

February, 2016

➤ LAW 20,897 MODIFIES ARTICLE 34 BIS OF THE ELECTRIC POWER SERVICES GENERAL LAW

Executive Summary

On February 5th, 2016, Law N° 20,897 was published in the Official Gazette incorporating 3 new paragraphs into article 34 bis of the Electric Power Services General Law ("LGSE"). By virtue of this modification, article 34 bis of the LGSE, widens its protection to any developer of non conventional renewable energy projects ("NCRE"). This article was originally intended exclusively for electric concessionaires.

Under the new law, developers faced to a Summary Possession Trial (Juicio Posesorio Sumario) may appeal injunctions which have been placed on new NCRE projects based on legal actions such as New Works Claims (Denuncia de Obra Nueva). In this way, developers can avoid delays in construction which often result from lawsuits which are brought against them by mining concessionaires who seek to use injunctions as leverage for negotiating higher compensation.

Introduction

On February 5, 2016 Law N° 20,897 was published in the Official Gazette. This new law modifies three existing laws: (1) Law 20,365, which establishes a tax franchise for thermal solar systems; (2) the Electric Power Services General Law; and (3) Law N° 20.897, which establishes the Chilean state-owned National Petroleum Company (ENAP). By virtue of, Law N° 20,897 incorporates three new paragraphs into article 34 bis of LGSE.

Context: New Works Claim

In Chile, mining property is treated differently than surface property under the law. This distinction often results in conflicts between the owners of the surface land rights and mining concessionaires. Many such conflicts have arisen in recent years due to the submission of New Works Claims by mining concessionaires.

The New Works Claim is a possessory action which seeks to suspend the development of a new project, which has either recently begin construction or will soon begin construction, in order to prevent further damage until such time as a judge is able to determine whether or not the developer has the right to build the project.



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A notable characteristic of this type of claim is that once the action is filed, a judge may impose a provisional injunction on the project without first hearing the defendant's case. During this provisional suspension only actions that are deemed essential may be performed. This results in delays to the construction and development of the project. This hindrance may well constitute a breach of contract by the developer, and even jeopardize the financing of the project.

New Works Claims have the capacity to inflict extreme damage on a project in a short period of time, therefore, this legal action has the potential to be abused and even used to commit extortion. In order to prevent the misuse of New Works Claims, Law N° 20,701 was passed in 2013 which amended the LGSE by introducing article 34 bis which applied to electric concessionaires. Further changes were made on February 5, 2016 when Law N° 20.897 was passed in order to modify article 34 bis.

Initially, bill N° 20.897 aimed to extend the protections that had been given to electric concessionaires to cover NCRE developers as long as they were an one-rous concessionaire of the Ministry of National Assets. However, in order to encourage the development of NCRE projects, its final text was edited to include the following statement, "for privately owned or third party's assets" and "by virtue of... any other title", expanding the entitlement of the property to which this surety applies. Therefore, from now on, any NCRE developer may employ the consignment of adequate surety in order to lift the precautionary measure of provisional suspension according to the terms of article 34 bis.

The only NCRE developers who are excluded from the protection of this article are those that are using indigenous lands with ancestral use, defined in the Convention N° 169 of the International Labor Organization, or lands that belong to agricultural communities referred to in Decree N° 5 of the Ministry of Agriculture of 1967.

Thus, hereinafter the NCRE developer will have the previously granted faculty to the electric concessionaire by Law N° 20,701, to suspend the effects of the injunction through the consignment of a surety enough to cover the eventual demolition of such works, or the compensation of the damages.