

Legal Aspects of Drafting Concession Agreement For PPP



PIYUSH JOSHI
PARTNER
CLARUS LAW ASSOCIATES

Approach To A Concession Agr.



- Main purpose is of vesting of rights, establishing the framework for project implementation and risk allocation.
- The nature of rights that can be vested and the framework that can be created depends and varies with applicable law governing a sector.
- The first step to drafting CA is a review of the applicable laws for the sector (and if it is a state subject then the applicable laws of the relevant state)

Basis For Concession Agrs.



- Under the Constitution executive power is co-extensive with legislative power and limited only by statutory law, rules and regulation.
- In absence of any specific limitations imposed by law or rules or regulations, an executive authority can execute concession agreements as an exercise of executive power
- Executive Power would have to be exercised in accordance with the Constitution (Art. 14, Art. 21)

Understanding Concession Agreements



- ▣ Providing the Contractual Framework for the Implementation of the Project by Private Entity.

- ▣ Divided broadly into: (i) Preamble; (ii) Definitions; (iii) Grant of Concession; (iv) Conditions Precedent (v) Obligations and Undertakings; (vi) Project Development and Operation Framework; (vii) Financial Aspects (Tolling; User Fee; Concession Fee); (viii) Generally Applicable Provisions (Force Majeure, Indemnity, Insurance, Assignment, Dispute Resolution, Miscellaneous Provisions) and (ix) Term and Termination

Concession Agreement



- ▣ Preamble : Important in litigation to clarify intention of Parties. It is used as a tool for interpretation.
- ▣ Definitions: Have to be drafted and reviewed carefully. Private entities tend to either expand on rights or reduce obligations through definitions
- ▣ Project Definition/ Scope of Project
- ▣ Grant of Concession: Have to drafted after review of applicable statutes to the sector/project.

Concession Agreement



- Grant of Concession: Have to be able to vest sufficient rights for the implementation of the Project.
- Concession Agreements can be structured to enable project implementation within the existing statutory regime – however, success of projects would depend on bankability of the Project

Concession Agreement



- Usual rights vested: exclusive right to implement the Project and all necessary associated rights.
- Type of rights depend on nature/structure of project and applicable statutory provision
- Usual rights vested relate to develop, design, engineer, finance, procure, construct, operate and maintain the Project.

Concession Agreements



- Right to collect user fee : nature of right that can be vested depends on applicable law. In certain sectors determination of tariff is subject to regulatory approval. In absence of statutory regulation relating to determination of tariff, the concession agreement provides for regulation and manner of determination. General right provided is to levy, collect, retain and appropriate user fee/toll/charges.

Concession Agreements



- **Conditions Precedents:** Depend on status of project. Reflect the nature of risks parties have identified as needing to be mitigated prior to costs can be incurred on the Project or prior to obligations becoming effective.
- **Usual conditions precedents:** (i) land for site being provided; (ii) obtaining necessary permissions to commence construction; (iii) providing any required performance security.

Concession Agreements



- Obligations of Concessionaire cover all aspects of project implementation : making applications for approvals, ensure financing of the Project/financial closure, reporting requirements, ensure adequate design of project facilities to meet specified parameters, ensure construction and operation of Project to certain specified parameters

Concession Agreements



- **Revenue Sharing:** A revenue share for the authority granting the concession is also provided in certain projects. Wherever revenue sharing is stipulated, concession agreement needs to provide clear framework for revenue sharing : maintenance of accounts, records, audit rights and regular reporting. Just a statement of revenue sharing would not be sufficient.

Concession Agreements



- Lender's rights: Lender's interest is to ensure that the project continues to be implemented and generates revenues. In order to protect lender's interest in a default/termination scenario the right to substitute Concessionaire in the event of default is provided to the lenders.

Concession Agreements



▣ Default & Termination

- Termination needs to be structured to be event of last recourse.
- At the same time it must provide effective protection of interests of relevant authority/public to remove a non-performing
- Relevant cure period for specific events of default provided
- Framework for allowing lenders to exercise Substitute Rights to be provided
- Termination triggered only after lender's fail to exercise substitution rights

Concession Agreements



Termination Payments

- Provided for enabling bankability of a project
- Provides mitigation against arbitrary action.
- Termination Payment different for Natural FM event, Political FM, Termination for Concessionaire Event of Default, Termination for Granting Authority/Government event of default. Highest compensation provided only for termination for Granting Authority event of default.

Concession Agreements



- **Consequences of Termination**
 - If facility is operational, important to ensure continued operations of the facility
 - Transfer and takeover of facility
 - Audit of condition of facility to ensure it meets the specifications of the concession agreement