

## Project finance. A new judgment in the saga of the Spanish toll roads lawsuits<sup>1</sup>

Madrid, November 2024

Last month the Madrid Court of Appeal (MCA) upheld a first instance court judgment ordering the sponsors of the R-3 and R-5 toll roads to honour the so-called Support Agreement entered into with the syndicated lenders to guarantee the loans granted in 2003 to build the toll roads (totaling more than €700 million)<sup>2</sup>.

The judgment deals, *inter alia*, with two legal issues that are relevant to sponsors' agreements similar to that of the R-3 and R-5 projects.

The first one is about (i) the appointment of and the role played by the syndicate's agent, which brought the legal action on behalf of the lenders, and (ii) the required majority within the syndicate to enforce the support agreement.

The sponsors claimed the agent lacked legal standing, as it had not proved it had been correctly appointed, following the resignation of the former agent, nor that the majority of lenders had been obtained.

The MCA found that the appointment of the new agent had been made in accordance with the relevant contractual provisions and that the process organized by the agent was correct, as it had arranged the casting of the votes through a notary public and had submitted a document in which a well-known accounting firm certified that the majority had been reached in accordance with the relevant clauses of the financing agreements.

The resignation of the agents and the need to appoint a new one is not common, and voting processes in syndicated loans tend to be rather informal, but in this case the formal and scrupulous way in which both things were done proved instrumental to defeat the sponsors' allegations.

The second issue worth mentioning is the interpretation of the will of the parties to the support agreement.

The sponsors have submitted in this and other lawsuits that, (i) by definition, project finance is nonrecourse debt and hence sponsors' agreements are not repayment guarantees, but *sui generis* commitments by the sponsors to inject funds in the concessionaire company (the borrower) only under very specific circumstances and while the project is alive, rather than when the companies go bankrupt and the State takes back the toll roads, or (ii) their obligation is merely to ensure that lenders claims rank senior *vis-à-vis* all other claims.

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<sup>1</sup> See our December 2023 note *Sponsors' support agreements in infrastructure project financing* at [https://www.almoquera.net/files/uqd/1360d0\\_7911bf16523b49039915ac36f5e50783.pdf](https://www.almoquera.net/files/uqd/1360d0_7911bf16523b49039915ac36f5e50783.pdf)

<sup>2</sup> Judgment of the MCA 367/2024 of 1 October. J. Almoguera Abogados represented the claimants.

They also claimed their commitments were not enforceable because the lenders were entitled to receive the so-called RPA (i.e. an amount payable by the State in the event of bankruptcy and rescission of the administrative concession) given that the concessionaire's right to the RPA had been pledged as part of the security package.

However, the MCA found that the correct interpretation of the long and complicated clause at hand was that it was a guarantee of the loans by the sponsors, one which was independent from the amounts received or to be received by the lenders from the State (the RPA). The MCA concluded that the support agreement could be enforced independently or in parallel to the RPA.

To reach this conclusion the MCA paid attention to what the clause at hand and other clauses of the financing documents said and did not say, and referred to the R-4 toll road judgment, in which the Supreme Court said that the sponsors' commitments can only be explained as a guarantee of the financing.