

FINANCER PROTECTION MECHANISMS UNDER PUBLIC CONCESSION AGREEMENTS

Public concession agreements have been fostered in numerous activities in Brazil, including airports, highways and railways. Brazilian law contemplates a number of strategic mechanisms that warrant protection to infrastructure financiers. If included in concession agreements, they can prove valuable incentive to much needed foreign investment. Foremost among them are step-in rights and the fiduciary transfer of receivables.

Step-in rights were introduced in the Law of Concessions in 2015. They allow financiers and guarantors to take control or temporary administration from the concessionaire of infrastructure projects to promote financial restructuring and to ensure continuity of services.

Such step-in-rights are relevant to projects that require large upfront capital expenditure. In these cases, the continuity of the enterprise is more advantageous to the financier than foreclosing the collateral involved in the agreement, as the relevant assets are typically worth less than the debt incurred to acquire them.

The right to take control or temporary administration needs to be provided in the applicable public concession agreement and approved by the relevant concession authority. Regulatory agencies also issued step-in rights rules applicable to their respective sectors, e.g. the National Electric Energy Agency (Agência Nacional de Energia Elétrica – ANEEL), which requires its prior consent for the enforcement of step-in clauses. Agreements can impose further conditions for the financiers to control or temporarily manage the venture.

Moreover, and as long as no unlawful acts can be attributed to the financier or its agents, in case of temporary administration the financier cannot be impacted by legal obligations arising from general, tax or labor liabilities of the project company. This tends to make temporary administration preferable in relation to the taking of control.

It is our opinion that the control of the project entity and temporary administration mechanisms can be used independently from the foreclosure of collateral on the shares of the project company, thus enabling both alternatives to be used on a transient basis. The situation should then be reverted as soon as the project company is reorganized to continue operating.

Nothing in Brazilian laws or regulation prevents the government step-in authorization to be issued at the time or prior to the time the financing needed for the project is sent to Brazil. This could be done to enhance financiers certainty that they will be able to intervene, conditionally upon default of the concessionaire in the future.

Another important safeguard that can benefit creditors of infrastructure projects is the fiduciary transfer of receivables, also introduced in the Law of Concessions in 2005. This is an authorization for the concessionaire to offer some of the project receivables as collateral for long term financings (5 years or more). These receivables are fiduciarily assigned to the financiers, who can indicate a financial institution to collect and receive payment of the assigned credits or allow the concessionaire itself to do so.

The receivables fiduciarily transferred to the creditors are not subject to insolvency proceedings that the concessionaire might face, such as in-court reorganization (*recuperação judicial*) and bankruptcy (*falência*). Hence, in case of default, the financiers are permitted to immediately enforce the collateral.

The concession of 1,273 kilometers of highways (Piracicaba-Panorama Project) announced by the Government of the State of São Paulo in July 2019 provides a relevant example of such safeguard. The project includes a trilateral arrangement among the State Government, the concessionaire and the financiers, providing for step-in rights and allowing the financiers to take control or temporary administration in case of default on the part of the concessionaire.

The exercise of these rights by the financiers is conditioned upon the presentation of certificates of good standing at corporate, labor and fiscal levels. The financiers shall submit a restructuring plan to the State Government after a short period in charge of the venture, containing a proposal to sort out the issues that led to the concessionaire's default. Such plan must be approved by the State Government.

Municipalities are also launching programs to foster the partnership between private and public sectors. The Municipality of São Paulo, for instance, incorporated a company (SP Parcerias S.A.), whose function is to organize and develop concession agreements and sell public enterprises to the private sector.

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