

Step-in Rights and the new airport concessions

In a scenario of great uncertainty about the outlook for the Brazilian economy, private investment in infrastructure is bound to play a key role in compensating the shortage of State investments and hence help overcome the economic downturn. Appropriate guarantees to lenders in connection with project finance are a key element in this regard.

Project finance mechanisms enable the dilution of risks associated with infrastructure projects. They allow lenders to rely on cash flow and assets from a project as primary sources of payment and as collateral for the invested capital.

Article 27-A of the Law of Concessions (Law No. 9,987, of February 13, 1995), introduced in January 2015, provides for “step-in rights” – namely, the possibility for lenders and guarantors to take control or temporary administration of the concessionaire of infrastructure projects in order to promote financial restructuring and to ensure the continuity of services.

Step-in rights and project finance are closely associated mechanisms, as the ability to take control or temporary administration of a project (step-in right) is particularly relevant in project finance transactions, where the continuity of the enterprise is more advantageous to the creditor than foreclosing the collateral involved in the transaction. Typically, the company’s assets are worth less than the debt incurred to acquire them.

Step-in rights provisions are not commonly adopted in Brazil. However, they do feature in several concession agreements of airports, such as São Gonçalo do Amarante, Brasília, Guarulhos, Viracopos, Galeão and Confins. Airport infrastructure projects are well suited for the mechanism, to the extent they require high investments; and involve a predictable cash flow.

The National Civil Aviation Agency (Anac) is the relevant authority responsible for the concession of the exploitation of aeronautical and airport infrastructure, and for authorizing transfers of corporate control under existing concession contracts.

The step-in can occur through the lenders taking corporate control or temporary administration. The latter enables the lender or guarantor to define the concessionaire’s strategic guidelines (to indicate members of the – board of directors or audit committee, for example) without, however, having corporate control. Temporary administration does not entail liability of lenders and guarantors in relation to tax, labor and other obligations towards third parties, including the relevant concession authority or employees (Article 27-A, §5 of the Law of Concessions).

The change of control, in turn, is provided by Article 17 of Decree No. 7,624, of November 22, 2011. This provision authorizes the assumption of corporate control of the company by creditors for the purposes of implementing financial restructuring and to ensure the continuity of services.

Although the legal text only provides for the step-in right through the change of control, temporary administration is not excluded. This is because the relevant legal provisions (i) also refer to the Law of Concessions, which allows temporary administration; (ii) have been drafted before the rules in the Law of Concessions which introduced step-in through temporary administration, and should now be construed more broadly.

The transfer of the concessionaire’s control depends on the prior consent of Anac and the failure to observe this requirement can result in the expiration of the concession¹. It remains an open question, however, whether it would be possible to obtain the final authorization in

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¹ The Government terminating the contract as a result of the concessionaire’s breach of obligation.

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favor of the financiers prior to the default hypothesis that can trigger the step-in rights – the idea is that, in case of default, the step-in occurs automatically, without interference from government agencies.

This will depend on the requirements for the implementation of the step-in rights provided by the Law of Concessions and by Anac's rules. Regarding the Law, there is nothing in its text which prevents the previous and hypothetical authorization. As for Anac, the agency has not published any regulation on the implementation of the step-in rights in the sector yet.

However, the concession agreements already entered into by Anac determine that the financier should submit the documents required by the agency at the time of the change of control/administration to be approved (such as documents which prove the financial capacity), thus excluding unconditional prior step-in approval.

Naturally, agreements apply to a specific concession. Thus, nothing prevents future agreements from modifying the requirements for the submission of documents at the time of the step-in event, considering there is no rule preventing the prior and hypothetical consent to the step-in rights.

The provision of the step-in rights can stimulate fearful financiers who intend to invest in the Brazilian air transport infrastructure. Given the sector's growth and the Olympic Games in Rio de Janeiro later this year, private interest in new projects tends to be high. While Infraero² is seeking partners from the private sector for expansion of the passenger's terminal³ and for the concession of the commercial area⁴ of the Congonhas airport (SP), the Federal Government has recently revealed an investment program in logistics involving the concession of the airports Pinto Martins, in Fortaleza (CE); Luiz Eduardo Magalhães, in Salvador (BA); Hercílio Luz, in Florianópolis (SC); and Salgado Filho, in Porto Alegre (RS)⁵.

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² Brazil's state-owned airport infrastructure company.

³ <http://www.valor.com.br/brasil/4419646/infraero-vai-atras-de-nova-parceria-para-ampliar-congonhas>

⁴ <http://www1.folha.uol.com.br/cotidiano/2016/04/1759317-aeroporto-de-congonhas-tera-terminal-ampliado-e-novo-estacionamento.shtml>

⁵ <http://www.anac.gov.br/Anac/assuntos/paginas-tematicas/concessoes>