
THE
PROJECTS AND
CONSTRUCTION
REVIEW

FIFTH EDITION

EDITOR
JÚLIO CÉSAR BUENO

LAW BUSINESS RESEARCH

THE PROJECTS AND CONSTRUCTION REVIEW

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THE PROJECTS AND CONSTRUCTION REVIEW

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EDITOR'S PREFACE

La meilleure façon d'être actuel, disait mon frère Daniel Villey, est de résister et de réagir contre les vices de son époque. Michel Villey, Critique de la pensée juridique modern (Daloz (Paris), 1976).

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association (ICP), the Royal Institution of Chartered Surveyors (RICS), the Chartered Institute of Arbitrators (CIArb), the Society of Construction Law (SCL), the Dispute Resolution Board Foundation (DRBF) and the American Bar Association's Forum on the Construction Industry (ABA). Some important issues recently discussed during the annual meeting of the International Academy of Construction Lawyers (IACL) have also been included for a broader debate. All of these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues related to projects and construction law practice and I thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are relatively young, highly specialised areas of legal practice. They are intrinsically functional and pragmatic and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have contributions from three new jurisdictions in this year's edition: East Timor, Nigeria and Saudi Arabia. Although there is an increased perception that project financing and construction law are global issues, the local flavour offered by leading experts in 30 countries has shown us that to understand the world we must first make sense of what happens locally; to further advance our understanding of the law we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and their law firms who graciously agreed to participate.

Finally, I dedicate this fifth edition of *The Projects and Construction Review* to a non-lawyer, a non-engineer, but yet a most noble man: Ozias Bueno, my dearest father, whose tenderness, dedication and wisdom has given me nothing less than the desire to also be a model father to my own little son.

Júlio César Bueno

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Chapter 11

CHILE

Victor Ríos and Carlos Molina¹

I INTRODUCTION

In Chile, financing of a project depends largely on its payment structure. In public-private partnerships (PPPs) that are arranged as build-operate-transfer (BOT) projects, in which payments and income flows are postponed until the operation stage, the contractor must finance all of the works without receiving any income. Such projects are usually financed by 80 per cent debt and 20 per cent equity, with the participation of a syndicate of local banks, and sometimes international banks.

Bonds are also typically issued for BOT projects, and are more commonly used than other investment products. Such issuances require registration of the issuer and the investment project, in addition to the other steps required to place the bonds on the market.

Although bond issuances have been successfully used for public works concession projects, the financing for such projects is usually provided by direct credit from a syndicate of commercial banks, led by an agent bank that negotiates and coordinates the transaction.

The Chilean financial market is highly developed, and allows many types of structure, including derivatives and rate swaps to be used to finance projects.

Local projects often use advance payment structures for the purchase or contracting of supplies (or both). If no advance payment structure is in place, the contractor is usually paid an initial amount to cover costs during construction, with the balance of payment made on completion.

II THE YEAR IN REVIEW

Infrastructure in Chile during the past four years has been marked by some distinctive events, such as the 8.8 magnitude earthquake in 2010 and the rescue of 33 miners from

1 Victor Ríos and Carlos Molina are partners at Molina Ríos Abogados.

the San José mine in October of the same year. These events plus certain other particular circumstances – such as the election of Sebastián Piñera as the president of Chile, ending the 25-year run of socialist governments – allowed the establishment of new trends in the construction and projects markets in Chile. These events triggered an extensive review and update of anti-seismic building standards, and of legal regulations regarding safety in construction. They also permitted a review of the Chilean infrastructure budget and the redirection of resources in this arena.

Mr Piñera's government also relaunched the Chilean public concessions system (public-private partnership (PPP) transactions), particularly for the construction of hospitals, prisons and schools. Not long after taking office in March 2010, the former government announced that during its four-year term, new projects would be subject to public tender through the PPP system, and improvements to existing projects would be introduced, up to a total value of US\$8,000 billion, which represented almost a doubling of what has been invested in the area since the public works concessions system was first introduced in the early 1990s to improve infrastructure in the country.

In 2014, Chile reverted to a socialist government, led by Ms Michelle Bachelet, who had been president prior to Mr Piñera's term. The first year of this new government has been marked by two historic reforms, in the areas of taxation and education. In parallel with these reforms, the foundations have been established for the other structural reforms to be discussed in Congress during 2015: labour reforms, a new constitution and therapeutic abortion in three extreme cases (hazard presented to the life of the mother, non-viable labour and rape). Furthermore, also in prospect on the calendar is deepening educational reform (with regard to public education and the teaching plan), as well as the enhancement of the labour agenda and the announcement of counter-cyclical measures of an economic and social nature and in relation to public safety.

In this scenario, the situation is uncertain for investment in private productive infrastructure. This is especially evident given that a construction spend of around US\$11,000 million projected for 2015 in July 2014 decreased to just over US\$8,000 million three months later because of the exclusion of certain mining projects, energy-related rescheduling and a lack of momentum for new projects to renew the Chilean infrastructure portfolio. If this situation persists, it could affect such activity even beyond 2015. Currently, estimates are that, for the second consecutive year, private investment in infrastructure projects will contract, with a reduction of 0.9 per cent in 2015 so far. This situation also impacts the labour market; for example, by September 2014 construction employment had seen two consecutive quarters of decline, which meant sector unemployment of 10.5 per cent.

The setback in construction investment in 2014 is explained by a low annual increase in infrastructure investment (0.6 per cent) and a decrease in housing investment (-3.6 per cent) over 12 months. However, investment in public infrastructure may experience a significant increase, with 14.6 per cent projected for 2015, and which, if adopted, could partly offset the contractionary cycle affecting private investment in productive infrastructure. It has to be borne in mind that in 2015, thus far, the flow of investment in PPP projects amounts to US\$555 million, 8.6 per cent less than 2014 – a situation that could be effectively reversed if the PPP projects for the next 12 months are duly awarded.

III DOCUMENTS AND TRANSACTIONAL STRUCTURES

i Transactional structures

In local projects, the contractor normally tenders for the project with its suppliers and subcontractors in place (subject to the tender being awarded). Once the tender is awarded to it, the contractor then executes relevant contracts with those suppliers and subcontractors. Alternatively, two or more companies may tender for the contract together, as a consortium. If the tender is awarded to this consortium it then must form a special purpose vehicle (SPV).

In more complex projects, other types of procurement arrangements tend to be used. These are known as 'closed box' arrangements, such as BOT, engineering-procurement-construction and engineering-procurement-construction-management arrangements. Such projects usually require the participation of international builders and engineers, who contribute their expertise, and technical and economic abilities.

It is not unusual for international and local parties to submit joint tenders for construction projects. In local projects, the construction company normally contributes its expertise and sufficient funding to undertake the project. Sometimes, it does this with other companies by way of a joint venture, strategic alliance or other similar agreement, which regulates each of the participants, either as co-contractors or as a contractor with subcontractors. If local companies tender together, they tend to do so as a contractual consortium (as Chile does not have anything like the Spanish temporary contractual consortium – the UTE).

When the project is awarded, the consortium normally creates an SPV with the exclusive purpose of developing the project. The SPV contracts with the various partners in the project to undertake different parts of the work. The SPV normally has various management and decision-making committees to deal with technical and commercial matters. These committees are made up of representatives from all the parties in proportion to their participation and the degree of risk they have taken on. A manager is appointed to make day-to-day decisions and to represent the SPV in its dealings with the client and the consortium partners.

The client normally requires that the partners guarantee the undertakings of the SPV as joint and several guarantors or debtors. Before this is done, the partners usually agree among themselves that, notwithstanding their joint and several responsibility to the client, the partners will contribute to the payment of any liabilities in proportion to their participation in the consortium.

In terms of transaction structures and corporate vehicles, there are no real differences when the main parties are international contractors or consultants. International companies usually participate in the tender process where the project is complex or of a high value, often in conjunction with local companies by way of a contractual consortium. International companies tendering for public works do not need to register with the Ministry of Public Works (MOP). Once a project is awarded to an international company, it usually establishes an SPV or incorporates a local branch or agency.

ii Documentation

Projects finance transactions in Chile require the typical documentation used worldwide, such as shareholders' agreements, concession deeds, construction contracts, operation and management agreements, host country agreements, offtake agreements, supply agreements, mandate letters, term sheets, loan agreements and intercreditor agreements, among others.

iii Delivery methods and standard forms

Unlike other European or American jurisdictions, in Chile there is no institute or entity that publishes standard forms of contracts for use by the construction and infrastructure industries. In practice, however, contracts are highly standardised in relation to matters of content and essential clauses, and suppliers and subcontractors are accustomed to contracting on the basis of certain types of provisions. The industry tends to resist any substantive changes to contractual custom.

Note that public works contracts involving government agencies, and particularly the MOP, are entirely regulated by the law, and negotiation of contract clauses is not permitted.

Contracts used for international projects differ from those used for local projects in that international contracts tend to have more extensive, detailed provisions, in keeping with the common law custom. The contract usually intensively regulates the project and provides contractual solutions to all situations that might arise. Local contracts are based on the Spanish legal tradition and therefore tend to be much briefer; in the absence of express contractual regulations, the law provides solutions when problems arise.

In addition, contracts for international projects, unlike those for local projects, often include provisions that stipulate that disputes are to be resolved in foreign jurisdictions or by arbitration institutions located abroad. They often also include provisions that stipulate that the contract is to be governed by a foreign law.

Most international projects tend to use the standard FIDIC contract forms published by the International Federation of Consulting Engineers.

IV RISK ALLOCATION AND MANAGEMENT

i Management of risks

Risks typically allocated in Chile to the contractor relate to:

- a* variations in the cost of employees and labour, materials and supplies;
- b* conditions of the subsoil and excavations;
- c* interruptions to construction caused by actions or omissions of third parties, including those caused by government decisions;
- d* labour risks such as strikes rather than just the cost of labour as mentioned above;
- e* risks caused by differences in legal systems; and
- f* exchange rate risks.

Depending on the type of contract, design risks are also allocated to the contractor, or the contractor may automatically assume the design risks as it often designs the works itself.

Contractors mitigate the foregoing risks by:

- a* negotiating fixed price contracts with subcontractors, which transfers the risk to suppliers and subcontractors by the incorporation of adjustment mechanisms in relation to certain basic supplies, with corresponding guarantees that mirror the main contract;
- b* agreeing the contract price in Unidades de Fomento (the unit of account used in Chile), which means that the contract price is adjusted by reference to the consumer price index;
- c* entering into derivatives contracts or obtaining exchange rate insurance, where the contract price has been set in a foreign currency; and
- d* supervising the activities of subcontractors and its employees to avoid labour contingencies.

Those risks related to the subsoil are typically mitigated by technical documentation reflecting the degree of knowledge and information available at the time the contract is entered into, and the recording of any later discrepancy.

In addition, some of these risks may be mitigated by obtaining relevant insurance.

There are normally no important differences concerning risks between local and international contracts.

ii Limitation of liability

The contractor's liability may be limited or restricted depending on the type of contract, and on whether the owner assumed any initial liability, for example, if the owner provided:

- a* the land on which construction is to occur;
- b* environmental permits;
- c* the design of the works; and
- d* any basic supplies.

In these circumstances, the contractor's liability is excluded. In addition, the contractor is usually contractually released from liability for indirect or consequential damages and loss of profits. Limitations or exclusions of liability may be agreed and are completely enforceable.

Although some contracts include caps on liability, it is not usual to agree a cap on liability for any damages caused by the contractor directly. Limitations are usually only agreed regarding indirect damages.

Contracts do commonly agree to a limit on the amount of any fine that can be imposed for breach of contract. These are normally capped at 10 per cent of the total price of the contract. If the fine is established by the contract as the only penalty that can be applied, and the contract expressly excludes the option of bringing a claim for damages, this in effect limits the contractor's liability.

There are no differences between local and international contracts or between industry sectors in relation to the way caps on liability are agreed.

Force majeure exclusions are available and the courts will enforce such exclusions, particularly in cases such as where:

- a* acts by third parties affect the development of a project;
- b* *force majeure* events prevent the timely availability of the land for construction;

- c* interruptions occur as a result of acts by associations of producers who are affected by a project;
- d* electrical transmissions lines cannot be moved and this causes project delays; and
- e* natural disasters occur, such as earthquakes.

However, in many contracts the contractor expressly undertakes to bear risks related to force majeure.

iii Political risks

The Chilean economy has benefited from exceptionally sound management in recent decades. It has enjoyed growth rates well above those of the rest of Latin America over this period, while at the same time avoiding acute financial crises and instability. Chile has maintained low and stable inflation for the past several years.

Chile's credit rating remains the best in Latin America, ranked A for long-term foreign currency, A+ for long-term local currency and F1 for short-term foreign currency with a stable outlook. Since Chile first received an investment grade rating in 1992, domestic firms have raised funds abroad by borrowing, selling bonds and issuing stock.

Chile's high domestic savings rate (fostered in part by mandatory retirement contributions administered by private pension fund management firms) continues to reduce dependency on short-term foreign capital to finance investment.

The country's reliance on exports and its desire for market diversification have led it to seek opportunities to expand several current or potential markets. Chile joined the Asia Pacific Economic Cooperation organisation in 1994. It has signed bilateral trade agreements with a host of nations in various regions of the world, including NAFTA-like free trade agreements with Canada and Mexico, and a free trade agreement with the European Union. Chile became a member of the Organisation for Economic Co-operation and Development in 2010.

The state has very little representation and ownership in industries and businesses in Chile, and these are predominantly owned and controlled by private interests. The most important public corporation is CODELCO, the world's largest copper company, of which the government has indicated that it is not willing to sell its current ongoing operations, but it appears very open to establishing partnerships with private sector enterprises (both foreign or domestic) for the development of new mines.

The sectors in which prices are regulated and those are principally for utilities (electricity, telephones, fuels, water and sanitation). Other sectors are free and in practice prices are determined by the result of market forces acting according to the laws of supply and demand.

Political and economic rights are also underpinned by an independent judicial system that is currently being modernised to further expedite access to justice and to reduce trial times.

It has to be borne in mind that in 2015 the flow of investment in PPP projects may amount to US\$555 million.

V SECURITY AND COLLATERAL

The guarantees required for projects of a high value and technical complexity can include:

- a* pledges over the project's cash flows or future payments;
- b* a pledge over the shares of the contractor's company (the SPV);
- c* a pledge over the rights of the construction or concession agreement; and
- d* corporate guarantees by the sponsors of the project if they are necessary.

In addition, income paid to the debtor company usually goes into a series of bank accounts, and money can normally only be withdrawn with the prior approval of the financing entities. Funders may also take security over the debtor company's assets by way of a subordinated debt instrument.

In general, types of security required on foreign and local projects do not differ, although foreign construction companies normally require a guarantee from their parent company.

Contractual protections usually give the financing entities rights to supervise and undertake technical inspections of the work. These are usually done by engineering firms that act for the funders, which normally approve technical and financial plans for the works in advance, and check the quality of work as it is executed, as well as additional or extraordinary works.

Funders also often take part in the selection of suppliers and subcontractors, and approve their appointment in advance.

If the project encounters extreme difficulties, the funders can usually then 'step in and take over the contract. If this occurs they can terminate the construction agreement and hire third parties to complete the works at the expense of the original contractor. In practice this occurs only rarely, given the technical guarantees, particularly for the equipment supplied, that are granted by the contractor.

VI BONDS AND INSURANCE

Project finance loans will normally be secured in various ways, such as pledge of project accounts; assignment of operating revenues; assignment of letter of credit, performance bond or completion bond relating to the project; pledge of company stocks; and charge over project facilities.

The client of a construction contract normally requires performance and completion bonds (bank guarantees), and retention of payments, as well as fines imposed to prevent delays. The construction contract also requires that insurance be obtained, including:

- a* all-risks construction insurance;
- b* civil liability insurance;
- c* machinery and equipment insurance;
- d* *force majeure* insurance; and
- e* professional liability.

The only insurance that must be maintained by law is employers' liability insurance to cover accidents experienced by employees working on the project. Where the project is a public works project, the law requires that civil liability and *force majeure* insurance be obtained.

VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The steps a project lender should take to enforce its rights as a secured party over the collateral depends on the documents evidencing the right of the creditor to collect on the principal agreement.

If the debt is secured by promissory note subject to Chilean law, the creditor will be able to foreclose on the collateral by means of a summary proceeding before Chilean courts; otherwise the secured party will need to first sue the debtor in regular proceedings and then begin summary proceedings.

In Chile the general rule requires commencement of a collection first, before a regular court, which will order a public auction of the collateral and allow the secured creditor to obtain payment.

Foreclosing on pledges on shares will not, however, require following the previous procedure, and will only require the giving of judicial notice and sale of the shares on a stock exchange.

Certain credits are afforded a preferred status by law. This is the case of judicial costs for the general benefit of creditors, bankruptcy expenses, remuneration of workers and family allowances, social security contributions and tax withholdings.

No legal restrictions apply on terminating the contract for bankruptcy or insolvency, and the client does not have to indemnify the contractor if this occurs. In general, contractual parties can terminate early without showing cause or having to indemnify the other party for lost profits caused by the early termination, beyond any direct costs incurred as a result of the termination.

In practice, the bankruptcy or insolvency of the contractor is a very common cause of early termination of the contract by the client.

VIII SOCIO-ENVIRONMENTAL ISSUES

i Licensing and permits

The owner of the project must submit requests for all relevant environmental authorisations from the Ministry of the Environment.

Certain projects (large infrastructure, mining, energy and transport, etc.) must be submitted for environmental assessment. If such projects may cause adverse environmental effects, they must undergo an environmental assessment study, in which the local community participates. If the study finds that the project should be authorised, it will also prescribe measures that must be taken to mitigate any environmental damage.

If the project does not produce adverse effects, an environmental impact statement will be issued, which will not prescribe any mitigation measures. In addition

to Law No. 19,300, there are hundreds of specific regulations covering environmental issues in Chile.

Law No. 19,300 regulates:

- a* the procedures involved for environmental approval of a project;
- b* the responsibilities of an environmental permit holder and the penalties for breach; and
- c* the applicable jurisdiction.

Chile has ratified the Kyoto Protocol, but projects do not have to be certified in relation to their carbon emissions. Instead, a system is in place that promotes the voluntary certification of projects.

ii Equator Principles

The Equator Principles have become the local industry standard for environmental and social risk management and financial institutions, clients or project sponsors, other financial institutions, and even some industry bodies, refer to the Equator Principles as good practice, in the sense of not providing loans to projects where the borrower will not or is unable to comply with their respective social and environmental policies.

iii Responsibility of financial institutions

Generally, lenders will not incur any liabilities upon foreclosure relating to any financed projects.

IX PPP AND OTHER PUBLIC PROCUREMENT METHODS

i PPP

PPPs are common in Chile, but only for public works concessions in areas such as motorways, hospitals, prisons, reservoirs, airports and ports. The relevant regulations on PPPs allow for private initiatives to develop public works projects.

The Concessions Law² contains the regulations on PPP projects and also on private initiatives relating to public works.

The PPP tender process begins with the request for tender (the MOP issues these in the case of public works). In this request, the conditions for tender and specific technical requirements and quality standards are set out. The interested parties (normally international consortia) then submit their bids (covering price and technical specifications), and the successful bidder must incorporate an SPV exclusively for the project.

The successful company is in charge of carrying out the construction and operating the project on completion. Concession agreements and the by-laws of the SPV are regulated by the Concessions Law and the corresponding bidding conditions for each project.

2 DS MOP No. 900.

Most bidders for public concessions are international. Foreign companies without a registered office in Chile can tender for such projects, but they must show that they have the relevant expertise and economic capacity to complete the project.

ii Public procurement

All tender procedures must be approved by the Office of the Comptroller General.

In 2003 the Public Procurement Tribunal (the Tribunal) was created by Law No. 19,886. It is independent of the Chilean government and is subject to the Supreme Court. Its powers must be exercised on the basis of the fundamental principles of tender procedures: equal treatment, transparency and competition.

An application for review before the Tribunal might have an automatic suspensive effect, blocking the continuation of the procurement procedure or the conclusion of the contract.

X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

Chile's foreign investment policy is based on three main principles: equal treatment for both domestic and foreign investors, free access to various markets and economic sectors, and minimum state intervention in their activities. This equality of treatment for investors – domestic and foreign alike – has permitted a simplification of the regulations on foreign investment.

Foreign investors are guaranteed free access to all prevailing general and sectoral privileges and incentives on the domestic market. Foreign investment is not subject to any selective principle. Regulations governing investment are sufficiently clear and precise to keep the negotiation between the foreign investor and the appropriate authority to a minimum.

There are two principal ways in which foreign investment is brought into Chile and each has a different impact in terms of tax and repatriation of dividends and capital. These two mechanisms are commonly referred to as Decree Law No. 600 and Chapter XIV of the Foreign Exchange Law.

Decree Law No. 600 applies to foreign individuals and legal entities, as well as to Chilean individuals and legal entities with residence and domicile abroad, who transfer foreign capital to Chile and enter into a foreign investment.

Decree Law No. 600 permits the following form of capital investment: freely convertible foreign currency; tangible assets; technology in its various forms; credits associated with foreign investment; capitalisation of foreign loans and debts in freely convertible currencies; and capitalisation of earnings qualifying for remittance abroad.

The procedure is simple and uses standard forms to be submitted to the Executive Secretariat of the Foreign Investment Committee, on which the investor is required to supply general background information on the project. Once permission has been granted by the Executive Secretariat, the investment may be realised in any commercial bank either totally or in part. It should be brought into the country within a period of three years for projects in general, or between eight and 12 years for mining projects.

Holders of foreign investment made under the terms of Decree Law No. 600 are entitled to include in their respective contracts a clause to the effect that, for a period

of 10 years from the start-up of the company's operations they will be subject to a fixed overall tax rate of 42 per cent on taxable income, including taxes applicable under the Income Tax Law valid at the time the contract is executed. Even if the foreign investor has opted for this fixed rate, it may, once only, waive this right and ask for the application of ordinary tax laws, in which case it will fall under the general taxation scheme with the same rights, options and obligations pertaining to national investors and, consequently, forfeiting assessment at the agreed fixed rate.

Capital may also enter the country under the terms of Chapter XIV of the Foreign Exchange Law. Its provisions differ from those of Decree Law No. 600, mainly in that:

- a* there is no contractual agreement with the state, but investors receive a certificate of capital investment, guaranteeing the right of remittance, subject to the Central Bank of Chile regulations;
- b* this Law applies only to currency, not to tangible goods or technology;
- c* Chapter XIV does not offer a guarantee against tax increases; and
- d* the investment involves an amount of at least US\$10,000.

i Removal of profits and investment

Decree Law No. 600 provides that capital invested under its provisions may not be repatriated earlier than one year from the time the investment is made. The Compendium of Foreign Exchange Regulations has no such restriction. Under both Decree Law No. 600 and the Compendium of Foreign Exchange Regulations, profits may be freely remitted abroad at any time at the discretion of each investor.

XI DISPUTE RESOLUTION

i Special jurisdiction

With the sole exception of PPP projects, where arbitration is contemplated as an option to the concessionaire, in general there is no special jurisdiction for projects in Chile. The courts will enforce the judgments rendered in accordance with the procedure contemplated in the Civil Procedure Code.

ii Arbitration and ADR

The preferred dispute resolution method for construction projects is arbitration, especially institutional arbitration. Such arbitration proceedings are normally governed by Chilean law and carried out in Santiago.

The preferred arbitration method normally involves making the arbitrator an arbitrator *ex aequo et bono*, that is, one who decides the matter in accordance with the equity of the case. Rights of appeal and remedies are normally waived. Arbitrations of disputes between parties to public works projects are subject to special arbitration procedures.

The best-known arbitration centre in Chile is the Santiago Arbitration and Mediation Centre of the Santiago Chamber of Commerce. In addition, the Construction Association has an institutional arbitration arm.

In international projects, other arbitration institutions used include the International Chamber of Commerce and the Permanent Court of Arbitration of The

Hague, but arbitrations are normally subject to Chilean law and based in Chile. If litigation is used to resolve disputes, the ordinary courts deal with such matters.

Mandatory conciliation regulations apply to disputes. In practice, this type of conciliation often succeeds in resolving disputes.

Contracts also often require that the parties submit to direct conciliation (without intervention by mediators) before commencing arbitration, although this often does not work in practice.

In relation to PPP projects, mandatory conciliation may apply through what is called a conciliation commission, comprising three mediators. Each party appoints a member and the third member is appointed by both parties. Such commissions have had some success in resolving disputes.

A final and conclusive court judgment or arbitral award rendered by a court or arbitrator sitting abroad against the borrower will be recognised in the courts of Chile and the courts will enforce the foreign judgment or arbitral award without any retrial or re-examination of the merits of the original action upon fulfilment of certain conditions.

XII OUTLOOK AND CONCLUSIONS

Construction in Chile is not regulated organically but rather is governed by legal and other regulations pertaining to issues specific to each sector. In this manner, the Civil Code provides certain general parameters, which enable regulations to be applied according to the particular requirements of the given sector (i.e., on the one hand there are regulations for the construction of public infrastructure, whether by the state or through concessions, and for the urbanisation and construction of houses or apartments; and, on the other hand, labour and social security regulations that impose safety regulations related to the execution of the projects). It is therefore necessary to consult individuals and organisations with recognised experience and particular expertise in the construction sector when entities are considering making investments in this sector in Chile.

As mentioned above, Chilean legislation does not establish modern regulations for the construction of private infrastructure, nor for regulating the actions of private entities while executing public infrastructure projects. Thus, it is a field that is based on forms of regulation and contracting that are commonly accepted by comparative law. In the same manner, the existing process for dispute resolution is antiquated and inefficient and does not allow for the necessary legal precision demanded by large-scale projects. In the private sector, private entities generally submit these matters to specialised arbitral tribunals, which conduct less time-consuming proceedings.

Last, we come to project finance. In terms of the financial sector, the legal system has established structures through which funds are distributed to develop construction projects and to acquire housing and other construction works. When it comes to infrastructure, however, legislation has been largely modernised, particularly in relation to projects executed through the public works concessions system. As a result, a series of resolutions and financial instruments have been introduced to facilitate the development of large-scale projects with low-risk indexes that may be developed with either national or foreign capital. Consequently, this country now has the capacity to develop the types of projects that have been traditionally associated with more developed countries.

Appendix 1

ABOUT THE AUTHORS

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Mr Ríos has advised several companies in the development of works, construction and engineering. He has experience as legal adviser on over 50 executed construction projects, both public and private works, from the bidding stage to construction and subsequent operation (including gas, slurry and water pipelines, reservoirs, hydroelectric plants, roads, railways, airports and hospitals), He has also participated in several arbitration proceedings, both national and international.

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