and accept USPs provided that such proposals do not relate to projects that have already received approval for implementation as a PPP.

Some countries further establish that USPs may be considered if they do not impose significant financial commitments on Contracting Authorities or involve the use of new concepts or technologies. By way of example, in Ghana, USPs must demonstrate innovation and should not impose onerous conditions on Government. On the other hand, depending on the legal context, countries that choose not to regulate USPs may, in some cases, be considered as prohibiting them since their legal frameworks do not provide a way for Contracting Authorities to manage them.

Submission Requirements for Unsolicited Proposals

Almost all countries that regulate USPs have submission requirements for USPs. In Guinea, a government decree (decree 2021/041) regarding the application of the PPP Act of 2017 establishes that the initial proposal must include a description of the proposed project, details about the project site, a statement of the proponent's previous project experience, and an estimate of any financial commitments required from the Contracting Authority.

Once a USP has been submitted, Contracting Authorities should inform project proponents whether there is a potential public interest in the project. If the Contracting Authority reacts positively, project proponents are usually invited to submit a formal proposal, including a feasibility assessment.

In some cases, however, countries choose to have the feasibility assessment conducted by the Contracting Authority. Having the feasibility assessment carried out by Contracting Authorities is likely to maximize private sector interest in the bidding process.

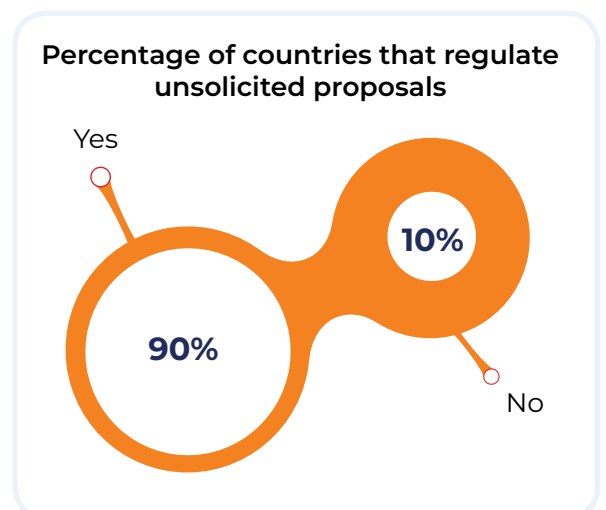


Figure 26: Percentage of countries that establish submission requirements for USPs

Countries that have the feasibility study conducted by the public sector entity

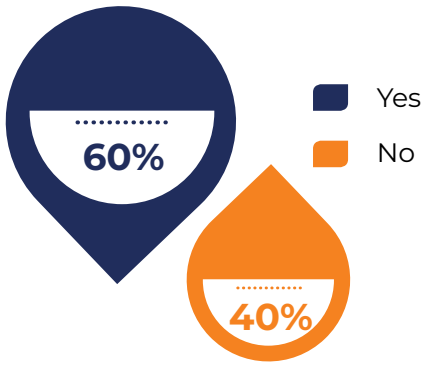


Figure 27: Countries that have the feasibility study conducted by the public sector entity

Countries that require PPP Units to manage the USP process

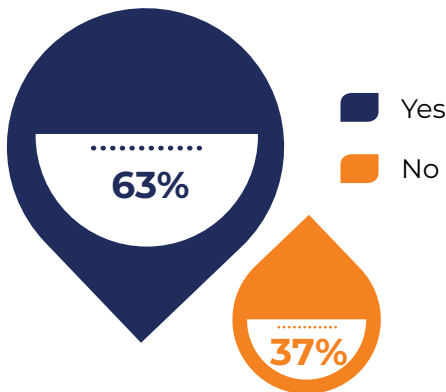


Figure 28: Countries that require PPP Units to manage the USP process

Countries that provide advantages to USP proponents

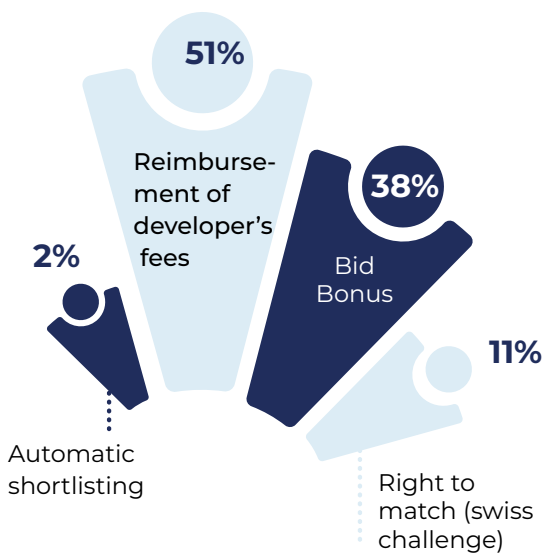


Figure 29: Countries that provide advantages/compensation to USP proponents

Approximately 60% of the countries that regulate USPs choose to have the feasibility study conducted by Contracting Authorities.

Some countries empower PPP Units to manage part or all of the USP process. In Malawi, project proponents may initiate an unsolicited bid by notifying the PPP Commission in writing rather than the relevant Contracting Authority. Requiring PPP Units to manage the USP process might prove beneficial, particularly in non-mature PPP jurisdictions, where the capacity of Contracting Authorities to deal with the USP process can still be limited.

Competitive Procedures for Unsolicited Proposals

If a government receives a USP that it is interested in pursuing, it should convert the USP into a competitive tender to give other bidders the opportunity to compete with the USP proponent. Having a competitive tender is beneficial as it increases the transparency of how USPs are handled and enhances the value for money in a project.

Despite this, only 63% of the African jurisdictions surveyed require USPs to be procured using a competitive tender process. In the remaining 37% of economies, there is no express requirement for a competitive procedure.

Most countries that adopt a competitive tender process provide some sort of compensation or advantage to the USP proponent for developing a project.

The most commonly used form of compensation in the African jurisdictions surveyed is reimbursement of the developers' fees. 51% of the countries surveyed prescribe it. When reimbursing developers' fees, the USP proponent is paid a fee by the government (or the winning bidder) to reimburse part of the project development costs.

Bid bonuses are provided in 38% of the jurisdictions surveyed. With a bid bonus, the proponent receives a scoring advantage, which is typically defined as an additional percentage added to their evaluation score.

One of the least used methods provided in Africa is the right to match. Under this mechanism, the USP proponent can match a competing proposal to win the tender. 11% of the countries that offer benefits to USP proponents prescribe it. On the other hand, automatic shortlisting is provided by one country in Africa. With automatic shortlisting, the unsolicited proponent is automatically included in the final round of the bidding process. This approach is used in the road sector in South Africa, as outlined in South Africa's Road Agency Policy Note.

Chapter 5

PPP Contract

This last chapter of the Brochure discusses specific aspects of the contractual relationship between the Contracting Authority and the Private Partner.

Domestic legislations in Africa often include provisions that deal with the content of the PPP contract. In some countries, the law only refers to the need for an agreement between the Private Partner and the Contracting Authority. In other countries, the legal framework includes extensive mandatory provisions regarding the content of clauses that must be included in the agreement. In Congo, for instance, Law No. 88-2022 regulates in detail the minimum requirements of contractual clauses in PPP agreements.

An intermediate approach is taken by those countries that list topics that should be included in PPP contracts without regulating in detail the content of the clauses. This is the case in Sierra Leone, for instance, where the scope of the PPP contract is regulated generically without fine-tuning the details of its clauses.

Irrespective of how different jurisdictions in Africa regulate the content of PPP contracts, it is worth highlighting that the contract between the Contracting Authority and the Private Partner will not be the only contract involved in a PPP transaction. In some projects, governments might need to enter into direct (or “tripartite”) agreements with lenders (when a project is financed on a project financing basis), leases, or other land-property related agreements, as well as government and credit support instruments.

Contract Approvals

Most jurisdictions surveyed require the PPP contract between the Contracting Authority and the Private Partner to be approved before being executed. 45% of the countries require approval from a cabinet (or a cabinet-level committee). An approximately equal number of countries require approval from the central PPP Unit or Ministry of Finance. In other cases, countries require approvals from other government entities, including technical ministries, regulatory authorities, and attorney generals’ offices.

In certain countries, approvals are needed from multiple government entities. In Mali, for example, before being signed, PPP contracts that receive government guarantees must be approved by Contracting Authorities and the Minister of the Economy and Finance.

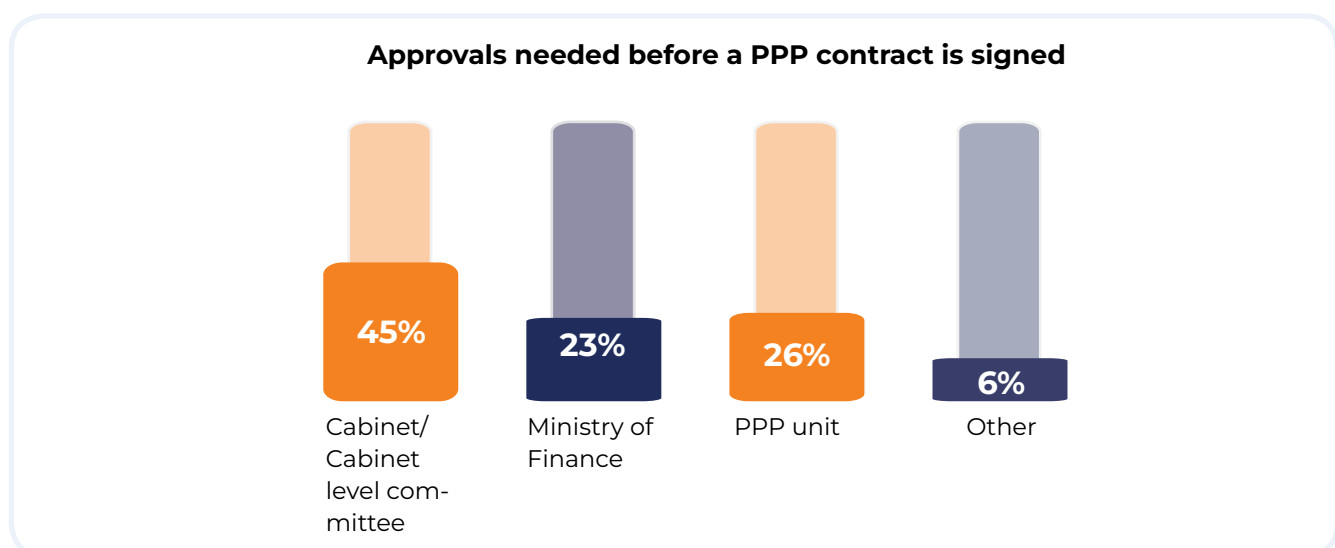


Figure 30: Approvals needed before a PPP contract is signed

Approval requirements may also depend on the size of a project. In Ghana, PPP projects with an estimated capital cost exceeding US\$ 200 million require approval from the Cabinet. Projects below that threshold require approval from the PPP Committee, while projects regulated by the Ghanaian Constitution require Parliamentary approval.³

Some countries also introduce contract approval requirements once a PPP contract is signed. In most jurisdictions surveyed, post signature approvals are usually needed to ensure the contract is properly considered as it enters the contract management stage.

Power to Contract

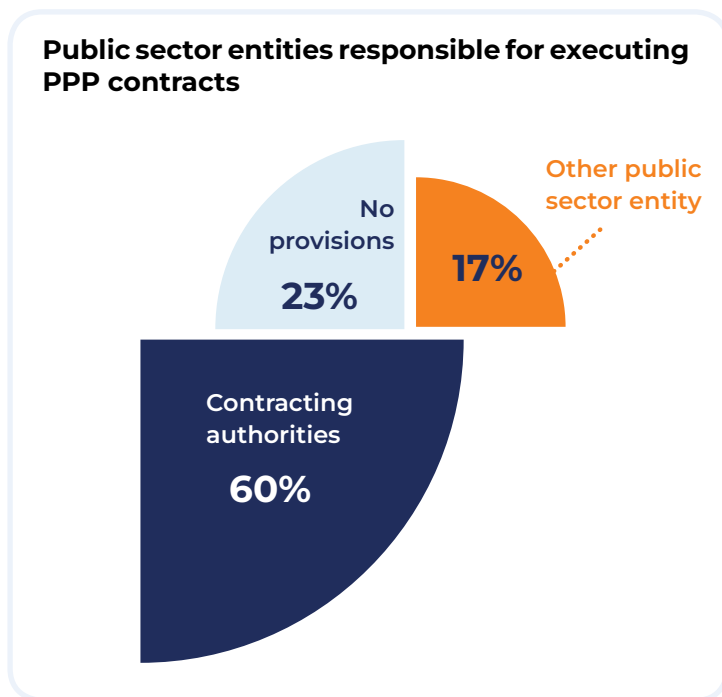


Figure 31: Public sector entities responsible for executing PPP contracts

PPP institutional frameworks should clearly define which government entity will have the authority to enter into the PPP contract with the Private Partner.

60% of the surveyed countries require Contracting Authorities to sign PPP contracts with Private Partners. 23% of the jurisdictions surveyed are silent on the matter, and 17% of the countries require other public sector entities, such as technical ministries or PPP Units, to sign PPP agreements.

The Contracting Authorities empowered to sign PPP contracts usually include government ministries, departments, and agencies. In some cases, Contracting Authorities also include local authorities, municipalities and state-owned enterprises.

The power to bind the relevant Contracting Authority is usually delegated to designated officials. In Uganda, for instance, under the PPP Act of 2015, the Contracting Authorities' accounting officers are responsible for executing PPP agreements.

In some countries, the legislation establishes that the PPP contract can only come into effect after certain formalities have been completed, such as the PPP contract's publication in the official gazette.

Standard Contractual Terms

Some jurisdictions require PPP contracts to be developed based on standardised contractual provisions. In South Africa, the National Treasury issues standardised PPP provisions that prescribe how key issues should be addressed in PPP contracts. These provisions form the basis of most draft PPP agreements.

The responsibility for drafting standard contractual clauses and related guidance materials is typically assigned to a country's PPP Unit. In Ghana, the PPP Unit established within the Ministry of Finance is responsible, in consultation with the Attorney General's and Ministry of Justice's offices, to generate standardised partnership agreements that contracting authorities must adapt prior to the initiation of the PPP procurement process. In the absence of any standard agreement, Contracting Authorities in Ghana are required to submit all PPP agreements to the PPP Unit for approval before use.



3. Projects regulated by the Ghanaian constitution include projects where Government requires an agreement for the granting of a loan out of any public fund or public account.

PPP Contracts' Governing Laws

PPP legal frameworks will, in most cases, outline the governing law applicable to PPP contracts.

Local law as the governing law of PPP contracts is a requirement in 54% of the African jurisdictions surveyed. However, approximately 10% of the countries, allow public and private sector partners to choose the law that will govern the PPP contract.

Examples of countries that allow the public and private sector partners to choose the law that will govern the PPP contract include Chad in Central Africa, Côte d'Ivoire in Western Africa, and Madagascar in Southern Africa.

In countries where the choice of governing law is not regulated, the absence of a specific governing law clause could result in the automatic application of domestic law.

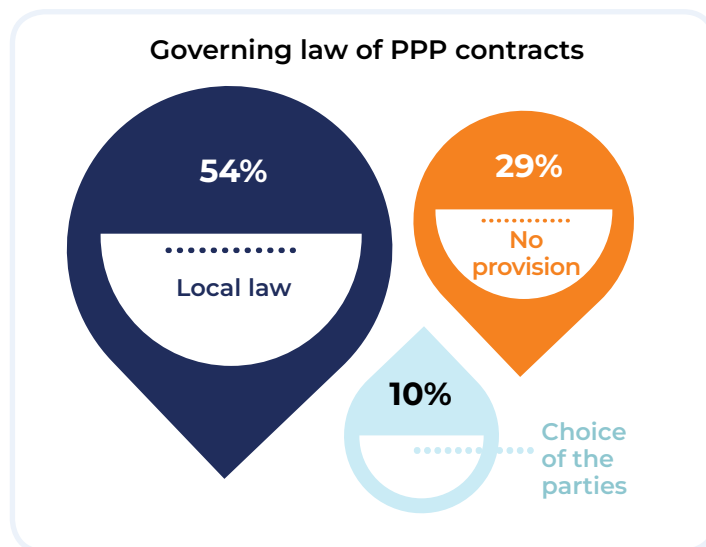


Figure 32: Governing law of PPP contracts

Overall, 50% of the countries that do not regulate the matter are from common law jurisdictions, 40% are from civil law jurisdictions, and 10% have a mixed legal system.

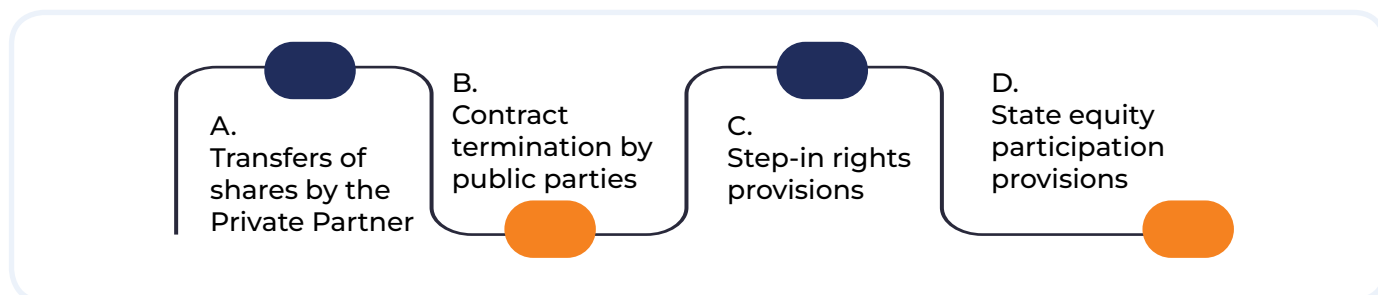
Contract Management

During the contract management stage, it is common to find performance monitoring and reporting obligations outlined in local laws. In Togo, the PPP Act of 2021 grants Contracting Authorities the power to exercise control and ensure the proper implementation of PPP contracts. Private partners must also submit annual performance reports that contain the necessary information for Contracting Authorities to exercise control effectively.

In Benin, according to the PPP Act of 2016, PPP contracts must establish the durations and control mechanisms necessary to ensure the contract's effective performance. **During the project construction and operational phases, a report must be prepared by the Private Partner to measure a project's performance.** Under the PPP Act of 2016, Contracting Authorities and Private Partners must also hold regular meetings to monitor the implementation of the PPP contract.

Contractual Terms Regulated By Local Laws

To support the entering into of PPP contracts, in some cases, jurisdictions regulate key contractual terms through the applicable legislation. In Kenya, minimum contractual obligations for PPP contracts are specified under the Third Schedule of the PPP Act of 2021. These include, by way of example, methods of dispute resolution, early termination events, and local content requirements. The Kenyan PPP Act of 2021 also establishes that whenever a project's revenue performance meets or exceeds the target return on investment, parties to a PPP contract must make provisions for revenue sharing mechanisms between the Private Partner and the government. For the purposes of this Brochure, an analysis was performed to assess whether the applicable laws and regulations regulated the following key contractual terms:



The types of contractual terms are reflected in the figure below. The number of economies that regulate each contractual term through applicable legislation is also shown and expressed as percentages.

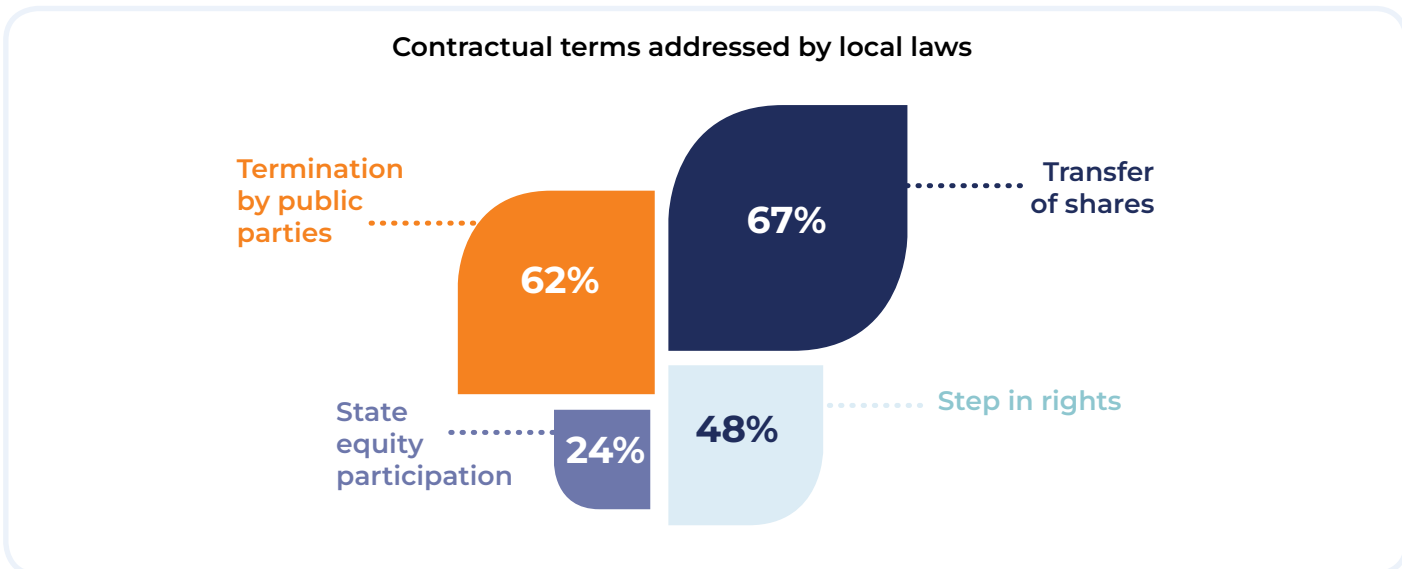


Figure 33: Contractual terms addressed by local laws

A. Transfer of Shares By the Private Partner

As far as PPP legislation is concerned, the transfer of shares by the Private Partner is the most widely regulated provision. **67% of the surveyed jurisdictions address this provision.** By way of example, in Sierra Leone, under the PPP Act of 2014, a transfer of shares that leads to a transfer of control of the project company can only be carried out with the approval of the Contracting Authority.

B. Contract Termination By Public Parties

The second most widely regulated provision is the termination of contracts by public parties. **Contract termination by public parties is addressed in 62% of the countries surveyed.**

In the jurisdictions surveyed, contract termination by public parties is usually attributed to three categories of circumstances: serious breaches by the Private Partner, Private Partner's insolvency, or reasons of public interest.

In some cases, the right to terminate for reasons of public interest can be exercised if expressly provided for in the relevant legislation. Common law jurisdictions typically adopt this approach. In civil law countries, however, such a right may be implied in a government's contracting power even without a specific legislative provision to that effect.

C. Step in Rights Provisions

Step in rights provisions (whether by Contracting Authorities or lenders) are addressed in 48% of the jurisdictions surveyed. In Ethiopia, the PPP Proclamation of 2017 establishes that Contracting Authorities have the right to temporarily take over the operation of a project in the event of a serious failure by the private party to perform its obligations after having given notice to that effect.

In Djibouti, the PPP Act of 2017 establishes that Contracting Authorities may agree with the lenders to replace the Private Partner in the event of a serious breach of contract.

When exercised by the lenders, step-in rights provisions should be formalized through a "direct agreement" between the lenders, the Private Partner, and the Contracting Authority. Not many countries in the region regulate lenders' step-in rights. However, when doing so, local laws should clearly define the scope of what is permitted, granting Contracting Authorities the authority to enter into Direct Agreements.

D. State Equity Participation Provisions

State equity participation provisions are addressed in 24% of the jurisdictions surveyed.

In Tunisia, the PPP Act of 2015 establishes that public entities may share in the equity of project companies and, therefore, have the right to be represented in the company's management. Ghana also regulates state equity participation provisions by establishing that a public entity may be included as a shareholder in the project company.

Out of the countries that regulate state equity participation provisions, 80% are from civil law jurisdictions, 10% are from common law jurisdictions, and 10% have a mixed legal system.

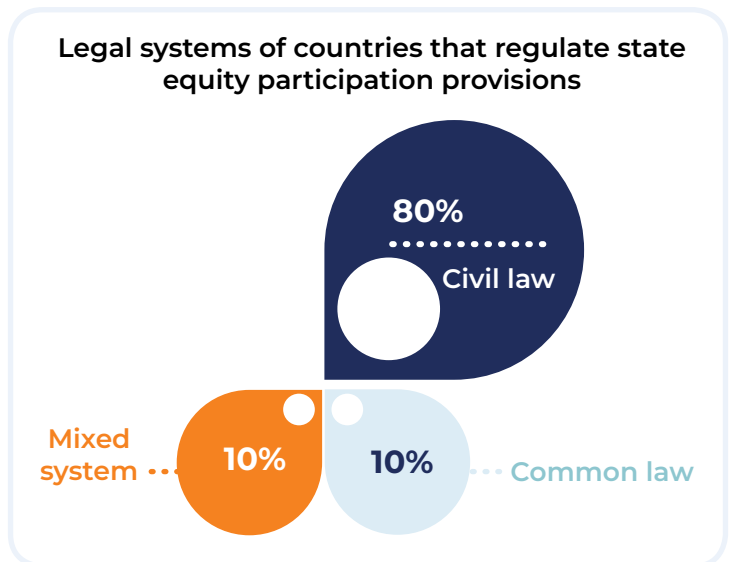


Figure 34: Legal systems of countries that regulate state equity participation provisions

Force Majeure, Material Adverse Government Actions and Changes in the Law

How countries in Africa regulate changes in circumstances under the contract due to force majeure events, material adverse government actions, and changes in law varies.

Under the PPP Act of 2020, Ghana has introduced minimum contractual obligations that must be specified in the project agreement. It requires the parties to establish the basis of risk allocation in respect of changes in law, unforeseeable accidents, and force majeure events.

In South Africa, project risks are allocated through the National Treasury's standardised PPP provisions. The definition of a force majeure event is narrow, and no compensation or payment is given during the duration of the event. In addition, relief or compensation are only given for changes in law and other governmental actions that are discriminatory against the project.

In Morocco, the PPP Act of 2014 establishes that the parties in a PPP contract must maintain the contract's equilibrium in the event of unforeseen or force majeure events. Under the PPP Act of 2014, PPP contracts must establish the basis for risk allocation between the Contracting Authority and the Private Partner, including force majeure events.

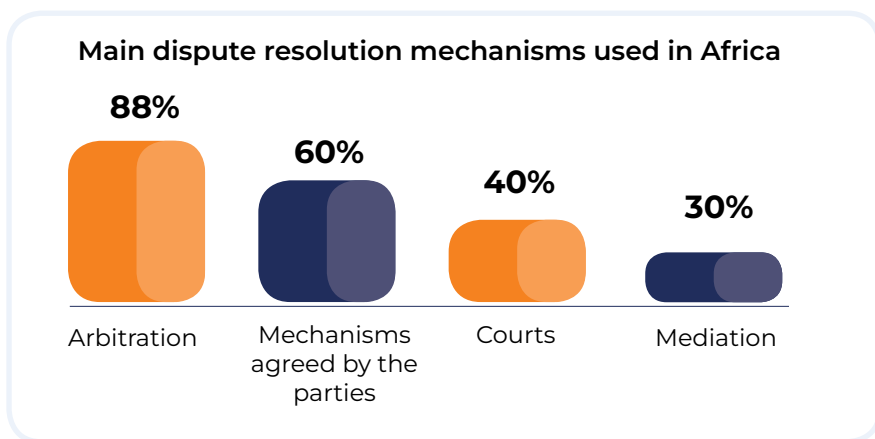


Dispute Resolution Mechanisms

Dispute resolution mechanisms are regulated in nearly all of the jurisdictions surveyed. Some of the main mechanisms used to resolve contractual disputes include non-judicial means such as arbitration and mediation and judicial means like courts.

For this Brochure, an analysis was performed to assess how arbitration, mediation, courts, and other dispute resolution methods agreed upon by the parties were regulated by the applicable legislation. These types of dispute-resolution mechanisms are illustrated in the figure below. The number of economies that regulate each dispute resolution mechanism in Africa is also shown and expressed as percentages.

Under local legislation, using a dispute resolution mechanism usually does not preclude resorting to other forms of dispute resolution processes. Parties may, therefore, be required to enter into mediation or arbitration proceedings and only use courts as a last resort.



Approximately 60% of the jurisdictions surveyed allow public and private sector partners to select the dispute resolution mechanism through the PPP contract. For instance, in Malawi, under the PPP Act of 2022, PPP contracts are required to include dispute resolution mechanisms in the event of a breach of contract or a misunderstanding between the parties. While parties can choose their preferred dispute settlement method, the PPP Act 2022 establishes that parties should try to resolve any dispute through amicable conciliation, mediation, or arbitration.

Figure 35: Main dispute resolution mechanisms used in Africa

In Mali, dispute resolution mechanisms agreed by the parties may include arbitral tribunals under the conditions laid down by the Organization for the Harmonization of Business Law in Africa (OHADA) Uniform Act on arbitration.

Alternative Dispute Resolution Mechanisms

Overall, arbitration is Africa's most utilised form of alternative dispute resolution mechanism. 69% of the surveyed economies prescribe it. However, some African countries require arbitration to be undertaken domestically.

In some cases, countries may also require institutional approvals to initiate arbitration. In Algeria, a 2015 Government Decree governing the delegation of public services establishes that recourse to international arbitration bodies must be subject to prior institutional approvals (e.g., a prior agreement reached in a government meeting).

Despite these shortcomings, it is worth highlighting that **most African countries are signatories to the International Centre for Settlement of Investment Disputes (ICSID) Convention**, which enables international arbitration under the auspices of the World Bank or other contracting states to ICSID.

Most countries on the continent are also signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which allows for the enforcement of arbitration agreements and foreign arbitral awards.

Arbitration is Africa's most utilised form of alternative dispute resolution mechanism

69%



Mediation is regulated in approximately 30% of the countries on the continent. Of the countries regulating mediation, 53% are civil law based, 40% common law based and 7% have a mixed legal system.

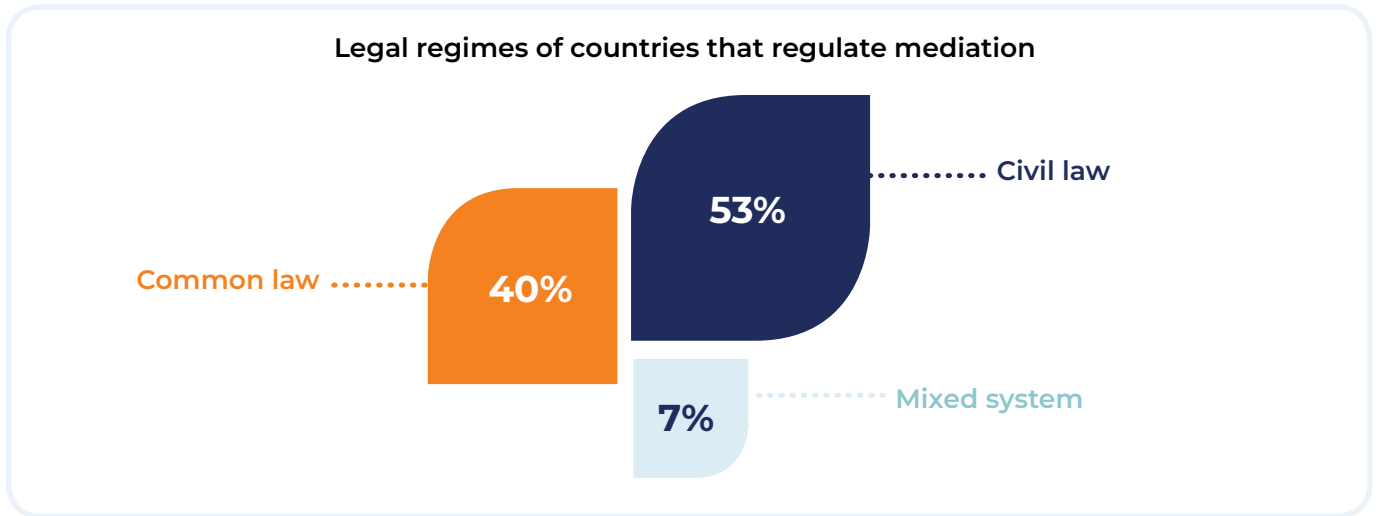


Figure 36: Legal regimes of countries that regulate mediation

The use of dispute adjudication boards, instead, is usually not addressed in local laws. However, according to the Dispute Board Federation, dispute adjudication boards have been used to resolve PPP related disputes in South Africa, Uganda, Malawi, Morocco, Tunisia, and Ghana.

Judicial Systems and Appeals Against Contract Award Decisions

As a judicial means of dispute resolution, courts are used in approximately 40% of the jurisdictions surveyed. **Most jurisdictions surveyed select local courts as the forum for resolving disputes.** This selection may be made for a variety of reasons, including the court's familiarity with the PPP legislation and because the PPP contract might already be governed by local laws and legislation.

Most countries on the continent also allow private sector partners to appeal a contract award decision. In Ghana, the PPP Act of 2020 establishes a complaints panel that any individual can use for any breach of the bidding process. Decisions made by the Ghanaian complaints panel can be appealed to the High Court.

In Guinea, under a 2021 government decree implementing the PPP law of 2017, disputes related to contract awards are referred to the Public Procurement Regulatory Authority. Guinea also introduces a 'minimum standstill period' between the contract award and the actual signing of the contract to provide unsuccessful bidders with the time needed to decide whether to challenge the contract award.

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The ALSF gratefully acknowledges the following documents as sources for some of the information in this brochure:

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