

Brazilian Port Sector Financing: The Step-in Right

Despite the economic and political crisis, the Brazilian port sector has been drawing attention due to its expansion and its optimistic outlook. Since 2003, the volume of cargo handled has increased 70% and, according to the National Plan of Port Logistics, these figures shall double from now to 2042. The numbers are consistent with a country with a port sector that is responsible for over 90% of its exports.

A deficiency in Brazilian logistics persists and represents an obstacle to the competitiveness of the national economy. With this in mind, the new Ports Law (Law No. 12,815, of June 5, 2013) significantly changed the regulation towards leveraging private investment in the sector¹.

Effective guarantees must be ensured in order to attract investors. In this context, Article 27-A of the Law of Concessions (introduced by Law No. 13,097, of January 19, 2015) allows lenders and guarantors the right to take control or temporary administration of the concessionaire to promote its financial restructuring and to ensure continuity of services. The condition is that the right to take control or temporary administration is provided in the respective public contract and is approved by the relevant concession authority. This "step in right", as it is called, has not been used much in Brazil until now².

Step-in rights also apply, by specific legal provision, to any legal forms of transfer to private entities of the utilization of ports or port facilities, either because such utilization is essentially a public service or because the law so provides.

Step-in rights are relevant in infrastructure projects that require large upfront capital expenditures, such as ports. In these cases, the continuity of the enterprise is more advantageous to the creditor than the foreclosure of the collateral involved in the transaction. The reason is that, typically, the company's assets by themselves are worth less than the debt incurred to acquire them.

The Right to Take Control

As mentioned previously, step-in can occur through the lenders taking corporate control or temporary administration. Corporate control is taken upon the transfer of shareholders' rights that permanently ensure the ability to prevail in corporate resolutions and power to elect the majority of the administrators of the private contractor. According to Decree No. 8,033, of June 27, 2013, which regulates the Ports Law, the Secretariat of Ports (SEP) – an administrative body under the direct supervision of the President of Brazil – approves the transfer of corporate control of concessionaires or lessees of ports, after prior analysis by the National Agency of Waterway Transportation (Antaq).

But would it be possible for financiers to obtain such approval prior to a port or port facility financing operation, i.e. before the disbursement of funds?

Nothing in Article 27-A of the Law of Concessions or the relevant regulation prevents the prior approval of the step-in before the disbursement of resources. The exploration of port activity can occur through the concession regime, the leasing regime or the authorization regime³.

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¹ Legal Bulletin: [Brazil's New Port Law](#)

² Subject already covered in relation to the electric energy sector in our previous Legal Bulletin [Step-in rights: a solution for investments in the electric energy sector?](#)

³ The Ports Law defines "concession" as the onerous assignment of the organized port, focused on the administration and the utilization of its infrastructure, while "leasing" is defined as the onerous assignment of the public infrastructure zone located inside the organized port, in both cases for a pre-specified period of utilization. "Authorization" is the right granted to the utilization of port facilities located outside the organized port zone, including terminals, cargo transfer stations, small-sized public port facilities and tourist port facilities.

Legal Bulletin
January 2016

In the case of the authorization regime, change in corporate control requires a simple communication to Antaq within thirty days counting from the act that formalized the change. This communication does not entail prior analysis or discretionary answer by the relevant government agencies. As a result, the step-in can occur automatically in the cases stipulated by contract.

In the concession regime, the change of control should be analyzed towards approval by Antaq and SEP. Nothing in the relevant regulation indicates that this change should not be analyzed prior to execution or closing of the financial contracts, i.e. before disbursement. Applicable regulation requires that the concessionaire presents the necessary technical qualifications. However, this requirement may be waived in favor of the lenders according to Article 27-A, §1 of the Law of Concessions.

The same conclusion concerning the possibility of approval of the step-in at the time of the funding applies to the leasing regime.

Temporary Administration

Step-in rights may also take the form of temporary administration. Among its main advantages are the following: a) the financier may prefer not to become a controlling shareholder of a port project, as it is not his core business, b) temporary administration does not entail responsibility of lenders and guarantors in relation to tax, labor and other obligations towards third parties (Article 27-A, §5 of the Law of Concessions). Thus, temporary administration represents an interesting form of lender intervention due to easier step-out and to the segregation of liabilities that the lenders are not willing to assume.

Again, there is no impediment in Brazilian law to the analysis and approval of a step-in clause prior to disbursement of the financing. The rules of the authorization, concession and leasing regimes do not address transfer via temporary administration, triggering the application of the Law of Concessions, which admits this possibility.

Step-in mechanisms can boost private financing in the port sector, assuring lenders that they will be able to intervene in the port and determine its utilization.

The practical operation of these mechanisms depends, of course, on the bureaucratic decision making of overlapping agencies, Antaq and SEP, and needs to be tested. The time is right for this as 21 public bids for new leasing contracts are expected to be formally published in the first half of 2016, with expected investment totaling R\$ 7.2 billion.

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