

ผนวก ง.

กฎหมายแม่แบบของคณะกรรมการกฎหมายการค้าระหว่างประเทศแห่งสหประชาชาติ  
ว่าด้วยการเข้าร่วมงานของเอกชนในการพัฒนาโครงการสาธารณูปโภค  
ที่มีลักษณะเป็นโครงสร้างพื้นฐานของรัฐ

ผู้เขียนได้นำ UNCITRAL Model Legislative Provisions on Privately Financed  
Infrastructure Projects เฉพาะในส่วนที่เกี่ยวข้องมาแสดงไว้ใน ผนวก ง. เพื่อเป็นข้อมูลประกอบ  
วิทยานิพนธ์นี้

# **UNCITRAL**

## **Model Legislative Provisions on Privately Financed Infrastructure Projects**

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### III. Contents and implementation of the concession contract

#### **Model provision 28. Contents and implementation of the concession contract (see the *Legislative Guide*, recommendation 40 and chap. IV, paras. 1-11)**

The concession contract shall provide for such matters as the parties deem appropriate,<sup>37</sup> such as:

(a) The nature and scope of works to be performed and services to be provided by the concessionaire (see chap. IV, para. 1);

(b) The conditions for provision of those services and the extent of exclusivity, if any, of the concessionaire's rights under the concession contract (see recommendation 5);

(c) The assistance that the contracting authority may provide to the concessionaire in obtaining licences and permits to the extent necessary for the implementation of the infrastructure project;

(d) Any requirements relating to the establishment and minimum capital of a legal entity incorporated in accordance with model provision 30 (see recommendations 42 and 43 and model provision 30);

(e) The ownership of assets related to the project and the obligations of the parties, as appropriate, concerning the acquisition of the project site and any necessary easements, in accordance with model provisions 31 to 33 (see recommendations 44 and 45 and model provisions 31-33);

(f) The remuneration of the concessionaire, whether consisting of tariffs or fees for the use of the facility or the provision of services; the methods and formulas for the establishment or adjustment of any such tariffs or fees; and payments, if any, that may be made by the contracting authority or other public authority (see recommendations 46 and 48);

(g) Procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final inspection, approval and acceptance of the infrastructure facility (see recommendation 52);

(h) The extent of the concessionaire's obligations to ensure, as appropriate, the modification of the service so as to meet the actual demand for the service, its continuity and its provision under essentially the same conditions for all users (see recommendation 53 and model provision 38);

(i) The contracting authority's or other public authority's right to monitor the works to be performed and services to be provided by the concessionaire and the conditions and extent to which the contracting authority or a regulatory agency may order variations in respect of the works and conditions of service or take such other reasonable actions as they may find appropriate to ensure that the infrastructure facility is properly operated and the

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<sup>37</sup>Enacting States may wish to note that the inclusion in the concession contract of provisions dealing with some of the matters listed in this model provision is mandatory pursuant to other model provisions.

services are provided in accordance with the applicable legal and contractual requirements (see recommendations 52 and 54, subpara. (b));

(j) The extent of the concessionaire's obligation to provide the contracting authority or a regulatory agency, as appropriate, with reports and other information on its operations (see recommendation 54, subpara. (a));

(k) Mechanisms to deal with additional costs and other consequences that might result from any order issued by the contracting authority or another public authority in connection with subparagraphs (h) and (i) above, including any compensation to which the concessionaire might be entitled (see chap. IV, paras. 73-76);

(l) Any rights of the contracting authority to review and approve major contracts to be entered into by the concessionaire, in particular with the concessionaire's own shareholders or other affiliated persons (see recommendation 56);

(m) Guarantees of performance to be provided and insurance policies to be maintained by the concessionaire in connection with the implementation of the infrastructure project (see recommendation 58, subparas. (a) and (b));

(n) Remedies available in the event of default of either party (see recommendation 58, subpara. (e));

(o) The extent to which either party may be exempt from liability for failure or delay in complying with any obligation under the concession contract owing to circumstances beyond its reasonable control (see recommendation 58, subpara. (d));

(p) The duration of the concession contract and the rights and obligations of the parties upon its expiry or termination (see recommendation 61);

(q) The manner for calculating compensation pursuant to model provision 47 (see recommendation 67);

(r) The governing law and the mechanisms for the settlement of disputes that may arise between the contracting authority and the concessionaire (see recommendation 69 and model provisions 29 and 49);

(s) The rights and obligations of the parties with respect to confidential information (see model provision 24).

### **Model provision 29. Governing law (see the *Legislative Guide*, recommendation 41 and chap. IV, paras. 5-8)**

The concession contract is governed by the law of [the enacting State] unless otherwise provided in the concession contract.<sup>38</sup>

<sup>38</sup>Legal systems provide varying answers to the question as to whether the parties to a concession contract may choose as the governing law of the contract a law other than the laws of the host country. Furthermore, as discussed in the *Legislative Guide* (see chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 5-8), in some countries the concession contract may be subject to administrative law, while in others the concession contract may be governed by private law (see also the *Legislative Guide*, chap. VII, "Other relevant areas of law", paras. 24-27). The governing law also includes legal rules of other fields of law that apply to the various issues that arise during the implementation of an infrastructure project (see generally the *Legislative Guide*, chap. VII, "Other relevant areas of law", sect. B).

**Model provision 30. Organization of the concessionaire (see the *Legislative Guide*, recommendations 42 and 43 and chap. IV, paras. 12-18)**

The contracting authority may require that the successful bidder establish a legal entity incorporated under the laws of [the enacting State], provided that a statement to that effect was made in the pre-selection documents or in the request for proposals, as appropriate. Any requirement relating to the minimum capital of such a legal entity and the procedures for obtaining the approval of the contracting authority to its statute and by-laws and significant changes therein shall be set forth in the concession contract consistent with the terms of the request for proposals.

**Model provision 31. Ownership of assets<sup>39</sup> (see the *Legislative Guide*, recommendation 44 and chap. IV, paras. 20-26)**

The concession contract shall specify, as appropriate, which assets are or shall be public property and which assets are or shall be the private property of the concessionaire. The concession contract shall in particular identify which assets belong to the following categories:

- (a) Assets, if any, that the concessionaire is required to return or transfer to the contracting authority or to another entity indicated by the contracting authority in accordance with the terms of the concession contract;
- (b) Assets, if any, that the contracting authority, at its option, may purchase from the concessionaire; and
- (c) Assets, if any, that the concessionaire may retain or dispose of upon expiry or termination of the concession contract.

**Model provision 32. Acquisition of rights related to the project site (see the *Legislative Guide*, recommendation 45 and chap. IV, paras. 27-29)**

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire

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<sup>39</sup>Private sector participation in infrastructure projects may be devised in a variety of different forms, ranging from publicly owned and operated infrastructure to fully privatized projects (see the *Legislative Guide*, “Introduction and background information on privately financed infrastructure projects”, paras. 47-53). Those general policy options typically determine the legislative approach for ownership of project-related assets (see the *Legislative Guide*, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 20-26). Irrespective of the host country’s general or sectoral policy, the ownership regime of the various assets involved should be clearly defined and based on sufficient legislative authority. Clarity in this respect is important, as it will directly affect the concessionaire’s ability to create security interests in project assets for the purpose of raising financing for the project (see the *Legislative Guide*, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 52-61). Consistent with the flexible approach taken by various legal systems, the model provision does not contemplate an unqualified transfer of all assets to the contracting authority but allows a distinction between assets that must be transferred to the contracting authority, assets that may be purchased by the contracting authority, at its option, and assets that remain the private property of the concessionaire, upon expiry or termination of the concession contract or at any other time.

or, as appropriate, shall assist the concessionaire in obtaining such rights related to the project site, including title thereto, as may be necessary for the implementation of the project.

2. Any compulsory acquisition of land that may be required for the implementation of the project shall be carried out in accordance with [*the enacting State indicates the provisions of its laws that govern compulsory acquisition of private property by public authorities for reasons of public interest*].

**Model provision 33. Easements<sup>40</sup> (see the *Legislative Guide*, recommendation 45 and chap. IV, para. 30)**

**Variant A**

1. The contracting authority or other public authority under the terms of the law and the concession contract shall make available to the concessionaire or, as appropriate, shall assist the concessionaire to enjoy the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

**Variant B**

1. The concessionaire shall have the right to enter upon, transit through or do work or fix installations upon property of third parties, as appropriate and required for the implementation of the project in accordance with [*the enacting State indicates the provisions of its laws that govern easements and other similar rights enjoyed by public utility companies and infrastructure operators under its laws*].

2. Any easements that may be required for the implementation of the project shall be created in accordance with [*the enacting State indicates the provisions of its laws that govern the creation of easements for reasons of public interest*].

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<sup>40</sup>The right to transit on or through adjacent property for project-related purposes or to do work on such property may be acquired by the concessionaire directly or may be compulsorily acquired by a public authority simultaneously with the project site. A somewhat different alternative, which is reflected in variant B, might be for the law itself to empower public service providers to enter, pass through or do work or fix installations upon the property of third parties, as required for the construction, operation and maintenance of public infrastructure (see the *Legislative Guide*, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 30-32).



**Model provision 34. Financial arrangements (see the *Legislative Guide*, recommendations 46, 47 and 48 and chap. IV, paras. 33-51)**

1. The concessionaire shall have the right to charge, receive or collect tariffs or fees for the use of the facility or its services in accordance with the concession contract, which shall provide for methods and formulas for the establishment and adjustment of those tariffs or fees [*in accordance with the rules established by the competent regulatory agency*].<sup>41</sup>

2. The contracting authority shall have the power to agree to make direct payments to the concessionaire as a substitute for, or in addition to, tariffs or fees for the use of the facility or its services.

**Model provision 35. Security interests (see the *Legislative Guide*, recommendation 49 and chap. IV, paras. 52-61)**

1. Subject to any restriction that may be contained in the concession contract,<sup>42</sup> the concessionaire has the right to create security interests over any of its assets, rights or interests, including those relating to the infrastructure project, as required to secure any financing needed for the project, including, in particular, the following:

(a) Security over movable or immovable property owned by the concessionaire or its interests in project assets;

(b) A pledge of the proceeds of, and receivables owed to the concessionaire for, the use of the facility or the services it provides.

2. The shareholders of the concessionaire shall have the right to pledge or create any other security interest in their shares in the concessionaire.

3. No security under paragraph 1 may be created over public property or other property, assets or rights needed for the provision of a public service, where the creation of such security is prohibited by the law of [*the enacting State*].

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<sup>41</sup>Tolls, fees, prices or other charges accruing to the concessionaire, which are referred to in the *Legislative Guide* as “tariffs”, may be the main (sometimes even the sole) source of revenue to recover the investment made in the project in the absence of subsidies or payments by the contracting authority or other public authorities (see the *Legislative Guide*, chap. II, “Project risks and government support”, paras. 30-60). The cost at which public services are provided is typically an element of the Government’s infrastructure policy and a matter of immediate concern for large sections of the public. Thus, the regulatory framework for the provision of public services in many countries includes special tariff-control rules. Furthermore, statutory provisions or general rules of law in some legal systems establish parameters for pricing goods or services, for instance by requiring that charges meet certain standards of “reasonableness”, “fairness” or “equity” (see the *Legislative Guide*, chap. IV, “Construction and operation of infrastructure: legislative framework and project agreement”, paras. 36-46).

<sup>42</sup>These restrictions may, in particular, concern the enforcement of the rights or interests relating to assets of the infrastructure project.

**Model provision 36. Assignment of the concession contract (see the *Legislative Guide*, recommendation 50 and chap. IV, paras. 62 and 63)**

Except as otherwise provided in model provision 35, the rights and obligations of the concessionaire under the concession contract may not be assigned to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which the contracting authority shall give its consent to an assignment of the rights and obligations of the concessionaire under the concession contract, including the acceptance by the new concessionaire of all obligations thereunder and evidence of the new concessionaire's technical and financial capability as necessary for providing the service.

**Model provision 37. Transfer of controlling interest<sup>43</sup> in the concessionaire (see the *Legislative Guide*, recommendation 51 and chap. IV, paras. 64-68)**

Except as otherwise provided in the concession contract, a controlling interest in the concessionaire may not be transferred to third parties without the consent of the contracting authority. The concession contract shall set forth the conditions under which consent of the contracting authority shall be given.

**Model provision 38. Operation of infrastructure (see the *Legislative Guide*, recommendation 53 and chap. IV, paras. 80-93 (for para. 1) and recommendation 55 and chap. IV, paras. 96 and 97 (for para. 2))**

1. The concession contract shall set forth, as appropriate, the extent of the concessionaire's obligations to ensure:

- (a) The modification of the service so as to meet the demand for the service;
- (b) The continuity of the service;
- (c) The provision of the service under essentially the same conditions for all users;
- (d) The non-discriminatory access, as appropriate, of other service providers to any public infrastructure network operated by the concessionaire.

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<sup>43</sup>The notion of "controlling interest" generally refers to the power to appoint the management of a corporation and influence or determine its business. Different criteria may be used in various legal systems or even in different bodies of law within the same legal system, ranging from formal criteria attributing a controlling interest to the ownership of a certain amount (typically more than 50 per cent) of the total combined voting power of all classes of stock of a corporation to more complex criteria that take into account the actual management structure of a corporation. Enacting States that do not have a statutory definition of "controlling interest" may need to define the term in regulations issued to implement the model provision.



2. The concessionaire shall have the right to issue and enforce rules governing the use of the facility, subject to the approval of the contracting authority or a regulatory body.

**Model provision 39. Compensation for specific changes in legislation (see the *Legislative Guide*, recommendation 58, subpara. (c), and chap. IV, paras. 122-125)**

The concession contract shall set forth the extent to which the concessionaire is entitled to compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of changes in legislation or regulations specifically applicable to the infrastructure facility or the services it provides.

**Model provision 40. Revision of the concession contract (see the *Legislative Guide*, recommendation 58, subpara. (c), and chap. IV, paras. 126-130)**

1. Without prejudice to model provision 39, the concession contract shall further set forth the extent to which the concessionaire is entitled to a revision of the concession contract with a view to providing compensation in the event that the cost of the concessionaire's performance of the concession contract has substantially increased or that the value that the concessionaire receives for such performance has substantially diminished, as compared with the costs and the value of performance originally foreseen, as a result of:

- (a) Changes in economic or financial conditions; or
- (b) Changes in legislation or regulations not specifically applicable to the infrastructure facility or the services it provides;

provided that the economic, financial, legislative or regulatory changes:

- (a) Occur after the conclusion of the contract;
- (b) Are beyond the control of the concessionaire; and
- (c) Are of such a nature that the concessionaire could not reasonably be expected to have taken them into account at the time the concession contract was negotiated or to have avoided or overcome their consequences.

2. The concession contract shall establish procedures for revising the terms of the concession contract following the occurrence of any such changes.

**Model provision 41. Takeover of an infrastructure project by the contracting authority (see the *Legislative Guide*, recommendation 59 and chap. IV, paras. 143-146)**

Under the circumstances set forth in the concession contract, the contracting authority has the right to temporarily take over the operation of the facility for the purpose of ensuring the effective and uninterrupted delivery of the service in the event of serious failure by the concessionaire to perform its obligations and to rectify the breach within a reasonable period of time after having been given notice by the contracting authority to do so.

**Model provision 42. Substitution of the concessionaire (see the *Legislative Guide*, recommendation 60 and chap. IV, paras. 147-150)**

The contracting authority may agree with the entities extending financing for an infrastructure project and the concessionaire to provide for the substitution of the concessionaire by a new entity or person appointed to perform under the existing concession contract upon serious breach by the concessionaire or other events that could otherwise justify the termination of the concession contract or other similar circumstances.<sup>44</sup>

## **IV. Duration, extension and termination of the concession contract**

### *1. Duration and extension of the concession contract*

**Model provision 43. Duration and extension of the concession contract (see the *Legislative Guide*, recommendation 62 and chap. V, paras. 2-8)**

The duration of the concession shall be set forth in the concession contract. The contracting authority may not agree to extend its duration except as a result of the following circumstances:

- (a) Delay in completion or interruption of operation due to circumstances beyond the reasonable control of either party;
- (b) Project suspension brought about by acts of the contracting authority or other public authorities;

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<sup>44</sup>The substitution of the concessionaire by another entity, proposed by the lenders and accepted by the contracting authority under the terms agreed by them, is intended to give the parties an opportunity to avert the disruptive consequences of termination of the concession contract (see the *Legislative Guide*, chap. IV, "Construction and operation of infrastructure: legislative framework and project agreement", paras. 147-150). The parties may wish first to resort to other practical measures, possibly in a successive fashion, such as temporary takeover of the project by the lenders or by a temporary administrator appointed by them, or enforcement of the lenders' security over the shares of the concessionaire company by selling those shares to a third party acceptable to the contracting authority.

(c) Increase in costs arising from requirements of the contracting authority not originally foreseen in the concession contract, if the concessionaire would not be able to recover such costs without such extension; or

(d) [Other circumstances, as specified by the enacting State].<sup>45</sup>

## 2. Termination of the concession contract

**Model provision 44. Termination of the concession contract by the contracting authority (see the *Legislative Guide*, recommendation 63 and chap. V, paras. 14-27)**

The contracting authority may terminate the concession contract:

(a) In the event that it can no longer be reasonably expected that the concessionaire will be able or willing to perform its obligations, owing to insolvency, serious breach or otherwise;

(b) For compelling<sup>46</sup> reasons of public interest, subject to payment of compensation to the concessionaire, the terms of the compensation to be as agreed in the concession contract;

(c) [Other circumstances that the enacting State might wish to add].

**Model provision 45. Termination of the concession contract by the concessionaire (see the *Legislative Guide*, recommendation 64 and chap. V, paras. 28-33)**

The concessionaire may not terminate the concession contract except under the following circumstances:

(a) In the event of serious breach by the contracting authority or other public authority of its obligations in connection with the concession contract;

(b) If the conditions for a revision of the concession contract under model provision 40, paragraph 1, are met, but the parties have failed to agree on a revision of the concession contract; or

(c) If the cost of the concessionaire's performance of the concession contract has substantially increased or the value that the concessionaire receives for such performance has substantially diminished as a result of acts or omissions of the contracting authority or other public authorities, for instance, pursuant to model provision 28, subparagraphs (h) and (i), and the parties have failed to agree on a revision of the concession contract.

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<sup>45</sup>The enacting State may wish to consider the possibility of having the law authorize a consensual extension of the concession contract pursuant to its terms, for reasons of public interest, as justified in the record to be kept by the contracting authority pursuant to model provision 26.

<sup>46</sup>Possible situations constituting a compelling reason of public interest are discussed in the *Legislative Guide*, chap. V, "Duration, extension and termination of the project agreement", para. 27.

**Model provision 46. Termination of the concession contract by either party (see the *Legislative Guide*, recommendation 65 and chap. V, paras. 34 and 35)**

Either party shall have the right to terminate the concession contract in the event that the performance of its obligations is rendered impossible by circumstances beyond either party's reasonable control. The parties shall also have the right to terminate the concession contract by mutual consent.

**3. *Arrangements upon termination or expiry of the concession contract***

**Model provision 47. Compensation upon termination of the concession contract (see the *Legislative Guide*, recommendation 67 and chap. V, paras. 43-49)**

The concession contract shall stipulate how compensation due to either party is calculated in the event of termination of the concession contract, providing, where appropriate, for compensation for the fair value of works performed under the concession contract, costs incurred or losses sustained by either party, including, as appropriate, lost profits.

**Model provision 48. Wind-up and transfer measures (see the *Legislative Guide*, recommendation 66 and chap. V, paras. 37-42 (for subpara. (a)) and recommendation 68 and chap. V, paras. 50-62 (for subparas. (b)-(d))**

The concession contract shall provide, as appropriate, for:

(a) Mechanisms and procedures for the transfer of assets to the contracting authority;

(b) The compensation to which the concessionaire may be entitled in respect of assets transferred to the contracting authority or to a new concessionaire or purchased by the contracting authority;

(c) The transfer of technology required for the operation of the facility;

(d) The training of the contracting authority's personnel or of a successor concessionaire in the operation and maintenance of the facility;

(e) The provision, by the concessionaire, of continuing support services and resources, including the supply of spare parts, if required, for a reasonable period after the transfer of the facility to the contracting authority or to a successor concessionaire.

## V. Settlement of disputes

**Model provision 49. Disputes between the contracting authority and the concessionaire (see the *Legislative Guide*, recommendation 69 and chap. VI, paras. 3-41)**

Any disputes between the contracting authority and the concessionaire shall be settled through the dispute settlement mechanisms agreed by the parties in the concession contract.<sup>47</sup>

**Model provision 50. Disputes involving customers or users of the infrastructure facility (see the *Legislative Guide*, recommendation 71 and chap. VI, paras. 43-45)**

Where the concessionaire provides services to the public or operates infrastructure facilities accessible to the public, the contracting authority may require the concessionaire to establish simplified and efficient mechanisms for handling claims submitted by its customers or users of the infrastructure facility.

**Model provision 51. Other disputes (see the *Legislative Guide*, recommendation 70 and chap. VI, para. 42)**

1. The concessionaire and its shareholders shall be free to choose the appropriate mechanisms for settling disputes among themselves.

2. The concessionaire shall be free to agree on the appropriate mechanisms for settling disputes between itself and its lenders, contractors, suppliers and other business partners.

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<sup>47</sup>The enacting State may provide in its legislation dispute settlement mechanisms that are best suited to the needs of privately financed infrastructure projects.



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