

## **ELECTRICITY – MANAGEMENT CONTRACT CHECKLIST**

### **Outline Of Legal Due Diligence Issues To Be Addressed By Local Lawyers**

The purpose of this note is to outline the general issues that should be addressed by the local lawyer in the "legal due diligence" exercise relating to preparation of a management contract for delivery of electricity services.

#### **General**

The intention of a legal due diligence exercise is to review the current legal and regulatory environment in [host country] and assess the following matters:

- Does the existing legal framework in [host country] permit restructuring of the institutions that deliver electricity services in the relevant area?
- Are there types of restructuring that would be permitted under the existing law as well as types of restructuring that would not be permitted?
- Does the existing legal framework explicitly permit a private sector contract?
- Are there any restrictions which appear in the existing legal framework which would make a private sector contract either difficult or impractical?
- Are there any currently proposed changes to the legal framework in [host country] that will affect either institutional restructuring in the electricity sector or the introduction of a private sector contract?

#### **The Concept of “Applicable Law”**

As a general matter, a legal analysis of the applicable law should approach the investigation from a very broad perspective. In other words, in order to have a comprehensive description of the legal and regulatory environment, due regard must be paid to both traditional legal instruments (for example, legislation) and "quasi-legal" instruments (for example, cabinet resolutions, decrees or similar types of authoritative resolutions). In reviewing the "applicable law" in [host country], it will be important to examine the following:

- constitutional laws;
- statutes, legislation, parliamentary orders or similar instruments;
- regulations or similar instruments;
- corporate charters that may be applicable (for example, with respect to the electricity utilities that currently serve the relevant area);
- decrees and declarations;
- municipal by-laws;
- policy decisions having the force of law;
- case law and court findings where applicable; and
- any other documents of any kind which may have the force of law in [host country].

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## **ANALYSIS OF THE LOCAL LEGAL FRAMEWORK**

### **(i) General Legal Framework Description**

*Task: Describe the general legal framework in [host country] that will be applicable to the private sector contract*

An analysis of the legal and regulatory environment in respect of the relevant area should begin with a general "survey" of the law of [host country] and the law that applies to electricity services. Usually, this type of general legal description should be carried out under the following categories:

#### Municipal Law

A description of the law as it applies to the city councils of the relevant area and their constituent departments.

#### Environmental Law

A description of environmental legislation that is applicable to the electricity sector in [host country]. This would include a description of any law relating to emission levels, energy conservation, use of clean energy and restrictions on land use.

#### Public Health and Safety Legislation

In many circumstances this is subsumed by the environmental law provisions. However, matters in respect of maintenance and repair of the facility, and generation, transmission, and distribution standards can often be found in the regulatory framework for public health and safety.

#### Consumer Protection Legislation

Electric utilities often enjoy a considerable portion of the market share for all stages in the production and distribution of electricity. A review of any guidelines or restrictions affecting the pricing, reliability, adequacy and quality of the electricity services to consumers must be carried out.

#### Employment and Labour Law

Employment and labour law is often quite critical in the establishment of a private sector contract because it sets the framework for how employees are to be treated. It is important to include in this analysis a review of the regulatory framework with respect to pensions, benefits and related social programs.

#### Occupational Health and Safety Legislation

How will occupational health and safety laws in [host country] apply to the Operator? Will the private sector operator under the private sector contract be responsible for the operations staff under a private sector contract?

#### Company/ Utilities Law

If some type of new institutional structure (for example, an asset holding company or new utility) is to be established and vested with both ownership and control over the electricity system for the relevant area, it will be very important to understand the legal framework within which such an

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entity will be established. Therefore, a general review of the law under which a new entity could be created must be carried out.

#### Privatisation Laws

In a number of developing countries specific legal frameworks have been introduced recently for the involvement of private sector entities in provision of various "public" services. It is very important to review the laws of [host country] that have been established.

It is also very important to understand any laws which may or may not present barriers to the divestiture of public sector assets or the delegation of the control of public sector assets under a private sector contract.

#### Public Procurement Laws

Are there laws in [host country] that impose specific requirements with respect to a public procurement process? Will these laws, if any, apply to the private sector operator when the operator procures goods, works or services on behalf of the electricity utilities?

#### Tax Law

It is extremely important to understand the tax implications of both the ownership of the electricity infrastructure and institutional restructuring. It is also very important to understand whether the utility has the benefit of tax exemptions in their operation of the electricity systems and whether a private sector operator would be eligible for such exemptions.

### **(ii) Analysis of Key Legal Issues**

***Task: Carry out an analysis of the key legal issues that routinely arise in the development and implementation of a private sector contract.***

Experience tells us that in the course of developing a private sector contract, a number of specific legal issues routinely arise. Therefore, in addition to a general review of the legal and regulatory environment and a review of that environment from the perspective of a private sector contract, it will be important to anticipate a number of specific issues. These issues are noted below.

#### Jurisdiction and Authority to Enter into a Private Sector Contract

A number of important fundamental matters must be examined with respect to whether the utility (or new entities, if established) has the jurisdiction to enter into a private sector contract. In this regard, the following issues should be examined:

- Is there any general prohibition in the applicable law against the implementation of a private sector contract?
- Is there any positive legislative authority for the implementation of a private sector contract?
- Are there any legal restrictions that would prohibit a municipal entity, a utility or an asset holding company from being party to a private sector contract?
- Are there any legal restrictions on the delegation of electricity services to a private sector operator?
- Is there anything in the law that would require the utility, an asset holding company or a newly created utility to get permission from the central government to enter into

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a private sector contract?

- Is there any requirement in law that the utility, an asset holding company or a newly created utility needs the permission of the national government to enter into contracts generally?
- Is a government legal review required (for example by the Department of Justice) before a municipality or utility can sign a private sector contract?
- Are there any constitutional problems in delegating authority for operations and maintenance of the electricity system to a private sector operator?

#### Ownership and Control of the Electricity Infrastructure

In order to comprehensively describe who has authority over the electricity infrastructure, the matter of ownership and control should be addressed:

- Who currently owns the electricity infrastructure?
- Are there any easements or rights of way that are being held by the utility that allow access to property that is not owned by the utility (for the purposes of servicing the electricity infrastructure)?
- Who has the right to allow access to the infrastructure?
- Is the entire infrastructure currently owned and controlled by the same entity?
- If the utility owns the infrastructure, has it delegated its rights of control to anyone?

#### Financial Matters

In a number of countries there are often particular rules that will apply to the financing of electricity infrastructure. These financial rules in the legal and regulatory environment often impose restrictions on financing and, therefore, should be understood in the early stages of planning for a private sector contract. Therefore, the following matters should be examined:

- What entity currently has the legal rights to charge a fee (rate) for electricity services?
- What entity legally owns the revenues that are collected?
- Are the revenues currently deposited in accounts controlled by the utility?
- Are the revenues used to subsidise any other non-electricity services?
- Are there any specific rules with respect to the disposition of the revenues?
- If costs currently exceed revenues in any particular year, what entity is legally responsible for covering the shortfall?
- As a practical matter how is the shortfall handled?
- Who currently has the legal right to issue bills to customers?
- Is there a legal right to disconnect customers and who has the right to disconnect currently?
- Who has the legal right to set tariffs for electricity services?

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### General Rules Restricting Foreign Companies Activities

It is also common in a number of countries for there to be restrictions that apply to foreign companies carrying out business in certain jurisdictions. Therefore, the following types of issues should be reviewed:

- Are there any restrictions on the operation of foreign companies in [host country]?
- Are there any special requirements with respect to registration, the requirement for a local agent, or similar requirements?
- Are there particular restrictions on foreign staff working in [host country] that may cause significant difficulties to the operator?
- Are there any particular restrictions on local staff who may be employed by a foreign company?
- Does the foreign company have to incorporate a local company?

### Operation and Maintenance Legal Powers

It is quite common in some jurisdictions to give particular legal powers to identified officials of a utility. For example, the utility officials themselves (as individuals) may be legally empowered to carry out the collection of revenues, disconnections or certain specific employer responsibilities. This is a very technical legal issue, but it will be important to assess whether any similar legal powers are given to the officials of the utility. This is important because these legal powers may not be capable of being legally passed on to a private sector company.

### Tax Implications

Is it possible under the tax laws of [host country] that tax exemptions would be lost if a private sector company were running the utility? Are there any other tax implications that may pose some difficulty in institutional restructuring and in the implementation of a private sector contract?

### Electricity Sector Specific Law

In most jurisdictions, a separate regime of laws usually exists to regulate electricity services in the community. The summary of these laws should appear as part of the analysis of the local legal framework that is noted above.

In particular, however, it will be important to establish whether the local laws related to electricity pose any specific problems to the development and implementation of a private sector contract. For example,

- Is there a process of licensing electricity facilities, transmission and distribution systems and, if there is, which organisation in the future would hold the license?
- Is there a system of fines or prosecutions in place for contravening this legislation?
- Do the laws pose any special liability problems for a private sector operator?

### Employment and Labour Law

Often, the labour and employment law issues are the most difficult issues that arise in the course of developing and implementing private sector contracts. These issues can often be the sole cause for an inability to implement the contract. Therefore, in addition to the general review of labour and employment law carried out by the local lawyer, some specific issues should be examined.

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These issues are:

- Does the labour and employment law permit the introduction of a private sector operator to supervise the employees of the utility?
- Would a secondment be permitted?
- Are the employees of the utility unionised workers?
- Is there a collective agreement in place?
- Does the collective agreement prohibit the introduction of an operator as a supervisor of the employees?
- How are the salaries of the utility employees established and is this a matter of law?
- How are pay increases for the utility employees established and is it a matter of law?
- Are there any legal prohibitions that would prohibit a private sector operator from hiring, firing, carrying out staff reductions, or reorganising the work force?
- Are there any legal obligations with respect to employee benefits (any health, pensions, and vacation leave or disability rules)?
- What rules apply with respect to severances and severance compensation?

#### Institutional Restructuring

A key issue in the review of the legal and regulatory environment in [host country] will be to assess what options are available to the government in the institutional restructuring of electricity services for the utility. For example, the government may wish to consider the creation of an asset holding company as part of the development of a concession or lease option. The government may also wish, for example, to establish a separate utility as a publicly owned entity with an option for private ownership of the entity sometime in the future. In this regard, a detailed analysis of the legal and regulatory framework related to the establishment of a new entity should be carried out. In this analysis, the following questions should be reviewed:

- Under what legislation would a new entity be created?
- Are there any restrictions in the local law with respect to the ownership of this new entity?
- Is there specific legislation which is aimed at the electricity sector in respect of the creation of a new entity?
- Is there legislation that would allow the creation of a separate regulatory body in respect of electricity and is such an organisation anticipated in the existing legislation?
- What restrictions would apply to the share capital of a newly created company?
- How would the new entity be different in law than a standard corporation?

#### **IDENTIFICATION OF LEGAL BARRIERS**

***Task: Summarise all potential legal barriers to the implementation of a private sector contract and suggest solutions.***

The fundamental purpose of the activities described above is to identify characteristics of the local law that will interfere, in any way, with institutional restructuring and the implementation of a private sector contract. The purpose of this task is to prepare a chart that summarises those legal barriers that have been identified as a result of the legal analysis and to suggest ways in which the legal barriers might be overcome. It will also be important to note whether the resolution of the legal barriers is likely to be successful or if the legal barrier must be dealt with through a change to the law.

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### **DOCUMENT COLLECTION**

*Task: Collect all relevant legal documents that are, or may be, applicable to this project.*

During the course of the legal research and analysis described above, it will be important to develop a collection of materials of legal documents. This will be helpful to both the project team and, possibly, the Bidders.

### **CONCLUSIONS**

The completion of the tasks noted above should provide valuable information as to,

- (i) the ease (or difficulty) with which a private sector contract could be developed and implemented in the utility; and
- (ii) the ease (or difficulty) of restructuring the key institutions involved in the delivery of electricity and services in the utility.

For ease of reference, a draft Table of Contents for the local legal report has been attached.

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**Attachment 1 - Draft Table of Contents for the Local Legal Review**

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VOLUME 2

1. Collection of Relevant Legal Documents  
[Note: This would include the relevant legislation, regulations, decrees, declarations, the charter of the Utility, the relevant environmental legislation, the employment and labour legislation and any other relevant legal documentation.]