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Private Port Terminals: New Rules

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Introduction

The National Waterway Transportation Agency (ANTAQ) has recently opened for public comment and consultation its proposed rule on licenses to build, operate and expand private port terminals.

Private port terminals are not subject to the same legal system as that applying to public terminals: the latter are governed by a lease contract that is executed with the winner in a public tender process, whereas the former are subject to authorization under an adhesion contract.

The rule proposed by ANTAQ (Rule), if approved, will replace ANTAQ Resolution No. 517 of October 18, 2005 and thus bring the private port use system in line with Decree 6,620 of 2008, which partially regulates the Brazilian Ports Law (Law 8,630 of 1993).

The Rule is more detailed than Resolution 517 and, as such, may give greater certainty to authorizations for building, operation and expansion of private port terminals – despite the debatable issues in the Rule as currently drafted and submitted for public consultation.

Main points in the proposed Rule

Adhesion contract – The major innovation in the Rule lies in replacing the “authorization” under Resolution 517 with an “adhesion contract”. The Rule also innovates by attaching a standard adhesion contract to be executed between the Brazilian waterway regulatory agency and authorized entities. It also contains template statements, applications and forms.

Term – Whereas an authorization is valid indefinitely under Resolution 517, the Rule stipulates the effective term at 25 years, renewable only once for a like period. However, the

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Rule has not established objective criteria for renewal: the term “may” be renewed “by operation of law, in the public interest.”

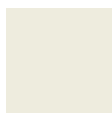
Transfer of title – Under the Rule, the authorization may be transferred to third parties upon the prior express consent of ANTAQ, provided that “the original conditions are respected.” The assignee must meet the technical and legal qualifications originally required for the authorization in point.

Early termination – The Rule provides for early termination of authorizations in the cases of annulment, reporting of bad standing status, or cancellation. Annulment is treated in the Rule as a penalty, which is technically incorrect. Bad standing is declared, among other events, upon (i) the existence of unlawful acts, (ii) reporting of false data or information by the authorized entity, (iii) exercise of senior management position by a person “convicted of illegal appropriation of public or private assets, taking undue advantage of public office, active or passive bribery, misfeasance in office, smuggling and import underreporting, or crimes against the economic system or good faith”; or (iv) abuse of economic power or engagement in anticompetitive practices.

Further, an authorization may be cancelled if, among other events, (i) the penalties imposed by ANTAQ on the authorized entity are not met, (ii) a notice for correction of terminal works or operations is disregarded, (iii) ANTAQ’s inspection activity is impaired or obstructed; (iv) ANTAQ is not provided with information upon request, (v) monthly reports on cargo handling are not released, (vi) the “indispensable conditions for compliance with the authorization” are no longer present; or (vii) an authorization is transferred to third parties without prior approval.

Fines – The list of offenses punishable by a fine has increased considerably under the Rule as compared to Resolution 517, and the maximum fines for existing offenses have increased sharply (threefold, in some cases). On the other hand, the Rule states that, if a minor offense is committed and there are mitigating circumstances (first-time offense, etc.), the offender may be punished by a warning only.

Expropriation – The template adhesion contract available in the Rule expressly provides for non-reversion of assets. Although this provision is technically unnecessary (since the non-reversion of assets is inherent to an authorization), it could in principle provide greater security to the authorization holder. However, the template document then states that “if the public interest so justifies, the Federal Government may opt to operate the terminal on its own, in which case the movable and immovable properties (...) will revert to the Federal Government, after fair compensation” to the authorization holder. The lawfulness of such provision is clearly questionable.



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Own Cargo – The Rule conforms the ANTAQ regulations to the new criteria set out in Decree 6,620 of 2008 with regard to handling of own cargo by composite private terminals. Overlooking the controversies that revolved around Decree 6,620, the Rule adopts the same classifications: (i) own cargo stands for “the cargo belonging to the authorization holder, its parent or controlled company, which technically and economically justifies the setup and operation of port facilities under the authorization”; and (ii) third-party cargo stands for “the cargo that is consistent with the technical characteristics of the infrastructure and superstructure of the authorized terminal, with the same storage and handling characteristics, as well as the same nature of authorized own cargo that technically and economically justified the application for setup of a private terminal, the operation of which occurs in an occasional and subsidiary manner.”

Shipyards – The Rule generally allows shipyards to run private port terminals upon authorization, even though such matter would surely deserve a more detailed regulation. In this case, handling of own cargo may be evidenced by invoices or bills of lading for the goods or services related to shipyard activity, backed by a supply contract.

Conclusion

The new rule proposed by ANTAQ has surely taken a leap forward, but some adjustments to the draft rule would be most welcome to bring even greater legal certainty for authorized entities acting in the private port terminal segment.

São Paulo, August 7, 2009.