

PORTS & TERMINALS 2022

Contributing editor
Alex Kyriakoulis



Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between October and November 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2015
Seventh edition
ISBN 978-1-83862-697-6

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



PORTS & TERMINALS 2022

Contributing editor

Alex Kyriakoulis

HFW

Lexology Getting The Deal Through is delighted to publish the seventh edition of *Ports & 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 Costa Rica, India and South Korea.

Lexology 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.lexology.com/gtdt.

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.



LEXOLOGY

Getting the Deal Through

London
November 2021

Contents

Global overview	3	Nigeria	72
Alex Kyriakoulis HFW		Chidi L Ilogu, SAN and Joseph O Amadi Foundation Chambers	
Brazil	6	Paraguay	80
Godofredo Mendes Vianna and Juliana Pizzolato Furtado Senna Kincaid Mendes Vianna Advogados		Juan Pablo Palacios Velázquez and Raúl Prono Toñanez Palacios Prono and Talavera Abogados	
China	14	Portugal	87
Ben Bury and Jessica Liu HFW		Jose Luis Moreira da Silva SRS Advogados	
Costa Rica	22	Russia	94
Tomás Nassar and Juan José Cheng Nassar Abogados Costa Rica		Alexander Mednikov Jurinflot International Law Office	
Denmark	29	South Korea	100
Christian Thiele and Jens V Mathiasen Gorrissen Federspiel		Woo Rin Sung, Kyu Min Hwang and Young Ho Oh DR & AJU LLC	
India	35	Turkey	107
Gautam Bhatikar, Vikram Kamath and Shruti Salian Phoenix Legal		Esin Çamlıbel, Naz Esen and Beste Yıldızlı Ergül Turunç	
Italy	41	United Arab Emirates	113
Giuseppe Loffreda and Alberto Cozzo Legal 4Transport		Alexander Reid HFW	
Japan	49	United Kingdom	120
Mizuki Koshimoto, Jumpei Osada, Masaaki Sasaki and Takashi Inoue TMI Associates		Alex Kyriakoulis and Joseph Botham HFW	
Mozambique	57	Venezuela	127
Teresa Empis Falcão VdA Guilherme Daniel and Kenny Laisse GDA Advogados		José Alfredo Sabatino Pizzolante Sabatino Pizzolante Maritime & Commercial Attorneys	
Netherlands	64		
Arnold van Steenderen and Charlotte van Steenderen Van Steenderen MainportLawyers			

Turkey

Esin Çamlıbel, Naz Esen and Beste Yıldızlı Ergül

Turunç

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?

Turkey's key port facilities, listed along with their primary purposes, are:

- Ambarlı: cargo handling, general cargo, container, storehouse;
- Antalya: cargo handling, general cargo, container, cruise;
- Asyaport: general cargo, container;
- Bandırma: cargo handling, general cargo, container;
- Borusan: general cargo, bulk cargo, roll-on/roll-off (ro-ro) transport, container;
- BOTAŞ (Ceyhan): oil and gas;
- Çanakkale: general cargo, bulk cargo, ro-ro transport, container, oil and gas, chemical cargo, cruise;
- Derince Sapiport: cargo handling, general cargo, container, oil and gas;
- DP World Yarımcı: general cargo and container;
- Er-port: cargo handling, general cargo;
- Evyapport: general cargo, bulk cargo, ro-ro transport, container;
- Gemlik: container, general cargo, liquids;
- Haydarpaşa: cargo handling, general cargo, container, ferry;
- Hopa: cargo handling, bulk cargo, general cargo, container, oil and gas;
- İçdaş: cargo handling, general cargo, storehouse;
- İskenderun: cargo handling, general cargo, container, transit vehicle trading, storehouse;
- İzmir: cargo handling, cruise, storehouse, general cargo, casting, container;
- Kumport: general cargo, bulk cargo, ro-ro transport, container;
- Limakport: general cargo, bulk cargo, ro-ro transport, container;
- Marport: cargo handling, general cargo, container, storehouse;
- Mersin: cargo handling, general cargo, container, cruise, oil and gas;
- Nemport: cargo handling, general cargo, container;
- Port Akdeniz: cargo handling, general cargo, container, cruise, ferry, oil and gas;
- Samsun: cargo handling, general cargo, container, cruise;
- Trabzon: cargo handling, bulk cargo, general cargo, container, ferry, oil and gas;
- Tuzla: general cargo, passenger, tug, oil and gas; and
- Yılport: general cargo, bulk cargo, oil and gas, container.

Except for the İzmir and Antalya ports, Turkey's key ports are generally focused on general cargo, cargo handling, ro-ro transport, vehicle handling and container services. The İzmir and Antalya ports supply an important service to Turkey's tourism industry by providing cruise port services.

For additional information regarding certain key port facilities, the tables on pages 46, 56, 105 and 106 of the 2021 Maritime Sector Report published by the Turkish Chamber of Shipping are useful resources.

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.

There has been a major trend in port privatisations in Turkey. As at August 2021, of the 181 coastal facilities suitable for international shipping in Turkey, only nine ports (Haydarpaşa, İzmir, Sarayburnu, Kuruçeşme Pier 1, Kuruçeşme Pier 2, Kabatepe, Taşucu, Uğurlu and Kuzu) are owned and operated by the Turkish government. In 2004, the High Board of Privatisation issued Decision No. 2004/128, which allowed the privatisation of seven of Turkey's largest and most significant ports (Bandırma, İzmir, Samsun, Derince, Mersin and Iskenderun) via a build-operate-transfer (BOT) model. Following the 2004 decision, the trend continued, leading to the current status of nearly all of Turkey's ports having been privatised through BOT structures or concession agreements. Turkey does not give private entities the right of ownership of ports, but instead gives them a right of operation for a maximum of 49 years.

State development policy

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

The overall state policy for the development of ports in Turkey is reflected in the trend towards the privatisation of ports and in Turkey's 2023 goals, which include improving and expanding overall port capacity in the country.

Turkey initially adopted privatisation laws and policies in the 1990s, as a result of which nearly all ports in Turkey have been privatised. These privatisations have been and continue to be governed by Law No. 4046 of 27 November 1994. Given that these privatisations transfer the right to operate an existing port for a certain duration of time to a private entity, they are sometimes referred to as 'brownfield' projects. The development of greenfield ports (ie, the creation of new ports) is governed by Law No. 3996 of 13 June 1994 and Council of Ministers Decree No. 2011/1807 implementing that law, which together constitute the general BOT legislation in place. Turkey has set certain development goals that it aims to reach by 2023, which will be the 100th anniversary of the Turkish Republic. Among Turkey's 2023 goals, which cover a wide variety of sectors, are the construction of new ports, the rehabilitation of existing ports and the creation of unified port complexes rather than individual piers.

Green ports

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

There are no green port requirements for Turkish ports. However, a voluntary green port certification system was established in 2012 by the Ministry of Transport and Infrastructure. The first such certificate was given to the Marport, which is owned by Arkas Holding, in July 2015, and as of July 2019, 14 additional ports (AKSA, Altintel, Asyaport, Bodrumport, Borusan Lojistik, Ege Port, Eyapport, Hopaport, Kumport, Limakport, Limaş, Mardaş, Petkim and Yılport) have acquired the certificate.

LEGISLATIVE FRAMEWORK AND REGULATION

Development framework

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

The privatisation of ports has been encouraged by the government through the passing of new laws and regulations. There is no single unified piece of legislation and no single ministry or department that deals with such projects or ports in general. Turkey's current port development and privatisation policies are supported by various pieces of legislation, including the following:

- Law No. 618 (the Law on Ports – 1925);
- Law No. 815 (the Law on Cabotage – 1926);
- Law No. 3621 (the Law on Coasts – 1990);
- Law No. 3996 (the Law on Build–Operate–Transfer Projects – 1994);
- Law No. 4046 (the Law on Privatisation – 1994);
- the Regulation on the Management of the State-Owned Properties dated 19 June 2007;
- the Communiqué of National Property No. 324 dated 26 April 2009; and
- the Regulation on Ports dated 31 October 2012.

Regulatory authorities

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

There is no specific regulatory authority for ports and there is no unified port authority that oversees all port-related affairs, but there are a number of port-related bodies including, but not limited to, the following:

- the General Directorate for Construction of Railways, Seaports and Airports;
- the Ministry of Agriculture and Forestry;
- the Ministry of Environment and Urban Planning;
- the Ministry of Health;
- the Ministry of Industry and Technology (MOI);
- the Ministry of Interior;
- the Ministry of Treasury and Finance;
- the Ministry of Transport and Infrastructure (MOT);
- the General Directorate of Maritime Trade;
- the Turkish Maritime Organisation; and
- Turkish State Railways (TSR).

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

Each port-related regulatory body deals with various types of matters that could arise in port projects such as financial, regulatory, privatisation and public-private partnership (PPP) issues in accordance with their

respective jurisdiction and mandate. For example, the MOT coordinates the development of ports and sets the port tariffs for TSR ports, while the MOI controls industrial ports operated by state-owned companies. Depending on the type of port and the nature of the project or issue at hand, there are several possible responsible bodies and bodies of regulations that could have jurisdiction or be applicable in each instance.

Additionally, each port authority has broad powers to determine and employ various operational measures for their specific port.

Harbourmasters

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

A harbourmaster is appointed by the Ministry of Transport and Infrastructure.

Competition

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

Ports are not subject to specific national competition rules. However, in practice, it has been observed that the Turkish Competition Board has followed EU competition rules and the approach of the European Commission regarding maritime disputes in its decisions.

Mergers and acquisitions, including privatisations that exceed certain thresholds, are subject to the Turkish Competition Board's approval. The applicable pieces of legislation are:

- the Communiqué Concerning Mergers and Acquisitions Requiring the Authorisation of the Competition Board (Communiqué No. 2010/4); and
- the Communiqué on the Procedures and Principles to be Pursued in Pre-Notifications and Authorisation Applications to be Filed with the Competition Authority in order for Acquisitions via Privatisation to Become Legally Valid (Communiqué No. 2013/2).

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?

Tariffs are collected by the Ministry of Trade pursuant to Presidential Decree No. 1 (dated 10 July 2018) concerning the organisations and functions of the Ministry of Trade. The port service fee to be collected from both foreign- and Turkish-flagged ships are determined in accordance with article 26 of Law No. 5174 through the Turkish Chamber of Shipping.

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?

The government can grant a right to the use of a state-owned property through a concession agreement in exchange for a concession fee and revenue sharing fee to be paid annually by the port operator. Concession fees are equal to the tender price for the first year and are increased annually based on the Producer Price Index in the ensuing years. However, revenue sharing fees are calculated as 1 per cent of the total revenue of the port.

There are no specific foreign exchange controls imposed on port operators. Having said that, all references to currency and monetary values are made in Turkish lira in the relevant legislation and the majority of concession agreements are made in lira.

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?

No.

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?

Pursuant to applicable privatisation legislation, which allows the transfer of the ownership of companies within the privatisation portfolio partially or fully, a state entity can enter into a joint venture with a port operator for the development or operation of a port in Turkey. There is no statutory percentage threshold applicable to the state's stake in such joint ventures.

Foreign participation

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

Law No. 815 provides that certain maritime activities can be performed only by Turkish persons, such as the provision of certain auxiliary services at Turkish ports. Therefore, if the operator of a Turkish port does not qualify as a Turkish person, it would need to outsource such reserved activities to Turkish persons. In practice, foreign entities can normally acquire the operational rights of a port through a Turkish subsidiary.

PUBLIC PROCUREMENT AND PPP

Legislation

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

The legislation governing procurement and public-private partnerships (PPPs) is specific. Although there are some general laws such as the Public Procurement Law (Law No. 4734) and the Public Procurement Agreements Law (Law No. 4735) that are also applicable, one must comply primarily with the specific procurement or PPP regulations applicable to the relevant activity. For example, some PPPs are made according to Law No. 4734; others fall under the health ministry or other relevant ministries regulations. Build-operate-transfer (BOT) projects are governed by Law No. 3996.

Proposal consideration

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

As a general rule, a formal tender process is required.

The Privatisation Higher Council is the authorised entity for decisions on privatisations according to the Law on Privatisation Practices (Law No. 4046). Once the Privatisation Higher Council decides that a public entity will be privatised, the bidding process starts through a formal tender process in accordance with Law No. 4046.

However, there is no general law for PPPs in Turkey because there are various methods for the operation of public services. The authorised entity for approving BOT projects is the Higher Planning Council and a formal tender is also required for this process.

Joint venture and concession criteria

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

According to Law No. 3996, the principles and procedures of BOT projects were brought into force by the Council of Ministers. Pursuant to the relevant Council of Ministers' Decree (2011/1807), it is compulsory that a bidding company have a solid financial structure, be certified by independent auditors and have experience performing activities related to the investment in question. Decree-Law No. 700 dated 2 July 2018 authorises the President to establish the rules and procedures applicable to BOT projects. However, this decree-law did not make any amendments to the existing rules and procedures.

Model agreement

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

There is no model PPP agreement. The Higher Planning Council is the authorised entity that allows a government entity to enter into an agreement with a private entity. After the approval, the relevant government entity determines the conditions of the agreement (always subject to constitutional, statutory and public policy limitations). In practice, concession agreements are used in the privatisation of existing ports and the BOT model for new ports.

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?

The relevant public entity must apply to the Higher Planning Council for permission to enter into a PPP agreement with a private entity. The Higher Planning Council then consults the relevant ministries, which could be one or more of the following:

- the Ministry of Environment and Urbanisation;
- the Ministry of Treasury and Finance;
- the Ministry of Transport and Infrastructure; or
- the Ministry of Culture and Tourism.

The Higher Planning Council may reject the request of the relevant public entity if such a decision is supported by the relevant ministry's reports. If the application is approved, the relevant public entity determines the PPP agreement conditions and the bidding process ensues.

Projects

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

In other sectors, build-operate (BO), transfer of operating rights (TOR) and build-lease-transfer (BLT) models are used, but there is no specific legal framework in place for build-own-operate-transfer (BOOT) projects in Turkey.

Term length

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

There is no minimum term; however, the maximum term is 49 years. In practice, 30-year and 36-year terms are most commonly used.

There are no existing examples of greenfield port projects in Turkey in a pure PPP form (such as those recently seen in the Turkish healthcare

sector). Ports operated by private entities are all run under the BOT model (for new ports) or concession agreements (for existing ports).

22 | On what basis can the term be extended?

Law No. 3996 specifically states that the 49-year term for BOT projects cannot be extended. There is legislation in place providing for other types of PPP projects such as BO, TOR and BLT, which may have different term durations, but the pertinent regulations governing these other types of PPP projects do not explicitly include ports and thus are not relevant here.

Fee structures

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

Various fees are collected for different activities, and for different kinds of ships and capacities (eg, registration fees, annual contribution fees and port service fees).

The fee structure is determined annually by the Chamber of Shipping.

Exclusivity

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

The government does not, in practice, provide guarantees in relation to port PPPs.

Once it has won the tender, the port operator is granted exclusivity under the relevant structure for a fixed period of time.

Other incentives

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

A port investment with a minimum value of 200 million liras can be made through the use of regional incentives. The President is authorised to increase or decrease this threshold. Regional incentives are determined in terms of the development levels of each region. Such incentives generally include exemptions from stamp duty, real estate tax and other fees and charges arising from corporate tax, value added tax, customs duty and social security premium support, and reduced income withholding tax. These incentives may also be used for greenfield and brownfield investments.

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?

Permission is required from relevant ministries determined by the Higher Planning Council. Generally, it is necessary to get feasibility reports from the Ministry of Transport and Infrastructure, the Ministry of Environment and Urbanisation, and the Ministry of Treasury and Finance. It is also generally required to get permission from the Ministry of Culture and Tourism to ensure that any cultural or historical heritage sites near the port will not be compromised by the project. Finally, a port facility operation permit is granted by the relevant ministry to the port operators regarding the services to be given by such operators.

Port construction

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

No. In Turkey, there are no examples of the government undertaking part of a port's construction. Consistent with Turkey's preferred build-operate-transfer public-private partnership (PPP) model, the aim of privatisation is transferring the port operation and construction to private entities, which is reflected in current practice.

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

As per Council of Ministers' Decision No. 2011/1807, the relevant administration designates specifications of any PPP-type agreements, which can include terms governing construction. Additionally, there are some technical standards for the construction of ports that must be complied with. In 2007, a technical guideline (the Coastal Structures and Ports, Planning and Designing Technical Guideline) was issued by the Ministry of Transport and Infrastructure Directorate General of Railways, Ports and Airports Construction. In 2015, the Ministry of Transport and Infrastructure Directorate General of Infrastructure Investments prepared a draft amended version of the technical guideline.

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

As per Council of Ministers' Decision No. 2011/1807, provisions regarding delays and cost changes in a construction project must be covered in the relevant agreement. If these types of problems occur, they are considered contractual breaches and the administration may terminate the agreement. It is required that provisions regarding contract termination be included in the agreement. If the agreement is not terminated, the dispute can be resolved via arbitration or in Turkish courts, depending on the terms of the agreement.

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?

A private entity port operator that has already successfully entered into a public-private partnership (PPP) agreement with the government must submit a facility information form and a business permit application document along with certain supporting documents to commence operations. The private entity port operator must apply to the Examination, Determination and Audit Commission (the Commission) with the required documents to get port operation permission.

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?

Private port operators perform all port services for their ports. The government is not involved in providing port services when a private entity is the port operator.

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?

The general practice is for operators to finance and develop access routes and interconnections. According to the Ministry of Development's five-year development plan for 2014–2020, one of the goals of the Turkish government is to realise hinterland connections from existing ports by road and rail. Similarly, the 11th development plan for 2019–2023 makes specific commitments regarding rail projects near strategic ports to ease access to these ports' hinterlands. Construction for a 4,000km-long railroad has started and is ongoing. As such, we expect to see a continued increase in hinterland connection projects.

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?

The Commission has the right to supervise ports. If any nonconformity is detected by the Commission, a maximum of six months is given by the Commission to correct the nonconformity. If the private entity does not correct the nonconformity, the Commission can suspend operations until the private company corrects the problem. The permit to operate the port may also be cancelled by the Commission if the documents provided by the operator are insufficient. Further, if the name, the coast facility name or the type of operation written in the permit to operate changes, the permit becomes invalid.

Port access and control

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

Accessing the port area is generally possible if there is a court decision granting such a right. If there is reasonable doubt or a court decision, law enforcement agencies may also access the port. Further, auditors from the Commission may access the port. The Turkish Tax Inspection Board may also supervise 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?

Pursuant to Law No. 3996, the agreement between the administration and the private entity is a private law agreement if the relationship is part of a build–operate–transfer PPP project. The administration may terminate the agreement if the conditions for termination set out in the agreement occur and the auditors from the Commission may suspend or cancel the permission to operate. The administration can also apply to Turkish courts (or arbitration if provided for in the agreement) for remedies generally available under private law contracts.

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?

Such requirements would be included in the terms of the PPP agreement, which are negotiated on a case-by-case basis.

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?

According to the Council of Ministers' Decision No. 2011/1807, a private entity that has won a bid to operate or construct a port must establish a Turkish joint-stock company special purpose vehicle (SPV) after it has been selected for the job. The equity capital ratio of the SPV may not be less than 20 per cent of the amount that will be used for the investment. As an exception to this SPV formation requirement, if a Turkish public entity owns more than 51 per cent of the shares of the company, it is not required to establish an SPV.

Transferring ownership interests

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

According to Council of Ministers' Decision No. 2011/1807, a private company may transfer its rights and obligations to another company subject to the same agreement conditions. The new company must abide by the procedures and satisfy the requirements of Council of Ministers' Decision No. 2011/1807. The approval of the relevant administration and the signature of the related minister are required for the transfer to take place. Moreover, if a concession holder wants to transfer more than 50 per cent of its shares to a third party, such a transfer shall be deemed the assignment of the concession agreement and, therefore, shall require a preliminary written consent of the General Directorate of National Real Estate (the Directorate). In such a case, a new agreement will be executed between the new shareholder, the concession holder and the Directorate, subject to the conditions that:

- all outstanding debts must be paid to the Directorate;
- all current violations of the use permit agreements shall be remedied within a period to be given by the Directorate; and
- the concession holder must waive all of its claims against the Directorate arising from or out of the relevant concession agreement.

However, transfers of shares in fully privately owned ports will normally be permitted without prior consent and a post-transaction notification will suffice.

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?

With the approval of the relevant authority, the port operator can grant such security. In practice, some agreements include share pledges granting step-in rights to the financing banks.

There are no examples of regulatory authorities entering into a direct agreement with project financing banks.

Agreement variation and termination

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

According to Council of Ministers' Decision No. 2011/1807, an agreement may be terminated by the relevant administration upon the private entity failing to fulfil its obligations, breaching the agreement, going into bankruptcy or entering into a composition with creditors. If the private entity changes the amount of its capital during the establishment period without the permission of the administration, the agreement may be terminated by the administration.

Contractual breach

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

The administration may terminate the agreement within the scope of Council of Ministers' Decision No. 2011/1807 if conditions triggering termination as set forth in the agreement occur. In the event of a breach, it is possible to apply to Turkish courts and, if it is provided for in the agreement, it is possible to start an arbitration process.

Governing law

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

According to Council of Ministers' Decision No. 2011/1807, disputes may only be resolved by Turkish courts or, if specifically provided for in the agreement, through arbitration. If arbitration is provided for in the agreement, it is compulsory that the substantive law applicable to the arbitration proceedings be Turkish law.

Disputes

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

Such disputes are technically considered to be private law matters, but as per Council of Ministers' Decision No. 2011/1807, they can be resolved only by Turkish courts or arbitration.

UPDATE AND TRENDS

Key developments of the past year

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

There has been increased interest in Turkish ports by foreign investors in the past few years. Several sector players, including British Trans Global Projects and Romanian P&O Ferrymasters, opened offices in Turkey in 2018 and Turkish port operator OYAK Denizcilik ve Liman İşletmeleri AŞ signed a partnership with Nippon Yusen Kaisha in 2018 for US\$110 million to establish a roll-on/roll-off port focused on the automotive sector in Kocaeli Yarımca, which started operating in 2021. Similarly, 90 per cent of Mersin International Port, valued at US\$2.1 billion, belongs to foreign investors as of 2017. In March 2021, this port realised an investment of US\$375 million to increase its capacity by approximately 33 per cent.

The Turkish government has three mega-port projects to build three high-volume ports in Çandarlı (İzmir), Mersin and Filyos (Zonguldak).

The Turkish government has plans to build a canal called Kanal İstanbul that will run parallel to the Bosphorus Strait. Although the Bosphorus Strait already has two ports (Haydarpaşa and İstanbul), the planned project includes the construction of additional ports as

TURUNÇ

Esin Çamlıbel

ecamlibel@turunc.av.tr

Naz Esen

nesen@turunc.av.tr

Beste Yıldızlı Ergül

byildizli@turunc.av.tr

Teşvikiye Caddesi 19/11
Teşvikiye 34365
İstanbul
Turkey
Tel: +90 212 259 45 36
Fax: +90 212 259 45 38

Cumhuriyet Bulvarı 140/1
Alsancak 35210
İzmir
Turkey
Tel: +90 232 463 49 07
Fax: +90 232 463 49 09

www.turunc.av.tr

integrated units: Küçükçekmece Marina, Marmara Container Port and Karadeniz Container Port. Because of the magnitude of financing required, the potential adverse environmental impact of the project and the seeming lack of popular support, whether the canal project will be completed is uncertain.

We expect activity in this sector to continue to be significant, in large part thanks to Turkey's strategic location at the crossroads of important trade routes.

Other titles available in this series

Acquisition Finance	Distribution & Agency	Islamic Finance & Markets	Rail Transport
Advertising & Marketing	Domains & Domain Names	Joint Ventures	Real Estate
Agribusiness	Dominance	Labour & Employment	Real Estate M&A
Air Transport	Drone Regulation	Legal Privilege & Professional Secrecy	Renewable Energy
Anti-Corruption Regulation	Electricity Regulation	Licensing	Restructuring & Insolvency
Anti-Money Laundering	Energy Disputes	Life Sciences	Right of Publicity
Appeals	Enforcement of Foreign Judgments	Litigation Funding	Risk & Compliance Management
Arbitration	Environment & Climate Regulation	Loans & Secured Financing	Securities Finance
Art Law	Equity Derivatives	Luxury & Fashion	Securities Litigation
Asset Recovery	Executive Compensation & Employee Benefits	M&A Litigation	Shareholder Activism & Engagement
Automotive	Financial Services Compliance	Mediation	Ship Finance
Aviation Finance & Leasing	Financial Services Litigation	Merger Control	Shipbuilding
Aviation Liability	Fintech	Mining	Shipping
Banking Regulation	Foreign Investment Review	Oil Regulation	Sovereign Immunity
Business & Human Rights	Franchise	Partnerships	Sports Law
Cartel Regulation	Fund Management	Patents	State Aid
Class Actions	Gaming	Pensions & Retirement Plans	Structured Finance & Securitisation
Cloud Computing	Gas Regulation	Pharma & Medical Device Regulation	Tax Controversy
Commercial Contracts	Government Investigations	Pharmaceutical Antitrust	Tax on Inbound Investment
Competition Compliance	Government Relations	Ports & Terminals	Technology M&A
Complex Commercial Litigation	Healthcare Enforcement & Litigation	Private Antitrust Litigation	Telecoms & Media
Construction	Healthcare M&A	Private Banking & Wealth Management	Trade & Customs
Copyright	High-Yield Debt	Private Client	Trademarks
Corporate Governance	Initial Public Offerings	Private Equity	Transfer Pricing
Corporate Immigration	Insurance & Reinsurance	Private M&A	Vertical Agreements
Corporate Reorganisations	Insurance Litigation	Product Liability	
Cybersecurity	Intellectual Property & Antitrust	Product Recall	
Data Protection & Privacy	Investment Treaty Arbitration	Project Finance	
Debt Capital Markets		Public M&A	
Defence & Security		Public Procurement	
Procurement		Public-Private Partnerships	
Digital Business			
Dispute Resolution			

Also available digitally

lexology.com/gtdt