



Aerial view of large highway in the city of Mendoza, Argentina. Credit: SobrevolandPatagoni/Adobe Stock

Regulatory changes in Argentina that promote infrastructure investment

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Jorge Ignacio Muratorio and Ana Belén Micciarelli, partners at O'Farrell, review the main amendments recently approved to the public works concession law in Argentina, which are intended to encourage domestic and foreign investment in public works and infrastructure.

Introduction

As from the enactment of the Law 'Bases of and Starting Points for the Freedom of Argentines' (Law No 27,742, *Official Gazette* 8 July 2024, hereinafter 'Bases

Law'), significant modifications have been introduced in the public works concession contract to generate the necessary conditions to encourage both domestic and foreign investments in public works and infrastructure.

Legislative amendments that promote investment in public works and infrastructure

Until now, the referred ‘public works concession’ (Law 17,520) was used for the construction, maintenance or operation of public works (roads, airports, ports, bus or railroad stations, among others), which are paid for by charging fees or tolls to their users – or other remunerations – during the time of their operation, which is necessary to amortise the investment made and obtain a profit.

By means of this figure – then with the reforms incorporated on the occasion of the State Reform Law, No 23,696 of 1989 – bridges and interprovincial tunnels were built, as well as Buenos Aires’ main long distance bus station; the city’s highway network was privatised; the national airport system was given in concession; the beaconing and signalling of the fluvial corridor of the Hydrovia was privatised, and so on.

Currently, the Bases Law has broadened the scope of the figure so that the concession becomes a concession of public works, public infrastructure and public services in favour of private companies, which allow its construction, conservation or operation. It is admitted that a ‘specific purpose company’ is constituted, which must be constituted as a corporation.

The distinction between ‘public work’ and ‘public infrastructure’ is that ‘public work’ refers to any movable or immovable thing of artificial construction (man-made), owned by the state and used for general utility purposes (hospitals, schools, etc) while ‘public infrastructure’ refers to an asset that serves as ‘support’ for an activity or service (public service or service of general interest): the distribution of drinking water, gas distribution (gas pipeline), electricity distribution and oil pipelines, among others. Public works are state-owned; public infrastructure can be publicly or privately owned (eg, telecommunications networks).

It is possible to grant concessions for the operation, administration, repair, expansion, conservation or maintenance of existing works, with the purpose of obtaining funds for the construction or conservation of other works that are physically, technically or otherwise related to the former. Thus, funds may be obtained from the operation of a concessioned route to remodel another route connected to it.

Individuals may access the concession of public works or infrastructure through the national or international public bidding procedure. In the latter case, it is accepted that those who have their main business headquarters abroad and do not have a branch office in the country may apply as bidders; at the same time, the call for bids must be made on international websites.

The regime provides that, during the term of the public works or infrastructure concession contract, the maintenance of the ‘balance of the economic-financial equation’ taken into account at the time of its execution must be guaranteed. The maintenance of the contractual balance is essential for the contract to be fulfilled and integrates the contractor’s property rights (Article 17 of the National Constitution and Article 965 of the National Civil and Commercial Code).

It is not a question of profitability, but rather the relationship between costs and benefits assumed, which allows a reasonable profit to be obtained

The ‘balance of the economic-financial equation’ can be defined as the situation of proportionality between the reciprocal benefits established by the parties at the time of entering into the contractual relationship. It is not a question of ensuring a specific profitability, but rather the relationship between costs and benefits assumed, which allows a reasonable profit to be obtained.¹ In practice, the economic-financial equation of the contract may be altered as a consequence of abnormal risks external to the parties or originated by the direct or indirect intervention of the state in the execution of the contract. For example, indirect intervention is configured through the enactment of new regulations (tax, import requirements, etc) that have an impact on the economic equation of the contract. In Argentina, a key distorting factor has been inflation.²

We describe below the main provisions established in the rules for the concession of public works or infrastructure that will make it possible to show the protection of the investment.

As regards the term of the concession, works or infrastructure concessions may be granted as follows:

- *Fixed term*: for which the estimated time required for the amortisation of the capital invested by the concessionaire,

the payment of financial services, the recovery of maintenance, conservation, administration and operation expenses of the works or infrastructure and the concessionaire's profit will be taken into consideration.

- *Variable term:* sometimes it is not possible to establish with a sufficient degree of approximation the volume of traffic or users of the works or infrastructure under concession. In these cases, the term will depend on the demand for the works or infrastructure effectively configured, regardless of the estimate and market studies carried out for the bidding process. The retribution in favour of the private parties will be through the collection of tariffs, tolls or remuneration, which may be charged to the users, third parties or the state, and which may be revised, according to the procedure established in the contract, to preserve the economic-financial equation of the contract. Minimum revenue guarantees may even be established (this method was used in the public works concession of the highways of Buenos Aires).

It is specified that in cases of termination of the contract for reasons of public interest, no rule establishing a limitation of liability in favour of the Public Administration shall be applicable

It is foreseen that the contracts will include clauses to guarantee the concessionaire's income with speed and certainty of payment³ to preserve the balance of the economic-financial equation.

In turn, the regime also establishes that the national state will be released only if the concessionaire receives the amounts committed in the agreed currency.

In each case, the conditions under which the concessionaire may raise the exception of breach of contract – *exceptio non adimpleti contractus* – must be established. For such purposes, it is foreseen that, in each case, it will be established which are the breaches of the grantor that affect the timely payment of the price or remuneration of the concessionaire. Until now, this exception was considered to be of very restrictive application in contracts with the state.

In some cases the concession will be 'free' to the concessionaire, while in other cases the concessionaire may be required to make a specified contribution to the state.

Among the benefits to individuals, it is foreseen that deductions may be established in the income tax balance to be paid by the investments of the concessionary companies.

The well-known 'prerogatives of the Public Administration', such as the right to modify the contract and terminate it for reasons of timeliness and illegitimacy, typical of public contracts, are attenuated. Thus, for example, it is provided that the bidding documents and the contract must foresee the grounds for termination of the contractual relationship, and must contemplate the compensation in cases of early termination, its scope and method of determination and payment. It is specified that in cases of termination of the contract for reasons of public interest, no rule establishing a limitation of liability in favour of the Public Administration shall be applicable. In other words, full indemnity is established.

Loss of profit is recognised in the event of unilateral early termination through no fault of the concessionaire.

The total or partial assignment of the contract to a third party is allowed, provided that the third party meets similar requirements as the assignor and at least 20 per cent of the original term of the contract or of the committed investment has elapsed, whichever occurs earlier. Likewise, the acceptance of the financiers, guarantors, sureties and guarantors, and the authorisation of the administration must be obtained.

It is foreseen that in the event that the economic-financial equation of the contract is broken, it must be renegotiated in order to achieve its recomposition, which may include:

- modification of the term;
- modification of the tariff;
- deferral, suspension or suppression of investments;
- authorisation to carry out new complementary or collateral operations to obtain additional income;
- direct economic compensation through funds from the National Treasury; and
- combination of the alternatives denounced or others that may be compatible according to the characteristics of the contract.

The regulation of the renegotiation of the contractual equation is a significant contribution to the legal security of the contract, since renegotiation is usual in long-term contracts exposed to multiple contingencies: if it is not foreseen, it may lead to administrative inactivity or arbitrariness.

The renegotiation must be carried out within 12 months of the occurrence of the cause of the imbalance in the economic-financial equation. In Argentina, there have been cases of contractual renegotiations that, due to regulatory changes and various deferrals, exceeded half of the originally foreseen contractual term.

In cases of force majeure or actions of the administration that result in a substantial breach of the economy of the concession contract, the possibility of extension for the same term of the initial concession is provided for, and that, in those cases in which the force majeure does not absolutely prevent the execution of the work or the continuity of its exploitation, the administration will ensure the minimum income agreed in the contract. This provision is important to avoid the questioning of the granting of an extension that allows repairing the affectation of a contract, as opposed to the requirement of a new bidding process. The administration is now also allowed, in order to repair the damaged equation, to ensure the minimum income agreed in the contract.

With regard to conflict resolution mechanisms, it is established that all contracts may provide for dispute prevention and resolution mechanisms, conciliation and/or arbitration: an essential aspect that provides an alternative that may be more effective than the systems of exhaustion of administrative procedures and subsequent judicial proceedings.⁴

Thus, discrepancies of a technical or economic nature that arise between the parties during the execution of the concession contract may be submitted to a technical panel or arbitration tribunal at the request of either party, and a suitable response may be obtained with the speed required for the execution of the contract.

The technical panels are made up of independent and impartial professionals of proven competence and experience in the field. These bodies will be competent to intervene, compose and resolve disputes of a technical, contract interpretation and economic or patrimonial nature that may arise during its execution or termination, applying for such purpose criteria of speed and efficiency in the processing of conflicts that are compatible with the execution times of the contracts. Such panels were already provided for in the Public-Private Participation Contracts Law No 27,328 (2016) and also

appear in Argentina in contracting financed by multilateral credit agencies.

In the event of opting for arbitration with extension of jurisdiction, the respective arbitration clause must be included, which shall be expressly approved by the President or the agency of the public administration to which the President delegates such authority, and immediately reported to the Honourable Congress of Argentina.

An interesting aspect is that private individuals may propose private initiatives for the execution of public works and infrastructure, provided that the financing is private. This allows individuals to bring feasible and innovative proposals to the state and to fight for their realisation.

Epilogue

The reforms introduced by the Bases Law tend to encourage the intervention of the private sector in the proposal, financing and execution of public works and infrastructure.

In this sense, it is positive that greater legal security and investment protection has been provided, safeguarding the maintenance of the economic-financial equation of the contract and private initiative, while introducing alternative dispute resolution mechanisms (technical panels and arbitration).

It is expected that a large number of works and infrastructure in the areas of energy, mining, telecommunications, transportation, etc, will be carried out for the benefit of the country and for the development and progress of its inhabitants.

Notes

- 1 Jorge I Muratorio, 'The Public Interest in Guaranteeing the Public Contractual Equation' (2023) 148 *Administrative Law Review*, 20.
- 2 Jorge I Muratorio, 'Impact of Inflation on Public Procurement' (2022) *E La Ley*, 264.
- 3 Jorge I Muratorio, 'Payment Terms in Public Procurement' (2021) *Administrative Law Review*, digital citation: ED-MMLXXX-183.
- 4 Jorge I Muratorio, 'Public Contract Dispute Resolution Systems. Necessary Changes' (2023) *La Ley*, digital citation: TR LALEY AR/DOC/2785/2023.

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