

Penalty mechanisms for enforcing concessionaire performance in public–private partnership contracts in Nigeria

Penalty mechanisms

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Abstract

Purpose – The purpose of this study is to develop penalty measures against concessionaires' defaults as a mechanism for protecting the interests of parties (public and private) in public–private partnership (PPP) contracts for enhancing project delivery.

Design/methodology/approach – The research methodology is a mixed qualitative and quantitative approach. This study commenced with an in-depth literature review, which provided the basis for identification of penalty measures in construction contract management. The qualitative assessment was based on semi-structured face-to-face interviews, which were aimed at identifying the underlying pattern of the penalty measures, and the quantitative assessment was based on a structured questionnaire. In both cases, respondents were stakeholders' organizations that had been involved in PPP contracts in the southwestern region of Nigeria. These include industrial practitioners from government-based organizations (ministries, agencies, corporations/parastatals, etc.), private developers/concessionaires, law firms, banks, etc. The sample size was selected using a respondent-driven sampling approach, as the comprehensive lists of the participants in PPP contracts are not readily available in the Nigerian construction industry. Responses from the interview were analysed using interpretative phenomenological analysis via ATLAS.ti7. The quantitative data were analysed using percentile for flexibility between “most” and “more” preferred mechanisms.

Findings – This study developed mechanisms that defined the rights of the public party to redress underperformance of PPP contracts consequent to the defaults of the private party. “Step-in-right” and “termination of the contracts” were preferred against specific cases of “delayed execution”, “abandonment of the project”, “bankruptcy of the concessionaire” and “non-compliance with design and specifications”. With respect to “shortfall in performance against established dates”, the results converged on “monetary fine” and diverged on “step-in-right” and “termination of the contracts”.

Practical implications – The study contributes to literature on mechanisms for enforcing PPP project performance. Besides, defining rights and obligations of the parties in specific events of underperformance of the concessionaires in PPP contracts is a significant step towards the development of standard conditions of contract for managing PPP projects in which the model is being newly adopted.

Originality/value – Project management studies on PPP were extended by defining the liabilities that are consequent to the defaults of the private party and the mechanisms for their enforcement.

Keywords Penalty, PPP, Concession, Mechanism, Projects, Concessionaire

Paper type Research paper



Introduction

Public–private partnership (PPP), especially the concession model, has been gaining popularity in infrastructure projects in areas of waste management, transportation, generation of power, management of waste disposal, etc. in Nigeria (Adegoke *et al.*, 2010; Babatunde *et al.*, 2012; Akinsiku, *et al.*, 2014; Babatunde *et al.*, 2016). The model had, however, been often criticized for not providing a satisfactory outcome (Sanni, 2012;

[Opawole and Jagboro, 2016a, 2016b](#)). Stakeholders hold different opinions on whether concession innovation could be a viable tool for infrastructure delivery. A burning argument against the concession model is that the problem of infrastructure development in Nigeria is more of corruption rather than financing issues, resulting in a belief that the concession model is an exploitative and subtle tool that the government avoids taking responsibility for rather than a good policy tool for remedying infrastructure deficiency cut across all social classes. The belief against concession is far fetching in explaining the mass protests by users against tariff payment on the completed phase of the Lekki-Epe road project ([Sanni, 2012](#)), which is one of the most successful concession projects in Nigeria.

As at 2016, limited PPP contracts that were signed in 2006 had been completed, leaving substantial contracts at various stages of delivery, including phase/partial completions. The unsavoury performance of most concession infrastructure had been attributed to considerable low performance of concessionaires, the private party. For example, the most prominent Lagos-Ibadan concession road project was eventually terminated in December 2012 by the government for alleged underperformance of the concessionaire ([Agande, 2012](#)). Although concession contracts were generally adjudged to be characterized by a number of opportunistic tendencies from both public and private parties, PPP laws and regulatory framework across most developing countries seem not to have offered adequate mechanisms for enforcing parties' commitments to their respective contractual obligations. For example, the cancellation of the Lagos-Ibadan concession road contract is still being challenged to date (2017) in the court by the concessionaire, with little fate of getting a favourable outcome for the reason of the absence of adequate PPP law that could deliver the expected compensations. Similar experience exists in the case of Murtala Mohammed Airport terminal (MMA2) airport concession in Lagos state. The MMA2 terminal was a concession signed with the Federal government on an agreement that all local airlines must patronize the facility for certain number of years. Along the line, the Federal government developed another terminal and made it open and competitive to the concessionaire's terminal, which led to an unanticipated competition. The absence of well-defined compensation/penalty measures against the public party in this respect led the concessionaire to no mechanisms to secure a redress other than litigation. Transaction economics theory holds that there are costs to drafting, negotiating and safeguarding any exchange or transaction that is friction impeding smooth transactions ([Williamson, 1975](#)). This theory had been very relevant in understanding the formation of various variants of a PPP deal ([Parker and Hartley, 2003](#)). The underpinning philosophy that makes concession contracts explainable by the transaction economics theory is that concession contracts, as any other contractual arrangements, are often based on some degree of uncertainties and incomplete information that expose parties to opportunistic behaviours, which require some contractual/operational frameworks to protect parties' interests.

In a concession contract, the public sector seeks to deliver projects through the use of private sector's resources (technical and financial), which otherwise would be provided by the public sector's limited resources ([Opawole and Jagboro, 2016a, 2016b](#)). The private sector, on the other hand, seeks return on investment. The implications suggest that a concession contract should be conceptualized to adequately define parties' obligations and liabilities for non-performance as a precursor for protecting parties' interests. The factors that make a concession contract exposed to opportunistic behaviours range from project characteristics to country-specific factors. For example, the design of concession contracts must allow for flexibility of design that meets future needs and the execution of the contract spans through relatively longer social, political and economic sessions compared to the traditional design-bid-build (DBB) project procurement ([Opawole and Jagboro, 2017](#)). In PPP

contracts, factors such as shortfall in performance with respect to established dates; delay in completion; abandonment of the project; insolvency; and failure to comply with health and safety and assignment of the project, among are significant concessionaire defaults that are associated with poor contract delivery (Pellegrino *et al.*, 2013; Opawole and Jagboro, 2016a, 2016b). While a renegotiation of a contract in the event of these factors by the parties would be an option, the effect of renegotiation may erode the interests of the projects. Thus, this is a significant justification for development of mechanisms both to protect parties' interests and enforce their performances.

In Nigeria, the concept of PPP has attracted growing attention consequent to poor performance of the earlier PPP contracts that were awarded in 2006. Ibrahim *et al.* (2006) appeared to be first to provide an empirical assessment that focussed on risks in PPP infrastructure projects in Nigeria. The extension of Ibrahim *et al.* (2006) by Babatunde *et al.* (2012) led to the identification of critical success factors that influenced PPP project delivery: favourable framework, appropriate risk allocation and risk sharing, provision of a guarantee to the private sector by the government, political support, stable macroeconomic condition, sound economic policy and availability of a suitable financial market. Sanni (2012) seems to be the first to provide a concession-specific PPP study. However, the study was limited to concession in the transportation sector, and the two-project case study approach significantly limited the robustness of the assessment. Famakin *et al.* (2012) identified communication, compatibility of objectives and mutual understanding among partners as factors affecting the performance of parties in a joint ventures PPP model. Babatunde *et al.* (2016) extended Babatunde *et al.* (2012) on PPP critical success factors in the light of difference in the perceptions of the stakeholders on critical success factors for PPP projects. Opawole and Jagboro (2017) focussed on PPP stakeholders' performance factors with specific emphasis on the private party. The concept of penalty mechanism had, however, remained an aspect of PPP research that had attracted limited research attention, especially in the Nigerian context. This study, therefore, aims to suggest penalty measures against concessionaires' defaults in PPP projects with the view to providing information for enhancing commitment to contract. The research is expected to provide the implication that could enable a concession contract to be structured on agreements that clearly define the liabilities of the private party and suggests mechanisms for improving their performances, which will ultimately increase the success rate of infrastructure delivery through the concession model in Nigeria.

Literature review

In the DBB procurement model, penalty is considered as an option for enforcing performance on the part of project execution party/contractor (Tuuli *et al.*, 2007; Klimas, 2011). Penalty has also been used as a risk mitigating tool and for enforcing performance of a contract in the events of factors that may portend negative implications on PPP project performance (Carbonara *et al.*, 2015). The subject of penalty has been considered if the projects are not delivered to the specified standards (Raisbeck *et al.*, 2010). Penalty in construction contract administration has been enforced through a number of mechanisms such as payment of a lump sum compensation/fine to the public party (Brawn, 2012); reducing payments, abatements and compensation (Bindemann, 1999; and financial compensation for termination by a party (Sillet, 2001). Bindemann (1999) opined that a contract would only be efficient if it cannot improve one party's terms without making the other party worse off. According to Voelker *et al.* (2008), one structural and institutional reform for improving infrastructure investment is the provision of compensation to meet public service obligations and establishing effective mechanisms for dispute resolution. The

International Review of Administrative Sciences (IRAS, 2006) argued that contract package must define compensations events, as well as conditions for termination and adaptation mechanisms/consequences, when legal principles involved in a PPP contract change are unsatisfactory. Along this line of thought, [World Bank Report \(2012\)](#) suggested that PPP contract packages must enshrine contingent liabilities for administering uncertain future events. Such clauses are expected to define the conditions under which contracts may be terminated and compensation payment that would be appropriate. [Verhoest et al. \(2014\)](#) asserted that the elements of the compensation mechanism are provided in a legal framework for PPP in many countries, but regulations such as procedures for unsolicited proposals, contract termination and payment collection are not regulated by most PPP laws but are rather defined in various documents relating to specific PPP projects. According to [Brawn \(2012\)](#), penalty/compensation measures are intended to reform or deter a party from non-performance. [McMeel \(2003\)](#) argued that commercial contracts are major sources of litigation, primarily because parties often fail to perform the terms of the contract. Generally, the purposes of penalty/compensation to protect the interests of parties to a construction contract can be classified into three categories, namely, restitution interest, which prevents unjust enrichment; reliance interest, which restores an innocent party to the position which the party would have occupied had the contract not been made; and expectation interest, which defines compensation for loss of the bargain, the object being to financially restore an innocent party to the position which would have been occupied had the contract been performed ([Chetwin, 2011](#)).

In DBB contracts, [Ilter \(2012\)](#) considered dispute categories as the main subject/instrument of compensation expected by the claimant party. Even in the traditional DBB contracts, [Raj et al. \(2009\)](#) argued that the most standard forms of construction contracts (Joint Contractual Tribunal, Federation International of Civil Engineers, New Engineering Contract, etc.), which define the obligations of the parties (client and executor) and management of variations at various stages of contracts do not adequately define the mechanisms for redressing defaults of parties in construction contracts. [Sacerdoti \(2015\)](#) opined that settlement mechanisms are fragmented in investment law, which has been mitigated through various mechanisms. These include monetary/financial compensation ([Rintala et al., 2008](#); [Damjanovic and Vajdic, 2011](#); [Pidomson, 2016](#)); penalty damages or liquidated damages ([Brawn, 2012](#); [Yoke-Lian et al., 2012](#); [Carbonara et al., 2015](#)); delivery time adjustment ([Ilter, 2012](#)); and concession price adjustment ([Carbonara et al., 2015](#)). For example, in the Laibin B Power Station in China, extension of the concession period and financial compensation were considered significant measures when force majeure causes delay/suspension in operation or termination of project ([Zhang and Kumaraswamy, 2001](#)). Another under-performance factor which had been the object of termination of concession contract is the bankruptcy of the concessionaire. When this occurs, there is a measure that the public party pays a compensation to the concessionaire for completed works but not yet depreciated ([Vassallo et al., 2011](#)). Moreover, [Wibowo \(2015\)](#) showed that if revocation is inevitable for valid reasons, fair compensation must be provided. Moreover, bonds and guarantees have been used against bankruptcy, service interruption by the private party ([Kerf et al., 1998](#); [Wamuziri and Clearie, 2005](#)), warranty against termination of contract by the government, influential economic events, changes in law, sanctions, restrictions on converting or transferring currencies, political violence, expropriation or breach of contract ([Voelker et al, 2008](#); [Singh and Kalidindi, 2009](#), [Ng et al., 2010](#); [Heravi and Hajihosseini, 2012](#)). [Zhang and Kumaraswamy \(2001\)](#) identified provision for extension of construction or concession period if the project is affected by factors such as archaeological or historical issues and establishment of recycling funds to provide seed capital to attract commercial

investments and loans from multiple sources. Zhang (2004) identified instruments such as step-in rights; liquidated damages; performance-related deductions against unitary charge; and collateral warrantees. Singh and Kalidindi (2009) identified insurance policy against third-party liability and loss of profits against potential losses to the concessionaire due to decrease in demand below the expected limit. Al-shareem *et al.* (2015) considered provision of subsidies, incentives, tax exemptions, reductions against economic risks. Extension of concession period and financial compensation were suggested against force majeure causing delay/suspension in operation or termination of project by Zhang and Kumaraswamy (2001); and index payments against inflation in long-term contracts by Parker and Hartley (2003). Although the unsatisfactory performance of most concession infrastructure was attributed in part to concessionaire performance, it was difficult to support this assertion and understand the enforcement mechanisms for efficient project delivery due to the absence of empirical evidences. Moreover, the level of maturity of infrastructure investment laws in most developing countries has created much opportunistic tendencies for parties involved in concession contract more than equitably protecting the parties' interests. This is a significant gap in PPP studies. This study therefore aims to suggest penalty measures against concessionaire defaults in concession projects with the view to enhancing commitment to contract. The ultimate implication is to enable a concession contract to be structured on agreements that clearly define the liabilities of the private party and suggests mechanisms for improving private party performances, which will ultimately increase the success rate of infrastructure delivery where a concession model is being newly implemented.

Performance of public–private partnership projects in Nigeria

The first set of PPP projects was launched in 2006, mainly by the Federal government and Lagos state government. Prominent among these projects are MMA2 concession; Lekki-Epe expressway concession; Lagos-Shagamu-Ibadan expressway; Federal capital Territory Light Rail Project LOT 2; Kuje Water Works supply and reticulation; Shagamu-Benin-Asaba highway rehabilitation and upgrade; Abuja-Kaduna-Kano highway rehabilitation and upgrade; National Inland Waterways; Kirikiri Lighter Terminals 1 and 2 concessions, Western Railway (Lagos-Kaduna-Kaura-Namoda-Nguru concession rail); Eastern Railway (Port Harcourt Kafanchan) concession; Island Power Projects; and Ayegbaju concession market and Sunshine Housing Estate Development. Some successful PPP projects are Lekki-Epe expressway (partly completed); Co-operative Home Ownership Incentive Scheme; Lekki-Ikoyi Link Bridge (commissioned in 2013); Island Power Project; Alausa Power Project (commissioned in 2012); Mainland Power Projects (commissioned in 2014); CG-EKO venture for renovation and upgrade of Eko Engineering facility (commissioned in 2012); Akute Power Project (commissioned in 2010); and Gbagada Renal and Cardiac Health Project. A number of these projects had, however, been trailed by a number of project management and administrative challenges attributable to the contributory defaults of parties (public and private). Table I presents notable PPP projects, the defaults attributed to the concessionaires and the penalty measures meted by the public party. This study is aimed at identifying mechanisms for defining rights and obligations of the parties in specific events of underperformance of the concessionaire in PPP contracts based on Nigerian experience. An obvious limitation, however, is the assessment of mechanisms that would on the other way round minimize the private party's risks in PPP projects. This is being considered in a separate study. In Nigeria, limited numbers of PPP contracts are at the facilities management phase; hence, meaningful assessment of the penalty mechanisms may only be undertaken for the construction phase. The absence of a standard form of concession

Table I.
Performance of PPP
projects in Nigeria

Project	Cost (N' billion)	Year of award	Current status	Defaults attributed to concessionaire	Action taken by the government
Lekki Deep Sea port	N325bn	2015	On going	Withdrawal from the contract	Plan to sell off 20% equity in the project
Badagry Deep Sea port	N806bn	2015	Stalled	Delay in execution	To be renegotiated
Lago-Ibadan Expressway	N167bn	2009	Cancelled	Delay in execution; long stop	Termination of contract; re-awarded as new contract in 2016
Abuja Light Rail Project	N180bn	2007	Postponed	N/A	N/A
Ibaka Deep Sea port	N370bn	2016	Abandoned	Funding due to recession	To be re-awarded
Fourth Mainland Bridge	N844bn	2016	Suspended	Delayed progress of execution	Terminated with initial concessionaire; searching for new investor
Katampe District project	N61bn	2012	Abandoned	Delay execution due to paucity of fund	Termination of contract
Onikan multi-storey car park	—	2014	Stopped	Delay execution	—
Lekki Port container terminal sub-concession	\$225m	2017	Cancelled	Delay execution	Re-award to another concessionaire
Second Niger Bridge	N130bn	2014	Abandoned	Delayed execution	Ste-in; process of renegotiation

Note: N350 = \$1 as at November 2017

contract that defines the obligations of parties and penalty for their enforcement explains to a greater extent the ill-definition and consequently the poor performance of most PPP projects, as revealed in [Table I](#). Notwithstanding, definitions of obligations of parties and penalty for their enforcement are based on standard forms of conventional contracts and memorandum of understanding (MOU) that are designed to suit individual contract. This study is justified in the absence of empirical evidence, which could be harmonized to generalize mechanisms for managing parties' defaults in PPP contracts in the Nigerian context. Besides, an interview survey adopted in this study is aimed at providing hands-on information on the applicability of the conventional penalty mechanisms and at exploring the experience of the stakeholders.

Methodology

The research methodology is a mixed qualitative and quantitative approach. Domains of unsatisfactory performance of concession contracts delivery in Nigeria comprising mainly shortfall in performance with respect to established dates; suspension; delay in execution; abandonment; insolvency; failure to comply with health and safety and assignment of the project; etc. were evaluated. [Johnson and Onwuegbuzie \(2004\)](#) argued that researchers may use methods that enhance optimum results, and this may entail switching between alternative paradigms. The assessment was initially intended to be based on an interview survey. However, because of the experience that most respondents were not readily available or willing to grant an interview, both the interview and questionnaire surveys were combined. The quantitative assessment enables the rating of the variables identified in literature, and the qualitative assessment was aimed at identifying the underlying pattern of penalty measures to understand the respondents' experience and insightful perspective of the mechanisms. Based on the domains of concessionaires' defaults identified, an interview pro-forma was developed to seek stakeholders' opinion on mechanisms that could adequately enforce commitment to a contract. The interviews were semi-structured face-to-face and were launched with different stakeholders' organizations that had been involved in PPP contract executions in the southwestern region. These are industrial practitioners from government-based organizations (ministries, agencies, corporations/parastatals, etc.), private developers/concessionaires, law firms, banks, etc. Significantly, these are organizations that are involved in major concession contracts, such as Lekki-Epe road project, Lagos-Ibadan road project; Lagos Port Terminal concession; Island Power Projects; Ayegbaju concession market project and Sunshine Housing Estate Development. The choice of southwestern region is justified for a greater number of PPP projects (most especially, the successful ones) in the region compared to other five regions in Nigeria. The sample size was based on respondent-driven sampling (RDS) approach as the comprehensive lists of the participants in PPP contracts are not readily available in the Nigerian construction industry. RDS is an advanced purposive sampling technique that enables the selection of asymptotically unbiased estimates from snowball samples in a study involving undefined population ([Heckathorn, 2002](#)). The technique is a network-based method that starts with a set of initial respondents referred to as driver-respondents who further refer the researcher to other respondents known to them. This sampling method helps to overcome the problem of bias by combining breadth of coverage of network-based methods with the statistical validity of standard probability sampling methods ([Salganik and Heckathorn, 2004](#)). The driver-respondents commence the referral chain, which continues to a point of referral where the part of the earlier drivers is again referred. In this study, the referral chain commenced with a principal partner of a renowned quantity surveying consultancy firm based in Lagos, which is reputedly known for participation in significant PPP contracts. The firm provided

the first iteration referral of a law firm, a bank executive and a civil/structural engineering firm with whom it had worked on sizeable number of PPP projects. The referral chain continued for about four iterations, after which a total of 17 respondents who were willing to grant the interview were identified. Adequacy of 17 respondents for the interview survey is justified for three reasons. In the first place, the sample size for interview survey might be larger with population involving more than one discipline and heterogeneous background (Charmaz, 2006). This requirement satisfied the heterogeneous background of the interviewees (project manager, public administrators, engineers, quantity surveyor, architect, etc) and the different interests they represent in PPP contracts for their organizations (government-based organizations and concessionaires). Second, Mason (2010) asserted that the quality of data in qualitative research is of greater essence than the sample size adopted. Moreover, Bazeley and Richards (2000) had opined that data saturation would be reached in a qualitative survey when new concepts are no more forthcoming with more interviewees. Hence, 17 respondents were considered to provide sufficient data saturation. However, significant number (97) of the respondents who were unwilling to grant the interview signified intentions to complete questionnaire, and their records were kept for the questionnaire survey. The interviewees provided direct hands-on information on significant areas of defaults of concessionaires and suggested penalty mechanisms for enforcing performance of contractual obligations. Responses from the interview were analysed using interpretative phenomenological analysis (IPA) via Atlas.ti.6/7. A total of 114 copies of questionnaire were thereafter administered, but 86 copies, which represented 75.4 per cent response rate, were retrieved. Of these, 81 were found to be properly completed and were considered suitable for the analysis. The questionnaire had two parts. The first part focussed on the respondents' profiles, and the second part focussed on the study objective. The questionnaire was presented in a closed-type format to enable better understanding of the instrument by the respondents so that completion of the questionnaire was possible on average of 30 min. The questionnaire was completed on a perceptual rating on 0-100 per cent scale, where 0 represents lowest and 100 represents highest based on the experience of the respondents in concession contracts. Quantitative data collected were analysed using percentile and parallel convergence comparison. The results of the analysis are presented in the result and discussion sections.

Description of interpretative phenomenological analysis and ATLAS.t.7/ti6

IPA is a tool used for analysing unstructured/interview data through content extraction (Reid *et al.*, 2005). The analysis commences with transcribing the interview responses and coding them in a manner that is meaningful for understanding the respondents' experience and perspective of the subject matter being investigated. Emphasis is laid on the emerging codes from the responses, which are subsequently patterned into meaningful themes consequent upon which inferences are drawn. The IPA in this study was facilitated by ATLAS.t.7/ti6, which is a proprietary software package for the organization and analysis of qualitative data. The software was developed by Thomas Muhr at the Technical University of Berlin, Germany. According to Zdenek (2007), ATLAS.ti7/ti6 enables a systematic analysis of complex phenomena hidden in unstructured data through the location, coding and annotation of findings in the data. The tools enable weighing the findings, evaluating their importance and sorting the complex relationships between them, consequent upon which inferences could be drawn. Moreover, the tool is efficient in consolidating large volumes of unstructured/interview data and providing analytical tools for better interpretative views of the data.

Data analysis and discussion

Sample size and description

Profile of the respondents to the interview. The profile of the interviewees is presented in [Table II](#). Eight (47.1 per cent) respondents were from public sector organizations. This was lower than the 52.9 per cent responses obtained from private sectors organizations. Analysis of the coverage of the operations of the respondents' organizations shows that 41.2 per cent of the organizations had operated only within their states, about 17.6 per cent had operated at the national level and 41.2 per cent had operated at the international level. The aggregate of 58.8 per cent of respondents' organizations that had operated beyond the shore of their states established the position of the respondents to provide information on national scope coupled with international experience. The distribution of the respondents showed that architects, quantity surveyors and builder/project managers involved in the interview had equal representation of 23.5 per cent of the sample. Moreover, engineers represented 17.6 per cent of the respondents and estate surveyors were represented at 11.8 per cent. Respondents with a master's degree represented the highest and represented 64.7 per cent. Respondents with a bachelor's degree represented 11.8 per cent of the sample. Furthermore, respondents with post graduate diploma (PGD) and higher national diploma (HND) were equally represented at 11.8 per cent. The years of working experience of the respondents was estimated at a mean of 18, which represents the years of working experience of 70.6 per cent of the respondents. With this average working experience, respondents are deemed experienced enough to supply reliable data on issues relating to infrastructure projects. Analysis of the professional qualifications of the respondents showed that 17 respondents (100.0 per cent) were either associate or corporate members of the various professional bodies or possess some other professional qualifications. Moreover, analysis of participations of the respondents in PPP projects showed that of the 17 respondents, 3 had equally participated in transportation and water/marine infrastructure; 7 participated in housing infrastructure; and 1 and 9 were involved in power and commercial projects, respectively. The average number of PPP/concession projected where respondents were involved was established as three. The overall results of the profile of the respondents were significant to the credibility of the responses obtained.

Profile of the respondents to the questionnaire. The profile of the respondents to the questionnaire is similar to results reported by [Opawole and Jagboro \(2016a, 2016b, 2017\)](#). In total, 39 responses (48.1 per cent) were obtained from public sector organizations of 81 duly completed copies of questionnaire retrieved, and 42 responses (51.9 per cent) were obtained from private sectors organizations. Analysis of the coverage of the operations of the respondents' organizations showed that 35.8 per cent of the organizations operated only within their states; 16.0 per cent operated within their geo-political zones; and 21.0 and 27.2 per cent operated at the national and international levels, respectively. The aggregate of 64.2 per cent of respondents' organizations that operated beyond the shores of their state revealed the positions of the respondents to provide information on national scope coupled with international experience on PPP contracts. The distribution of the respondents showed that architects, quantity surveyors, engineers and builders/project managers involved in the study represented 17.3, 19.8, 21.0 and 13.6 per cent, respectively, of the sample. Each of the estate surveyors and economist/financial manager/banker involved represented 8.6 per cent, and lawyers represented 11.1 per cent. The academic qualifications of the respondents showed that respondents who held a bachelor's degree represented 28.4 per cent of the sample. The highest numbers of the respondents were those with a master's degree and represented 45.7 per cent of the respondents. Furthermore, 13.6 per cent obtained PGD and 12.3 per cent obtained HND. The mean number of years of work experience of the

Table II.
Profile of the
respondents to the
interview

Respondent	Respondent type	Academic qualification	Professional qualification	Official designation
1	Architect	Master of Science	NIA	Resident Architect
2	Quantity Surveyor; Project Manager	Master of Science	NIQS, RQS, RICS	Principal Partner
3	Estate Surveyor	Postgraduate Diploma	NIESV	Senior Marketer
4	Quantity Surveyor	Bachelor of Science	NIQS	-
5	Architect	Master of Science	NIA	Assistant General Manager
6	Architect	Master of Science	NIA	Project Architect
7	Builder	Postgraduate Diploma	NIOB	-
8	Architect	Master of Science	NIA, ARCON	Principal Partner
9	Engineer	Master of Science	NSE, COREN	Deputy Director
10	Engineer	Bachelor of Science	NSE, COREN	-
11	Builder	Master of Science	NIOB, COBON	Director
12	Engineer	Higher National Diploma	NIOB	Project Engineer
13	Estate Surveyor, Construction Manager, Project Manager	Master of Science	NIESV, ESVRBON	Project Manager, Chief Executive Officer
14	Project Manager	Master of Science	FRICS, MICE, AACE, APM	Project Manager
15	Quantity Surveyor	Higher National Diploma	NIQS	Partner
16	Quantity Surveyor	Master of Science	MIPM	Project Manager
17	Public Administrator	Master of Science	MPA	Permanent secretary, project manager (continued)

Respondent	Organization type	Organization coverage	Working experience	Project type	PPP project	Project worth (N, average)
1	Developer; Contracting	International	18 years	Water, transportation, commercial	3	1bn
2	Consulting	International	29 years	Commercial, Water	3	250-500m
3	Developer	International	8 years	Commercial	8	Multi-billion
4	Client	National	3 years	Housing	3	Multi-billion
5	Client, consulting	Within the state	23 years	Housing	8	>10m
6	Developer	National	3 years	Commercial	3	-
7	Client	Within the state	23 years	Housing	3	Multi-billion
8	Client, consulting	International	23 years	Commercial	3	-
9	Client	Within the state	23 years	Housing	3	-
10	Client	Within the state	23 years	Housing	3	-
11	Client	Within the state	23 years	Housing	3	Multi-billion
12	Developer	International	18 years	Commercial	3	-
13	Developer	National	35 years	Transportation	3	-
14	Developer; Engineering consultant	Within the state	20 years	Transportation and water	3	-
15	Consulting	International	23 years	Housing, commercial	3	-
16	Developer	International	3 years	Commercial, power	3	-
17	Client	Within the state	Over 26 years	Commercial	3	-

Table II.

respondents was estimated at 12 years, which represents the working experience of about 53.0 per cent of the respondents. Analysis of the professional qualifications of the respondents showed that the 81 respondents (100.0 per cent) were either associate or corporate members of their various professional bodies or possessed some other professional qualification, and they had executed five PPP projects on average. The overall results of the analysis of the profile of the respondents were considered to reflect adequate qualifications to supply reliable data for this study.

Qualitative assessment

Table III shows the results of penalty mechanisms suggested by the interviewees against major concessionaire defaults relating to PPP contracts in Nigeria. The interviews were tape recorded and transcribed as shown in the Appendix. The responses were analysed using ATLAS.ti/ti6, which enabled the interpretative views of different respondents on penalty mechanisms that are appropriate for each default to be translated into meaningful themes. Sorting of the relationships among the themes is summarized in Table III. The major themes that emerged from the analysis (Table III) include monetary fine/compensation; application of liquidated and ascertained damages; determination of the employment of the private party; zero compensation; invocation of forfeiture clause; provision for guarantor in event of bankruptcy; blacklisting; revocation; legal prosecution; financial/monetary fine; reduction of concession period; termination of contract; project cancellation; and step-in right by public party. The convergence of the responses is summarized in Table V.

Penalty mechanisms against shortfall in performance against established dates/criteria. Monetary fine against the concessionaire was suggested as a penalty against shortfall in performance of the concessionaire with respect to established dates/criteria, as asserted by 15 interviewees:

The government should be compensated. Government should not compromise quality or standard. The essence of going into this type of agreement is for quality job and delivering something that is acceptable (Private, consulting, Quantity Surveyor, Housing project, over 20 years of work experience).

This may be enforceable by enshrining the application of liquidated and ascertained damages similar to that existing in the DBB chargeable weekly or monthly. Interviewees 12 and 16 asserted differently as follows:

There should be a renegotiation of the terms of contract because for private developer to have defaulted there could be need to compensate the government (Private, Developer, Estate Surveyor and Valuer, Commercial project, eight years of work experience).

The best the government can get out of the project from the private sector is just to negotiate time (Private, Developer, Engineer, Commercial project, 18 years of work experience).

This would, however, be counter-compensation, which is capable of encouraging indolence on the part of the concessionaire, which may negatively affect the overall delivery date. The finding here could have been influenced by the experience of the respondents (participation in three projects) or the fact that the two respondents were from private party organization. Interviewee 17 would prefer a reconstruction of the part of the project in the event of shortfall in the performance of private party at no monetary compensation and at no extension of time to the private party:

All those must have been agreed upon at the beginning, but in case it happens, both sides would have been involved. But in this one, little is involved about money because it is the partner that

Factors	Respondents/interviewees	Financial/monetary fine	Adjustment of the concession period	Renegotiation of terms of contract	Termination of contract	Project cancellation	Step-in right by public party	Adjustment of delivery period
Shortfall in performance with respect to established dates	15 3, 12 and 16	✓						✓
Failure to complete design to schedule	3 and 13 8 1, 4, 7, 8, 10, 11 and 15	✓	✓		✓			✓
Prolonged delay in commencement of project	3 4, 5, 6, 7, 8, 9, 11 and 15 12 and 16				✓		✓	
Delayed execution/Long stop after commencement of project	3 1, 2, 4, 6, 7, 8, 9, 10, 11 and 13 15 & 17				✓		✓	✓
Insolvency/Business failure	4, 6, 7, 11, 12, 13, 14 and 16 6, 9 and 10 1, 3 and 5			✓	✓		✓	
Contributory fault arising from design or other obligations	1, 4, 7 and 11 3	✓			✓			
Non-compliance with design and technical specification	1, 4 and 11 3 and 5	✓				✓		
Non-compliance with health and safety	5, 9, 12 and 16 4, 7, 11 and 15				✓			
Assignment and change in control	1, 3, 4, 5, 7, 8, 10, 11, 13 and 15 10, 12 and 16			✓	✓			
Use/disclosure of confidential information	12 and 16 1 and 3 4, 5, 14 and 17 16	✓			✓			
		✓					✓	

Table III.
Convergence of the theme(s) of penalty mechanisms suggested against concessionaire defaults

bears the burden, the delivery period cannot be extended. The more you extend, the more the risk of the problem, because there will still be more inflation (Public, client, Project Manager, commercial project, over 26 years of work experience).

Interviewees 3, 9 and 10 opined that the public party would have right to invoke forfeiture clause against the private party after warning and notice were issued to him. In which case, the public party determines the employment of the private party and engages another developer after paying off initial developer to the extent of work executed. The public party would also have right to confiscate the equipment of the concessionaire to recoup some investment into the project: “if the private party cannot re-negotiate, then terminate” (Private, developer, Estate Surveyor and Valuer, commercial project, eight years of work experience); “the ultimate is to determine the contract. If the developer is found faulty in the expected delivery, the solution is you determine the contract and award it to another developer” (Public, client, Engineer, handling transportation, housing and commercial projects, 23 years of work experience); “equipment is usually used as collateral and government can take over and confiscate some of the equipment to recoup their own portion of the compensation” (Public, client, Engineer, handling transportation, housing and commercial projects, 23 years of work experience)”. Interviewee 14 asserted that:

If the delay basically is from the government, they should be informed of their contribution to the delay. If the delay is as a fault of the contractors, there is what we call liquidated and ascertained damages that will be paid against any delay which will be calculated on the revenue loss (Private, developer and consulting, Project manager, handling transportation and water projects, 20 years of work experience).

This means that the application of liquidated and ascertained damages and determination of the employment of the private party may not be enforceable together.

Penalty mechanism against prolonged delay. With respect to developing a mechanism for enforcing a concessionaire’s consistent progress with the contract, Interviewee 3 asserted that:

For prolonged delay, there should be extension of delivery period because prolonged delay can be from unforeseen circumstances that you don’t put the consideration to at the initial stage; so by that, you need to go back to the government that this is what has happened so that the two of them can agree and give little to extending the delivery period (Private, developer, Estate Surveyor and Valuer, commercial project, eight years of work experience).

This would be counter-compensation. However, Interviewees 5, 9, 13 and 15 asserted differently as follows:

There could be termination of the contract if it is discovered that he (concessionaire) doesn’t have the capacity or he doesn’t have the real title he had indicated in the agreement, both parties can terminate; but there must have been performance clauses embedded in the contract (Private, Developer, Estate Surveyor and Project Manager, Transportation project, over 25 years of work experience).

If the cause of the delay is established, the government may have to terminate and give the contract to other (Private, consulting, Quantity Surveyor, Housing project, over 20 years of work experience).

The consultant would have warned, if he doesn’t listen, then the government take over the project and award it to another person (Public, Consulting and Client, Architect, Commercial project, 23 years of work experience).

Having given such a developer series of warning, the next thing is outright determination and then you give it to a more serious developer (Public, client, Engineer, handling transportation, housing and commercial projects, 23 years of work experience).

This opinion suggested that the public party may terminate a contract in case of long stop/delayed execution by the concessionaire. This is justified as a long stop could infer factors such as bankruptcy or lack of technical capability to handle the project. This reason could justify the termination of the Lagos-Ibadan concession road project. In this case, forfeiture clause would be invoked after warning and notices, and another developer would be engaged to complete the project. Moreover, Interviewee 12 asserted that:

The delay might not be the fault of the contractor; the government can step in and talk to their bank if it is finance (Private, developer, Engineer, commercial project, 18 years of work experience).

In which case, the public party nationalizes and completes the project.

Penalty mechanisms against abandoning the project. In a situation where the private party abandons a project, Interviewee 3 recommended monetary fine:

If they abandon after sometime they have started, there should be monetary compensation because even before they started, they must have arrived at a point that there should be monetary compensation or they renegotiate the term of the contract because they will need to appoint somebody else, so there must be monetary compensation (Private, developer, Estate Surveyor and Valuer, commercial project, eight years of work experience).

This may not be worthwhile otherwise through confiscation of the equipment or materials on site as obtainable in the DBB contract. There seems to be a consensus on the right of public party to terminate the contract where the private party abandons the project, and this is logical. Interviewees 1, 2, 4, 6, 7, 9, 10, 11, 13 and 15 suggested termination of the contract and enforcement of monetary fine against the private party. Monetary compensation could have been suggested on the proposition that the public party would need extra finance to arrange a new contract with another concessionaire, which otherwise would be unnecessary if the private party had performed the required obligations under the contract. In this situation, the private party would be paid the value of work done so far, but excluding the expected profit. The monetary charge against the private party could be recoverable by confiscation of the equipment or material left on site by the private party or deduction from any money because of him for the value of work done. The right of public party to terminate the contract in this instance was agreed to be enforceable after earlier warnings and notifications. The interviewees made the following statements:

That leads to termination and it is a recourse to compensation because when abandoned the project, you have frustrated the project, you have frustrated the expectation of the government, and in that case they have lost money or they have been unable to deliver on the promise made to the public (Private, developer, Estate Surveyor and Project Manager, transportation project, over 25 years of work experience).

If there is no such clause, the government cannot make a claim, they have to terminate; what they have ab initio is not the extent of what he has done. If the state government has contributed to it, this contribution should be noted and the outstanding contribution to developer paid. If there is no mutual agreement to what they can use to compensate each other, then they can go to court and government can award it to another developer (Public, client, Engineer, housing Project, over 22 years of work experience).

On no account should the developer abandon the projects. If he does, the government should terminate (Public, client, Builder, housing project, 23 years).

Forfeiture clause should be invoked after warning and notices. Other developer should be engaged to take up the job, but he should be paid the value of work done so far, but would not be paid the expected profit (Private, consulting, quantity surveyor and Project Manager, commercial and water projects, 29 years of work experience).

Interviewees 15 and 17 agreed that the public party should take over the project:

Government has the right to step in (Private, consulting, Quantity Surveyor, Housing project, over 20 years of work experience).

That would have been expressly stated that when you prolong or out rightly abandon, take it over, the government can step in (Public, client, Project Manager, commercial project, over 26 years of work experience).

Penalty mechanisms against bankruptcy/insolvency of the concessionaire. When there is bankruptcy or insolvency of the concessionaire, Interviewees 13 and 14 asserted differently as follows:

That is automatic termination. But that is why it is important for both parties to have done due diligence. You must certify that the company you are partnering with has the capacity to do the work. The company that will be insolvent will not start with the problem in one day. There must be means to track the company. Since the government is also liable, you have the right to terminate that contract (Private, developer, Estate Surveyor and Project Manager, transportation project, over 25 years of work experience).

It is a recipe for the government to take off. Those are factors for termination (Private, developer and consulting, Project manager, transportation and water projects, 20 years of work experience).

Interviewee 9 was of the opinion that depending on the magnitude of bankruptcy, there should be renegotiation of the terms of the contract. This would be desirable where it can be proved that the private party is still technically capable and the bankruptcy is caused by third parties' defaults. In which case, the private party should be allowed to arrange for other financiers even after the financing close had been reached. Moreover, Interviewee 3 asserted that:

I think he can move back to the government, make his complain and suggest the way out. May be government can come in, they will adjust their initial MOU so that the government will not loose and the job will also be completed and the work will not be abandoned (Public, client, Engineer, housing Project, over 22 years of work experience).

The findings agreed in part with those reported by [Vassallo et al. \(2011\)](#) that the case of bankruptcy of the concessionaire suggests a measure that the public party pays a compensation to the concessionaire for completed works but not yet depreciated.

Penalty mechanism against failure to comply with design and technical specification. When the private party fails to comply with the design and technical specification, Interviewees 1, 4, 7 and 11 consensually asserted that the contract should be terminated. This would, however, be preceded by warnings and corrections: "They will first of all warn, correct and terminate" (Private, developer and contracting, architect, handling water, transportation, housing and commercial projects, 18 years of work experience)". The right to terminate on this ground is justified to ensure that the public party obtains a quality facility at the expiration of the concession period when the project reverts to the party. Interviewee 3

was of the opinion that monetary compensation should be given to the government, which would be determined through renegotiation of the terms of contract. This would not be worthwhile as the instrument for enforcement of monetary compensation may not be available. Furthermore, Interview 16 asserted that:

If the design will add value or improve the project cost, the private sector should be allowed to bear the risk, but if it will reduce the quality, it is then they can come in (Private, developer, quantity surveyor and project manager, commercial and power project, three years of work experience).

In this situation, it would be demanding that public party gives approval to the private party where there is modification to design and specification to respond to market demands. This scenario was significant in the case of Aiyegbaju concession market, Osogbo, where modification was agreed on lock-up shop units to accommodate market demand. Interviewee 9 was of the opinion that the failure of private party to comply should not be a sufficient ground for the contract to be terminated; rather, the concessionaire should only be sanctioned for violating the code of professional practice. In which case, fine could be awarded against the private party.

Penalty mechanisms against non-compliance with health and safety. In cases where the private sector fails to comply with health and safety, different kinds of compensation would apply, as recommended by the respondents. According to Interviewees 4, 7, 11 and 15, the appropriate penalty for non-compliance with health and safety is the termination of the contract:

Actually in international project, PPP project design normally comes from the investor to be reviewed by the government. I will tell him to stop and seek necessary redress (Private, consulting, quantity surveyor, housing project, over 20 years of work experience).

On the other hand, Interviewee 12 preferred a penalty measure on the private party, which would have been originally spelt out in the contract to enforce compliance:

I expect a penalty to have been spelt out in the contract for this. Health and safety is always a standard policy everywhere (Private, Developer, Engineer, Commercial project, 18 years of work experience).

This may be exerted through a stop order until the private party does that which is contractually needful to comply with health and safety.

Penalty mechanisms against assignment and change in control. With respect to mechanism for deterring assignment and change in control, respondents were of the opinion that the private party should not assign his right or change the control of the project without prior notification to the public party. Interviewees 5, 11 and 13 asserted that:

As long as the project is done and it doesn't defeat the interest of the government, if the private party cannot cope with the project and was sure that another private sector can do it, it should be allowed. However, the permission of the government is required. It is the loss of the government if it does not agree (Public, consulting and client, architect, commercial project, 23 years of work experience).

Under the PPP, the developer does not have the right to assignment and change in control without the consent of the client. If you do that you must be charged. That is a breach; already it is a breach of contract and he has to pay compensation (Public, client, builder, housing project, 23 years of work experience).

There will be clause in the agreement that allows subletting of that concession contract. Where that will happen, where that is allowed under the contract, it must be done strictly on the terms and conditions under that clause in the agreement. That is proper, and content of the MOU also requires transfer of interest (Private, developer, estate surveyor and project manager, transportation project, over 25 years of work experience).

These findings suggest that assignment and change in control would be acceptable where the private party foresees distress and changes the control as alternative to abandonment. However, the considering a public party and monetary award chargeable in form of fine against the private party were also suggested. In this situation, the contract would be renegotiated as a new contract with the new concessionaire. However, Interviewees 10, 12 and 16 were of the opinions that assignment or change in control without the consent of the public party would be a sufficient ground for termination of the contract because it is a breach of the initial agreement.

Penalty mechanisms against use or disclosure of confidential information. In cases of use or disclosure of confidential information by the private party, Interviewees 12 and 16 opined that monetary fine should be charged against the private party. Besides, Interviewee 3 asserted that:

They shouldn't do that, but if they do, it can lead to termination of that contract because who knows may be they are planning to hijack the total project from the government. It can terminate the contract because they are not the owner of such property (Private, developer, estate surveyor and valuer, commercial project, eight years of work experience).

These findings would only be worthwhile when the project relates to intelligence or security. However, such project may not be executed using concession arrangement, as revealed in [Babatunde et al. \(2012\)](#). Interviewees 4, 5, 11 and 14 were of the opinion that if the action was deliberate, the private party should be sanctioned, penalized and sacked from the contract for such action. Interviewees 5 and 9 opined that disclosure or divulgence of any information relating to the project that is entrusted to a private party should be used as part of criteria for assessment of the concessionaire in future bidding. In this regard, any act of use or disclosure of confidential information by the private party would attract blacklisting.

Quantitative assessment

The penalty mechanisms that emerged from the analysis of the interviews were triangulated for the purpose of comparison by involving a larger sample size, which also comprised all the interviewees. Triangulation entails using more than one method or source of data in the study of a social phenomenon ([Bryman and Bell, 2003](#)). The overall results of the analysis of the profile of the respondents, as discussed under the "Profile of the respondents to the questionnaire" section, were considered to reflect adequate qualifications to supply reliable data for this study. The penalty mechanisms that were subjected to qualitative assessment were those that relate to a greater number of performance factors of the concessionaire. In this regard, only financial/monetary fine, adjustment of concession period, termination of contract, project cancellation and step-in right by public party were assessed. The penalty mechanisms of application of liquidated and ascertained damages and zero compensation/penalty, invocation of forfeiture clause, provision for guarantor for event of bankruptcy, blacklisting, litigation, which emerged from the interview results, relate to significant lower numbers of cases.

The penalty mechanisms preferred against the defaults of private party are presented in [Table IV](#). The criterion for the selection of appropriate enforcement mechanism(s) for the factors was based on minimum average of 14.3 per cent (the ratio of maximum percentage [100

Factors	Financial/ monetary fine	Adjustment of concession period	Renegotiation of terms of contract % of respondents	Termination of contract % of respondents	Project cancellation	Step-in right by public party	Adjustment of delivery period
Shortfall in performance with respect to established dates	18.6**	11.3	15.5	14.4	6.2	17.5*	16.5
Failure to complete design to schedule	10.2	15.9	14.8	18.2*	5.7	13.6	21.6**
Prolonged delay in commencement of project	7.4	14.9	16.0*	18.1**	14.9	10.6	18.1**
Delayed execution/Long stop after commencement of project	10.3	12.4	16.5*	20.6**	10.3	15.5	14.4
Abandonment of the work	7.5	2.2	6.5	49.5**	8.6	21.5*	4.3
Bankruptcy	5.4	1.1	3.3	51.1**	14.1	20.7*	4.3
Insolvency	5.7	2.3	4.5	53.4**	12.5	19.3*	2.3
Business failure	9.2	3.4	8.0	49.4**	12.6	14.9*	2.3
Contributory fault arising from design or other obligations	15.6	10.4	36.5**	7.3	4.2	9.4	16.7*
Non-compliance with design and technical specification	7.9	5.6	10.1	36.0**	16.9*	15.7	7.9
Non-compliance with health and safety	13.3	6.7	10.0	24.4*	12.2	30.0**	3.3
Assignment and change in control	7.1	14.3	29.8**	11.9**	3.6	26.2*	7.1
Use/disclosure of confidential information	14.6	4.5	16.9*	40.4**	7.9	15.7	0.0

Notes: **Most preferred penalty mechanism; *more preferred penalty mechanism

Table IV.
Assessment of
preferred penalty
mechanisms

per cent] of the respondents to total number of 7 variables assessed), suggesting six identified mechanisms. When higher values (>14.3 per cent) were obtained, the two most suggested mechanisms were identified as the “most” and “more” preferred. In the case of shortfall in performance of the private party with respect to established dates/criteria, about 18.6 per cent suggested monetary fine in favour of the public party, which would be charged on the private party; 17.5 per cent were of the opinion that this is a sufficient ground for the public party to take over the project; and 16.5 per cent suggested that the public party should be generous to grant the private party a palliative extension of time. The percentage of the respondents who suggested termination of the contract were 14.4 per cent and those who suggested adjustment to the concession period/price and cancellation of the project by the public party were 11.3 and 6.2 per cent, respectively. When the private party fails to complete design to schedule, 21.6 per cent suggested granting of extension of time and 18.2 per cent suggested that the public party should at this time terminate the contract. The percentage of the respondents who suggested monetary fine against the private party, adjustment to the concession period and renegotiation of the contract were 10.2, 15.9 and 14.8 per cent, respectively. Also, 5.7 and 13.6 per cent of the respondents were of the opinions that the project should be cancelled and the public party should step-in, respectively. In situation where the concessionaire delays the commencement of project, 8.1 per cent of the respondents equally suggested that the contract should be terminated or the public party should grant palliative extension of time to the private party. Furthermore, 16.0 per cent of the respondents suggested renegotiation of the contract; 14.9 per cent equally agreed that the concession period should be adjusted in favour of the public party or the public party cancelled the project; 10.6 per cent suggested that the public party should step-in; and 7.41 per cent suggested that monetary fine should be charged against the private party. When the private party stops activities for a prolonged time after commencement of construction, 20.6 per cent suggested termination of the contract; 16.5 per cent suggested renegotiation of the contract; and 15.5 per cent agreed that the public party should step-in. About 14.4 per cent suggested that the public party should grant the private party an extension of time; 10.3 per cent equally suggested monetary fine against the private party and project cancellation; and 12.4 per cent suggested adjustment of the concession period in favour of the public party.

About half (49.5 per cent) of the respondents agreed that the public party should terminate the contract where the private party outrightly abandons the project, and 21.5 per cent suggested that the public party steps-in. The percentage of the respondents who suggested monetary fine against the private party, adjustment to the concession period, renegotiation, project cancellation and extension of the delivery period were considerably low at 7.5, 2.2, 6.5, 8.6 and 4.3 per cent, respectively. More than half (51.1 per cent) of the respondents agreed that the public party should terminate the contract if the private party becomes bankrupt, and 20.7 per cent suggested that the public party should step-in. About 14.1 per cent suggested project cancellation; 5.4 per cent suggested a monetary charge against the private party; 1.1 per cent suggested adjustment to the concession period; 3.3 per cent recommended renegotiation of the contract; and 4.3 per cent suggested extension of the delivery period.

In the event of the private party becoming insolvent, 53.4 per cent suggested termination of the contract; 19.3 per cent recommended the public party to step-in; and 12.5 per cent recommended project cancellation. A considerably lower percentage of the respondents recommended monetary fine against the private party (5.7 per cent); adjustment to the concession period (2.3 per cent); renegotiation of the contract (4.5 per cent); and extension of the delivery period (2.3 per cent). When contributory fault arising from design or other contractual obligations occurs, 36.5 per cent of the respondents recommended renegotiation of the terms of the contract; 16.7 per cent suggested extension of the delivery period; and

15.6 per cent suggested monetary fine against the private party. The percentage of respondents who suggested adjustment to the concession period, termination of the contract, project cancellation and step-in by the public party were 10.4, 7.3, 4.2 and 9.4 per cent, respectively. Also, 36.0 per cent of the respondents recommended termination of the contract when the private party fails to comply with design and technical specifications; 16.9 per cent suggested project cancellation; and 15.7 per cent suggested step-in by the public party. About 7.9 per cent equally agreed that monetary fine should be charged against the private party and the delivery period should be extended on compassionate ground. Furthermore, 5.6 per cent of the respondents suggested adjustment to the concession period, and 10.1 per cent suggested renegotiation of the contract. When the private party fails to comply with health and safety, 30.0 per cent suggested step-in by the public party and 24.4 per cent suggested termination of the contract. About 13.3 per cent suggested monetary fine against the concessionaire; 6.7 per cent suggested adjustment to the concession period; 10.0 per cent suggested renegotiation of the contract; 12.2 per cent suggested project cancellation; and 3.3 per cent suggested that the public party should grant additional delivery period. In situation where the private party assigns the project to other private party or changes control, 29.8 per cent recommended renegotiation of the term of contract and 26.2 per cent recommended step-in by the public party. Moreover, 7.1 per cent of the respondents equally suggested monetary charge against the private party and extension of the delivery period; 14.3 per cent suggested adjustment of the concession period; 11.9 per cent suggested termination of the contract; and 3.6 per cent suggested cancellation of the project. About 40.4 per cent recommended termination of the contract when the private party uses or discloses confidential information relating to the project. None of the respondents (0.0 per cent) suggested public party granting an extension of the delivery period; 14.6 per cent recommended monetary fine against the private party; and 4.5 per cent suggested adjustment to the concession period. The percentage of the respondents who suggested renegotiation of the contract, project cancellation and step-in by the public party were 16.9, 7.9 and 15.7 per cent, respectively.

These findings suggest that monetary fine against the private party would apply when there is shortfall in performance of the private party with respect to some established dates/criteria. The terms of the contract would be renegotiated where contributory faults arise from design or other obligations and when private party assigns the project to other private party or changes control without due approval of the public party. Moreover, termination of the contract was suggested in the event of delay relating to design and commencement of projects; delayed execution; abandonment of the project; and bankruptcy/insolvency. The findings also showed that termination of the contract is suggested for non-compliance with design and technical specification; non-compliance with health and safety; and uses/disclosure of confidential information relating to the project. Moreover, public party would have the right to take over the project when there is abandonment of the project; insolvency; non-compliance with health and safety; and assignment of change of control of the project to other concessionaires. The findings also showed that public party may consider compassionate extension of time when non-performance is attributable to contributory defaults of both public and private parties. Although the findings show a higher acceptance of “monetary fine” against the private party and “termination of the contract” in the event of shortfall in performance, termination of contract may be much worthwhile as “monetary fine” has not been much respected in the administration of contracts in Nigeria, even in the conventional procurement model. In the case of failed Lagos-Shagamu-Ibadan concession road contracts, for example, the government preferred termination of contract rather than any other measures. However, the inclusion of monetary fine in concession contract may be

structured to take the approach of liquidated or ascertained damages as applicable in the DBB procurement model. Findings supported granting an extension of time much more than termination of the contract in the event of shortfall in performance. Although, in an ideal situation, the commencement of the contract presumes that the designs are finalized. Thus, defaults at the design stage, which is the first obligation, presumes a lack of technical competence on the part of the private party, which may justify termination of the contract. Findings supported renegotiation of the contract or adjustment of concession period in favour of the public party in case of delay commencement. The fact that PPP is a new concept in Nigeria has not left private developers without challenges. For example, in the Sunshine Garden PPP project, the private investor brought in mortgage bank, whose defaults significantly affected the progress of activities of the private party. Moreover, renegotiation of the contract could be justified in the case of Ayegbaju concession market, where the commencement of site work was delayed for four months because of delay of approval from the government. The suggestion that the concession period should be adjusted in favour of the public party in cases of delayed progress, however, may not be worthwhile considering the present maturity level of PPP in Nigeria. Findings are similar to those obtained using qualitative assessment in cases of long stop, delayed execution and abandonment, where it was suggested that the public party should terminate a contract. This could be justified by the fact that long stop, delayed execution and abandonment could infer factors such as bankruptcy or lack of technical capability to handle the project. This could justify the termination of the Lagos-Ibadan concession road project.

Convergence of the findings

The manner in which the results of the qualitative and quantitative assessments converged is shown in [Table V](#). The most preferred penalty mechanism (MsPCM) and more preferred penalty mechanism (MrPCM) from the quantitative assessment were identified by their highest rating by the respondents. On the other hand, MsPCM and MrPCM from the qualitative assessment were suggested by majority of the interviewees. The results showed highest convergence of the preferred penalty mechanisms in cases of delayed execution/long stop after commencement of work, abandonment of the project, bankruptcy of the concessionaire and non-compliance with design and specifications. In this regard, the preferred mechanisms of step-in-right and termination of the contracts were identified against each case of delayed execution/long stop after commencement of work, abandonment of the project, bankruptcy of the concessionaire and non-compliance with design and specifications. With respect to 'shortfall in performance against established date, the results converged on monetary fine and diverged on step-in-right and termination of the contracts. Similar results were obtained against contributory faults by the parties, for which the findings converged on renegotiation of the contract and diverged on termination of the contracts and palliative extension of the delivery period. The least level of convergence of the results was obtained in "assignment and change of control" and "use/disclosure of confidential information". The cases of least convergence suggest early warning options with the mechanisms for which the results diverged, and the optimum penalty measure was defined by most critical mechanisms (that is, the mechanisms that impose comparable higher penalty on the concessionaire). Thus, in the case of contributory faults by the parties, the management approach would be to renegotiate the contract and grant an extension of the delivery period. Thereafter, an option of termination of the contract may be considered if the defaults persists. Similarly, case of assignment and change of control may be administered by charging monetary fine before decision for eventual termination of the contract. Besides, the results also suggest renegotiation of the contract. This may be a viable option to at least steer the projects to completion instead of eventual

Factors	Results of quantitative assessment			Compensation mechanisms/actions of private party Results of qualitative assessment		Convergence and most worthwhile mechanism(s)/action(s)
	MsPCM	MrPCM	MsPCM	MrPCM	MsPCM	
Shortfall in performance with respect to established dates	Monetary Fine	Step-in right by public party	Termination of Contract	Monetary Fine	Termination of Contract	Monetary fine; or termination of contract
Failure to complete design to schedule	Palliative extension of delivery period	Termination of Contract	Termination of Contract	Monetary Fine	Termination of Contract	Monetary fine; and palliative termination of contract
Prolonged delay in commencement of project	Termination of Contract	Palliative extension of delivery period	Determination of employment of private party	Renegotiation of affected delivery dates	Determination of employment of private party or palliative extension of delivery period	Determination of employment of private party or palliative extension of delivery period
Long stop after commencement of project	Termination of Contract	Step-in right by public party	Termination of Contract	Step-in right by public party	Termination of contract; public party should take over the project	Termination of contract; public party should take over the project
Abandonment of the work	Termination of Contract	Step-in right by public party	Termination of Contract	Take over the contract and pay off the private party	Take over the contract and pay off the private party	Termination of contract; take over the contract and pay off the private party
Bankruptcy/insolvency	Termination of Contract	Step-in right by public party	Termination of Contract	Renegotiation of contract	Renegotiation of contract; and palliative extension of delivery period	Renegotiation of contract; and palliative extension of delivery period
Contributory fault arising from design or other obligations	Renegotiation of contract	Palliative extension of delivery period	Termination of Contract	Termination of Contract	Termination of Contract	Termination of contract
Non-compliance with design and technical specification	Termination of Contract	Step-in right by public party	Termination of Contract	Step-in right by public party	Step-in right by public party	Termination of contract
Non-compliance with health and safety	Step-in right by public party	Termination of Contract	Termination of Contract	penalty measure should be meted on the private party to enforce compliance or termination of contract	penalty measure should be meted on the private party to enforce compliance	Penalty measure should be meted on the private party to enforce compliance or termination of contract
Assignment and change in control	Renegotiation of contract	Step-in right by public party	Monetary award chargeable in form of fine against the private party	Termination of Contract	Termination of Contract	Monetary award chargeable in form of fine against the private party; and termination of contract

(continued)

Table V.
Compensation mechanisms preferred against private party defaults

Table V.

Factors	Results of quantitative assessment		Compensation mechanisms/actions of private party Results of qualitative assessment		Convergence and most worthwhile mechanism(s)/action(s)
	MsPCM	MrPCM	MsPCM	MrPCM	
Use/disclosure of confidential information	Termination of Contract	Renegotiation of contract	Private party should be sanctioned, penalized and sacked	Private party should be blacklisted	Private party should be sanctioned, penalized and sacked; should be blacklisted
Conflict of the terms of contract with the national constitution	Renegotiation of contract	Termination of Contract	Renegotiation of contract	Termination of Contract	Renegotiation of contract or termination of contract

Notes: MsPCM = most preferred penalty mechanism; MrPCM = more preferred penalty mechanism

abandonment by the concessionaire. The case of use/disclosure of confidential information may be managed using a similar approach. Early penalty measure would be to blacklist the concessionaire and to review the contract. Persistent default could thereafter attract termination of the contract.

Implications for public–private partnership practice in Nigeria

The study provides both theoretical and practical implications for PPP practice. Project management studies on PPP were extended by revealing mechanisms for ensuring contractual compliance of parties. Presently, the administration of concession-based projects in Nigeria is bedevilled by varying challenges, particularly with respect to the definition of parties' obligations, as they are in most cases ill-defined and lack appropriate mechanisms for enforcement. These result in long stop, contract renegotiation, suspension of projects and, most importantly, protracted litigation. Findings of this study, however, suggested options of penalty mechanisms under specific defaults, which could be applied to protect interests of parties (public and private) and improve project success. In this way, preparation of robust concession contracts that clearly define the obligations and liabilities of public agencies and private firms could be made possible. Moreover, understanding of parties' obligations and penalty for defaults would go a long way to attract private investors both from local and international environments to participate in infrastructure development in Nigeria. The study, in a broader context, contributes a significant body of information for documenting standard conditions of contract for managing PPP contracts in Nigeria.

Conclusion

This study developed penalty measures against concessionaires' defaults as a mechanism for protecting the interests of parties (public and private) in concession contracts for enhancing project delivery. Domains of unsatisfactory performance of concession contract delivery in Nigeria, comprising mainly shortfall in performance with respect to established dates/criteria; suspension; abandonment; insolvency; failure to comply with health and safety; assignment of the project; etc., were evaluated. The study adopted a triangulation of qualitative and quantitative methodology. Based on parallel convergence of the results in both cases, appropriate penalty mechanisms were suggested against specific concessionaire defaults. MsPCM and MrPCM from the qualitative assessment were identified by their highest rating by the respondents. On the other hand, MsPCM and MrPCM from the qualitative assessment were those that were suggested by majority of the interviewees. The research findings indicate that "monetary fine" against the private party would apply where there is shortfall in performance of the private party with respect to some established dates/criteria. This may be structured to take the approach of liquidated or ascertained damages as applicable in the DBB procurement model. In this regard, both parties have to agree on an amount chargeable weekly or monthly in the contract document. Findings did not agree with the adjustment of the concession period/price against the concessionaire in the event of any concessionaire default. The terms of the contract would be renegotiated when contributory faults arise from design or other obligations and private party assigns the project to other private party or changes control without due approval of the public party. Public party would have the right to terminate a concession contract in the event of delay relating to design and commencement of projects; delayed execution; abandonment of the project; and bankruptcy/insolvency. It was discovered that defaults that warrant the right of the public party to terminate the contract are non-compliance of with design and technical specification; non-compliance with health and safety; and use/disclosure of confidential information relating to the project. Moreover, public party would have the right to take over the project when there is shortfall in performance with respect to

established dates/criteria; abandonment of the project; insolvency; non-compliance with health and safety; and assignment of change of control of the project to other concessionaires. The findings also showed that the public party may consider compassionate extension of time where non-performance is attributable to contributory defaults of both public and private parties. Furthermore, granting an extension of delivery period will be worthwhile when factors delaying the commencement of activities by the concessionaire could be reasonably justified and technical and financial capabilities of the private party are established. The robustness of the study lies in the mixed approach adopted and the involvement of all interview participants in the questionnaire survey. However, the limitation of the assessment to the construction phase of PPP; the adoption RDS technique; and limited experience of the respondents indicated by involvement in average of five projects may limit a larger generalization of the findings.

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Further reading

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Concessionaire defaults	R	Major emerged theme(s)
Shortfall in performance with respect to established dates/criteria	R1	Termination of contract
	R2	Invocation of forfeiture clause
	R3	Renegotiation of the term of contract; termination
	R4	Taking over/step-in-right
	R5	Termination of contract
	R6	Termination of contract
	R7	Taking over/step-in-right
	R8	Compelling the concessionaire to insure the project
	R9	Termination of contract
	R10	Termination of contract
	R11	Cancellation/take over the project
	R12	Renegotiation
	R14	Payment of liquidated and ascertained damages
	R15	Monetary fine/compensation
	R16	Adjustment of delivery period
	R17	Not specified
	Failure to complete design to schedule	R1
R2		No penalty
R3		Monetary fine/compensation
R4		Termination of contract
R5		Termination of contract
R6		Not specified
R7		Termination of contract
R8		Adjustment of concession price/period
R10		Termination of contract
R11		Termination of contract
R12		Taking over/step-in- right; monetary fine
R13		Monetary fine
R15		Penalty to have been included in the contract. Not specified
R16		Not specified
R16		Step-in-right
Delayed execution/ prolonged delay		R1
	R2	Invocation of forfeiture clause
	R3	Adjustment of delivery period
	R4	Termination
	R5	Termination
	R6	Terminate; renegotiate; adjust the concession period/price
	R7	Termination
	R8	Termination; step-in-right
	R9	Termination
	R10	Not specified
	R11	
	R12	Termination
	R13	Termination
	R15	Termination
	R16	Step-in-right

(continued)

Table AI.
Penalty mechanisms
suggested against
specific
concessionaire
defaults

JEDT 16,1	Concessionaire defaults	R	Major emerged theme(s)
190	Abandonment of the work	R1	Termination
		R2	Invocation of forfeiture clause
		R3	Monetary fine; renegotiation
		R4	Termination of contract
		R5	Termination of contract
		R6	Termination of contract
		R7	Termination of contract
		R8	Not specified
		R9	Monetary fine through property confiscation; termination
		R10	Monetary compensation; termination
		R11	Termination
		R12	Step-in-right
		R13	Monetary compensation; termination
		R14	Step-in-right
		R15	Monetary compensation
		R16	Step-in-right
		R17	Step-in-right
Bankruptcy/ insolvency/business failure		R1	Step-in-right
		R2	Termination
		R3	Step-in-right
		R4	Termination
		R5	Step-in-right
		R6	Renegotiation; if no improvement, terminate
		R7	Termination
		R8	Not specified
		R9	Step-in-right; assignment of third party (another concessionaire)
		R10	Step-in-right; renegotiation
		R11	Termination
		R12	Termination
		R13	
		R14	Termination
		R15	Not specified
		R16	Termination
		R17	Appointment of guarantor
Contributory faults from design or other contractual obligations		R3	Renegotiation
		R4	Termination
		R5	Not specified
		R7	Modification of the contract
		R11	Modification of the contract
Non-compliance with design and technical specifications		R1	Termination
		R2	Not specified
		R3	Renegotiation of terms of contract
		R4	Termination
		R5	Seeking court injunction to enforce compliance
		R6	Sanction (nature not specified)
		R7	Termination
		R8	No penalty
		R9	Sanction (nature not specified)
		R10	Not specified
		R11	Termination
		R12	Step-in-right

Table AI.

(continued)

Concessionaire defaults	R	Major emerged theme(s)
Non-compliance with health and safety	R13	Prosecution in court
	R15	Cancellation of contract
	R16	Not specified
	R17	Not specified
	R1	Not specified
	R4	Termination
	R5	Not specified
	R6	Sanction (not specified)
	R8	Not specified
	R10	Not specified
Assignment and change in control	R11	Termination
	R12	To be spelt out in the contract
	R1	Not specified
	R2	No penalty if with consent of the public party
	R3	Renegotiation of the term of the contract
	R4	Monetary fine
	R5	Not specified
	R7	Monetary fine
	R8	No penalty if with consent of the public party
	R9	No penalty
	R10	Termination of contract
	R11	Monetary fine
	R12	Cancellation of contract
	R13	Not specified
	R15	Not specified
	R16	Cancellation of contract
	R17	Not specified
Use/disclosure of confidential information	R1	Strong warning; termination
	R2	Negative criteria against future bidding
	R3	Termination
	R4	Sanction (nature not specified)
	R5	Not specified
	R6	Take-over/step -in-right; Negative criteria against future bidding
	R7	Termination
	R8	Sanction (nature not specified)
	R9	Blacklisting; Negative criteria against future bidding
	R10	Blacklisting; Negative criteria against future bidding
	R11	Termination; prosecution
	R12	Monetary fine/compensation
	R13	Sanction (nature not specified)
	R15	Negative criteria against future bidding
	R16	Monetary fine
	R17	Revocation; prosecution

Note: R = respondents

Table AI.

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