

PORTS & TERMINALS

Portugal



Ports & Terminals

Consulting editors

Alex Kyriakoulis

HFW

Quick reference guide enabling side-by-side comparison of local insights, including into key ports; reform and port models; state development policy; green ports; legislative framework and regulation; public procurement and PPP; port development, construction and operation; corporate, finance, competition and dispute considerations; and recent trends.

Generated 10 October 2022

The information contained in this report is indicative only. Law Business Research is not responsible for any actions (or lack thereof) taken as a result of relying on or in any way using information contained in this report and in no event shall be liable for any damages resulting from reliance on or use of this information. © Copyright 2006 - 2022 Law Business Research

Table of contents

GENERAL

- Key ports
- Reform and port models
- State development policy
- Green ports

LEGISLATIVE FRAMEWORK AND REGULATION

- Development framework
- Regulatory authorities
- Harbourmasters
- Competition
- Tariffs
- Public service obligations
- Joint ventures
- Foreign participation

PUBLIC PROCUREMENT AND PPP

- Legislation
- Proposal consideration
- Joint venture and concession criteria
- Model agreement
- Approval
- Projects
- Term length
- Fee structures
- Exclusivity
- Other incentives

PORT DEVELOPMENT AND CONSTRUCTION

- Approval
- Port construction

PORT OPERATIONS

- Approval

Typical services

Access to hinterland

Suspension

Port access and control

Failure to operate and maintain

Transferrable assets

MISCELLANEOUS

Special purpose vehicles

Transferring ownership interests

Granting security

Agreement variation and termination

Contractual breach

Governing law

Disputes

UPDATE AND TRENDS

Key developments of the past year

Contributors

Portugal



Jose Luis Moreira da Silva
moreira.silva@srslegal.pt
SRS Advogados



GENERAL

Key ports

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 five key ports in Portugal: Aveiro, and the Douro and Leixões in the north, and Lisbon, Setúbal and Sines in the south.

Apart from these, there are also ports in the autonomous regions of Madeira and of Azores, and some smaller ports that are managed by the main ports:

- Viana do Castelo, managed by Douro and Leixões;
- Figueira da Foz, managed by Aveiro; and
- Algarve, managed by Sines.

The government has put in place a joint board of directors to manage the ports of Lisbon and Setúbal in what could be seen as a step to integrate these two ports, which has been under discussion for a long time.

The key ports have the capacity for all sorts of cargo and also passengers, although they tend to specialise in some types of cargo. The main ports have specialised facilities for:

- containers;
- oil and gas;
- bulk;
- general cargo; and
- cruises.

Sines is the main Portuguese port for oil and gas, but also has the largest container terminal (managed by the Port of Singapore Authority). Setúbal specialises in roll-on/roll-off and general cargo. Sines is also Portugal's main transshipment port, stretching its influence into the centre (Estremadura) of Spain. The government is finalising a new and modernised rail link to improve the existing one between the ports of Sines, Setúbal and Lisbon towards Spain.

Law stated - 01 August 2022

Reform and port models

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 ports in Portugal underwent significant changes in their organisational model in 1998.

The main port authorities were transformed from state-integrated public entities to limited liability companies, although they are still wholly owned by the state.

The landlord model is mostly used, where the port authority is responsible for regulation, and infrastructure and operations are carried out via public service concessions or licensed private operators. In smaller ports the port authority still manages some cargo services. Tow services are under some discussions, being in some main ports under the port authority and in others under licenses to private operators. Pilots are managed by the port authorities.

Other services are also managed by the port authorities or licensed to private operators, namely collection of waste from ships.

Discussions are currently ongoing as to whether the model should evolve to a mix of private service port and landlord model, transferring the overall responsibility for certain terminals from the port authority to private operators, including construction and maintenance of the infrastructure such as dredging and moors construction. The legal regime in Portugal currently prohibits the privatisation of ports, allowing only the concession regime. That will necessarily mean a new type of concession contract for public service terminals with new durations. This has already been seen in the recent tenders for the new Sines Multipurpose Terminal (Vasco da Gama), which had no bidders, and for the new Lisbon Multipurpose Terminal in Barreiro, which had to be reviewed due to environmental problems. Both didn't go forward.

Over the past five years, the ports have also undergone a management reform, with the main ports assuming the management of the smaller ports. Thus, Douro and Leixões, and Aveiro and Sines manage some small ports (respectively, Viana do Castelo, Figueira da Foz and Algarve). Also, Lisbon and Setúbal are managed by the same board of directors, giving them a unified policy and investment strategy. The government felt that they are complementary to each other and not far apart, as they have the same territorial influence. They currently remain autonomous ports, although with a joint board.

Law stated - 01 August 2022

State development policy

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

Although there was in the past a special member of government responsible for ports (the Sea Minister), under the current government (in place from 2022) the responsibility for ports was transferred to the Minister of Infrastructure, who supervises all the ports and oversees the main investment policy. The general economic regulation of ports, namely the fixing of tariffs, is also done by an independent regulator (AMT).

However, each port authority has full autonomy to define its own strategic goals within the general policy lines defined by the government and fix its tariffs, which are negotiated with AMT.

Law stated - 01 August 2022

Green ports

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

Environmental policies are becoming more and more important for port authorities. For instance, with Decree-Law No. 102/2020, of December 9, which implemented the EU Directive (UE) 2019/883 in Portugal, the port authorities became liable for the management of waste brought by ships and their loads. They can manage this service directly by themselves or they can licence it to private operators. Some ports have been designated green ports, taking into consideration the environmental measures in the way they do business. Also, the EU Water Framework (Law No. 58/2005, which implemented the EU Water Framework Directive) is mandatory to keep the port environments clean, and manage them to preserve water conditions and the environment.

All public service concessions establish obligations towards the private operator to maintain the terminal as environmentally friendly and all the terminals have an environmental plan. Any new terminal or expansion has to undergo an environmental impact assessment before construction is authorised.

The port of Setúbal has been recognised as an EcoPort by the European Sea Ports Organisation, recognising the

excellent environmental quality of the port.

Law stated - 01 August 2022

LEGISLATIVE FRAMEWORK AND REGULATION

Development framework

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

The existing legal framework still prioritises the traditional public service contracts (port concessions), although licensing is still used in some ports and for some services. In small ports it's still the port authority in charge of cargo handling. The newest concessions in place (Lisbon, Sines and Douro and Leixões) tend to include some clauses typical of a public-private partnership model contract, although they are not formally PPP contracts.

This change shows the need to modify the present law, which was established in the 1990s (Decree-Law No. 298/93 and Decree-Law No. 324/94) although modified by the current public contracts law (Decree-Law No. 18/2008 with the latest revision being Law No. 30/2021 of 21 May 2021).

Law stated - 01 August 2022

Regulatory authorities

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

The Autoridade da Mobilidade e dos Transportes (AMT) is the regulatory entity for all ports. The Ministry of Infrastructure and the Ministry of Finance supervise the port authorities.

Law stated - 01 August 2022

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

The main powers are supervision and economic regulation, which have an influence on tariffs, contracts and investments. AMT has the power to issue a mandatory advisory decision prior to any new tender for a concession contract and prior to any tariff revision.

Law stated - 01 August 2022

Harbourmasters

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

The harbourmaster is a naval officer appointed by the National Maritime Authority.

Law stated - 01 August 2022

Competition

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

The ports are subject to both national and European general competition rules.

The Portuguese Competition Authority has reviewed in the past the way in which ports comply with competition rules

and the services that are offered. A report from the Competition Authority was published in 2018 asking for more competitiveness on the award of port services. In the past, the Competition Authority has even applied fines to towage services for anticompetitive practices.

European Regulation (EU) 2017/352 (as modified by Regulation (EU) 2020/697) on port services applies directly in Portugal, regulating all the port services and imposes rules for tariffs and transparency on financing from the government, thus preventing state aid in ports. The Decree Law 9/2022, of 11 January complements this Regulation.

The practice from the European Commission regarding state aid considers the important role that they play in the development of trade and the role of governments, thus allowing a more generous approach to the rules.

The Competition Authority participated in a major study about competition in transport, including ports, within a global Organisation for Economic Co-operation and Development project, which shows the sector's awareness of competition issues.

Law stated - 01 August 2022

Tariffs

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 is a general law on port tariffs (Decree-Law No. 273/2000 , last revised by Decree-Law No. 6/2017), but all port authorities have their own regulations on tariffs for operations alongside the general rules set by law. The tariffs are fixed by the port authorities after having been approved by AMT. They are normally revised each year.

In specific terminals under public service concession contracts, the concessionaire fixes the tariffs after consultation with the port authority, usually taking into consideration the rules fixed in the contract. The tariffs approved are normally maximum tariffs that can be negotiated with the clients. Licensed operators have tariffs approved in the same way.

Law stated - 01 August 2022

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?

There are no specific regulations regarding the currency applied to port tariffs, so the euro is the currency applied as Portugal is a member of the eurozone, and all the general rules regarding the euro and its exchange rate are in place.

Law stated - 01 August 2022

Public service obligations

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?

The ports afford free access to all because they are in the public domain and are managed by the state through port authorities under limitations on safety and security.

Notwithstanding this, the services supplied in the ports are limited to those operators and suppliers that apply and fulfil legal requirements, including public service obligations. The port authority passes on these public service obligations

to private operators through concession contracts (for port terminals) and licences (for other port services).

Law stated - 01 August 2022

Joint ventures

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 examples to date of such a joint venture. In the past, the state managed all the terminals through the port authorities, but today the terminals are managed by private operators through public service concessions. Nevertheless, the law allows for the possibility of joint ventures in ports as they are permitted by law and occur in other sectors, although the services must always be provided under a concession contract or licence.

Portuguese law does not impose a specific percentage threshold, although it prohibits the privatisation of ports by allowing only the intervention of private companies by concession contracts or licences.

Law stated - 01 August 2022

Foreign participation

Are there restrictions on foreign participation in port projects?

There are no restrictions on foreign participation in port projects.

As Portugal is a full member of the European Union, it cannot impose any restrictions on the participation of another member of the European Union. For countries outside the European Union, it can restrict their participation, but it has never done so.

Currently, the largest container terminal in Portugal is managed and operated by the Singaporean company PSA in Sines. Several terminals in the Lisbon, Setúbal, Aveiro, and Douro and Leixões ports are managed and operated by Turkish companies (Yıldırım in containers and GPH in cruises).

Law stated - 01 August 2022

PUBLIC PROCUREMENT AND PPP

Legislation

Is the legislation governing procurement and PPP general or specific?

The legislation governing procurement and public-private partnerships (PPPs) is general.

Procurement is regulated by the Public Procurement Code (PPC) approved by Decree-Law No. 18/2008, as amended to the present, which incorporates the current Directives 2014/23/EU, 2014/24/EU and 2014/25/EU into Portuguese law. The PPC regulates both the procedural rules applicable to public tenders and the substantive regime governing the execution of public contracts, including specific liability rules. Ports are included in the specific utilities rules included in the PPC.

In turn, PPPs are regulated by Decree-Law No. 111/2012, as amended to the present (a major revision was put in place in 2019 but was subsequently revoked), which states the general standards applicable to the intervention of the state in the definition, design, preparation, launch, award, modification, supervision and monitoring of PPPs.

There have been some discussions about the application of the general PPP law to ports as they have a specific regime, but the principles of the PPP law tend to be applied and the recent (ongoing) revision of the public service concession incorporated several PPP principles in the contracts. Also, those principles are today incorporated in the concession contracts regime within the PPC.

Law stated - 01 August 2022

Proposal consideration

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

There is no room for unsolicited proposals or for privatisation. The procedure used for port concessions is an international public tender regulated by the PPC.

Law stated - 01 August 2022

Joint venture and concession criteria

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

The criteria are always the best proposal in terms of public interest. The best technical solution and the best capacity to attract cargo and revenue to the port authority are included in these criteria. The value of the investment to be made and the duration of the concession, along with other criteria specific to the tender, may also be considered.

Law stated - 01 August 2022

Model agreement

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

In the tender to be launched, the authority proposes a model contract. The public body can only deviate from its terms as specified in the tender and when it is allowed a negotiation procedure. It is common to allow some deviations negotiated within the tender procedure.

Law stated - 01 August 2022

Approval

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?

There is no need for a specific law in Portugal as there is a general law applicable, but some approvals (eg, permits) and licences (eg, environmental) are needed. Only when the government wants to include in the contract some specific rules different from the ones of the general law is it mandatory to publish a specific law. This has been the case for some container terminals, namely in Alcântara in Lisbon and in Sines.

Law stated - 01 August 2022

Projects

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

As a rule, to date, the terminals concessions have not been greenfield projects, as they have been designed and built by the government or port authority; what is transferred to the private operator is just the operation and management of the port terminal. In specific cases where the improvement or expansion of the terminal is included in the concession, the model used is build–own–operate–transfer. The government recently announced for the first time some greenfield projects to be launched in the main ports (new terminals in Sines, Lisbon and Leixões) but those projects are currently paused.

Law stated - 01 August 2022

Term length

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

The applicable law establishes a general term of 30 years, although it can be increased for a maximum of 75 years. This period may vary according to the value of the investment because the term should allow recovery of the amount invested. Discussions are ongoing as to whether this term should be generally increased to at least 50 years as other European countries such as Spain have already done, taking into consideration the huge investment that a port operation represents especially if the government wants to transfer more responsibility to the private operator, such as the enlargement of the terminal and the necessary dredging. Specific laws allow for more than the 30-year period mentioned, such as the container terminal of Alcântara in Lisbon and in Sines. For the new terminals that the government intends to launch, the duration will be fixed for a period of time in the region of 50 years.

Law stated - 01 August 2022

On what basis can the term be extended?

As a rule, the initial term of the contract can only be extended in cases expressly stated in the contract. EU rules and the PPC limit the possibility of extending the term of the concessions.

Nevertheless, even the PPC in some cases allows the extension of a concession as a mechanism to rebalance the economic and financial considerations of the contract in the event of a change of circumstances. The extension is authorised considering, for example, the investments made and the time necessary to conclude the return on the investment. We have seen a number of specific laws authorising an extension of port concession contracts for more than 30 years, including for Liscont in Lisbon.

Law stated - 01 August 2022

Fee structures

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

As a rule, the fees are a mix of fixed land rent and revenue shares. The fees are usually subject to indexation. The new model of recent concessions (eg, Lisbon's and Douro and Leixões' revised contracts) establishes a formula that benefits an operator that attracts more cargo to the port and allows more risk in partnership with the port authority.

Exclusivity

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

Neither the government nor the port authority gives guarantees, so the operator assumes all the demand and financial risks.

As the model contract in use is a public service concession contract, it is granted with exclusivity for the terminal, although there is no exclusivity for the port as other terminals inside the same port can compete between themselves.

Law stated - 01 August 2022

Other incentives

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

There are no other incentives to investors in ports as they could be classified as state aid by the European Commission, as has already happened in other European countries. What is normally done by the government is a facilitation of the necessary infrastructure by building new roads and railways to the terminal.

Law stated - 01 August 2022

PORT DEVELOPMENT AND CONSTRUCTION

Approval

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?

The construction licence is given by the port authority with the concession contract. An environmental licence may also be needed on a case-by-case basis. The time needed to obtain the permits depends on the specifics of the case, but as the construction part of a concession is normally limited, the environmental approval assumes low relevance and is easily obtained.

That is not the case when the private operator assumes the construction or expansion of a new terminal, because the environmental impact assessment is then important and can take some time to obtain, with no assurance that it will be obtained (as it happened in one recent case in Lisbon).

The new Lisbon terminal of Barreiro had to be rethought as it did not pass the environmental impact assessment. The new terminal of Vasco da Gama in Sines also went through an environmental impact assessment prior to the launch of the tender for its construction and management, and was approved.

In some cases, there is a need for the Cultural Protection Agency to issue an opinion, as has occurred in some parts of Lisbon.

Law stated - 01 August 2022

Port construction

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

Normally, the public authority (ie, the government or relevant port authority) undertakes all of the construction, access and dredging of the port.

Sometimes, the contract transfers that construction responsibility or part of it (dredging and maintenance or expansion) to the private operator.

The government intends to transfer that responsibility to the concessionaire in future contracts.

Law stated - 01 August 2022

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

The operator does not have to adhere to any specific construction standards, although it normally assumes the responsibility to use best practice and best engineering methods. The past experience of the operator in similar projects is a criterion for awarding this type of contract.

The operator may engage any contractor it wishes unless otherwise specified in the contract, as the concession is awarded by a public tender that allows for transparency and competition.

Law stated - 01 August 2022

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

In the case of delays or defects, the party responsible for the construction of the port can be held liable for delays or defects and the contract can ultimately be terminated. A penalty may also be applied for each day of the delay.

Law stated - 01 August 2022

PORT OPERATIONS

Approval

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?

No specific approvals are required as the right to operate a terminal is given by the concession contract. The concession contract allows the port operator to commence operations immediately following construction and normally allows up to two years for the construction, although the time limit will depend on the amount of construction needed.

Law stated - 01 August 2022

Typical services

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?

The port authority may provide to port operators the use of equipment, workers and facilities, and electricity and water supplies. It may also supply pilots, towage and moorage. According to law, the port authority has the obligation to supply waste services. These services are charged according to the regulations approved by each port authority. Some of these services may be supplied by private operators licensed by the port authority and, in this case, the tariffs are established by the private operators.

Law stated - 01 August 2022

Access to hinterland

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?

The relevant port authority does not give any commitments in relation to access to the hinterland (rail, road, etc). Those are obligations of the government. All the ports in Portugal have good access by road and rail, and a new rail link is under construction to link the ports of Lisbon, Setúbal and Sines more directly to the Spanish hinterland of Extremadura. Logistics terminals (dry ports) are also ready to serve all the ports, managed by either private operators or a government-owned company.

Law stated - 01 August 2022

Suspension

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

The port authorities oversee terminal operations through their inspection powers given by law and by the concession contracts. The port authority is responsible for the whole port management, even if it is operated by private operators.

In a major emergency, a port authority can suspend the activities of a private operator. However, Portuguese jurisdiction only allows for a public entity to suspend or terminate a contract or a licence if cessation of activity is imminent, or if a serious disturbance in the management of the terminal occurs that adversely affects the regularity of the operation.

A legal procedure must take place that allows the private operator to be heard and to present its case. The port authority can only maintain a suspension for a year, after which it has to resume the contract or licence, or terminate it.

Law stated - 01 August 2022

Port access and control

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

The port authorities may access the port for inspection and the operator cannot deny or hamper this access under any circumstances. The port authority should liaise with the private operator to avoid any disturbance in the management of the terminal that could involve the responsibility of the authority.

The takeover of port operations can happen in two possible cases: default of the private operator or for reasons of public interest. In the event of default, the authority can seize the concession. The authority may take control over operations if a serious disturbance occurs. In this case, the operator must pay the authority operating expenses if the value is higher than the operation's revenues.

In a public interest situation, there are two possible scenarios:

- concession redemption, in which case the authority must communicate its intention one year in advance and can only take place if half of the contract period has passed; and
- termination, in which case the authority may terminate the concession for specific reasons.

In these cases, the operator has the right to fair compensation.

Finally, in the event of a major emergency, the authority may take control of port operations. If this happens, the contract is suspended.

Law stated - 01 August 2022

Failure to operate and maintain

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

It is normal to establish a penalty system in the contract depending on the seriousness of various criteria.

Another available remedy is concession seizure.

The port authorities can also terminate the contract in the event of non-fulfilment of the main obligations. In this case, the terminal will revert to the authority without any compensation and the authority can take over the terminal without needing the consent of the operator.

Finally, the operator is, in any case, subject to the general rules of civil liability and is responsible for all damages incurred.

In the case of a licensee, the authority can revoke the licence and apply a fine prohibiting the operator from working in the port for several years.

Law stated - 01 August 2022

Transferrable assets

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?

After the concession terminates, the operator must transfer all the assets necessary to operate and maintain the terminal to the port authority, including those that it received at the beginning of the contract and those bought or built by the concessionaire. These assets shall revert free of charge and in good working condition, without any right to claim compensation or retention by the operator unless otherwise stated in the contract and apart from those whose

acquisition was approved by the authority in the final years of the contract, which can revert only if agreed upon and paid.

Investments in replacement equipment or technological updates made by the operator during the last 10 years of the contract that the authority has expressly approved and agreed to reimburse are excluded from the above rule, normally being reverted with the right for just compensation. The price to be paid is established taking into consideration the value of the non-redeemed asset.

The concession contract can foresee the terms under which the reversion and transfer of assets will take place, as the law is only a subsidiary and the parties to the contract can overturn the general rule.

Law stated - 01 August 2022

MISCELLANEOUS

Special purpose vehicles

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?

The port operator must establish a special purpose vehicle (SPV) with the sole object to operate and manage the terminal. The SPV will be the concessionaire and it must be incorporated in Portugal.

Law stated - 01 August 2022

Transferring ownership interests

Are ownership interests in the port operator freely transferable?

The ownership of a port operator is freely transferable but is subject to prior authorisation by the public entity. This will not be denied unless there are sufficient relevant grounds.

Law stated - 01 August 2022

Granting security

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?

The private finance initiative (PFI) model has not been used widely in port concessions to date, but it is a model frequently used in Portugal for roads, hospitals and other big infrastructure projects. The Portuguese public-private partnership law can generally be applicable to ports if this model of financing the construction and operation of terminals is to be chosen.

There are some cases where the PFI model has already been applied to ports and, in those cases, direct agreements were put in place (Setúbal, Lisbon, Aveiro and Leixões). The key terms of those direct agreements are the normal terms used in these situations regarding authorisations to transfer ownership or the operation, step in rights and to execute guarantees before suspending or terminating the concession.

The only problem is that not all the assets transferred to private operators can serve as security, as some are included in the public domain. Normally the contract allows the private operator to use some assets as securities or it specifies that, to serve as securities, the port authority must authorise it previously. Another problem is that, according to

specific EU rules, the assets owned by the government or port authority and transferred to the concessionaire cannot be used as security as this would transfer the risk from the private operator to the government and, thus, would add to the government deficit. Therefore, it limits the securities to those that are built or acquired and owned by the private operator.

Law stated - 01 August 2022

Agreement variation and termination

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

Agreements to construct or operate a port facility have, as a rule, specific clauses related to the modification of the contract and the terms under which the modification is admissible. The modification of a contract is strictly limited by law (including the Public Procurement Code (PPC) and EU law) and can only happen in the event of a substantial variation from the initial conditions of the contract. Modifications will be very limited in scope as the law does not allow for substantial modification of the contract. If these rules are not followed, the contract is deemed to be terminated and a new contract must be put in place after launching a new tender. To avoid this problem, the government can issue a specific law to allow for such modifications on occasion.

Termination of the contract can occur in the event of a severe breach or for reasons of public interest.

Law stated - 01 August 2022

Contractual breach

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

Remedies available to a government or port authority for contractual breach by a port operator result, as a rule, from the law or the contract: for example, penalties for each day of breach and responsibility for damages. Also, if the breach is considered serious, the contract or the relationship between the parties can be terminated. If a problem occurs but is deemed not to be permanent, the contract can be only suspended with the assurance that it is to be reassumed after the problem is solved. However, in this case, the suspension can only last for a maximum of one year.

Law stated - 01 August 2022

Governing law

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

As a rule, they are governed by the laws of Portugal. However, the parties may consider some parts of the contract to be ruled by laws of other jurisdictions, as normally happens with the financing clauses and agreements (ie, English law). That has an impact on dispute resolution clauses – namely place, language and law ruling arbitration.

Law stated - 01 August 2022

Disputes

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

Usually, disputes between the government or the port authority and the port operator are solved by arbitration, as set forth in the contract. Subsidiary law ruling arbitration, including international arbitration, is in place in Portugal (Law No. 63/2011) and incorporates the best international practice.

Nevertheless, contracts implemented after September 2017 are subject to specific rules included in the PPC that demand, namely, that all arbitration decisions over €500,000 must be allowed to have access to an appeal to the competent administrative court and for the publication of all decisions by the Ministry of Justice. Also, the PPC establishes a preference for institutionalised arbitration, rather than ad hoc, although it does not prohibit this process.

Parties can resolve disputes in the general administrative courts or in other ways, such as conciliation, mediation or dispute boards.

Law stated - 01 August 2022

UPDATE AND TRENDS

Key developments of the past year

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

Before the covid-19 pandemic, we were expecting several major investments to take place in the coming years, but the government stopped all major investments and they have never resumed. Only the Multipurpose terminal in the Port of Sines was awarded after a new tender.

The tender for a new terminal in the port of Sines (Vasco da Gama) was launched, but no bidders came and it was postponed. The new terminal for Douro and Leixões is still waiting for tender. The projected new Lisbon terminal in Barreiro failed its environmental assessment and must be rethought.

Nevertheless, some major investments have continued. The major dredging operations in the port of Setúbal, to allow for more modern ships to come into the terminals, is already finished and gave the port more depth for larger ships. The rail links from the ports of Sines, Setúbal and Lisbon inland are being modernised. The PSA container terminal in Sines is ongoing a major expansion, allowing for the terminal to double its capacity to almost 3 million 20-foot equivalent units. The renegotiation of Liscont's Alcântara container terminal in Lisbon is completed, which will increase the capacity of the terminal (four new cranes are already delivered).

The Port of Lisbon is expected to launch four or five new tenders for its north terminals in 2023 and 2024, including for its Santa Apolonia Container Terminal as all contracts end in 2025 and 2026.

Law stated - 01 August 2022

Jurisdictions

	Angola	SRS Advogados
	Brazil	Kincaid Mendes Vianna Advogados
	Denmark	Gorrissen Federspiel
	India	Phoenix Legal
	Italy	Legal 4Transport
	Japan	TMI Associates
	Mozambique	VdA
	Netherlands	Van Steenderen MainportLawyers
	Nigeria	Creed & Brooks
	Paraguay	Palacios Prono and Talavera Abogados
	Portugal	SRS Advogados
	Russia	Jurinflot International Law Office
	South Korea	DR & AJU LLC
	Turkey	Turunç
	United Kingdom	HFW
	Venezuela	Sabatino Pizzolante Maritime & Commercial Attorneys