

# Ports & Terminals 2020

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# Ports & Terminals 2020

**Contributing editor****Alex Kyriakoulis**

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Lexology Getting The Deal Through is delighted to publish the fifth edition of *Ports & Terminals*, which is available in print and online at [www.lexology.com/gtdt](http://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 a new chapter on Nigeria.

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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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# Mozambique

Teresa Empis Falcão and Guilherme Dode Daniel

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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?

The key ports in Mozambique are the port of Maputo (southwest of Mozambique), port of Beira (centre of Mozambique) and the port of Nacala (north of Mozambique).

There are other smaller ports in the Province of Gaza (Port of Xai-Xai), Inhambane, Quelimane and Pemba.

Despite being small, the Port of Pemba gained more relevance due to the fact that it recently became the fourth port to receive petroleum products imported for local consumption. This relevance is likely to increase with the implementation of the Rovuma Basin gas projects.

The Port of Maputo is the biggest Mozambican port in terms of annual volumes of cargo, with capacity to handle more than 26 million tons a year. The port is composed of two different areas, namely the Maputo cargo terminals, also called the commercial port and the Matola Bulk Terminals. The Maputo cargo terminals includes fishing, cabotage, general cargo, coal, fruit, sugar, containers, cars and steel terminals and tanks of molasses. The Matola bulk terminals comprise the coal, oil, cereals and aluminium terminals.

The Port of Nacala is the largest deep-water natural harbour on the East African coast. It currently has a general cargo terminal, eight warehouses and a container terminal and was connected by rail to the Tete province to allow the export of coal by Vale Moçambique.

The ports indicated above stand out in the SADC region as strategic infrastructures on which hinterland countries rely for a significant part of their imports and exports.

### 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 management of the ports in Mozambique was carried out by the former National Directorate of Ports and Railways until 1989, the year in which that role was taken on by the state-owned company Empresa Nacional de Portos e Caminhos de Ferro de Moçambique (CFM), created by Decree No. 6/89, of 11 May 1989.

With the launch of port concessions by the state, namely in the ports of Maputo, Beira and Quelimane, CFM was replaced by the relevant concessionaires as port operator in each of those ports and the landlord model, based on public-private partnerships (PPP) under a concession regime, became the principal port model in Mozambique.

The Port of Pemba and the fuel terminals in all ports of the country are managed directly by CFM.

### State development policy

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

Mozambique does not have an overall state policy for the development of ports. However, Resolution No. 5/96, of 2 April 1996, which approves the Mozambican Transport Policy, introduced a chapter on port policy, establishing, among others, the following objectives regarding ports in Mozambique:

- increasing the operational efficiency of the ports;
- encouraging the modernisation of management techniques, ranging from the operational to the human resources matters;
- encouraging the participation of private capital in the creation of new infrastructure, port operations and port services, by means of management contracts, full or partial concessions, in partnership with the state-owned port operator (joint venture); and
- fostering exploration of specialist terminals by means of full or partial concessions to private parties (joint venture).

### Green ports

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

Mozambique has a Regulation for the Prevention of Pollution and Protection of the Marine and Coastal Environment, approved by Decree No. 45/2006, of 30 November 2006.

Regarding ports, this Regulation establishes the main principle that all ports must have adequate means for the collection and treatment of various types of waste to combat pollution.

As a result of this principle, port operators must have a manual of internal procedures for the management of pollution risks, as well as for the management of the various types of waste generated or derived from the handling and storage activities of oils and harmful substances. Port operators must also have individual contingency plans to combat pollution from oil and harmful substances.

## LEGISLATIVE FRAMEWORK AND REGULATION

### Development framework

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

There is no specific legal framework for port development or operations in Mozambique. However, this activity is regulated by the Transport Policy and the PPP Law and its Regulation, as all concessions of ports and terminals awarded to private entities are under the PPP regime.

## Regulatory authorities

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

The Ministry of Transport and Communications is the single regulatory authority for all ports in Mozambique.

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

The port regulatory authority is generally responsible for the development and security of all ports in Mozambique.

Other competences typical of a port regulatory authority lie with the port operator, including:

- supervising all services related to the economic exploitation of the port and the personnel involved in them and collect the corresponding revenues, promoting the execution of all the works and the acquisition of all the equipment necessary for the development of the port and the efficiency of its services;
- defining of the tariffs regime to be applied in the provision of port services;
- defining fines enforce and collect the same in the case of non-compliance with the applicable regulations;
- ensuring compliance with applicable regulations;
- ensuring security within the area of port jurisdiction;
- carrying out inspections to vessels, goods and equipment within the port area without prejudice to the powers conferred on other entities; and
- planning of the territory within the perimeter of the port or the concession in accordance with the plans of development and of territorial occupation previously approved by competent authority.

## Harbourmasters

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

The harbourmaster is a naval officer appointed by order of the Minister of Transport and Communications.

## Competition

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

The ports are subject to general competition rules established in Law No. 10/2013, of 11 April 2013 – the Legal Framework for Competition (Competition Act); however, six years after the enactment of the Competition Act the relevant regulatory body has not yet been appointed.

## 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?

For ports under a concession regime, the concessionaire (private operator) is the entity responsible for establishing the tariff regime to be applied to the provision of port services.

CFM also has a Port Tariff Book, which is a document approved by its board of directors, which applies to the ports or terminals that are under the direct management of CFM. Private operators generally use the Port Tariff Book as reference for setting up the tariffs in the ports operated by them.

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?

Tariffs or fees payable to the government are always established and payable in the official currency, metical. There are no restrictions as to the currency that may apply to the tariffs or to any fees payable to any other entities, notably, to port operators; however, local invoices (issued to Mozambican entities) must be in meticals. Exchange rates are based in agreements by the parties involved but in general by reference to the exchange rate of a specific commercial bank on the payment date.

## 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?

Port areas in Mozambique are classified by law as Partial Protection Zones and are considered part of the public domain. Therefore, all citizens have to be given free access to port areas.

The port authority transfers certain of these public service obligations to private operators through concession contracts (for port terminals) and licences (other port services).

## 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?

The Mozambican Transport Policy encourages joint ventures between the state entity and private parties for the development and operation of ports in Mozambique and Law No. 15/2001, of 10 August 2001 – Public-Private Partnerships, Large-scale Projects and Business Concessions Law (PPP Law) – will apply. Pursuant to PPP Law, if a state entity enters into a joint venture with a private entity, the state entity must have a stake in the share capital of the port operator that shall be not less than 5 per cent and more than 20 per cent of the total investment.

## Foreign participation

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

There is no restriction on the participation of foreigners in port or terminal projects, unless a participation is reserved for sale via the stock market in favour of economic inclusion in commercial market terms, preferably of Mozambican natural persons, in the capital of the enterprise or in capital of the consortium, whether or not involved in foreign investment, guaranteed through the Mozambican state or other public entity, in a percentage of not less than 5 per cent nor more than 20 per cent of the capital.

## PUBLIC PROCUREMENT AND PPP

### Legislation

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

The legislation governing procurement and PPP is general.

Procurement is governed by Decree No. 5/2016, of 8 March 2016, which approves the Regulation of Contracting of Public Works, Supply of Goods and Provision of Services to the State (Public Procurement

Regulation). This piece of legislation sets out both the procedural rules applicable to public tenders and the substantive regime governing the execution of public contracts, including specific liability rules.

In turn, PPPs are governed by the PPP Law and Decree No. 16/2012, of 4 June 2012 – Regulation of the Public-Private Partnerships, Large-scale Projects and Business Concessions Law (PPP Regulation), which establishes the guidelines for entering into, implementing and monitoring PPP, the principles applicable to the institutional framework, process and procedure, specific provisions for each type of project, guarantees and incentives, benefit sharing, irregularities and their administrative treatment.

### Proposal consideration

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

There is room for unsolicited proposals for port PPP, without prejudice to the application of the procedure established in the Public Procurement Regulation for the award of concessions. Privatisation of the ports is currently not permitted under applicable legislation in Mozambique.

### Joint venture and concession criteria

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

The key consideration for the award of port or terminal concessions is the utmost satisfaction of public interest together with other more technical criteria that may be defined in the public tender.

The Public Procurement Regulation establishes the following criteria for the award of public services:

- higher price offer for the grant;
- lower tariff or price to be charged from users;
- better quality of services or goods made available to the public; and
- better service and demand satisfaction.

### 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?**

The concession contract is the common contractual structure for port projects. There is no model concession contract that the public body is compelled to use for that purpose. However, the form concession contract must be included in the tender documents and there is limited room for deviating from it thereafter.

### 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?**

Following the public tender, the government issues a decree with the terms of the concession, therefore, establishing the legal basis for the concession to the private operator of the construction, operation, maintenance or management of the port or terminal, as a PPP. The terms of the concession are individual and specific to each port or terminal.

### Projects

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

Most port concessions awarded to date were brownfield projects. Indeed, given that the ports were designed and built by the government or port authority in the colonial period, the activities transferred to the private operator were limited to the operation and management of the port or terminal.

The construction of new terminals by the private operator was included in more recent concessions, including the recently (2018) awarded concessions for the LNG and materials off-loading terminals in Afungi, Palma in connection with the Rovuma Basin gas projects.

Accordingly, the most used PPP models for ports and terminals in Mozambique are ROOT (rehabilitate-operate-own-transfer) and BOOT (build-own-operate-transfer) or DBOOT (design-build-own-operate-transfer), or the parties may opt for a combination of the existing models, agreed under the terms of the concession contract.

### Term length

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

The law establishes a maximum period of 30 years for greenfield concessions and 20 years for concessions where the infrastructure is already built but requires rehabilitation or expansion. For other types of PPP contracts, the law does not establish a minimum term, the duration being determined taking into account the project economic and financial attractiveness, the time required for its implementation and for recovery of the invested capital.

22 | **On what basis can the term be extended?**

Concession contracts for greenfield projects may be extended for a maximum period of 10 years in case of large projects and where the project life cycle and technological or biological requirements of their implementation or process of their implementation so require.

The government may also, by means of an addendum to the contract, extend its duration for the time required for the compensation of:

- any additional investments made at the express request of the government and agreed in an addendum to the contract approved by the competent entity;
- price or tariff policy fixed by the government, below the cost price and the agreed profitability; and
- mitigation of the effects of any force majeure event.

### Fee structures

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

The fee structure is a combination of fixed and variable rates (award and concession) and revenue shares.

The PPP Law foresees the payment of an award or subscription bonus that must be between 0.5 per cent and 5 per cent of the value of the concession assets. In addition, it also provides for a concession fee payable monthly, quarterly, semi-annually or annually as agreed between the parties with an element subject to variable rate from 2 per cent to 10 per cent of revenues and another to a fixed rate from 2 per cent to 5 per cent of the value of the concession assets.

## Exclusivity

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

Under the PPP Law, the government may, in the case of a strategic project or of a special socio-economic interest for the country that is not financially viable on its own:

- contribute with financing or provide a financial guarantee to the project;
- facilitate the access to guarantees for financing requested from multilateral or governmental institutions; and
- grant subsidies or compensation for the provision of its services at prices or tariffs fixed administratively below or at the tangent of its actual cost.

## Other incentives

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

The government may grant some tax benefits and incentives under Law No. 3/93, of 24 June 1993 (Investment Law). In the case of the port industry, there is no specific regime applicable to the sector, unlike in the case of investments in the oil and gas industry.

Notably, the Investment Law foresees benefits such as the allowance for repatriation of profits abroad, if the capital invested is higher than approximately US\$40,000, exemption on imports of goods in class K of the Customs Tariff, permission to hire a certain number of foreign employees for the project. Projects implemented in special economic zones also have benefits such as exemption in the importation and exportation of goods produced in those areas.

To be eligible for these benefits private entities must file an application with the Agency for the Promotion of Investments and Exports and the project must be approved by this entity.

## 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?

Ports constitute partial protection zones and, therefore, the government must issue a Special Licence for their construction or exploitation. This licence is given to the port operator with the concession contract (attached to the terms of concession).

The time for obtaining said licences depends on the specifics of the case. An environmental licence may also be needed on a case-by-case basis. Where the private operator assumes the construction or expansion of a new terminal, it shall be subject to an environmental impact assessment, which may take up to 45 business days for government approval for the activities in the Category A.

### Port construction

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

Most ports in Mozambique were built in the colonial period, and only recently have new terminals been built.

Although the construction of new terminals may, from a legal point of view, be carried out either by the port authority or the private operator, depending on what is agreed in the concession contract, it is usually the private operator who is responsible for the entire construction, as it happened, for example, at the port and logistics terminals

of Pemba and Palma, in the province of Cabo Delgado, and in the coal terminal in the port of Beira (Pier 13), in the province of Sofala.

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

The construction standards are commonly agreed in the concession contract and the private operator is expected to use the required quality standards for the construction of the ports or terminals.

The port operator may engage any contractor it wishes, unless the identity of, or requirements applicable to, the contractor are set out in the concession contract.

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

In the event of delays or defects in construction, the private operator may be subject to penalties under the concession contract. In the case of a material breach that affects the objectives and purposes of the project that is not remedied by the port operator, the port authority will be entitled to terminate the contract.

## 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?

No specific approvals are required for the port operator to commence operations following construction, as the right to operate a terminal is given by the concession contract and the terms of concession.

### 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?

The services typically provided by the port operators are pilotage, towing, mooring and unblocking, stowage on board ships and at berth, handling of cargo, storage, fuelling, water and electricity supply to ships, among others. The port authority may, unless the concession contract allocates those services to the private port operator, provide the following services: safety of the port area, inspection of vessels, goods and equipment in the port area and creation of public interest easements.

### 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?

Ensuring access to the hinterland (rail, road, etc) is an obligation of the government and the port authority have no responsibilities in that regard. The operator only has obligations to perform works on land or water in the area of the concession, namely construction works, maintenance works, dredging and provision of any other services, activities or works that have been duly authorised for achieving the purpose set out in the concession contract.

## 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 powers to inspect port operations are established in the general legislation and in the concession contract.

The causes for suspending or terminating those operations must be specified in the concession contract. Although the law lists some causes that can lead to the suspension or termination, namely material breach of contract or in the implementation of its object, abandonment of the performance of the activity agreed in the contract, transfer to a third party of the rights and obligations of the port operator or the operation of another business, failure to pay fees or other payments established in the contract and default in the provision of the agreed services.

Before suspending or terminating the port operations, the port authority must notify the port operator in writing to comply with its obligations and remedy any outstanding default and to compensate the port authority for any damages resulting from the breach of contract, within a period not exceeding 120 days.

If the port operator fails to comply with its obligations or to repair the damages caused by its non-compliance by the deadline indicated, the port authority may, unless another procedure has been foreseen in the concession contract, terminate the contract immediately by written communication to the port operator.

## Port access and control

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

The port authority may take over the port operations if protection of public interest, public order and public safety so justifies, despite there is no default or responsibility of the port operator. In this case, the operator is entitled to receive a compensation, considering the remaining time of the contract for the recovery of investments, if another principle has not been stipulated in the contract.

See the causes indicated in the response 33.

## 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?

The port operator may be subject to penalties in case of failure to operate and maintain the port as agreed and, if such failure is material and not remedied or capable of being remedied, the port authority has the right to terminate the contract. The operator is, in any case, subject to the general rules of civil liability and, therefore, may be responsible for all damages incurred.

## 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?

The concession contract can foresee the terms under which the reversion and transfer of assets will take place.

In accordance with applicable law, after termination of the concession the operator must transfer all the assets necessary to operate and maintain the terminal to the port authority, including those that it has received at the beginning of the contract and those bought or construed by the concessionaire. These assets shall revert free of charge and in

good working condition and the operator has no claim to compensation or retention unless otherwise stated in the contract. The operator is, however, entitled to compensation or reimbursement for investments previously agreed upon and realised but not yet amortised.

## 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?

The port operator shall be in the form of a commercial company, in accordance with the commercial law applicable in Mozambique. The purpose of the company must clearly be the implementation of such project and the duration of the company cannot be less than the period of validity of the concession contract. The new company must be incorporated in Mozambique but the shareholders can be foreign entities or individuals.

### Transferring ownership interests

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

Generally, the transfer of ownership interests is subject to prior authorisation of the port authority under the relevant concession contract, not to be unreasonably denied.

### 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?

The port operator may grant security over its rights under the PPP agreement to its financing banks, the creation and enforcement of such security being often subject to the prior authorisation of the grantor. The same apply to the concession assets.

Under the laws of Mozambique, land cannot be privately owned and, accordingly, cannot be mortgaged. Buildings erected on land covered by a DUAT (right to use and benefit from land) may be privately owned and granted mortgages, unless they are in the public domain. Assets that are in the public domain cannot be encumbered.

Mortgages and pledges are the most common security interests created under the laws of Mozambique and their terms and formalities vary depending on the type of assets at stake. Assignments of receivables or of future credit rights by way of security are also quasi-security interests commonly used.

### Agreement variation and termination

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

The agreements to construct or operate a port facility have, as a rule, specific clauses relating to the modification of the contract and the terms under which the said modification is admissible. The modification of a contract is limited by law and can only occur by agreement between the contracting parties or for correcting or adjusting situations arising out of events or factors unrelated to the will and capacity (professional or managerial) of either contracting party, and for the purpose of mitigating the effects of force majeure events.



Termination of the contract can occur in the event of a severe breach or for reasons of public interest. It may also occur in the following cases:

- the abandonment of the performance of the contract or implementation of its object or its unjustified suspension;
- the transmission by the contractor of his contractual position, or the conclusion and operation of another business for the same purposes as the current contract, either temporarily or definitively, without the written approval or consent of the contractor and the entities responsible for the sectoral and financial supervision;
- non-payment of fees or other compensation due under the contract; and
- non-compliance in the provision of public service, under the contractually agreed terms.

### Contractual breach

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

One of the mandatory clauses in a PPP contract is the indication of applicable sanctions and the manner in which they may be applied in cases of non-compliance or other breach of contract. Moreover, a serious breach of contract, which affects the aims and purposes of the project, may lead to termination of the contract.

### Governing law

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

In accordance with the PPP Law, the contract for the concession of ports or terminals should be governed by Mozambican law. Also, construction contracts entered in Mozambique must be governed by Mozambican law. Those construction contracts do not need to be executed in Portuguese, although a Portuguese version may be required for registration purposes and other acts before Mozambican public entities.

### Disputes

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

Disputes are resolved under the terms defined by the parties in the concession contract. Usually, the parties privilege conflict resolution through mediation and arbitration.

Mozambique has a regime of alternative means of conflict resolution, established by Law No. 11/99, of 8 July 1999 – Law of Arbitration, Conciliation and Mediation.

The parties can also resolve disputes in the general courts.

## UPDATE AND TRENDS

### Key developments of the past year

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

The most important recent development was the announcement made in June by the Minister of Transport and Communications Carlos Mesquita that the government is preparing a preliminary new Ports Law aimed at increasing the operational efficiency of the national port system by attracting investments and removing obstacles hampering the exploitation of existing capacity. The new law, which is also aimed at encouraging the participation of the private sector and attract Investment in new infrastructure and port services, will provide incentives for the creation and rehabilitation of secondary and tertiary ports in Mozambique.



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The government also announced that a tariff policy is being developed to encourage free competition in the ports and rail sector.

This year was also marked by the announcement in May of the creation of an association of port operators dedicated to defending and promoting the interests of its members.

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