THE TEST SERIES: *THE LAWYERS*

In the first of our new series, it's the lawyers' turn to give their views on the PPP market. Turn the page for the participants' full names and companies

Where are you seeing the biggest opportunities in the market at the moment?

The clear evidence from the panel is that emerging markets are becoming increasingly fruitful hunting grounds. This is particularly true of places like the Middle East and Africa, which once would have been virtually no-go areas for PPP schemes, but are now much more attractive.

"Africa continues to offer really interesting opportunities as an energy and infrastructure market," says Wilson.

"While volatile oil prices and other factors have affected activity levels for infrastructure in the Middle East, there is substantial work ongoing to develop firm PPP pipelines, which will decrease reliance on upfront government funding," adds Grimes.

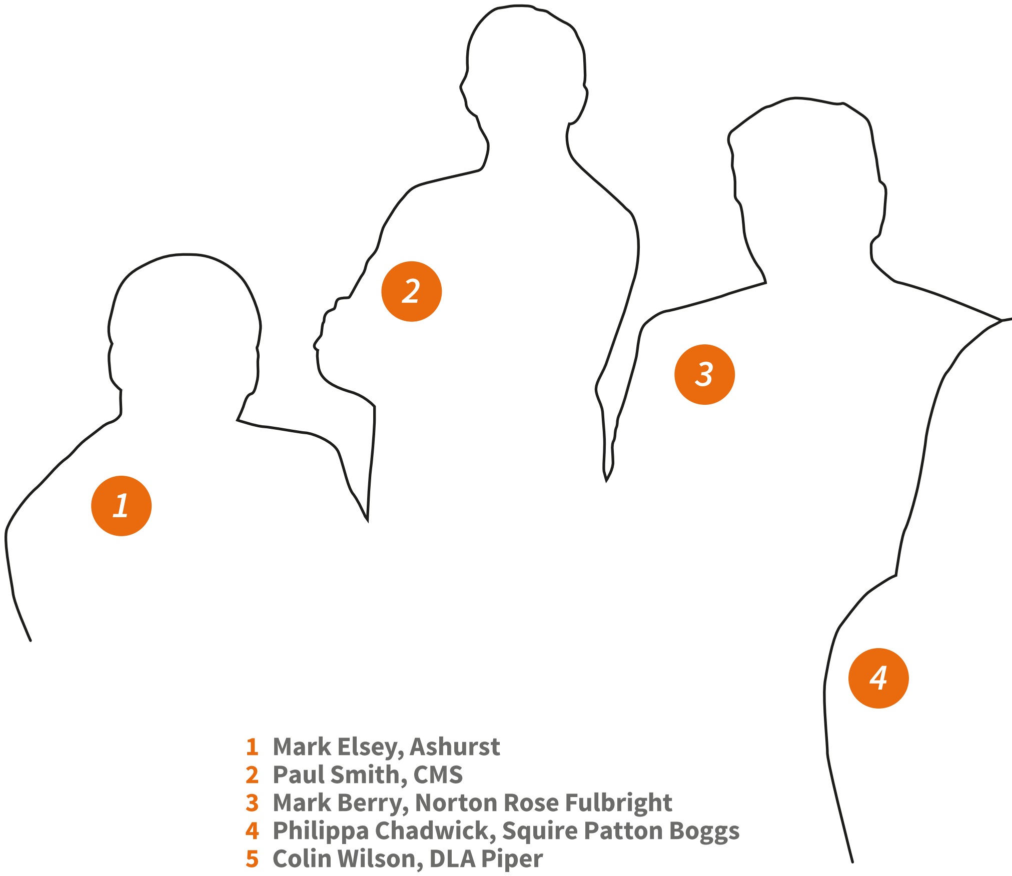
"In sub-Saharan Africa, there are also signs of unprecedented activity, with countries such as Kenya, Tanzania, Namibia and Malawi all either developing PPP projects or successfully operating them."

Unsurprisingly, the issue that comes up time and again in both these regions is political will, with Smith warning that larger scale projects in the Middle East "seem to be stalling".

The other area piquing interest is the Americas. Some, such as Chadwick, are at firms that already have a presence in the US, thus giving them a foothold in potentially one of the next big boom markets.

"The US continues to represent a significant opportunity despite the uncertainty created by the change in administration," Chadwick says. "We have also seen a significant uptick in European sponsors wanting assistance in the US market and an initiative with our Madrid Office and Spanish sponsors has led to some exciting opportunities."

Carter perhaps sums things up best for the legal profession when it comes to PPPs, however, concluding: "As the UK PPP pipeline has evaporated, we've simply followed our clients into new areas such as merchant energy from waste, district energy and renewables, while maintaining a healthy flow of work on legacy PPP."



1 Mark Elsey, Ashurst
2 Paul Smith, CMS
3 Mark Berry, Norton Rose Fulbright
4 Philippa Chadwick, Squire Patton Boggs
5 Colin Wilson, DLA Piper
6 Rebecca Carter, Stephenson Harwood
7 Michael Grimes, Eversheds Sutherland
8 Mark Richards, Berwin Leighton Paisner

Which sectors are most interesting at the moment, and why?

As markets around the world look to boost their economies, it is no surprise to see so-called economic infrastructure dominating the lawyers' workload. In particular, it is transport schemes that are proving popular.

"Given the relative political acceptability of private transport infrastructure delivery and more transparent economic benefits, transport deals are tending to dominate the US, Australian, European and Gulf markets," says Elsey. But he adds that it does not stop there: "Australia has also developed a renewed interest in the renewables sector."

Chadwick agrees. "Transport remains a key sector of interest, particularly airport and rail activity in Europe in both primary and secondary markets."

However, she points to another emerging trend for more integrated transport projects. "There is also more activity on rail related to other infrastructure such as airports and we are acting on the LAX Automated People Mover project at the moment that is a good example of this," she explains. "The development/upgrade of airport infrastructure is an area that we see significant growth in."

In the UK, the most active sector continues to be university accommodation, which continues to be a growth market, but also ongoing waste schemes are providing lawyers with plenty of work. "There have been some high profile failures and challenges in the waste sector and this year will be interesting to see how projects in 'stress' will come through," says Berry. "More controversially it will be particularly interesting to see whether local councils will continue to look to exit long-term waste contracts in order to save money."

Are there any new and interesting deal structures emerging?

For all the negativity around the UK market over recent years, it seems that this lack of government pipeline has helped to push the boundary on new models. Hence, the lawyers refer to schemes such as Thames Tideway as leading the charge on innovation here.

"The hybrid regulated asset base (RAB) structure developed on that project delivered real economic benefits for customers and we believe this structure can be adapted to deliver some of the larger projects in other RAB based sectors such as UK rail," says Elsey.

Richards agrees, but also points to similar structures that are growing in the energy sector: namely, the offshore transmission owner (OFTO) schemes and their upcoming onshore counterparts, the CATOs. "I would anticipate further use of M&A style regulated structures in deals in the transmission/networks space," he says.

The Welsh government's mutual investment model (MIM) is also pointed out for praise here, by both Chadwick and Wilson, with the latter explaining: "ESA10 has presented real challenges for the PPP sector over the last couple of years but the Welsh government has responded quickly and pragmatically to those challenges."

Finally, there is also agreement that the growth in more innovative structures that fit local circumstances are becoming more popular.

"Constraints on local budgets means that releasing land to generate income can be really attractive for local authorities, while reaping regenerative benefits over the long term," says Carter. "These projects need to be put together carefully though if they are going to fly and we've developed a number of structures in this area."

How is the use of the estate-wide model working in the UK, for example through LABVs or SEPs?

As Carter alludes to above, there has undoubtedly been a surge in interest among local authorities in asset-backed models (LABVs), while a growing number of trusts are launching strategic estate partnerships (SEPs).

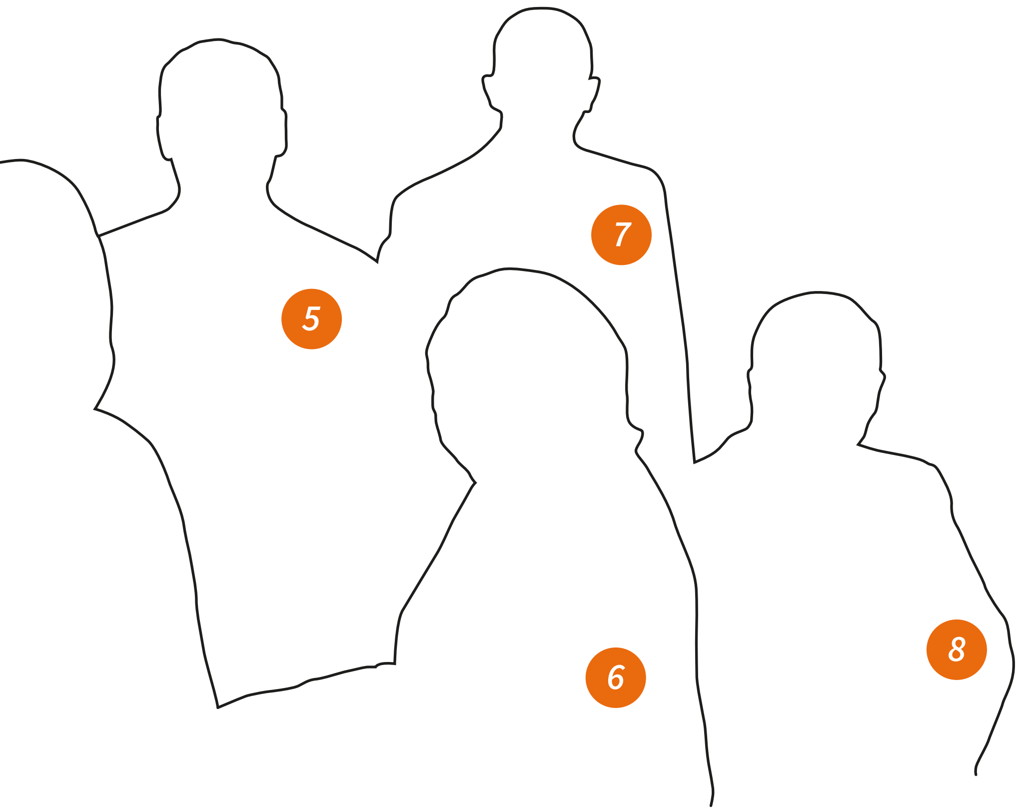
"DLA Piper is working on the SEP type of approach in its operational projects work," says Wilson. "It works well, as the public sector operates from the same platform as its private sector partner, which mitigates the risk of aggressive payment deductions (that we are starting to see more of in the market) because parties have collaborated from the start on how services are best provided."

"This is clearly a logical area to focus on and much good work has been done," adds Elsey. "Key to making these arrangements work is to ensure full buy-in from the relevant public bodies and to ensure that appropriate approval processes are in place to allow the platforms to generate momentum in both improving the existing state and, where needed, attracting private capital to support further investment."

Richards, however, strikes a note of caution, suggesting it is still "early days". He says: "There is no real consistency in approach or capturing and sharing best practice other than through the efforts of the Local Partnerships team."

One aspect driving this is the increase in devolution. "I can see this increasing as local issues become more capable of being dealt with at local level by local teams," says Chadwick.

"It will be interesting to see the rise of the Metro mayors and local combined authorities and whether larger projects come to market," concludes Richards.



How do you see the market developing over the coming year?

In the UK, the General Election has dampened previously optimistic outlooks for a new PPP pipeline. Most of the lawyers agree that any programme of PF2 projects will now be unlikely to hit the market before the end of the year.

Elsewhere, however, the picture is more positive. Grimes points out that a lot of work has been done in other countries over recent years to lay the groundwork for a PPP programme, and that is starting to come to fruition. "Where that groundwork is now in place, markets are becoming more mature and the deployment of pipelines will provide substantial opportunity."

Wilson agrees, pointing to places such as the Middle East and the US. However, he also contrasts President Donald Trump's plans with progress on the ground south of the border. "We see Latin America as the more dynamic market, with official project pipelines beginning to bear fruit in the ports, railways, airports, and roads sectors," he explains.

Apart from new deals, the lawyers still see plenty of activity in existing contracts, where issues continue to arise. "Existing PPP deals will continue to require attention whether in relation to restructurings and refinancings or dealing with disputes," says Smith.

What are the biggest challenges facing the PPP market?

The consensus among the lawyers is that the continued uncertainty surrounding Brexit will continue to cast a long shadow over the market – both in the UK and on the continent.

"It's the consequential issues which are the most interesting – in the UK what do we do about skills shortages in the construction industry if free movement of workers is curtailed; where will we stand in terms of procurement regulations and the ability to attract the best companies to bid for UK projects; will European Investment Bank funding still be available or will it be radically reduced?" asks Chadwick.

"In previous years the UK has been considered as an open and fair market where a European contract was assured of having a level playing field," adds Berry. "The suspicion will be that government and local government may be influenced by a 'buy British' mentality. This will not be good for competition or value for money."

Others, such as Smith, point out that the amount of political energy going into the Brexit discussion could impact progress on infrastructure policy.

However, beyond the Brexit debate, Elsey and Richards pick up another theme: the need to continue banging the drum for the benefits of PPPs as an investment tool – particularly in more developed markets. "If the industry wants a real pipeline of projects, it needs to convince policymakers that there is real value in the innovation and efficiencies that private sector financial accountability for service delivery and whole life asset management can deliver," says Elsey.

Richards agrees, asking whether the industry in the UK can create a "positive enough brand" to "detoxify" the image of PFI. "How can the private sector capital have a positive and value add role in public services?" he asks.

How can emerging PPP markets avoid the political problems that the UK model has encountered?

Getting the structure right and making sure the model is appropriate for the project came through as answers from the lawyers, who have had plenty of experience in drafting different approaches to meet specific schemes.

"PPP models are complex, so preparing the projects properly and getting good advice throughout the procurement will be crucial for emerging market authorities," says Richards.

"It is important to tailor a project to local market requirements rather than replicating the approach of another jurisdiction," agrees Grimes.

Early engagement is another important theme. "They need to ensure that there is public engagement early in the process to explain clearly why the PPP model is the best approach where there is an absence of public capital but a high demand for new infrastructure," says Smith. "The UK has never really explained PPP to the public and the benefits it brings."

"It is also sensible for developing economies to start their PPP programmes with smaller less complex deals to allow the development of suitable country models and to build investor confidence," adds Elsey.

"You see a lot of jurisdictions falling into the trap of launching over-ambitious programmes that are just bound to fail," agrees Carter. "This simply leads to the criticism that PPP is not deliverable. A small number of pilot projects that have a strong business case is the best starting point."

Chadwick, though, suggests that many countries are in a better position than the UK was at the outset of its programme. "I think new markets adopting the approach are already avoiding the problems and learning the lessons – for example make sure the law works for the projects you want." She points to Kuwait, which revised its law after the first project was procured and closed to respond to the practical issues that had emerged.

"Many adopting PPP are doing so with standardised procurement and documentation at the outset," she continues, "something we didn't have at the beginning in the UK." PB