

Ports and Terminals 2021

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Ports and Terminals 2021

Contributing editor**Alex Kyriakoulis**

HFW

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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Contents

Global overview	3	Nigeria	73
Alex Kyriakoulis HFW		L Chidi Ilogu SAN, Donald Ibebuike and C Ogundu Ojukwu Foundation Chambers	
Argentina	6	Paraguay	81
Maria L Schiariti and Elias F Bestani Marval O'Farrell Mairal		Juan Pablo Palacios Velázquez and Raúl Prono Toñanez Palacios Prono and Talavera Abogados	
Brazil	13	Peru	88
Godofredo Mendes Vianna and Juliana Pizzolato Furtado Senna Kincaid Mendes Vianna Advogados		Carla Paoli Consigliere and Francisco Arca Patiño Estudio Arca & Paoli	
China	21	Portugal	94
Ben Bury and Jessica Liu HFW		Jose Luis Moreira da Silva SRS Advogados	
Croatia	29	Russia	100
Gordan Stanković and Maja Dotlić Vukic Jelusic Sulina Stankovic Jurcan & Jabuka		Alexander Mednikov Jurinflot International Law Office	
Denmark	37	Sri Lanka	106
Christian Thiele and Jens V Mathiasen Gorrissen Federspiel		Nadine Puvimanasinghe, Savantha De Saram and Jivan Goonetilleke DL & F De Saram	
Italy	43	Turkey	112
Giuseppe Loffreda and Beatrice Settanni Gianni Origoni Grippo Cappelli & Partners		Esin Çamlıbel, Naz Esen and Beste Yıldızili Ergül Turunç	
Japan	50	United Arab Emirates	119
Mizuki Koshimoto, Jumpei Osada, Masaaki Sasaki and Takashi Inoue TMI Associates		Alexander Reid HFW	
Mozambique	58	United Kingdom	126
Guilherme Daniel and Teresa Empis Falcão VdA		Alex Kyriakoulis and Joseph Botham HFW	
Netherlands	65	Venezuela	133
Arnold van Steenderen and Charlotte van Steenderen Van Steenderen MainportLawyers		José Alfredo Sabatino Pizzolante Sabatino Pizzolante Maritime & Commercial Attorneys	

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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?

There are 57 main Italian ports, organised into 16 Port System Authorities (PSAs), based in the Italian core, or comprehensive, ports as set out by the EU, and coordinated by the National Coordination Conference established at the Ministry of Infrastructures and Transport (MIT). Among the 57 ports organised in PSAs, the 16 key ports are as follows:

- Genoa;
- Venice;
- Trieste;
- Ravenna;
- La Spezia;
- Ancona;
- Leghorn;
- Civitavecchia;
- Naples;
- Bari;
- Gioia Tauro;
- Taranto;
- Messina;
- Cagliari;
- Augusta; and
- Palermo

Each of these ports groups together with and has jurisdiction over a port system where maritime traffic of various types coexist. They are mostly multiservice ports that boast a wide selection of specialised terminals, managed by private terminal-operating companies, and equipped to accommodate all classes of ships and cater for all key commodity sectors. Moreover, backed up by a group of dedicated companies, the Italian ports guarantee a full range of complementary services from ship maintenance to ship construction and repair. The primary purpose of Italian ports is gateway. The purpose of Gioia Tauro, Cagliari and Taranto also includes transshipment. The organisation of the Italian port system is integrated with the Trans-European Transport Network.

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.

The main regulatory framework for Italian ports dates back to 1994. Prior to that reform, Italian ports were administered by public entities entitled to directly operate within and outside the port boundaries. At

the end of 1994, the new port law (Law No. 84/1994) radically changed the port organisational system. 'Public' ports were replaced by land-lord ports in which port authorities were in charge of coordinating, promoting and planning the port activities with a specific prohibition of any direct involvement in port operations. According to this new port model, port operations have been awarded to private companies entitled to operate under a concession. Therefore, the two main port actors became the port authority and the port facilities and terminal operating company: while the former lost its operational powers and gained administrative and planning duties, the latter became the only port actor able to manage a terminal and to handle cargoes. In 2016 new legislation (Legislative Decree No. 169/2016) was issued to make the Italian port system compatible with European Union regulations and with the aims of improving efficiency, promoting cooperation between neighbouring ports and simplifying administrative procedures. The 16 PSAs responsible for port governance are led by a president, assisted by a management committee, a board of public accountants, a secretary general and a sea resource partnership body. Advisory commissions for the different ports included in the PSA network perform advisory functions over topics connected to port management.

The PSA is a non-profit public body with administrative, budgetary and financial autonomy that directs, plans, coordinates, promotes and controls port operations. It performs maintenance of the common areas, maintains the seabed, supervises the provision of services of general interest, exclusively administers the state areas and property and plans the development of the port territory, subject to the guidance and supervision of the MIT.

State development policy

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

Yes. The overall state policy for the development of Italian ports is contained in the following sources:

- Legislative Decree No. 50/2016 (known as the Public Contracts Code), implementing both the 2014 Public Contracts Directive and the 2014 Concession Contracts Directive, as well as the 2014 Utilities Contracts Directive. It regulates, among other things, a new planning and development process to identify the 'priority infrastructure and settlements for the development of the country', using the following tools:
 - the Transport and Logistics Master Plan; and
 - the multi-year Planning Document, referred to in article 2(1) of Legislative Decree No. 228/2011;
- the National Strategic Plan of Ports and Logistics, adopted in 2015 under a Decree of the President of the Council of Ministers, which provides general guidelines that touch on aspects of port planning;
- the Infrastructure Annex to the Economics and Finance Document approved in 2016;

- the strategic document 'Connecting Italy – Strategies for Transport and Logistics Infrastructures' on the objectives and strategies for national infrastructure policies;
- the document 'Policies for the Relaunch of Freight Rail Transport – Intermodality, Connections between Ports and Logistics Platforms'; and
- the 2014–2020 Partnership Agreement between Italy and the European Commission for the use of European Structural and Investment Funds, and consequent National Infrastructure and Networks Operational Programme 2014–2020.

At a local level, according to article 6 of Law No. 84/1994, PSAs' planning and promoting powers for port development and operations are mainly exploited through two strategic and policy tools: the Triennial Operative Plan and Regulatory Port System Plan. The former is an operational plan aiming at providing medium-term targets and at rationalising investments while the PRSP represents the long-term strategy of the port. Both should take into consideration the National Strategic Plan for Ports and Logistics.

Green ports

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

According to Law No. 84/1994 (article 4-bis), the planning of the port system must be respectful of the criteria of energy and environmental sustainability, in line with the policies promoted by the current European directives on the subject. To this end, each PSA promotes the drafting of the energy and environmental planning document of the port system with the aim of pursuing adequate objectives, with particular reference to the reduction of carbon dioxide emissions. Such a planning document, drawn up based on the guidelines adopted by the Ministry of the Environment and of the Protection of the Territory and the Sea, in agreement with the MIT, defines strategic guidelines for the implementation of specific measures in order to improve energy efficiency and promote the use of renewable energy in the port area. The planning of port system activities must be made in accordance with energy and environmental sustainability criteria and the applicable European Union directives. The reduction of carbon dioxide emissions is a major planning objective. The PSA must constantly monitor its planned activities in order to achieve energy and environmental efficiency goals.

LEGISLATIVE FRAMEWORK AND REGULATION

Development framework

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

The legislative framework for port development and operations in Italy is set out in Law No. 84/1994, as amended and supplemented.

Regarding Italian port privatisation and public-private partnership (PPP), according to article 28 of the Italian Code of Navigation and articles 822 and 823 of the Italian Civil Code, a port is a property that belongs to the Italian state and cannot be privatised. With regard to port rights, three types of physical areas can be identified:

- docks: they belong to the state in the form of public property and are managed by the Port System Authorities (PSA), which can grant them to private operators through the instrument of concession; docks cannot be subject to rights for third parties, except through concession agreements;
- land on which the port stands: it may belong to the state (which, through the PSA, entrusts it as a build-operate-transfer concession) or to private individuals; and

- water spaces: they belong to the state and are generally used for free transit.

The cruise terminal in the port of La Spezia is the only existing example of PPP relating to greenfield port facility projects in Italy.

Regulatory authorities

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

There are three main port regulatory authorities in the Italian jurisdiction:

- Ministry of Infrastructures and Transport (MIT) – with competence for all ports;
- Transport Regulation Authority (ART) – with competence for all ports; and
- PSA – with competence for each port of its specific port network.

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

MIT is focusing on planning, funding and developing the Italian ports, performing supervisory tasks over PSAs for the implementation of infrastructure programmes. The tasks performed by the MIT also include port services and activities, as well as works in ports.

ART's main mission is economic regulation in the field of transport and access to related infrastructures and services. Further, ART is competent for defining the quality levels of transport services and the minimum content of the rights that may be claimed by users against infrastructure managers. The Authority is an independent administrative authority and operates in full autonomy, in accordance with EU legislation and in compliance with the subsidiarity principle.

PSAs perform maintenance of the common areas – seabed included, supervise the provision of services of general interest, exclusively administer the state areas and property, and plan the development of the port territory, subject to the guidance and supervision of the MIT. Law No. 84/1994 also places on PSAs the task of regulating and supervising the performance of port operations as well as of issuing the relevant BOT concessions and authorisations, subject to verifying compliance with certain legal requirements. Technical and nautical services (ie, pilotage, towage, mooring and ferrying) are regulated and organised by the Maritime Authority – whose competences in the major ports are limited to police and security functions and to the organisation of nautical services – in agreement with the PSAs (article 14, Law No. 84/1994).

There are also a number of port-related authorities dealing with various types of matters that could arise in port regulation and administration, such as financial, regulatory, competition, privatisation and PPP issues, in accordance with their respective jurisdiction and mandate.

Harbourmasters

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

The harbourmaster, who is an official of the Italian Coast Guard, is directly appointed by the Supreme Authority of the Italian Coast Guard, which is part of the MIT.

Competition

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

According to Italian law and other authorities, PSAs are non-economic public bodies of national importance with special status, and are provided with administrative, organisational, regulatory, budgetary and financial autonomy. They should, therefore, not be subject to national and EU competition rules, which are mainly based on articles 101 to 109 of the Treaty on the Functioning of the European Union. However, the European Commission considers that the fact that PSAs are publicly owned is not sufficient to conclude that they are not undertakings and therefore not subject to competition rules. Indeed, the commercial operation of port infrastructure, such as providing paid access to the port, constitutes an economic activity for the European Commission and therefore EU competition rules should apply to the PSA.

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?

Each port operator freely establishes tariffs for the handling of goods in ports within the PSA's network. According to article 16(3) and (5) of Law No. 84/1994, port operators shall communicate to the PSA the tariffs they intend to apply to users for port operations and services, as well as any subsequent change. Each PSA monitors the application of the tariffs indicated by each port operator, reporting periodically to MIT. Every year the PSA, by decree of the president, makes the tariffs public.

Article 37(2)(b) of Legislative Decree No. 201/2011 provides that ART is competent to define 'the criteria for setting tariffs and tolls, taking into account the need to ensure the economic equilibrium of regulated companies, the productive efficiency of management and the containment of costs for users, businesses and consumers'. For this purpose, ART has adopted Resolution No. 57/2018 containing measures to regulate the methodologies and general criteria to guarantee fair and non-discriminatory access to port infrastructures. Port operators must comply with the Resolution when determining port operation tariffs requiring the use of essential infrastructures such as a port terminal. The tariffs concerned are directly collected by the port operators for the relevant services provided to the users.

In Italian ports there are also companies specialised in the supply of technical-nautical services and services of general interest (piloting, towing, fireguards, mooring, bunkering, etc) essential for the execution of commercial operations of ships calling at Italian ports. The tariffs related to such services are established differently, based on the relevant ministerial decree, ordinances of the harbourmaster's office or a PSA's decree.

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?

According to article 1277 of the Italian Civil Code, debts shall be paid with the currency that has legal tender in Italy at the time of the payment at its nominal value. Therefore, any fees that are payable by a port operator to the PSA must be paid in euros.

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?

With regard to public service obligations – the definition of which is 'requirement[s] defined or determined in order to ensure the provision of those port services or activities of general interest', Regulation (EU) 2017/352 establishing a framework for the provision of port services and common rules on the financial transparency of ports shall apply in Italy.

Based on the above, at national level Law No. 84/1994 is in line with the above-mentioned Regulation and imposes on the PSA (and the harbourmaster) public service obligations in terms of ensuring and supervising:

- the availability of the port services (ie, bunkering, cargo handling, mooring, passenger services, collection of ship-generated waste and cargo residues, pilotage and towage) to all port users, at all berths, without interruption, day and night, throughout the year;
- the availability of the services to all users on equal terms;
- the affordability of the services for certain categories of users;
- the safety, security and environmental sustainability of port operations;
- the provision of adequate transport services to the public; and
- territorial cohesion.

Such port services are carried out by private companies on the basis of specific authorisations granted by the competent Italian authorities.

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?

No. According to article 6(11) of Law No. 84/1994, PSAs cannot carry out, either directly or through joint venture shared ownership, port operations and activities strictly connected to them.

A PSA may only take on minority corporate shareholdings in initiatives aimed at promoting logistical and intermodal connections functional to the development of the port system, in line with article 46 of Law Decree No. 201/2011.

Foreign participation

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

Pursuant to article 45 of the Public Contracts Code (PCC), economic operators established in Italy and other European member states, in accordance with the legislation in their respective countries, are eligible to participate in the BOT concession granting tender procedures. Italian contracting entities (eg, PSA) shall allow economic operators established in EU member states to participate in national procurement procedures, according to treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators established in Italy (article 49, PCC).

PUBLIC PROCUREMENT AND PPP

Legislation

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

General PPP rules are provided in the Public Contracts Code (PCC). The relevant legal framework is completed by a number of secondary sources, which include ministerial decrees and guidelines issued by the National Anti-Corruption Authority, aimed at providing detailed rules on specific matters.

As to projects and works concerning Italian seaports, article 18-bis(5) of Law No. 84/94 sets out a specific regulation governing procurement and PPP, providing that for the construction of port works PSAs may resort to forms of private equity participation, based on the discipline of project financing referred to in article 183 of the PCC, also entering into medium- and long-term loan agreements.

Article 183 also provides that private operators and specific institutional investors may submit to the competent authorities project financing proposals including concession agreement schemes, a feasibility study of the project concerned and related economic and financial plans. These proposals, should they be considered of public interest, will be the reference documents based on which the subsequent procurement procedure will be called by the competent contracting authority.

Proposal consideration

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

Yes, Port System Authorities (PSAs) may consider private investors' proposals for port PPP, as regulated by article 18-bis(5) of Law No. 84/1994 and article 183(15-19) of the PCC, which include a private negotiation procedure. A tender notice for the award of the relevant BOT concession will in any case follow the project's feasibility evaluation and its approval by the PSA.

Joint venture and concession criteria

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

The criteria for the PSA to award port concessions are set out in the Italian Code of Navigation (ICN) (article 36) as far as port concessions that do not involve the use of port docks are concerned, and in article 18 of Law No. 84/1994 as far as concessions of port terminals (surrounding area and relevant dock) to stevedoring companies are concerned. PSAs' specific regulations provide detailed rules on the matter.

Briefly, the granting of the concession is divided into three phases: presentation of the application to the competent office, accompanied by adequate technical documentation; preliminary activity; and the final measure. In the preliminary phase, also including publication of the application pursuant to article 18 of the Regulation for Implementation of the ICN, the opinions provided for by rules and regulations will be acquired, where necessary, both from the PSA and from external bodies. The preliminary investigation is concluded with the opinion of the management committee. Once the investigation has been successfully completed, the concession is issued (drafting of the concession agreement, payment of the fee, payment of the deposit, signing of the agreement) and the maritime state concession is registered with the registry office at the Revenue Agency. If the application is not accepted, a decision of refusal is issued. In the event that the same maritime state property is subject to more than one request, it will be subject, pursuant to article 37 of ICN, to a comparative assessment.

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?

No.

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?

A wide variety of national and local approvals are required for the implementation of a port PPP agreement in Italy, including the possible approval by the national and EU antitrust authorities.

The approval of projects by the contracting authorities shall be made according to the *conferenza di servizi*, which is a formal agreement among more public administrations involved in the proceeding, with internal rules and purposes, for approval of the feasibility of projects, whose procedure is established by article 27 of PCC and article 14-bis of Law No. 241/1990.

No specific law shall be passed.

Projects

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

Port projects in Italy are based on the BOT model. The concession agreement between the grantor (ie, PSA) and the concessionaire (ie, operator of the port facilities and terminal) will define the extent to which the concessionaire will build, operate and transfer the port facilities and terminal, and the duration of the concession.

Term length

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

The duration of PPPs BOT concessions is limited and is determined in the concession agreement by the PSA according to the works undertaken and services provided by the concessionaire (article 168, PCC). The same is commensurate with the value of the concession, as well as the organisational complexity of the object of the same.

The maximum duration of the concession cannot exceed the period necessary for the recovery of investments made by the concessionaire, as resulting from the operational and business plan. To this end, the PSA shall also take into account the programme of operation submitted and the commitments taken for the concession's purpose.

22 | On what basis can the term be extended?

The term of the BOT concession can be extended in the event that the concessionaire has, during the management of the port facilities and terminal, sustained further investments, acquired new traffic and increased occupancy levels compared to the commitments it had assumed at the time in which the concession was originally granted.

Fee structure

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

Concession fees are calculated as a fixed land rent and are directly collected by the PSA. The measure of the fee is subject to annual update

based on the ISTAT index (ie, the index for consumer prices for families of workers and employees and the corresponding values for the whole-sale market).

Exclusivity

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

Terminal operators whose concessions have been granted on the basis of article 18 of Law No. 84/1994 enjoy exclusivity in the use of the docks or area identified in the concession agreement.

Other incentives

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

No.

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?

A wide variety of national and local approvals are required for a port operator to commence construction of a port facility or terminal at the relevant Italian port. Dispositions on the *conferenza di servizi* – to which all the competent administration authorities shall attend – set out in article 27 of the Public Contracts Code (PCC) and article 14-bis of Law No. 241/1990, shall apply. The time taken to obtain approvals is unpredictable.

Port construction

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

Yes. According to Law No. 84/1994 (article 5(8)), the construction of major infrastructure works (eg, maritime canals, defence breakwaters, docks, basins and equipped docks, excavation and deepening, dredging, hinterland access) is undertaken by the Italian government, through the Port System Authorities (PSAs).

However, Law No. 84/1994 (article 18(4)(5)) also provides that in the case of a major infrastructure project the PSA, following a resolution of the Port Committee, may enter into PPP agreements or into 'substitutive agreements' to the concession agreement according to article 11 of Law No. 241/1990.

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

In March 2017, the Ministry of Infrastructures and Transport issued the 'Guidelines for the Preparation of Port System Regulatory Plans' wherein the technical standards for ports facilities in Italy are listed.

It is possible for the operator to engage the contractors it chooses, but the prior authorisation of the PSA is required and the specific PCC rules shall apply.

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

If there are delays or defects in the construction of the port facilities or terminal, the PSA may terminate the build-operate-transfer concession agreement and declare the concessionaire's forfeiture according to article 47 of the Italian Code of Navigation.

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?

In order to carry out port operations, prior authorisation, to be issued by the Port System Authority (PSA), is required as per article 16 of Law No. 84/1994. Such activity is regulated, in general, by Ministerial Decree No. 585/1995 (Regulation containing the rules for the issuance, suspension and revocation of authorisations for the exercise of port operations).

In order to obtain such authorisation, the port operator shall produce an application in the required form and demonstrate that it meets the requirements of Decree No. 585/1995.

The application, overseen by the competent offices of the PSA, is submitted to the management committee in accordance with the provisions of articles 8 and 9 of Law No. 84/1994. The maximum number of authorisations is limited for each port.

Where the outcome is positive, the PSA should issue authorisations within a maximum period of 90 days from the termination of the procedure.

An authorisation in favour of an entity that is not a terminal operator pursuant to article 18 of Law No. 84/1994 shall have a duration that may vary from one to four years, depending on the operational programme to be attached to the application.

An authorisation for carrying out port operations, in favour of a terminal operator pursuant to article 18 of Law No. 84/1994, shall have the same duration as the one provided for the granting of the concession. Both authorisations are subject to a renewal procedure.

The legal framework is integrated also by Ministerial Decree No. 132/2001 containing 'Regulation concerning the determination of the binding criteria for the regulation by port and maritime authorities of port services, pursuant to article 16 of Law No. 84/94', and various local regulations adopted by each PSA.

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?

According to article 16 of Law No. 84/1994 port operators may provide, upon issuance of the PSA's authorisation, the following services: loading, unloading, transshipment, storage and general handling of goods and any other material held at ports.

As to the services that can be provided by the PSA, Ministry of Infrastructures and Transport circular letter 0010251 17-04-2018 clarified that the PSA may provide services to be rendered to the generality of users of the port, such as lighting of the common areas and cleaning and depolluting the seaport waters.

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?

According to Law No. 84/1994, article 5(8)(9), it is up to the state, also through the PSAs, to implement and guarantee access to the hinterland and to finance the development of access routes and interconnections.

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?

Port authorities, in exercising their powers of supervision and control, may:

- request the port operator to provide any documentation or references in order to verify the maintenance of the requirements that had to be met conditional to the issuance of the terminal operations authorisation; and
- at any time, including during the execution of the operations, carry out direct inspections to verify compliance with the current international, national and local provisions on hygiene, safety, environment and security, and with administrative measures relating to the management of the maritime state-owned areas.

More specifically, Ministerial Decree No. 585/95 concerning the 'Regulation for the release, suspension and revocation of the authorisation for port operations and activities' shall apply.

According to article 7 of the Decree, an authorisation may be suspended or revoked by the PSAs at any time without the right to any compensation, with a motivated provision if:

- the subjects indicated as holders of the authorisation are no longer in possession of the personal and professional requirement for exercising port operations because they have been involved in criminal and bankruptcy proceedings;
- the technical and financial capacity, ascertained at the time of issuing the authorisation, is considerably reduced and such as to jeopardise the activities indicated;
- the operational programme can no longer be implemented due to organisational deficiencies and inefficiency of operations;
- the tax laws, those provided by the social security legislation, as well as the provisions of Ministerial Decree No. 585/1995, have not been respected;
- personnel not registered in the appropriate registers are used; and
- tariffs higher than those communicated to the competent authorities are applied.

Port access and control

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

Port authorities, in exercising their powers of supervision and control granted by Law No. 84/1994, may have access at any time to the port area in order to control port operations, also carrying out inspections to verify compliance with international, national and local regulations.

PSAs cannot take over port operations.

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?

Remedies available to the PSA against a port operator that fails to operate and maintain the port facilities or terminal are the following:

- forfeiture of build-operate-transfer concession according to the concession agreement's provisions and article 47 of the Italian Code of Navigation (ICN); and
- suspension or forfeiture of the authorisation to undertake port operations, according to Law No. 84/1994 (article 16) and Ministerial Decree No. 585/1995.

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 49 of the ICN, unless otherwise established in the concession agreement, when the concession ceases the non-removable assets built in the area by the concessionaire remain in the ownership of the state, without any compensation or reimbursement due by the PSA. The PSA may order the demolition of such assets with the restitution of the state property to its prior condition.

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?

Yes. As to the eligibility criteria for the SPV to be granted with a build-operate-transfer (BOT) concession, pursuant to article 45 of the Public Contracts Code (PCC), economic operators established in Italy and other European member states, in accordance with the legislation in their respective countries, are eligible to participate in the BOT concession granting tender procedures. Italian contracting entities (eg, the Port System Authority (PSA)) shall allow economic operators established in EU member states to participate in national procurement procedures, according treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators established in Italy (article 49, PCC).

Transferring ownership interests

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

According to article 46 of the Italian Code of Navigation (ICN), it is possible to replace others in the enjoyment of the concession by requesting a subrogation. To this end, it is necessary that the concessionaire and the person or entity intending to replace them in the enjoyment of the concession jointly submit an application to the PSA, including the full set of documentation listed in the PSA regulation on concessions. Such a subrogation remains subject to the PSA's authorisation.

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?

Article 18-bis(5) of Law No. 84/1994, setting out a specific regulation governing procurement and PPP, provides that for the construction of port works PSAs may resort to project financing, also entering into medium- and long-term loan agreements. So far, the only example of a greenfield port facility project in Italy fully undertaken in a PPP form is the La Spezia cruise terminal project started in 2019. It cannot be clarified as to whether La Spezia PSA entered into a direct agreement with the project financing banks and what the relevant key terms are since details are not public.

Agreement variation and termination

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

BOT concessions are made within the limits of space and time and for the works, uses and powers resulting from the relevant agreement. Any variation in the extension of the granted area, in the works or in the operating procedures shall be requested in advance to the PSA and may be permitted by means of supplementary investigations and agreement (article 24 of the Regulation for implementation of ICN). Such a variation remains subject to the PSA's authorisation.

In the case of breach by a port operator of the obligation imposed by the law or by the concession agreement, the PSA may decide to terminate the concession agreement (article 47, ICN).

Furthermore, PSAs may revoke the concession at their own discretion for specific reasons related to the public use of the sea or to the public interest (article 42, ICN).

Contractual breach

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

The PSA may declare the concessionaire forfeiture pursuant to article 47 of the ICN.

Before declaring the forfeiture, the PSA would set a deadline within which the port operator can submit its own pleading of defence.

Also, the PCC contains a single provision governing termination, revocation and withdrawal of concession agreements (article 176) that would also apply, particularly in case of PPP concession agreements.

Governing law

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

Yes. Italian law regulates the contracts wherein the public administration is party (Law No. 241/1990).

Disputes

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

Disputes between the government or PSA and the port operator are customarily settled by Italian administrative courts – regional administrative courts acting as courts of first instance, and the Council of State as a court of second instance, referring to a procedure recently updated through the enactment of the Code of Administrative Procedure.



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UPDATE AND TRENDS

Key developments of the past year

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

Article 18(7) of Law No. 84/1994 provides for the prohibition to award a double concession to carry out the same activity in the same port, so that each terminal operator can hold only one specific concession agreement for each traffic typology within the specific port in each port.

However, Italian case law, based on logistical and geographic considerations, has made clear that the prohibition of double concession is not breached not only in the event of specialisation, which was undisputed, but also when the two concessions concern contiguous state-owned areas.

Furthermore, the recent evolution of case law (*Genoa Container Terminal PSA-SECH*) has even gone so far as to consider that the prohibition is not breached whenever a dominant position is not created to the detriment of competition (as might also be the case, for example, if the same undertaking were allowed to enjoy 'exceptionally large spaces' in a given port).

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?

A notable amount of emergency legislation, relief programmes and best practices for clients have been issued by the Italian government to address the pandemic, including with respect to the maritime and ports sector. They are all published on the Italian government website: www.governo.it/it/search/node/coronavirus.

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