



# Concessions and the Search for an Entrepreneur

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Recent years in Brazil have witnessed an increasing investment in the formation of partnerships between the public sector and private agents through concessions.

The legal institute of concession, although ancient - one can speak of a remote origin, which precedes even the notion of concession as that formulated in the nineteenth century, which was absorbed by the theme of public services - remained somewhat dormant for much of the twentieth century in Brazil, due to a political option of the Brazilian State to undertake certain activities (including those subject to the public service regime) by persons of its own administrative structure, mainly state-owned companies. Consequently, concessions in this period, although existing in one or another economic sector, were inhibited as instruments of partnership between the Government and private parties (concession, specifically).

The resumption of concessions as useful instruments in the articulation between the State and private parties - especially for the provision of public services - occurred mainly from the mid-1990s, with the enactment of Law No. 8987 / 1995.

However, despite the fact that the experience of concessions in recent years could have demonstrated the significant differences between concession contracts and other arrangements involving the Government and private entities (such as those indicated in Law No. 8666 / 1993), it seems that many do not recognize the discrepancies between these contracting regimes.

One of the aspects that most highlight these differences concerns what is expected of the private entity that will contract with the Government in both cases. In summary, in the case of less complex administrative contracts, the expectation is that the private entity has the capacity to, essentially, carry out tasks in the exact terms established by the Government Authority, without being granted a large margin of freedom of action.

The logic in concession contracts, due to the characteristics inherent to them, is completely different. What is desired in relations of a concession nature is to achieve, in the private market, a partner for the execution of complex undertakings. Complexity, in these cases, is associated with the various relationships that emanate from the concession, in which a series of necessary articulations are required with various actors (that is, the Government, financiers, companies, users, etc.).





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In fact, the choice of a concessionaire should be based mainly on the ability of the interested party to contract with the Government to undertake an activity, from its structuring to its execution.

This implies recognizing the private partner, unlike other contractual relationships involving the Government, a greater margin of freedom of action to promote the activity assigned to it through the concession. The control to be exercised by the Government, in such circumstances, should be dedicated to the results presented by the concessionaire in developing that activity, in that one should not consider a greater interference of the Government on the formulas created by the private partner in undertaking public-interest tasks.