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List of recommended clauses in concession contracts in people-first Public-Private Partnerships in support of the United Nations Sustainable Development Goals

Note by the Bureau¹

Background

The present document contains a list of recommended² clauses for voluntary inclusion by public authorities in concession contracts for the delivery of infrastructure and the provision of public services in People-first Public-Private Partnerships in support of the Sustainable Development Goals. In preparing this document, the authors paid particular attention to the specific needs of low and middle-income countries, with very challenging Public-Private Partnerships (PPP) enabling environments.

¹ At its meeting on 8 May 2018, the Bureau of the Working Party on PPPs decided that policy documents from reputable sources, such as those submitted by the International PPP Specialist Centres of Excellence, could be submitted to the Working Party after being reviewed and finalised by the secretariat, with a recommendation for their endorsement if the Bureau thought that these documents added value and benefited the member States in implementing people-first PPPs. Once endorsed, these documents will become an output of the ECE International PPP Centre of Excellence for use in its capacity building activities and policy advisory services in countries.

²The ECE PPP standards, guiding principles, best practices, declarations and recommendations are adopted by acclamation by the ECE intergovernmental bodies – the Working Party on PPPs and the Committee on Innovation, Competitiveness and PPPs – and do not impose any obligations on member States as their implementation is entirely voluntary.

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The document was prepared by an expert team at the International Specialist Centre of Excellence on PPP Law, Policy and Institutions in France, led by Mr. Marc Frilet. An earlier version of the document was circulated at the first session of the Working Party on PPPs in November 2017. After review and editing by the secretariat, the document was approved by the Bureau of the Working Party with a recommendation for endorsement by the Working Party at its second session on 20-21 November 2018.

I. Introduction

1. Mobilizing new investments in high quality infrastructure projects, especially in low and middle-income countries, is essential for the achievement of the United Nations Sustainable Development Goals and the 2030 Agenda for Sustainable Development. Such investments can directly eradicate poverty by achieving access to public services, such as health, education, energy and water and sanitation. A further critical challenge is climate change and the need to promote investments in resilience and to address the enhanced risks to all people, especially the economically and socially disadvantaged.
2. The Sustainable Development Goals raise a new challenge to PPPs, which have traditionally been designed as a “value for money” tool with very little regard to eradicating poverty and serving the poor. Overall, it can be said that not all PPPs are “fit for purpose” for the Sustainable Development Goals, nor is there a guarantee that the traditional PPP model will lead to the successful achievement of the Goals. There has yet to be a model that is on the one hand transformative and on the other hand responds to the challenges of low and middle-income countries where arguably PPP is needed the most.
3. The ECE has advocated the need to adapt the traditional PPP model to the Sustainable Development Goals by placing people at the core. While the value for money concept remains important, with the adoption of the 2030 Agenda, the challenge is to implement PPPs according to a broader set of holistic criteria and undertake projects that from inception to termination create “value for people”. People-first PPP projects³ should: increase access to essential services, especially to vulnerable groups; have particularly strong economic effectiveness and transformational impact; be replicable; cut or significantly reduce carbon emissions; make infrastructure more resilient; and engage effectively with all stakeholders.
4. The present document contains a list of recommended clauses for voluntary inclusion by public authorities in concession contracts for the delivery of infrastructure and the provision of public services in People-first PPPs in support of the Sustainable Development Goals.
5. Concessions, which have the longest history of public-private financing, are most associated with PPPs. By bringing private sector management, private finance and private sector knowhow into the public sector, concessions have become the most established form of this kind of financing. They are contractual arrangements whereby a facility is given by the public to the private sector, which then operates the PPP for a certain period of time. concessions⁴ are often financed by user fees (e.g. for drinking water, electricity, public

³ For a detailed description of the people-first PPP concept, please see document ECE/CECI/WP/PPP/2018/5.

⁴ Another model originating in the United Kingdom in the early 1990s and adopted by several other (mainly) common law countries (e.g. Australia and Canada), is the Private Finance Initiative. In

transport etc.), and are often associated with roads, bridges, railways, ports, water supply, wastewater treatment, power plants etc. This kind of PPP model was promoted in France and other civil law countries. By far, the vast majority of the PPPs around the world are concessions.

6. The success of concession PPPs are down to well-prepared projects where the private company is entrusted with the financing, designing, building (or rehabilitating) of a public infrastructure supporting a public service fully delivered to the end users by the project company which recovers entirely or mostly from user's fees. Although there is a long practice of this delivery method both in developed and developing countries, the procurement framework and contract conditions which underline the long-term success of concession PPPs remain to a large extent to be further analyzed, debated and promoted around the world.

7. An important consideration for concession PPPs is the existence of many underlying common issues and related legal or contractual conditions applying across the board to most projects irrespective of countries and sectors.

8. The authors used as empirical evidence a large number of actual concession PPP projects in various sectors and countries. The overall exercise is to set the scene for future work with the objective to foster exchanges and debate towards template concession contract conditions governing the relationships between the public authorities and the private partner in situations where the interest of the people for essential public services is paramount. Such a template has the potential of substantially reducing the transaction costs of concession PPPs in low and middle-income countries to the benefit of the people, which are the ultimate beneficiaries of infrastructure and public services.

II. Preface

9. It is important to keep in mind that the main objective for the parties (public and private) is to deliver the essential public service as described in the contract recognizing that, without prejudice of the main terms of the agreement, it may have to be adapted in accordance with the contractual process, to meet general interest and the possible changing needs of the end users during the project lifecycle.

10. Example of "common objectives" in a concession contract: "to best deliver an essential public service affordable and adapted to the needs of the end users for the lifetime of the concession and meeting the Sustainable Development Goals in an economically viable manner based on a full mandate given by the public authority to the concessionaire to finance, design and build the asset and to deliver the public service by recovering entirely or mostly from the end users."

III. Preliminary provisions

Art 1. Definition of important concepts

Note: The composite nature of a concession PPP made up of a general obligation of the concessionaire under strict monitoring to design and build the asset, while at the same time providing a full service to be delivered to the public over many years, may only be sustainable

contrast to the concession model, financing schemes are structured differently. Under these schemes, privately financed contracts for public facilities and public works cover the same elements but in general are paid by the public authority and not by private users. Examples of this type of projects are: hospitals, schools and prisons).

in the long term unless a durable partnership is formed based on simple and clear concepts including clauses and provisions which are often not applicable in other types of contracts.

- Asset replacement plan: this plan will guarantee that the assets will remain at all times fit for purpose and able to deliver the service.
- Conceptual design: blueprint of asset's design prepared by the contracting authority deriving from the prefeasibility studies for the particular public service and which is the basis of all design developments by the concessionaire.
- Concession asset: tangible and non-tangible assets built or developed only for the purpose of delivering the public service.
- Concession perimeter: the boundaries of the land necessary for the construction of the asset and operation of the public service.
- Construction: buildings, civil works and/or facilities of all kind, including equipment, which are to support the public service to be delivered.
- Contracting authority requirements: physical and functional specifications and norms which govern the construction of the asset and the delivery of the public service.
- Economic and financial viability: indicator or series of indicators deriving from the project business case and representing the common expectations of the parties for the project lifecycle at the date of signature.
- Final design: design of the asset complying with the contracting authority's requirements developed from the tender design that the concessionaire must develop prior to the construction phase.
- Operation and maintenance plan: minimum requirements in terms of maintenance of the construction of the asset and the operation of the service in order to comply at all time with the public service obligations.
- Performance parameters: list of performance criteria to be observed by the Concessionaire in terms of time for completion and on output quality, consumable, availability, satisfaction, return, etc.
- Project business case: presentation of the main characteristics of the project on an agreed matrix for the whole project lifecycle including key parameters and indicators also used for reporting of the economic and financial situation at all times.
- Public service: service to be provided to the benefit of a large number of people at the same time for meeting their essential needs and in a situation of de facto monopoly triggering several obligations and rights both to the contracting authority and the concessionaire generally not required from a commercial service provider.
- Tender design: design developed by the concessionaire at the tender stage on the basis of the conceptual design and which is the basis for the asset's development.

Art 2. Language of contract

11. The clause should provide that the language of contract is the language of the country where the project is developed.

12. Some limited exceptions could be envisaged if duly justified and if there is sufficient language capacity on both sides during contract performance.

Art 3. Contract documents: order of precedence

13. The clause should provide that the documents which all together constitute the contract must be read and construed as an integral part of the contract and be listed in the special conditions.

14. In case of any conflict, ambiguity, inconsistency or discrepancy between any of the contract documents, it is recommended to have the following order of precedence for interpretation purposes:

- General conditions;
- Special conditions including any other document ancillary to the special conditions;
- Contracting authority's requirements including the performance parameters; and
- Tender.

Art 4. Duration

15. It is recommended to have a duration or term in line with the project lifecycle. Main consideration should be given to the amortization period of the main assets.

Art 5. Purpose

16. This clause should provide that the contract is a global contract for financing, designing and building an asset and to deliver an essential public service to the citizens, who will be paying for the service.

17. It should clarify that the main obligations of the concessionaire are to deliver at its own risks, subject to the provisions of the contract, a complete service to the citizens and to recover entirely or mostly from user fees.

18. It should also clarify that unless otherwise specified, upon termination of the contract the asset and all equipment needed for the delivery of the public service are transferred (at no costs) to the contracting authority in good state and operating conditions.

Art 6. General description of the asset

19. This clause should provide that the special conditions specify the main physical characteristics of the asset together with the functional specifications and the main characteristics of the public service (including performance parameters).

IV. General obligations of the concessionaire

20. This chapter should address the main obligations during the lifetime of the project inter alia in terms of Construction, operation, maintenance of the asset and the delivery of the public service and particularly:

Art. 7. International best practices and standards

21. This clause should provide that the concessionaire shall:

- Use equipment and materials complying with international standards and any other particular norms or standards applicable as provided for in the special conditions;

- Subscribe to international quality assurance procedures facilitating the monitoring and control of the work carried out and the adequate equipment and material;
- Include in any subcontract, supplier or service provider contract the same duty of compliance with international best practices and standards.

Art 8. Origin of supplies and materials

22. It is recommended, when specified in the tender, to indicate that the supplies and materials must have their origin in an eligible source country.

Art 9. Environmental and social impact management plan

23. This clause should provide that the concessionaire as well as any of its subcontractors, suppliers or service providers will at all time comply with the project environmental and social impact management plan.

V. General obligations of the contracting authority

Art. 10 Supply of documents

24. This clause should provide that the special conditions list all the documents prepared by the contracting authority which are intended to be binding on the concessionaire.

25. It is recommended to design in the special conditions a process for delivering these documents in a non-ambiguous manner within a given time period from the contract signature.

26. The clause should also clarify the cooperation between the contracting authority and the concessionaire if the latter considers that the documents are either unclear or are contradictory.

Art. 11. Transfer of land to the concessionaire

11.1 General

Note: The availability of the land for the asset and for the provision of the public service as well as the conditions of transfer of plots of land or rights of way necessary for the project need to be addressed in detail since the process is often controversial, complex and time consuming.

27. The clause should provide that the special conditions determine the boundary limits of the land (the concession perimeter) to be assigned to the project either on a permanent or temporary basis (to build the asset, deliver the public service, etc.).

28. It should further provide that a process, complying with applicable laws and international best practices, is detailed in the special conditions. The concessionaire shall be transferred the exclusive right to use the land either permanently or temporarily for developing the project free of encumbrances. This process should permit the transfer of all necessary rights to build the asset and to deliver the public service throughout the contract period.

29. The clause should also indicate that the special conditions will provide for the financial conditions of permanent land occupancy, if any.

11.2 Steps prior to transfer

30. The clause should provide for the need of an environmental and social impact assessment complying with applicable laws and international standards and policies.

31. When expropriation is necessary for public interest, it is recommended to provide for a fair and transparent consultation and process complying with international commitments, best practices, guidelines and policies for a resettlement action plan. This clause could also indicate a date of commencement of the expropriation procedure for the land situated within the project perimeter together with a date for transfer of the land to the concessionaire. This date should not be earlier than the date of full completion of the resettlement action plan.

11.3 Actual transfer of the land and related title

32. The clause should clarify the scope of the land rights granted to the concessionaire, which should permit to develop all activities linked to the operation of the public service.

33. The clause should also provide that the concessionaire will not enjoy full property rights and that in particular it has no right to sell any or all part of the land or to lease it. However, the clause should indicate that leasing could be acceptable for contractors and service providers contributing to the delivery of the public service under the responsibility of the concessionaire, subject to prior approval of the contracting authority.

34. The clause should also provide that the special conditions specify the nature of the legal instrument transferring the exclusive use of the land to the concessionaire for the operation of the service. The related title should permit, subject to applicable laws, to pledge or mortgage during the contract period the concessionaire's assets built on the land for the benefit of the lenders or provide some similar liens.

35. The clause should include a public undertaking to protect all the rights granted to the concessionaire on the land necessary for the project against any trespassing or infringement.

Art 12. Authorizations and permits

Note: Dealing with issues related to authorizations and permits in complex projects where cooperation with various public authorities is envisaged is an important part of the success of the venture, and overall governance needs to be considered in some details.

36. The clause should indicate that the public authority will facilitate the issuance of any administrative instrument, approval, authorization, permit, visa, title etc. to the concessionaire within a given time period. It should also clarify that this time period only starts from the receipt by the competent authority of a complete and complying application.

37. The clause could further provide that when the concessionaire has filed an application in full compliance with the applicable regulations and procedure before the competent authority and in the absence of answer within a time period indicated in the special conditions, the corresponding authorization or permit shall be deemed to have been granted.

Art 13. Assistance with local regulations

38. This clause should provide that the contracting authority will assist the concessionaire upon request in obtaining copies of laws, regulations and information on local customs, orders or by-laws, which may affect the concessionaire in the performance of its obligations under the contract.

VI. Construction design and execution studies

Art 14. Sufficiency of information

Note: It is important for the concessionaire to prepare an offer based on all information it considers necessary to build the asset and deliver the public service in accordance with the provisions of the contract and performance parameters.

39. This clause should clarify that the concessionaire is deemed to have obtained all necessary information on any circumstances which may affect the execution and completion of the asset and of the operation of the public service to have inspected and examined the site and its surroundings and to have satisfied itself before submitting its tender, as to the nature of the ground and the sub-soil. It should also be deemed to have conducted all necessary preliminary studies, including all applicable laws such as tax laws, environmental law, land use regulations, permits requirement procedures, labour and public service practices and policies of the country.

Art 15. Design development

40. The clause should provide for early exchanges on the design process for optimizing methods, systems and processes and minimizing the operation and maintenance costs.

41. The clause should also provide that the design development should be carried out in phases depending on the nature of the asset as further developed in the special conditions.

42. Unless otherwise indicated in the special conditions, the phases should be divided as follows:

- Preliminary design: this is where the general composition of the asset, including general plans and volume, external aspect and identification of main technical options should be developed.
- Final design: the clause should describe the content of the final design such as a detailed description of the asset including drawings and calculations needed to satisfy all regulatory approvals, and to provide evidence of the operability, stability and resistance of the structures as well as their fitness for purpose for the uninterrupted delivery of the public service.
- Execution studies: the clause should provide the conditions under which execution studies are prepared.

43. It is also recommended to describe in the clause the review and approval mechanisms of the design documents.

44. The special conditions should provide a time limit for approval of the design documents. Otherwise, the concessionaire becomes fully liable for any delays, fitness for purpose and the delivery of public service.

45. The clause should indicate that the concessionaire shall remain fully responsible for the design of the asset in accordance with the contract, and no action or failure to act by the contracting authority's representative shall relieve the concessionaire of its responsibility.

VII. Construction phase

Art 16. Planning

46. This clause should provide that the concessionaire submits to the contracting authority a detailed asset planning in accordance with the timing and conditions provided for in the special conditions.

Art 17. Monitoring

47. This clause should provide for an inspection and monitoring of the asset in accordance with the concessionaire design, planning and contracting authority requirements.

48. The clause should also provide that due consideration must be given to the particular nature of the concessionaire's freedom of organization and implementation to meet all objectives and parameters inter alia in terms of fitness for purpose of the asset and delivery of the public service.

Art 18. Acceptance

Note: Acceptance by the contracting authority of the asset designed by the concessionaire or by a subcontractor under its responsibility for the delivery of a public service needs to follow a particular process since on the one hand the concessionaire is not discharged of its obligations by acceptance and since on the other hand the main purpose of the contract is not to accept as asset but to operate an essential public service.

49. The clause could provide that when the asset is a building or a civil work, the acceptance procedure should comply both with local laws and international best practices such as those by the International Federation of Consulting Engineers and the standard World Bank conditions of contract for civil works in civil law countries.

50. The clause should elaborate in detail the process of testing and commissioning from pre-commissioning up to trial operation, and as the case may be, reliability and availability tests.

51. The clause should address the situation where the commissioning requirements and performance parameters are not met. Two situations may then arise:

- Performance is within an agreed percentage of compliance: this is generally remedied by way of liquidated damages; or
- Performance is below this percentage leading to a breach of contract: it can nevertheless be remedied under various conditions and within specified time limits.

Art 19. Defects liability

Note: Taking into account the complexity of the asset and the paramount requirements of fitness for purpose and of reliability and continuity of the public service, the following should be considered:

52. The clause should provide that the concessionaire shall be responsible for the execution and completion of the asset in accordance with the contracting authority's requirements and should be able to meet the performance parameters in a sustainable manner and for remedying to any defect in, or damage to, any part of the asset which may appear or occur during the defects liability period.

53. This clause should refer to the applicable laws and often provides for additional requirements in the special conditions for the defects' liability, their nature, statutes of limitation and related remedies. The following principles should to be considered in the interest of a sustainable public service:

- Punch list:⁵ duty to make good without delay and in all cases before the commencement of the commercial operation of the public service;
- Defect in the materials and equipment needed for the operation of the public service: strict liability for one or two years and a duty to make good in the shortest time frame; and
- Defect in the asset affecting its strength and/or fitness for purpose: strict liability for a number of years as specified in the special conditions.

VIII. Operation of the public service

Art 20. General provisions of the operation of the public service

54. The clause should provide that the concessionaire guarantees, subject to the provisions of the contract and applicable laws, the equality of treatment for the users, continuity of the public service and, if justified by public interest, the adaptability of the public service to the needs of the users. These principles should comprise the following:

55. Equality of treatment: all the users of the service shall be offered the same service without discrimination.

56. Continuity: the concessionaire shall ensure the continuous delivery of the essential public service meeting the performance parameters, except in specific situations such as force majeure or imminent threats to the security of the persons and the property.

57. The clause should also provide that in case of disruption of the service not excused by a contract provision or applicable laws, the contracting authority is entitled to step in and to provisionally operate the equipment and use the work force of the concessionaire to ensure a continuous delivery of the essential public service.

58. Adaptability: the clause should provide that the concessionaire shall make full use of the prevailing conditions permitting to improve and adapt the service to public needs within the existing performance parameters, and if appropriate to propose changes and adaptation.

59. A process should be envisaged in the contract, starting with the partnering procedure, for exchanging and agreeing on such changes and adaptations and their impact on contract conditions with the objective of maintaining the economic and financial viability of the project.

60. When public interest is justified, the contracting authority may impose unilateral changes and adaptations. If such unilateral changes and adaptations deteriorate the Economic and financial viability of the project, the concessionaire shall have a right of full restoration of the economic and financial viability commensurate with the impact of this specific cause of deterioration.

⁵ A punch list is a document prepared towards the end of a construction project listing work not conforming to contract specifications that the concessionaire is responsible to undertake.

Art 21. Performance parameters

61. This clause should be divided into time milestones and performance specifications.
62. It is recommended that within a certain threshold in terms of the nature of the impact on the operation of the public service, the only remedy for failure to meet performance parameters is liquidated damages. Going beyond this limit would result in a breach of contract.
63. The clause could also provide a performance incentive above a certain threshold of performance for instance in terms of: output performance, service performance, productivity performance, and operation and maintenance costs performance.

Art 22. Liquidated damages

64. The clause should indicate that if the concessionaire does not comply with some key milestones referred to in the special conditions, it shall pay to the contracting authority an amount of liquidated damages.
65. The clause should also provide for liquidated damages for performance in case of failure to meet the performance parameters below a certain limit.
66. It is also recommended that the clause provides a cap for liquidated damages which are the sole remedy of the contracting authority for delay and performance below the cap.

Art 23. Maintenance and renewal obligations

67. The clause should provide that the:
- concessionaire shall at its sole risk and expense maintain the asset within the concession perimeter and keep same in good maintenance and operating condition so as to ensure that it is always suitable for the delivery of the public service and avoid any service inadequacy or suspension thereof.
 - renovation and repair of damaged assets shall be carried out as soon as possible as of discovery, without prejudice to any subsequent right of action against the parties having caused such damage.

23.1 Maintenance programme

68. The clause should provide that:
- a maintenance and monitoring programme shall be drawn up by the concessionaire in respect of the asset and all equipment and other resources necessary for the delivery of the public service located within the concession perimeter.
 - the concessionaire shall be responsible for the renovation of the asset located within the concession perimeter based on a multiyear renovation programme updated on a regular basis in agreement between the parties.

Art 24. Reporting

24.1 Yearly report

69. The clause should require that the concessionaire provide each year a report comprising a technical report, an operating report, a public satisfaction report, a financial report and a human resources report.

24.2 Financial and accounting statements

70. The clause should provide that the financial and accounting statements for the concession shall be established in conformity with a matrix and pro-forma statements. The same matrix and pro-forma statements shall be used for the initial establishment and subsequent updating of the project business case.

71. An update of the initial project business case shall in all instances be drawn up at the date of commencement of the commercial delivery of the public service.

IX. Economic and financial provisions

Note: Since the concessionaire recovers its investment and costs of the asset and of the operation of the service entirely or mostly from user's fees in a situation where both parties recognize that the concessionaire is entitled to have a fair return, a general clause should address this matter before more specific clauses.

Art 25. General

72. The clause should provide that the project is based on provisional accounts and a project business case annexed to the contract permitting the concessionaire to invest and deliver the service under the economic and financial viability conditions, that include a fair return on the investment.

73. When it is agreed that in order to reach the economic and financial viability an element of incentives (e.g. a subsidy) are needed, their length, amounts and conditions of payment should be part of the contract and should be duly taken into account for determining the agreed economic and financial viability objectives and parameters.

Art 26. Tariffs

74. The clause should provide that the tariff to be paid by the end users for the public service as agreed between the parties in the special conditions is part of the project business case.

75. It should also provide that the tariffs shall be updated at the date of commencement of operation in accordance with the methodology annexed to the project business case.

76. Thereafter the clause should indicate that the tariffs shall be regularly updated and at least on an annual basis to the extent necessary and calculated with the same methodology as the one which was used for their initial determination.

77. The clause could further provide that the common objective is to always have the tariffs calculated in such a way that the concessionaire has the opportunity to develop the project and deliver the service throughout the project lifecycle in accordance with the economic and financial viability parameters as provided for in the project business case (as updated for from time to time).

Art 27. Economic Stability

Note: Stability of key economic factors is an essential feature of success of long term investment projects for essential public services. The following clauses are designed to strike a reasonable balance between the interest of the concessionaire and those of the contracting

Authority for the optimum operation of the public service based on precedents both in underlying contract laws and contract practices in countries.

27.1 Change in laws

78. The clause should provide that legislative or regulatory provisions taking effect after the date of the signature of the contract which may have the effect of changing, cancelling or of restricting the provisions of the legislative or regulatory regime, in such a way that it deteriorates substantially the economic and financial viability shall not be applicable to the concessionaire unless otherwise agreed between the parties.⁶

79. The same will apply for the employees of the concessionaire and to the suppliers and service providers participating to the construction and operation of the service.

27.2 Change in the tax and excise regime⁷

80. The clause should provide that the stability of the tax and excise regime is guaranteed to the concessionaire with respect to scope, rates, collection methods and audits in such a way that it will not deteriorate the economic and financial viability.

81. The concessionaire shall not be liable unless otherwise agreed between the parties for any taxes created after contract signature or which arises from any amendment effective after such date.

27.3 Unforeseen changes in economic circumstances (hardship)

82. This clause should provide that when unforeseeable economic circumstances outside the concessionaire's control arise and negatively affect the economic and financial viability of the project, the parties shall meet to remedy the situation and restore the economic and financial viability up to a certain threshold.

27.4 Change in physical conditions

83. This clause could provide that if the concessionaire encounters artificial obstructions or physical conditions, other than weather conditions, which could not reasonably have been foreseen, and if such obstruction negatively affects the economic and financial viability above a certain threshold, the concessionaire shall be entitled to compensation to restore part of the economic and financial viability.

Art 28. Force majeure

84. This clause should describe force majeure in simple terms such as any unforeseeable act or event that is extraneous to and lies outside the control of the party that seeks to rely thereon, (e.g. natural disasters, fires, explosions, war, uprisings, mobilisation, strikes, earthquakes, acts of State, etc.).

⁶ This clause might be considered by some as concessionaire-biased as it could be argued that a strict adherence to the clause would possibly place the concessionaire at a competitive advantage vis-a-vis others operating in the same sector. Unless the legislative changes target specifically the project in question, it is argued that a more nuanced language could be used, by for example, including a provision of a compensation mechanism to maintain the economic and financial viability of the project.

⁷ Careful attention should be paid as not to create a competitive advantage to the concessionaire vis-a-vis others operating in the same field.

85. It should clarify that no party is held liable for non-performance of its obligations deriving from the occurrence of a force majeure event and that each party has a paramount duty to mitigate the consequences of the event.

86. The clause should also indicate that the parties shall seek a solution allowing continued performance of the concession.

87. If force majeure event does not lead to early termination of the contract, the contracting authority shall compensate or have the concessionaire compensated in order to restore the economic and financial viability as if the force majeure event would not have occurred.

Art 29. Tax and excise provisions

Note: The applicable tax and excise regime and forecast of the related excise and tax budget for the project is complex to determine inter alia due to the number of different suppliers, contractors and service providers participating in the project at various levels. The proper evaluation of the project excise and tax budget is an important element for establishing the economic and financial viability.

88. It is recommended to provide for a tax and accounting annex describing the applicable tax regime both for the concessionaire and other project participants including provisions on cooperation and reporting.

89. It is recommended not only to list the applicable tax, duties and levies in an annex, but also the conditions under which they will be calculated.

90. Due care should be taken to municipality and local taxes including levies and fees for authorizations and permits.

X. Miscellaneous

Art 30. Concessionaire's performance

91. The clause should provide that since the contracting authority when agreeing to enter into a contract with the concessionaire has given due consideration to the concessionaire's qualifications and capacity, including that of its staff, to build the asset and to operate the public service, during the project lifecycle the concessionaire is not entitled, without prior authorization by the contracting authority, to assign all or part of this contract or any benefit or interest deriving from it.

92. The clause should also provide that the concessionaire shall not without prior approval of the contracting authority change the majority ownership.

93. The clause should indicate that when the concessionaire is part of a consortium, the main terms of the consortium agreement shall be approved by the contracting authority, and that the concessionaire will remain in all cases fully responsible for all acts and omission of the other consortium members.

Art 31. Substitution

94. This clause should provide that in case of insolvency, liquidation or winding up of the concessionaire, the lenders which have not been fully repaid shall be entitled to, subject to the non-objection of the contracting authority, to appoint a third party to replace the concessionaire with all rights and obligations provided for in this contract.

Art 32. Subcontracting

95. The clause should provide that the concessionaire is not entitled to subcontract any substantial part of the activities of the asset, supply or the operation of the public service without the approval of the contracting authority.

96. The clause should refer to the special conditions listing the suppliers, contractors and service providers for which a prior approval by the contracting authority is deemed to have been granted.

97. The clause should provide that the concessionaire shall remain responsible for the acts, defaults or negligence of the subcontractors, their agents or employees. The approval by the contracting authority of the sub-contracting of any part of the contract, and in particular for subcontractors involved in the construction of the asset or in the operation of the public service, shall not relieve the concessionaire of any of its obligations under the contract.

Art 33. Staff

Note: International companies are involved in most concessions for the delivery of infrastructure and public services. Although a priority should be given to local people, it is important to consider the special conditions of expatriate staff that might need to be employed by the concessionaire for the proper functioning of the project.

98. The clause should provide that:

- all employees of the concessionaire and of its subcontractors and service providers are governed by local employment laws. However, expatriate employees' benefits, including pensions, may be governed by foreign laws.
- the concessionaire should give employment priority to local citizens or residents and provide them a remuneration and employment package locally competitive.
- the concessionaire should contribute to the design of a long-term human resource programme comprising training of local citizens and residents.
- when there are no local citizens or residents with the necessary skills, the concessionaire should be allowed to hire any foreign or expatriate employee as deemed appropriate in terms of qualifications and numbers.
- as appropriate, the contracting authority will assist the concessionaire in granting work and residence permits for its expatriate employees and their families in accordance with domestic legislation.

Art 34. Environment and society

99. The clause should provide that the concessionaire should abide by local regulations as well as international best practices.

100. Special conditions should describe the steps already made by the contracting authority in terms of environmental and social impact studies and environmental and social impact management plans. These conditions should describe the additional steps to be taken jointly or separately by the contracting authority or the concessionaire for finalizing all the necessary studies with appropriate indicators in compliance with the applicable laws and international best practices in order to obtain approvals of the environmental and social impact management plans and the related authorizations and permits as necessary.

101. The clause could also clarify that if the concessionaire has complied with the applicable national and international requirements for developing the studies and proposing

an environmental and social management plan, any delay in granting authorizations and permits or approving the plan shall not be considered as a default, and contracting authority shall assist and to the extent necessary compensate the concessionaire.

34.1 Corporate social responsibility

102. The clause should indicate that the concessionaire, its suppliers, subcontractors and service providers, shall comply with corporate social responsibility principles as further defined in the applicable laws and international best practices.

34.2 Community relationships, women and indigenous people

103. The clause should indicate that the concessionaire with the support of contracting authority should develop a community relationship and women empowerment programmes, and if applicable, an indigenous programme in accordance with the applicable regulations and international best practices.

104. The main terms of the initial programme, its organization and costs should be agreed at the date of signature.

Art 35. Third party liability

105. The clause should indicate that the concessionaire is solely and fully liable for any damage caused to users or third parties as a result of the asset and the operation of the public service.

106. The clause should further indicate that the concessionaire shall assume sole responsibility for all risks or disputes arising as a result of its actions or omission in connection with the operation of the service.

Art 36. Insurances

107. This clause should describe the different types of insurance coverages to be subscribed by the concessionaire in compliance with the applicable regulations.

108. The clause could provide that a minimum list of insurance policies should be subscribed with at least one or more insurance companies of reputed solvency and to maintain the same in force.

109. The following insurances should inter alia be considered:

- insurance cover for general third-party liability throughout the term of the concession;
- a work site all risks policy or similar coverage for the asset up to an amount indicated in the special conditions;
- an all risks policy for damages on the concession assets for an amount specified in the special conditions;
- professional indemnity insurance covering bodily injury and property damage that may be caused to third parties and to its employees, in the amount specified in the special conditions; and
- as applicable builders' strict liability covering the concessionaire strict liability on equipment and structure.

Art 37. Guarantees

Note: Since the contract is not only entered into for the asset, building, civil works or facility designed for providing a public service, but mainly for the actual provision of an essential public service during the project lifecycle, the guarantees to be provided by the concessionaire should not be limited to an asset fit for purpose; but should also be valid throughout the project lifecycle. Guarantees should also be provided for the retransfer of the asset and any equipment permitting the operation of the service either at the end of the contract or as a consequence of early termination.

110. It is recommended that the guarantee takes the form of a bank guarantee based on the form and for an amount provided for in the special conditions.

111. Unless otherwise provided in the special conditions, it is recommended that the initial performance guarantee should be five per cent of the estimated construction costs.

112. The clause could provide that after the construction phase and the successful completion of the trial tests, the guarantees are reduced by half.

113. Special conditions should also provide for other guarantees during the operation phase, inter alia in relation to maintenance and consumption parameters.

114. Special conditions should also provide that a special guarantee shall be provided to ensure that at the end of the concession, the contracting authority receives the assets, equipment and all service obligations in good state and operating capacity.

Art 38. Confidentiality and disclosure

115. It is recommended to outline what constitutes confidential data and information, and a commitment to keep such data and information confidential.

116. The clause should describe a process for disclosure of non-confidential data and information during the project lifecycle in such a way that such data and information is available in a format easy to understand by stakeholders.

Art 39. Patents and licenses

117. The clause should indicate that the concessionaire has the full right to use patents and licenses as well the intellectual and other property rights in the asset and/or operation of the service, and that such rights will be transferred at no cost to the contracting authority at the expiry date of the concession or in case of early termination.

118. The concessionaire undertakes to indemnify and hold harmless the contracting authority for all damages and cost incurred due to any claim brought by any third party in this regard.

XI. Termination**Art 40. General**

Note: The particular nature of a concession contract is that the public service rendered by the concessionaire must continue after the term of the concession contract without restriction or limit in time. As a result, the contracting authority must be in a position to organize itself to deliver the service under the same conditions and/or to enter into a contract with another operator to deliver the service.

119. This may only be possible if the assets created by the concessionaire, including knowhow and equipment necessary for the smooth continuity of the public service, revert back to the contracting authority. Since the duration of the concession has been calculated in consideration of the full amortization of the concession's assets, all such assets, know-how and equipment shall be transferred to the contracting authority in good operational conditions. Various clauses should address this situation.

Art 41. Assets transfer

120. The clause should indicate that the parties should meet in advance to organize an inspection process on the asset, inventories, supplies and equipment necessary to operate the service and more particularly for:

- Assets transferred automatically without compensation free of all liens and encumbrances to the contracting authority (returned assets) and;
- Assets that the contracting authority has option to purchase in accordance with the list and conditions provided for in the special conditions (purchased assets).

121. The clause should also indicate the practical conditions of transfer of the returned and purchased assets.

Art 41. Early termination

Note: Early termination of a concession contract for essential public services should always be possible for sovereign reasons in addition to traditional termination clauses. Since it is not realistic to stop the delivery of essential public services in case of early termination, the concession asset necessary for the delivery of the service will continue to be used. This situation triggers special clauses dealing inter alia with the financial and economic consequences of each early termination event.

122. The events and consequences may be summarized as follows:

- by mutual consent: the parties shall agree on all consequences and in particular on the conditions of transfer and repurchase of assets taking into account the non-amortized value of such assets including together with an indemnity to be paid by the contracting authority to the concessionaire for loss of opportunity;
- for public interest reasons: the contracting authority should compensate the concessionaire for loss of profit, the residual value of the returned asset, the price for the repurchase of assets, as well as and any other assets to be sold to the contracting authority, and the demobilization cost of the concessionaire's equipment and personnel;
- by either of the parties in case of occurrence of a force majeure event if the duration of the event exceeds a duration specified in the special conditions: the contracting authority should compensate the concessionaire in the same manner as for termination for public interest reason except for compensation for loss of profit;
- by the contracting authority in case of persistent default of the concessionaire not excused by a provision of the contract and not remedied after a period of time indicated in the special conditions: the contracting authority should pay the concessionaire an indemnity equal to the non-amortized value of the returned asset from which shall be deducted an amount equal to the indemnity due by the concessionaire to the contracting authority to compensate for the breach of contract by the concessionaire;

- by the concessionaire in case of gross default of the contracting authority preventing the concessionaire to meet its own obligations: the contracting authority should indemnify the concessionaire for an amount equal to the amount payable for termination in case of public interest increased by an indemnity to hold harmless the concessionaire of all the consequences of the default.

123. All the provisions relating to the transfer of assets and return of land to the contracting authority upon the term of the concession will apply equally in case of early termination.

XII. Partnering, dispute avoidance and arbitration

Note: It is important to keep in mind that the contractual relationship in a concession agreement is often closer to company laws than to contract laws given that each party assumes a number of long-term commitments to ensure the optimum delivery of a public service.

124. It should be recognized that it is not possible to set forth all detailed terms and conditions on how the public service is to be provided during the project lifecycle. It is therefore essential to foster a PPP relationship.

125. This should be the basis of a partnership and decision-making process without compromising on the terms of the contract with a view to deliver, and as the case may be, to adapt and optimize the service to the needs of users, their financial capacity and the economic growth of the region and of the country.

Art 43. Partnering

126. The parties should agree on a minimum organizational partnering structure and process to ensure the smooth, long-term development of their relationship.

127. The partnership should be developed along the following lines:

- Partners' meetings are organized on a regular basis, for instance each quarter;
- The delegation from each partner should be composed of several individuals having an important role in relation to the asset and delivery of the service (technical, commercial, financial);
- Basic partnership by-laws for efficient partners' meetings based on a consensus decision making process should be drawn up;
- Duty to disclose any potential issues at the partners' meetings;
- For complex projects, consider a facilitator; and
- Duty to disclose and discuss any cause of dispute during partners' meetings before any other steps toward dispute resolution.

Art 44. Dispute board (optional)

Note: Dispute boards are becoming very popular and efficient for complex contracts. In the last decade, best practices and use of dispute boards have been developed around the world and in particular through the Dispute Review Board Foundation.

128. The benefit of such a board is that is composed of senior experts selected by the parties and it holds regular meetings with the throughout the contract duration, even in the absence of disputes. This allows for a review of the project from every angle.

129. For a concession for essential public services where the partners are working towards common goals, a dispute avoidance board is highly recommended.

130. The board could be a standing board composed of three experts up to the closing of the commissioning phase and transformed into a single person board during the operation phase.

131. The clause should provide for a standing board of three experienced experts.

132. It should define a minimum qualification for each member having altogether experience and capacity in similar situations of a concession for essential public services where the concessionaire is entrusted with full delivery of the service and recovers entirely or mostly from user's fees.

133. The board should in particular have proven experience in essential public service delivery in the country.

134. Further reference to dispute board rules such as the International Chamber of Commerce or the Dispute Resolution Board Foundation is recommended.

Art 45. Mediation (optional)

Note: If the parties do not opt for a dispute board process, a structured mediation process should be considered.

135. The clause could provide for mandatory mediation before referring the matter to arbitration.

136. The clause should provide for a structured mediation by a mediation board with more or less the same qualifications as the one proposed for dispute boards.

137. It should organize a simple mediation process with a limited role of due process reserved to arbitration proceedings.

138. The clause could provide for a very simple default process within strict time limits.

Art 46. Arbitration

139. The clause should provide that disputes which have not been settled through a dispute or a mediation board shall be finally settled by three arbitrators appointed in accordance with the rules of arbitration provided by an authoritative international organization.

Art 47. Applicable law

140. The concession should be governed by and construed in accordance with local laws.

141. The clause should provide that in the absence of relevant references in local law or case law, the arbitration tribunal shall refer to internationally recognized best practices in essential public services projects.
