
Infrastructure newsletter

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Public-private cooperation as the adequate path for developing infrastructure

In contrast to the traditional forms of contracting in large public works, public-private associations are a mechanism for cooperation and collaboration between the party with the capacity (competence) to decide to promote and set up infrastructure, and the party with the capacity (experience) to develop and execute it, which could be carried out through contracting formulas linked to the classic concept of concession.

Legal solutions have been adopted in Latin America, Portugal, and Spain for some time where the risks of infrastructure projects are assigned to the different parties involved based on their respective organization and management capacities.

We shall only look back at the evolution starting at the early 90s of countries such as Chile, Colombia, Peru, Mexico, Portugal, or Spain to see the highly satisfactory results in developing important infrastructure by applying formulas with private-sector intervention. This collaboration of private entities with the public sector does not alter the purpose of these formulas, which is to protect and guarantee public interest.

There is no doubt that investment in infrastructure, based on the population's real needs, constitutes a determining factor in creating prosperity and wellbeing in countries where investment is promoted, while also incentivizing the progress of less economically developed zones. The level of economic resources that these projects demand, given that they come from public funds, requires clear regulation in defining the scope of the responsibilities of the different parties involved in developing infrastructure.

The link between identifying the risks arising from executing infrastructure and its legal regulation in each country constitutes a highly relevant element of knowledge and actively supports the overall analysis of the investment. In other words, the legal analysis of an investment in infrastructure constitutes an essential element in assessing and identifying the risks that must be considered in such long-term projects.

Consequences arising from issues such as (i) how they are regulated and the solutions the different legal systems offer to situations resulting from developing infrastructure when the term of the agreement is 40 years, or (ii) the legal and contractual consequences of a crisis like the one erupting in 2007 or the current COVID-19 crisis, make it essential to seek legal advice.



Legal certainty is one of the most common demands of players interested in this economic activity. Certainty on the reasonable distribution of the risks and adequate regulation of the legal consequences in particularly complex situations during the term of the contracts are essential to guarantee the presence of private players who will work hand in hand with the public authorities to promote and develop infrastructure.

Regarding sustainability, infrastructure projects currently face significant global environmental and social challenges ranging from climate change to natural resource depletion and social inequality.

In view of this, the advantages of this cooperation mechanism include the fact that the parties must identify any possible environmental, social, and governance risks and impacts, implementing appropriate strategies to address and manage them at their different stages of maturity based on the Environmental, Social, and Governance Criteria (“ESG Criteria”), to achieve sustainable development in the infrastructure sector.

We believe that only consolidated structures of legal knowledge in interpreting the risks of infrastructure investments can help the different players to successfully complete their promotion or their development and execution.

Cuatrecasas has dedicated significant resources to this for many years, and we accept the challenge of being reliable collaborators with developers and investors that decide to venture into this interesting world of infrastructure.

Significant legal developments

Chile

Confirmed hospital concessions

The public works concession system was established in Decree with Force of Law 164 of 1991 and has remained practically unchanged until now. This concession system has been the main engine driving public policies in Chile, particularly in hospital infrastructure.



The Chilean Government's 2019-2023 concessions agenda confirmed a series of new hospital concessions that will continue being processed this year.¹ These include (i) the Red Maule concession for three medical premises in the Maule Region with a budget of USD 244 million,² with the technical and economic bids set from August 2020; (ii) medical premises in Buin, Santiago Metropolitan Region, with a budget of USD 120 million, with the technical and economic bids date set between July and August 2020;³ (iii) four medical premises in the Biobío Region with a budget of USD 360 million, with the bids date set in the second quarter of 2020;⁴ (iv) medical premises in the Coquimbo Region, Coquimbo commune, with a budget of USD 300 million, with the bids date set for the second quarter of 2020;⁵ (v) medical premises in the Coquimbo Region, La Serena commune, with a budget of USD 300 million, with a call for tender date set for the fourth quarter of 2020, and a bids date for 2021;⁶ and (vi) at least four further hospital premises in 2021 and 2022.⁷

These concessions have been confirmed during a period of uncertainty following the October 2019 public demonstrations. The investments plan forecast for 2020 currently includes 11 projects for USD 2.516 billion, while the 2021 schedule envisages 14 projects amounting to USD 2.652 billion.⁸

Spain

Economic/financial rebalancing of concessions due to COVID-19

The extraordinary measures approved by the Spanish government as a result of COVID-19 include article 34.4 of Royal Decree-Law 8/2020, which grants a right to economic/financial rebalancing—consisting of extending the term of the concession or modifying its economic clauses—for works and services concession holders when they cannot be executed due to the measures adopted. The rebalancing will compensate the concessionaires for the loss of revenue and the increase in costs if both are evidenced

¹ All the dates indicated below are from the website of the Directorate General of Concessions of the Chilean government's Ministry of Public Works and must be confirmed.

² http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=212

³ http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=214

⁴ http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=213

⁵ http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=219

⁶ http://www.concesiones.cl/proyectos/Paginas/detalle_adjudicacion.aspx?item=221

⁷ http://www.concesiones.cl/proyectos/Paginas/AgendaConcesiones2018_2022.aspx

⁸ <https://www.latercera.com/pulso/noticia/mop-ajusta-cartera-de-concesiones-y-modifica-cronograma-de-proyectos-hospitalarios/ENHE3XYLWVG7RNQCU4WYRW3JP4/>



along with, most importantly, the impossibility of executing the contract. It is up to the procurement entity to assess these elements.

In each case, it must be analyzed whether the situation generated by the state of emergency is covered under article 34.4 of Royal Decree Law 8/2020 given that the concession can no longer be executed. If it is not, the general rules of risk and peril distribution, the elements affecting that distribution, and their consequences under the law applicable to the concession will apply. Generally speaking, if it can be demonstrated that the concession's economic balance has been broken and the contract cannot be amended, the concessionaire could turn to other elements (such as *force majeure* or the theory of unforeseeable risk) to request the corresponding compensation from the granting administration to reestablish the concession's economic balance.

However, for some state concessions (for constructing, conserving, and operating toll highways; for conserving and operating first-generation highways; and the service areas of the State Roads Network), Royal Decree Law 26/2020 has established a special rebalancing system that will only apply to concessions whose gross operating margin was negative during the state of emergency, without taking into account depreciations or provisions. For these concessions, the right to rebalance the contract cannot be founded on the general rules on harm due to *force majeure* or on reestablishing the economic balance that may apply to the contract.

A specific case-by-case analysis of the affected agreement, its clauses, specifications, and other applicable regulations, and the effects of the COVID-19 crisis on the concession's balance must be conducted for these purposes.

New legal framework regarding “direct foreign investment” regulation

Following the legal amendments that were approved due to COVID-19, yet in this case intended to be permanent following the health crisis, a preliminary study is required to ascertain the applicable regime before making any investment in Spanish companies because “direct foreign investment,” as defined in the regulations, are now subject to prior authorization if certain conditions are met.

In accordance with the new regulation, investment in which the following two circumstances are met shall be considered as “direct foreign investment”:

- It is made by a non-EU resident or a resident of a non-EFTA country (Iceland, Liechtenstein, Norway, and Switzerland), or by an EU/EFTA resident in which a non-



resident holds significant control.

- When the investor holds a stake of at least 10% in the Spanish company's capital or when, as a result of the transaction, takes an active part in managing or controlling that company.

Direct foreign investment is subject to authorization in either of the following scenarios:

- The investment affects the sectors of public order, public security, and public health, which include critical infrastructure, among others.
- The investor (i) is controlled by a third-country government; (ii) participates in sectors affecting the public order, public security, and public health of another Member State; and (iii) has had administrative or court proceedings brought against it in another Member State for exercising criminal or unlawful activities.

The regulation of foreign investments in Spain is now more complex, and so it is necessary to seek legal advice to determine whether the transaction is subject to authorization or whether other additional requirements must be fulfilled. This advice is crucial if we take into account that, among other consequences, the absence of the mandatory authorization means the investment will lack validity and legal effects, and will lead to heavy fines.

See more detail in the Legal Flash on [Foreign investment in Spain: key issues.](#)

Mexico

ESG criteria in FONADIN's Venture Capital Funds Investment Policies

In Mexico, the National Infrastructure Fund ("FONADIN"), a Payment Source and Administration Trust through which the Federal Government endorses infrastructure development in the sectors of communications, transport, water, environment, and tourism, has amended its Venture Capital Funds Investment Policies to include ESG criteria and adapt them to address conflicts of interests and update fund management standards.

Under that policy amendment, the Federal Government, through the FONADIN, recently implemented an Environmental, Social, and Governance Action Plan.

Finally, the FONADIN recently formalized a partnership agreement with the Asociación Mexicana de Capital Privado A.C., a civil association promoting the development of the



private capital and venture capital industry in Mexico. The purpose of that agreement is to form an important strategic alliance in the sector to promote global initiatives driving sustainable development in Mexico.

Peru

G2G contracts with the United Kingdom and France

In June 2020, the United Kingdom was selected by the Peruvian government for a government-to-government (“G2G”) agreement to provide technical assistance in executing large prevention and reconstruction works in areas affected by the 2017 coastal El Niño floods in the north of the country. These works are managed by the Authority for Reconstruction with Changes (“ARCC”).





The United Kingdom’s main obligations under the G2G agreement include:

- providing technical assistance in Management of the Program (“PMO”) through an office that will work hand in hand with the ARCC’s PMO;
- providing specialist technical assistance in diagnosing and improving all the existing operational studies and plans;
- contracting for goods and services, preparation of technical files, and works execution; and
- implementing capacity development strategies for all levels of government involved in implementing the interventions considered in the agreement.

Over the next two years, investment is expected to reach approximately S/. 7 billion (approximately USD 2.1 billion). The projects envisaged in the Reconstruction with Changes include⁹:

⁹ Imagen taken from the Twitter account of the Peruvian President’s Office, available at:
<https://twitter.com/presidenciaperu/status/1275118408661708806/photo/1>



Sector	Detail	Regions
HEALTH	 15 establishments	Piura, Lambayeque, La Libertad, Ancash, Lima
EDUCATION	 74 educational institutions	Tumbes, Piura, Lambayeque, La Libertad, Ancash, Lima, Cajamarca, and Huancavelica
URBAN	 7 storm drains	Tumbes, Piura, Lambayeque, and La Libertad
TREATMENT OF RIVERS AND STREAMS	 17 rivers 5 streams	Tumbes, Piura, Lambayeque, La Libertad, Ancash, Lima, and Ica

On health infrastructure, the Peruvian government entered into a G2G agreement with the French government to improve and extend health services in the Antonio Lorena hospital in Cusco, and the Sergio Bernales hospital in Lima. This agreement will involve an investment of approximately S/. 19.5 million (around USD 5.8 million), which Egis Batiments International and AP-HP International, companies designated by the French government, will use to execute the corresponding works.

Reactivation of infrastructure projects

The Peruvian government has been taking measures to reactivate the economy in view of COVID-19. Among other measures, the government issued Emergency Decree 070-2020 authorizing the transfer of almost S/. 4 billion (approximately USD 1.2 billion) to finance the contracting of road networks maintenance services forming the Local Road Network and the National Road Network.

Based on information provided by CAPECO, the national construction chamber, works have restarted on 70% of the projects initiated before the pandemic, accounting for projects worth USD 1 billion.

Of 1,000 reactivated projects, 500 are located in Lima and range from infrastructure works to housing and commercial buildings projects.

PPPs scheduling

The president of Proinversión, the Private Investment Promotion Agency, has unofficially stated that he does not expect greater delays in relation to the prioritized tender processes and expects the processes scheduled for July 2021 to be completed.



It should be noted that, up to July 2021, tenders are expected to be sought for projects such as the Huancayo-Huancavelica train line, the Ring Road, the widespread use of natural gas in seven regions, and transmission lines, among others.

The projects scheduled up to July 2021 amount to an estimated investment of USD 5.3 billion.

Portugal

Financial rebalancing of state contracts and public-private cooperation agreements in the context of COVID-19

Decree-Law 19-A/2020, of April 20, 2020

The main issues addressed in this Decree-Law affecting road concessions:

- Between April 3 and May 2, 2020, the application of all contractual clauses and legal provisions establishing the right to compensation for loss of use or the right to financial rebalancing is suspended. Therefore, the application of these clauses on events occurring during that period (the state of emergency) cannot be claimed and there will be no compensation or financial rebalancing either.
- With regard to events occurring after the stated period, any potential compensation or financial rebalancing right may only be asserted if the validity of the contract is extended.
- The obligations for concessionaires and subconcessionaires must be reduced or suspended in accordance with the reduction of the traffic levels and the minimum services required to guarantee safety.
- Arbitral awards addressing the provisions contained in this Decree Law can be appealed before the Supreme Court of Justice.

The rewording of the Public Procurement Code and the State's intervention in PPPs approved in December 2019 are repealed

Assembly of the Republic 16/2020 of March 19, 2020

Decree Law 170/2019, of December 4, 2019, amending Decree Law 111/2012, of May 23, 2012 (establishing the main regulations applicable to any state intervention in a PPP project) and the Public Procurement Code, was only in force for three months.

This Decree Law introduced significant amendments to Decree Law 111/2012, of May 23, 2012, notably including (i) increasing flexibility to implement and award PPP projects;



(iii) centralizing responsibility for preparing, contracting, awarding, and modifying a PPP project in the Council of Ministers; and (iii) excluding any project that does not entail public payments to the private party from the legal framework of PPPs.

As a result of all the significant changes introduced in the public procurement legal regime and in state intervention in PPP projects, which appeared to reduce transparency and increase discretionary powers in the preparation, contracting, and award process, as well as excluding specific sectors from the PPP legal system, such as housing PPPs, the Portuguese parliament decided to terminate the amendments to the legal system of PPPs and public procurement approved on December 4, 2019, and the legal system in force up to that date was reapplied.

Cases and transactions

Lima metro international arbitration

Cuatrecasas is representing the International Consortium awarded the concession for Line 2 of the Lima metro in an international arbitration filed by that Consortium against the Republic of Peru, overseen by the CIADI.

This project involves building a 35 km underground metro line in Lima and is one of the largest and most complex works in Peru's history, with a predicted initial investment of over USD 5.3 billion. It is also the first underground metro line in Peru, with the added technical complexity that it is an automatic (driverless) service.

It is a comprehensive project in which the concessionaire is responsible for designing; financing; constructing; supplying electromechanical equipment, system equipment, and rolling stock; operating, and maintaining the project.

The awardee International Consortium is composed of some of the most important construction and engineering groups in the world: ACS Group, FCC Group, Salini Impreglio (currently Webuild), Cosapi, and Hitachi Group. Between them, they have unrivalled experience in designing and constructing complex infrastructure works, and, particularly, underground metro works.

Cuatrecasas advised the International Consortium in its claim against the Republic of Peru, from the negotiation phase to the arbitration phase. The amount of the arbitration exceeds USD 1 billion.



BRISA tender process in Portugal

Cuatrecasas advised a consortium of two large infrastructure groups with an infrastructure fund in the private tender for a controlling interest of Arcus and the Portuguese family group José de Mello in the Brisa Group, the largest road infrastructure operator in Portugal and other jurisdictions.

We have advised the consortium during the due diligence phase and in reviewing and negotiating the sale and purchase agreement and shareholders agreement, in defining the corporate and financial acquisition structure, and on the highways system in Portugal, and other international matters.

The transaction also required legal consulting in many other jurisdictions, including Brazil, the United States of America, and Luxembourg.

Although the consortium did not complete the acquisition in the end, it has been a very important transaction in recent months, as it is the largest transaction in relation to Portugal's roads network.

Financial advice in the ACS's sale of a majority shareholding in several highways concessionaires

Cuatrecasas has advised the European Investment Bank and a number of lender syndicates on one of the year's most important transactions in the infrastructure sector in Spain: ACS Group's sale of a majority of its shareholding in different highways concessionaires to the British fund Hermes, notably (i) Eix Diagonal Concessionaria de la Generalitat de Catalunya, S.A.; (ii) Reus-Alcover Concessionaria de la Generalitat de Catalunya, S.A.; (iii) Autovía de los Pinares, S.A.; and (iv) Sociedad Concesionaria Santiago Brión, S.A.

Our work has focused on adapting all the financial documentation on the projects to the new reality after the change of control, as well as on verifying different regulatory aspects linked to the new foreign investments regulations. For this purpose, the firm has given multidisciplinary advice (in financial, corporate, and administrative areas) in the middle of the COVID-19 crisis. This has meant conducting negotiations electronically and developing signature structures to ensure the legal certainty necessary for the entities, as in-person and notarial signing was unfeasible.

A substantial portion of the added value provided by our Firm in this transaction stemmed from the seamless coordination of the different participating entities within



the lender syndicate (composed of several of the main European banks, including Banco Santander, S.A.; Banco Bilbao Vizcaya Argentaria, S.A.; CaixaBank, S.A.; Dexia Credit Local, S.A.; ING Bank, N.V.; Société Générale, S.A.; and HSBC France Sucursal en España), the European Investment Bank, the borrowers, and their shareholders.

Initial phase of the Toluca Science Park infrastructure in Mexico

Cuatrecasas has advised the Secretariat of Public Works of the Mexican government on the national public tender called to integrate the initial phase of the social infrastructure project to design, construct, operate, and maintain the Toluca Science Park, through the Undersecretariat of Water and Public Works.

The Science Park project consists of a complex in which an underground car park with up to three levels, a center for dissemination of science through a planetarium, a commercial area, and a public park are to be constructed. The Undersecretariat of Water and Public Works called all the parties interested in the project to submit their proposals by proving their technical experience and financial capacity to carry out the requested work.

Cuatrecasas advised the client throughout the initial phase of the project, including completing the applicable legal analysis in terms of the Administrative Code of the State of Mexico and its Regulation, and preparing the documentation necessary for the public tender, including the call, tendering terms, unit-price agreement, and minutes from the clarifications meetings.

Toluca is the capital of the State of Mexico, which surrounds most of Mexico City and has the highest population in the country. The Science Park project is therefore fundamental, as it will make it possible to drive commercial, real estate, tourist, and business activity throughout its area of influence and thus achieve higher levels of economic growth to the benefit of its population, and relaunch the capital of the State of Mexico. This will attract the population of the area and other neighboring towns, and even foreign visitors, as restoring public spaces is a significant factor in regenerating the social fabric and helps improve public safety rates.

Developing infrastructure to store petroleum products in Mexico

Cuatrecasas has advised an important hydrocarbons logistics company on incorporating a special purpose vehicle. Cuatrecasas also drafted a mixed engineering, procurement, and construction (EPC) agreement (turnkey and open-book with simultaneous stages) for the construction of a petroleum products (gas and diesel) receiving and storage terminal in



the central State of Mexico. Cuatrecasas drafted the operation and maintenance agreement for that terminal.

The project is noteworthy given the highly complex EPC agreement required for its development, since it involved merging two types of EPC agreements with the specific feature of simultaneous development of stages.

Central Mexico is the region with the highest demand for petroleum products in the whole country. The petroleum products receiving and storage terminals in the center of the country are currently owned by the state production company Petróleos Mexicanos (PEMEX) and so this will be the first private terminal to operate in the center of the country.

The terminal will have storage capacity for approximately 600,000 barrels of oil to meet a demand of approximately 50,000 barrels per day, on a plot with an approximate surface area of 8 hectares in Acolman, State of Mexico.

For additional information please contact Cuatrecasas.

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