



Aerial view of empty streets during Covid-19 quarantine in Santiago de Chile. Credit: progat/Adobe Stock

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# The Covid-19 pandemic in the recommendations of the Chilean Technical Concessions Panel

Is Covid-19 a *force majeure* event? Does it give rise to a compensation of the construction costs? Has the economic regime of the concession contracts been altered by the pandemic? Should the state compensate the concessionaires for the costs caused by additional sanitary requirements imposed due to Covid-19? The authors analyse how these questions have been addressed by the Chilean Technical Concessions Panel.

## Introduction

Two and a half years have elapsed since the Covid-19 pandemic first began to impact the Chilean territory. Since then, its effects have

become noticeable in many construction and public works concession projects. In this regard, the Technical Concessions Panel for Public Works (hTCP) has issued six

Recommendations concerning the effects of Covid-19. This article analyses how the TCP has characterised this phenomenon and what consequences it has attributed to it when issuing its recommendations.

In accordance with the provisions of the Public Works Concessions Law (Concessions Law), any discrepancies arising between a concessionaire company and the Ministry of Public Works (MPW) during the execution of the public works concession contract may be submitted for consideration by the TCP<sup>1</sup> prior to resorting to arbitration. However, the same law establishes that:

‘The technical or economic aspects of a dispute may be brought to the attention of the Arbitration Commission or the Court of Appeals only when they have been previously submitted for consideration and recommendation by the Technical Concessions Panel.’<sup>2</sup>

As a result of this provision, due to the technical or economic nature of all the disputes, the submission of the discrepancy to the TCP becomes mandatory.

The TCP was established and has been operating since 18 March 2011.<sup>3</sup> Its first Recommendation was issued in 2015.<sup>4</sup> Currently, it has jurisdiction over more than 30 public works concession projects. The TCP is a permanent body composed of five professionals (two lawyers, two engineers and one economist) with jurisdiction over all public works concession projects awarded from the entry into force of Law No 20.410 on 20 January 2010. While the TCP performs certain functions that make it resemble a dispute board, it should not be equated with one. It is rather a standing body with all of its members appointed by public authorities.

The TCP does not exercise jurisdiction in the way a court or tribunal does. Instead it has to issue a well-reasoned technical and economic Recommendation.<sup>5</sup> The Recommendation is not binding on the parties; each of them can either comply with it or submit a claim to an arbitration commission (an ad hoc arbitral tribunal) or to the Court of Appeals of Santiago to resolve their dispute.<sup>6</sup> The Recommendation may be taken into account by the arbitration commission or the Court of Appeals of Santiago as a precedent for rendering the judgment.

To conduct this analysis, the following steps are followed:

1. The discrepancies submitted for consideration by the TCP are summarised.

2. The criterion applied by the TCP regarding Covid-19 and its effects is analysed.
3. Concluding remarks close the analysis.

### The summary of the discrepancies

Four out of the six Recommendations pertain to airport concessions – a type of project that was particularly affected by measures taken against the spread of the pandemic – involving the reduction of air traffic. In turn, two Recommendations concern increased costs for the concessionaire due to sanitary measures instructed by the authority to address Covid-19 in concessioned hospitals.

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As we will see below, the characterisation of Covid-19 carried out by the TCP is not limited to airport activities or measures taken to address the pandemic’s effects in hospitals. Instead, the TCP analyses the phenomenon in a generic manner, without delving into its specific effects on each activity. This general approach might become helpful in the overall assessment of the legal consequences of Covid-19 with regard to various kinds of projects.

### Alteration of the economic equilibrium of the contract

#### DISCREPANCY D02-2021-16: DISCREPANCY DUE TO ALTERATION OF ECONOMIC EQUILIBRIUM DERIVED FROM THE PANDEMIC

The discrepancy was submitted by the concessionaire company Nuevo Pudahuel SA regarding the New Pudahuel Airport project, Chile’s main airport located in the city of Santiago. The concessionaire company requested from the TCP firstly to recognise the Covid-19 pandemic as a supervening event, whose effects on air traffic substantially and enduringly altered the economic equilibrium of the concession contract, and secondly for said economic equilibrium to be restored. The solicitor submitted two proposals: the main proposal related to a contract revision based on observed values, and an alternative proposal

related to a contract revision based on projected values. The TCP stated that:

‘[T]he pandemic caused by Covid-19 falls outside the natural, rational, and foreseeable risks of the business for which the responsibility of the Concessionaire Company extends, and therefore this aleatory event cannot not be borne solely by it.’

Subsequently, the TCP indicated that:

‘[T]he pandemic is a supervening event of nature, an extraordinary and unforeseen situation, completely beyond the control of the parties, and it has caused effects not only in various spheres and activities globally and within the country (...) [recognised] by the Ministry of Public Works itself through Official Letter No 394 of 20/03/20.’

At the same time, it maintained that:

‘[T]he Covid-19 pandemic is a supervening event, but its specific effects in this case must be evaluated considering the terms of the contract and, in any case, adopting a time horizon of several years.’

The TCP rejected both proposals put forth by the concessionaire company, merely stating that:

‘[T]he contractual framework empowers the MPW to engage in negotiations, with the purpose of jointly with the counterparty to review or to make more flexible the concession contract, due to a justified supervening cause.’

Given the non-binding nature of the Recommendation and its somewhat ambiguous wording, the concessionaire company and the MPW engaged in a controversy regarding its scope, with each party declaring itself the victor in the said discrepancy.<sup>7</sup> Additionally, the concessionaire company initiated proceedings before the International Centre for Settlement of Investment Disputes (ICSID) against the state of Chile.<sup>8</sup>

#### **DISCREPANCY D01-2021-11: DISCREPANCY REGARDING COMPENSATIONS ARISING FROM HEALTH MEASURES INSTRUCTED BY THE AUTHORITY**

This discrepancy was submitted by the concessionaire company Aeropuerto del Sur SA regarding the El Tepual Airport project, located in the city of Puerto Montt in southern Chile. The concessionaire company requested the recognition of the MPW’s obligation to compensate it due to the decrease in embarked passengers resulting from regulations due to Covid-19. As an alternative to the above, and

because the TCP cannot terminate the contract, the concessionaire company requested the TCP to establish criteria for the early termination of the concession contract by mutual agreement.

The TCP concluded that the contractual termination requirement, namely, ‘significant alteration of the economic regime of the contract,’ was not fulfilled, as the economic imbalance was caused by the pandemic as a primary cause, and not by the authorities’ actions or regulations. The acts of the authorities were not ‘sovereign acts’ per se but a consequence of the pandemic.

In addition, in its view, a *force majeure* event took place. However, since *force majeure* operates as an exoneration of liability, it is not applicable in this case as neither party had breached the contract.

Notwithstanding the above, the TCP recommended the parties renegotiate the contract to extend the concession period and suggested each of the parties to bear 50 per cent of the cost thereof.

#### **Compensation for health measures decreed by the authorities**

#### **DISCREPANCY D07-2022-9: DISCREPANCY DUE TO COST OVERRUNS RESULTING FROM THE ADOPTION OF MEASURES INSTRUCTED BY THE AUTHORITIES DURING THE PANDEMIC**

The discrepancy was submitted by the concessionaire company Salud Siglo XXI SA regarding the Antofagasta Hospital, located in the city of Antofagasta in northern Chile. The concessionaire company requested compensation for cost overruns due to measures instructed by the authorities in the context of the Covid-19 pandemic. These measures included additional requirements and an increase in the technical standard of services: new procedures and protocols that affected the services provided by the concessionaire during the operational stage. The TCP concluded in its Recommendation that:

‘The orders issued in the context of the pandemic for extraordinary measures to be implemented by the Concessionaire Company, constitute an increase in the service levels within the terms of Article 19, paragraph 3, of the Concessions Law.’

The aforementioned provision establishes that, when an increase in service levels is instructed, the MPW shall provide economic compensation to the concessionaire, for the

additional costs incurred by the concessionaire due to such circumstances.

**DISCREPANCY D03-2021-14: DISCREPANCY DUE TO REQUEST FOR COMPENSATION FOR SERVICES, REQUIREMENTS, AND CHANGES IMPOSED BY THE AUTHORITY**

The discrepancy was submitted by the concessionaire company Metropolitana de Salud SA regarding the Félix Bulnes Hospital located in Santiago. The concessionaire company requested additional costs due to requirements, increased demands, and changes imposed by the authorities as a consequence of Covid-19, which were not included in the contract or exceeded its scope. The TCP concluded that the modifications to the approved definitive project of the hospital by the MPW related to health and safety measures were additional works. However, the TCP did not find it possible to determine the value of each additional work claimed by the concessionaire.

**DISCREPANCY D04-2022-21: DISCREPANCY DUE TO DECREASE IN REVENUE DERIVED FROM THE EFFECTS OF THE PANDEMIC**

The discrepancy was submitted by the concessionaire company Aeropuerto Carriel Sur SA regarding the Carriel Sur Airport located in the city of Concepción in southern Chile. The concessionaire company claimed a decrease in revenue caused by Covid-19 and associated sanitary measures.

The TCP followed the same line of arguments as in Discrepancy D02-2021-16. In particular, it confirmed that Covid-19 was an extraordinary supervening event that led to a decrease in passenger demand and, consequently, in other commercial activities. However, these circumstances were not ‘sovereign acts’. The TCP reiterated its characterisation of the pandemic as a phenomenon that ‘falls outside the natural, rational and foreseeable risks of the business’.

Nonetheless, it maintained that the specific effects of the pandemic should be evaluated under the terms of the contract and, in any case, over a time horizon spanning over several years. It asserted that, with nine years of concession remaining, it was premature to speak of a loss of economic equilibrium. Furthermore, attempting to obtain compensation for a specific impact, as the concessionaire attempted, did not

necessarily imply the existence of a potential economic imbalance of the contract.

Ultimately, the TCP rejected the concessionaire’s proposal but recommended it to request a review of its economic aspects, which the parties were authorised to do under the contract.

*Compensation for construction costs*

**DISCREPANCY D05-2021-16: DISCREPANCY DUE TO EXTENSION COSTS AND HIGHER CONSTRUCTION COSTS**

The discrepancy was submitted once again by the concessionaire company Nuevo Pudahuel SA, regarding the New Pudahuel Airport project. The concessionaire company requested compensation from the MPW for the cost and time impact caused by the Covid-19 pandemic and the measures taken by the authorities to address it during the construction period. The concessionaire company asserted that, due to these factors, the agreed-upon costs and timeline of the project had been altered. The TCP concluded that:

‘(1) The Covid-19 pandemic and its consequences affected the duration and/or costs of the construction process under the Concession Contract; (2) In accordance with the applicable regulations of the present Concession Contract, the costs incurred by the Concessionaire Company due to the Covid-19 pandemic during the construction phase are to be borne by the Concessionaire Company.’

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*The TCP reiterated its characterisation of the pandemic as a phenomenon that ‘falls outside the natural, rational and foreseeable risks of the business’*

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Thus, the concessionaire company had to bear the construction risks and costs, while the MPW had to bear the risks and costs of delays in project completion.

It is worth mentioning that the Chair of the TCP issued a dissenting opinion stating that the concept of *force majeure* was not applicable as neither of the parties had breached the contract. Indeed, the MPW instructed the non-stoppage of the works in the public interest. However, in this case, it did so at the request of the concessionaire company, making it not a ‘unilateral act of the authority’.

### Characterisation of Covid-19 and its effects on concessions

The TCP leaned towards compensating hospital concessionaire companies, relying on the provision of the Concessions Law mentioned above, which states that measures taken by the authorities that require an increase in service levels should be compensated to the concessionaires. In these cases, the TCP disregarded the pandemic as the cause of the increase in service levels ordered by the public authorities. Indeed, the Concessions Law does not specify for what reasons the authorities may have instructed the increase in service levels. Thus, it did not matter that the increase in service levels was caused by a phenomenon that fell ‘outside the natural, rational and foreseeable risks of the business’ as was Covid-19. According to the TCP’s recommendation, the mere order to increase the service levels gave rise to compensation.

Their stance was different in the case of airports.

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*This is explicitly stated in each of the six Recommendations, referring to the Covid-19 pandemic as an event that was unforeseen at the time of the award of the contract, with effects that could not be foreseen, and are completely beyond the control of the parties, and impossible to resist.*

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As a starting point, the TCP characterised Covid-19 as a *force majeure* event or an act of God. This is explicitly stated in each of the six Recommendations, referring to the Covid-19 pandemic as an event that was unforeseen at the time of the award of the contract, with effects that could not be foreseen, and are completely beyond the control of the parties, and impossible to resist.

The TCP relied on the guidance provided by the Contraloría General de la República, the entity responsible for overseeing the legality of actions taken by the state administration, that in its Ruling No 3610/2020 dated 17 March 2020, indicated that the Covid-19 pandemic is an unforeseen and extraordinary event.

In turn, *force majeure* is regulated in Chile under Article 45 of the Civil Code. Under this provision, *force majeure* acts as an exemption from liability, suspending the obligation of the affected party to perform the obligation during the occurrence of the

*force majeure* event. The occurrence of a *force majeure* event, by itself and in the absence of different contractual agreements, does not entitle the affected party to compensation for damages.<sup>9</sup> Thus, the notion of *force majeure* does not support the concessionaire company’s claim for compensation.

To reach the conclusion regarding compensation or the lack thereof, the TCP relied on Article 22, letter b) of the Concessions Law for Public Works, namely:

‘Article 22. The legal regime of the concession during the construction phase of the work shall be as follows:

2. The works shall be carried out at the entire risk of the concessionaire, who shall be responsible for all necessary expenditures until their complete completion, whether arising from unforeseen events, *force majeure*, or any other cause. The State shall not be liable for the consequences arising from contracts entered into by the concessionaire with contractors or suppliers. However, the State shall contribute to the payment of damages resulting from unforeseen events or *force majeure* if provided for in the tender conditions.’

This broad provision was used by the TCP to reject the claims of the concessionaire companies. In other words, the characterisation of Covid-19 as a *force majeure* event or an act of God leads the TCP to the conclusion that the concessionaire companies are not entitled to compensation and, therefore, must bear the costs caused by the pandemic.

In particular, the TCP deemed that the MPW was not the author of a breach that could have caused the damages suffered by the concessionaire companies. The concessionaire companies had not incurred breaches either. Thus, they could not invoke cost compensation under the *force majeure* doctrine in their favour. As the economic harm was caused by a *force majeure* event such as Covid-19, the concessionaire companies were not entitled to demand compensation from the MPW and were required to bear the associated costs themselves, in accordance with Article 22.2 of the Concession Law.

Notwithstanding the above, Article 19 of the Concessions Law also stipulates that the concessionaire may request compensation in the event of a supervening act of a public authority.<sup>10</sup> But, because the TCP classified the Covid-19 pandemic as a nature-born *force majeure* event, since it was not an act of authority or a ‘sovereign act’, the

concessionaire company was not entitled to compensation under Article 19.

However, the TCP itself recognises that an event might have a dual nature, being both an act of God and a public authority decision at the same time. Therefore, the TCP could have adopted a stance more consistent with its overall approach to the pandemic and could have recognised that, despite the pandemic being a *force majeure* event, compensation for the governmental measures was still due to the concessionary companies.

### Final reflections

The economic equilibrium of the contract, altered by the pandemic, requires restoration for the purpose of allowing the impacted concessionary companies' investments to regain their unaffected status, by providing compensation for the damages caused directly by Covid-19 or by the instructions given by the authority as a result.

These types of contracts are administrative or public contracts. The state administration has the unilateral power to modify the contract's content to adequately satisfy public needs: a power that is acknowledged by the Concessions Law. As the power of modification constitutes an act of authority or 'sovereign act', the Concessionary Company should have the right to compensation to the extent that the requirements established in Article 19 of the Concessions Law are met. However, this was not the course of action taken by the TCP.

As we have seen, the Recommendations of the TCP have had mainly a negative outcome for the concessionary companies. Their requests for compensation were primarily based on restoring the economic equilibrium of the contract. However, the TCP has characterised the Covid-19 pandemic as an event of *force majeure*. On this basis, it has rejected the compensation requests submitted by the concessionary companies, in accordance with the risk allocation rule provided in Article 22.2 of the Concession Law.

Now, it is worth asking whether the arbitral tribunals to which these concessionary companies have resorted or will resort, will uphold or not what was decided by the TCP.

Given the limited possibilities for maintaining the economic and financial equilibrium of the concession contract in situations like Covid-19, the only alternative for improving the position of the

concessionary companies in the future is for the administration to include renegotiation clauses in the tender documents. Indeed, if another extraordinary or *force majeure* event occurs that alters the economic equilibrium of the contract, the renegotiation clauses will allow a more balanced solution in the interest of the concession system in Chile. The question is whether this alternative is in the interest of the state and whether, if such a possibility is granted, the agreements would be feasible.

### Notes

- 1 Public Works Concessions Act 1991, Art 36. The text has been consolidated, coordinated and systematised by Decree No 900 of 1996 of the Ministry of Public Works.
- 2 *Ibid* Art 36 *bis*, para 1.
- 3 *Annual Report* (Technical Concessions Panel, 2022), 7.
- 4 *Ibid*, 26.
- 5 MPW Decree No 956 (1997).
- 6 Public Works Concessions Act, Art 36, para 3.
- 7 'MOP rechaza nuevamente peticiones Nuevo Pudahuel' (La Agencia de Viajes, 8 April 2021), see <https://chile.ladevi.info/mop/mop-rechaza-nuevamente-peticiones-nuevo-pudahuel-n29805>.
- 8 *ADP International SA and Vinci Airports SAS v Republic of Chile* (ICSID Case No ARB/21/40).
- 9 Elina Mereminskaya & Álvaro Jara Burotto, 'Should the law foresee the unforeseeable? The unforeseeable trends in Chile in view of the Covid-19 pandemic' (2020) 15 (3), *Construction Law International*, 47.
- 10 Public Works Concessions Act, Art 19: 'The concessionaire may request compensation in the event of a supervening act by an authority with public powers, that it must justify, only when, cumulatively, the following requirements are met: the act occurs after the award of the concession tender; it could not have been foreseen at the time of its award; it does not constitute a legal or administrative norm issued with general effects, exceeding the scope of the industry of the concession in question, and significantly altering the economic regime of the contract.'

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