

Ports and Terminals 2021

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Lexology Getting The Deal Through is delighted to publish the sixth edition of *Ports and Terminals*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Italy and Japan.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alex Kyriakoulis of HFw, for his continued assistance with this volume.

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GENERAL

Key ports

1 Which are the key ports in your jurisdiction and what sort of facilities do they comprise? What is the primary purpose of the ports?

Venezuela has a variety of ports on coastal, lake and river fronts, comprising the following:

- petrochemical terminals in the eastern and western part of the country, under control of the state-owned company *Petróleos de Venezuela*:
 - La Salina;
 - Bajo Grande;
 - El Tablazo;
 - Puerto Miranda;
 - Amuay;
 - Cardon;
 - El Palito;
 - José; and
 - Guaraguao;
- bulk terminals in the Orinoco river, mainly under the supervision of *Corporación Venezolana de Guayana*, handling steel products such as iron ore fines, pellets, briquettes and coils, among others:
 - Sidor;
 - ACBL;
 - Venalum;
 - Bauxilum;
 - Puerto Ordaz-Ferrominera;
 - Copal;
 - Palúa;
 - San Félix; and
 - Punta de Piedra;
- public ports under the administration of the state-owned company *Bolivariana de Puertos, SA (Bolipuertos, SA)*:
 - Puerto Cabello;
 - La Guaira;
 - Maracaibo;
 - Guanta;
 - Guamache;
 - La Ceiba; and
 - Eulalia Buroz;
- OCAMAR and Terquimca, which are navy facilities for public use;
- Puerto Sucre and Guaranao, which are decentralised public ports under the control of Sucre and Falcón States, respectively; and
- a few private companies operating port facilities, among them Vopak, as well as some marinas and ferry terminals.

The only dedicated container terminal in the country is located within the port of La Guaira, a project advanced by Bolipuertos, SA and executed by the Portuguese consortium Teixeira Duarte, the company now in charge of the administration of this terminal.

Reform and port models

2 Describe any port reform that has been undertaken over the past few decades and the principal port model or models in your jurisdiction.

Towards the end of 1991, the country embarked on a decentralisation process, giving rise to regional public port bodies acting as landlord port authorities with the presence of private port operators in charge of stevedoring, storage and warehousing services. A number of port operators were then granted container yards within the ports through authorisation contracts. On 17 March 2009, amendments to the Law of Decentralisation, Delimitation and Transference of Competences of National Public Powers, as well as to the General Law on Ports (GLP), were published in Official Gazette No. 39,140. Said amendments aimed to enhance the powers of the National Executive to:

- revert control over regional public ports to the central government for strategic reasons, merits, opportunity or convenience; and
- intervene with the assets and services to guarantee the quality of services and to safeguard constitutional rights.

Consequently, pursuant to the amended laws, the National Assembly reverted the infrastructure of the ports of Puerto Cabello (Carabobo State), Maracaibo (Zulia State), Guamache (Nueva Esparta State) and La Guaira (Vargas State) to the central government.

Now controlling the public ports, the National Executive set up a national company named Bolipuertos, SA vested with the administration, development, maintenance and conservation of the ports, and whose organisational structure is found in Official Gazette No. 38,146 dated 25 March 2009. Therefore, the main public ports handling general (break-bulk and containers) and bulk (excluding oil-related products that are handled through PDVSA terminals) cargo are nowadays in the hands of Bolipuertos, SA acting as an operating port (administration and operation), although stevedoring services are also performed by private port operators.

The above changes concerning the recentralisation process have only reached the public ports of commercial or public use, and not the ports of private use within which the majority of the oil, steel, navy and particular terminals fall. These terminals are under the administration of the relevant entity (PDVSA, CVG, OCAMAR, Vopak, etc) and are subject to the control of the National Institute of Aquatic Spaces (INEA) that grants the corresponding title to the entity in charge.

Thus, the GLP distinguishes three sorts of contracts (article 28) through which the INEA grants the administration of ports and terminals according to its nature:

- concession: for construction, maintenance and operation of private ports of private use;
- habilitation: for construction, maintenance and operation of public ports of private use, belonging to public agencies or state-owned companies; and
- authorisation: for construction, maintenance and operation of a pier of local or particular interest.

State development policy

3 | Is there an overall state policy for the development of ports in your jurisdiction?

Although the GLP aimed to introduce the governing principles for ports and their infrastructure, at this point little has been achieved regarding shaping a modern and efficient national port system embodied in a National Plan for Port Development (article 1). Such a plan has not even been drafted yet, so there is no overall state policy for port development.

Green ports

4 | What 'green port' principles are proposed or required for ports and terminals in your jurisdiction?

Articles 63–67 of the GLP deal with environmental management, requiring that the INEA, together with the specific ministry, oversee compliance with national laws within the ports in order to ensure the implementation of policies for the conservation, defence and improvement of the environment. According to article 65, those in charge of the administration of public and private ports must inform the INEA and the ministry in charge of the environment about any modification, improvement or development of existing infrastructure, submitting an impact study with a corresponding plan for the implementation of measures related to the prevention, correction and control of the effects resulting from the projected works.

As per article 66, ports and terminals also need to have special plans for environmental action and contingency, prescribing the preventive and immediate actions that may be needed in case of fire, oil spillage and industrial safety to ensure the continuity of the services, as well as facilities and procedures in place for the reception, treatment and disposal of rubbish and oil-related waste generated on board the ship (article 67).

However, Decree No. 1,257 dated 13 March 1996, published in Official Gazette No. 35,946 dated 26 April 1996, obliges any public or private entity to notify the competent ministry about any project that implies the occupation of the territory, for subsequent compliance with the environmental regulations (ie, elaboration of the impact study and discussions with the competent entity about the methodology to be followed for the environmental assessment). It should be noted that article 6.7 of this Decree makes such an impact study necessary for projects involving commercial ports and piers for ships of 500 gross metric tons or over, or dredging of 50,000 cubic metres or more. On review of the documentation and after approval, the competent authority will issue the authorisation for the occupation of the territory.

LEGISLATIVE FRAMEWORK AND REGULATION

Development framework

5 | Is there a legislative framework for port development or operations in your jurisdiction?

The legislative framework is embodied in the General Law on Ports (GLP), the Law for Public Procurement (last amendment published in Official Gazette Extraordinary No. 6,154 dated 19 November 2014) and the Decree-Law for the Promotion of Private Investment under Concessions

Regime, related to public-private partnerships (PPP) for infrastructure and public services, published in Official Gazette Extraordinary No. 5,394 dated 25 October 1999, whose article 15(c) states that it can be granted under concession projects involving the development, execution and exploitation of port infrastructure, including ports, warehouses, storage and related facilities.

Regulatory authorities

6 | Is there a regulatory authority for each port or for all ports in your jurisdiction?

As a matter of strict law, the port authority in Venezuela is the National Institute of Aquatic Spaces (INEA) acting as regulatory body for ports nationwide, pursuant to article 22 of the GLP. Under domestic legislation, it is important to make a differentiation between this port authority and the 'port administrator' that, according to article 71 of the GLP, is the public or private entity in charge of the management and maintenance of the port. It is fair to point out that Bolipuertos, SA, having the administration and operation of the main public ports, has a significant degree of freedom.

Despite the above, the Executive has recently placed under military control the major public ports, appointing in each one a 'single authority' in the person of military officials. The legal ground for the above is found in Decree No. 2,382 published in Official Gazette Extraordinary No. 6,242, dated 22 July 2016, through which the Single Authorities for the Port System are created. Seven single authorities throughout different regions are established, sitting in the ports of La Guaira, Puerto Cabello, Guaranao, Maracaibo, La Ceiba, Guanta and El Guamache, all of them under the supervision of the Single Authority of the National Port System, sitting in Caracas (article 1). According to article 2, there corresponds to each single authority the supervision, assessment and monitoring of the administration and operation of the National Port System, ensuring efficient activities in each port, coordinating the work among the competent entities.

Pursuant to article 3, the single authorities shall guarantee the expediting of port operations and the availability in the distribution chain of strategic goods for national consumption, imported by the public and private sectors in the framework of the Great Mission Sovereign Supply, for which they have wider powers, including:

- the implementation and execution of mechanisms for supervision and control of the port activities;
- the direction of operations within the ports and terminals throughout the country;
- coordination of the performance of public entities in respect of port activities;
- determination of the priority order for the loading and discharge of ships; and
- designing and implementing mechanisms to reduce the permanence of cargo within port areas to improve distribution.

Finally, article 4 states that although the different public agencies working within the port area are independent and retain their powers as attributed by law, they must review its functioning in the light of the guidelines issued by the single authority, aimed to improve the port operation. In practical terms, and irrespective of the resulting conflicting regulations, the appointment of these single authorities is intended to deprive the INEA of its powers of supervision over public and private ports, transferring these tasks to the Single Authority of the National Port System.

7 | What are the key competences and powers of the port regulatory authority in your jurisdiction?

The Organic Law of Aquatic Spaces (Official Gazette Extraordinary No. 6,153 of 18 November 2014) set the general principles governing shipping and port affairs at a national level. As the national port authority, the INEA has power over all public and private ports. The GLP lists these powers in article 24 comprising, among others:

- elaborating port policies and monitoring the execution of the National Plan for Port Development;
- supervising compliance with the policies and rules concerning the construction, improvement and maintenance of port infrastructure;
- implementing the national and international regulations on environment and security;
- representing the republic in the national and international events;
- granting concessions and authorisations upon ports;
- setting up policies concerning training, collecting and assessing the port statistics;
- monitoring the correct performance of port services; and
- taking care of the environment and quality of life in urban centres.

Harbourmasters

8 | How is a harbourmaster for a port in your jurisdiction appointed?

The aquatic authority is assigned to the Ministry of Transport and Public Works and exercised through the INEA and its local branches in the shape of harbourmaster offices, also called port captaincies. Pilotage, towage and launch services within a port are under the control of the harbourmaster, not ports and terminals, and the berthing and unberthing operations must be coordinated between them.

Competition

9 | Are ports in your jurisdiction subject to specific national competition rules?

The GLP does not contain provisions dealing with competition; however, port activities are subject to the Antimonopoly Law published in Official Gazette No. 40,549 dated 26 November 2014, regulating the conduct, practices, agreements and contracts that may prevent, restrict or limit competition. Such practices are monitored and sanctioned through a national body named the Antimonopoly Superintendency.

Tariffs

10 | Are there regulations in relation to the tariffs that are imposed on ports and terminals users in your jurisdictions and how are tariffs collected?

There are basically two kinds of tariff schemes within the port legislation, the first applicable to the main public ports, and the second to those under the control of the INEA. Thus, tariffs to be charged by Bolipuertos, SA in its capacity as administrator of public ports are embodied in the Law on Port Dues, last amendment published in Official Gazette Extraordinary No. 6,150 dated 18 November 2014. The port dues referred to are similar to those prescribed in article 56 of the GLP, namely:

- arrival (anchorage and channel transit);
- berthing; embarking and disembarking;
- wharfage;
- deposit;
- warehousing;
- parking of vehicles and machinery; and
- registration.

In addition to the former, a Ministerial Resolution on Port Tariffs (published in Official Gazette No. 41,227, dated 1 September 2017) has also been enacted to charge for services such as renting of equipment, stevedoring and security. Dues are payable by shipping and cargo interests, as the case might be. According to article 11 of the Law on Port Dues, foreign shipowners are required to pay the dues in US currency. Besides the former, the Circular BP-PRE No. 001-2018 dated 12 January 2018 and issued by Bolipuertos, SA imposes payment of additional tariffs related to activities such as container repairs, fuel and water supply, port area access, etc.

The second tariffs scheme is applied to ports under the control of the INEA granted through concession, habilitation or authorisation contracts. In these cases, article 41 of the GLP prescribes the fees to be paid to the INEA by the contracting party, based on the annual gross income for port operations worked out in tributary units (TU) a domestic rate use for tax and other governmental charging purposes, annually adjusted by the Executive, with 1 TU currently equivalent to 1,500 bolivars. Therefore, the concessionaire will pay a monthly figure as per the applicable percentage:

- up to 10,000 TU of gross income, up to 4 per cent;
- between 10,000 to 40,000 TU of gross income, up to 8 per cent;
- between 40,000 to 80,000 TU of gross income, up to 12 per cent;
- more than 80,000 TU of gross income, up to 15 per cent; and
- in any case, the annual minimum amount will be estimated as 10 TU.

In so far as tariffs payable by users are concerned, under this category of ports and terminals there are no specific regulations. Usually, these are set by the concessionaire in accordance to the contractual provisions.

11 | Are there restrictions relating to the currency applied to the tariffs or to any fees that are payable by a port operator to the government or port authority? Are any specific currency conditions imposed on port operators more generally?

Venezuela is currently subject to an exchange control regime, and payment of tariffs in foreign currencies is conditioned by said provisions. Therefore, vessels through ship agents as well as cargo through port operators are obliged to pay certain tariffs in US dollars or euros, as the case might be. At the beginning of 2018, the INEA announced that foreign flag ships would pay tariffs such as pilotage and towage in 'petros', a cryptocurrency introduced by the government; however, this announcement, which found widespread rejection by foreigners owing to US sanctions against Venezuela, has not been implemented so far. Later on, the INEA ordered the payment of services in question in euros, as per Ministerial Resolution No. 033, published in Official Gazette No. 41,389 dated 3 May 2018; prior to that they used to be in US dollars. In addition, port operators working within Bolipuertos, SA are required to pay for services in either US dollars or bolivars, depending on the services.

More recently, in a move to boost the use of other methods of payment reducing the country's dependence on foreign currencies, the National Executive issued Decree No. 4,096 published in the Official Gazette Extraordinary No. 6,504 dated 14 January 2020, according to which all dues, contributions, tariffs, commissions, surcharges and public prices payable in foreign currency to governmental agencies must be paid in 'petros'. Article 4 of the Decree lists a number of services that must exclusively be paid so, among those services being the tariffs for services rendered by Bolipuertos, SA, prescribed by article 7(1) of the Joint Resolution No. 065 of 28 August 2017 published in the Official Gazette No. 42,227 dated 1 September 2017. Nevertheless, despite the new legislation payment through 'petros' has been delayed.

Public service obligations

- 12 | Does the state have any public service obligations in relation to port access or services? Can it satisfy these obligations through a contract with a private party?

Port activities are regarded by the port legislation as a public service, so ports are open to all users depending on the nature of each one. Article 77 of the GLP states that ports will be available on all days throughout the year. As per domestic legislation, the state can satisfy its obligation to provide port services by delegating them to private parties through concessions or other contractual instruments. Ports controlled by Bolipuertos, SA are commercial ports of public use and access is open to all ships subject to compliance with operational regulations. This is not the case in ports regarded as facilities of private use.

Joint ventures

- 13 | Can a state entity enter into a joint venture with a port operator for the development or operation of a port in your jurisdiction? Is the state's stake in the venture subject to any percentage threshold?

There are no domestic provisions preventing a state entity from doing so, nor requiring a specific percentage threshold. The GLP fosters private investment in ports, for which the INEA will encourage strategic associations with port operators (article 18). The port law of Falcón State, for instance, allows several figures for its administration, one of them being the use of a mixed company with public or private participation. Strategic alliances are also a mechanism to achieve this public or private cooperation in port projects.

Foreign participation

- 14 | Are there restrictions on foreign participation in port projects?

There are no restrictions on foreign participation in port projects, so it is possible to incorporate a national company owned 100 per cent by the foreign entity to carry out the project.

PUBLIC PROCUREMENT AND PPP

Legislation

- 15 | Is the legislation governing procurement and PPP general or specific?

The governing legislation is a general one embodied in the Law for Public Procurement (LPP) and the Decree-Law for the Promotion of Private Investment under Concessions Regime (LPPICR) regulating PPPs for infrastructure and public services. Nevertheless, it is important to bear in mind that in light of articles 4 and 5 of the LPP, there are some contracts excluded from its application. These contracts comprise those for the execution of works and provision of services that are within the framework of international cooperation agreements between Venezuela and other states, including joint ventures incorporated within the framework of these agreements.

Proposal consideration

- 16 | May the government or relevant port authority consider proposals for port privatisation/PPP other than as part of a formal tender?

Under article 17 of the LPPICR, anyone may submit a proposal for the construction of new infrastructure or the maintenance, modernisation and exploitation of the existing one. However, subject to a review by the competent body, a tender procedure must be opened with the

participation of all interested particulars to grant the eventual concession. Proposals could also be considered in the framework of bilateral or multilateral agreements, through strategic alliances or other ways of cooperation.

Joint venture and concession criteria

- 17 | What criteria are considered when awarding port concessions and port joint venture agreements?

Article 28 of the LPPICR states that the concession contract will be awarded to whoever submits the best economic and financial proposal among those accepted from the technical point of view.

Model agreement

- 18 | Is there a model PPP agreement that is used for port projects? To what extent can the public body deviate from its terms?

There is no specific PPP model agreement. Any project is discussed between the competent body and the particulars, in order to draft the contractual terms very much based on the general conditions of the tender process. Once the contract is signed it will be published in the Official Gazette (article 28 LPPICR).

Approval

- 19 | What government approvals are required for the implementation of a port PPP agreement in your jurisdiction? Must any specific law be passed in your jurisdiction for this?

Although there is no need for a specific law to be passed, the lack of regulations to the General Law on Ports (GLP) makes it difficult to have clear guidance as to the steps to comply with and the necessary approvals. Generally, a proposal by the particular must be submitted to the relevant body. Or, in the context of the tender procedure, it could even be implemented as a result of a bilateral agreement between countries; usually, a ministry with powers in respect of the specific area is involved; for instance, the Ministry of Transport and Public Works or the Ministry of Oil and Mining (with power over the oil marine terminals). Environmental and National Institute of Aquatic Spaces (INEA) approvals are also needed at national level, whereas local approval is required by the respective municipality concerning the urban variables.

Projects

- 20 | On what basis are port projects in your jurisdiction typically implemented?

Currently, there are no precedents for port projects under build-operate-transfer (BOT) or build-own-operate-transfer (BOOT) schemes. Pursuant to article 40 of the GLP, for strategic reasons the National Executive may grant concessions for the construction and operation of new private ports for public users. They will listen to the opinions of the regional planning and coordination council of public policies and the National Council of the Aquatic Spaces. In any case, the regional state where the port will be developed will receive part of the income from the concession. BOT or BOOT schemes could be proposed for this category of port.

Term length

- 21 | Is there a minimum or maximum term for port PPPs in your jurisdiction? What is the average term?

Domestic legislation prescribes a maximum term of 50 years for the concession contract (article 16 LPPICR), although it can be renewed at least one year before expiration (a revision must be effected).

22 | On what basis can the term be extended?

Article 16 prescribes that renewal will be subject to an objective evaluation of performance by the concessionaire. For the purposes of the extension, the grantor may listen to the opinion of the organised community.

Fee structure**23 | What fee structures are used in your jurisdiction? Are they subject to indexation?**

Article 41 of the GLP provides guidance for the estimation of the concession's fees, according to which the INEA must take into consideration the investment, profitability and duration of the concession over the annual gross income for port operations, to determine the corresponding fee, based on the scale provided by the article in reference. Unfortunately, owing to the lack of regulations to the port law, there are currently no clear technical and economic criteria to work out the applicable percentage dependent on the structure of costs. Domestic legislation does not make reference to indexation.

Exclusivity**24 | Does the government provide guarantees in relation to port PPPs or grant the port operator exclusivity?**

Nothing is expressly said about guarantees and exclusivity in the relevant legislation, so such aspects should be covered in the general conditions of the tender and the concession contract. However, article 44 of the LPPICR states that, through the specific ministry or competent entity, the republic is responsible for the acts, facts and omissions attributable to them that may cause damage to the concessionaire. In such cases, the concessionaire will be indemnified for the patrimonial reduction that he or she may suffer and the benefits that he or she may be deprived of. Some other provisions may be found in the law ensuring compensations to the concessionaire where substantial modifications are introduced by the grantor affecting the economic regime of the contract.

Other incentives**25 | Does the government or the port authority provide any other incentives to investors in ports?**

Incentives of this sort to investors in ports are not prescribed by domestic legislation.

PORT DEVELOPMENT AND CONSTRUCTION**Approval****26 | What government approvals are required for a port operator to commence construction at the relevant port? How long does it typically take to obtain approvals?**

Article 29(a) of the Decree-Law for the Promotion of Private Investment under Concessions Regime (LPPICR) requires the concessionaire to incorporate a national company who will sign the contract. The company must comply with municipal licences. Besides this, the concession contract should be signed with the National Institute of Aquatic Spaces (INEA), and approvals by the grantor and the minister in charge of the environment should also be in place. If dredging is to be carried out, permission is required from the National Institute for Canals.

Port construction**27 | Does the government or relevant port authority typically undertake any part of the port construction?**

This is something to be discussed in the context of the submitted proposal or the tender procedure. As the public company in charge of dredging, the National Institute for Canals could eventually get involved, whereas hinterland access could be undertaken by the government or relevant ministry.

28 | Does the port operator have to adhere to any specific construction standards, and may it engage any contractor it wishes?

There are no specific construction standards to comply with, since the INEA, as the port authority, has not issued any. So, in principle, the port operator could engage any contractor. This is certainly a matter to be discussed in the context of specific projects.

29 | What remedies are available for delays and defects in the construction of the port?

The grantor has powers of inspection, vigilance and control at all times throughout the concession, as prescribed by article 37 of the LPPICR. This ensures compliance with the concessionaire's contractual obligations, specifically to verify its performance, the state of the works and the conditions of quality and other technical specifications in accordance with the general conditions of the tender. Eventual delays and defects in construction are likely to be regarded as a gross breach of contractual obligations, giving the grantor the right to apply the sanctions set up in the general conditions and the contract (article 43), as well as to suspend the concession and to proceed with intervention and the extinction of the contract according to the circumstances.

PORT OPERATIONS**Approval****30 | What government approvals are required in your jurisdiction for a port operator to commence operations following construction? How long does it typically take to obtain approvals?**

According to article 31 of the Decree-Law for the Promotion of Private Investment under Concessions Regime (LPPICR), the concessionaire is obliged to conclude the works and put them into service on the dates and terms indicated in the general conditions of the tender and the contract. The same provision states that the regulations (not enacted so far) or the general conditions should prescribe the procedure for commencement of operations. If no authorisation is received, the grantor must justify it, indicating any objections that exist regarding the projected work and the executed work. A timeframe will also be set for the concessionaire to correct the deficiencies, without prejudice to the sanctions for the delay not imputable to the grantor. Again, in the absence of General Law on Ports (GLP) regulations there is no express procedure as to the approvals needed, and for this reason commencement of operations is an aspect that should be clearly stated in the concession contract if possible.

In any case, the GLP requires port operators to perform services within the public ports under the control of Bolipuertos, SA. They should be registered there as per internal regulations.

Typical services

31 | What services does a port operator and what services does the port authority typically provide in your jurisdiction? Do the port authorities typically charge the port operator for any services?

Owing to the variety of ports, it is difficult to easily describe the services vested with the port authority and the port operator, as such services vary in accordance with the category of the specific port. To properly answer this question, a review of some concepts is required.

Under domestic legislation the 'port operator' is defined as the public or private company performing services to the merchandise (article 78 GLP). It follows that by strict interpretation of law the port operator is that which is rendering stevedoring, storage and warehousing services. However, article 79 of the GLP defines the 'terminal operator' as the port operator that has direct control over an open area or specialised installation within the port area, by means of a contract entered into with the port administrator.

Nevertheless, it is fair to say that in colloquial language any company rendering services within the port area is named port operator. Besides, it has been already mentioned that in Venezuela the only port authority is the National Institute of Aquatic Spaces (INEA), acting as a regulatory and not an operational entity, leaving aside the pilotage, towage and launch services provided by the former, although as aquatic rather than port services. In any case, the INEA does not charge the port operator for any services.

On the contrary, under domestic legislation the port administrator controls the management and operations of the port or terminal, although in practice some of them do not perform services, leaving them to port operators who may then pay some charges to the port administrator. Having said this, article 74 of the GLP contains a list of port services, among them:

- berthing;
- mooring;
- stevedoring;
- cargo handling within port area, including storage and warehousing;
- stuffing and stripping of containers;
- renting of cargo handling equipment;
- scale; and
- services of a similar nature.

Access to hinterland

32 | Does the government or relevant port authority typically give any commitments in relation to access to the hinterland? To what extent does it require the operator to finance development of access routes or interconnections?

Access to the hinterland should be discussed as a result of a proposal submitted to the relevant body, or the general conditions governing the tender procedure. Consequently, the operator might be required to finance the development of access routes or interconnections if these are needed.

Suspension

33 | How do port authorities in your jurisdiction oversee terminal operations and in what circumstances may a port authority require the operator to suspend them?

As per article 24(10) of the GLP, the INEA has the power to supervise the activities of the concessionaire, which in most cases will include the terminal operations. This can be done through the Port Management unit of the INEA, or the port captaincy of the jurisdiction where the port

or terminal is located. The GLP does not contain specific sanctions for port operators, but it might be expected that such sanctions, including a suspension, should be prescribed by the concession contract.

Port access and control

34 | In what circumstances may the port authorities in your jurisdiction access the port area or take over port operations?

As per article 36 of the LPPICR, certain obligations are imposed upon the concessionaire, in particular those related to the rendering of uninterrupted services under the conditions prescribed by the contract. Unless exceptional situations of force majeure occur, the port activity is regarded as a public service. In line with the former, the INEA has the powers to access the port; whereas the grantor has the right to supervise and if necessary intervene in the concession and take over port operations, pursuant to article 51 of the LPPICR.

Failure to operate and maintain

35 | What remedies are available to the port authority or government against a port operator that fails to operate and maintain the port as agreed?

According to article 51 of the LPPICR, if the concessionaire abandons the works, interrupts the services or is involved in conduct regarded as a gross breach of its obligations under the contract or that is unlawful, then the grantor will appoint a controller in order to avoid the paralysis of the works or services.

In doing so, the grantor will open a procedure to notify the concessionaire, to determine the alleged breaches and to take the necessary measures or decisions. The controller will remain in office until the concessionaire resumes its functions or the concession is granted again according to the law. In any event, if the concessionaire does not resume its functions after 90 days following the appointment of the controller, there will be a gross breach of the contract, giving rise to its extinction pursuant to article 50.

Transferrable assets

36 | What assets must port operators transfer to the relevant port authority on termination of a concession? Must port authorities pay any compensation for transferred assets?

According to article 38 of the GLP, all the assets affected by the concession will revert to the republic without compensation on termination of the contract. This provision must be expressly included in the contract. Nevertheless, article 48 of the LPPICR states that the contract will establish the term or duration of the concession, the investment to be made and the assets that, being affected by the contract, will revert to the grantor, if they are not amortised during the term. The contract should also identify the works or installations to be effected by the concessionaire that are not subject to reversion, which, if considered to be of public interest, may revert to the grantor, subject to compensation.

MISCELLANEOUS

Special purpose vehicles

37 | Is a port operator that is to construct or operate a port in your jurisdiction permitted (or required) to do so via a special purpose vehicle (SPV)? Must it be incorporated in your jurisdiction?

There is no express reference in national law to the concept of SPVs. However, article 29 of the Decree-Law for the Promotion of Private Investment under Concessions Regime (LPPICR) requires the

concessionaire to incorporate a national company for the purposes of signing a contract.

Transferring ownership interests

38 | Are ownership interests in the port operator freely transferable?

Cession of the contract, or the ownership of it, can be transferred as per article 35 of the LPPICR, subject to the previous authorisation of the grantor.

Granting security

39 | Can the port operator grant security over its rights under the PPP agreement to its project financing banks? Does a port authority in your jurisdiction typically agree to enter into direct agreements with the project financing banks and, if so, what are the key terms?

As per article 34 of the LPPICR, the concessionaire can use the contract or future incomes as a guarantee for the credit obligations assumed for financing the execution of the works, with the previous authorisation of the grantor. A similar provision is prescribed by article 36 of the General Law on Ports (GLP).

Agreement variation and termination

40 | In what circumstances may agreements to construct or operate a port facility be varied or terminated?

Article 39 of the LPPICR prescribes the unilateral modification of the concession contract after it has been formalised. The grantor may vary the characteristics of the works and services, subject to compensation to the concessionaire in case of damages, such compensation being payable by way of an increase of tariffs, subsidies, etc. If, during the course of the contract the works are not sufficient for the rendering of services in accordance with the parameters required by the concession or the general conditions of the tender, and its extension or improvement is deemed convenient by the grantor or the concessionaire, it is possible to sign a supplementary agreement to the contract (article 40).

However, as per article 46, the concession will be terminated for the following:

- expiration of the contract;
- mutual agreement between the grantor and concessionaire;
- rescission of the contract for gross breach of the concessionaire's obligations;
- anticipated rescue of the concession;
- bankruptcy; and
- those prescribed by the general conditions and the contract.

Contractual breach

41 | What remedies are available to a government or port authority for contractual breach by a port operator?

Apart from the right of intervention that the port authority or government has in those cases where a port operator fails to operate and maintain the port as agreed, the declaration of gross breach of the contractual obligations will result in the extinction of the contract, in light of article 50 of the LPPICR. Irrespective of the gross breach of the obligations contained in the general conditions of the tender, article 51 lists the following as gross breach of the concessionaire's obligations:

- unjustified delays in construction;
- non-compliance with the minimum levels of quality in the services as required under the general conditions of the tender;
- charging of unauthorised tariffs;

- failure in the maintenance of the works as specified in the general conditions of the tender; and
- no submission of guarantees, also as required by the general conditions.

Governing law

42 | Must all port PPP agreements be governed by the laws of your jurisdiction?

Ports are regarded as a public service in Venezuela and so are subject to domestic laws. As per article 151 of the Constitution, in contracts of public interest an implicit clause is deemed to be included, according to which the doubts and controversies which may arise and that cannot be solved by the parties under amicable terms will be dealt with by the competent courts in accordance to the laws of the republic. It is important to bear in mind that port matters are declared matters of public interest by article 8 of the GLP. Besides this, article 35(10) of the Constitutional Law on Productive Foreign Investment, published in Official Gazette No. 41,310 dated 29 December 2017, states that any foreign investment must be subject to the applicable national legislation on commercial, labour, taxation, customs, environmental and any other matters in connection with said investment.

Disputes

43 | How are disputes between the government or port authority and the port operator customarily settled?

Article 61 of the LPPICR states that for the solution of conflicts arising from the execution, enforcement and extinction of the contracts referred to by said legislation, the parties may use mechanisms of direct solution such as conciliation and transaction. It is also possible to refer the controversies to an arbitration court whose composition, competence, procedure and applicable law will be mutually agreed between the parties.

UPDATE AND TRENDS

Key developments of the past year

44 | Are there any other current developments or emerging trends that should be noted?

The legal framework governing public procurement and public-private partnerships in the port field is cumbersome, giving rise to some gaps affecting developments; even so there will always be opportunities to invest in the country, particularly in petrochemical-related marine works and the intermodal terminals or dry ports and free zones decreed by the Executive in 2019. Said gaps can be overcome by seeking expert advice in respect of the tender procedure, and also by means of thorough discussion with the competent government agency about contractual clauses to be agreed in the concession contract, clearly setting out the rights and obligations for the parties.

There are no current port projects underway, but Bolipueños, SA has established strategic associations with some private port operators for the rendering of services within public ports, but this does not involve infrastructure expansions.

The port system continues to play an important role for the country's economy, given the huge population and lack of capacity of internal production to support it; however, the system is currently working at reduced capacity owing to a dramatic decrease in cargo volumes.

Coronavirus

45 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

After detection of the first coronavirus cases, the National Executive issued the Decree by which the State of Alarm was declared to attend to the health emergency of covid-19, published in Official Gazette No. 6,519 Extraordinary, from 13 March 2020 and reviewed for subsequent periods of 30 days. Article 9(8) indicates that 'activities related to the national port system' will not be subject to suspension as ordered for other areas referred to by the Decree.

Thus, commercial ports, the majority of which are under the administration of Bolipuertos, SA, have been working normally, like the rest of the marine terminals. Of course this normality is relative, conditioned by the lack of gasoline, affecting public transport along with restrictions on mobility, with impact on the delivery of goods to their final destination, as well as the movement of the port staff in general.

Customs offices are also working, and importantly – in terms of original documentation (licences, health records, commercial invoices and transport documents, among others) – have been flexible regarding the submission of original documents, replacing them with scanned documentation together with letters of commitment for the submission of the originals at a later date.

Furthermore, the National Institute of Aquatic Spaces (INEA), namely, the maritime authority, based on the recommendations issued by the International Maritime Organization (IMO), has been issuing different circulars and administrative orders, among which the following are noteworthy: Circular No. 06 dated 13 March 2020 regarding the establishment of Protection 'Level 1', in accordance with the prescriptions of the International Ship and Port Facility Security Code, in all port facilities, marine terminals, passenger terminals, shipping agencies and marinas. This level does not imply militarisation or delay in port activities – the rules established in the Convention of Facilitation (FAL-65) are still in force, but subject to a number of preventive measures such as obligation of the Master to report on the last three ports of call, quarantine in the case of symptoms, etc. And Circular No. 014 of 27 April 2020, setting guidelines for the mobilisation of seafarers and personnel involved in the ship–port interface, regardless of their nationality, while they are within Venezuelan geographic space; so pursuant to the recommendations of the IMO, the aquatic authority now identifies the seafarers and personnel referred to as key workers, facilitating their mobilisation. Bolipuertos, SA, on the other hand, has issued very little regulation in connection with the pandemic. It has, however, issued Circular 0007-2020 of 19 March 2020, by which it is required that latex gloves and masks are worn by operators working within the port; and Circular 0008-2020 dated 20 March 2020, allowing the submission of a commitment letter authorising guarantees and insurance policies to be presented at a later stage, in order to complete registration at the port so as to be able to execute activities there.

Also in the context of the pandemic, individual initiatives and those of a private nature must be mentioned, such as that of the Venezuelan Association of Maritime Medicine that has been actively working on the dissemination of informational material and prevention. Thus, on 17 May 2020, together with the Iberoamerican Institute of Maritime Law and the Maritime University of the Caribbean, a very useful document entitled 'Crew Rotation Recommended Protocol for Venezuelan Flag Ships' was released. Finally, it is important to highlight that up to now the government has not implemented any relief programmes, laws or regulations for the port sector in the context of the pandemic.



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