

Concessions and Similar Legal Instruments in Argentina

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Abstract

Argentina presents a variety of legal instruments around the legal figure of concession. The present article discusses four cases which are casinos, exploitation mining and hydrocarbon resources, the advertisement in public spaces, and, finally, the exploitation of municipal parking. The selection of cases is not arbitrary as it provides a good panoramic view of the enabling titles as well as the legal regime of these activities. All of them are governed by Public Law and all of them imply the use of administrative prerogatives. In the end, we present our concluding remarks that are related to the weakness in which the private counterpart finds itself.

Keywords: Concession, Argentina, casinos, mining, hydrocarbon resources, advertisement in public spaces, municipal parking

1. Introduction

1.1 General: the Argentine system in brief

Argentina has a presidential and federal system of government (art. 1 of the Constitution of 1994, from now on “C”) that implies the unfolding of power in relation to the territory at the national, provincial and municipal levels. The National Constitution determines the powers of each of these levels of government. According to art. 121 C. the provinces conserve all the powers not delegated to the federal government. That is to say, the provinces act also as a residual power as long as they are the original authorities that signed the federal Constitution. Art. 122 C. allows the provinces to establish their own institutions even their own Constitutions. Nonetheless, all the 23 provinces and the Autonomous City of Buenos Aires share a similar institutional scheme and emulated the federal system in which respect the executive and legislative branches: there is no example in Argentina of a parliamentary system, neither at the federal nor at the local level. In all the cases the Chief of State is at the same time the Chief of Government: The President of the Republic (federal level), the Governor (provincial level), and the Mayor (municipal level).

As far as the judiciary is concerned, the Argentine system is one of a unity of jurisdiction and of a Supreme Court kind ⁽¹⁾. In areas governed by Public Law, there are competent specialized judges in that matter. The National Chamber of Appeal in Federal Administrative Matters is divided into several sections (called “rooms”, a term borrowed from the Spanish system “*salas*”) ⁽²⁾. There are also first instance judges that rule in federal administrative conflicts distributed all along the national territory. The federal law covers the matters involving two or more provinces as well.

At the provincial level, we can verify two systems: in provinces such as Buenos Aires, the Autonomous City of Buenos Aires or Córdoba, there are specialized judges competent in administrative matters with their correspondent Chamber of Appeal ⁽³⁾. The local Supreme Court is the ultimate resort of this level. There are other provinces in which the local Supreme Court is the first and unique instance in administrative matters. This is possible because of the fact that the

¹ Art. 108 C., Law No 26 183.

² Today, 5 rooms with three judges each.

³ Law No 12 008 of the Province of Buenos Aires; Law No 7 182 of the Province of Córdoba; Law No 189 of the City of Buenos Aires.

double degree of jurisdiction is not constitutionally compulsory in administrative law in Argentina⁽⁴⁾ and this is due also to the fact that some provinces of Argentine are scarcely populated⁽⁵⁾.

The federal Supreme Court acts as first and unique instance in conflicts between two or more provinces. It acts as a third instance in conflicts ruled by federal administrative law (ordinary federal remedy)⁽⁶⁾. There is also a way to attain it from the local sphere by the procedure of the “federal extraordinary remedy”⁽⁷⁾. This could be the case of a simple federal inquiry, when the pure interpretation of a federal body is involved; a federal direct inquiry, when the province contradicts a federal legal body; or an indirect federal inquiry, when the province contradicts the legal hierarchy provided by the National Constitution, *i.e.*, when the provincial judge pronounces a ruling based on a local legal text against the local Constitution⁽⁸⁾. Now we should examine briefly the Argentine Administrative Law.

1.2 Outlook of the Argentine Administrative Law

Argentina adopted in general de sub-constitutional system of European Continental Law. That implies the existence of legal texts instead of a purely binding precedent system.

At the federal level, the Administrative Procedure Act (*LPA* in Spanish)⁽⁹⁾, adopted in 1972, contains the main principles of what is called an administrative act: unilateral decision taken by a competent administrative authority to achieve direct effects. By contraposition, the general acts do not enter within this category. The pure normative act (regulation) is always different from the administrative act and its way of contesting differs also (GORDILLO, 2013). By the same token the contract is bilateral and differs from the administrative act (or decision, which is individual) and from the normative regulation (*reglamento*, which is general).

The Executive Order (*decreto*) No 1023/2001 is the general regime of public contracts in Argentina at the federal level. It imposes a subjective criterion to identify the administrative contracts: all the contracts signed by the public administration are presumably administrative ones if it is not mentioned that the contract is a private law one⁽¹⁰⁾. It imposes the trending as a natural procedure and the direct contract as an *ultima ratio* possibility except from some cases, *i.e.*, *intuitu personae* contract needed for artistic purposes⁽¹¹⁾.

Regarding the general details of the regime, the National Procurement of the Treasure is the organ in charge of the consultative function at the federal level⁽¹²⁾. Its opinions are compulsory for the entire body of national public officers. More specifically, the National Office of Contracts (ONC) is the authority in charge of even more detailed aspects and it has a consultative competence as well⁽¹³⁾.

This framework is duplicated and emulated at the provincial level. Each province has its own written text about the public contracting system⁽¹⁴⁾. They have sometimes an Office of Contracts and even if the details can vary from province to

⁴ Supreme Court, Fs. 311:274; 312:195; 318:1711; 310:1424; 322:3241; 329:1180. *Nb.*- “311:274”, for example, must be understood: tome n° 311, page n° 274 of the national collection of decisions.

⁵ The province of Tierra del Fuego counts nowadays a population of 152 317 people; the province of La Pampa 353 106.

⁶ Law No 4 055.

⁷ Arts. 14 to 16, Law No 48.

⁸ Art. 31 C.

⁹ Law No 19 549.

¹⁰ Art. 1 *in fine*.

¹¹ Art. 25 inc *d*).

¹² Law No 24.

¹³ Art. 23, Executive Order No 1 023/2001.

¹⁴ Decree-agreement No. 3 716-H-1978 (province of Jujuy); Law No. 7 253 (province of Santiago del Estero); Law No. 8 072 and Regulatory Decree No. 1 319/18 (province of Salta); Law No. 2 000-A (province of San Juan); Law No. 8 706 (province of Mendoza); Law No. VIII-0256-2004 (province of San Luis); Law No. 4 938 (province of Catamarca); Decree-agreement No. 22/1 (province of Tucumán); Decrees No. 470/73 and their amendments No. 2 272/74, 520/78, 1 457/79, 2626/86 and 835/05 and Law No. 2 237 (province of La Pampa); Law No. 13 981 (province of Buenos Aires); Law No. 2 095 (Autonomous City of Buenos Aires); Laws n° 5 140 and 8 964 (province of Entre Ríos); Law No. 47 (province of Misiones); Decrees No 3 056/04 and 406/05 (province of Corrientes); Law No. 1 180 (province of Formosa); Law No. 4 713 (province of Chaco); Law No. 1 015 (province of Tierra del Fuego); Law No. 3 755 (province of Santa

province, the principles are always the same: tender as a principle, competition among aspirants, equality among the offers and so on (BALBIN, 2008). Having said that, the question about a conception of Argentine concessions arises.

1.3 Towards a conception of Argentine concessions system

Regarding concessions, Argentina took French law as a source of inspiration in the elaboration of its general theory of administrative contracts. That is why all these matters are colored by a truly exorbitant regime for private law. This somewhat forced marriage between a US-inspired federal and presidential constitutional law and a French-inspired administrative law provides a panoramic view of the normative framework that crosses these matters.

Concessions are always a public contract in Argentina both due to federal, provincial or municipal regulations. This implies in each case a public tender procedure. From the moment direct selection contract takes place; we cannot speak about a concession in Argentina (BIELSA, 1964).

We have mentioned before that the so-called exorbitant regime for private law exists in Argentine public contracts. That is to say that the public administration reserves a certain amount of prerogatives towards the co-contractor: the unilateral interpretation, the possibility of unilaterally altering some clauses of the contract (*jus variandi*), the direction or commandment of the contract during its execution stage, the possibility of applying sanctions during the contract (police power), the possibility of revocability of the contract by the administration invoking reasons of public interest without a tribunal pronouncement – this is called “the rescue” of the concession. From all evidence, this last aspect means for the administration the mandatory payment of reparation to the co-contractor.

It should be noted that, globally, the granting authorities that concern us are the governors of each province and the mayors; the power in charge of defining their legal regimes are the local provincial legislatures.

Please note also that in Argentina the administration can celebrate private law contracts and public law contracts. The public law contracts can have more or less imprint of public law. That is to say, the power of commandment of the administration can be lower (supply contracts, buy and sell contracts, etc.) or greater (public works, concessions). They are all public contracts; the difference is the degree of imprint of public law which can be defined the degree of the exorbitant regime to private law (GORDILLO, 2015). In this logic, the most publicized contract is the public service concession (public utility in English) but Argentina has adopted the theory of the public service (*service public*) from French law. In this case, we can even find implicit exorbitant clauses (MARIENHOFF, 2006). Now we will focus on the material studied in this contribution.

1.4 Material studied in this contribution: the enabling titles

1.4.1 The concession

The concession is an administrative contract by which a person (called a grantor) entrusts a private or, more rarely, public person (called a concessionaire) with the responsibility of managing an operation at their own risk, recognizing the right to be remunerated by a payment collected from its users (SARMIENTO GARCÍA, 2007).

1.4.2 The license

The concession implies the transfer to the individual of the exercise of certain prerogatives of the administration, which grants it a new but derived power of its ownership. The notion of license consists of the public authorization for the private provision of a service in itself of private ownership (SARMIENTO GARCÍA, 2006).

1.4.3 The fee

A fee is defined in Argentine law as the tax whose obligation has as its generating event an actual or potential provision of an individualized public service to the taxpayer. Its product must not be foreign to the service which constitutes the basis of the obligation (URRESTI, 2005). The main difference here is the fiscal nature of the payment.

1.4.4 The permit. The permit implies the granting of a right to the individual that constitutes an exception to a prohibition imposed by a police rule in a preventive manner. It constitutes a unilateral act of the Administration that in essence represents nothing more than an act of administrative tolerance with a merely precarious nature, that is, freely revocable at any time (CASSAGNE, 1996).

1.5 Area description and methodology

Below we discuss, partly based on the distinctions discussed above, the following four cases, as they show a panoramic view of the concessions’ regime in Argentina: **2)** the exploitation of casinos, **3)** the exploitation mining and hydrocarbon

Cruz); Law No. 5 447 (province of Chubut); Decree No. 123/19 (province of Río Negro); Decree No. 2 758-1995 (province of Neuquén); Law No. 10 155 (province of Córdoba).

resources, 4) the advertisement in public spaces and 5) the exploitation of municipal parking. After the discussion of these cases, a brief concluding observation follows.

Regarding our methods, we will help ourselves using the legal instruments (Constitution, legal texts, executive orders) both at the federal, provincial and municipal levels. Also, we will take into account the legal discussions within the relevant legal literature which have led to legal debates. Finally, the ruling of different courts will be another source for our analysis. We will now move towards the first case which is the casinos.

2. Casinos

The regulation of games of chance, within which casinos are found, is not included in the powers attributed to the National Legislative Power, so its treatment does not correspond at all to it (art. 75 C.). That is to say, the regulation of games of chance has been fully kept in the orbit of the provincial powers.

In this sense, the Supreme Court of Justice of the Nation, in a ruling dated May 31, 1999, "*Dandolo, Esperanza Patricia s/ infracción decreto - ley 6618/57*" resolved that the regime in matters of games of chance and its possible non-criminal infractions is not a federal matter nor is it included in the reserve that was established on the common legislation (art. 75 inc. 12 C.).

In other words, each of the provinces that make up the Argentine Republic legislates exclusively in relation to the system of administration and exploitation of games of chance within their respective territories, without the Federal Government having the power to impose mandatory regulations on them.

When a casino management is granted to private companies the regime then is that of concession⁽¹⁵⁾.

Current legislation does not require the use of a specific type of company to operate in games of chance. However, the regimes of each province when bidding for the concession to operate games of chance may require among their requirements a specific type of company, a minimum capital, a minimum number of directors, etc.⁽¹⁶⁾.

The legal instrument is therefore a contract. As mentioned before, the bilateral act excludes in Argentina the unilateral decision and the concession is always a contract, in other words bilateral. So, it is a Public Law contract with the entire exorbitant regime inherent to private law. As mentioned, Public Law contracts in Argentina may be more or less close to Private Law, with the analyzed concession being one of the most publicly present without reaching the public service concession, which is the one with the greatest Public Law presence.

The so-called "public tender" (public tendering procedure) is used, which is the ordinary framework regime of the concession. It implies competition between the bidders to obtain the concession. This is the normal regime – principle – for public contracts. In Argentina, there is no concession without a public tender⁽¹⁷⁾.

The general principles are free access for competitors, transparency, equality of applicants and bidding among them. Likewise, the list of bases and conditions (*cahier des charges*) is published well in advance. These principles derive from all the provincial applicable law. Such principles are general and then there are detailed rules that vary from province to province.

The role of such principles is, on the one hand, the obtaining by the Administration of the most convenient offer and, on the other, the respect of all the potential co-contractors of the possibility of obtaining the concession. The most convenient offer in matter of casinos is not merely the highest return to the province which is pre-established in the *cahier the charges* but also the quality of the provided commercial service, the use of the facilities, the personnel involved in the operation (employment reasons), investment proposals, etc⁽¹⁸⁾.

¹⁵ The formula literally present in the provincial legislation is the following: "*The administration and operation of provincial casinos by individuals will be carried out under the concession regime.*" This formulation may vary a little in certain provinces but the concession regime is the common regime on the matter. *I.e.*, "Casino Club" and "New Star" (province of Tierra del Fuego), "Tecno Acción Salta", "Gammalink" and "New Gaming" (province of Salta); "Entretencimientos Patagonia S.A." (province de Río Negro); "Boldt S.A" (province of Buenos Aires).

¹⁶ *I.e.*, Law No 6 362, province of Mendoza; Law No 11 536, province of Buenos Aires; Law No 8 665, province of Córdoba.

¹⁷ See *supra* footnotes No 13 and 14 for the normative framework both at federal and provincial levels.

¹⁸ *I.e.*, art. 7.d), Law No 205, province of Chubut: "*Taking into consideration the nature of the activity subject to concession, the most convenient offer will be evaluated not only taking into account the economic aspect, relative to the best price, but also the different variables that demonstrate the greatest benefit for the public interest and the community in order to select the best operator. In this regard, the bases of the selection or contracting procedures may, when*

As we mentioned, the public bidding procedure is applied. The procedure begins with the call to receive bids and the publication of the specifications and conditions (*cahier des charges*). After the deadline for bidding, bidders receive notification of the decision and have a deadline to challenge their competitors' bids. Once this stage is completed, a pre-award is made and then an award by which the contract and its corresponding economic-financial equation begin to govern. This procedure is common to all provinces given the similarity of regimes among the provincial legislation, without prejudice to the fact that deadlines and other detailed issues may vary from one province to another.

Regarding the national legislator, he/she cannot interfere in powers not delegated to the Nation (see *supra*, introduction). As far as the governments of provinces, games of chance constitute a means of found collection for them.

The granting authority is the local executive power (governor). Only the legislator, particularly, the local legislator, is competent to limit free competition and establish a state monopoly that will later take the form of a concession (¹⁹).

In general, the regime is accepted, although its constitutionality can be discussed because art. 14 of the Argentine Constitution establishes the freedom of industry and commerce if its purposes are lawful. At the moment, there is not and has not been a constitutional dispute on the matter. The instruments and procedures used in this matter are not under discussion. Nonetheless, there are particular cases of floating casinos in which de federal legislation is applicable when the boats exert their activity in federal waters (²⁰). It is a very exceptional situation but the regime is still a concession and the principles are similar due to the similarity of them both at the federal and provincial levels (²¹).

As far as the business risk, it is at the expense of the co-contracting party in its entirety. He himself pays a fee for the concession and it is at his risk that he assumes the execution of the contract. Likewise, certain prerogatives of public power weigh on the co-contractor, such as "rescue", that is, the possibility of the State to terminate the concession for reasons of opportunity, merit and convenience, of course always compensating the damage (²²).

The risk is the situation of relative weakness in which the co-contracting party outside private law finds himself. For example, he must accept a certain police power over the activity, he must accept administrative sanctions under certain conditions, he may be subject to a certain power of administrative command under justified reasons of general interest, etc. In short, the comparative risks with the hypothetical private operator are greater. This follows from provincial regulations (²³). The transferred risk is aggravated to the extent that the Administration does not want to terminate the concession and the concessionaire must continue to pay the concession fee under the terms of the contract.

The aforementioned is a *de jure* risk. As for the *de facto* risks, it must be said that the Argentine Administration does not always indemnify lost profits. In this way, integral reparation is compromised in the event of "rescue" of the concession. That is to say, the possibility of the State to terminate the concession for reasons of opportunity, merit and convenience could only compensate emerging damages (²⁴).

In terms of legal certainty, the concession terms for casinos were always respected. Once again, the Administration has at its disposal the so-called "rescue" possibility, always compensating for emerging damage but not always for lost profits. Also, contrary to what is expected in terms of legal certainty, in the case of concessions, there is the so-called *jus variandi* which implies that the grantor can modify certain terms of the contract.

The legal framework is rather inclined towards the prerogatives of the Administration. The jurisprudence outlined limits for the respect of the property rights of the co-contracting party (COVIELLO, 1996).

appropriate, establish scoring or percentage systems referring to different aspects or variables to be taken into account for the purposes of the evaluation."

¹⁹ Art. 42 C.

²⁰ There is only one example of this, the "Buenos Aires" casino that is located on two Casino Ships in Puerto Madero.

²¹ See *supra* footnotes n° 13 and 14.

²² Rescue: "Administrative act by which the reorganization of a granted service is arranged, for reasons of public interest, extinguishing or suspending the execution of a concession contract or other administrative act or contract that grants the exploitation of a service on a non-precarious basis, before the expiration of its term, with the granting administration assuming the provision of said service." Cf. PRITZ, O. A. F., 2000: 245.

²³ See *supra* footnote n° 14.

²⁴ Supreme Court, "Cía. Azucarera Tucumana" (1989), rev. ED t. 135, p. 392; "Calderas Salcor Caren" (1997), rev. LL t. 1 997-C, p. 782; "Almacenes del Plata" (1990), rev. LL t. 1 990-A, p. 625; Fs. 145:307, "Bourdieu c/ Municipalidad de la Capital" (1925).

As far as legislative changes are concerned, the private actor is not particularly protected in case of legislative changes beyond the responsibility of the State for its legislative activity, which is unanimously recognized in Argentina as of Law No. 26944 of July 2, 2014. It is of note that its art. 5 establishes that lost profits will not be compensated. This would be the case of legal legislative change.

Regarding the protection against unforeseen circumstances, the theory of the Sovereign act and the theory of unforeseeability are applied as a mechanism to safeguard the economic-financial equation of the contract ⁽²⁵⁾.

The duration of the execution of the contract varies from province to province. However, all offer calls consider an investment curve so that the dealer recovers the investment with a reasonable profit. For example, province of Santa Fe: 30 years; Mendoza province: 10 years; province of Buenos Aires: 10 years ⁽²⁶⁾. The duration does not come from the legal framework but from the specifications and conditions (*cahier des charges*). There is no legal rule about the duration of the concession but each concession itself treats the question in its *cahier des charges*.

The concession takes into account the investment curve for the recovery of the investment and reasonable profitability (MARIENHOFF, 1993).

Having examined the case of casinos we will now embark on the analysis of mining and hydrocarbon resources.

3. Mining and hydrocarbon resources

Regarding mining matters, the provinces, being owners of the mineral resources located in their territories (art. 124 C.), have delegated to the Nation the power to dictate the Mining Code (art. 75 inc. 12 C.). The Code establishes a legal system for the granting of mining rights to individuals (whether natural or legal persons), with the granting of mining concessions falling on the provinces through the competent administrative authorities. The National Mining Code establishes the rules that must be applied regarding the rights, obligations, and procedures to acquire, exploit and take advantage of mineral substances. The foregoing is complemented by provincial mining procedure codes and other specific regulations at that level.

The Code distinguishes three categories of mines:

- (i) Mines of the first category. Main metals, including copper, gold, silver, lithium, potassium, lead, zinc, among others. They belong to the provinces and are granted to individuals.
- (ii) Those in the second category are made up of metalliferous substances not included in the first category: salt pans, saltpeter, and peatlands. This category is preferably granted to the owner of the land and, if he does not exercise the right in term, to a concessionaire.
- (iii) Third category mines. They are mostly quarries, including construction rocks and productions of a stony or earthy nature, applicable as construction material or ornament. They belong exclusively to the owner of the land.

In terms of hydrocarbons (oil and gas), Law No. 24 145 of September 24, 1992 transferred ownership of the deposits to the provinces, which would take effect as of the expiration of the legal terms of the concession contracts then in force, a situation that was reinforced by the constitutional reform of 1994 that recognizes in its art 124 *cit* the property of the provinces of their natural resources.

Through Law No. 25 943 of October 24, 2004, the company "*Energía Argentina Sociedad Anónima*" (ENARSA) was created, its purpose is to carry out the study, exploration and exploitation of solid, liquid and/or gaseous hydrocarbon deposits, the transportation, storage, distribution, marketing and industrialization of these products and their direct and indirect derivatives, as well as the provision of the public service of transportation and distribution of natural gas and the generation, transportation, distribution and marketing of electricity, holding the ownership of exploration permits and exploitation concessions over all the national maritime areas that are not subject to permits or concessions and may intervene in the market in order to avoid situations of abuse of dominant position originating in the formation of monopolies or oligopolies.

²⁵ Supreme Court, "*Marocco y Cía. S.A. C. I. F. I. C. A. c/ Dirección Nacional de Vialidad s/ Ordinario*", February 9, 1989; National Chamber in Federal Administrative Litigation, Room II, "*Vialco S.A.C.I.C.I. y Otro c/D.N.V., s/ contrato de obra pública*", May 5, 1989; Room II, "*Dunco S.A. c/B.N.A. s/ cobro de pesos*", April 1, 1993; Room II, "*Metalúrgica Bulcar S.R.L. c/ E.F.A. s/ juicio de conocimiento*", October 5, 1993; Supreme Court, "*J. J. Chediak S.A. c/ Estado Nacional (Fuerza Area Argentina) s/ nulidad de resolución*", August 27, 1996; among others.

²⁶ Decree No. 1 842/22, province of Mendoza; decree No. 324/2020, province of Santa Fe; decree No 36 112, province of Buenos Aires.

The main purpose of the creation of ENARSA was to act as a witness firm in the market, to avoid the possibility of abuse of a dominant position by private sector companies and against the formation of oligopolies. If the concessionaire does not exploit its right or exploits it badly to avoid the existence of idle resources, it is possible that the province takes it back, to give it to ENARSA. In that case, an agreement (inter-administrative contract) is needed between the province and the federal government as far as ENARSA is a national company ⁽²⁷⁾.

Regarding the activities of transportation and distribution of gas, the contract has a greater presence of Public Law as they are public service concessions given the fact that the transportation and distribution of natural gas, whether gaseous or liquefied, in Argentina are considered public services ⁽²⁸⁾.

Between the State and the concessionaire there is a contractual relationship governed by Public Law with all the exorbitant prerogatives of private law inherent to such type of contract. In the case of gas transportation and distribution, these prerogatives acquire greater presence.

The applicable regime is public bidding (*marché public*). After the tender the province can refuse to conclude the contract, in that case the tender is considered “deserted” to employ the terms on Argentine Law ⁽²⁹⁾.

The call for bids is public together with the specifications and conditions (*cahier des charges*). Once the bids have been submitted, the Administration has a period to decide which one was the winner. There is then a contest period in which unsuccessful candidates can challenge the winning bid. Finally, a pre-award is made and then an award. With this last act, the concession contract begins its execution stage (BARRA, 1989).

The concession is the ordinary framework regime in force on the matter and guarantees bids from bidders while reserving certain command prerogatives of the concession to the grantor. The regime is sanctioned by local legislatures. Each call for bids has considerations. Globally, what is usually indicated is that they want to avoid the existence of idle resources, the search for energy sovereignty and the attraction of investments. The granting authority is the local executive power.

Only the legislator can establish a monopoly regime and, of course, in the granted area the grantor has a monopoly ⁽³⁰⁾. The granting authority is the local governor in his capacity as the highest authority of the administration and whose signature binds the province in its capacity as body ⁽³¹⁾.

In general, this regime is usually accepted.

The private actor must pay a charge, generally annual. If the operation is in deficit, he must continue to pay it. Of course, the individual can, if necessary, terminate the contract, but this implies the payment of penalties. So, he assumes the risk of the profitability of the operation. The transfer of risk to the private actor is situated in the hypothesis of concessioned areas whose exploitation is not profitable enough. The individual acting in the purely private framework could simply leave the business. The operator within a concession cannot do so ⁽³²⁾.

There is a risk, especially but not exclusively in gas matters, that, for reasons of public interest, the Administration decides to continue exploitation even at a loss. Of course, the concessionaire may then initiate legal action, but this implies litigation and, what is worse, if well-founded reasons of public interest justified the administrative action, the individual must demonstrate that this preeminent general interest did not justify the continuation of the operation ⁽³³⁾.

The *de facto* risks, in addition to the normal *alea* of the activity, have to do with the extremely unstable political circumstances in Argentina, in which, by invoking “emergency” situations, the State can influence the market. For example, a rate freeze on gas – the imposition of a certain pricing for the final consumer during a period without the

²⁷ Resolution No 1 299/2006. Framework Agreement for the generation of the hydrocarbons database, signed between the ENARSA and the provinces. The producing provinces are invited to adhere to the aforementioned Convention.

²⁸ Art. 1, Law No 24 076.

²⁹ Situation that occurs when there is no admissible offer or proposition in accordance with the criteria that appear in the *cahier des charges*.

³⁰ Art. 42 C.

³¹ The Law No 26 197 transfers to the provincial States the exercise of powers as granting authority according to the constitutional reform of 1994.

³² Supreme Court, “*Sánchez Granel*” (Fs. 306:1409, 1994); “*Juncalán Forestal Agropecuaria S.A. c/ Provincia de Buenos Aires s/ daños y perjuicios*” (Fs. 312:2266) (1989); “*El Jacarandá S.A. c/ Estado nacional*” (Fs. 328:2654) (2005) and “*Zonas Francas Santa Cruz S.A. c/ Estado nacional – P.E.N. – Dto. 1583/96 s/ daños y perjuicios*” (Fs. 332:1367) (2009).

³³ Supreme Court, “*Panedile Argentina SACIFP*” (Fs. 305:1011, 1990); “*Yacimientos Petrolíferos Fiscales*” (Fs. 315:158, 1992) and “*Pcia. del Chubut c/ Centrales Térmicas Patagónicas S.A.*” (Fs. 324:4199, 2013).

possibility of increasing it – impacts the entire market, including its storage, transportation, distribution and sale. That is the *quid of the de facto* risk since, although the concession is not affected directly, it will be affected indirectly. Of course, the concessionaire can initiate legal actions but, once more, this implies litigation ⁽³⁴⁾.

Legal certainty finds protection in the contractual *synallagma*. As we have stated, Argentina being a country whose administrative legal system has followed the French trend of the administrative contract category (KURLAT AIMAR, 2020), the concession presents particularities that, globally, place the individual in a situation of inequality with the grantor. It is noteworthy that for investments of a certain magnitude, international arbitration jurisdiction is agreed, which is not prohibited in administrative matters in Argentina, unlike other countries ⁽³⁵⁾.

We can clearly see that the legal framework is rather inclined towards the prerogatives of the Administration. The jurisprudence outlined limits for the respect of the property rights of the co-contracting party (COVIELLO, 1996).

Now we should examine de advertising in the public space.

4. Advertising in the public space

The advertising regime in the public space is crossed by Argentine federalism. That is, on routes, international ports, international airports and any other area of national competence, the intervening administrative authority is the national State. On the contrary, in provincial routes or provincial establishments, the administrative authority is the province in question. Finally, and this is the most frequent situation, in municipal areas such as streets, squares, municipal buildings, etc. the authority is municipal.

The right to exploit public space is obtained through the payment of a fee. The fee is a particular type of tribute that enters the category of Tax Law and that is the consideration for a service provided by a public person, particularly, the provision of space. So, it is not a contract but a fee (see *supra* introduction). It is a public law relationship. The jurisprudence has understood the tax nature of the fee ⁽³⁶⁾. Consequently, the National Congress, the provincial legislatures and the local legislatures will establish the respective fee. In terms of taxes, the Chamber of Deputies is always the Chamber of origin when the regime is bicameral ⁽³⁷⁾. Likewise, the administrative authorities (President, governors, mayors) are constitutionally incompetent to set taxes.

The payment of a fee – Public Law – grants the right to exploit that space for a certain time and according to the uses established by the applicable regulations. In this case, there is no competition for the acquisition of space. From the publication of the availability, the first person interested in using the space in question acquires the right to exploit it.

The availability of the place is published and the first individual interested in using it acquires the right to do so by making the payment of a fee. There is no formal procedure. It is a well-established tradition in Argentina for certain services provided by the administrations of the three levels (federal, provincial and municipal).

The legislatures (national, provincial or municipal) are the only ones competent to establish this type of taxes ⁽³⁸⁾. Among the considerations that each norm usually mentions the increase in the public treasury is found. The decision to exploit it is justified by the increase in the treasury. The decision that it be the legislature that establishes the tax is given by art. 4 C. that prevents the imposition of taxes by other means.

In general, this regime is accepted, although in disputed spaces it is suggested that tenders (*marchés publics*) should be held instead of a regime of public law decisions. So, in the discussions it is suggested to prefer the form of a contract (ROITMAN, 2017).

The risk is of different nature as in cases I and II. In terms of tax matters, Tax Law is the one that commands the relationship. For example, if the fee is not paid, a fiscal execution will be initiated. A very important principle of Argentine Tax Law is the so-called *solve et repete*, which implies that before disputing the situation, the fee must be paid to be able to access its judicial questioning, for example in the event that the Administration had made the exhibition impossible or deteriorated it ⁽³⁹⁾.

³⁴ Supreme Court, “*Cía. Gral. de Gas S.A. c/ ENARGAS y otros*”, 23/8/2011.

³⁵ See *Energy Charter Treaty* (ECT), 16 April 1998.

³⁶ Supreme Court, Fs. 251:50 (1961), “*Compañía Swift de la Plata*”, n° 4 and 5.

³⁷ Art. 52 C.

³⁸ Art. 75 inc. 30 C.

³⁹ Supreme Court, “*Microómnibus Barrancas de Belgrano S.A.*” (1989), “*Sociedad Anónima Expreso Sudoeste S.A. v Pcia. de Buenos Aires*” (1990).

In the case of public domain properties, the greatest risk is that the Administration decides to change the use of that space for reasons of public interest and the individual may find himself in the situation of having to initiate litigation against the State for compensation of the damage.

Beyond what is mentioned in the preceding point, there is no transferred risk by this type of service. The legal framework does not establish a particular protection beyond the fact that a consideration must be guaranteed for the payment of the fee.

The duration varies in each space in question. It can be very short, from a few days to bright billboard advertisements for several years.

The duration is always fixed by the administration and non-negotiable. However, after completion there may be an extension and even successive extensions again by an individual decision. The reason for continuity is merely the good behavior of the private actor and the founded considerations (motivation) of the decision. There is no absence of rule of duration, it is always present. The principle is that the service as consideration for the fee must be clearly determined and, therefore, the term is always previously established and fixed.

So as to move forward, the municipal parking' regime will be examined.

5. Municipal parking

Globally, it can be said that the regime is diverse and varied since each municipality will establish its mechanism. It can be said, however, that the permit regime dominates. The permit is in Argentine law a precarious title, freely revocable, contrary to the authorization that grants more solid acquired rights. What is sought through this system is that the municipality can recover the property in its complete domain without major difficulties.

In general terms, the system used is an exploitation permit. That is to say, it is not a concession, and it is not even a license (TAWIL, 1999). It is not a contract but a permit, an institution of Public Law.

A public bidding regime is previously established because such is the general principle of the selection of the private part of the link. However, it is neither a concession nor a fee. The difference with case 4 is the freely revocability of the title of access to the activity. The municipalities authorize the use of the property through permission.

As it is a precarious title, the main principle is that the private party does not acquire vested rights if the public party considers that it should retake full ownership of the property. Although the title is precarious, a public bidding system is established.

The procedure begins with the call to receive offers and the publication of the specifications of bases and conditions (*cahier des charges*). After the deadline for bidding, bidders receive notification of the decision and have a deadline to challenge their competitors' bids. At the end of this stage, a pre-award is made and then an award by which the exploitation permit begins to govern.

The solution adopted is due to the reason of preserving the municipal domain if necessary. The applicable regime is decided by local municipal legislatures (commonly called deliberative councils). The competent authority to grant the permit is the mayor. The reasons for this regime are due to the design of Argentine municipal law. Unfortunately, in Argentina there are no public establishments for intercommunal cooperation, so there are no links at the same time uniting several municipalities.

It is highly discussed due to the situation of legal fragility of the operator of the property (MAIRAL, 2005). The operator pays a fixed right for the use of the property. He must continue to pay it for the duration of the exploitation if the Administration decides that, for reasons of general interest, he must continue. The risk is relatively high. As mentioned in the preceding point, a private counterpart could abandon the operation without further ado in case of loss. On the contrary, here the operator must continue to pay the fee if well-founded reasons of public interest justify it. In general terms, it is possible to agree on the abandonment of the exploitation. Only well-founded reasons of general interest can cause the permit holder to be forced to continue the activity, even at a loss (MAIRAL, 2005, *cit.*).

Conversely, the Administration can at any time withdraw the authorization even when the individual is making large profits. It is a *de jure* risk resulting from the fact that the permit is conceived as lifting a legal obstacle while the authorization is to allow something that did not have such an obstacle. That is why the permit is a "precarious title" (TAWIL, 1999, *cit.*). The legal certainty in the matter is weak. It could be said that the private investor is in a situation of significant legal weakness.

The jurisprudence grants the right to compensation in case of modifications to the conditions of provision of the service (40). The legal and regulatory frameworks are not protective of the situation of the operator.

Regarding protection against unforeseen circumstances, the theory of Sovereign act and the theory of unpredictability are applied as a mechanism for safeguarding assets (41).

In certain situations, a term is established and in others it is not. It depends on each permission. The legal framework does not set a duration. The general criterion is the granting for a determined period, or else, for an indeterminate period according to the administrative act (decision, *acte administratif*, *Verwaltungsakt*) that establishes it.

The principle already invoked is the free revocation of the permit (see *supra* introduction). In this way, the Administration can always recover full control. Of course, there must be, where appropriate, compensation for the damage but the right to recover the property immediately is not questioned. Where the private has built the parking infrastructure it is a private parking outside this regime.

6. Concluding remarks

The Argentine system for the four case studies presents a multiplicity of settings. However, as a transversal line we can indicate that they are relationships dominated by Public Law. The publication regime reaches its maximum point in the transportation and distribution of gas, which is a public service concession.

The instruments used vary between the concession, the fee and the permit. The justification provided by the manuals is based on the fact that the concession is recommended for contractual bonds, the fee for direct and brief considerations and the permission to remove legal obstacles. The latter is justified by the need to provide the quick and easy possibility of recovering full ownership by the public person.

The most emblematic case regarding the selection of the operator is that of advertising in the public space in which the right is obtained by the mere fact of being the first to link with the Administration. A reflection on this selection mechanism would be necessary.

In the case of casinos and in energy matters, the concession, although it does not fully achieve it, protects the interests of the co-contracting party to a greater extent. Then, in terms of advertising, the payment of the fee allows certain coverage, although to challenge it judicially, it is necessary to pay it in advance (*solve et repete*). Finally, the operation of car parks is subject to a permit, which implies the least degree of legal coverage for the investor.

The guidelines should be a concession regime for all sectors, abandoning legal figures that do not offer sufficient guarantees when it comes to attracting and stimulating investment.

The exposed regime gives itself to criticism. On the one hand, in terms of casinos, it is debatable whether the State can reserve ownership of the activity, since constitutionally (art. 14) the only limit to private initiative is that of having lawful purposes. Regarding energy resources, the Administration rejects integral reparation when it terminates the concession for reasons of opportunity, merit, and convenience. It goes without saying that in the latter case the individual may always take legal action. In terms of advertising in public space, there is no competition between potential users of the space. In turn, when the space in question is important, for example, a very large bright billboard in front of a monument, the regime should be a concession under the bidding modality (*marché public*). The system exposed in terms of parking is not exempt from criticism either. The free revocability of the permission is the core of the issue and, faced with this, the private provider finds itself in a situation of almost total legal weakness.

Globally, international administrative arbitration is accepted in Argentina when it comes to large investments, and this is likely to counteract the general trend that places the individual in a completely disadvantageous situation.

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⁴⁰ Supreme Court, “*Motor Once, S.A.C. and I. w/ Municipality of the City of Buenos Aires. wth/ APPEAL OF FACT*”, May 9, 1989.

⁴¹ See *supra* footnote n° 25.

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