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Risk Transfer in Public Private Partnership/Private Finance Initiative Procurement Documents: The Difference between The United Kingdom and Malaysia

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Abstract

The aim of this paper is to analyse the risk transfer issue in Public Private Partnership/Private Finance Initiative (PPP/PFI) procurement documents in the United Kingdom (UK) and Malaysia. It utilises qualitative research methods using documentation and interviews for data collection. The UK documents (guidelines and contracts) identify the risks related to this form of public procurement of services and make explicit the appropriate allocation of those risks between the public and the private sector PPP/PFI partners and so the types of risks each party should bear. However, in Malaysia, such allocation of risks was not mentioned in PPP/PFI guidelines. Hence, a question arises regarding whether risk transfer exists in Malaysian PPP/PFI projects, whether in contracts or by other means. This research question is the rationale for the comparative analysis of documents and practices relating to risk transfer in the PPP/PFI procurements in both countries. The results clarify risk-related issues that arise in implementing PPP/PFI procurement in Malaysia, in particular how risk is conceptualised, recognised and allocated (whether explicitly or implicitly), whether or not that allocation is intended to achieve optimum risk transfer, and so the implications for achievement of value for money or other such objectives in PPP/PFI.

Keywords: Risk Transfer; PPP/PFI Procurement Documents; The UK; Malaysia

1. Introduction

A Public Private Partnership/Private Finance Initiative (PPP/PFI) is a form of procurement where the public sector procures services over a prescribed concession period (frequently 20 years or more), which leaves the risk of ownership and efficient operation of the project facilities with a private sector supplier. It is a modern form of public sector procurement designed to achieve improved value for money through a focus on whole life costing and increased risk transfer to the private sector (HM Treasury 1996; HM Treasury 2006; Corner 2006; OECD 2008; Asenova 2009; Winch et al 2012; World Bank 2012;). PPP/PFI

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procurement has become a well-established concept and is adopted in many territories around the world in providing supposedly efficient public infrastructures. Worldwide sectors in which PPP/PFIs have been completed include power generation and distribution, water and sanitation, refuse disposal, utility pipelines, hospitals, school buildings and teaching facilities, sports stadiums, air traffic control, prisons, railways, roads, billing and other information technology systems, and social housing (IMF 2004, World Bank 2012).

Meanwhile in Malaysia, PPP/PFIs are considered a new approach in developing social and economic infrastructures of the country through private finance. However, the involvement of the private sector in the provision of infrastructure is not completely new as the principle of 'growth with equity' has underpinned Malaysia's development planning since the 1970s. It was based on a pro-business growth strategy with the private sector as the 'growth engine', while the public sector ensures the achievement of the national socio-economic objectives (EPU 2004, Abdullah et al 2012). The Malaysian New Economic Model, launched in 2010, emphasized that the private sector is to be the main driver of growth in market-led investment, while the government will manage possible disruptions arising from market failures (NEAC 2010).

Both the UK and Malaysia have adopted PPP/PFI procurement and there are some similarities and differences of risk transfer in terms of their institutional, political and economic contexts (Abdullah 2016). The utilization of PPP/PFI procurement in the UK and its role in the provision of infrastructure and related services had motivated Malaysia to follow suit. Nevertheless, can the mechanism of risk transfer practised in the UK be implemented in the Malaysian environment?

Thus, the aim of this paper is to compare, contrast and analyse the risk transfer arrangements specified in PPP/PFI procurement documents obtained from the UK and Malaysia and thereby clarify issues arising when implementing PPP/PFI procurement in the latter country. The identification of risks, how they are being allocated (whether explicitly or implicitly), whether that allocation can be expected to achieve optimum risk transfer, and the impact of risk transfer on the public sector are analysed through investigation of PPP/PFI procurement documents obtained from public and private sector partners. The results are revealed in the findings and discussion section.

2. Literature Review

Official documents can be key repositories for a case and could represent the scenario of the events where a researcher is not able to attend (Stake 1995). As such, a document is an artefact that has as its central features an inscribed text, which is in a simple term a written text (Scott, 1990). These documents, according to Grix (2001), are written with a purpose based on particular assumptions and are presented in a certain style. According to Prior (2003), analysis of a government development policy and report can define any political actions; for instance, a political party's manifesto, a document written by a trade union as well as an association linked to a political ideology. Hence, those documents should be analysed in the context in which they were written (Grix, 2001).

Based on Mogalakwe's (2006) classifications of documentary sources, two types can be associated with risk transfer in PPP/PFI procurement in the UK and Malaysia:

- <u>Public documents</u>: One example are UK guidance documents such as 'Standardisation of PFI Contracts (SoPC) Version 4' and 'Standardisation of PF2 Contracts' (SOP2C).

[https://www.gov.uk/government/publications/private-finance-2-pf2]. In Malaysia the 'Guideline for PPP' and the pamphlet 'Economic Transformation' and 'Facilitation Fund Guideline' are for public use, while the document 'PPP Guidelines No.01/2009' is for government agencies. [http://www.ukas.gov.my/en/garis-panduan].

- Private documents: These are sources from private sector organisations and the State Governments in Malaysia. Some examples include monthly progress reports on construction work; PowerPoint presentations; 'A Contract Agreement' and 'State Government Circular on Privatisation'.

The use of documentary methods not only refers to the analysis of documents containing information concerning a phenomenon such as the relevant issues that relate to PPP/PFI procurement in the UK and Malaysia (Mogalakwe 2006), but also is a technique used to categorise, investigate, interpret and identify the limitations of physical sources, most commonly written documents whether in the private or public domain (Payne and Payne 2004).

3. Methodology

In qualitative research, document and documentary sources are recognised to provide rich information and evidence. The text in the documents allows the researcher to understand and explore the phenomena of the study. Using documents as a part of qualitative research ensures account is taken of an important source of evidence and provides data backup. Glaser and Strauss (1967) recommend all researchers regard documents as important as informants for providing answers to some research questions. For instance, the data obtained from the guidelines indicates government policy related to PPP/PFI procurement implemented in Malaysia and this policy can determine risk transfer.

Data collection for this paper came from documentary sources and elite interviews with key stakeholders. Interviewees were assured that their identities would remain confidential so as to elicit frank and meaningful responses from them. Hence, only their official status is identified in the text, this being sufficient to make clear that the interviewees were of appropriate status in the PPP policy and practice field and so able to answer the interviewer's questions authoritatively. The documentation was collected from guidelines, newspaper reports, project reports and brochures. Additionally, the documents listed below were collected during the interviews and were provided by the respective interviewees. They include:

1. An agreement contract between the Special Purpose Vehicle (SPV) and the Public Sector. Title: Build- Lease-Transfer Agreement under the PPP project category (given by the SPV).
2. Monthly progress report prepared by the main contractor (given by the SPV).
3. A guideline used by a State Government for infrastructure projects by the private sector (given by the State Government officer).
4. PowerPoint hand-outs: 'PFI Model for Malaysia' prepared by a Consultant of SPV (given by the SPV).
5. PowerPoint hand-outs: 'Enabling Environments: Legal & Institutional – Malaysia PPP Experience' prepared by a government officer (given by Public Private Partnerships Unit (3PU)).
6. A pamphlet from 3PU on Economic Transformation through strategic PPP (given by 3PU).

In total, 25 documents and power-point slides were analysed (Table 1). The documentary analysis was undertaken using content analysis techniques, the flowchart for which is in Figure 1 below. The steps involved defining the data type, for which the researcher used 'known text'. According to Rich (2010), 'known text' is unstructured content, typically found in documents, where we know the source and want to protect that specific information. As mentioned above, the sources were from the documents collected during the interviews and via the government websites both in the UK and in Malaysia. Lastly, all selected documents were analysed using pattern matching that searches for the key word of risk transfer/risk sharing and other sentences in the text that indicates the meaning of the two key words.

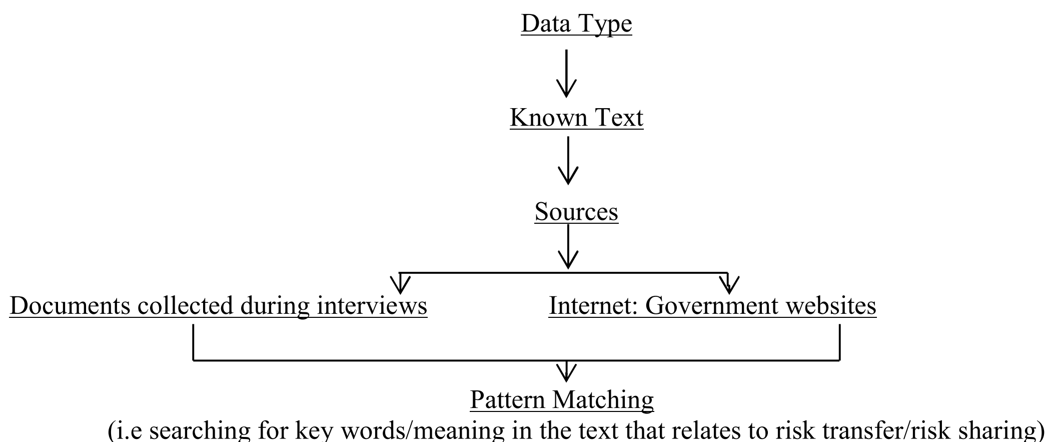

Fig 1. Content analysis techniques (Source: Abdullah 2016)

4. Findings And Discussion

Analysis of the documents was undertaken in two phases. First, analysis of key guidance documents in the public domain in the UK and Malaysia regarding risk transfer in PPP/PFI procurement. Second, analysis of private documents in relation to risk transfer in PPP/ PFI procurement in Malaysia. The key guidance documents produced in the UK include 'Standardisation of PFI Contracts (SoPC) Version 4' and 'Standardisation of PF2 Contracts' (SOP2C) in the UK. [https://www.gov.uk/government/publications/private-finance-2-pf2]. While in Malaysia, the public documents include 'Guideline for PPP' (Public), 'PPP Guidelines No.01/2009' (Government Agencies), Pamphlet and 'Facilitation Fund Guideline'. [http://www.ukas.gov.my/en/garis-panduan].

The UK's rules and regulations related to risk transfer are embedded in the various Standardisation of PFI Contracts (SoPC) Guidance issued by HM Treasury. For instance, in July 1999, the first edition of SoPC (HM Treasury 2007) was published to provide guidance on the key issues that arise in PPP/PFI projects. The aim was to promote the achievement of commercially balanced contracts and to enable public sector procurers to meet their requirements and deliver best value for money. Subsequently, the second and third editions of the SoPC (HM Treasury 2007) were issued in September 2002, and April 2004 respectively. Version 4 contains the updates of the guidance taking into account new legislation and developments in the PPP/PFI market, providing new guidance on certain matters identified in HM Treasury's March 2006 document, entitled "PFI: Strengthening Long-Term Partnerships" (HM Treasury

2006). Analysing the SoPC Guidance, revealed three main objectives of PPP/PFIs that have been identified, which include (HM Treasury 2007; UK Government 2004):

- To promote a common understanding of the main risks encountered in a standard PPP/PFI project;
- To allow consistency of approach and pricing across a range of similar projects; and
- To reduce the time and costs of negotiation by enabling all parties concerned to agree on a range of areas which can follow a standard approach without extended negotiations.

Nevertheless, according to Walsh (2003), the PFI Handbook (PFP 1995) was the first specific guidance focusing on risk transfer. The key features of risk allocation and risk transfer contained in the handbook include (PFP 1995):

- Obligation of private sector partners to genuinely assume risk without guarantee or indemnities payable by the public sector against unexpected low level of demand or other forms of project failure;
- Ensure optimal risk transfer in risk allocation to yield Value For Money (VFM) under the PPP/PFI procurement;
- Negotiations with bidders should evaluate the amount and type of risk that needs to be transferred to achieve optimum VFM;
- There are financially Free-Standing projects where the private sector seeks to recover costs entirely through charges for services to end users and only minimal risk should be retained by the public sector;
- Other relevant risks which are of sufficient general importance in the PPP/PFI projects to be considered such as a) design and construction risks; b) commissioning and operating risks; c) demand risks; d) residual value risks; e) technology/obsolescence risks; f) regulation and similar risks and g) project finance risks.
- Risk that should be retained by the public sector such as risk of wrongly-specified contractual requirements and reputational risk of criticism from the public.

The above (SoPC) Version 4, in the UK, is being replaced with a new version of standard wording and guidance [known as "Standardisation of PF2 Contracts" (SOP2C)] issued by HM Treasury in December 2012. [https://www.gov.uk/government/publications/private-finance-2-pf2].

This new approach, called PF2, is the UK Government's successor to the PPP/PFIs for the delivery of infrastructure and related services through PPPs. The new guidance is to be used by public sector bodies and their advisers when drafting PF2 contracts (HM Treasury, 2012). Referring to 'PF2: A User Guide', many new chapters were added in the PF2 Guidance and some chapters in the previous SoPC4 have been revamped and rearranged. This includes the chapters on risk allocation principles that relate to changes in law, indemnities, guarantees, contractual claims, insurance and authority step-in (i.e. regulatory intervention). The UK government introduced these changes to improve VFM by reducing the requirement for contractors to build up financial reserves against risks (HM Treasury, 2012).

Meanwhile, in Malaysia, there are several PPP/PFI guidelines on the implementation of PPP/PFI procurement issued by 3PU. However, very few guidelines are relevant to the issue of risk transfer, this being a key difference compared with the UK's proactive and evolutionary approach to risk sharing within PPP/PFIs outlined above. This disparity seems to reflect the different policy, institutional and other contexts within which PPP/PFIs operate in the two countries (Abdullah 2016).

The main Malaysian guidelines are contained within several documents. First, 'Guideline for PPP' which is for public sector organisations aims only to explain to interested parties the key principles of the Malaysian PPP/PFI programme as embodied in the Malaysian Ninth Plan [http://www.ukas.gov.my/en/garis-panduan]. It also addresses some of the key attributes of the PPP/PFI structure and operational principles.

Second, 'PPP Guidelines No.01/2009' [http://www.ukas.gov.my/en/garis-panduan] is meant for Government agencies, its purpose being to explain basic PPP/PFI principles and procedures and how to implement them. The guideline contains information on matters related to the framework of the PPP/PFI concept, principal payments, project evaluation criteria, structure of the project, processes, procedures, implementation and a guide on the preparation of the project business case.

Third, 'Facilitation Fund Guideline', [http://www.ukas.gov.my/en/garis-panduan] aims to bridge the viability gap in private sector investment in implementing high value infrastructure projects; to act as catalyst for private sector investment; to rationalise the Government's involvement in business and increase participation of the private sector in the economy.

Fourth, a pamphlet issued by 3PU [http://www.ukas.gov.my/en/garis-panduan] which contains general information on PPP/PFI procurement in Malaysia and a few initial infrastructure projects such as building of university campuses.

Analysis of the first and second guidelines reveals that transfer of risk to the private sector is embedded in financing the PPP/PFI projects as well as managing related services which include the construction, management, maintenance, refurbishment and replacement of public sector assets such as buildings, infrastructure, equipment and other facilities. In particular the guideline emphasises the allocation of risk as the main aspect differentiating PPP/PFI procurement from the conventional method of public procurement that separates the building of physical infrastructure such as schools and hospitals (by private sector contractors) from provision of the related service by the public sector itself (education and medical care respectively). This is because, utilising PPP/PFI procurement for any infrastructure projects should achieve VFM, through such risk transfer, which allocates risks optimally between the public and private sectors.

Optimal sharing of risks is one of the key characteristics of PPP/PFI projects allocating risk to the party (i.e. public or private sector partner) deemed best able to manage it. Moreover, according to the guidelines, transfer of assets at the end of the concession period becomes an option for the Malaysian government. This statement refers to PPP/PFI projects assets which have minimal positive, or even negative, terminal value and in this case the assets are not transferable to the government at the end of the concession period. In the case of minimal terminal value, for example, by exercising this option the government can avoid incurring costs arising from the technological obsolescence of assets such as the need to upgrade medical equipment or power generators. In the case of negative terminal value, the government can avoid incurring costs such as those related to demolition of the physical infrastructure and rendering its site safe from contamination by toxic substances, such as medical wastes and heavy metals. This means that the government will not incur end-of-contract liabilities, the construction of these public facilities and their subsequent scrappage having been fully financed by the private sector.

This statement contrasts sharply with the government objective of providing the Facilitation Fund under PPP/PFI procurement. The Facilitation Fund is intended to make a PPP/PFI project viable for the

private partner(s) whilst the guideline statement seeks to avoid the public partner bearing residual financial risks by default at the end of the contract. Ultimately, it is a case of achieving an appropriate balance between incentivising the private sector to engage in PPP/PFIs and ensuring that the public sector secures VFM and achieves its other public policy objectives for economic and social development.

Analysing the 'Facilitation Fund Guidelines' [http://www.ukas.gov.my/en/garis-panduan] issued by the Malaysian government in February 2011, although funds are provided to the private sector, it does not mean that financial risk is being transferred to the former. This is because the fund is capped at 10% of the total project cost, to encourage private sector participation. The purpose of the fund is to finance the development of the basic infrastructure projects such as access roads, bridges, utilities and land acquisition for highway projects. On the other hand, the pamphlet [http://www.ukas.gov.my/en/garis-panduan] prepared by the government agency does not provide any further information that relates to either risk transfer or risk sharing.

The risk allocation in the UK guidance is much more comprehensive compared to the Malaysian guidelines. The issue of risk transfer is also much more evident in the UK guidance as to who should bear certain types of risk. This also indicates that private sector companies in the UK are likely to have a clearer view and be aware of the types of risks they have to bear when they enter into a PPP/PFI contract. Therefore, a question arises: does risk transfer exist in the PPP/PFI projects implemented in Malaysia? Hence, analysis of private documents in relation to risk transfer in PPP/ PFI procurement in Malaysia provides the answers considered below.

Documents received from the respondents during the fieldwork data collection in Malaysia from December 2011 to March 2012 and from February 2013 to March 2013 include a progress report on construction work completed and PowerPoint presentations. Four PowerPoint presentations were received from respondents. The first PowerPoint is related to 'PFI Model for Malaysia'. This PowerPoint was prepared by a consultant of an SPV, which basically explains the structure of the PPP/PFI model in Malaysia. The diagrams make clear that the issue of risk transfer were then being discussed. For instance, risk transfer is stated as one of the criteria for generating VFM from PPP/PFI projects in Malaysia. The slide on 'Risk Identification and Management' also discusses the principles of risk transfer that emphasises risks be transferred to those parties best able to manage and control them at the lowest cost. The principles also highlight that risk transfer should result in a project being treated as on the balance sheet of the private sector and there should be symmetrical allocation of risks and benefits. This could indicate that the private sector company is aware that certain risks of PPP/PFI procurement have to be transferred to them.

On the other hand, analysis of a PowerPoint document prepared by a government agency on 'Enabling Environments: Legal & Institutional – Malaysia PPP Experience' reveals that the Malaysian government is more inclined towards risk sharing compared to risk transfer. Several slides emphasise the risk sharing mechanisms between the public and private sector. For instance, in the 'PPP in Malaysia' slide, risks should be shared between the partners in implementing economic and socio-economic projects while in the 'PPP Concept' slide, it states that one of its characteristics relates to sharing of risk between the partners. Another slide on 'PPP/PFI: Key Concerns & Issues' mentions that the option to choose PPP/PFI procurement is relevant when there is VFM via optimal risk sharing and capability for the private sector to implement the project. Lastly, the 'Conclusion' slide summarises that the PPP/PFI approach is only possible through smart partnership ventures between private and public sector organisations with a high level of commitment from the government. Hence, these statements indicate the Malaysian government

viewpoint that risks should be shared between the public and private sectors in implementing PPP/PFI procurement. However, there is a possibility that to promote PPP/PFI projects, the government is also prepared to absorb more risks (Abdul Aziz 2006). This brings us back to point noted above about the need to secure an appropriate balance between facilitating involvement by the private sector whilst avoiding the public sector bearing unnecessary costs.

The other two PowerPoint presentations were received from a consultant company appointed by a government agency. The documents are related to progress work on an integrated transport terminal. These documents are not associated with PPP/PFI procurement as the construction of the terminal was built using the conventional procurement method which separates the provision of infrastructure from the service subsequently provided using that infrastructure. Nevertheless, there is some information contained in the documents that is related to risk transfer and risk sharing. For instance, a statement on one slide mentions that the Project Quality Specific Plan (PQSP) and Project Quality forms used shall conform to the Quality Manual and Standard Quality System Procedures (SQSP) of the Consultant Company. This means that risk related to the quality of the project is being transferred to the consultant company. Slides such as 'Monthly Monitoring & Reporting' and 'Project Execution Phase' depict the responsibilities and liabilities of the construction company in building the terminal. This can also be interpreted as construction risks being borne by the main contractor. Nevertheless, risk was also borne by the public sector organisations, as observed in several slides related to issues arising in 2008.

For example, the issues of squatters' settlements and stalls surrounding the construction site could cause the project to halt if immediate action is not taken. The responsibilities for rectifying these problems were transferred to the government agencies such as the Kuala Lumpur City Hall and the Department of Land and Mines. In addition, analysis of the PowerPoint documents also reveals an element of risk sharing between the government and the private sector company. This can be seen in the slide 'Lesson Learnt' relating to land acquisition, which was occupied by the squatters' residents. The cost of compensation paid to 150 families who occupied the land was divided between the government agency and the main construction company. Hence, although this terminal project was built using traditional methods, the involvement of private sector companies made it possible to use risk transfer and risk sharing mechanisms.

Finally, a monthly progress report prepared by a main construction company for a PPP/PFI project in Malaysia was analysed. This progress report relates to the construction of a branch campus of a university in Malaysia. The content of the report is mainly on technical issues related to the progress work on the construction works. It includes project information, comprehensive reports on the work in progress, costs, quality control reports, project control reports and reports on health, safety and the environment. Analysis of the contract summary stated in the report, shows that 'Liquidated and Ascertained Damages' (LAD)[†] of approximately RM163,509 (£33,369.18) per day can be imposed on the construction company if they fail to deliver the project on time. Additionally, the construction company also purchased Contractor All Risk and Workmen Compensation Insurance policies to cover their liabilities against any misfortune during the construction of the buildings. This indicates that certain financial risk is transferred to the

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[†] LAD refers to a fine/compensation imposed on a contractor/supplier who fails to fulfil a contractual obligation as stipulated in the contract. Among the failures to meet contractual obligations that can be subjected to LAD include delay in completing a project that is not in accordance with the schedule specified in the contract; and delay to supply/failure to supply or quality of goods supplied not according to the specifications in the contract. (Ministry of Finance Malaysia http://www.treasury.gov.my/index)

private sector company. Other indications that construction risk was borne by the private sector company can be seen from the 'Non Compliance Report' section in the monthly progress report. A list of non-compliance items was issued by the consultant company for the contractor to rectify.

During the interviews two documents were reviewed: 'A Contract Agreement' and 'State Government Circular on Privatisation' (Selangor State government office). Due to confidentiality, these documents were only allowed to be viewed during the interviews with the respondents. The first document was reviewed during an interview with an SPV in Kuala Lumpur. This is a contract agreement between the SPV and a State Government in Malaysia on building Sharia Courtrooms. The method used in the project was Build Lease Transfer (BLT) with a concession period of 20 years. Similar to the monthly progress report, this contract also has a clause on LAD that requires the SPV to be liable for any delay to the project and an amount of about RM15,000 (£3,061.22) per day would be charged to them. Other information contained in the document includes a section related to insurance coverage on Standard Fire and Special Perils Insurance that the SPV has to purchase. This indicates that financial risk due to delay and insurance costs are transferred to the private sector company.

The second document reviewed was related to a circular adopted by a state government in Malaysia when dealing with privatisation projects (Selangor State government office). This document served as a guideline to the state government for use by the relevant departments when dealing with privatisation projects. It also mentions that one key requirement for the private sector companies is to prepare Risk Sensitivity Analysis in their proposals. Hence, private sector companies have to be aware of the types of risks that are involved in privatisation projects. Due to limited time during the interviews a thorough analysis of the documents could not be performed.

Table 1 below summarises the content analysis of the selected documents, which relates to risk transfer issues. All the UK documents discussed issues of risk transfer, which is a significantly different finding from the documents obtained from Malaysia that placed the emphasis more on risk sharing.

Table 1. Summary of content analysis of risk transfer/risk sharing in the selected documents

No.	Documents/Power-Point Slide	Issues	Issues relating to risk transfer/risk sharing	
			Yes	No
1.	PFI Hand Book (1995)	Key issues on risk allocation and risk transfer	√	
2	HM Treasury Guidance (2006)	VFM guidance, Benchmaking and Market Testing guidance	√	
3	HM Treasury Guidance (2007)	Project Transition Guidance	√	
4	HM Treasury Guidance (2008)	Variations protocol for Operational projects	√	
5	HM Treasury Guidance (2009)	Contract Expiry Guidance	√	
6	HM Treasury Guidance (2011)	Finance Guidance, General Guidance	√	
7	HM Treasury Guidance (2012)	Appropriate risk transfer in terms of legal risk, site risk, utilities risk, insurance costs risk and authority step-in during emergency.	√	
8	Guideline for PPP in Malaysia (2009)	Risk transfer to private sector in financing the PPP/PFIs project and managing services	√	
9	PPP Guidelines no.01/2009	Emphasising optimal sharing of risks in PPP/PFIs project, however, no transfer of risk to government for projects/facilities that have minimal value at the end of concession period.	√	
10	Facilitation Fund Guideline (2011)	Financial risk is not being transferred to private sector as the purpose is to encourage private sector participation.	√	

No.	Documents/Power-Point Slide	Issues	Issues relating to risk transfer/risk sharing	
			Yes	**No**
11	PPP/PFI pamphlet (2006)	Initial information on PPP/PFIs in Malaysia.		√
12	Power-point slide on PFI Model for Malaysia	Risk transfer as one of the criteria for generating VFM	√	
13	Power-point slide on Risk Identification and Management	Discusses the principle of risk transfer, which indicates that the private sector too has to bear some of the PPP/PFIs risks.	√	
14	Power-point slide on Enabling Environments: Legal & Institutional – Malaysian PPP Experience	Reveals that Malaysian government is more inclined towards risk sharing mechanisms.	√	
15	Power-point slide on PPP in Malaysia	Risks should be shared between the partners in implementing economic and socio-economic projects.	√	
16	Power-point slide on PPP Concept	One of PPPs characteristic relates to sharing of risk between partners	√	
17	Power-point slide on PPP/PFI: Key Concerns & Issues	Relevance of private sector option for implementing PPP/PFI procurement due to VFM via optimal risk sharing.	√	
18	Power-point slide on conclusion	Summarises that PPP/PFI approach is possible via smart partnership ventures	√	
19	Power-point slide of progress work on an integrated transport terminal	Statement on PQSP and project quality indicates that project risk is transferred to the consultant company.	√	
20	Power-point slide on monthly reporting and project execution phase	Construction risks being borne by the main contractor	√	
21	Power-point slide on lesson learnt relating to land acquisition	Element of risk sharing between the government and private sector to pay compensation to the squatters residents.	√	
22	Monthly progress report	Construction company buys contractor all risks and workmen compensation policies that indicate risk transfer via insurance	√	
23	Non Compliance report	Construction risk was borne by the private sector.	√	
24	A Contract Agreement	Financial risk due to delay and insurance costs are transferred to the private sector company.	√	
25	State Government Circular on Privatisation	Requirement for private sector to prepare risk sensitivity analysis, which indicates that risk can be transferred to them.	√	

Being qualitative research involving case studies and opinions elicited from interviewees who are practitioners and policymakers in Malaysia, the generic caveat regarding limitations of such research are of particular relevance here. That is to say that the research findings presented here are not necessarily directly applicable in the very different economic, politico-constitutional, social and cultural contexts of western countries (or, indeed, in other Asian countries) which also have their own particular forms of PPP/PFIs.

5. Conclusion

This paper has analysed the issue of risk transfer contained in public and private documents associated with PPP/PFI procurement. Analysis of the PPP/PFI guidance from the UK revealed clear and explicit allocation of risks between the public and the private sectors that indicate the types of risks each party needs to bear. However, in Malaysia, such allocation of risks was not mentioned in the PPP/PFI guidelines. Hence, a question arose regarding whether risk transfer exists in the PPP/PFI projects implemented in Malaysia.

Analysing some private documents such as the progress report on construction work, PowerPoint presentations documents, a contract agreement and State Government Circular on Privatisation indicated that risk transfer exists in PPP/PFI projects implemented in Malaysia. Some of the documents, in particular those prepared by the government agencies, emphasise sharing of risks rather than risk transfer. However, the balance between the public and private partners of those shared risks is not made clear and the government seems to have to bear all risks by default when the viability of a PPP/PFI is in jeopardy.

Nevertheless, at least prior to publication of the UK's PF2 document, this 'risk bearer of last resort' scenario implicitly adopted by the Malaysian government appears little different from the much more explicit formal contractual risk transfer arrangement in the UK because the UK government has sometimes had to bail out failed PPP/PFIs by assuming financial liability in those cases. The lesson seems to be that setting down the legal arrangements for risk sharing and risk transfer within contracts only works when contracts are underpinned by viable PPP/PFIs and when both the letter and spirit of the contract is observed by both parties. Contractual obligations in respect of financial risk become meaningless if a PPP/PFI becomes financially unviable. Hence, too much attention may be paid to contractual matters at the expense of neglect of the financial viability of PPP/PFIs, the reliability of private partners and their commitment to provide the service and its infrastructure at a price proportionate to the risks they actually bear.

Therefore, the findings of this documentary analysis have demonstrated that by the sharing (as distinct from transferring) of financial risk with the private sector, the Malaysian government is able to rapidly expand development of its public service infrastructures. This can be seen from examples of the building of public infrastructures such as Southern Integrated Transport Terminal (SITT), building of Shariah Courtrooms and University campuses. Furthermore, the utilisation of PPP/PFI procurement in Malaysia demands that the public sector personnel acquire competent negotiation skills. This is to ensure that risks can be transferred by allocating risks optimally between the public and private sectors. In this regard, the documentary analysis found that the Malaysia government is more inclined to share the risks rather than transfer them to the private sector, which contrasts to the UK practice of PPP/PFI procurement based on risk transfer.

However, such a statement was not found in other documents that were prepared by the private sector, which emphasise more the construction risk, and the financial risk that they have to bear. This apparently unbalanced and myopic treatment of risks may reflect companies' considerable experience with bearing short-term construction-related risks and their lack of experience with risks related to the subsequent operation of PPP/PFI projects, over extended periods of time, mainly for several decades. In such circumstances the contractual arrangements for risk transfer and risk sharing are exposed to unforeseen eventualities (on the part of both parties to the contract) that may make those arrangements unviable and require governments to adopt default positions as risk bearers of last resort.

In a nutshell, analysing the relevant documents indicates that a mechanism of risk transfer exists to some extent in the PPP/PFI projects implemented in Malaysia. Therefore, it makes sense to further analyse how the Malaysian government could structure its PPP/PFI procurement to achieve optimum risk transfer for the benefit of Malaysian citizen. It also makes sense to consider arrangements for the governance of PPP/PFIs during their operation over extended periods of time so as to ensure that the contractually-agreed transfer of risks is not subverted by either partner.

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