MORALES, NOGUERA, VALDIVIESO & BESA
ABOGADOS

# LEGAL AND CONTRACTUAL ASPECTS OF PPP IN CHILE

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# I. LEGAL FRAMEWORK

## 1. PPP in Chile is enshrined in the Concession Law of 1996

- The MOP is the granting authority. Exceptions: ports, parking lots…

- Other ministries can agree with the MOP on a mandate agreement (*convenio de mandato*). Problems: overlapping; requirements, standards…

- Concessions are awarded after a competitive process

- The concession agreement is a broad concept, although of statutory character: Bidding Terms, Concession Law, Concession Regulation, MOP Law.

- Amendments to the concession agreement: change orders, compensation…

- SPVs are holders of concession agreements on a BOT scheme.

- Re-bidding at expiration

- Government discretion is limited: termination on grounds of material breach; change orders; *teoría de la imprevisión*.

**2. Dispute Resolution:**

- Conciliation and Arbitral Panel
- Rulings: enforceable; precedents.

**3. Financial Enhancement:**

- Subsidies: fixed or contingent (MRG)
- Right to sell revenues or MOP payments
- Pledge of Concession: right, revenues...
- Bankruptcy
- MOP risk: delay and penalty interest, default, enforceability.

**4. Capital Markets Regulations:**

- Banks: flexibility on lending margins
- Institutional Investors: AFPs, Insurance Cos., Mutual Funds
- Securitization
- Tax: VAT rules; withholding on premiums
- MK II: single registry of pledges; collateral agent; derivatives; subordination.

# II. FINANCIAL MATTERS

**1.Banking Industry:**

- Growth in long term financing for highly subsidised projects.
- Bridge financing
- Intercreditor Issues
- Wrapped loans
- Subordination
- Hedging (not yet in local loans)

**2. Wrapped domestic and/or foreign bonds:**

- IRA/CTA-CASA-SSGA
- Completion guaranties
- Concession termination
- Security Package and pledge of significant contracts
- Turnkey EPC Contract
- O&M
- Related party contracts
- Step-In Rights: Recourse; equity cushion;**sponsors support**; Performance; ownership; use of proceeds; DSCR and others; Default & Potential Default; permitted investments; additional investments; restricted payments.

**3. Corporate bonds**

**4. Securitization**

**5. DGOP Resolutions and Non Recourse.**

# III. CONTRACTUAL FRAMEWORK

## A. GENERAL:

1. **Risk Allocation:**
   - Construction, operation, other (technological, political, regulatory (expropriatoion), transactional).
   - *Sponsors*, SPVs, Third parties.

2. **Contracts:** clear, comprehensive, inter-related, enforceable.

3. **Cashflow:** Certainty .

4. **Bankruptcy**

## A. GENERAL:

5. **Legal Opinions:** corss border transactions: NY laws.

6. **Information:** to financiers; monitoring

7. **Accounts:** Control and restrictions (DSCR).

8. **Restriction on Indebtedness and Dividends**

9. **Security Interest: Rights, significant contracts, assets.**

## B. CONSTRUCTION PERIOD:

**1. EPC:**

- Turnkey, date certain
- Experienced contractor.
- Financiers and independent engineer.
- Warranty Period
- Recovery from MOP

**2. Delay and Cost Overruns:**

- Completion guaranties and sponsors guaranties
- Contingency: LCs, *sponsors*, subordinated debt...
- Insurance: *tailor made*
- Damages

**3. Start-Up - Project Completion**

**4. Force Majeure**

**5. Incentives:**

- *Performance Bonds*
- Retention
- Contingency funds

## C. OPERATION:

1. **O&M or self-operation and maintenance**

2. **Technology Risk**

3. **Cost Overrun**
   - Reserve Accounts
   - Maintenance

4. **Efficiency:**
   Debt service accounts

5. **Market & Prices**

6. **Force Majeure**