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Concessions Checklist

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The Questionnaire and Checklist highlight key issues in concession contracts between the public and private sectors. Download pdf versions of the Concession Contracts Questionnaire and Checklist Between Public and Private Sector.

If Civil Law:

- Does law provide for adjustment of terms in the event of change in circumstances?
- Does the purpose behind the project constitute public service obligations/public interest and what is effect of this in relation to:
    - change in cost structure;
    - use of assets;
    - compensation on termination
- Can the private sector acquire land/assets/land use consents in its own right? And if so, how onerous is this?
- Does State have continuing liability for services carried out (e.g. public service obligation or public interest)?
- Is contract or are assets used for project alienable?

Is there a Concession Law or similar?

- If so does it restrict:
    - ownership of project company;
    - control of project company;
    - assignment by lenders to the project company;
    - change in assets (renewal or replacement);
    - payment for services (does it restrict profit element in payment);
    - use of assets owned by State.

Is there procurement legislation?

- If so does it permit:
    - change in ownership of project company;
    - assignment of project agreement;
    - negotiated procedure or similar for letting contract;
    - prequalification of bidders and restricted number of bidders;
    - sufficient time to run a complex tender – if not what are the restrictions;
- What approvals during the tender process are required and from whom?
- If there is a concession law what is the relationship between the two laws?

Is there any legislation which impacts upon the proposed project and which:

- requires the public sector to exercise certain functions;
- restricts delegation down to private sector of certain functions.

How long does the use of land consents procedure take and what are the stages?

How long does the compulsory acquisition of land procedures take and what are the stages?

What is the position of lenders to the project or project company:

- are step-in rights by lenders recognised;
- can the lenders obtain protection from claims by third party creditors so as to protect the use of assets for and income stream from the project;
- can administrators of an insolvent project company prevent the project assets from being used by:
    - the public sector; and/ or
    - the lenders or their nominee;
- are there restrictions in using a charge or pledge over assets so as to enable those assets to be used for revenue earning in relation to the project – e.g., must the holder of the pledge auction those assets subject to a pledge?

Are different classes of shares recognised under corporate law?

Can a holding company of the project company be based off-shore?

Can security packages be created off-shore and be subject to English or New York law?

What is the tenor of debt in the debt market?

What is the availability of hedging:

- interest;
- foreign currency, if applicable.

How are changes in cost of living reported and what are the indices used?

Are there restrictions on the remittance of currency to outside the host country?

What is the incidence of tax (including VAT and Stamp Duty) on transfer of project assets between the public and private sector?

If the projected assets are vested in the State:

- can the project company obtain writing down allowances against tax on the capital valve of the project assets;
- is a leasehold interest sufficient to obtain writing down allowances?

In real property law is there the concept of stratified title – namely buildings and structures can be in separate ownership to the land on which they are erected?

Are utilities state owned?

Do the administrators (civil servants) change with the Government?

Is the concept of an indemnity understood and permitted in law?

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