

BOT Contract through the optics of Albanian legal provisions. Issues of the implementation and transfer framework.

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Abstract

The last years have resulted in an increase of concession contracts in Albania, followed by a revised modern legal framework. Beside the debate on whether the government should perform most of the activities itself instead of giving them to the private sector through a concession contract, the concession contracts are nowadays a reality and as such they should be studied and analysed carefully.

The scope of this article is limited to the provisions of the Albanian legislation and its approach to the international provisions regarding BOT (build – operate - transfer) concession contract. A detailed analyse will drive to the conclusion as to what extent the Albanian concession legislation does compile with the international accepted principles of Public Private Partnership concerning mainly implementation and transfer phase of a BOT contract.

Albanian Public Private Partnership legislation has gone through many revisions and amendments during the last twenty years, resulting in a challenging situation for everybody that deals with any aspects of a concession. Having a detailed understanding of the legal provisions is indeed the core element toward a successful implementation process of any concession, resulting in the highest profitability for concession parties, the public entity and the private investor, and consequently culminating to the best interest of the population.

Keywords: Albanian legislation; concession; BOT contracts; implementation; transfer; international legal framework

Introduction

The first official private facility development under the name “Build Operate Transfer” was used in Turkey in 1984, by Prime Minister Ozal, as part of an enormous privatization program to develop new infrastructure (Beuker, 1988). However, the BOT approach was used as early as 1834 with the development of the Suez Canal. This revenue-producing canal, financed by European capital with Egyptian financial support, had a concession to design, construct, and operate assigned to the Egyptian ruler Pasha Muhammad Ali (Levy, 1996). (Menheere and Pollalis, 1996)

During the communist era in Albania the private sector was very limited and as a result concession contracts were inexistent. It was only after the communist collapse that

the private sector in Albania began to burst. The concession concept is introduced in the Albanian legislation for the first time by Law No. 7973, dated on 26. 7. 1995 "On the Concessions and the Private Sector Participation in Public Services and Infrastructure"

The first definition of a concession is given in article 2, paragraph 4 of Law No. 7973/1995:

"Concession" is a form of contract agreement, through which a legal person non-state physical or is entitled to receive in the form of concession by the state authorized a fortune to perform specified services for a long period of time in one of the forms provided in this law. Entity which granted the concession, is responsible for the financing of new investments during the concession period specified. Newly created assets are transferred to public sector at the end of the concession. While the BOT contract definition is provided in article 2, paragraph 7 "BOT" (Build-Operate-Transfer) is a form of concession where a company or trading company agrees to finance, build, operate and maintain a facility for a specified period of time and then to transfer this to the state authority concerned."

Law No. 9663, dated on 18. 12. 2006 "On the concessions" does not provide any definition for BOT contracts, but Article 2, paragraph 3 provides a detailed definition of "Concession" means the agreement, irrespective of the name given, between the contracting authority and the concessionaire, defining its requirements and conditions and the terms of which the concessionaire:

- carries out an economic activity which, otherwise, will be carried out by the contracting authority for a concession project, contract for administration or other public services;
- assumes all or a substantial part of the risk associated with this economic activity
- receives a benefit".

Law No 125/2013 "On concessions and the Public Private Partnership" article 3 makes the distinction between the concession of public works and the concession of public services. As a recent law, Law No. 125/2013 has detailed provisions regarding many aspects of PPP and concessions.

These three laws would be the main reference point during this analyse, as per the implementation and transfer related issues.

The article is divided in two main parts. The first part analyses the Concession Legislation which is divided into two main subsection, the Implementation legal issues and Transfer related issues. It should be made clear that any transfer of the rights of the concessionaire to a third part will be analysed under the Implementation legal issues section while the final transfer to the contracting authority in the end of the concession period is treated under subsection Transfer related issues. The second

part gives examples of amended concession contracts during implementation phase, providing details of two important concession contracts and their modification process.

Public concession selection procedures, application and any issue related to the evaluation and signing of the concession contract in Albania are not the purpose of this paper and will not be part of the henceforth analyse. Nonetheless, this paper can serve as a starting point to further analyse and improvement of the PPP legislation regarding implementation and transfer related issues as any future demand may require.

Analyse of concession legislation

The concern of this paper is to identify the differences a BOT concession contract may go through depending on the period it has been signed and the compliance of these provisions to the international legal framework for PPP. Every concession legal aspect that do compile with international provisions and has not been changed recently will not be analysed in order to avoid repetitions. That being said, every provision that might be of concern, if not stated otherwise, is in full accordance to the International framework taken into analyse. This analyse will be presented based on three different periods corresponding to three different Legal regulations applied in Albania for any concession contracts.

Law No 125/2013 “On concessions and the Public Private Partnership” in Article 50 provides that “This law does not apply to concession contracts signed before the entry into force of this Act, except for the provisions governing the register of concessions / public private partnerships, which must be regulated within six months from the entry into force of this law.”

The same situation is foreseen by Law No. 9663, dated on 18. 12. 2006 “On the concessions” in Article 35 “This law does not apply to concession contracts, signed before the entry into force of this law. Contracts may not be renewed or extended, except in accordance with provisions of this law.”

Based on the here cited articles it is clearly evident that any contract signed before the entry into force of Law No. 125/2013 shall be subject to the regulation of Law No. 9663/2006 and any contract signed before the entry into force of the latest shall be subject of the provisions of Law No. 7973/1995. This legal situation makes it very important to consider any of this three concession laws when making the following analyse

Implementation legal issues

In reference to the Green Paper on Public – Private Partnerships and Community Law on Public Contracts and Concessions (Commission of the European Communities) paragraph 45 “The success of a PPP depends to a large extent on a comprehensive contractual framework for the project, and on the optimum definition of the elements which will govern its implementation.” Clearly stated legal framework plays a crucial part in any successful PPP implementation. This paragraph is the core principle any modern Law on PPP should be based upon. Having an agreement that is evasive or incomplete will have the negative effect on any public interest and may result also in the disadvantage of the concessionaire.

The UNICITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects in Model Provision 37 regarding the Transfer of controlling interest in the concessionaire requires that:

“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.”

In this analyse the following listed model provisions shall be the guideline and the comparison base of the Albanian legislation applicable to any concession contract:

UNICITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects Model provision 40 for the Revision of the concession contract:

“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:

- Changes in economic or financial conditions; or
- 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:
- Occur after the conclusion of the contract;
- Are beyond the control of the concessionaire; and
- 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.”

UNICITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects
Model provision 42 Substitution of the concessionaire:

“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.”

Law 7973/1995 in Article 10, paragraph 15 and 18 provide that the Concession agreement may include “Provisions related to the inspection of drawings, equipment, implementation and completion of the project, including the use, maintenance and eventual transfer to the state.” and “Provisions dealing with the possibility of transferring contract rights.”

Considering a case of BOT contract published in Official Gazette No. 82 of year 2003 there is not any provision regulating the transfer issue, neither any provisions regarding the transfer of contract rights, which means that any concession contract governed by Law 7973/1995 can easily be transferred to any third party. This is a situation in which the principle of equality of treatment of economic operators is clearly not respected and it is in violation of Paragraph 49 of the Green Paper requires the following “In general, changes made in the course of the execution of a PPP, if not covered in the contract documents, usually have the effect of calling into question the principle of equality of treatment of economic operators. Such unregulated modifications are therefore acceptable only if they are made necessary by an unforeseen circumstance, or if they are justified on grounds of public policy, public security or public health. In addition, any substantial modification relating to the actual subject-matter of the contract must be considered equivalent to the conclusion of a new contract, requiring a new competition.”

At least Article 16 of Law 7973/1995 provides the right and obligation of the state authorised organ to make regular controls of the implementation of the concession agreement and the transferred rights and the fulfilment of the obligations will be at least monitored by the contracting authority.

Law 9663/2006 has gone under some important improvements, even though the only Article regulating implementation changes in the concession contract is Article 27, requiring that the Content of the concession contract includes:

- “ç) any request for establishment and the capital of a legal person that shall be created by the successful bidder, according to the laws in force, and any prohibition on the transfer of shares or capital shares of the company without prior consent of the contracting authority;
- e) procedures for the review and approval of engineering designs, construction plans and specifications by the contracting authority, and the procedures for testing and final control, approval and acceptance of the infrastructure, rules and standards, on the basis of designed concession projects, should be in accordance with best practices, aiming the development of the market through risk sharing;
- ë) the extent of the obligations of the concessionaire, as appropriate, to ensure the change of service, to meet the demands of the time, its continuity and outsourcing, in essentially the same conditions to all users, mechanisms to address their potential costs;
- gj) any restrictions or conditions applicable to the transfer of rights and obligations of the concessionaire under the concession contract.”

While Law 125/2013 in Article 27 provides the general aspects that a concession contract should include and the second paragraph of this article states for the first time in the Albanian Concession legislation that “Contract issues not regulated by this Law, are subject to the provisions of the Civil Code of Albania.” This provision is of a very great importance as it legally puts the parties, the public and the private sector, on equality bases as the civil legislation in Albania considers any private agreement. In other words, any conflict arising from the concession contracts will be treated and solved bearing in mind the principle of equality between the parties, without any prevail of the public interest.

Article 31 of Law 125/2013 explains clearly the modification procedure of the Concession Contract / public private partnership being so in full accordance to the requirements of Green Paper and with UNICITRAL Model Legislative Provisions on Privately Financed Infrastructure

“1. Contracts regulated by this law can be modified by adding an annex contract, provided that this option shall have been stated in the tender documentation and contract.

and

4. Amendments to the essential terms of the contract, which are not provided in the tender documents and / or the contract itself require the application of a new procedure to award the concession / public private partnership.”

In an overall evaluation Law 125/2013 has regulated many aspects of a PPP and concession agreement and Article 32 has justified any transfer of the concession with the fulfilment of some conditions stated clearly in this article:

“1. In accordance with the provisions of this Article, with the prior written consent of the contracting authority, the contract of concession / public private partnership can be transferred to a third person, who meets the requirements of eligibility requirements laid down in the tender documents, according to which the contract was initially awarded unless these requirements refer to conditions that are no longer required to fulfil the contract, due to the fact that the obligations and requirements referred to are already being consumed or being carried out by the initial concessionaire / private partner.

2. The transfer of the concession contract does not ruin the quality and continuity of performance and the fulfilment of the contract.”

Transfer related issues

The transfer procedure once the concession period is over is one of the legal aspects of the concession legislation that needs a detailed regulation. In the meantime, this is not an urgent aspect and maybe it has been “forgotten” due to the fact that the first concession contracts are signed during the early 2000 and there is still time for the transferring of the assets to the contracting authority.

UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects in Model provision 48 requires “The concession contract shall provide, as appropriate, for:

- Mechanisms and procedures for the transfer of assets to the contracting authority;
- 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;
- The transfer of technology required for the operation of the facility;
- The training of the contracting authority’s personnel or of a successor concessionaire in the operation and maintenance of the facility;
- 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.

Law 7973/1995 in Article 13 describes the rights of the authorized state organ to:

“1. State authorized organ will retain all control rights on the concession.

2. Maintain ownership of key assets. State authorised organ will retain the legal ownership of main concession assets.”

While Law 9663/2006 in Article 27 paragraph n) states that the contract includes “The conditions and procedures for amendment and / or termination of the contract; rights and obligations of the parties, maturity or termination of the contract (including mechanism for transfer of assets, technology, compensation, training and support service to be provided by the concessionaire)” In reference to some concession contracts regulated by Law 9663/2006, can be noticed that there are not any regulations related to the transfer aspect.

The provision of Law 125/2013 article 38 regarding the ownership states that “1. The right of ownership of the facilities built under a concession contract / private public partnership, including additions and improvements, belongs to the contracting authority unless otherwise provided in the contract. 2. In the tender documents, the contracting authority must provide the conditions that regulate property rights, as described in paragraph 1 of this Article.”

Based on the here above cited legal provisions it is evident that there is a need for clarification on the transfer related aspect of any concession contract, nevertheless the signing period of the contract. This can be done through a Council of Minister Decision providing details how the transfer of assets should be performed, due to the fact that Law No. 7973/1995, Law No. 9663/2006 and Law No 125/2013 have insufficient regulations on this aspect.

Council of Minister Decision No. 150, dated on 22. 3. 2007 “On the organisation and functioning of the concession treating Agency (ATRAKO)” has provided to this agency a very important role in the identification of potential PPP and concessions and also in the negotiation of concession contracts and their monitoring. Unfortunately, there are no reports to refer to any monitoring practice of this Agency and on the other hand, even after nine years from the creation of the ATRAKO there is not any concession register created, or to say the least it is not publicly accessible when referring to the official webpage of ATRAKO.

Examples of amended Concession contracts during Implementation Phase

During the last few years, Albanian government has revised some concession contracts. The approach used differs case by case. In this paper, after a careful evaluation I will bring to the attention of the reader two important concession contracts and their different amendment processes. Of course this is a limited number of cases to drive general conclusions for the best practices applicable for each case, but it helps understand different aspects of the process.

Modification of Concession Contract approved by Law No 9312 dated on 11. 11. 2004 “On ratification of the concession agreement between the Council of Ministers of the Republic of Albania and the concessionaire company “Tirana Airport Partners” Ltd

for the construction, commissioning, operation and maintenance of the international airport "Mother Teresa" in Tirana and giving some incentives to this concession company."

Back to 2006 the International Airport "Mother Teresa" in Tirana has been the only functioning airport in Albania. The concession contract provided exclusivity to the concessionaire based on paragraph 2.3 stating that:

"a) The concession is exclusive and the Company has the exclusive right to exercise the rights under the Concession.

c) The Government of Albania guarantees that during concession term will not license, authorise or operate any other airport for international commercial flights (cargo and passengers), in the Republic of Albania, with the exception of emergency landings. No condition of this Contract can limit the use of any airport in the Republic of Albania for humanitarian aid purposes or emergency relief in times of disaster or civil emergency in the Republic of Albania or in neighbouring territories."

This concession contract has a detailed text of 72 pages regulating almost every aspect of the partnership, followed by other 70 Annexes. Considering that the concessionaire has fulfilled all duties and responsibilities as per the contract terms, it would have been a big mistake with many financial costs to withdraw from this contract. The sole best way to modify this contract would be through negotiations in accordance to Article 7 of Law No 9312 dated on 11. 11. 2004. This is what happened indeed. As per the official communication of Ministry of Transport and Infrastructure of April 02, 2016 an agreement has been signed between the contract parties to amend the contract as follows:

The principle upon which the whole process of negotiations was organized was that the company should not be disadvantaged in terms of its business, which means that any reduction in the number of passengers that might result from opening new airports will be compensated with an extension of the concession period. In concrete terms, was removed the exclusivity article and the opening of the Kukes airport for international flights is followed by a 2-year extension of the concession contract. As for other domestic airports that may open in the future an extension of the period of concession would be calculated as 0.5 years multiplied to the years remaining of the concession contract. The market will become more competitive, which means competitively priced fee. This will have a direct impact in the creation of the low cost segment and will help the development of tourism in Albania.

The adoption of this agreement will be finalised by the government and parliament in the shortest period possible. Then an operational plan will take place to make the entire testing of the airport of Kukes, all his physical condition and navigation equipment. Development of a new airport will help specific sectors of the economy; especially tourism and will provide better services for the Albanian citizens.

Legally the negotiation of this contract is also in accordance to paragraph 50 of the Green Paper "It should be pointed out that secondary legislation lays down the exceptional situations in which additional works or services not included in the project initially considered or in the initial contract may be awarded directly, without a call for competition. The interpretation of these exceptions must be restrictive. For example, they do not refer to the extension of the period of an already existing motorway concession, in order to cover the cost of works to complete a new section. Thus, the practice of combining "profitable" and "non-profitable" activities awarded to a single concessionaire must not lead to a situation where a new activity is awarded to an existing concessionaire without competition."

Modification of contract signed on 10 April 2013 between the Ministry of Finance and "S2 Albania" Ltd and "Rapiscan Systems" INC approved by Law 123/2013 "On the approval of the concession contract between the Ministry of Finance, as the contracting authority, and the company "Rapiscan Security" INC, a concessionaire for financing, building and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee"

Based on business complaints over Rapsican's tariffs, the newly elected government of Albania tried to renegotiate the contract. Through a no reasonable reaction and without trying to keep negotiating the contract terms as per the contract provision, the newly elected government did indeed breach the contract. In the absence of an agreement, the US Company ("Rapiscan Systems" INC) sued for illegal breach of contract to the tune of \$350 million in the arbitrage court in Paris in September 2014. In the beginning, the government seemed determined to fight Rapsican in court and hired Omnia Strategy in early 2015 for 495, 000 euros in order to represent it in the looming legal battle.

However, it quickly changed its mind and decided to settle the case amicably in April 2015. Treasury transactions published by the Ministry of Finance show that Omnia Strategy was paid 495, 000 euros on November 10, 2015 based on two invoices the law firm issued in early February 2015. The Albanian government has given an added compensation for legal advice offered by Omnia Strategy of 150, 000 euros as per the Government decision of December, 28 2015, taking so the payment to a total of 645, 000 euros.

Prime Minister Order No. 15, dated on 1.2.2015 "On the establishment of interinstitutional negotiating working group to solve the disputes with companies "S2 Albania" Ltd and "Rapiscan Systems" INC, derived from the concession contract signed with the Ministry of Finance", in the new conditions created, the negotiating group was set up to find solutions outside arbitration. The group was chaired by the Minister of Finance and its composition included Minister of Economic Development, Tourism,

Trade and Entrepreneurship, State Attorney's Representative, representatives of the Council of Ministers and from the General Customs Directorate. Finding a solution out of the arbitration was strongly supported by "Omnia Strategy".

The new modified agreement was approved by Law No. 118/2015 dated on 29. 10. 2015 "On the amendment of the concession agreement for financing, building and operating the service of scanning containers and other vehicles in the Republic of Albania and the scanning service fee approved by law No. 123/2013" and included the following changes:

- Payment for scanning (tariffs) will be performed on the basis of custom declaration. All businesses will have to pay.
- Average payment value for any custom declaration over 1000 (one thousand) euros for the entire period will be 22 euros. This payment is 17 euros less or 43.6% lower than the fees imposed in the initial version of the agreement that was 39 euros.
- For custom declaration of equal to or lower than 1000 euros, the respective payment will be 5 euros.
- The differences of in costs that is uncovered by the incomes (the average payment for statement), in the first years of the contract will be covered by the state budget. After the first year, it is estimated that revenues could cover the costs.

As a conclusion a close up monitoring of concession contracts and their implementation can help the contracting authority understand better and propose the right legal solution case by case. On the other hand, any concession agreement that will not consider the highest interest of the public it is destined to be revised. Of course transparency principle can help redefine and increase public interest on any concession related issues issue.

Conclusion

Albanian Legislation on concession offers a broad protection in accordance to the most recent international regulations. Although the Albanian legislation on concessions has gone through many changes and revisions there is a need to address some further issues, especially the necessity to have an efficient control system regarding concession contract changes during implementation phase.

The analysis presented in this article defined that there is a need for clarification on the transfer related aspect of any concession contract, nevertheless the signing period of the contract. This can be done through a Council of Minister Decision providing details how the transfer of assets should be performed, due to the fact that Law No. 7973/1995, Law No. 9663/2006 and Law No 125/2013 have insufficient regulations for this aspect.

The role of ATRAKO should increase especially regarding monitoring during implementation phase.

BOT contracts are the most common form of concession contracts and the legislation in force offers all the necessary protection for any future investor wanting to enter in a PPP in Albania.

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