Agreement Synopsis, Context and Review

Sector: Transport – rail

Name of Agreement: Agreement relating to the Concessioning of a Railway between the State and the Concessionaire.

Type of Agreement: Model Concession Agreement

Region (if known): Sub Saharan Africa

Comments by: Robert Phillips, LEGPS

Purpose and Context: This agreement should be read in the context of the relevant Civil Code and transport legislation. The Concession Agreement is intended to address abuse of dominant power by the Concessionaire and these provisions should be considered in relation to competition law in the host country.

Circumstances where this contract may be appropriate: Where the State wishes to improve rail transport services by the introduction of private sector expertise and possibly funding.

This is generally a helpful document to form the basis of a rail concession agreement. The issues set out below should be considered when looking at this as a sample agreement – and should form part of a feasibility study for any proposed project.

Drafted for common law/ civil law jurisdiction: Civil law – it would require substantial amendment for a common law jurisdiction.

Main Issues:

1. The effectiveness of the exclusion of an indemnification for changes in economic circumstances will depend upon local legislation and in that respect may depend upon the scale of the change in circumstances. Some Civil Codes restrict the effectiveness of exclusion clauses.

2. The exclusion of a right of assignment by the Concessionaire is in fact conditioned by a subsequent clause which, if there is to be substantial investment through project finance, will allow Lenders step-in rights in those circumstances. However the fact that Lenders always get paid out no matter the grounds for termination of the Concession Agreement does raise the question as to why a direct agreement is required with the Lenders and more importantly should be considered in relation to the State’s budget at the time that the pre concession feasibility study is carried out.

3. The standard to be applied by the Concessionaire in the operation and maintenance of the assets also includes a reference to the common practice of the railway industry and the standards of the International Union of Railways. These standards may be too high for the location or alternatively too high to impose from the effective date of the concession and some reduction of standard either permanently or on a transitional basis should be considered.

4. Whilst there is consent for the Concessionaire to hold equity in subsidiaries, where assets used for the object of the concession are held by the subsidiaries it may be prudent to restrict disposal of shares in those subsidiaries whilst they hold those assets.

5. An issue for the public sector is that under local insolvency law moveable equipment may not transfer to the public sector on termination of the Concession where the Concessionaire is insolvent. Some equipment could be retained by an administrator where the Concessionaire becomes insolvent which may not be easily and quickly replaceable particularly where lenders do not rank in priority to other creditors. It may be necessary to require key moveable assets to be transferred to the State at the time of procurement with a transfer back to the Concessionaire when those assets are replaced.

6. The Environmental Action plan is not agreed until six months after the effective date for the concession. As the cost is to be borne by the State a mechanism should be set out by which the State is able to secure value for money.

7. The Insurance provisions are light by international standards. The issue of insurance not being available or only available at premium levels above a commercial rate is not addressed. Nor are the policies extended for the benefit of the State or its agents and employees. As a consequence there are no provisions for a “broker’s letter” requiring the Concessionaire’s insurance broker to notify the State if insurance is no longer available or only available on terms which are
different to current terms. Consideration should also be given as to waiver of rights of subrogation and protection from default by one insured party.

8. The effectiveness of the exclusion of liability provisions for prior breaches of contract where existing contracts are transferred by the State to the Concessionaire will need to be considered in the light of the actual documentation for that transfer.

9. Where there is a change in law impacting on financial equilibrium the contract allows six months for the parties to reach resolution before the dispute is referred to arbitration. Bearing in mind the possible length of arbitration proceedings the Concessionaire could run out of money before the dispute is resolved.

10. By way of general comment there are a number of instances where financial issues are referred to a disputes mechanism but it is by no means clear the base case on which any decision could be made.

In addition to change in law, the issue of abuse of dominant position in relation to pricing by the Concessionaire as well as charges for third party access, might be helped by having an agreed financial model at the outset which could be revised from time to time.

11. There is a preference for agreements to agree in the document. The terms for exploiting rights for transmission lines such as for gas etc have to be countersigned by the State where their term exceeds the concession period and the terms for meeting public service obligations have to be agreed before being implemented as do the terms for emergency use of the railways (which in addition to putting the State in a possible weak negotiating position may not always be practicable). In addition there is no provision to promote commercial development of stations and to share with the State the benefits derived from that development.

12. The regime for track access, safety cases, taking possession of sections of track for maintenance and renewal, compensation payable by one train operator who causes delay to another and connections with infrastructure (particularly at country or state boundaries) all seems a little vague.