

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2017

GETTING THE
DEAL THROUGH

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Ports & Terminals 2017

Contributing editor
Alex Kyriakoulis
Holman Fenwick Willan LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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Preface

Ports & Terminals 2017

Second edition

Getting the Deal Through is delighted to publish the second edition of Ports & Terminals, which is available in print, as an e-book, and online at www.gettingthedealthrough.com.

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 **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 Cyprus, Denmark and Portugal.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

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.

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 Holman Fenwick Willan LLP, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH

London
October 2016

Global overview

Alex Kyriakoulis

Holman Fenwick Willan LLP

Ports and terminals today

Ports and terminals are vital to the global economy. In the US and China, the world's two largest economies, more than 90 per cent of imported and exported cargo moves through commercial ports. For coastal states and islands such as those in the Caribbean or the Mediterranean that rely heavily on tourism, and in particular the cruise industry, ports are the lifeblood of their economies. The rising demand of emerging markets such as the 'BRIC' countries (Brazil, Russia, India and China) has led to a significant increase in the use of containers, and to the emergence of large multi-terminal operators adept at designing, financing, constructing, operating and maintaining terminals capable of efficiently moving, storing and repairing huge numbers of containers. In addition, the commodities boom fuelled by this rising demand has contributed to increased investment in bulk cargo terminals (coal, iron ore, grain etc), owned and operated by multinational agricultural and mining companies and commodities traders seeking to export their raw materials to the growing economies of the world.

A vast (and increasing) number of ports and terminals are globally in operation, and their operating structures, capabilities and objectives are diverse. Some ports have only a passenger or cruise terminal; others might also handle (or only handle) cargo; while others consist of one or more specialist terminals such as bulk, container or LPG/LNG terminals. Terminals may then be further segmented into gateway terminals, that is, terminals used primarily for the importing of cargo, or transshipment terminals which move cargo from one vessel to another smaller or larger vessel.

Constructing or developing a port or terminal generally requires significant financial investment, and governments and port authorities are not always willing or able to make such an investment. At the same time, corporatisation and privatisation of ports have been shown to lead to increased profitability and enhanced employment opportunities. There have, consequently, been major changes in the ownership and operating structure of many ports, driven by the increasingly prominent role of the private sector, both as a source of finance and as the provider of some (or in some cases all) of the services required for the successful operation of a modern port. This in turn has led to a diminished or altered role for the traditional owner and operator of a port, the port authority. Whatever the separation of roles between a port authority and a port operator or services provider, and whatever the type or location of the port, the most important party is ultimately the port customer. Without sufficient customers and volume, any ambitious new port is destined to be a white elephant (as indeed has happened in some countries). The shipping lines, which have grown in size and influence through the increase in cargo traffic, through consolidation and the resultant increased market share (sometimes as a result of strategic mergers and acquisitions (M&A) and sometimes as a result of the demise of competitors such as Hanjin), and through the establishment of alliances such as the 2M, Ocean 3, G6 and CKYHE alliances, are putting pressure on port operators to be more competitive and provide more efficient services. At the same time the lines are key drivers in the further development of ports - for example, the ever-increasing size of container ships being built on behalf of shipping lines (20,000 TEU capacity ships are currently under construction) means that many container terminals will need to continue to invest in their infrastructure and superstructures or equipment in order to be able to attract the volume from such vessels. The prohibitive cost of such investments is

an important factor in the rise of the private sector in ports. This in turn has led to consolidation among port operators through M&A activity and an increased number of joint ventures in relation to specific greenfield or brownfield port projects between port operators that otherwise compete with one another in other ports.

Getting a deal through, be it the development, the operation, or the sale or purchase, of a port or terminal, requires an understanding of the roles of all the key parties involved in a port or terminal project (port authority, port operator, shipping lines, any employee unions etc) and the dynamics between them; the legislative and regulatory backgrounds; and the different services that need to be provided at a port (marine, cargo handling, safety etc) and who needs to provide them.

Port authorities and operators

The port authority has in most ports traditionally been its governing body and is usually part of, or supervised by, a ministry (merchant ministry, ministry of transport, ministry of public works, etc) of the country's government. The powers and duties of port authorities include establishing the standards and codes to be observed by the providers and users of marine and port services and facilities; controlling the navigation within the perimeter of the port and the approaches to the port (including providing adequate navigational aids and disseminating navigational information); regulating the charges and fees payable by users of the port facilities; providing marine and port services and facilities such as towage, pilotage and berth scheduling (and where applicable exercising licensing and regulatory functions in respect thereof); and generally improving, developing and promoting the use of the port. Where the port authority is established at a national level, it may additionally be tasked with exercising regulatory functions in respect of merchant shipping, particularly in respect of safety at sea, the manning of vessels and the prevention of pollution at sea. Its functions may also include the promotion and safeguarding of a competitive, fair and efficient market (to the extent that this is not the prerogative of an overarching national competition policy administered by a competition commission or similar); developing, promoting and regulating employment and training within the shipping and port industries; promoting the development of merchant shipping; advising the government on matters relating to marine and port services and facilities (and on sea transportation generally); and representing the country at an international level (for example, at the International Maritime Organization) in relation to marine and port matters generally. In some countries the port authority exercising the regulatory functions mentioned above may actually be a body called the 'ports regulator', with one or more separate port authorities supervising the operational aspects of the country's ports.

Many countries have, in the last few decades, succumbed to pressure to devolve the responsibility for the improvement of ports and their performance to self-sustaining (incorporated) entities, and to eliminate the provision to them of governmental subsidies and other state aid. Stakeholders such as the shipping lines calling at ports, as well as terminal and logistics operators, have been clear about the need for a modernisation of port governance practices, with a view to improving performance and efficiency. This has in large part been achieved through corporatisation. This is the process by which a public port enterprise is transformed into a private corporation (although, unless the corporatisation is followed by some form of privatisation, all or some

of the equity in such corporation remains in public hands following the corporatisation). Corporatisation leads to changes in the institutional structure of the port business, which in turn often leads to the increased involvement of the private sector in the exploitation and financing of port facilities, terminals and services. Port authorities have become more autonomous through the devolution of the decision-making from the government to the port company's directors, who are accountable to the corporation's shareholders (be they the state or private institutions or individuals). This has produced greater transparency in relation to port authority development and prioritisation of business and customer satisfaction. True privatisation of port authorities, in other words the sale of shares in the entity that owns the port land or exercises regulatory functions, is relatively rare. For example, the privatisation of the Piraeus and Thessaloniki authorities through IPOs in the early 2000s was actually an offering of shares in companies that had concessions (see below) to run the respective ports for a finite period of time. Similarly, the subsequent privatisation of those port authorities that were launched in 2013–2014 in the wake of the Greek debt crisis (and which in the case of the Piraeus port authority concluded with the sale of a 51 per cent/67 per cent stake to COSCO) is actually nothing more than the sale of shares in those two listed companies that were retained by the state at the time of the earlier IPOs. Of the larger developed countries, only the UK has implemented outright privatisation of some of its ports.

The rise of concessions

The term 'privatisation' is often used to describe something that is actually quite different from the UK model. It usually refers to the process of the port authority (or other relevant governmental body or entity with the relevant rights and powers) granting to a private party certain rights and obligations in relation to a port for a number of years under a 'concession agreement'. This is in essence a public-private partnership. In these partnerships governments (acting through the port authority) will retain, or rather create, the role of port regulator and also often act as the provider or licensor of marine services and sometimes land developers. The private party will assume responsibility for the financing of port development and for the running of port operations, theoretically for a sufficiently long period of time to make a return on its investment. The appeal of concessions is that states can transfer a major part of the financial and operational risks in developing and operating terminals to the private sector while permitting them to retain ultimate ownership of the port land and responsibility for licensing port operations and construction activities, and thereby safeguard public interests. Concession agreements and leasehold agreements are quite similar, and in some jurisdictions they are considered to be more or less the same thing. In practice, a concession agreement typically goes further than a lease in that it governs the entire relationship between the government and the private sector regarding the right to exploit port land and facilities as well as the obligation to construct port infrastructure and provide superstructure. A lease is sometimes entered into in addition to a concession agreement so that the leaseholder's (concessionaire's) interest in the land can be registered with the relevant land registry or cadastre.

How far a government will go in terms of transferring responsibilities for port development or operations to the private sector through concessions depends on a number of factors, including political considerations and the underlying constitution or legal regime; the financial investment capabilities and anticipated returns profile of the project; the extent of the port authority's ability and desire to provide services in relation to the port; and the power of stevedores' and other port employees' unions. Sometimes a port authority will also, in addition to entering into a concession agreement, have an interest in the company that is granted the concession. By investing equity the port authority participates in the economic success (or failure) of the concession and becomes more directly involved in port operations, but this is not always permitted. Such participation may be acceptable if there is a monopoly in the port (and there is therefore no existing or potential intra-port competition), but in other cases a conflict of interest may arise between the roles of the port authority as an investor and as the regulator of the monopoly (unless the two roles have been adequately separated from one another).

Port concession tenders

Not all countries have the necessary legal frameworks to grant concessions. In some cases there is a general law dealing with concessions,

which may cover ports, but if the country is implementing a wholesale privatisation of its ports there may be a specific law in force. Sometimes a law needs to be passed specifically in order to enable the port authority to grant a concession or for the government to ratify the grant. Generally these laws set out the extent of any concession in terms of its duration and the ports services for which the port operator may or may not take responsibility under the concession. They will sometimes also deal with the right of, or as the case may be, prohibition on, the state or port authority taking an interest in the company (usually a special purpose vehicle) that will be awarded the concession.

Where the granting of a concession is permitted under such laws, the awarding authority usually runs an open tender and awards the concession to the tenderer offering the terms which are most beneficial to the state. These tenders are usually split into phases. In the first phase tenderers typically evidence their technical qualifications and financial wherewithal to design, construct, finance, operate and maintain the port or terminal (or relevant services there). Subject to satisfying the technical and financial qualification criteria, tenderers then proceed to the next round, where they are given the opportunity to investigate the project further, comment on the concession terms and provide their binding offers. This round is sometimes followed by a further negotiation round with one or two of the tenderers. The need for an open tender as opposed to a bilateral negotiation with a port operator is usually driven by the existence of national procurement rules designed to ensure that the state is achieving the best possible deal available to it at the time. A tender may also assist in countering claims that the terms of the concession constitute unlawful state aid, on the basis that the tender process will have served to 'test' the market and that the terms are therefore the best achievable on an arm's-length basis. The need for a tender may also be driven by the involvement of international financing institutions such as the World Bank/IFC or the EBRD, who may require a transparent process in order to provide finance for the project. International financing institutions have shown increasing interest in the port sector, seeking ways to facilitate port reform either by providing expertise or direct financing through commercial loans or subscription for project bonds.

Some port category terminology

As a result of the changes in the way ports are organised, structured and managed following varying degrees of port reform, ports now tend to be categorised as either service ports, tool ports, landlord ports or fully privatised ports. Service and tool ports mainly focus on the realisation of public interests. Landlord ports have a mixed character and aim to strike a balance between public (port authority) and private (port industry) interests. Fully privatised ports focus on private (shareholder) interests. In a service port the port owns, maintains and operates every available asset, whether fixed or mobile. Such ports are usually ultimately controlled by the relevant ministry (public works, transport, maritime etc) with the director of the port being a civil servant appointed by the minister concerned. The number of service ports is declining, as many former service ports are gradually becoming landlord ports. Tool ports are similar to service ports, but stevedoring is usually carried out by private firms. The landlord port is characterised by its mixed public-private nature. Under this model, the port authority acts as the landlord and often as the regulatory body, while private companies carry out the port operations (especially stevedoring) pursuant to a concession, as mentioned earlier. The private port operators provide and maintain their own superstructure, including buildings (offices, sheds, warehouses, container freight stations, workshops), and purchase and install their own equipment on the terminal as required by their business. Fully privatised ports are, as also mentioned earlier, few in number and lead to the state no longer having any meaningful involvement or public policy interest in the port sector, although these ports are still subject to over-riding laws affecting all infrastructure assets such as land planning, environmental and health and safety legislation.

Environmental issues

The heightened global environmental awareness due to climate change and health issues has not left the port sector unaffected. On the legislative side there are obligations, for example those in the EU requiring ships to burn fuel of 0.1 per cent sulphur content when within EU ports or within EU inland waterways. At the same time, when awarding concessions port authorities are increasingly examining port operators'

'green port' credentials, and proposals such as the use of cold ironing or shore power; zero emissions technology for port equipment and vehicles; sustainable power generation (wind and solar); reducing or managing water run-off; effective dust suppression systems for dry bulk cargo (dry fog etc); recycled concrete and other green construction materials; and so on are often required. In addition, some ports, such as the Port of Rotterdam, provide discounts on port dues to sustainable seagoing vessels – that is, vessels that score highly on the Environmental Simulations

International (an international benchmark for emissions from seagoing vessels). These developments are sure to continue and impact on the way in which ports are constructed and operated, especially following the agreement signed at the COP21 meeting in Paris on 12 December 2015 and despite the agreement not including a specific reference to ports. If the ports industry does not proactively address environmental issues lawmakers will no doubt eventually step in to do so.

Venezuela

José Alfredo Sabatino Pizzolante

Sabatino Pizzolante Abogados Marítimos & Comerciales

General

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:

- petrochemical terminals in the eastern and western part of the country (La Salina, Bajo Grande, El Tablazo, Puerto Miranda, Amuay, Cardon, El Palito, Jose and Guaraguao) under control of the state-owned company PDVSA;
- bulk terminals in the Orinoco river (Sidor, ACBL, Venalum, Bauxilum, Puerto Ordaz-Ferrominera, Copal, Palúa, San Félix and Punta de Piedra), mainly under the supervision of Corporación Venezolana de Guayana (CVG), handling steel products such as iron ore fines, pellets, briquettes and coils, among others;
- public ports (Puerto Cabello, La Guaira, Maracaibo, Guanta, Guamache, La Ceiba and Eulalia Buroz) under the administration of the state-owned company Bolivariana de Puertos, SA (Bolipuertos, SA);
- OCAMAR and Terquimca, navy facilities for public use;
- Puerto Sucre and Guaranao, 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.

While oil and steel terminals are mainly engaged in exports, public ports are focused on imports of general cargo by way of containers and break-bulk, as well as dry and liquid bulk cargo. Trans-shipment used to be important traffic for ports such as Puerto Cabello, but no longer.

2 Describe any port reform that has been undertaken over the last 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 the 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 in order 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 the 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 Petróleos de Venezuela (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.

It is important to point out that 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.

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.

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 garbage and oil-related waste generated on board the ship (article 67).

On the other hand, Decree No. 1,257 dated 13 March 1996, published in the 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 tonnes or over, or dredging of 50,000 cubic metres or over. 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

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

The legislative framework is embodied in the GLP, the Law for Public Procurement (LPP) (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 (LPPICR), related to public-private partnerships for infrastructure and public services, published in the Official Gazette No. 5,394 Extraordinary 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.

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 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 Spanish *Autoridad Única*) in the person of military officials. The legal ground for the above is found in Decree No. 2,382 published in the Official Gazette No. 6,242 Extraordinary, 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, Guanao, 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, among them 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:

- elaboration of 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;
- implementation of 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.

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

The aquatic authority is assigned to the Ministry of Aquatic and Air Transportation 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.

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 the 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.

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 scheme 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. 40,618 dated 11 March 2015) 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.

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 on Tributary Units (TUs) a domestic rate use for tax and other governmental charging purposes, annually adjusted by the Executive, with 1 TU currently equivalent to 177 bolivars. Therefore, the concessionaire will pay a monthly figure as per the applicable percentage:

- up to 10,000 TUs of gross income, up to 4 per cent;
- between 10,000 and 40,000 TUs of gross income, up to 8 per cent;
- between 40,000 and 80,000 TUs of gross income, up to 12 per cent;
- more than 80,000 TUs of gross income, up to 15 per cent; and

- in any case, the annual minimum amount will be estimated as 10 TUs.

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 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.

12 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.

13 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

14 Is the legislation governing procurement and PPP general or specific?

The governing legislation is a general one embodied in the LPP and the LPPICR regulating public-private partnerships (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.

15 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 frame of bilateral or multilateral agreements, through strategic alliances or other ways of cooperation.

16 What criteria are considered when awarding award 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.

17 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).

18 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 GLP makes it difficult to have clear guidance as to the steps to comply with and the necessary approvals. Generally speaking, 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 it is involved, for instance, the Ministry of Aquatic and Air Transportation or the Ministry of Oil and Mining (with power over the oil marine terminals). Environmental and INEA approvals are also needed at national level, whereas local approval is required by the respective municipality concerning the urban variables.

19 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, based on 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.

20 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).

21 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.

22 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, due 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.

23 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, it is important to point out that 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.

Port development and construction

24 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 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 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.

25 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.

26 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. Nevertheless, it should be borne in mind that through Decree No. 6,839 dated 28 July 2009 the legal entity Puertos del Alba, SA was set up by Venezuela and Cuba using the framework of an existing bilateral agreement for the modernisation, equipping and construction of ports in both countries, as well as for the execution of engineering projects, development plans and managing funds for such purposes. It follows that in some cases during the course of negotiations the technical management and inspection of the project could be awarded to Puertos del Alba, SA.

27 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

28 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 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 GLP regulations there is no express procedure as to the approvals needed, for

Update and trends

From the previously mentioned review of the legislation embodied in the LPP, LPPICR and the GLP, and particularly due to the lack of regulations for the last two instruments, it is clear that the legal framework governing public procurement and PPP is cumbersome, and that there are gaps that could be filled. There are no prospects for the introduction of legislative changes in the foreseeable future, but by way of contrast there will always be opportunities to invest in the country, due to its economy based on huge petrochemical and steel resources as well as import volumes. Even so, the 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.

Of the main port projects sponsored by the government the expansion and modernisation of the port of La Guaira executed by the Portuguese Consortium Teixeira Duarte, with capacity for 600,000 TEUs, has been now completed and about to enter into service; however, the construction of the container terminal at Puerto Cabello to handle approximately 700,000 TEUs in phase I, works entrusted to China Harbour Engineering Company, has stopped due to lack of funding.

Although the move by the Executive to place under military control the major public ports has been regarded by some people as a 'militarisation' of the marine terminals, this scheme does not mean the presence of military personnel within the port areas, at least not to a greater extent than in the past, which may affect or prevent the operations in any way. Changes have been implemented in the context of a state of economic emergency, due to the precarious financial situation resulting in severe shortages of food, medicine and basic supplies. Thus, the government claims to have handed over the ports to the military authorities in order to attack corruption and ensure the effective distribution of supplies as a matter of national security and defence.

which 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.

29 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?

Due 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. On the other hand, article 79 of the port law 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 said that in Venezuela the only port authority is the 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.

30 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.

31 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.

32 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.

33 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 which 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.

34 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

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

36 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.

37 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 LGP.

38 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



SABATINO PIZZOLANTE
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José Alfredo Sabatino Pizzolante

jose.sabatino@sabatinop.com

Centro Comercial 'Las Valentinas', Nivel 2
Oficinas 12/13, Calle Puerto Cabello
Puerto Cabello 2050
Estado Carabobo
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Tel: +58 242 3618159
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deemed convenient by the grantor or the concessionaire, it is possible to sign a supplementary agreement to the contract (article 40).

On the other hand, as per article 46, the concession will be terminated for the following causes: 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.

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

Apart from the right of intervention referred to in question 33, 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.

40 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 31(10) of the Law on Foreign Investment, published in the Official Gazette Extraordinary No. 6,152 dated 18 November 2014, 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.

41 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.

Getting the Deal Through

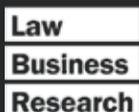
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