LEGAL ISSUES SURROUNDING PUBLIC-PRIVATE PARTNERSHIPS (PPP) IN TRANSPORT PROJECTS

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ABSTRACT

In Brazil, the improvement of the efficiency of public transport systems requires the use of Public-Private Partnerships for promoting competitiveness and delivering modern and high quality public services. Experiences from European countries have shown advantages and disadvantages of using PPP in transport projects. Lack of financing in transport infrastructure could deliver opportunities for testing this mechanism in developing countries. The main aim of this study is to understand the crucial role that legal analysis plays in developing new financing transport projects. The paper concludes with a discussion of legal issues in international experiences in the field of infrastructure concession.

1, INTRODUCTION

In Brazil, the improvement of the efficiency of the transit systems requires new investment in infrastructure: as conventional bus transportation has reached its limit, especially due to the increase of individual transportation, road traffic conditions has been aggravated . On the other hand, several vices of the current regulation as: capture of regulators , the trend to oversupply central axes and to under supply minor transit markets, the information asymmetries which lead to unjustified fare increases may only reduced if the authorities introduce a "technology shock" where they re-win the control over the operational strategy. By doing this, they may renew the relationships with operators and reconstruct a planning discipline for the service network.

Nevertheless, public resource for infrastructure investments are scarce, whereby searching for funding alternatives becomes a critical condition for improvement of transportation services. In this context, Public-Private Partnerships (PPP) are spreading out worldwide as a new strategy for financing infrastructure. In this partnership contract, the public sector purchases infrastructure services (instead of implanting and operating them directly, and the private sector assumes the tasks to conceive, to implant, to keep and to operate infrastructures and the diverse risks – receiving, on the other hand, payment by means of tariffs from users (preferred option), indirect payment from the government (by means of shadow tolls for example) or still remuneration by means of a mixed solution (supported in part by the user or indirect beneficiary and in part by the public sector).

Literature has emphasized that through PPP's, the government changes its focus of concern. Instead of acquisition and operation of goods, the government

concentrates to provide services and its results. In this sense, PPP's complement public or private projects as new institutional arrangements for infrastructure.

One expects that private initiative improve investment and operation of transport systems. Firstly, in terms of quality, resulting in positive effect for users satisfaction. Secondly, searching for efficiency, where public funds, timing for implementation of a competitive market will be achieved. Thirdly, in terms of service transparency, by means of contracts whose result and performance will be measured.

It is not only the authorities that has benefited from partnerships. Private sector has also advantages in its development. However, the private sector may depend heavily on governmental support, as regulatory protection and tax incentives, which are indispensable in sectors of few yield or high risk, and long periods of return.

Evidently the advantages are followed by risks. Some issues are:

(a) Processes for implementation are slow, especially when legal framework is imperfect and unbalanced;
(b) Attempts for capturing the State and its regulatory politics, especially if it becomes dependent of few suppliers;
(c) Public interest are linked to contracts which have been badly written and badly negotiated;
(d) Situation open to corruption.

All these risks, if well managed, may provide a favorable climate for starting and continuation of partnerships projects.

PPP should be an important investment tool for transport infrastructure in Brazil. Although several legal rules, which facilitate the implementation of PPP, are already present in the national Administrative and concession legislation, legal issues still place impediments for its development, as it will be demonstrated ahead.

Thus, the present contribution aims to deal with challenges in implementation of a new legislation on PPP. Therefore, the contribution analyzes critical issues for implementation of this model in the Brazilian legal framework and sketches the structure of a specific legislation of PPP, which tries to harmonize them with the Brazilian Law on concessions and administrative contracts.

2. CRITICAL ISSUES IN THE BRAZILIAN LEGAL FRAMEWORK

In the legal framework, partnerships constitute a complex subject. Its application affects several branches of the Law (Lignières 2000). In this context, the respective international experience should be studied.

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In *Constitutional Law*, the competencies of different administrative levels have to be analyzed. PPP will require the introduction of a couple of new rules into the national framework of Administrative Law, which may conflict with the principle of autonomy of Local Government. Moreover, the proper notion of public service should be illuminated under a new focus of delegation, according to which private partner is into functions in the conception of infrastructures.

Modifications must be operated in the system of financial regulation, foreign exchange rules and arbitration. The consequent modernization, indispensable for the bloom of PPP, will demand an ample regulatory reform.

In *Financial Law*, adaptations in the budget and tax rules must be foreseen to guarantee the advanced partnerships. Here, it is not treated to adjust taxes and incentives only, but also to insert budget and fiscal responsibility into the politics of partnerships, with respect to issues of public indebtedness, intergovernmental agreements, and adaptation of agencies to promote the new missions.

In order to attract private investors, it has to be guaranteed the availability of public financial resources. On the other hand, the commitment of resources has to fit into budgetary legislation. Equally, it has to adjust to the budgetary legislation timetable. Usually, a program of partnerships would have to consist as one of the elements for a strategic investment planning, whose timetable will determine the partnerships chronogram, a listing of projects to be contemplated, a respective rule for the selection of partners, the contract structure and finally the performance measures of the investments.

Another issue has arisen in the literature which is critical to most of the countries under Civil Law, where the Administrative Law foresees the unavailability of the "public assets". Equally, the strong public service and Concession Law concepts depart from the notion that the goods affected to the services are *reversible*, i.e., after the end of the contracts they return to the public hands. Several partnerships options as leasing and lease-back of physic assets may be put into question by this principle.

Civil, Company and *Commercial Laws* will have to insert new types of agreements, review Company Law, allow the creation of new organizations, new types of credits contracts (including warranties and securities, such as guarantees and mortgages), review Civil liability, as well as rules of project finance.

The regular application of project finance demands the development of diverse financial instruments, as well as new types of commercial contracts. Important issues would be:

(a) agent trustees,
(b) insurances and reinsurance contracts and the markets of derivatives,

(c)specific purposes companies (SPC),
(d)non-ressource financing.

These elements are in the Brazilian Law already, but still need development so that the national legal framework will be presented as internationally competitive (Rodrigues Júnior 1997, Vinter 1998, Wood 1995).

The logic of project finance in infrastructure concessions imposes other legal challenges for public sector (Vinter 1998, Wood 1995). In principle, the public sector would be a customer-agent. In project finance, the public sector would be inserted as partner in the financing, for example, acquiring the services produced or guaranteeing a minimum demand (mechanism take-or-pay). Although the idea of shadow toll is foreseen in the second round of road concessions in Brazil (CREMA Program), the public sector payment for services not actually produced (as instrument of mitigation of risks) is still not treated in the Law, which foresees that this type of risk must be fully assumed by the concessionaire.

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The *regulatory policy and the State reform*, especially in terms of the role of the regulator agencies, would be equally affected. Firstly, there is a need to consolidate basic legal principles of regulation and Public Administration role and regulating organisms in the transport sector. A second aspect would be to strengthen the role of the authorities for the contracting of public services by private operators under conditions of complying contracted performance levels obligations. A third aspect would be the organization of really competitive tendering procedures, but which are dynamic and flexible in order to introduce negotiations and free spaces for innovative proposals..

From these principles some issues have to be detailed as (Irigoyen 2000):

(a)regulation of security and quality,
(b)consumers rights and collective interests;
(c)interference of some regulations;
(d)organization of regulatory organisms and its mutual relation with Public Administration;
(e)service control overseeing and discipline the installment of services; and
(f)transparency of information.

Competition Law is another regulatory issue that certainly will conflict with a too flexible negotiation with “preferred bidders” for a PPP agreements. Accordingly to the Theory of Natural Monopolies, investments in infrastructure require protection of the investors against free competition, and in this context, economic regulation prefers to adopt competitive bidding procedures (competition for the market).

In complex projects of project finance and PPP, the number of capable bidders which have a good risk ranking and managerial capacity narrows drastically. The

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public sector has the maximum interest to forbid access to adventurers in such complex procedures, which are costly in their structuring and full of dangers which may lead to bankruptcy. This extremely needed caution challenges in the other hand the objectives of building up a competitive partnership market..

International literature on PPP still mentions the need of adaptations in *Labor Law* (Irigoyen 2002). In countries where PPP had been developed, partnerships had been considered as alternative option to the State provision of public services as a way to privatize it, and thus, in sectors formerly dominated by public sector, privatization creates problems to public employment. Therefore, labor regulation will equally be included into the list of basic issues for the necessary legal reform. However, in the present contribution, the attention is focused toward the financing of new infrastructures of transport, which will from beginning be in operated by private sector, and for this reason, this question will not be treated here.

The referred legal reform will of course follow guidelines already present in International Law, especially the international rules for procurement and administrative contracts (OMC 1994 Agreement) and those regarding dispute settlements (International Centre for Settlement of Investment Disputes Convention and Center; Panama Convention and Inter-America Commercial Arbitration Commissions; International Chamber of Commerce rules and International Court of Arbitration; New York Convention of United Nations Commission on International Trade Law Arbitration rules; United Nations Commission on International Trade Law model for statutes on international commercial arbitration; cf. Irigoyen 2002).

Challenges are more complex in *Administrative Law.* In this branch of Law, changes in tendering and concessions rules (Laws 8.666/93, 8.987/95 and 9.074/95) are immediate tasks. Therefore, a clear statutory procurement law will promote stability in the process, allowing the parameters to which negotiations must be followed. Private sector only enters in the tender if the process is transparent and just, commercially sound and has political support.

The characteristics of a partnership contract impose a substantial negotiation of contracts contents. It has passed to the private partner to detail the ways of provision, or either, the proper project of infrastructure, which differentiates substantially of traditional delegation of public services. The current model of PPP, developed in the context of the Common Law, follows in general this sequence:

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- definition of infrastructure and services needs and analysis of institutional options;
- developing of the business case and the respective project;
- institute a project team;
- marketing the project among potential interested parties;
- publish the call for interest;
- pre-qualify participants;
- refine the analysis;

- negotiate with pre-qualified participants;
- receive and evaluate final proposals;
- select final participants;
- sign contract; and
- manage the contract.

This sequence is observed, with few differences, in almost all Common Law countries. The applicability of this procedure in a Civil Law country as Brazil is not so evident. For example, the Brazilian Law on procurement and administrative contracts, which underlines the isonomy of bidders, would be defied not only in its concrete rules but also in its principles.

Another challenges are necessary in the Brazilian law. Firstly, projects have to respect public purposes and interests. Secondly, the isonomy principle between bidders imposes a common base for elaboration of proposals. The freedom of conception of private partner is, thus, seriously affected.

International experiences based on the Common Law foresee diverse phases of negotiation and renegotiation between preferred bidders and authority, which would bring accusations to break the isonomy principle. As alternative, it could be conceived an open space for the public and interested ones in the participation in the tender, where the project would be conceived collectively, to incorporate different points of view and divulged private know-how. The risk of this solution is the appropriation of potential participants expertise by other competitors.

Special difficulty would have jurists to justify negotiation of project details after the pre-selection of preferred bidders. This negotiation should not affect the economic and financial conditions announced. In terms of these conditions, the proponents had established their proposals.. If they had made use the same favors to the preferred bidders, the discarded ones would allege that could have presented better conditions.

The negotiation issues affect also the property of private know-how, or the copyright of the bidders. In Brazilian legislation, a too literal interpretation of the publicity principle would impede participants with more advanced know-how to participate of tenders. For this aim, the International PPP practice foresees the protection of the copyright.

Such conflicts are especially present in cases where a private supplier offers to the Public Administration a project which had not been initially solicited, but would be of potential public interest. This issue is well treated in the international literature and practice, as it would be a clear sign of the capacity of private sector to innovate and to reject it would imply in a great cost for the public interest. Actually, such events defy the isonomy principle.

The possibility of putting non-requested proposals is still not foreseen by the Brazilian Law. This would provoke a great risk for public sector morality, which could be accused of favoritism to a selected group. A current solution for these cases would be to submit non-requested proposals to a competitive bid, where the proponent would benefit from an initial knowledge advantage. If a competitor happens to win, the original author would be entitled to a compensation for copyright reasons. Then, the Brazilian legislation according to the publicity principle does not treat bidders copyright, reducing the interest to innovate proposals.

However, before starting a process like this , the institutional context has to be prepared in different fields. In the political field, acceptability of this type of the procedure by the authorities and by the general public has to be ensured . In terms of organizational preconditions, well prepared teams and structured regulators are to be built up.

The mean contract work of the PPP, bears the character of a formal concession contract. Having a duration of decades, such contracts objective to appropriate the capacities of the private sector to introduce efficiency measures and innovations. For this mission, , the private partner benefits of a relative freedom of the means in order to comply with specified performance targets in terms of human resources, and financial organization, etc.

The public sector will keep the role of monitoring performance and giving the indispensable financial, material and prescribed support, never abdicating, however, of its regulating function. These roles will imply to define, to measure, to incentive performance, to control and enforce the compliance with the contract rules regarding, for example, relationship with customers, customer information, payment obligations, as well the maintenance of reversible public goods.

Coming back to the project characteristics, the main issue is to adjust it to a context of profit seeking and risk management, but without disregarding the aims of a public policy. In this complex environment, tariffs, contract periods and support duties by the public sector and the contract duties of the concessionaire may not be always specified since the beginning. Especially the distribution of risks between the partners will dry a lot of attention since the public sector will have the function to reduce regulatory risks (Irigoyen 2002). This will only be sustainable if partnerships are planned in investments articulated between public and private sectors. Moreover, a proper distribution of risks will have to be negotiated, as it happens in any long-term relationship. Such characteristic of flexibility of partnership contract can be rise accusations of posterior aid to the already contracted parties, in detriment of other former competing bidders who not have counted in advance with this flexibility at the moment of the ellaboration of their proposals, implying in a possible break of isonomy principle between bidders.

The risks of break of the isonomy and transparency principles cannot be moved away. To solve it, the international literature tries to distinguish aspects that can be

negotiated (for example, the type of insurance, arbitration and responsibilities) and those that would not be negotiable. However, considering that all contract negotiation will imply, directly or indirectly, in changes for the financial quality, this differentiation between what it is negotiable and non-negotiable loses its evidence.

Similar criticism will arise when some measures may be applied which are common in the international practice of PPP contracts, such as negotiation of the final contracts after the result of the selection procedure or even the negotiation with a limited set of pre-selected candidates before the final selection. These practices are justified with the argument that the public sector does not possess enough know-how comparable with that of the private companies, whose appropriation into the project would be one of the reasons of a PPP. This means that the public sector is presumed not to have the competence to determine all details of the agreement.

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Other issues regarding the clauses of the PPP contracts are (Trosa 2003, National Treasury 2001, Treasury Taskforce 1997, Lignières 2000, Perrot and Chatelus 2000, Her Majesty's Stationery Office 2000):

- obligations guarantees by the concessionaires vis-à-vis the investors, and their consequences for the continuity of services;
- arbitration of conflicts and the role of the Courts;
- rules for the building up of consortia;
- implications of the already existing concession contracts in other utility industries (telecom, electricity, water, etc.) for the new PPP concessions;
- relationships between regulatory organisms and the different government levels and its implications for the legal framework of partnership contract (example: the interference of antitrust regulators into the design and control of partnership contracts in the transportation industry);
- previous licensing and Planning Law procedures and other preparative administrative measures for execution of the contract (example:acquisition of land, environment impact and feasibility studies);
- Tax Law.

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Within the domain of Administrative Law, still another issues for reform are placed, such as:

- Reception and selection of unsolicited project proposals;
- specific regulations for the transportation industry;
- internal regulation of public agents;
- general regulations and norms on diverse economic activities;
- Urban, and Environmental Law; and,
- land acquisition procedures and norms of Traffic Law.

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3. SEARCHING FOR A NATIONAL PPP LEGISLATION

3.1 General issues

One of the significant steps for PPP implementation is the development of a legal framework that becomes attractive to investments without damaging governmental functions in defense of public interests. Such adequacy of legal context is a complex process. Here it is included the reform of usual legislation in diverse law branches in Brazil, in diverse administrative levels, as well to demand amendments in the Federal Constitution. In this scope, the advantages and disadvantages of creating a specific legislation of PPP constitute a controversial issue in international literature. Would it be necessary to repeal current instruments in concessions and administrative contract legislation, or would those be enough to solve most of inherent conflicts in this type of public services delegation?

Common Law countries allow flexibility in contract rules that Public Administration celebrates with private sector: all contracts are conducted basically in the same rules of Civil and Commercial law. Therefore, this is the reason why PPP had firstly blossomed in these countries.

In countries that had followed Civil Law tradition, in particular, those who had adopted the French Administrative Law, the situation is different. The interventionist State character, able to exceed in contractual relations to defend the public interest, is transparent in its detailed and peculiar Administrative Law. At the same time, this excessive rigor limits negotiation with private sector. Principles of public morality, isonomy, and transparency that monitor all public actions, make difficult preserve commercial secrets even in irrelevant details for the public interest. Nevertheless, these very aspects are routine in any contract. Of course, Courts ruling have adapted the statute law and its interpretation to the needs of concession practice (it may be remembered that France is a champion in matters of co-operation between private and public sectors, and this long before the relatively recent privatization policy introduced by Thatcherism).

Brazil follows, by its Administrative Law, the second system. In particular, concessions and administrative contract legislation occurred at a disturbed time after the impeachment of President Collor. The political imposition to combat public immorality reflected in extreme severity of Laws 8.666/93, 8.987/95 and 9.074/95. In those laws, norms contained to promote public tender and the act of contract from concessions, practically hinder the transaction of PPP such as current in International practice.

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Hardly a country will be able to impose its own proper logic and interests and remain competitive to attract international capitals. This is demonstrated by the history of railroad development in Brazil, where it attended the delay of decades in

the implementation of the railroad infrastructure. International Commercial Law and its multilateral agreements, which Brazil is co-signatory, limit domestic laws.

Recently, the Federal and some State governments were preparing the introduction of special legislation to facilitate the adoption of PPP in Brazil. The main issues of those legislative proposals will be explained in the next section. Unfortunately, written documents were not available, so that the present lines are written as a testimony of an insider.

Actually, the Brazilian legislation will have to adjust to the international practice to develop its interests for PPP projects. That is, once PPP is recognized and adopted as a basic planning instrument, the introduction of a specific legislation will be necessary, which will repeal certain points of general rules of administrative contract and concession, provided that this "liberalization" does not apply indiscriminately but only to selected projects, in terms of its extraordinary social, economic and strategic benefit, measured by the level of investment.

In Brazil, a legislation review could improve the regime of road concessions but also other concession areas in the transportation sectors. This will facilitate the use of PPP in projects currently not attended by the inadequate or insufficient remuneration of the particular by toll. Thus, some basic issues are analyzed in this work, on the basis of international experiences, which would have to be enclosed by a proper legislation of PPP.

3.2 The selection of partners

3.2.1 Selection procedure

The selection procedure should be more efficient and flexible. For this aim, some suggestions would be:

- definition of the nature and scope of the projects to be targeted by the new legislation as well its acceptance criteria and integration to strategic planning objectives (public service need);
- introduction of legal competence for negotiations with and by public Authorities;
- the authorization that, when a project is developed separately by means of a contract with a consultancy firm, the same firm may participate direct or indirectly (e.g., by joining participating consortia) in the definitive partner selection procedure;
- the current costs of study project elaborated by a particular should be supported by the authority or, either total or partially, by the contracted partner;
- the introduction of pre-selection procedures and short listing of preferred bidders calling
- to faculty, where admissible and desirable, the participation of public interest companies and also of SME's;
- to faculty corrections and adaptations of the contract, so far it does not modify the basic assumptions of the economic conditions of the contract; and,

- measures to attract foreign contractors and investments.

3.2.2 Criteria of judgment

Criteria of judgment should admit the lowest price or the best technique, as well as the combination of both. The criteria of judgment based on the better technique should be adopted only when public interest will not be properly reflected by the lowest price. Other supportive selection criteria would be the service quality the level of patronage and selected project details included in the proposal.

3.3 Execution and management of contracts

The special PPP contracts would bear the following characteristics:

Risks taken by the contracted: the private sector would assume the responsibility for construction and operation of infrastructure as well adapt the project to environmental and social demands. The private sector assumes the demand risk, where as the Government subsidies should be provided in cases where the fare prices do not cover systematically the costs.

Period of duration: maximum of 5 (five) years for contracts that are not remunerated by fare prices. PPP contracts should in general benefit form more stability guarantees than common administrative contracts.

Payments guarantees for the private partner: when the contracts are dependent on contractual payments by the authorities which may interfere into the general budgeting procedure, measures are to be taken to ensure priority for the project credits.

Mechanisms of efficiency incentive: partnerships contracts have to foresee quality and performance standards to be complied with.

Guarantee of economic and financial balance: the contracts should include tariff adjustment and revision clauses in order to guarantee the economic and financial balance of the contract.

4 FINAL CONSIDERATIONS

The adoption of partnerships contracts should be determined case by case. AN special regulatory agency should be responsible for adopting and monitoring the use of the criteria to measure the opportunity for partnerships. It is necessary to introduce a new type of contract which allows negotiations with bidders, introduces more flexible forms of selection and new spaces for the renegotiation of contracts.

Beforehand, both private and public partners will have to know that, by means of partnership contract, the government does not acquire direct service provision means but the very services and its performance, which will imply changes in procedures and in the managerial culture of the public services agents. Equally, responsibilities of contracted parties and their rights are empowered. On the other hand, the traditional double nature of concession as an authority act and contractual relationship, which is a core notion in the administrative contracts in the Civil Law system, is under test.

Partnership projects are especially exposed to political risks. Therefore, it is necessary to assure proper participation by diverse sectors already in the design phase but also in the subsequent steps so that the benefits may affect broad groups of society and the cost be minimized and equitably distributed.

The introduction of PPP contracts, especially in Civil Law countries requires a general simplification of the administrative procedures. For this aim, , the following measures should be taken (Lignières 2000): (a) systematic codification of the legal texts; (b) reduction of bureaucratic formalism; (c) reduction of number of stages and the deadlines; and (d) reduction of threshold value for its application.

Finally, public sector activity should be exerted in a new way. This would stimulate innovative solution for problems in the relationship between contracted parts and these and customers, promoting a climate of mutual relations, which guarantees the bloom of partnership in spite of the most diverse difficulties.

With respect to the subject of the conference, which is public transportation, we have alleged the need of investment in new transit systems for the improvement of the transportation service in our towns and also for the improvement of its regulatory conditions. Normally, the specific financial and environmental conditions of transit investment do not make it one of the preferred industries for transit investment. However, given the extreme scarcity of financial resources for further investment in the respective infrastructures, PPP will impose itself also in this industry.

Special conditions have to be created in this particularly unfavorable environment for the respective project, such as:

- a general PPP policy, both national and regional/local, multi-sector and sector specific; in the case of transit investments, the PPP projects shall be based upon a network strategy of transit lines which reinforce mutually the patronage prospectives;
- a strategic urban planning in general and, more specifically, by urban transportation planning (comprising different modes, giving priority to public transportation);

- to combine commercial exploitation of transportation services with diverse side businesses as real estate (value capture), activity centres (shopping, schools and faculties, culture, offices, etc.);
- an urban quality design;
- inserting into broader industrial and social policies, such as policies for construction and equipment sector, policies for development of real estate in influence areas of new infrastructures, policies for development of SME's and popular co-operatives;
- to involve the local saving capacity as local infrastructure and pension funds, saving banks and stock exchange;
- to be supported politically by different relevant political and social forces;
- to be duly protected by Law with respect to the contract, financial feasibility conditions, protection of disruptive competition and planning environment.

All these conditions will turn the development of a PPP more complex, even running against current recommendations to maintain the simplicity of operational, financial, contractual and institutional frameworks. Actually, these recommendations make sense when the investment is financially self-supporting, it has a character of "club-good" and it does not affect immediate interests of local social environment. This, of course, will definitely not be the case in transit industry. Beyond the fact that the multiple insertion of transit infrastructure investment project into policies will bring up difficulties for forecast cash flows, implying higher commercial, political and economic risks requires that the "whole city shall work for the project" (which implies that project works for the city).

In terms of legislation reform, Planning and Construction Law will be a special issue for PPP project in urban transit, as expropriation procedures and modifications in urban development plans were to be facilitated. On the other side, participation and consultation procedures will be afforded, as the conflict potential in urban areas and infrastructure, where the sense of public service is strong, may escalate the political and financial risks of projects (see the case of the Circular Motorway in Lyon). The recent Law no. 10.257 (Statue of the Cities) has introduced several instruments for public urban policy which will be useful for facilitating PPP in urban areas. A revision of this Law may point additional legal facilities.

Recently, the notion of Public Interest Companies has been rising in order to develop an additional institutional and organizational tool for PPP project, which are sensible in terms of social and environmental impacts or do not show the necessary financial profile for the private sector. The recent legislation on NGO's and Social Organisations (respectively, Laws no. 9.790 and 9.637) need to be tested and eventually adapted.

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