

Law n° 2008-23 dated 1st April 2008, relating to the concessions' regime (1)

In the name of the People,

The chamber of Deputies and the Chamber of Advisors having adopted,

The President of the Republic enacts the following law :

TITLE ONE

GENERAL PROVISIONS AND DEFINITIONS

Article one - The purpose of the law herein is to define the legal regime of concessions and to fix the fundamental principles relating to their grant, performance, follow-up and control and to define the legal regime of constructions, works and installations necessary to their performance.

Art. 2 - Within the meaning of the law herein, the concession is the contract by which a public person called "conceding party" delegates, for a limited period, to a public or private person called "concessionaire", the management of a public service or the use and exploitation of public domains or equipments in return of a remuneration that he perceives from the users for his profit within the conditions fixed by the contract.

The concessionaire may, in addition, be charged of realizing, modifying or extending the constructions, works and installations or purchasing the properties necessary to the performance of the subject of the contract.

The contract may authorize the concessionaire to occupy some parts of the conceding party's domain in order to realize, modify or extend constructions, works and installations referred to above.

The temporary occupation of the public domain does not constitute, within the meaning of the law herein, a concession.

Art. 3 - Within the meaning of the law herein, it shall be meant by:

a) public service: provision of services aiming at satisfying the general interest under the direct control of the conceding public person and any other public person exercising the missions of control in accordance with the legislation in force,

b) conceding party: the State, the public establishment or enterprise which text of establishment allows them to grant concessions,

c) concessionaire : the public or private person, beneficiary of the concession and with whom the contract of concession is concluded,

(1) preparatory works :

Discussion and adoption by the Chamber of Deputies during its session held on 4 March 2008.

Discussion and adoption by the Chamber of Advisors during its session held on 13 March 2008.

d) contract: the written contract of concession concluded between the conceding party and the concessionaire.

Art. 4 - The conceding party and the concessionaire watch over the keeping of the financial balance of the concession contract by taking into account the requirements of the public service subject of the contract and the remuneration perceived by the concessionaire.

The concessionaire assumes a substantial part of risks which arises from the performance of the subject of the contract, the methods of share of the other risks between conceding party and the concessionaire shall be determined by the contract.

Art. 5 - The concessionaire may, in accordance with the legislation in force, benefit from incentives and advantages and transfer the profits from his investments carried out within the framework of the concession.

The participation of foreigners in the capital of the company established for the realization of the concession is possible by way of importation of currencies, and this, in accordance with the exchanges regulation and legislation in force relating to the investments of foreigners.

Art. 6 - Except in case when the concessionaire is a public person, the concessionaire is bound to form a company limited by shares or with limited liability, governed by the Tunisian law in conformity with the legislation in force governing the incorporation of the companies.

The company shall have as exclusive purpose, the performance of the subject of the contract.

Art. 7 - The contracts of concession shall not be subjected to the provisions regulating the relationship between the lessors and lessees with regard to the renewal of the lease of buildings or premises of commercial or industrial use.

TITLE TWO

THE CONCESSIONS INITIATIVE AND THE CHOICE OF THE CONCESSIONAIRE

Art. 8 - The initiative of the concession belongs to conceding party.

Art. 9 - Except in the cases mentioned in article 10 of the law herein, the conceding party, shall be bound, for the choice of the concessionaire, to call upon competition to ensure the equality between candidates, the transparency of procedures and the equivalence of chances.

The conditions and procedures of the call upon competition, and notably the modalities of the preparation of its documents and its different stages shall be fixed by a decree.

Art. 10 - The concessionaire may be selected either after consultation or by way of direct negotiation in one of the following exceptional cases:

- a) When the call upon competition was declared unsuccessful,
- b) For reasons of national defense or public security,
- c) When there is emergency to ensure the continuity of public service,
- d) When the performance of the subject of the contract, refers to services which performance shall be entrusted to a determined person or an activity which the exploitation is exclusively reserved to a holder of a patent.

The conditions and procedures of granting concessions after consultation or by way of direct negotiation are fixed by a decree.

Art. 11- Any person may propose, in a spontaneous way, the realization of an investment within the framework of a concession. He must in this case, present to the relevant public person, being able to be a conceding party within the meaning of the law herein, an offer including the technical, environmental, economic and financial feasibility study.

The conditions and procedures of admissibility of the spontaneous proposals are fixed by a decree.

Art. 12 - The relevant public person is bound to examine the presented offer and notify the interested person of its result.

The above-mentioned public person reserves the right, in the event of agreement as for the possibility of the realization of the investment within the framework of a concession, to use the offer to apply the procedures mentioned in article 9 of the law herein by informing the concerned by writing and by respecting the patents and ownership rights related to his proposal.

The agreement relating to the possibility of realizing the investment within the framework of a concession does not constitute a negotiated contract unless in the cases provided for in article 10 of the law herein.

Art. 13 - The State is represented in the concluded concession contract by the Minister concerned by the sector of activity of the public service subject of the contract or by the Minister delegated for this purpose. The local collectivities, the public establishments and enterprises are represented in the contracts of concessions which they conclude, by the person entitled by their deliberating body without prejudice to the rules of approval by the supervisory authority.

The contracts of concession of national interest are approved by a decree.

The criteria of classification of the concessions of national interest are fixed by a decree.

TITLE THREE

THE CONCESSION CONTRACT

Chapter one

The documents of the concession

Art. 14 - The documents of the concession are composed of the contract, the specifications and the annexes that may include documents and agreements which take into account the specificity of the obligations provided for by the contract.

Art.15 - The contract defines the obligations of the conceding party and the concessionaire as well as their respective rights and guarantees.

Art. 16 - The specifications fixes the terms and the technical, administrative and financial conditions of the concession, and if necessary, the conditions and procedures of the realization and the exploitation of constructions, works and installations which the performance of the subject of the contract requires. The specifications forms an integral part of the contract.

Art. 17 - The annexes consist of all the enclosures of the contract and the relevant specifications, and mentioned as such in the contract or in the specifications. The annexes form an integral part of the contract or of the specifications.

Chapter two

The content of the contract

Art. 18 - The contract fixes the duration of the concession, taking into account the nature of services required from the concessionaire and the investment he shall realize.

The duration of the concession can be extended only in the following cases:

- For reasons of general interest and for a duration not exceeding two years,
- In the event of a delay of completion or interruption of the management due to unforeseeable and foreign events to the will of the parties to the contract,
- when the concessionaire is constrained, for the good performance of the service subject of the contract and at the request of the conceding party or after his approval, to achieve the new works not provided for in the initial contract, likely to modify the general economy of the concession. The duration of extension must be limited, in this case, to the deadlines necessary to restore the financial equilibrium of the contract and to preserve the continuity of the public service.

The extension of the concession duration may intervene only once at the concessionaire's request and on the basis of a justified report established by the conceding party justifying the extension. The extension has to be the subject of a contract annexed to the initial one.

Art. 19 - The contract fixes the amount of the royalty that the concessionaire pays to the conceding party as well as the amount of the remuneration which the concessionaire is authorized to perceive from the users for his profit in return of the services he provides.

Art. 20 - The contract specifies the periodicity and the methods of control and follow-up that the conceding party exercises on the performance of the concession and determines the technical, accountable and financial documents that the concessionaire is bound to regularly communicate to the conceding party.

The contract also specifies the measures that may be taken against the concessionaire in case he impedes the control operations exercised by the conceding party and in the event of his failure to his obligation to communicate the

documents provided for by the contract within the agreed upon deadlines.

The contract shall stipulate the periodical examination by the contracting parties of the progress report of the performance of the contract.

Art. 21 - The contract may stipulate the possibility for the concessionaire to ask for the review in the event of an upheaval of the contract financial equilibrium for reasons occurring after the conclusion of the contract and which are beyond the concessionaire's will or with a view to the adaptation of the public service subject of the contract to the technological and economic needs and developments at the conceding party's request.

Art. 22 - The contract includes, in addition to the provisions relating to its normal end, provisions relating to its anticipated end, notably in the following cases:

- a) the repurchase of the concession by the conceding party after expiry of a period determined in the contract, and this in accordance with the provisions of article 27 of the law herein,
- b) the forfeiture of the concessionaire pronounced by the conceding party in the event of a serious failure to one of his substantial contractual obligations and this in accordance with the provisions of article 26 of the law herein,
- c) the termination of the contract by the concessionaire in the event of non-respect by the conceding party to one of his substantial contractual obligations and this in accordance with the provisions of article 31 of the law herein,
- d) the termination of the contract in the event of cause beyond control.

Art. 23 - In addition to the mentions provided for by articles 18, 19, 20, 21 and 22 of the law herein, the contract may also provide other stipulations agreed upon by the contracting parties.

TITLE FOUR

THE CONCESSIONS PERFORMANCE

Chapter one

The rights and obligations of the conceding party

Art. 24 - The conceding party has to take all the measures arising from his contractual obligations and necessary for the good performance of the concession.

Art. 25 - In addition to the control exercised by the State or the other institutions in accordance with the regulations in force, the conceding party reserves the right, in a permanent way, to exercise an economic, technical and financial general control inherent in the obligations arising from the contract. He may for this purpose, be assisted by experts or officials of his choice that he makes known to the concessionaire.

Art. 26 - The contract specifies the cases of serious failure which generate the forfeiture of the concessionaire by the conceding party after warning him by a registered letter with acknowledgement of receipt and granting him the deadline fixed by the contract in order to fulfill his commitments.

In this case, the creditors whose rights are registered, are informed by a registered letter with acknowledgement of receipt, before the time limit fixed by the first paragraph of this article and before the date by the decision of forfeiture, and this, to allow them to propose to the conceding party the substitution of the forfeited concessionaire with another person. The transfer of the concession to the proposed person is subjected to the agreement of the conceding party.

Art. 27 - The conceding party may, after the expiry of the period determined in the contract and before the agreed upon term, repurchase the concession. In this case, the concessionaire shall be informed by a registered letter with acknowledgement of receipt six months before the date provided for the repurchase. In this case, the concessionaire has the right to be compensated for the damage which he underwent.

The creditors whose credits are registered on the register mentioned in article 39 of the law herein are subrogated for their credits collection to the concessionaire, up to the amount of the allowance which he is entitled to.

Chapter two

The rights and obligations of the concessionaire

Art. 28 - The concessionaire is bound, during the performance of the contract and till its end, to protect the constructions, works and installations necessary for the performance and management of the public service subject of the contract by ensuring the equal treatment and the continuity of the services.

Art. 29 - The contract is concluded by reason of the concessionaire's personal qualities and it does not confer to him any right of exclusivity unless in cases and in accordance with the conditions fixed by the contract. The concession may not be transferred, during its performance, to a third party unless prior and written agreement of the conceding party. The transfer is a subject to a contract concluded in accordance with the provisions of article 9 of the law herein.

Art. 30 - The concessionaire is bound to personally perform the contract unless the contract authorizes him to sub-contract a part of his obligations after the conceding party prior authorization. In this case, the concessionaire remains personally responsible towards the conceding party and third parties for the achievement of all the obligations imposed by the contract.

Art. 31 - The concessionaire may ask for the termination of the contract in the event of non-respect by the conceding party of one of his substantial contractual obligations and this, after warning him and granting a time limit fixed in the contract to fulfill his commitments and by informing the creditors whose credits are registered on the register mentioned in article 39 of this law. In this case, the concessionaire has the right to be compensated for the damage which he underwent because of the failure which led him to require the termination.

Art. 32 - If the contract has as a subject, a public service managed directly by the conceding party, the concessionaire is bound, unless contrary stipulations in the contract, to take again the aforesaid staff of the service and

to maintain their vested rights. In this case, the contract stipulates, in conformity with the legislation in force and if the concessionaire has the intention, the level and methods of readjustment of manpower of the aforesaid staff.

Art. 33 - The concessionaire is bound to obtain all the licenses and authorizations or to be in conformity with the specifications relating to the performance of the concession in accordance with the legislation in force.

The conceding party may assist the concessionaire in order to make easier the obtaining of these authorizations as well as to be in conformity with the specifications.

Art. 34 - The concessionaire assumes the responsibility of the work management and organization in the public service subject of the contract and he is held responsible, in conformity with the legislation in force, for all the fixed constructions, works and installations which he exploits, within the framework of the concession. He must ensure his civil liability, throughout the concession, against the dangers resulting from the works achieved by him and from the exploitation of the abovementioned constructions, works and installations according to the insurance contract concluded in conformity with the legislation in force with insertion to the contract of insurance of a clause for this purpose which prohibits the termination of the contract or making significant modifications by him without the conceding party prior agreement.

TITLE FIVE

THE CONCESSION PROPERTIES

Chapter One

The categories of properties

Art. 35 - The properties of the concession are classified in properties of return, properties of recovery and private properties. The contract defines, if necessary and on the basis of this classification, the categories of properties which will be used by the concessionaire during all the duration of the concession.

Art. 36 - Are considered properties of return, the parcels of land, fixed constructions, works, installations and movable properties, freely put by the conceding party at the disposal of the concessionaire, realized or acquired by the latter in conformity with the conditions mentioned in the contract and which, because of their importance, contribute substantially to the operation of the public service subject to the contract.

Are also considered properties of return, the parcels of land belonging to the public domain, the occupancy of which by the concessionaire was authorized by the contract. These properties are the subject of an inventory appearing in a document annexed to the contract.

These properties can be subject of no transfer or guarantee except in the cases and according to the conditions mentioned in the law herein, and must be freely returned to the conceding party at the end of the contract free of all charges or mortgages.

Art. 37 - Are considered properties of recovery, the movable properties contributing to the good operation of the service subject of the contract and which may become after the end of the contract the property of the conceding party if this latter exercises his right of recovery against payment to the concessionaire of an allowance which

amount is fixed according to the method determined by the contract.

Art. 38 - Are considered private properties, the movable properties which remain the property of the concessionaire after the end of the contract.

Chapter two

The chattel real

Art. 39 - If the performance of the contract requires the building of fixed constructions, works and installations on the conceding party's property, the concessionaire has special chattel real on the mentioned constructions, works and installations which confers to him, for the duration of the contract, the owner's rights and obligations within the limits of the provisions provided for in this chapter.

The chattels real, burdening the fixed constructions, works and installations, are registered on a special register held by the relevant departments of the Ministry charged of the State Properties and Land Affairs.

The methods of holding this register are fixed by a decree.

The forms and procedures provided for by the legislation in force as regards to chattels real are applicable to the registration of the chattel real as well as the rights of the creditors burdening it.

Art. 40 - It is prohibited, during all the duration of the contract, to sell or transfer, whatever the basis is, the chattels real, fixed constructions, works and installations including the guarantees relating to the aforesaid rights, unless an authorization of the conceding party.

Art. 41 - The chattels real, fixed constructions, works and installations can be mortgaged only to guarantee the loans contracted by the concessionaire in order to finance the realization, modification, extension, maintenance or renewal of the constructions, works and installations realized within the framework of the concession.

The unsecured creditors other than those whose credit was born at the time of the achievement of the works mentioned in the previous paragraph can not exercise measures of conservation or executory measures on the rights and properties mentioned in this article. The mortgages burdening the chattels real, fixed constructions, works and installations extinguish at the expiry of the contract.

Art. 42 - The concessionaire must demolish, at his expenses, the fixed constructions, works and installations which he carried out in accordance with article 39 of this law, unless explicit and contrary stipulation of the contract.

The Fixed constructions, works and installations, which maintenance was accepted, return to the conceding party free of all charges or mortgages.

TITLE SIX

FINAL PROVISIONS

Art. 43 - The provisions of this law herein shall apply to all the concessions without prejudice to the related sectoral texts in force.

The law herein shall be published in the Official Gazette of the Republic of Tunisia.

Tunis, 1st April 2008.

Zine El Abidine Ben Ali