Evolution Without Revolution: Fine-Tuning Brazil's Concessions Law

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Modernizing a legal framework does not always mean overturning the entire existing structure. Often, focused adjustments and some fine-tuning are enough to make real improvements, without compromising legal certainty or upsetting established understanding of how the law applies. Legal evolution must also take successful practices into account to ensure a balanced and secure development of the system.

Modernization and unification of the law governing concessions and public-private partnerships (PPPs) has been debated for years in Brazil, with legislative proposals dating back to 2011. Given the long duration and complexity of these contracts, fostering an environment of legal certainty and economic sustainability is essential. Although many aspects of concessions and PPPs are well-established in practice, there are some essential issues where express legislative provision could give greater uniformity and certainty to these contracts.

A good example is provisional adjustments to contracts, which are permitted under the regulations of some states and federal agencies, such as the state of São Paulo and the federal National Land Transportation Agency (ANTT).[1] The mechanism allows temporary adjustments to be made, pending the outcome of the review process, when the concessionaire or private partner has applied for revision of the contract to reestablish its economic and financial balance. Provisional adjustments ensure continuity of public services in the face of unpredictable events, reducing financial impacts for the concessionaire at times of great economic stress, while promoting trust and financial stability and protecting users against interruptions in service or a drop in service quality.

Another point that merits attention is the need for a faster procedure for approving adjustments to prices and tariffs, which are usually provided for in the contracts themselves. Although not a technically complex process, approval is often politically sensitive. The absence of a formal decision by the relevant regulatory agency, often due to a lack of specialized technical staff or external pressure, ends up making it impossible to implement a right that is essential to the financial health of concessions.

In contrast, other mechanisms such as risk sharing and ancillary revenues are already fully consolidated in practice and do not require structural legislative changes.

The reform of the legislation governing concession and PPP laws should be directed to improving the existing model, and so preserve advances while making specific adjustments where necessary. A radical overhaul could result in more risks and uncertainties than benefits, compromising the stability and attractiveness of contracts for both investors and public service managers. The evolution of the regulatory framework should respect consolidated practices and market needs, with a view to providing a safe and predictable environment for the development of public infrastructure and services.

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NOTE

1. Resolution SPI 19/23 by the São Paulo Investment Partnerships Secretariat – SPI and Instruction IN 33/2024 issued by the National Land Transportation Agency – ANTT.

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