

# Bases and Starting Points for the Freedom of the Argentinians Law.

## Force majeure in Public Works and other contracts. Concessions Regime. Disputes resolution.

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*The Honourable Chamber of Deputies approved the Law Bases and Points of Departure for the Freedom of Argentinians.*

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### 1. Force majeure in existing contracts and settlement agreements

Article 63 of the Bill authorises the National Executive Power to order the renegotiation or termination of the following contracts for reasons of emergency -which for the purposes of the Bill constitute grounds for force majeure under the terms of Article 54 of Law No. 13.064-: (i) public works, public works concessions, construction, provision of goods and services and their annexed and associated contracts, whose amounts exceed ten billion pesos, and (ii) have been entered into prior to 10 December 2023. Prior to this, a transparency report must be carried out, provided that it is financially or economically more convenient for the public interest.

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Contracts entered into by virtue of privatisation processes authorised by Law No. 23.696 and those entered into within the framework of activity promotion schemes, investment or production stimulus programmes are excluded from this regime.

In this sense, it is established that it is economically and financially inconvenient for the public interest to suspend or terminate public works contracts that are 80% completed at the date of the enactment of the law or that have international financing. Their execution will be resumed prior to agreements signed between the principal or contractor and the contractor and must be authorised by the competent authority in the matter and must be signed within 90 days from the publication of the present law.

The National Executive Power is authorised to enter into pre-judicial, judicial or arbitration settlements provided that the agreement is duly founded and is convenient for the interests of the National State.

### 2. Concessions

- It is established that the National Executive Power may grant concessions for public works and infrastructure and public services for a fixed or variable term.

- The purpose of the concessions will be the construction, conservation or exploitation of public works or infrastructure and for the provision of public services through the charging of a fee, toll or other remuneration in accordance with the procedures established by law.
- The terms of the contract may provide for the constitution of a special purpose company, which must be incorporated as a public limited company under the terms of the General Companies Act.
- Concessions may be granted for works, public infrastructures and public services for the operation, administration, repair, extension, conservation or maintenance of existing works with the aim of obtaining funds for the construction or conservation of other works that have physical or technical links of another nature with the former, without prejudice to the prior investments that the concessionaire must make. For this purpose, the economic-financial equation of each undertaking shall be taken into account.
- The fee, toll and/or remuneration shall compensate for the execution, modification, extension and/or administration, repair, conservation or maintenance services of the existing work and the execution, operation and maintenance of the new work.
- In order to achieve the stated objectives, the Executive Power may delegate the powers and obligations to jurisdictions and entities it deems appropriate.
- Public works, public infrastructure and public services shall be awarded by means of national or international public bidding.
- The executive branch may call for the presentation of private initiatives for the conclusion of concession contracts for works, public infrastructure and public services in sectors considered to be of public interest, in accordance with the criteria and procedures established in the regulations.
- Any person may submit private initiatives to the executive branch.
- The regulations shall establish the procedure applicable to the admissibility requirements of the proposals, the rights and obligations of the proponent of the private initiative and the competitive advantages to be recognised in the bidding procedures convened on the basis of initiatives declared to be of public interest.
- The tenders subject to the concession will be awarded to the most convenient offer in accordance with the conditions established in the regulations and the bidding or tender conditions.
- As regards the construction stage, the legal rules established for the public works contract shall be applicable in all relevant aspects.

**Content of the bidding and contractual documentation for concessions.**

The bidding and contractual documentation by virtue of which public works concessions are awarded must contemplate the following aspects:

- The mechanisms for controlling compliance with the obligations assumed and the penalties for breach of contract, their application procedures and forms of execution, and the destination of the pecuniary penalties;
- The form, modality and opportunities for payment of the remuneration that may be received, depending on the case, from users, the State and/or third parties, as well as the procedures for revision of the contract price in order to preserve its economic-financial equation;
- The instruments that make it possible to adapt the modalities of execution to technological advances and to the financing needs and requirements that arise during the term of the contract;
- The power of the national public administration to unilaterally establish variations to the contract only with regard to the execution of the project, up to a maximum limit, more or less, of twenty percent (20%) of the total value of the contract;
- The grounds for termination of the contract due to fulfilment of the object, expiry of the term, mutual agreement, fault of one of the parties, reasons of public interest or other grounds with an indication of the procedure to be followed, the compensation applicable in cases of early termination, its scope and method of determination and payment.
- In the event of termination of the contract for reasons of public interest, no rule that establishes a limitation of liability, especially those contained in Laws 21.499, as amended, 26.944 and Decree 1023/2001, as amended, shall be directly, supplementary or analogically applicable.
- The suspension or nullity of the contract on grounds of illegitimacy shall be requested and declared by the competent judicial court;
- The power to assign, in whole or in part, the contract to a third party, provided that the third party meets similar requirements as the assignor and at least twenty percent (20%) of the original term of the contract or of the committed investment has elapsed, whichever occurs first.
- Prior to the execution of any assignment, the full acceptance of the financiers, guarantors, sureties, guarantors and guarantors, and the authorisation of the administration must be obtained.
- Any assignment that is finalized in accordance with the requirements referred to in this subsection above shall have the effect of releasing the assignor from all obligations originally assumed under the contract, unless a different solution is provided for in the specifications.

#### **Maintaining the balance of the economic-financial equation.**

Throughout the term of the concession contracts, the administration shall guarantee the maintenance of the balance of the economic-financial equation taken into account at the time of their conclusion.

In the event of a distortion of such balance due to causes not attributable to any of the parties, the parties shall be entitled to renegotiate the contract in order to achieve its recomposition or to agree on its termination by mutual agreement, according to the term to be established in the regulations or in the bidding documentation.

If no agreement is reached, the dispute shall be submitted to a technical panel and, if appropriate, to the respective arbitration tribunal.

The bidders must include in their proposals the economic-financial equation by means of the Net Present Value (NPV) and/or the Internal Rate of Return (IRR), in accordance with the parameters to be established in the bidding documentation.

The bidding and contractual documentation will establish the mechanisms for the recomposition of the economic-financial equilibrium of the contract.

In cases of force majeure or actions by the administration that result in a substantial break in the economy of the concession contract, the term of the concession may be extended for up to the same period as its initial duration. In cases of force majeure, the grantor shall guarantee the minimum income agreed in the contract, provided that such force majeure does not absolutely prevent the execution of the work or the continuity of its operation.

#### **Termination of the Contract for reasons of public interest.**

The termination of the contract for reasons of public interest shall be governed solely by the provisions of this article and no rule that establishes a limitation of liability, especially those contained in laws 21.499 as amended and 26.944 and in decree 1023/01 as amended, shall be directly, supplementary or analogically applicable.

The granting authority's decision to terminate the concession contract for reasons of public interest, in order to be adequately founded, shall:

- a) Identify the objective technical reports that justify the termination of the contract;
- b) Explain in a concrete manner the causes on which it is based and the reasons that support a different evaluation of the public interest committed to in the concession contract;
- c) Submit the determination of the scope of the concessionaire's reparation, in the event that there has been no prior agreement between the parties, to the consideration of the technical panel and/or the arbitration tribunal acting within the framework of the contract, in cases where the concession contract does not contemplate formulas or other mechanisms for its determination. For this purpose, unamortised investments may be used as an objective weighting parameter;
- d) Establish the term for payment of the compensation, which must be specified prior to the execution of the acts that materialise the termination of the contract

for reasons of public interest or the taking of possession of the work or infrastructure by the grantor.

**Dispute settlement mechanisms.**

All contracts may provide for dispute prevention and resolution, conciliation and/or arbitration mechanisms.

a) Disputes of a technical or economic nature that arise between the parties during the performance of the concession contract may be submitted to a technical panel or arbitration tribunal at the request of either party.

b) The technical panels shall be composed of independent and impartial professionals, in all cases of proven competence and experience in the field. These bodies shall be competent to intervene, compose and resolve disputes of a technical nature, contract interpretation and economic or patrimonial disputes that may arise during its execution or termination, applying criteria of speed and efficiency in the processing of conflicts that are compatible with the time of execution of the contracts.

c) In the case of opting for arbitration with extension of jurisdiction, the respective arbitration clause shall be included, which shall be expressly and non-delegatably approved by the National Executive Power and immediately reported to the Honourable Congress of the Nation.

**Prohibition of application of direct, supplementary or analogue rules.**

The following shall not apply directly, supplementarily or by analogy to procurement subject to this law:

a) Decree 1023/01 as amended and its regulations;

b) Articles 7 and 10 of Law 23.928, as amended.

The payment of the contract price and/or the remuneration of the concessionaire constitutes an obligation to give money if the debtor owes a certain amount of currency, determined or determinable, at the time the obligation is constituted, whether or not it is legal tender in the country. The national State will only be released if the concessionaire receives the amounts committed in the agreed currency. Judges may not modify the form of payment or the currency agreed by the parties.

**Retroactivity.**

The National Executive Power may, with the prior intervention of the Office of the Treasury of the Nation and of the Office of the General Attorney of the Nation, renegotiate, for emergency reasons, the renewal of public works contracts and public works consultancy services entered into prior to the enactment of this law

that are at a standstill, for the purpose of enabling the contribution of private financing aimed at restarting and completing the committed works.

The regulations shall establish the applicable conditions, requirements and procedures, which shall guarantee the transparency, efficiency and effectiveness of the reconduction.

**Regulatory Authority.**

The regulatory authority of Law No. 17.520 shall be defined by the National Executive Power.

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