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Turning Bust To Boom: P3 Initiatives Under PROMESA

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If there is one thing that all stakeholders in Puerto Rico's fiscal crisis can agree on (and there are likely not many such things), it is that, without real economic growth, the commonwealth of Puerto Rico will neither be able to repay its creditors nor offer its residents a viable, let alone prosperous, future. The recently certified fiscal plan of the commonwealth calls for sizable reductions in government expenditures, significant increases in overall revenue collections, the right-sizing of Puerto Rico's bloated government, labor reform, unprecedented adjustments to public pension systems, and a litany of regulatory reform and other measures to facilitate new business formation. But when it comes to driving economic growth, particularly over the short term, the commonwealth and the certified fiscal plan are relying heavily on the entry into a series of public-private partnership (PPP) transactions to jump-start the economy, contemplating approximately $5 billion of new investment over the next two years.[1] In particular, the commonwealth's certified fiscal plan identifies energy, waste management and transportation projects among key target areas for these transactions, and public corporations such as the Puerto Rico Aqueduct and Sewer Authority (PRASA), the Puerto Rico Electric Power Authority (PREPA) and the Puerto Rico Highways and Transportation Authority (HTA) similarly envision PPP transactions playing an important role in their turnaround strategies.[2]

But how realistic is this assumption?[3] Normally, investors and lenders to PPP projects avoid pursuing projects where the government's ability to provide financial, operational and logistical support is subject to considerable uncertainty. Additionally, any PPP project undertaken today in the commonwealth will have to overcome real challenges when it comes to forecasting the projected use or need for a given PPP project in light of the overall macroeconomic uncertainties, particularly the possibility of further and accelerated population loss. Further, PPP sponsors and lenders may be rightfully concerned about the prospects of executing such transactions. For example, sponsors may be concerned that changes in the operations of existing assets or governmental functions, or the development of new sources of revenues, could give rise to competing claims to existing assets and cash flows. Finally, no project sponsor or lender reacts well to legal uncertainty, and at present, there is likely no other jurisdiction in the United States or its territories with more legal uncertainty than Puerto Rico.

With all of those challenges, any reasonable observer may wonder whether the goal of securing $5 billion of new investment from PPP projects over the next two years is realistic. Rather than speculate over the likelihood of that target being reached, this article focuses on how the tools provided by the Puerto Rican Oversight, Management and Economic Stability Act (PROMESA) can help mitigate some of these risks and even facilitate future PPP projects in Puerto Rico. With the recent Title III filing of PREPA, and the very public goals of the commonwealth government to transform PREPA through the use of PPP projects, it is a question that government officials, investors and other market participants are undoubtedly asking themselves.

The History of PPP Projects in Puerto Rico

PPP projects in Puerto Rico have a mixed history. While anecdotal evidence suggests that both the commonwealth government and the local private sector are increasingly supportive of the implementation of PPP initiatives, that was not always the case. In 2002, PRASA entered into a 10-year service contract with an affiliate of French conglomerate Suez for the operation and management of the Puerto Rico water and wastewater system. Valued at approximately $4 billion, this PPP transaction represented at the time the largest water and wastewater operation and management contract ever awarded. Even before the contract was signed, PRASA's unionized workforce and the general public, even though unhappy with the level and quality of service that PRASA was providing, sought to mobilize opposition against any new private investment in PRASA, particularly from a foreign company with no substantial ties to Puerto Rico.

Notwithstanding a successful bidding process and the entry into an agreement that required increased private sector investment and improved operational performance, the contract was ultimately terminated by the parties when it became clear that the government's objectives were not going to be met. This termination effectively dimmed interest in potential PPP initiatives in Puerto Rico for years. However, with the development and enactment of the Puerto Rico Public-Private Partnership Act (Act 29-2009) under former Gov. Luis G. Fortuño's administration, Puerto Rico has executed a number of successful PPP projects, such as the lease of San Juan's Luis Muñoz Marín International Airport and the PR-22 and PR-5 toll road concessions.[4] Looking forward, and particularly in light of the commonwealth government's constrained capital budget, PPPs may be an attractive vehicle to improve service quality, while also transferring some of the risks and rewards to the private sector. For the commonwealth, with neither spare funds nor access to the capital markets, one of the strong appeals of PPPs is the ability to improve its infrastructure and provide jobs without spending its own resources.

Title III's Tools to Promote PPP Transactions

PROMESA's Title III process represents a unique opportunity for the commonwealth to address not only its financial and pension-related liabilities but also a chance to truly transform some of its public corporations and instrumentalities by bringing in private sector expertise and capital to improve services currently delivered by the government. The oversight board's recent decision to reject the restructuring support agreement PREPA had negotiated with its financial creditors was clearly motivated, in large part, by this objective.[5] As a result, we will no doubt see renewed effort by the government and the oversight board to not only increase the financial concessions from PREPA's creditors, but also to change the nature of PREPA itself, including by negotiations with its unions and other stakeholders to allow for greater operational flexibility and the potential introduction of private sector involvement.

The precedent from Detroit's bankruptcy demonstrates that economic development measures such as PPPs can be important factors when analyzing a plan of adjustment's compliance with the applicable confirmation requirements. In the Title III context, a debtor contemplating a possible PPP project would be well-advised to incorporate such project into its fiscal plan early on and prominently highlight its benefits to all stakeholders, including creditors. Moreover, debtors pursing PPP projects should use Title III proceedings to improve the legal certainty around such projects, including possibly obtaining orders that confirm the legal status of the revenues that will be used in such projects, or by requiring the debtor to reject burdensome contracts that could not otherwise be consensually renegotiated and that otherwise might chill interest from potential PPP sponsors. Powers under Title III also permit debtor-in-possession (DIP) financing arrangements that may bring mutual benefits to both the debtor and a potential PPP sponsor or by using indirect ownership or participation in a PPP project as a form of value for distribution to creditors.

Plan of Adjustment's Consistency with the Certified Fiscal Plan

To understand how a Title III process can facilitate PPP projects, one first needs to understand what role the certified fiscal plan plays in a Title III proceeding. The certified fiscal plan is the very touchstone of the Title III proceeding — and Section 201 of PROMESA sets forth 14 requirements that a fiscal plan must meet in order to be certified by the oversight board. One of those requirements is that a certified fiscal plan must "provide for capital expenditures and investments necessary to promote economic growth." With respect to the commonwealth, the oversight board and the commonwealth government are relying largely on PPPs to generate near-term growth, and, regardless of how one views the likelihood of achieving that objective, the text and intent of PROMESA make it difficult for creditors and other stakeholders to question or challenge that reliance. Because a fiscal plan certified by the oversight board is conclusive and nonreviewable, a Title III court is likely to accord great deference to the oversight board's determination that a specific PPP satisfies this "economic growth" requirement, and absent a successful challenge to PROMESA itself, would by its terms lack authority to hear any dispute regarding such determination.[6]

Thus, if a certified fiscal plan prioritizes PPP transactions as part of a Title III plan of adjustment, a Title III court is likely to give the implementation of the PPP great weight when evaluating relevant issues that may come up as part of a Title III process. As a result, we would expect that a Title III debtor will seek to use all of the tools inherent in the Title III process to advance the relevant PPP project and make it more attractive to investors. In that sense, a Title III proceeding can be used by the debtor as both a shield to protect the PPP transaction and a sword to drive the PPP transaction toward execution as part of a plan of adjustment. Sponsors and lenders to such PPP projects should make sure they understand the potential benefits available to them under Title III to facilitate the implementation and operation of such projects.

Confirmation of Legal Landscape and Rights and Interests

How would a commonwealth debtor seek to use Title III to make PPP projects more attractive to prospective project sponsors and/or lenders? One objective of any party considering investing in or lending to a PPP project is to eliminate as much as possible any identifiable legal risks associated with such projects. Take PREPA, for example, one of the commonwealth's prime candidates for PPP investment. Any PPP investment in PREPA would be subject to a number of commonwealth statutes, including PREPA's Enabling Act, Act No. 83 of May 2, 1941, as amended (PREPA Act), Act 66-2014, known as the Special Law of Fiscal and Operational Sustainability of the Government of the Commonwealth of Puerto Rico (Energy Relief Act), and Act 29-2009. These statutes contain an array of conflicting and ambiguous legal requirements, and any project sponsor will want to make sure that its view of what is required and permitted by these laws is consistent with its understandings and assumptions when it bids for a particular project.

For example, although the PREPA Enabling Act would seem to permit the creation of a less than wholly owned subsidiary to own and operate the proposed offshore Aguirre Gas Port, the level of control that a private owner/operator of that facility could exercise would be an issue of first impression under Puerto Rican law, as would the restrictions that would apply to that entity under existing Puerto Rican statutes, including the Energy Relief Act. The broad powers afforded to the Title III court should permit a debtor to obtain orders confirming or clarifying aspects of a PPP project that would otherwise be too difficult or time-consuming to obtain.[7] It will also be possible to condition a plan of adjustment, or incorporate into the confirmation order of such plan, many of the assurances or clarifications that project sponsors may seek. Accordingly, Title III may provide a debtor such as PREPA, PRASA or HTA with a unique opportunity to attract new private investment and provide the type of legal assurances and guarantees to investors that would be difficult, if not impossible, to obtain in the absence of such a process.[8]

Use of Special Revenues to Support PPP Projects.

What other ways could Title III be used to make such projects more attractive to PPP sponsors and/or lenders? One possibility relates to the underlying revenues generated or used by potential PPP projects. Unlike the very public dispute between creditors holding general obligation (GO) bonds and sales tax revenue bonds issued by the Puerto Rico Sales Tax Financing Corporation (COFINA, by its Spanish acronym) over whether certain sales tax revenues are “available resources” under the Puerto Rican Constitution, most legal commenters believe that revenues in the nature of tolls, tariffs and user fees generated from public corporations such as PREPA are, for the most part, not vulnerable to the same type of legal challenges. Nonetheless, the revenues generated by these entities are largely encumbered by existing debt and, depending upon the nature of those encumbrances, there may be substantial limitations on how such revenues can be used or whether they may be available to provide security to PPP sponsors (or their lenders) for commitments and undertakings by government entities who contract with such sponsors.

In particular, if project revenues are secured by a statutory lien or constitute special revenues under Section 928 of the Bankruptcy Code, the existing secured parties’ lien would continue to attach to those revenues even after a Title III filing,[9] potentially making them more difficult to utilize in a contemplated PPP project. Given the areas where PPP investment is targeted under the various certified fiscal plans, this is no small issue. Entities such as HTA, PREPA and PRASA are likely going to have a larger portion of their available collateral treated as special revenues, and thus, those revenue streams will potentially be off-limits as potential sources of repayment and/or liens for new PPP investors and lenders.

However, Section 928(b) of the Bankruptcy Code clearly states that such liens on special revenues are subject to the “necessary operating expenses of such project or system.” While this section of the Bankruptcy Code has not received much attention in the traditional Chapter 9 context, its use and meaning in the context of PROMESA is likely to get much more attention, particularly if a PPP transaction is incorporated into a certified fiscal plan. While PPP transactions are a way to incorporate private sector capital into public infrastructure, the balance sheet of the public sector contracting party is still highly relevant to a prospective PPP sponsor and lender.

Private sector sponsors in PPP projects are often concerned about the creditworthiness of their public sector counterparty, both for direct obligations (such as payments under a power purchase agreement or a management fee) and contingent obligations (such as payments under indemnities, “nonimpairment” or “adverse action” clauses, etc.). Likewise, PPP projects often require the construction of complementary infrastructure, e.g. the construction of interconnection facilities to service power plants built under a PPP regime. Any sponsor interested in a PPP transaction will be keenly attuned to the ability of a public sector counterparty to utilize their revenue streams to support these obligations, and will want certainty that those revenue streams will not be tied up by existing creditors.

The scant jurisprudence available under Chapter 9 has done little to define the scope of Section 928(b)'s carveout for necessary operating expenses.[10] In the unique context of PROMESA, however, the oversight board's certification of a fiscal plan, particularly if the plan targets specific growth initiatives through PPP projects, may carry enormous weight as to what a court may view as "necessary operating expenses." A court would be hard-pressed to confirm a plan of adjustment that deviates from that view to the extent that the oversight board made a nonreviewable determination that a PPP transaction (and any related capital expenditures) is "necessary to promote economic growth." Even if the Title III court were not inclined to defer to the oversight board, the fact remains that the plan of adjustment under Title III must be consistent with the certified fiscal plan. Therefore, a fiscal plan that did not provide for "special revenues" to be made available for the execution of a specific PPP project could jeopardize confirmation of the plan of adjustment. As such, the inclusion of a particular PPP project in a certified fiscal plan may pave the way for the commonwealth or its instrumentalities to use all or a portion of these pledged special revenues to support PPP transactions, providing both a source of capital and innovation to the commonwealth entities seeking to engage in the PPP transaction and certainty to private sector sponsors providing such capital and expertise.

Rejection of Contractual Obligations

How else can a Title III plan of adjustment be used to mitigate the risks of a particular PPP project or facilitate its execution? Because Title III incorporates Section 365(g) of the Bankruptcy Code, a plan of adjustment can be used to reject certain executory contracts containing provisions that, in whole or in part, could chill a potential PPP sponsor's willingness to bid or otherwise affect the pricing of such bid. At the outset, the power of rejection can be used to reject or renegotiate all manner of onerous supply or trade agreements. In particular, public entities that have collective bargaining agreements (CBA) that cabin management discretion with respect to the operation and/or sale of potential PPP assets can utilize this provision to remove or otherwise weaken labor barriers to PPP transactions (i.e., PPP options may be limited to design, build and financing PPPs to the extent a CBA forecloses operation and management PPPs).

Both Chapter 9 and PROMESA significantly depart from the framework under Chapter 11 of the Bankruptcy Code and grant greater leeway to reject CBAs by not incorporating the stricter standards for rejecting CBAs that Congress imposed under Section 1113 of the Bankruptcy Code. Instead, the standards that predate Section 1113 apply, and a municipality must only demonstrate (1) that the agreement constitutes a burden, (2) the balance of the equities is in the municipality's favor and (3) that it negotiated reasonably with the union prior to rejection.[11] A lingering question remains with respect to whether state law requirements can effectively limit a Chapter 9 debtor's ability to reject CBAs, and the little case law addressing this question is inconclusive.[12] As a baseline, there are strong arguments in favor of rejecting CBAs irrespective of state law requirements.[13] However, a Title III debtor has additional arguments where the rejection of CBAs is necessary for the implementation of the applicable certified fiscal plan, and the Title III plan of adjustment must be consistent with the requirements thereunder.

As a threshold matter, a Title III debtor could use the power to reject burdensome CBAs to revamp its operations in furtherance of the goals of the applicable fiscal plan by, for example, allowing the termination or transfer of underutilized employees or reducing the largesse of certain benefits. In the PPP context, the power to reject CBAs may also be useful to entities such as PREPA with legacy CBAs containing provisions that could be expected to dissuade potential PPP partners because of the payroll and benefits costs they might have to assume (for example, if existing generation assets were to be acquired by a PPP as part of a transaction that also requires the building of new generating units).

Under Section 10(g) of Act 29-2009, a PPP employer may be required to pay employer contributions under, and/or assume vested benefits of transferred employees who participated in, PREPA's pension plans. Among the goals of PREPA's certified fiscal plan is its transformation from a generation owner to a distribution system operator,[14] a process that entails the retirement of antiquated units in favor of modern generation equipment financed by private capital, in part, through PPP transactions that may or may not involve the transfer of existing PREPA employees to PPP entities. Regardless of how labor issues are ultimately addressed under a PPP contract, PREPA would benefit from the flexibility that Title III provides to mitigate such costs and increase its bargaining leverage vis-a-vis a potential PPP counterparty.

For example, if PPP sponsors prefer PREPA to have greater management flexibility with respect to the hiring of workers, or PREPA requires flexibility with respect to the management of its workforce, rejecting, modifying or renegotiating burdensome CBAs as part of a Title III plan of adjustment may help PREPA attract the PPP sponsors it needs to promote the goals outlined in its certified fiscal plan.[15] And to the extent a PPP project requires the retention by, or transfer of skilled employees to, a new entity managing the generation unit,[16] or public sector CBAs set a comparative benchmark for analogous private sector CBAs, certain terms in PREPA's CBAs may limit the value PREPA can extract from these PPPs by increasing the direct or indirect compensation PPP partners demand for assuming certain labor risks.

DIP Financing

Another way a Title III proceeding could be used to facilitate PPP projects, while also providing needed liquidity to a particular instrumentality, is through the use of possible DIP financing. By incorporating Sections 364(c)-(f) of the Bankruptcy Code, Title III allows Puerto Rican entities to obtain DIP financing during the pendency of a Title III proceeding on various terms that afford special protections to DIP lenders. These include superpriority liens, subordinated secured liens and, in certain extraordinary circumstances, the grant of priming liens. Further, a court order approving the terms of a DIP arrangement can be conclusive evidence of the perfection of security interests created thereunder and, even if a DIP order were appealed, so long as the lenders acted in good faith, reversal does not affect the validity of the obligation. Taken together, these protections may help Title III debtors secure financing to support PPP transactions, particularly for PPPs that require significant capital support.

For example, a DIP arrangement could theoretically be structured to automatically convert into a permanent financing mechanism subsequently incorporated into a Title III plan of adjustment (provided it complies with the applicable confirmation requirements). As such, there is nothing that bars the use of DIP loans to help implement the PPPs contemplated by the fiscal plans which, as discussed above, could play an important role in the confirmation of a plan of adjustment under PROMESA's Title III. To be sure, Section 1123(a) of the Bankruptcy Code requires that the plan of adjustment provide for the adequate means of its implementation. The commonwealth could use the proceeds of a DIP loan to make a PPP project more bankable, particularly when financial contributions from government owners are needed to help mitigate the operational risks assumed by the private sector. To the extent a PPP requires the government owner to provide capital support, funds obtained from one or more DIP loans could be used to provide direct cash support or loans, or to finance the payment of stabilization subsidies, such as shadow tolls or minimum revenue guarantees. Similarly, a portion of DIP loan proceeds could be segregated into special accounts that create liquidity facilities for PPP projects or guarantee contingent liabilities, such as letters of credit, indemnities and similar support instruments provided by public corporations.

As a practical matter, DIP financing arrangements are only an option to the extent potential lenders are comfortable with the credit support they receive. Therefore, Puerto Rican instrumentalities with significant unencumbered tangible properties and assets, such as PRASA, may be the best candidates for DIP arrangements. However, PRASA’s enabling legislation does not authorize the pledge of these assets.[17] Ideally, Puerto Rico’s legislature would remove these provisions from relevant local law, as it has done in the past.[18] Alternatively, arguments can potentially be made in favor of PROMESA’s preemption of any conflicting state or territory law. Not only are PROMESA’s supremacy provisions broadly worded to override any inconsistent Puerto Rican law or regulation, the specific powers granted to the oversight board to approve the issuance of debt or enter into financial transactions may permit the encumbrance of these properties and assets in order to implement the certified fiscal plan.

Settlement Agreements with Creditors and Other Stakeholders

Another possibility of how Title III could possibly be used to facilitate the use of PPP transactions can be found in Detroit’s settlement agreement with Syncora Capital Assurance Inc. and Syncora Guarantee Inc. (Syncora), a monoline bond insurer.[19] Detroit’s plan of adjustment incorporated a settlement with Syncora into the plan that ultimately helped turn creditors into partners with the government and gave them a vested stake in its economic recovery.[20] Among other provisions, a subsidiary of Syncora was granted a one-year option to enter into a 30-year concession for a parking garage that required the developer to invest $13.5 million in capital expenditures during the first five years. In turn, the developer was entitled to all the revenues from the concession until it recouped 140 percent of such capital expenditures, after which Detroit would be entitled to a quarter of the revenues.

The Syncora agreement also amended Syncora’s lease of the Detroit-Windsor Tunnel (already owned by a subsidiary of Syncora), and it extended its term from 2020 until 2040. The amended and extended leases permit Syncora to credit certain capital expenditures against rent payments.[21] When it approved Detroit’s settlement agreement with Syncora, the bankruptcy court explicitly endorsed a structure that provided “the benefit of improved management” and the “implementation of desperately needed capital expenditures,” each of which could be obtained from the PPP transactions that the certified fiscal plans seek to implement.

Similar agreements could be incorporated into a Title III plan of adjustment for the commonwealth or its public corporations, particularly with respect to abandoned or underutilized properties or other assets that are good candidates for greenfield PPP transactions. In other words, in exchange for their support of a Title III plan of adjustment, and as part of their recovery under said plan, creditors could be given an option to enter into, or receive equity-like returns from, PPP projects.

In the sovereign context, so called “debt-for-equity” swaps were a regular component of debt restructurings during the 1980s. When it comes to structuring these agreements, the Title III debtor has substantial flexibility to both accommodate its operational needs and comply with the applicable confirmation requirements under PROMESA. A Title III court likewise has considerable latitude to approve such settlements,[22] which can take various forms and could be specifically targeted to certain stakeholders, such as government pension plan beneficiaries and local retail bondholders whose physical proximity to a PPP project, as well as their vested interest in its long-term success (i.e., as rate payers), may justify giving them preferential access to this type of loss mitigation mechanism.[23] For example, new “creditor-controlled” special-purpose vehicles could be created to participate in various PPP projects with equity ownership of such projects allocated among the government, PPP sponsors and such entities. Alternatively, a PPP contract can simply provide creditor constituencies with the right to receive a portion of the revenue or fee income generated by a particular PPP project, and therefore offset some of the losses such creditors may experience.

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Decades from now, PROMESA’s success or failure will be judged not by the pitched courtroom battles we are witnessing today or the fact that one creditor group fared better than another, but on whether Puerto Rico’s economic trajectory was positively and fundamentally altered so that its residents could secure an optimistic and hopeful future. Real economic growth will be a key driver toward that objective, and although the execution of successful PPP projects will not necessarily guarantee such growth, they can meaningfully contribute to it. Beyond that, PPPs can also be a tool to improve the government’s delivery of services to residents, which will not only enhance the quality of life on the island, but also stimulate the growth of business activity. Given the formidable capital constraints the Puerto Rican government currently faces, the loss of access to capital markets, and the substantial legal, operational and other uncertainties that exist today in Puerto Rico, the challenges of designing, executing and carrying out such projects should not be underestimated. However, the same set of tools that facilitate restructuring under Title III of PROMESA can be used to help facilitate PPP transactions and, from the perspective of project sponsors (and their lenders), possibly mitigate some of their inherent risks. The structures discussed above provide just a few examples of how PROMESA can be utilized to accomplish these goals. The achievement of these objectives will ultimately benefit all of Puerto Rico’s stakeholders, including its creditors, for years to come.

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DISCLOSURE: Cleary Gottlieb assisted the commonwealth of Puerto Rico and its instrumentalities with their financial challenges prior to the recent change in government. Cleary Gottlieb is currently representing the Government Development Bank for Puerto Rico (GDB) on a discrete legacy matter. The firm also advised GDB and the governor’s office in the drafting and development of the Puerto Rico Public-Private Partnerships Act and represented the winning bidder for San Juan’s Luis Muñoz Marín International Airport PPP.

To read the authors' prior articles on the Puerto Rico debt crisis, click here.

[1] See Puerto Rico Fiscal Agency and Financial Advisory Authority, Fiscal Plan for Puerto Rico, at 25 (March 13, 2017) (https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/58f614498b647.pdf).

[2] See Puerto Rico Electric Power Authority (PREPA) Final Fiscal Plan at 52-56, 90-96 (April 28, 2017) (https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/59037737859d2.pdf); Puerto Rico

Highways and Transportation Authority (HTA) Fiscal Plan 2017-2026 at 14 (April 28, 2017) (https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/590926a0c0a17.pdf); Puerto Rico Aqueduct and Sewer Authority (PRASA) Final Fiscal Plan at 51-58 (April 28, 2017) (https://juntasupervision.pr.gov/wp-content/uploads/wpfd/50/59035add12eb9.pdf).

[3] See Heather Gillers, For Sale: Puerto Rico, June 26, 2017, WALL ST. J. (June 26, 2017) (quoting experts discussing the difficulty the commonwealth faces in achieving its PPP objectives), available at https://www.wsj.com/articles/for-sale-puerto-rico-1498474800.

[4] The enactment of Act 29-2009 was welcomed by the market as a positive development. Prior to its enactment, PPP initiatives had to navigate an inconsistent patchwork of legislative provisions, mainly centered around the enabling legislation of various commonwealth instrumentalities, that did little to clarify the legal framework applicable to PPP transactions. Act 29-2009 centralized the administration of PPP initiatives under GDB's technical supervision, provided flexibility to negotiate different types of PPP contracts, improved transparency during the bidding process and streamlined the mechanisms to identify and implement potential PPP projects.

[5] See Andrew G. Biggs, Arthur J. Gonzalez, Ana J. Matosantos and David Skeel, Privatize Puerto Rico's Power, WALL ST. J. (June 29, 2017), available at https://www.wsj.com/articles/privatize-puerto-ricos-power-1498776904.

[6] Prior to confirmation, PROMESA requires that both the Title III court and the oversight board determine that a proposed plan of adjustment under Title III is "consistent with the applicable Fiscal Plan certified by the Oversight Board." See § 314 of PROMESA.

[7] For example, outside the Title III context, a PPP party may need to engage in costly, time-consuming litigation in order to clarify many of the legal issues under Puerto Rican law that could have a material adverse effect on the execution, and subsequent operation, of a PPP project. Article III, section 2 of the U.S. Constitution limits federal subject matter jurisdiction to actual "cases" and "controversies" and prohibits the "render[ing] of advisory opinions." Flast v. Cohen, 392 U.S. 83, 96 (1968). The Puerto Rico Supreme Court has similarly adopted the view that case or controversy must exist in order for Puerto Rican courts to exercise their decisional power and prohibits the issuance of advisory opinions. See E.L.A. v. Aguayo, 80 D.P.R. 552 (1958).

[8] Another example of how the legal landscape applicable to PPPs can be improved and/or clarified under PROMESA is through the invocation of the supremacy provisions pursuant to Section 4 of PROMESA, which is discussed in greater detail herein under the heading "DIP Financing."

[9] If the underlying revenues generated, or projected to be generated, are not currently secured by a statutory lien, or do not constitute "special revenues" under Section 928 of the Bankruptcy Code, then the government entity contracting with a PPP sponsor may very well be free to access or pledge post-filing revenues to a project sponsor to support its undertaking.

[10] See, e.g., In re Jefferson County, Ala., 482 B.R. 404 (2012) (noting after analyzing the legislative history that certain reserves, including those for future capital expenditures, were not intended to be included in "necessary operating expenses," but ultimately declining to interpret the scope of section 928(b) and instead relying on the indenture's broad scope of "Operating Expenses").

[11] See NLRB v. Bildisco, 465 U.S. 513 (1984); see also In re City of Vallejo, CA, 432 B.R. 262, 272 (E.D.

Cal. 2010) ("find[ing] Bildisco and In re County of Orange to be persuasive authorities for analyzing and determining the appropriate standard for a municipality to reject a CBA during Chapter 9 bankruptcy ... [and affirming] the Bankruptcy Court's use of the Bildisco standard.").

[12] Cf. In Re County of Orange, 179 B.R. 177 (C.D. Cal. 1995) (holding that before a Chapter 9 debtor could reject CBAs under Bildisco, it was required to follow state law bargaining procedures in order to demonstrate that the balance of equities favored rejection of the CBAs), with In re City of Vallejo, CA, 432 B.R. 262 (E.D. Cal. 2010) (ruling that a Chapter 9 debtor could reject a CBA as part of a reorganization without limitation by state labor law).

[13] These arguments would likely be based on supremacy and preemption grounds.

[14] PREPA's fiscal plans aims to have approximately 30 percent of system generation delivered by PPP projects. See PREPA Fiscal Plan, supra note 2 at 53.

[15] In practice, however, other considerations should inform the use of Section 365(g) during a Title III proceeding. To the extent the treatment of CBAs can have a significant impact on the long-term relationship of a Title III debtor with its workforce, the mere existence of this ability can still provide significant negotiating leverage when seeking to obtain concessions from unions.

[16] Under federal National Labor Relations Board rules and decisions applicable to Puerto Rico, a new entity does not automatically assume the CBA obligations of the transferring entity. However, if the new entity assumed a critical mass of employees from a transferring entity with antecedent CBA obligations, the new entity may be deemed to assume a unionized labor force and have to negotiate a new CBA.

[17] The attorney general of Puerto Rico opined that unless explicitly authorized by law, instrumentalities may not privatize assets or services absent an explicit delegation of authority to do so. See, e.g., Op. Sec. Just. No. 24 of 1990, Op. Sec. Just. No. 15 of 1986. In light of this principle, PRASA's Enabling Act, Act No. 40 of May 1, 1945, as amended, was interpreted to prohibit the privatization of the sanitary sewer system absent statutory authority to sell or mortgage these assets. See Op. Sec. Just. No. 15 of 1986.

[18] See Act No. 328-1998 (amending PRASA's Enabling Act to explicitly authorize the contracting of one or various private entities to administer all or part of PRASA's aqueduct and sewer system).

[19] See In re City of Detroit, 524 B.R. 147, 194-95 (E.D. Michigan 2014).

[20] See id. at 163 ("In addition, the settlements with [...] Syncora include real estate development agreements that give these creditors vested stakes in the City's recovery.").

[21] See id. at 193-94 (summarizing the terms of the Syncora agreement).

[22] See Fed. R. Bankr. Pro. 9019(a) (granting a bankruptcy court broad powers to approve a compromise or settlement).

[23] See Richard J. Cooper, Luke A. Barefoot and Jessica E. McBride, "What Should Puerto Rico Offer its Creditors?" March 15, 2017, Law360, available at https://www.clearygottlieb.com/~/media/cgsh/files/bio-pdfs/what-should-puerto-rico-offer-its-creditors.pdf.