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Welcome to **WALA XII**
Punta Cana, Dominican Republic
April 27-29, 2022

Early Termination of Airport Concessions

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Airport privatizations in Brazil

Background

In the past, all federal airports in Brazil were operated by Infraero, a federal state-owned company.

According to Infraero's Management Report (2010), at that moment the company managed 67 airports that year, was responsible for about 97% of regular air traffic in Brazil and was present in all 26 Brazilian states.



Secretariat for Civil Aviation of the
Federal Government



Since 2011, Brazil has changed its public policy on the management and maintenance of airports. The federal government started a process to grant concessions to operate and expand the largest airports under a concession regime.

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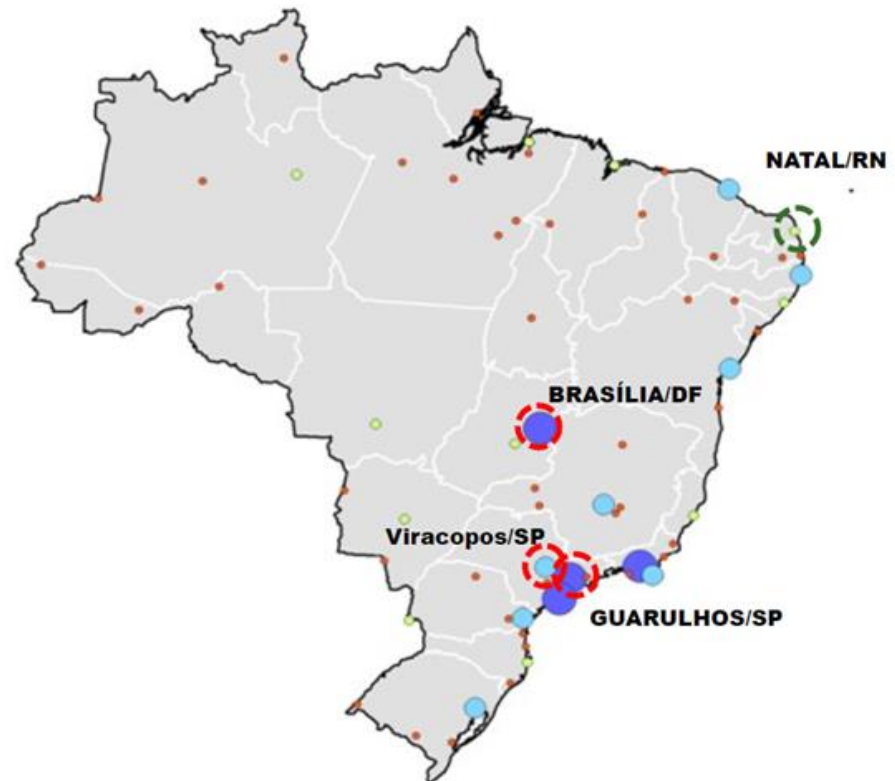
Airport privatizations in Brazil

Background

In 2011, **São Gonçalo do Amarante Airport (ASGA)**, located in Rio Grande do Norte State, was the first airport to be granted to the private sector.

In the following year, important airport concessions were also granted:

- ▶ **Brasília Airport**, which serves the Brazilian Capital;
- ▶ **Guarulhos International Airport**, in Guarulhos, São Paulo; and
- ▶ **Viracopos Airport (VCP)**, in Campinas State of São Paulo.



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Airport privatizations in Brazil

Main agents involved in airport privatizations



SAC/PR is linked and subordinated to the Ministry of Infrastructure, and it is responsible for supervising the privatizations processes and contracting the feasibility studies.



ANAC is responsible for inspecting the airports granted, ensuring: (i) security; (ii) quality of services; and (iii) tariff moderation. ANAC is responsible for regulating the sector, executing the projects and signing the concession agreements.



TCU is the external control institution of the federal government and is responsible for the prior approval of the bid documents related to the auctions. The Federal Court of Accounts can issue orders and recommendations to SAC/PR, interfering, to a greater or lesser degree, in the concession.

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Early Termination of Concessions

Re-bidding and legislative history

Re-bidding is the possibility of conducting a new bid for concessions that have been previously granted to the private sector before the end of its contractual term. The procedure is an alternative to concessions that are not deemed to be feasible or viable.

Before 2017, there was no legislation in Brazil regulating the procedure for airports re-bidding. This scenario changed with the publication of Federal Law No. 13,448, of June 5, 2017.

Jun 5, 2017

Federal Law No. 13,448/2017

Established general guidelines for the extension and "re-bidding" of concession agreements with the Federal Government.

Aug 6, 2019

Federal Decree No. 9,957/2019

Set forth the applicable procedure for re-bidding contracts in road, rail, and airport sectors.

Nov 12, 2019

ANAC Resolution No. 533/2019

Regulates the procedures and methodology for calculating the indemnification amounts related to non-amortized reversible assets investments in the event of early termination of the concession agreement due to re-bidding, forfeiture, or bankruptcy.

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Requirements to the re-bidding process

According to Federal Law No. 13,448/2017, the re-bidding process is conditional on the submission by the Concessionaire of:

Formal declaration as to the intention to **adhere, irrevocably, to the re-bidding** process.

Justifications and technical elements demonstrating the **need and convenience of the adoption of the rebidding process**, with any solution proposals to the issues faced.

Waiver of the deadline to correct any failures and transgressions and of the rights provided for in § 3 of art. 38 of Concessions Law (which allows the Concessionaire to correct any failures before the initiation of a sanctioning proceeding), if the forfeiture process is subsequently initiated or resumed.

Waiver of the right to participate in the concessionaire and its direct or indirect shareholders in the new bid or in the future re-bid concession agreement.

Indication of the conditions proposed for the **provision of essential services during the rebidding process**; and the essential investment obligations to be maintained, amended, or replaced after the execution of the Amendment to the Concession Agreement.

Necessary information to carry out the re-bidding process, in particular the: (i) investments in reversible assets linked to the project and to possible financing instruments used in the contract; (ii) commercial and services contracts in force, with the specifications of the current stage of its physical and financial execution and any defaults; (iii) situation of the areas affected by the concession agreement, especially regarding the procedures of expropriation, eviction and removal; (iv) disputes between the concessionaire and the granting power and between the grantor and third parties; and (v) existence of a judicial recovery, out-of-court recovery or bankruptcy regime.

RE-BIDDING STEPS

- 1** The concessionaire announces its intention to return the Concession to the Federal Government and to adhere to the rebidding process.
- 2** After analysis by the technical areas, ANAC's Board recognizes the technical and legal feasibility of the request and calculates the compensation owed.
- 3** Following the recommendation of ANAC's Board, PPI's Council begins to analyze the feasibility of re-bidding.
- 4** Once the PPI qualification process is concluded, the President of the Republic issues a Federal Decree qualifying the airport for the re-bidding process.
- 5** Once the Decree is published, the Amendment to the Concession Agreement is executed by and between the Granting Authority and the Concessionaire, regulating the provision of the service up to the transfer of the asset to the new Concessionaire.
- 6** Other steps for regular concession, including the need for approval of a new grant plan.

CONCESSION STEPS

- 1** Public call for the Technical, Economic and Environmental Feasibility Studies (EVTEA) of the airport clusters. The studies chosen by the Ministry of Infrastructure (MINFRA) are forwarded to ANAC.
 - 2** Public consultation and public hearings to receive comments on the draft bidding notice and the draft concession, with the provision of payment of indemnification by the future concessionaire to the outgoing one.
 - 3** Analysis report of the contributions received by ANAC to forward the documents related to the process to be submitted to the Federal Court of Accounts (TCU).
 - 4** TCU decides on the approval and makes suggestions to improve bid documents.
 - 5** Publication of the concession bid documents with the schedule of planned activities.
 - 6** Submission of requests for clarification and challenges to the bid documents, followed by ANAC's answers and analysis. Shortly before the Auction, those interested in participating submit proposals and guarantees. The Auction takes place, and after the analysis of the document of the awarded bidders, ANAC approves the result. After fulfilling all the applicable obligations, ANAC schedules the date to execute the concession agreements by the Specific Purpose Vehicles that will become the concessionaires.
 - 7** ANAC starts managing and supervising the executed concession agreement, while the awarded bidder oversees the operation of the airport by INFRAERO.
 - 8** The concessionaires start operating the airport while INFRAERO oversees the operation.
- FINAL STEP** The concessionaire starts operating the airport independently.

Early Termination of Concessions

Requirements to the Amendment to the Concession Agreement

Irrevocable adherence of the concessionaire to **the rebidding process** and the subsequent termination of the Concession Agreement.

Conditions for the **services provision** subject to the concession agreement **up to new Concession Agreement come into force.**

Express consent of the concessionaire that the **financiers or guarantors will directly provide to ANAC additional information** that supports the assessment of the financial conditions, including those considered confidential.

Adoption of **arbitration or private dispute resolution** mechanisms for any issues involving the calculation of indemnification.

Forecast of the **indemnities payment for reversible assets** not amortized or depreciated.

ANAC' power to monitor the meetings of the concessionaire's board of directors.

Suspension of investment obligations that have not been considered essential.

The conditions under which the **operational transition of assets** and contractual and non-contractual obligations for the future concessionaire will take place.

The provision that the execution, extension, renewal and amendment of **commercial contracts will comply with applicable legislation.**

Access by ANAC and by the Ministry of Infrastructure to relevant information about the company.

The effectiveness of the Amendment is conditional on the **proof by the original concessionaire of the absence of a regime of judicial recovery**, extrajudicial recovery or bankruptcy.

The payment for the future concessionaire of **indemnities relating to reversible assets** not amortized or depreciated eventually due by the granting power to the original contractor.

The **penalties for non-compliance** with the obligations of Amendment and the hypotheses in which the reiteration or severity of the infringements committed will provide a proposal for the disqualification of the enterprise under the PPI's Council.

Concessionaire's duty of (i) **not distribute dividends** or interest on equity and not to carry out operations that constitute shareholder remuneration; (ii) **not reduce its share capital**; and (iii) **not offer new guarantees** on behalf of third parties, except if for justified reasons and with the express authorization of ANAC.

Concessionaire's duty of (i) **not dispose, assign, transfer, dispose of or constitute a burden, pledge or record on assets or rights linked to the Concession**, unless for justified reasons and with the express authorization of ANAC; and (ii) does not claim bankruptcy, judicial or extrajudicial recovery.

The disqualification of the PPI implies: (i) the **immediate establishment or resumption of any forfeiture proceeding** against the original concessionaire; (ii) the automatic re-establishment of the charges, obligations and conditions in force prior to the conclusion of the additive term.

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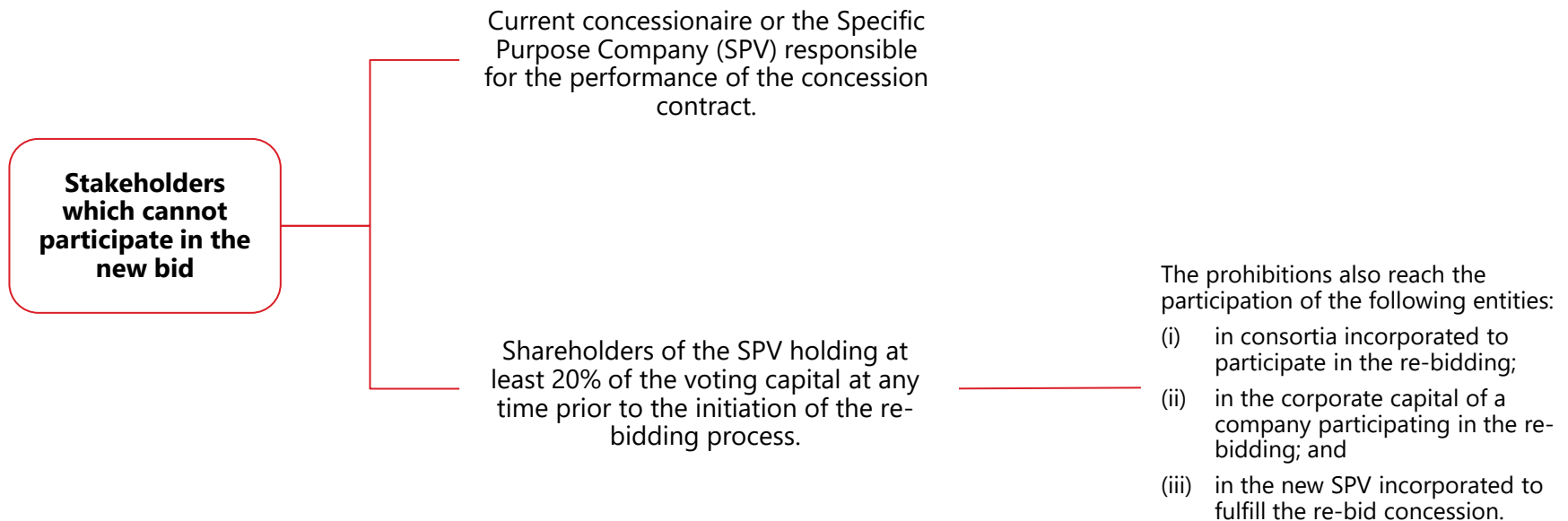

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Stakeholders that are prevented from participating in the re-bidding



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Early Termination of Concessions

Current cases: ASGA, VCP and GIG



São Gonçalo do Amarante (ASGA)

- ✓ First Federal airport concession.
- ✓ The contractual term was initially 28 years, ending in 2040.
- ✓ In 2018, the concessionaire announced its intention to return the Concession to the Federal Government because of financial problems.
- ✓ Qualified under Federal Decree No. 10.472, of August 24, 2020, and the Amendment was executed in November 2020.



Viracopos (VCP)

- ✓ Contractual term was initially 30 years, ending in 2042.
- ✓ At the beginning of 2020, the current operator announced its intention to return the concession because of financial difficulties.
- ✓ Qualified under Federal Decree No. 10,427, of July 16, 2020, and the Amendment was executed in October 2020.
- ✓ Currently under arbitration.

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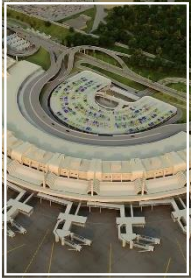

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Current cases: ASGA, VCP and GIG



Galeão (GIG)

- ✓ Contractual term was initially 25 years, ending in 2039.
- ✓ In 2022, the Changi Group of Singapore, the main shareholder of the Galeão International Airport (GIG) concessionaire, announced its intention to request the re-bidding of the asset, alleging difficulties in the performance of the contract.
- ✓ The analysis of the qualification for the re-bidding process has not yet started to be processed by ANAC.
- ✓ The re-bidding is expected to occur in 2024 together with Santos Dumont (SDU), both located in Rio de Janeiro.

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Methodology for calculating indemnities

Among other rules, **ANAC Resolution No. 533/2019** sets forth:

List of which are the **reversible assets**;

Indexes, amortization rules and other methodology rules **for calculating the value of unamortized investments**.

Indemnification will be calculated based on the amounts of the cost of acquisition of reversible assets, net of recoverable taxes and acquired or formed in accordance with the obligations assumed by the Concessionaire.

Any amounts received by the Concessionaire for assets passed on by the Granting Authority will be deducted from the final amount of the indemnification (offsetting).

In the case of indemnified assets arising from contracts with related parties, an evaluation of the terms and conditions of the contracts, their amendments and their performance will be carried out.

According to **Federal Law No. 13,448/2017**, shall be deducted from the indemnification amount:

Fines and other sums of a non-tax nature owed by the original Concessionaire and not paid by the time the indemnity is paid.

The concessions due up to the termination of the partnership agreement and not paid up to the payment of the indemnification.

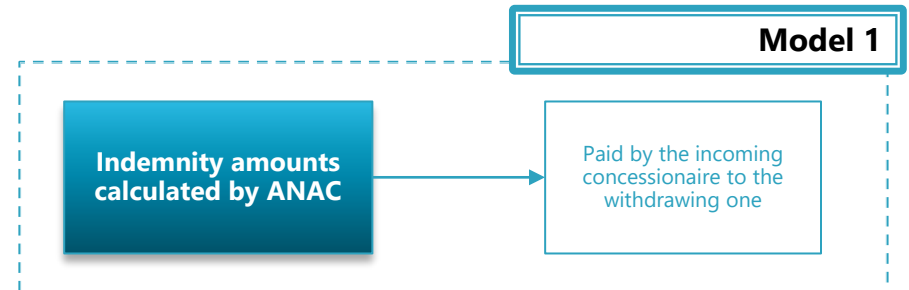
The exceeding amount of the tariff revenue obtained by the original concessionaire due to the non-accounting of the economic and financial impact on the value of the tariff resulting from the suspension of non-essential investment obligations at the time of the conclusion of the Amendment.

Payment of the indemnity due is a condition for the start of the new Concession Agreement.

Early Termination of Concessions

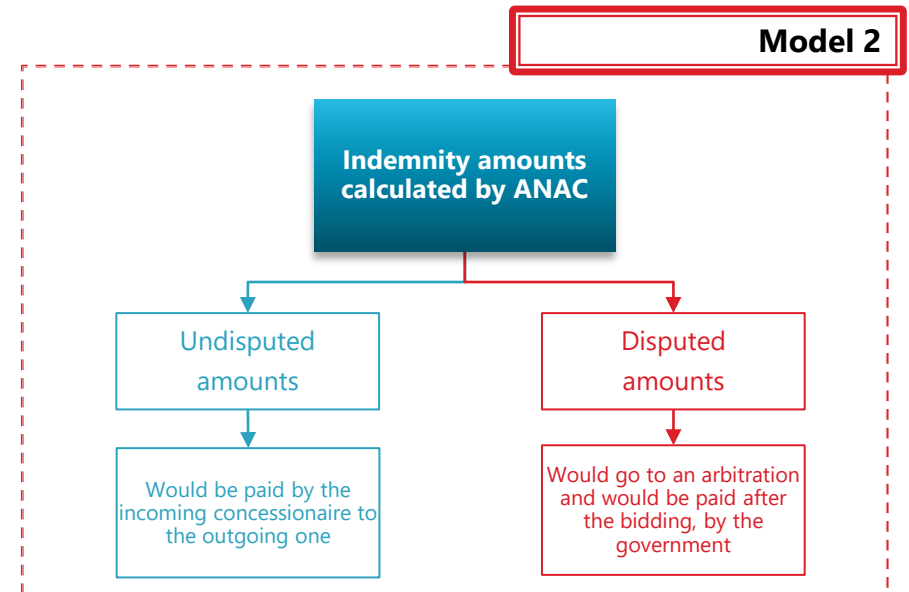
Methodology for calculating indemnities

Today, the legislation provides that any amounts to be indemnified will be paid by the new concessionaire directly to the withdrawing concessionaire, without direct commitment of public resources.



A proposal to amend **Temporary Measure No. 1,089/2021**, which deals with the Simple Flight Program, is under analysis in the National Congress, aiming to adapt Federal Law No. 13,448/2017.

Through the aforementioned proposal, it would become formally clear that the re-biddings deals can close before the final calculation of indemnities to the concessionaire that is leaving the asset; and exceeding amounts can be paid by the government can pay with its own financial resources if the amount of the grants of the entering concessionaire is not sufficient to pay the compensation to the departing concessionaire.



If approved, the legislative change will try to unlock the re-bidding process, which, more than five years after the law was passed, still has not had any process concluded.

Thanks!

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