

KLUWER LAW INTERNATIONAL

International Project Finance and PPPs

A Legal Guide to Key Growth Markets

Edited by

Jeffrey Delmon

Victoria Rigby Delmon



Wolters Kluwer

Law & Business

AUSTIN

BOSTON

CHICAGO

NEW YORK

THE NETHERLANDS

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-2719-8

© 2010 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to:
Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY
10011-5201, USA. Email: permissions@kluwerlaw.com

Printed in Great Britain.

Summary of Contents

Preface	xliii
Acknowledgements	xliv
General Reports	
Chapter 1 Introduction to Public-Private Partnerships	Introduction to PPPs – 1
Chapter 2 Introduction to Project Finance	Introduction to Project Finance – 1
Chapter 3 Local Legal Issues	Local Legal Issues – 1
Country Reports	
Chapter 4 Brazil <i>Thomas Benes Felsberg, Maria da Graça de Brito Vianna Pedretti, Andréa Machado Martins Costa & Fabrizio de Oliveira Sasdelli</i>	Brazil – 1
Felsberg, Pedretti, Manrich e Aidar Advogados e Consultores Legais	

SUMMARY OF CONTENTS

Chapter 5

Chile

Chile – 1

F. Patricia Núñez, F. Sebastián Quijada & Carolina Benito Kelley

Núñez, Muñoz & Cía. Ltda. Abogados

Chapter 6

China

China – 1

Matthew McKee & Aldo Settimio Boni de Nobili

Hwuason & Lehman, Lee & Xu

Chapter 7

Egypt

Egypt – 1

Ahmed El Sharkawy & Salma Shams El-Din

Sharkawy & Sarhan Law Firm

Chapter 8

India

India – 1

Cyril Shroff & Alice George

Amarchand & Mangaldas & Suresh A. Shroff & Co.

Chapter 9

Nigeria

Nigeria – 1

Adedolapo Akinrele, Zelda Odidison & Jumoke Onigbogi

F.O. Akinrele & Co.

Chapter 10

Romania

Romania – 1

Luminița Popa, Iuliana Craiciu & Marius Bârlădeanu

Musat & Asociații Attorneys at Law

Chapter 11

Russia

Russia – 1

Andrei Baev, Alexander Dolgov, Veronika Kondruseva & Elena Shishmariova

Allen & Overy LLP

SUMMARY OF CONTENTS

Chapter 12 South Korea <i>Young Kyun Cho & Seong Soo Kim</i> Kim & Chang	South Korea – 1
Chapter 13 Tanzania <i>Wilbert Basilius Kapinga, Joy Hadji Alliy & Nasra Hassan</i> Mkono & Co.	Tanzania – 1
Chapter 14 Turkey <i>H. Tolga Danişman, Itir Sevim-Çiftçi, Hakki Gedik, M. Kemal Mamak & Senem İşmen</i> Hergüner Bilgen Özeke Attorney Partnership	Turkey – 1
Chapter 15 Uganda <i>Joseph B. Luswata, Nicholas Ecimu, Julius Ojok, Munanura Andrew Kamuteera & Brenda Judith Kyokwijuka</i> Sebalu & Lule Advocates and Legal Consultant	Uganda – 1
Chapter 16 United Arab Emirates <i>David Wadham & Mhairi Main Garcia</i> Ashurst Middle East	United Arab Emirates – 1
Chapter 17 United States <i>Allan T. Marks & Eric F. Silverman</i> with contributions from <i>Alexander K. Borisoff, Caroline Conway, Henry T. Scott & Amy E. Turner</i> Milbank, Tweed, Hadley & McCloy LLP	United States – 1
List of Country Codes	Country Codes – 1
Index	Index – 1

Chapter 5

Chile

F. Patricia Núñez

Ms. *Patricia Núñez* studied law at the University of Chile Law School (J.D. in 1991), where she received the ‘Pedro N. Montenegro’ award as the best student of her generation. She then went on to receive a Fulbright Scholarship in 1996 and her Master in Laws degree from Yale University Law School (USA) in 1997. Currently a founding partner at Núñez, Muñoz & Cía., Mrs. Núñez previously worked with Debevoise & Plimpton (New York, USA) (1997–1998), and has held several positions at international associations such as council member of the Energy, Environment, Natural Resources and Infrastructure Law Section of the International Bar Association (IBA-SEERIL) (2008 onwards), member of the Editorial Board of the *Journal of Energy & Natural Resources Law* published by the International Bar Association, member of the LL.M. Program Board of Suffolk University School of Law (Boston, USA), former Chair of the Mining Committee of the International Bar Association (2004–2008), and former Trustee at Large of the Rocky Mountain Mineral Law Foundation (2005–2008). In addition, Mrs. Núñez has a wealth of hands-on experience in Commercial Law, Energy and Natural Resources, Project Financing, and Public Works Concessions, among other areas.

F. Sebastián Quijada

Mr. *Sebastián Quijada* studied law at the University of Chile Law School (J.D. in 2005) and received his Master in Laws degree in International Law, Trade and Investments from the University of Chile and Heidelberg University (Germany) in 2006; he is set to receive his postgraduate degree from the University College of London (United Kingdom) in 2010. Currently an attorney at Núñez, Muñoz & Cía., Mr. Quijada previously held a position as in-house attorney of the National Railroad Company of Chile (2004–2006) and as legal consultant of international agencies such as the Inter-American Development Bank, Chemonics and USAID (2004–2006).

CHILE

Carolina Benito Kelley

Ms. *Carolina Benito Kelley* studied at the University Complutense of Madrid Law School (Spain) (J.D. in 2002), and received the Erasmus Scholarship to study her fourth year of law at the University Panthéon-Sorbonne Law School (Paris, France) (1999–2000). Mrs. Benito later studied at Hofstra University (New York, USA), where she became a Certified Paralegal (2004) and graduated among the top of her class. Currently an attorney at Núñez, Muñoz & Cía, Mrs. Benito has previously worked in the Department of International Arbitration and Litigation with Garrigues Abogados y Asesores Financieros (2002–2003) and in Real Estate Portfolio Management at the Royal Bank of Scotland (2005), both in Madrid, Spain.

Núñez, Muñoz & Cía. Ltda. Abogados

Núñez, Muñoz & Cía. Ltda. Abogados renders legal services to national and foreign clients in different areas of the law, including, among others:

- Corporate law
- Project financing
- Natural resources
- Antitrust law
- Litigation.

As a law firm, we are committed to providing the best legal service to our clients and to solving their requirements in the fastest and most effective way. For such purposes, our working team is composed of lawyers graduated from the most prestigious Chilean law schools, many of whom have completed graduate studies abroad.

Núñez, Muñoz & Cía Ltda. Abogados

Av. Isidora Goyenechea 3250 piso 13

Las Condes, Santiago

Chile

Tel.: +56-2-431-9040

Fax: +56-2-378-8060

E-mail: info@nam.cl

Web: www.nam.cl

Chapter 5 Chile

*F. Patricia Núñez, F. Sebastián Quijada &
Carolina Benito Kelley*

Núñez, Muñoz & Cía. Ltda. Abogados

1. OVERVIEW OF PUBLIC-PRIVATE PARTNERSHIPS IN CHILE

1.1. MARKET CONTEXT

The public-private partnership (PPP) model in Chile takes on many forms. Among the types of infrastructure and services that have been developed using contracts executed by the State and the private sector, one can distinguish between those known as “Public Services,” such as electricity distribution, sanitary services, communication services (fixed phone) and, the so called “Public Works Concessions,” under which road, highway, prison, reservoir, port and airport infrastructural projects have been developed.

With regards to Public Services, although the structure of such services shares a few main features with the PPP schedule, there are certain differences that distinguish it from PPPs. Firstly, from a historical point of view, it is a sector in which the services were provided by State-owned companies that, in time, particularly during the seventies and eighties, began to be privatized. Such privatization included not only the provision of services but also the entire service companies, along with all the assets that the same possessed. For this reason, Public Services in Chile are currently provided by private companies which generally benefit from a natural monopoly and which often have not entered into a formal agreement by virtue of which the service company is bound to the State. On the contrary, the security, quality and frequency standards according to which these services are provided are set forth by specific laws that govern each sector. The Electrical Services General

Act (Decree with Force of Law No. 1, 1982) and the Sanitary Services General Act (Decree with Force of Law No. 382, 1988) are examples of this.

On the other hand, from a historical view point, in the 1990s Public Works Concessions started with the enactment of the Public Works Concession Act. Its specific purpose was to include the private sector into the financing, design, construction and operation of the infrastructure that Chile required in order to perpetuate the economic development that it was experiencing at the time. Thus, in Chile, the Public Works Concession model was designed under the framework of the so called “BOT” (*build, operate and transfer*) contracts, by virtue of which the private investor, by means of a concession company, provides the necessary infrastructure which it later exploits during a specific term. Upon expiration of the concession’s contractual term, the concessionaire then hands over the management of the assets, which, contrary to the Public Services model, are always State-owned.

The foregoing public private scheme has been the most used, accepted and validated by the different parties involved therein, such as the public sector, investors, financiers, beneficiaries and even the local capital markets, which have promoted the development of the country’s infrastructure and associated services. With regards to the principal regulatory and legislative aspects of the Public Works Concessions, they will be explained in depth hereinafter.

1.2. LEGAL CONTEXT

As previously mentioned, during the 1990s, Chile addressed its enormous infrastructure needs by introducing private capital into the financing, construction and operation of large projects such as roads, ports, jails and airports. The incorporation therein of such private investments was the beginning of the Private Public Partnership process in Chile.

In order for this initiative to be implemented, the Public Works Concession Act was enacted in 1991.¹ The Concession Act governs the way in which private capital is allocated to infrastructure development in Chile. It does so by entrusting the Ministry of Public Works with the responsibility and authority to grant public works in concession. Likewise, the Concession Act requires that the private investors awarded with the concession fulfill certain obligations, mainly related to the construction and operation of such works within a certain term. It also provides that the private investor, by means of a special purpose concession company, may receive payments from either the beneficiaries of the works or from the State. Such payments guarantee the

1. The Public Works Concession Act was enacted by Law Decree No. 164 of 1991, which was later amended by Law No. 19,460. The adapted text is contained in the Supreme Decree number 900 of 1996, likewise amended by Law No. 20,410 on Jan. 20, 2010. For the purpose of this chapter, we will refer to the Supreme Decree 900 and its subsequent amendment as the “Concession Act.”

concessionaire a long-term recovery of the investment during the duration of the concession.

The Concession Act also establishes the basis for a flexible contractual system applicable to all types of public works granted in concession. The system minimizes the preemptive nature of the State's public powers in the concession contract, and creates a legal framework within which the parties are deemed equal.

2. LOCAL LEGAL ISSUES

In accordance with Article 1 of the Concession Act, the Supreme Decree No. 240 provided the Act's regulation in 1991 (hereinafter, the "Regulation"). The Regulation expressly addressed issues that the Concession Act had delegated thereto.

Additionally, in 1996, Law No. 19,460 introduced improvements into the Concession Act and clarified the rules governing private initiatives, the regime for tender offers, the execution of the concession contract and the term within which the concession should take place. It also expanded the legal concept of public works concession. Furthermore, Law No. 19,460 deals with operational aspects of the contractual regime, such as, the manner in which compensation for the modification of the works must be paid, and principles which govern the transferring of rights and surety bonds. It provides new manners in which to access information about works offered in concession, rules on tariff evasion and the corresponding fine system. This law also protects the concessionaires' financiers by creating a special non-possessory pledge for public works concessions and preferential rights for creditors over the secured assets.

Further amendments to the Concession Act have been recently introduced by Law No. 20,410, published in the Official Gazette on January 20, 2010. Such amendments set forth the creation of a Concession Council which shall issue reports regarding the type of infrastructure and projects to be developed under the scope of the Concession Act and the concession regime; the explicit obligation for the concessionaire to comply with the required service levels and technical standards during the entire duration of the concession; greater flexibility in the amounts of time and additional investment allowed for modifications to be incorporated into the already awarded concession, provided due compensations; the registration of contractors in a special registry kept by the Ministry of Public Works; the prohibition for contractors and subcontractors incurring in serious contractual breaches to work on future concessions; and, lastly, the reduction and capping of fines applied to concession users who have not paid the corresponding tolls.

The main issues governed by the Concession Act, including all subsequent amendments, and its Regulation are described hereinafter.

2.1. PROCUREMENT RESTRICTIONS

Equal treatment under Chilean Law and the right to develop economic activities are rights recognized by the Constitution. In harmony with these guarantees, the Concession Act, particularly in its Article 6 *bis*, forbids arbitrary or discriminatory² treatment of the bidders that participate in the tender process, thereby ensuring their equality.

Other than the requirements of equality and non-discrimination, Chilean legislation does not set forth specific restrictions regarding the participation of an individual or entity in the tender process. Article 4 of the Concession Act provides that private persons and legal entities (Chilean as well as foreign) may bid in accordance with the requirements and conditions set forth in the corresponding Regulation.

Notwithstanding the above, by virtue of Article 22 number 2 and Article 28 *bis* of the Concession Act, a concession company and its related persons³ as well as contractors and subcontractors incurring in serious breach of contract may be disqualified from participating in future tender processes for five years counted as of the date on which the judgment decreeing such serious breach is issued. The breach must be declared by the Arbitration Commission,⁴ at the request of the Ministry of Public Works.

Likewise, Article 16 of the Regulation provides criteria for disqualification from the tender process in view of reducing the risks of poor management or insolvency, and to prevent delinquents from participating in the tender process.

The terms and conditions of the request for tender (hereinafter, “RFT Terms and Conditions”) may also include additional requirements for the bidders as long as they do not violate the principle of equality. In fact, fulfillment of such requirements may even be analyzed at a previous stage. In such manner, Article 6 *bis* of the Concession Act authorizes the Ministry of Public Works to hold a prequalification process to evaluate how potential bidders

-
2. It is not permitted to set limitations that do not result from the concession system’s intrinsic nature or features or limitations that are not soundly justified.
 3. Articles 97 and 99 of Stock Market Law No. 18,045 determine when two entities are to be considered associates in order to prevent the evasion of rules and responsibilities as a result of the overlapping of legal structures. Art. 97 defines control of a company as influence exercised over the voting of the directors, managers or legal representatives of the company, and influence exercised directly over the management of the company. Art. 99 provides that decisive influence over the management of a company exists when 25% or more of the share capital or of the shares with voting rights is directly or indirectly controlled.
 4. Article 36*bis* of the Concession Act, introduced by Law No. 20.410, provides an Arbitration Commission to mediate the conflicts that result from or arise out of the interpretation, application or performance of a concession contract. If such conflicts are of a technical or financial nature, they must first be submitted to a Technical Panel which shall issue a non-binding recommendation, in the manner set forth in Art. 36 of the Concession Act.

measure up to certain objective standards such as financial and technical capacity, experience, past results on similar works and historic compliance with social security and worker's compensations rules and regulations.

After the corresponding technical and price bids are submitted and the final evaluation process is concluded, the Ministry of Public Works Administration, by means of a supreme decree duly signed by the latter's minister and the Treasury Minister, will award the concession to the most advantageous and convenient proposal, thereby designating its contracting party.

The award decree shall include the following essential contractual terms:

- Identification of the concessionaire.
- RFT Terms and Conditions and the accepted technical and price bids.
- Identification of the rules and regulations applicable to the contract.
- Identification of the appendixes that are part of the contract.
- Description of the services that the concessionaire shall provide and their geographical location.
- Term of the concession.
- Rate structure.
- Rights and obligations of the concessionaire.
- Guarantees and fines that may apply.
- Consideration for provided services.
- Commitments undertaken by the State.
- Ministry of Public Works entities that shall audit the contract.
- National property of public use that shall be assigned to the service areas in accordance with Article 32 of the Concession Act and.
- Any other clause in accordance with the RFT Terms and Conditions.

The award decree shall then be published in the Official Gazette in order for the concession contract to be perfected. Furthermore, in the term stipulated by the law, and in no less than 60 days, the awarded party shall notarize a duly signed transcription of the award and incorporate a concession company. The latter requirement is extremely relevant as it is the company, and not the awarded party, who will be bound by the concession contract.

2.2. THIRD PARTY RIGHTS TO CHALLENGE A PROJECT

The Concession Act and other relevant laws do not provide third party rights to challenge public works concessions or to demand the amendment of the RFT Terms and Conditions.

However, third parties may challenge a project under the general rules set out in the Constitution. For example, if a public works concession were deemed harmful or hazardous to the environment, such concession could

be challenged under Article 19 of the Constitution which protects, among other fundamental rights, the right to live in a pollution-free environment.

Article 35 of the Concession Act establishes that the concessionaire shall be liable for any damage or harm, regardless of the nature, caused to a third person on account of the execution or exploitation of the of the public works unless such damage or harm has resulted exclusively from the implementation of measures imposed by the Ministry of Public Works once the concession contract was already awarded. There are no specific mechanisms in law such as injunctions to prevent damage occurring, and third parties can only file a law suit after damage has been incurred. The suit is filed before the ordinary courts followed by a lengthy judicial proceeding.

2.3. ULTRA VIRES

As stated above in section 2.1, the concession contract must follow a specific protocol and include essential contractual terms in order to be valid. The General Comptroller of the Republic of Chile has the power to subject the award to a preventive control to ensure that the administrative act in which the contract is embodied has been duly processed. Under Chilean Law, the absence of any of these requirements in the concession agreement could cause the contract to be deemed null and void.

Once the concession company is incorporated, it may act only within the scope of authority provided in the concession contract, which itself will be governed by the rules and regulations that are in force at the moment of execution of the contract. Therefore, any later amendments to such rules or regulations will not be applicable to existing contracts, unless both parties expressly accept their application.

2.4. CORPORATE LAW

The Concession Act, its Regulation and the corresponding RFT Terms and Conditions set out how the concession company shall be incorporated, its name, purpose and term.

One of the most important requirements is to constitute either a company or an agency – an affiliate of a company domiciled abroad- in Chile. Under Article 9 of the Concession Act, the company’s purpose must be *“to carry out, repair, maintain and exploit the fiscal public works in accordance with the system provided in Article 87 of the Supreme Decree No. 294, of 1984, of the Ministry of Public Works.”*

Unless the RFT Terms and Conditions establish otherwise, the concession company shall be governed by the Corporations Act and shall therefore be registered in the corresponding public registry.

The Concession Act also requires that the company name include the expression “Concession Company,” and the company term must equal the sum of the duration of the concession plus two years following the termination of the concession.

The Regulation establishes that the company’s subscribed and paid up capital shall be at least equal to 20% of the total budgeted investment for all the works, unless the RFT Terms and Conditions provide a different percentage. In any event, the requirements regarding the initial capital shall be determined by the concession’s financing structure and the demands of the concession company’s lenders and financiers.

As the recipient of the concession award and the concession company are different legal persons, the Regulation additionally requires that the former hold at least 51% of the concession company’s shares for the entire term of the concession. Any variations regarding the participation in the company’s share capital that may affect the control of the company shall be notified to the Ministry of Public Works.

Finally, the RFT Terms and Conditions may include limits on the debt/capital ratio (*leverage*) of the company. Typically, an acceptable ratio must be between 20% and 30%. The tender offer may also establish the mandatory nature of nominal shares, maximum percentages of foreign capital, limitations on foreign loans, and limitations on the issue of debt instruments.

2.5. LICENSES AND PERMITS

Both the Concession Act and its Regulation require the concessionaire to obtain all government authorizations (environmental, construction, et al.) required in order to fulfill the obligations and carry out the works and tasks stipulated in the concession contract. The RFT Terms and Conditions reiterate this obligation.

In some cases, provided that such authorizations and permits are granted by local authorities, the Ministry of Publics Works shall be required to assist the concessionaire. However, the latter bears the ultimate responsibility for obtaining all permits and authorizations in a timely manner.

2.6. ASSETS

All assets granted under a concession must fulfill a public or fiscal interest. Consequently, the granting of private assets in concession is strictly

prohibited. This is because the concession regime involves the delegation to a private person of the State's power to build, repair or carry out public works. The regime grants the concessionaire the right to use and exploit the public works during the concession term but the State shall exercise this right upon expiration. At that point in time, the assets shall return to the public domain.

According to Article 22 of the Concession Act,⁵ the concessionaire bears the risk of the total destruction of the assets that constitute the public works until the end of the concession, when the assets are put at the State's disposal. In order to protect these assets and minimize the risk involved, the concessionaire usually purchases insurance.

The assets constructed and acquired by the concessionaire are considered accessory to the concession and as such, also fall within the public domain. According to Article 46 of the Regulation, an up-dated registry of these acquired or constructed assets and rights shall be kept by the Public Inspector, who represents the State's interests. Likewise, the Public Inspector shall notify the concessionaire of the advancements made in the expropriation process, if the case may be. In harmony with the above, all property purchased by the concessionaire for its use in the concession shall be considered to have been purchased on behalf of the State of Chile, and the State's ownership should be recorded upon registering the property.⁶

2.7. GOVERNMENT SUPPORT

The State of Chile, through the Ministry of Public Works, grants subsidies and guarantees in order to fund and assist infrastructure projects. Such funds are an important part of the public works concessions financing scheme, and are also quite controversial.

On the one hand, the justification given for the State providing guarantees and subsidies is that the State is the recipient of the investments and the title holder of the properties granted in concession. It is also argued that, as the investments are made in public services which represent basic consumer services required for the economic development of the country, the granting of guarantees is justified.

-
5. This Article provides the legal regime applicable during the construction phase of the works, stipulating under No. 2.: "The works shall be carried out at the full risk of the concessionaire, who will be liable for making as many payments as necessary until the full completion of the works, regardless of whether they are occasioned by force majeure or by any other cause."
 6. To transfer real estate in Chile, the title deed is registered in a public register of which a civil servant, known as the Real Estate Registrar, is in charge.

Notwithstanding the above, ever since the Concession Act has been in force, government policy on subsidies and guarantees has been repeatedly questioned, both in connection with the monetary amount associated thereto as well as with regards to the real necessity of such subsidies. In essence, it is argued that the State, in accordance with the Constitution, should play a dispensable or non-essential role in the private economy.

Furthermore, some experts believe that when the State grants monetary support in the form of subsidies or guaranteed revenues, the associated financial cost is not closely analyzed, as this type of expense is borne by all taxpayers and not only by the direct beneficiaries or consumers of the investments. Along the same lines, investments that are truly worth-while and profitable from a social and private stand point do not received due consideration, as the private sector's interest is captured by other not so revenue-attractive projects on the sole account of the substantial state subsidies that are guaranteed.

Notwithstanding the above, due to the accounting treatment that State guarantees receive in the Public Finance sector, the Chilean Government, by means of the Finance Ministry, is tremendously strict with the authorization of these types of guarantees.

In the realm of public works concessions, the Guaranteed Minimum Revenue is the State's main subsidy tool.

2.7.1. Guaranteed Minimum Revenue in the Public Works Concession (GMR)

Under the GMR, the State guarantees the concessionaire a particular income calculated in accordance with three revenue tiers. The tiers are determined by two inclining lines, each reflecting a particular revenue amount. From year to year, the concession company's revenue may fall above or below either of lines, resulting in any of the following alternatives:

- (1) When the period's total revenue is between the two revenue lines – in other words, in the middle tier – the GMR does not apply.
- (2) When the total revenue is located in the bottom tier – in other words, the revenue falls below the lower of the two revenue lines – the GMR does apply and the State pays the concessionaire the outstanding amount in order to reach the minimum revenue level established by the lower of the two lines.
- (3) On the contrary, when the concessionaire's revenue surpasses the higher of the two revenue lines, such surplus is equally distributed between the State and the concessionaire.

In this way, the concessionaire is assured the minimum revenue needed to cover its costs and the maximum revenue line plays the role of limiting the social harm that potential excessive overpricing could cause.

2.7.2. GMR: An Obligation for the State

The 2005 Public Finance Report, presented by the former Budget Director, Mario Marcel Cullell, to the National Congress' Extraordinary Mixed Budget Commission in October, 2004, indicates that the GMR is the concession system's main contingent liability. That is, it is a liability that is triggered when the concession company obtains an income that is lower than the GMR.

The 2005 Public Finance Report states that the GMR is essential for the financing structure required to carry out the concession works, as it reduces the financiers' risks by securing repayment of the debt.⁷ However, it does not reduce the risk of those who provide the investment capital as these creditors are the last to be repaid by the concession company.

It is important to bear in mind that the GMR is included in the concession contract and therefore represents an obligation of the State of Chile. Furthermore, while the concession contract is subject to public law and the RFT Terms and Conditions, said contract is also governed by private contract law. Consequently, the breach of the concession contract triggers the State's strict contractual liability which in turn translates into the obligation to compensate the damage caused.

2.8. SOVEREIGN IMMUNITY

In Chile, although the general rule is that the State's acts and contracts shall be subject to Chilean legislation and to the jurisdiction of the national courts, the State may contractually agree to submit to the jurisdiction of foreign courts or arbitral tribunals for practical reasons. Such is the case with international business or financial contracts entered into by and between the State of Chile or its organisms, institutions or companies, as one party, and companies whose principal businesses and offices are located abroad, as the other party.

Law Decree No. 2,349, however, prohibits concession contracts which grant assets of public use or fiscal property in concession from being subject to foreign law or courts, regardless of the domicile of the partners of the concession company. Consequently, rules related to waiving immunity from jurisdiction and the subjection to the law and jurisdiction of foreign courts shall not apply to projects and investments performed under the Concession Act.

7. Article 43 of the Concession Act provides that the concession company may grant the public works' financiers a pledge over any payment guaranteed by the State, by virtue of whatever title. Such pledge must be formalized in public deed and registered in the corresponding Registry.

2.9. DISPUTE RESOLUTION

One of the main innovations of the Chilean concession system is its dispute resolution mechanism. Article 36 *bis* of the Concession Act provides that all disputes relating to the interpretation or application of the concession contract or its performance may be brought before the Arbitration Commission (the “Commission”) or Appeals Court of Santiago.

Upon submission of a dispute to the Commission, it may, on its own initiative or that of one of the parties, initially encourage the parties to reach a settlement by proposing specific terms and conditions. In fact, the Concession Act provides that disputes of a technical or financial nature must be considered by a Technical Panel prior to submission to the Commission. The Technical Panel shall issue a grounded recommendation, which, if the dispute persists, may later be delivered to the Commission for its consideration. Notwithstanding the above, if the initial mediation carried out by the Commission fails, the latter shall then act as an arbitrator.

The Commission’s composition is governed by Article 36 *bis* of the Concession Act. In accordance with the provisions therein, the Commission shall be composed of three university professionals, of which at least two of them must be attorneys. The parties shall designate all three members in common accord from among two different rosters of experts prepared by the Supreme Court and the Antitrust Court, respectively.

The Concession Act provides that the members of the Commission shall be designated at the beginning of the corresponding concession and, within 30 days of such designation, the Commission shall be constituted. Furthermore, all members shall remain in place until termination of the concession contract, although they may be replaced when necessary or deemed convenient.

Once the Commission is constituted it shall determine the applicable arbitration procedures and the rules that shall govern the parties’ right to be heard, the manner in which to provide evidence and be notified.

As set forth under Article 36 *bis* of the Concession Act, the Commission shall act as arbitrator *ex aequo et bono* with respect to the procedure and, within a sixty-day term counted as of the date on which the parties were heard, shall issue a grounded award in accordance with the law. The arbitral award is not subject to any appeal.

2.10. REGULATORY AND STATUTORY DUTIES

In addition to the concessionaire’s general contractual obligations of performance, the Ministry of Public Works has general or special prerogatives that allow it to introduce additional obligations into the concession contract.

The following prerogatives may be exercised by the State during the concession term:

- (1) Authority to manage, audit and supervise the concession in order to ensure the contractor's proper management.
- (2) Authority to regulate all material and technical conditions and requirements which the service's private management should be subject to.
- (3) Authority to amend the contract (*ius variandi*), thereby allowing the State to modify the object or services (service levels and technical standards) to be delivered by the contractor. It should be understood that all such modifications should be requested in the name of public interest.
- (4) Authority to intervene in the service's financial management by means of regulating tariffs or limiting the concessionaire's profit margin.
- (5) Authority to substitute; which, in the cases expressly permitted by the law, allows the corresponding State bodies to take charge of the services.
- (6) Authority to fine.
- (7) Authority to terminate the contract early.

Another expression of the State's unilateral power of intervention in the concession contract⁸ is embodied by the Public Inspector, who controls and supervises the project during the construction and exploitation stages. The Inspector has to meet the requirements of the Ministry of Public Works, which may – in the name of public interest or with a view to increasing the service levels or technical standards- demand modification of the contracted works and services once the concession term has already begun.

However, it should not be understood that the Ministry of Public Works has the power to freely cause detriment the other party's rights, especially with regard to the substantial rules that establish the contractual rights and obligations. In this manner, while the concessionaire may not reject the State's intervention, it does have the right to be compensated⁹ for the damage that it may suffer as a result of such intervention.

8. Bear in mind that the concession contract is an administrative contract which results from an administrative process in which the State designates its contracting party, the concessionaire. The concessionaire is therefore subject to the strict regime of Public Law.

9. Articles 19 and 20 of the Concession Act set forth the compensation rules.

2.11. COLLECTING TARIFFS FROM CONSUMERS

The concessionaire not only has the right but is obligated to collect tariffs during the concession. Article 1 of the Regulation expressly provides that the concession shall include: “the collection of the tariffs that the consumers of the basic and additional services shall pay.”

On the other hand, Article 11 of the Concession Act provides that: “The concessionaire shall receive as sole compensation for the provided services the price, tariff or agreed subsidies and other additional benefits expressly agreed to. The concessionaire shall not be obliged to exempt any consumer whatsoever from payment.”

Article 3 of the Regulation defines the tariff as: “consideration for the basic service provided by the concessionaire, as governed by the concession contract,” and the tariff structure as: “the sum of tariffs collected for the basic services provided by the concessionaire.” Likewise, the concept of price is only referred to in connection with the secondary services and is defined as follows: “the consideration that shall be paid by the consumers of the complementary services or of other services of a similar nature provided by the concessionaire in virtue of the concession contract.”

The tariff and price are usually set forth in the tender offer, although the Ministry of Public Works may decide to stipulate it in the corresponding RFT Terms and Conditions. However, the RFT Terms and Conditions shall include, at least, the following items with regards to the tariff:

- (1) Tariff structure. In the area of transit, the toll systems are based on vehicles classified by the Direction of Transit, and the relationships among different types of vehicles are established.
- (2) Location where said tariffs may be collected without altering traffic and human settlements (location of booths, etc.).
- (3) Collection systems. Tariffs may be collected on the basis of the pass-through system, under which the consumer is charged for the right to pass through a certain location without considering the distance that has been traveled, or on the basis of the effective use system, under which the consumers are charged for the distance traveled.
- (4) Collection technologies, including manual, automatic, tele-toll or several combinations.
- (5) Formula to readjust tariffs in accordance with inflation.
- (6) Reassessment of the tariff system due to an unexpected event that may affect the financial balance of the concession contract.
- (7) Tariff management, according to which the tariff may be established in accordance with overcrowding and the concessionaire’s right to implement commercial policies (different tariffs at peak hours, etc.).

In Chile, the collection of tariffs mainly applies to the area of road infrastructure, for both urban and interurban highways, as well as to airport concessions, where the concessionaire has the right to receive a substantial portion of the taxes paid by airline passengers (boarding tax) and the beneficiaries of airport services.

In the case of other infrastructures that have been granted in concession to private investors, such as jails, railroad infrastructure and public construction, direct payments from the State to the concessionaire (subsidies) are used. The payments may be fixed or variable, depending on the services provided.

2.12. PENALTIES, SANCTIONS AND BONUSES

In order for an interested party to participate in the bidding process, Article 6 of the Concession Act requires that said party post a provisional bond in order to ensure the seriousness of its proposal in the manner, amount and terms that either the Regulation or the RFT Terms and Conditions set forth.

Along this line, Article 9 of the Concession Act and Article 32 of its Regulation provide that lack on the part of the awarded bidder to constitute the concession company and failure to sign the supreme decree of award shall be sanctioned by loss of the award. Such non-compliance must be declared by the Ministry of Public Works, with the signature of the Minister of Finance. Upon declaration, the Ministry of Public Works will be entitled to enforce the bond provided by the concessionaire, who may not claim compensation of any nature whatsoever.

Additionally, Articles 12, 13 and 14 of the Concession Act provide that the concessionaire shall post a permanent surety bond for both the construction and operation stages; the nature – real or personal, possessory or non-possessory- and amount of such bonds will be determined in the RFT Terms and Conditions in accordance with the estimated value of the damages resulting from the relevant breach of the concession contract. These bonds shall be returned to the concessionaire once the respective stages have been finalized and provided that all contractual obligations have been met.

Article 33 of the Regulation lists certain breaches that enable the Ministry of Public Works to enforce, totally or partially, the surety bonds provided by the concessionaire. Such breaches include:

- (1) Performance of an act by the concession company without the authorization of the Ministry of Public Works, provided said authorization was required.
- (2) Non-payment of monetary sanctions or fines imposed during the concession on account of breaches of the concession contract.

- (3) Breach of the obligation to constitute or reconstitute guarantees.
- (4) Delays in the payments to be made to the Ministry of Public Works on account of the amounts set forth in the concession contract.
- (5) Breach of the concessionaire's obligations to third parties, when the Ministry of Public Works is liable on the third party contracts.
- (6) Any other breach of contract as stipulated in the RFT Terms and Conditions.

As previously indicated, in addition to the bonds posted by the concessionaire, Article 18 of the Concession Act provides that the concessionaire may also be sanctioned monetarily for contractual breaches occurred during the different concession stages. Such sanctions are also set forth in the RFT Terms and Conditions.

2.13. TRUSTS, AGENCY AND OTHER LEGAL RELATIONSHIPS

In 2007, the enactment of the Law No. 20,190 created the credit or guarantee agency.

Said Law defined the credit or guarantee agency as a “collective agency contract by virtue of which two or more creditors agree to designate a common agent to represent them in the granting or the processing of their credits, or in the constitution, amendment or termination of their guarantees, or in both, and for the joint use of the rights that result from said loans or guarantees.”

By virtue of the above mentioned law, the agent is vested with the following rights:

- (1) To administer and safe-guard the loans identified in the mandate contract. In other words, the agent may carry out all procedures that contribute to recovering the loans that it represents. However, the agent shall request the creditors' express authorization in order to negotiate or reach an agreement on behalf of said creditors in connection with the loans.
- (2) To receive compensation for performance of its duties, unless agreed otherwise.
- (3) The constituted guarantees shall be granted in favor of the agent, who shall accept them on behalf of all the current and future creditors. Likewise, the agent shall accept the amendments or substitutions made to the constituted guarantees or agree to their release in accordance with the terms and conditions provided in the contract, as well as the use of the remaining rights that result from such guarantees, such as priority rights to claim recovery of debt, etc.
- (4) In absence of specific provisions, it shall be understood that the agent has the right to recover the loans and receive payments in connection

with the latter, including by means of judicial action, to grant receipts for payment and cancellation, and to release the guarantees without limit.

- (5) In the event that the guarantee consists of a pledge, the pledged item shall be delivered to the agent or to whomever the latter designates, provided that delivery is required in order to constitute the guarantee. The summons and notices that, according to the law, shall be delivered to the mortgage or pledge creditors, shall be considered as performed once delivered to the agent.

The agent is responsible for all the actions taken in performance of the agent's duties, but the agent is not responsible for any financial effects that result from the debtor's insolvency.

Due to the recent enactment of the agency law, such legal figure has been used in only a few concession contracts or PPP contracts. However, when the Public Works Concession System was initially implemented in Chile, certain projects were financially structured with off-shore financing, and several of the creditors used similar agency contracts abroad.

2.14. TAKING SECURITY AND INSOLVENCY

The Concession Act in Chile sets forth a procedure that is very similar to the one provided in the Bankruptcy Act, with several particularities due to the features of the concession contract.

Firstly, the Ministry of Public Works shall appoint a representative who coordinate with the creditors' and their appointed trustee in order to assure that the services provided under the concession are not disrupted. The first ordinary creditors' meeting shall resolve to follow either of the two alternatives described below; a quorum representing two thirds of the total credit shall be required for approval of the resolution. If no agreement is attained, ancillary application of the Concession Act provides that the assets be sold at public auction.

2.14.1. Liquidation of the Concession's Assets

The Regulation of the Concession Act requires the liquidation proceeding to be made under auction and sold as one economic unit. In other words, all property and rights under the concession must be sold together to the same natural or legal person, or group of persons in order to prevent the deterioration or devaluation of the assets' worth. Therefore, neither the summary liquidation – for assets whose estimated worth is equal to less than approximately USD 40,000 – nor the ordinary proceeding may be used in this situation as such procedures permit the separate sale of the assets.

It is important to bear in mind that upon auctioning the concession's assets, the nature of these assets shall be revealed. In other words, the potential buyers should be aware that, as the concessionaire is not the owner of the public works that it operates, the assets and rights being sold are actually committed to a concession and are necessary for the latter's operation. The terms, benefits and conditions of the initial concession contract shall apply to the subsequent concessionaire.

The Concession Act sets forth that during the first auction, the minimum bid shall be no less than two thirds of the amount of the debt incurred. In the absence of bidders, a second auction shall take place without a minimum requirement.

As the concession company no longer maintains control over the administration of the concession company, a trustee appointed by the bankruptcy judge shall be in charge of paying the company's debts in accordance with the general rules of credit priority, taking into account the priority that the Concession Act confers to the special pledges encumbering the concession, should such pledges exist, and to the payment of the construction and/or operation surety bonds granted to the Public Works Ministry in order to secure the debt incurred.

2.14.2. Factual Continuity of the Line of Business

The Concession Act also provides that the creditors may agree to perpetuate the concession company's line of business if they conclude that the auction would generate insufficient funds to satisfy the loans. In such case, the concession shall last long enough to enable creditors to recover their debts and, in any event, as set forth by Article 38 of the Concession Act, no longer than the initially stipulated term. It can be understood that, once such debts have been recovered, the Ministry of Public Works may put the concession up for bid again. In the interim, the Ministry of Public Works shall appoint a representative in order to work in a coordinated fashion with the creditors and the concession company's trustee with the purpose of assuring the maintenance of the works or services object of the concession.

Subsequently, in no later than a five-day term counted as of the decision to continue the line of business, the creditors shall renew the corresponding surety bond that the Ministry of Public Works was entitled to make effective upon bankruptcy of the concession company.

Noteworthy is the case in which the concessionaire breaches its obligations to its creditors because of either delays in payments made by the State to the concessionaire, delays in the administrative procedures or due to certain demands or requests on the part of the State, which – although duly compensated- did not allow the concessionaire to honor the payment schedule agreed to with the creditors. The Regulation provides that the Arbitration

Commission shall mediate between the parties and, if necessary, establish an arbitration procedure in order to resolve such administrative problems. Regardless of the ensuing resolution, it is clear that the concessionaire should be compensated even if the concession contract is not terminated as a result of the concessionaire's payment default, as described above.

2.15. CURRENCY

The exchange system and currency movement are governed by the "Compendium of Rules for International Exchange," issued by the Central Bank of Chile.

In particular, Chapter XIV of the Compendium governs the internalization of foreign capital. It applies to all amounts exceeding USD 10,000 or its equivalent. Chapter XIV of the Compendium provides that the internalization of currencies into the country shall be done by means of the Official Exchange Market. The entity responsible for bringing in the funds in must fill out a form identifying the recipient and the reasons for bringing the foreign currency into the country (credit, capital financing, investment, inter alia). The Central Bank keeps a register of all the information on the investments and investors.

Chapter XIV also provides that the Central Bank must be notified of the modifications in connection with the internalization of foreign currency, such as the substitution of the creditor, debtor or the provider of the capital; total or partial credit transfers or transfers of the investment rights; amendments made to the corporate name; or corporate mergers or divisions.

These rules also apply to the investors that have, by virtue of the Decree Law No. 600, entered into a special foreign investment contract with the State of Chile.

2.16. EXPROPRIATION

Prior to issuing a concession award, the State may expropriate assets that are essential for the awarding of the concession or its execution. The Political Constitution of the Republic requires the expropriated person to be compensated with an amount equivalent to the value of the expropriated asset.

In the event that a new expropriation is required during the construction stage, Article 15 of the Concession Act provides that said expropriation shall be carried out by virtue of the declaration of public use, and in accordance with the procedure of expropriation, specifically set forth in the Decree with force of Law No. 2,186 of 1978. Article 15 also states that the resulting expenses shall be borne by the concessionaire unless the RFT Terms and Conditions provide for a partial or total contribution from the Treasury.

Article 46 of the Regulation requires the designated Fiscal Inspector to keep the concession company notified of the status of the expropriating process.

2.17. EMPLOYMENT

The concession company fully operates as a private entity and does not have to transfer the benefits that apply to public sector employees to the employees hired to carry out the works. The concession company must comply with the fundamental obligations of the private hiring regime, as set forth in the Chilean Code of Labor.

These obligations consist, generally, in the requirements to execute the corresponding employment agreement as a public deed; stipulate the minimum monthly wage, which is currently equal to USD 165,000 Chilean pesos, the national currency;¹⁰ honor the forty-five-hour weekly work schedule and the fifteen-business day annual holiday; and pay the due compensation in the event that the employment agreement is terminated for reasons not attributed to the employee.¹¹ Likewise, there are certain social security obligations, such as the obligation to pay all health and retirement contributions as well as to contribute to unemployment insurance.

The labor legislation provides different financial treatment of employment severance in accordance with the grounds of termination. In this regard, compensation is not owed if the termination is pursuant to the terms of the employment agreement (e.g., an agreement for a limited term only). However, if the employer decides to terminate the work relationship for financial or other reasons of personal convenience, it is obliged to compensate the employee. Finally, an employee terminated on the grounds of negligent or fraudulent behavior is not entitled to any compensation whatsoever. If the employee challenges the grounds of termination, the burden of proof falls on the employer, who shall have to provide evidence of the employee's objectionable behavior.

2.18. CHOICE OF LAW

Discussion to be provided in future updates.

10. On Jul. 1, 2009, the minimum monthly wage was increased from CLP 159,000 to CLP 165,000. This amount is equivalent to approximately USD 314 as of Mar. 3, 2010.

11. Compensation or severance pay shall be calculated in the following manner: one month's salary for every year that the agreement lasted and/or for every fraction over six months. Likewise, the employer must give the employee a thirty-day notice of termination prior to the date of dismissing the employee from his/her duties. In the event that this term is not honored, the employer shall pay compensation equivalent to one month's salary.