

DESIGNING, NEGOTIATING AND DRAFTING OF CONCESSION CONTRACTS

By

Paul Obo Idornigie, Ph.D, FCIS, MCIArb (UK)
General Counsel/Privatization Adviser
Bureau of Public Enterprises (BPE)
ABUJA, NIGERIA

INTRODUCTION

Infrastructure¹ services are critical to the operation and efficiency of a modern economy. They are critical inputs in the provision of goods and services and significantly affect the productivity, cost, competitiveness of the economy and the alleviation of poverty. Consequently, policy decisions regarding their provision and sector development have ramifications throughout the economy. Infrastructure's enormous economic importance, a desire to protect the public interest in industries supplying essential services, and concerns about private monopoly power led governments to conclude that control over these services could not be entrusted to the motivations and penalties of free markets. Governments also believe that, given the large investments involved, public resources were required to increase infrastructure coverage. Accordingly, a single public entity (Nigerian Airways, NEPA, NITEL, NPA, NIWA, and NIPOST) usually controlled every aspect of a utility – facilities, operations and administration – and determined which services to provide to essentially captive customers.

¹ See section 36 of the Infrastructure Concession Regulatory Commission (Establishment, etc) Act of 1995 where 'infrastructure' was defined as including development projects which before the commencement of this Act, were financed, constructed, operated or maintained by the Government and which, after the commencement of this Act, may be wholly or partly implemented by the private sector under an agreement pursuant to this Act including power plants, highways, seaports, airports, canals, dams, hydroelectric power projects, water supply, irrigation, telecommunications, railways, interstate transport systems, land reclamation projects, environmental remediation and clean-up projects, industrial estates or township development, housing, governing buildings, tourism development projects, trade fair complexes, warehouses, solid wastes management, satellite and ground receiving stations, information technology networks and database infrastructure, education and health facilities, sewage, draining, dredging, and other infrastructure and development projects as may be approved, from time to time, by the Federal Executive Council. See also Guash J L *Granting and Renegotiation Infrastructure Concessions: Doing It Right* The World Bank Washington, DC, 2004 p 27 where it was stated that concession contracts are defined in terms of four features.

Over the years, however, government ownership has proved disappointing: the level of operational efficiency has been low and the sectors are embodiments of corruption. Views on how public utilities should be owned, organized and regulated changed. Over and above all these, in the face of competing demands, government lacked the resources to provide significant investment in these sectors. Consequently, most countries have transferred the provision of infrastructure services to the private sector. Such transfer has been accompanied by sector reform and re-structuring before privatization or concession and by the implementation of a regulatory framework. From the Latin American countries through Europe to the Far East, reform of one form or the other has been carried out. Concessions have gained in popularity recently but they are an old innovation. For instance, as far back as 1777, the French Government granted a 15-year concession to collect and distribute water to households in parts of Paris.²

In Nigeria, privatization and reform are in the air. From 1987 till now, the Government of Nigeria has been involved in privatization. However since the promulgation of the Public Enterprises (Privatization and Commercialization) Act³, Nigeria has been involved in the reform of infrastructure. The National Council on Privatization (NCP) which was established under the Act set up eleven (11) sector steering committees⁴ to produce National Policies for these sectors as precursors to their reform. All these committees produced National Policies.⁵ The Bureau of Public Enterprises (BPE) is the government's economic reform agency and is the Secretariat of the National Council of Privatization.

² See Kerf M et al *Concessions for Infrastructure: A Guide to their Design and Award*, The World Bank, Washington, 1998 p 11. Local private firms were responsible for developing most of the electricity utilities in Brazil, Chile, Costa Rica and Mexico. In many Latin American countries – Argentina, Brazil and Uruguay, private developers from Britain, France and the United States built many of the early railways

³ Cap P38 Laws of the Federation of Nigeria 2004 (hereinafter referred to as “the Act”)

⁴ The Committees are Electric Power Sector Reform Implementation Committee, Transport Sector Reform Implementation Committee, Aviation Sector Implementation Committee, Telecommunications Sector Implementation Committee, Oil and Gas Implementation Committee, Agric & Water Resources Steering Committee, Solid Minerals Sector Steering Committee, Insurance Sector Reform Steering Committee, Industry/Manufacturing Sector Steering Committee, Steering Committee on Hospitality & Tourism and Basic Metal Sector Steering Committee

⁵ For example, the National Policy on Telecommunications led to the reform of the telecommunications sector, the passage of the National Communications Commission Act of 2003 while the National Policy on Power led to the passage of the Electric Power Sector Reform Act of 2005. The Nigerian Electricity Regulatory Commission was established under the Electric Power Sector Reform Act. At the moment there is a National Policy on Transport that has led to the drafting of the National Transport Commission Bill. When passed into law, the National Transport Commission will be established as a multi-sector regulatory agency with other laws passed for the sub-sectors like rail, ports, roads, airports and inland waterways.

In this presentation, therefore, our searchlight will be focused on designing, negotiating and drafting of concession agreements. However, before doing this it is instructive to examine the legal and regulatory framework.

MEANING OF CONCESSION

In its ordinary meaning, a concession is a grant. Section 36 of the Infrastructure Concession Regulatory Commission (Establishment, etc) Act of 2005 (ICRCA) defines 'concession' as a contractual arrangement whereby the project proponent or contractor undertakes the construction, including financing of any infrastructure, facility and the operation and maintenance thereof and shall include the supply of any equipment and machinery for any infrastructure and the provisions of any services. A 'project proponent' means any person or body corporate who has contractual responsibilities for the project and who has adequate financial base to implement the said project consisting of equity and firm commitments from reputable financial institutions to provide, upon award, sufficient credit lines to cover the total estimated cost of the project. 'Construction' means any form of engineering work whether civil, structural, mechanical or electrical and includes rehabilitation, improvement, expansion, alteration and related works and activities, supply and installation of equipment or materials.

Similarly section 168 of the draft Ports and Harbour Authorities Bill defines a 'concession' as an arrangement between an Authority and a third party pursuant to which such third party shall be authorized to provide a port service or operate a port facility in accordance with the Bill.

According to Guash⁶, concession contracts are typically defined by four features as follows:

- a) The contract governs the relationship between the concession-granting authority and the private concessionaire (operator). The concession-granting authority is the government, an inter-ministerial commission or less common – and least appropriate – the regulatory agency.
- b) The concession is awarded for a limited but potentially renewable period. During this period the concessionaire enjoys the exclusive right to use the assets, exploit existing facilities and develop new ones. The contract determines the conditions and prices at which the concession provides the service and uses these facilities, which continue to be publicly owned.

⁶ Guash, Loc Cit

- c) The concessionaire is responsible for all investments and for developing all new facilities – many of which are specified in the contract – under the supervision of the state or regulator. The concessionaire retains control and use rights over the new assets until they are handed over at the expiration of the contract. The contract might contain a clause specifying compensation for investments not fully amortized by the end of the concession period, and clauses specifying causes and remedies for early termination of contract and stating penalties and fines for non-compliance with agreed-upon terms.
- d) The concessionaire is remunerated based on contractually established tariffs (with appropriate guidelines for review and adjustment) collected directly from users. These prices are typically regulated through rate-of-return or price-cap mechanisms, usually driven by the principle of “efficient financial equilibrium” – allowing the firm to earn a fair rate of return on its investments. If revenues do not cover costs, compensation mechanisms are established.

We should add that during the period the concessionaire receives revenue directly from the users and pays concession fees to government. This is usually a commencement fee, an annual fixed fee and a variable fee based on performance.

DIFFERENCES BETWEEN CONCESSION AND PRIVATIZATION

The word ‘privatization’ is very elastic. It has different meanings.⁷ If defined broadly, it includes concession and all forms of private-public partnership (PPP) but if narrowly defined, it excludes concession. However, though the two tend to achieve the same objectives – securing private sector management and operational expertise and investments – they differ in three key respects as follows:

- a) Concessions do not involve the sale or transfer of ownership of physical assets, only of the right to use the assets and to operate the enterprise⁸.
- b) Concession agreements are for a limited period – usually 10-30 years, depending on the context and sector

⁷ See Guislan P *The Privatization Challenge: A Strategic, Legal and Institutional Analysis of International Experience* 4th Edn, The World Bank, Washington DC, 2001

⁸ Hence a Build Operate and Own (BOO) Contract is not a concession whereas a Build, Operate and Transfer (BOT) Contract is a concession

- c) The Government, as owner of the assets, retains much close involvement and oversight in concessions through regulatory bodies.

The main rationale for concessions is that they can facilitate the regulation of natural monopolies – services that can be provided more cheaply by a single firm than by two or more – so power (transmission and distribution), gas (transmission and distribution), water distribution, transport are candidates for concession. Before adopting concession as a reform strategy, government should, therefore, first determine whether competition can be made to work in the relevant sector, possibly through reforming the market structure – vertically or horizontally. Concessions should be used in areas where they are most likely to aid development.

LEGAL AND REGULATORY FRAMEWORK

One of the first things investors would want to check before becoming involved in a concession is whether the country's legal and regulatory environment is favourable to concession operations. This is because a concession contract cannot unilaterally modify or override the provisions of a law or the country's constitution. To ensure a successful implementation of any reform or restructuring, the following critical factors are usually taken into account:

- **Formulation and design/review of a policy for the sector**
- **Identification of the desired strategy to be adopted**
- **Identification of legal and regulatory requirements**
- **Design and drafting of the legal and regulatory framework**
- **Sector Restructuring/Reform**
- **Formulation of an institutional framework**
- **Setting parameters for monitoring performance**

The NCP/BPE, relying on the provisions of the Act, has always broadly interpreted its mandate to include 'concession'. In exercise of this mandate, the NCP set up steering committees for all the sectors including infrastructure. This is a realization of the fact that there must be a proper policy in place for the reform of the infrastructure sector. The policy led to the setting up of the legal and regulatory framework for concession. In terms of specific sectors, a lot of work has been done in the Transport Sector. After the formulation of a Transport Policy, the BPE has drafted the National

Transport Commission Bill.⁹ Within this sector, the Nigerian Ports Authorities Act¹⁰ provides that the Authority can enter into agreement with any person for the operation or the provision of any of the port facilities which may be operated or provided by the Authority. Taking advantage of this provision, the NCP/BPE started with the concession of the port facilities.

Side by side with this, BPE has drafted the Ports and Harbour Authorities Bill. One of the purposes of the Bill is to provide an appropriate institutional framework for the ownership, management, operation, development and control of ports and harbour to ensure the integrity, efficiency and safety of the ports based on the principles of accountability, competition, fairness and transparency. Another purpose is to encourage private investment in port infrastructure, promote private sector participation in the provision of port services and facilities and promote and safeguard Nigeria's competitiveness and trade objectives.

Two Authorities are established under the Bill, namely Lagos Ports and Harbour Authority and Nigerian Delta Ports and Harbour Authority¹¹. Part X of the Bill deals with Concession. Each Authority with the consent of the Minister of Transport can grant concession subject to such conditions as the Authority may impose and specify in the concession authorizing any person to provide any maritime service or facility or any port service or facility¹².

Similarly, instead of the Port Authorities being involved in regulating the activities in the ports as well as managing and operating the ports, the Authorities' role will be two-fold: landlord function and regulatory function. The landlord functions include ownership and administration of land and water within the ports limit, planning and development of port operational infrastructure, lease and concession of port infrastructure, providing nautical services and promoting other marine services.¹³

The regulatory functions include safety, security, environment, enacting port regulations and bye-laws, monitoring, control and enforcement of legislations and regulations and nautical management by the Harbour Master¹⁴. The management and operation of the ports will be carried out by the concessionaires who will operate within a regulatory regime that will require monitoring and rendering periodic returns. At the moment, we have entered into over 20 Rehabilitate, Operate and

⁹ There will also be enactments for the sub-sectors – rail, seaports, airports, roads, inland waterways. BPE is working on these.

¹⁰ No. 38 of 1999 now Cap N126 Laws of the Federation of Nigeria 2004

¹¹ See section 3 of the Bill

¹² See section 54 of the Bill

¹³ See section 41 of the Bill

¹⁴ See section 42 of the Bill

Transfer (**ROT**) Contracts with various concessionaires. With time, we can go into BOT, BTO, BLT, etc Contracts.

The first Nigerian legislation on concession is the ICRCA. Section 1 of the ICRCA provides that from 10th November, 2005 (its commencement date), any Federal Government Ministry, Agency, Corporation or body involved in the financing, construction, operation or maintenance of infrastructure, by whatever name called, may enter into a contract with or grant concession to any duly pre-qualified project proponent in the private sector for the financing, construction, operation or maintenance of any infrastructure that is financially viable or any development facility of the Federal Government in accordance with the provisions of the ICRCA. The ICRCA provides for the establishment of a Commission¹⁵ with specific powers¹⁶ and functions¹⁷.

In terms of providing the legal framework for public private partnership (PPP) in Nigeria, the ICRCA is deficient in many respects. A PPP can be categorized based on the extent of public and private sector involvement and the degree of risk allocation between the two. All partnerships have a unique risk/reward allocation. PPP can take many forms including Service Contract (O&M), Design, Build, Operate (DBO), Concession/Lease, Finance, Design, Build (FDB), Operate, Own, Operate (OOO) and Asset Sale/Transfer. The institutions and personnel in NCP/BPE have acquired technical and managerial skills to administer the provisions of the ICRCA. The composition of the NCP is almost similar to the composition of the Commission to be set up under the ICRCA¹⁸. Unfortunately, there is no advisory, operational, regulatory or supervisory role for the NCP/BPE under the ICRCA. Indeed, there is no reference to the NCP/BPE under the ICRCA. The consequence is that unless the ICRCA is amended, there may be no future role for NCP/BPE in infrastructure development and reform in Nigeria.

One of the functions of the Commission is to take custody of every concession agreement made under the ICRCA and monitor compliance with the terms and conditions of such agreement. It is hoped that the provisions of the ICRCA will not conflict with the regulatory functions of the regulatory agencies for the various sectors and the oversight functions of the supervising Ministries.¹⁹ It is also hoped that the general policy guidelines to be published by the Commission

¹⁵ See section 15 of the ICRCA

¹⁶ See section 19 Id

¹⁷ See section 20 Id

¹⁸ See sections 9 and 15 of the Act and ICRCA respectively

¹⁹ Section 12 of the ICRCA provides that subject to the provisions of the Act, the relevant Federal Government Ministry, Agency, Corporate or body shall supervise the project in respect of which

will address these concerns otherwise there may be conflict in the reform agenda of government as implemented by BPE and the grant of concession contracts under the ICRCA.

Section 33 of the ICRCA provides that the President may give to the Commission such directives of a general nature or relating generally to matters of policy with regards to the exercise of it or his functions under the ICRCA as he may consider necessary and it shall be the duty of the Commission to comply with the directives or cause them to be complied with. Similar powers are vested in the NCP under the Act.²⁰

On the part of BPE, the bills being drafted and the instruments used at the moment for concession contracts are very comprehensive. There is the need for harmonisation between the provisions of the ICRCA and the powers and functions of the NCP. The transfer of a public monopoly to a private sector works better if there is a proper legal and regulatory environment. Regulations serve both to protect the investors from arbitrary and politically motivated intervention from the government and to protect users from the abuse of the monopoly or dominant position of the new private sectors. There should be no confusion in the minds of users as to whether they should go to BPE or the Commission or the line Ministers or Corporation or Regulatory Agencies where there is the need for further clarification or resolution of conflicts. The definition of the word 'construction' in the ICRCA makes this more worrisome. What happens in future if a port concessionaire needs to alter or rehabilitate the facility, should the concessionaire apply to the Commission, the line Minister, Ports Authority or BPE?

The need for the protection is underscored by the fact that, quite often, investments in infrastructure are sunk costs, that is, costs that cannot easily be recouped or salvaged if the economic atmosphere deteriorates. These high sunk costs may tempt governments to behave opportunistically, taking regulatory actions that expropriate the available quasi-rents once costs are sunk. Similarly the private operator may behave opportunistically by asking for re-negotiation of tariffs or other terms. Opportunistic re-negotiations should be discouraged.

DESIGN OF A CONCESSION AGREEMENT

concession has been granted by it under the Act. Compare section 36 of the draft Port & Harbour Authorities Bill which provides, among others, that the Ministry shall the responsibility for formulating, determining and monitoring of the general policy for the port and maritime sector in Nigeria. Similarly, sections 41, 42 and 43 of the draft Bill provides that the Authorities established under it shall have landlord powers, technical supervisory powers and general corporate powers respectively.

²⁰ See section 11 of the Act

As in every contractual relationship, the key to the efficient allocation of responsibilities and risks is the design of a proper and effective concession contract. A proper design will ensure long-term sector efficiency and vigorous network expansion.

Concession contracts should be awarded competitively and designed to avoid ambiguities as much as possible. For example, treatment of assets, evaluation of investments, outcome indicators, procedures and guidelines to adjust and review tariffs, and criteria and penalties for early termination of concession and procedures for resolution of conflicts.²¹

Public and private parties in concessions come to the negotiating table with differing concerns and objectives – private sector and their financiers would like to seek adequate returns in sufficiently stable environment while the public sector would want to limit possible abuses of monopoly power, maximize productivity efficiency as well as allocative efficiency, and ensure that appropriate quality, environmental and health standards are maintained. Some trade-offs are therefore imperative.

Concession contracts should contain:

- The main principles of risk allocation – the aim is to ensure that the party with the ability to reduce risks has incentives to do so and that the remaining risks are borne by the party for which it is least costly – this may be difficult in practice, for instance, changes in law, foreign exchange fluctuations, changes in interest rate, level of risk aversion, mitigation measures, environmental risks
- Allocation of responsibilities – this will be done in the provisions defining the service to be provided. Overlapping and undefined responsibilities should be avoided
- Price setting – establishing basic tariff, possibly differentiating between types of services, categories of consumers, pro-poor services, services benefiting public utilities
- clauses committing governments to a policy of no re-negotiation except in the case of well-defined triggers.
- specify that the operators will be held to their Technical and Financial Bids. This forces operators to bear the costs of aggressive bid and of normal commercial risks
- Setting specific performance targets for the operator covering such matters as construction time, minimum investments, output quality, collection ratios and safety and health standards.

²¹ Guasch Op Cit at 19

- Stipulate the process for and level of adjustments – fees and tariffs. Should also provide that the first tariff review should not be entertained for a significantly long period (at least five years) unless contract contingencies are triggered.
- Provide for significant compensation to operators in the event of unilateral changes to the contract by the government, including penalties and bonuses.
- Stipulate that significant fees will be paid for any re-negotiation request. However, if the re-negotiation is decided in the operator's favour, the fee would be reimbursed.
- Provide for concession fee and how they are to be paid including penalties for late payment.
- Provide for bid bonds, payment guarantee and post performance bonds of significant value
- Duration and Termination – early termination, scheduled termination, biasing re-bidding in favour of the incumbent.
- Provisions dealing with transfer of assets and personnel at the end of the term
- Treatment of Labour Issues – payment of pension and gratuity. For example, seaports have moved from labour-intensive to capital-intensive
- Provisions stating that the concession contract takes priority over any other project agreement in the event of conflict
- Provisions entitling the government to intervene and run the project itself in the event that the concessionaire fails to do so.
- Provide for Dispute Resolution mechanism – judicial and arbitral
- Force majeure
- Governing Law
- Boiler Plate provisions – assignment, confidentiality, further assurances, etc

Claims for re-negotiation should be reviewed as transparently as possible, possibly through external professional panels.

The restructuring of infrastructure services over the past two decades has shown that there is no universally appropriate model for reform. Every restructuring and privatization programme must take explicit account of each sector's features: its underlying economic attributes and the technological conditions of its production; and the country's economic, institutional, social and

political characteristics²². For example, reforming the telecommunications sector where technological development eliminated natural monopoly cannot be replicated in the power sector where you still need cables for transmission. Thus power restructuring is more problematic in developing and transition economies than telecommunications.

Build, Operate and Transfer (BOT) arrangements in a concession agreement are spelt out in detailed provisions covering construction, quality control, time schedules, milestones and similar issues. One important provision deals with the granting of exclusivity rights, guaranteeing that the Authority does not promote or permit any other competing facility in the concessionaire's lease property for a certain time period. BOT and BTO (build, transfer and operate) arrangements are frequently integral parts of concession agreements. The difference between these models is the time at which the operator transfers the newly constructed assets to the Authority. Generally BTOs are used when the enabling laws does not allow for the private ownership of the assets. Transfer is conducted immediately upon the completion of construction and the operator receives the equivalent of a management contract.

Under a BOT arrangement, the facilities are transferred to the Authority at the end of the concession period, usually with or without compensation. The hand-back is concluded after a joint inspection and assessment of any renovation works, materials, spare parts, etc. A Hand-back Certificate is usually issued.

A successful PPP builds on the experience of each partner to meet clearly defined needs and provide a net benefit to the general public through the appropriate allocation of resources, risks and rewards. This will lead to the allocation of such elements to the partner best able to absorb and mitigate them. The ability of the public and private sector partners to efficiently and effectively mitigate each risk governs the allocation of each risk.

No two concession contracts are the exactly the same: technical provisions differ from sector to sector; the nature of the contract and the legal regime also influence this. The morale is that a concession contract should be designed to suit the specific situation and needs. However, there is a set of core issues common to all concession contracts.

THE BIDDING DOCUMENTS

²² Kessides, I N Reforming Infrastructure: Privatization, Regulation and Competition: A World Bank Policy Research Report, Washington DC 2004

Once it is agreed that the strategy for the privatization of an enterprise is concession, the bidding documents will be prepared. The first of such document is an advertisement for Expression of Interest (EOI) inviting prospective concessionaires to bid. These bids are evaluated and the concessionaires whose bids are responsive are issued Information Memorandum (Info Memo) and Request for Proposals (RFPs). The Info Memo contains detailed information about the sector, the enterprise and its constitutional instruments. Utmost care must be taken in the preparation of these documents especially the RFP because it is the basis of the contract. Most of the terms in the concession contract are derived from these two documents. The prospective concessionaires are also allowed to conduct their due diligence on the enterprise while a Data Room Exercise is conducted. During the exercise documents on the enterprise are displayed – such documents include, list of staff, liabilities, contracts, receivables, debts – secured and unsecured. There are usually appendices to the RFPs. Such appendices include Confidentiality Agreement and draft Concession Contract. Concessionaires are often asked to comment on the draft Concession Contract. This makes negotiation easier at the end of the bidding process. Two main documents used for bidding are the Technical and Financial Bids. On submission of the bids, the Technical Bids are evaluated and the concessionaires who meet the requirements as stipulated in the RFP are invited to the financial bid opening. It is the concessionaire who emerges as the preferred bidder that is so appointed by the appropriate authority and invited to the negotiation of the contract.

NEGOTIATION OF CONCESSION CONTRACTS

In this part of the presentation, we will critically examine the contents of a concession agreement. These are the terms and conditions that will be negotiated. Effective negotiation requires preparation – knowledge of the facts and subject matter is important. Knowledge of the legal and regulatory framework and of law generally is the background against which all legal negotiations take place. The negotiating strategy to be adopted may be positional (competitive) or problem-solving (cooperative). There are various negotiating styles and tactics. It is not intended that this paper dwells on negotiating strategies, styles and tactics. These are comprehensively covered elsewhere.²³

²³ For a detailed study on negotiations, see Fisher R and Ury W *Getting to Yes: Negotiating Agreement Without Giving In*, 2nd Edn New York, Penguin Books, 1991, Fisher R and Brown S *Getting Together:*

Parties

The parties must be competent to contract. However, who is the concession-granting party? Government itself, a parastatal or ministry or corporation?²⁴ Are the assets or use rights to be transferred under the concession owned by different parties? In the case of the Concessionaire, various issues usually arise. For example, if a foreign company, is there any necessity for registration as a Nigerian company to enter into concession agreement? Does entering into such contract amount to carrying on of business as envisaged in section 54 of CAMA?²⁵ Can a Special Purpose Vehicle (SPV) or a Consortium be used for such transactions? If a subsidiary of a company or an SPV is used, do you need a parent guarantee? If a Consortium, can assignments be made within the Group without the consent of the concession-granting party? Who are Affiliates? Are they determined in terms of control? Occasionally, a parent guarantee is necessary. If an SPV, who will be the authorized signatory? Do you require a Power of Attorney? All these must be carefully negotiated.

Recital

What is the purpose of a Recital in a deed? A Recital can be narrative – explains how the seller came to own the property or introductory – explains the reason for the transaction. In a Deed, Recitals perform three main functions, namely, a) if in a document that is 20 years old at the date of contract are presumed to be sufficient evidence of the truth of such facts²⁶, b) although Recitals cannot be used to modify a clear provision of the operative part of the deed, it may clear an ambiguity in the operate part, and c) where a Recital is clear and unambiguous, it constitutes estoppel against the party making the statement in favour of third parties.

It is important that facts should be correctly recited and chronologically stated

Definitions and Interpretations

Building Relationships As We Negotiate, New York, Penguin Books, 1989, Ury W *Getting Past No: Negotiating Your Way from Confrontation to Cooperation*, New York, Bantam Books, 1993, Halpen A *Negotiating Skills*, London, Blackstone Press Ltd, 1992 and Doherty O *Legal Practice and Management in Nigeria*, London: Cavendish Publishing Ltd, 1998, p 249

²⁴ In the negotiation of the National Iron Ore Mining Company Ltd, Itakpe, Kogi State, it was argued that because the Ministry of Power and Steel that gave BPE an irrevocable Power of Attorney was negotiating directly, BPE could not be a party to the concession contract. The same problem arose during the negotiation of the Apapa Port Terminal Contract between officials of the Nigerian Ports Authority and BPE.

²⁵ See also sections 17 of the NIPC Act of 1995 and 12, 13 and 15 of the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act of 1995

²⁶ See section 130 of the Evidence Act and *Johnson v Lawanson* (1971) 1 All NLR 56

Both parties need to consider each definition carefully since the way in which a word or term is drafted could easily favour one party. Terms usually defined include the Affiliates/Subsidiaries, Control, Common Services/Areas, Effective Date, Lessor/Lessee Event of Default, Term, Staffing and Succession, Force majeure, Improvements, Interruption, Accounts, Termination Notice, Transition Period, Applicable Law and Change in Law.

In standard Concession agreements, I have always found sections on Interpretations. When viewed against the provisions of the Interpretations Act, this may appear redundant and superfluous.

Effective Date and Term

Apart from providing for the effective date, the contract should also provide for the term. Various factors influence these. These include but not limited to the type of investment envisaged, the period it will take to recoup such investment and general government policy. It is instructive to consider the possibility of renewal of the contract and the Transition Period. The Conditions Precedent will also affect the effective date.

There may be need to negotiate early cancellation. Thus the contract can provide for several cases for early cancellation, for instance, automatic cancellation in the event of dissolution, liquidation or as a result of force majeure or at the initiative of the State in the event of a serious breach of obligations.

Alternatively, the contract can be cancelled due to interference by the State or early cancellation on mutual understanding

Basic Lease Rights and Obligations

This will deal with transfer of lease property, maintenance of the lease property, right to peaceful and quiet enjoyment, lease fees and the use of Common Areas, if any. Should the concessionaire have access to other property other than the lease property? What are the obligations? There should be a Schedule to the contract defining and delineating the lease property. What are the degrees of exclusivity granted to the concessionaire?

Depending on one's negotiating ability, the fees can be three, namely, commencement fee, annual fees and fixed fees. The fixed element is independent of the level of activity while the variable is usually a percentage of turnover exclusive of taxes, with the rates changing over time. When are the fees payable? What is the meaning of 'turnover'? It is important that the Schedule should provide for how all these are calculated.

What happens if there is default in the payment of the fees? It is advisable to provide that any sum due but unpaid shall bear interest at LIBOR plus five per cent if international or MRR if domestic.

Use of Lease Property

Express provisions should be made for the permitted use of the lease property and alteration of the lease property by the parties. Such alteration will include amendment to the plan/site/survey and other improvements to the lease property.

Movable Assets

Will there be need to convey any movable asset to the use of the concessionaire? If so what will be the consideration? A schedule of such assets is necessary.

Operations

It is advisable to draw a Schedule specifying the operations and services being transferred to the concessionaire. Will the concessionaire be expected to perform additional services and have access to common areas? For the duration of the concession should the concessionaire be entitled to exclusive right to perform the operations in the Schedule and if so what standard of performance is required. If additional performance is required, it is instructive to provide for criteria for measuring the performance. What happens if there are interruptions to performance? If there are no exclusive rights, will the conceding authority undertake not to grant similar concessions or prevent third parties from acquiring similar rights during the life time of the concession?

The regulatory authorities should set criteria for tracking and evaluating performance. This will ensure that the variable fees are properly calculated.

Parameters should be set for measuring operation rates. Such rates must be in accordance with the Applicable Law. A Schedule should clearly set out these rates. Such rates should be published for information of the general public.

Conditions Precedent

The obligations of the parties to a concession contract to consummate the transactions contemplated in the contract are usually subject to the fulfillment prior to the Effective Date of certain conditions. Such conditions include execution and delivery of the contract, corporate standings of the parties, representations, warranties, covenants, payment of commencement fees, entering into performance bond by the concessionaire and the period within which the bond shall be entered into. Will there be governmental consent, permits, etc to be obtained? Is stamping and

registration required? There is usually a certificate or letter confirming the satisfaction of the conditions or a waiver is provided.

In negotiating such contracts, it is preferable that conditions precedent are distinguished from either conditions inherent or conditions subsequent. A breach of a condition precedent may lead to rescission. It is safer, therefore, to provide for waivers and extensions of time.

Government/Authority/Lessor's Covenants

This usually includes an undertaking to cooperate with the concessionaire, non-interference, access, utilities, taxes, remediation, renewal of permits/licenses and effect of non-compliance.

Concessionaire/Lessee's Covenants

This will include negotiating terms such as required insurance, choice of insurance company, nature of policy modifications to the policy; safety procedures, security system, fire control, traffic; compliance with Environmental Laws, Conventions, protocols, regulations, taxes and effect of non-compliance. Should the concessionaire provide office space to governmental authorities, for example, security agents and in the case of the ports, customs and immigration? An obligation on the concessionaire to construct the relevant facilities in accordance with certain specifications within a certain time

Documentation and Audits

This is one area where the concession-granting body must pay particular attention especially for the purposes of ascertaining the concession fees. What records and reports must be kept and maintained? What accounting model will be used in keeping them? How is the list of assets to be kept? How can the additional investment by the concessionaire be ascertained and monitored? What are the monitoring mechanisms? Can a party disclose any information to the general public? What statistical data should be kept?

Who appoints the auditors and when should the audited accounts be ready? What accounting standards are to be used – national or international?

What should be contained in the Annual Reports prepared by the concessionaire – any circumstance that may impact negatively on the financial obligations, volume of traffic, number and categories of customers, renovation works and repairs carried out, emergencies, etc.

There should be an obligation on the concessionaire to prepare planning and investment report for an agreed period. This should include proposals for improving operations, capital expenditure, human resource, etc

Default

What are the events of default and what are the consequences – rescission, rectification, damages, etc. Events of default will involve insolvency and a breach of material term. What is a material term? What happens if the lease property is wholly or partly expropriated, compulsorily acquired or nationalized by a government authority? What happens if there are changes in law?

Termination

Termination can occur on the expiry of the term, event of default or *force majeure*. If the contract is to be terminated, what are the periods of notice? What are the consequences of termination?

What are the rights accruing to the other party and what compensation is payable?

Compensation

Instead of termination, should a party apply for compensation on the occurrence of *force majeure*, and event of default? At the expiry of the term, what compensation is payable for the investment made by the concessionaire?

Who bears the cost of the transaction? Generally the parties bear their respective costs.

For any delayed payment, there is the need to provide for compensation using appropriate interest rate.

Indemnities, Liabilities

It is advisable to negotiate fully which of the parties is liable for which default. Is there need for indemnity? What are the procedures, the time and financial cap? What is the effect of statute of limitation on indemnity?

Governing Law

For international transactions, this is a major issue. How do you determine the governing law of a contract? Knowledge of conflict of laws rules is important here. The Governing Law can be expressly chosen by the parties or connecting factors like the law of the place where the contract is made (*lex loci contractus*) or the law of the country where a contract is to be performed or where a debt is to be paid (*lex loci solutionis*) or the law of the country where the thing is situated (*lex situs*), etc. What determines the connecting factors, the *lex fori* (the domestic law of the forum) or the *lex causae* (the law which governs the question). Generally the *lex fori* determines the connecting factor²⁷.

²⁷ Collins, L (ed) *Dicey & Morris on The Conflict of Laws*, 13th Edn, (London: Sweet & Maxwell, 2000) p 1195

Jurisdiction

Would you like any dispute to be resolved by the courts or by arbitration? At the international arena, compare the advantages of arbitration over litigation – applicable law, enforcement, neutrality and flexibility.

Dispute Resolution

It would appear that in the case of international commercial transactions, the proper forum is arbitration. It is advisable to adopt the other alternative dispute resolution processes – negotiation and mediation/conciliation – before arbitration. Do you need to appoint an expert before adopting these processes?

If arbitration is chosen, which law governs arbitration bearing in mind that there are at least five different laws regulating arbitral proceedings? Should arbitration be ad hoc or institutional? If institutional, which institution? Which arbitral rules?

Should parties continue to perform their obligations until an arbitral award is given?

How do you determine the venue for arbitration?

Waiver of sovereign immunity is an issue that features frequently in international transactions?

Should the immunity be waived?

Boilerplate provisions – alteration, sub-contracting, notices, survival, severability, further assurances, amendment, confidentiality, counterparts, entire agreement, and assignment

Execution

Which law regulates the mode of execution? This creates problems sometimes. However, the national laws of the parties should regulate this. For example, under Nigerian law, where an instrument is a deed and common seal is fixed, such sealing must be authenticated²⁸. A concession, like any other instrument, must be executed in the proper manner by the proper parties.

Schedules

The use of schedules is extremely important in drafting.

DRAFTING A CONCESSION CONTRACT

²⁸ In the case of a corporation established by the statute, the statute will provide for mode of execution and in a case of a company registered under CAMA, the Articles of Association regulates this.

Once the bidding process is efficiently and professionally carried out and design takes into account the issues canvassed above, negotiations and drafting are easy. As part of the bidding documents, a draft concession contract is usually attached to the RFP for the comments of the prospective concessionaires. Whoever emerges as the concessionaire is invited to negotiate the execution copy.

In drafting a concession contract, therefore, the first question to be answered is what is to be concessioned – the contract must be precise about the assets that are to be transferred, the services that will be performed by both parties and those open to competition.²⁹ For instance in the case of a port terminal, the contract must describe in detail the limits between the infrastructure that is concessioned (berths, surfaces, inner access roads, etc) and what is not (such as common areas) to clearly establish the concessionaire's responsibilities. Assets must be transferred free from any other contractual obligations, etc.

CONCLUSION

In this presentation, we have tried to highlight the issues involved in the design of a proper concession contract for the reform of the infrastructure services. It is obvious that governments all over the world can not provide these services alone and private sector participation is imperative. The promulgation of the Act and enactment of the ICRC have facilitated the reform of this sector in Nigeria. However, there is the need to harmonize these enactments and the functions of the regulatory agencies otherwise there will be chaos.

It is gratifying to note that the Commission has not been set up. This gives room for an amendment of the ICRC and the transfer of the functions/powers of the Commission to the NCP. It is humbly submitted that the setting up of the Commission will amount to duplication of resources. BPE has the technical know-how and expertise to administer concessions. A full implementation of the provisions of the ICRC will amount to the transfer back to line Ministers of the functions currently exercised by the NCP/BPE. It is interesting to note that the line Ministers who are in charge of the public utilities are members of the NCP.

Designing, negotiating and drafting of concession agreements require special skills. These have been developed at BPE. For the efficient implementation of the reform agenda of government,

²⁹ Estache A and Rus de Gines (eds) *Privatization and Regulation of Transport Infrastructure: Guidelines for Policymakers and Regulators*, The World Bank, Washington DC 2000, p 135

therefore, the ICRC should be amended. The beauty of a concession arrangement is that the government is still the owner of the infrastructure but the operation is transferred to the concessionaire. No two concession contracts are the same but there are basic elements common to all. Care should be taken in designing, negotiating and drafting such contracts.

Thank you and God bless.

E-mail: jdornigie@hotmail.com or jdornigie@yahoo.co.uk or pidornigie@bpong.org