Privatization of port authorities

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Authors

Ana Cândida de Mello Carvalho

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Seen by Brazil's federal government as the next frontier for development of the country's port sector, privatization of port authorities will undergo its first test with the auction of the Espírito Santo Port Authority Company, Codesa (Companhia Docas do Espírito Santo), scheduled for March 2022.

Currently, Brazil's ports are managed by stateowned port authorities subject to a public law regime. With privatization, the legal regime applicable to the authorities will be the private law, resulting in greater agility in decisionmaking, more flexibility in negotiations and contracting, and incentives for investment in new technologies.

The model provided for under the Codesa privatization – which can be expected to be replicated in future privatization projects – combines a sale of the shares in the port authority with a concession to provide the public service of managing organized ports. The criterion for selection of the winning bidder will be the highest bid.

In the case of Codesa, the government expects that privatization will be able to double the port complex cargo movement.

Given the pioneering nature of the proposal, the complexity of the projects, and the long term of the commitments to be assumed by the investors (35 years minimum), there are a number of legal challenges that will need to be addressed.

One of them is the restriction on participation in the privatization auctions imposed to companies that hold leases or adhesion contracts in the privatized ports. According to the Codesa privatization documents, such companies may only participate through consortia, holding a maximum individual interest of 15%, while the aggregate interest of all such companies cannot exceed 40%. Furthermore, these companies are barred from being part of Codesa's control group.

In addition to the barriers on participation by these companies, there are also questions over how to accommodate existing port leases in the new, privatized reality in order to minimize negative impacts. Under the Codesa model, existing port contracts must be respected, but they will have to be adjusted to reflect the private law regime within 180 days, and the parties will be able to use the opportunity renegotiate the terms of the contracts.

Other port authority privatization projects are already on the horizon, and should follow the Codesa model: (i) the Santos Port Authority – SPA for the Port of Santos in the State of São Paulo, with draft privatization bid documents already available for contributions in Public Hearing no. 01/2022-ANTAQ; (ii) the Itajaí port authority, in the state of Santa Catarina; and (iii) the São Sebastião port authority, in the state of São Paulo.

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Ana Cândida de Mello Carvalho