

Sponsors' support agreements in infrastructure project financing

Madrid, December 2023

So far there have been a few judgments about the so-called *support agreements* (SAs), whereby the sponsors of an infrastructure project undertake to provide funds for the benefit of the concessionaire company and of the lenders. This obligation is usually triggered by the materialization of certain contingencies such as construction or expropriation extra costs, shortfall in revenue or non-compliance with financial ratios.

These judgments refer to the toll roads built in Spain about two decades ago¹. Expropriation costs and the number of users turned to be much worse than expected and the concessionaires and their parent SPVs ended up in insolvency and eventually liquidation proceedings. The syndicated lenders required the sponsors to fulfil their funding obligations under the SAs, but they refused to do so, *inter alia*, on the grounds that such obligations were no longer enforceable due to the insolvency and liquidation of the concessionaire, since, according to the sponsors, the SAs were only aimed at securing the construction of the infrastructure and the viability of the business, which was no longer possible following liquidation and the termination of the concession contracts.

One of these judgments has just become final as on 18 October 2023 the Supreme Court (SC) decided not to hear the appeal filed by the sponsors of the R-4 toll road against the Madrid Court of Appeal (MCA) judgment² that ordered them to pay EUR 23 million to the SPV that had borrowed the funds and was the parent company of the concessionaire (both under insolvency proceedings).

The claim was filed by eighteen syndicated lenders that had granted a EUR 556 million loan to finance the project. According to the SA, should a certain financial ratio be below the agreed threshold three months before the loan maturity date the sponsors would be obligated to pay the borrower the amount necessary to reach the threshold, with a cap of EUR 23 million. The lenders brought evidence that the financial ratio was below the threshold on the relevant date, but the defendants refused to pay submitting, *inter alia*, that their obligations were no longer enforceable after the judicial declaration of insolvency.

The MCA found that this ground of defence was "not acceptable", as the SA stated that the sponsors' obligations would remain in force until "any sums owed by the borrower under [the loan agreement] have been paid in full".

¹ Two of these judgments have upheld the lenders' actions: one is about the R-4 toll road (already final) and the other concerns the R-3 and R-5 toll roads (currently under appeal). This note refers to the first one. The second one ordered the sponsors to pay more than EUR 450 million plus interest and costs (J. Almoguera Abogados represented the lenders).

² Judgment 300/2020 dated 30 September 2020. The lenders were represented by the litigation and finance teams of DLA Piper Spain.

In our opinion, the same has to be said about the SAs of other toll roads, for it seems clear that these agreements have generally two main functions: one is supporting the construction of the infrastructure and the viability of the business, the other - equally, if not more, important- being to guarantee that the loans are reimbursed in full or in part despite the insolvency and liquidation of the concessionaire company and the failure of its project.

We note that in a judgment also referring to the R-4 toll road³ the SC categorically said that the sponsors' obligations under SAs are aimed at guaranteeing that the borrower will reimburse the financing provided by the lenders.

The CAM's interpretation in R-4 that the concessionaire's insolvency does not prevent the lenders from enforcing the sponsors' obligations has become stronger given the SC's decision not to hear the appeal filed by the sponsors.

³ Judgment 17/2020 dated 19 February 2020.