

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2016

GETTING THE
DEAL THROUGH

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DEAL THROUGH 

Ports & Terminals 2016

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Published by
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London, W11 1QQ, UK
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Fax: +44 20 7229 6910



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First published 2015
ISSN 2397-0316

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



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Global overview

Alex Kyriakoulis

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Ports and terminals today

Ports and terminals are vital to the global economy. In the US and China, the world's two largest economies, more than 90 per cent of imported and exported cargo moves through commercial ports. For coastal states and islands such as those in the Caribbean or the Mediterranean that rely heavily on tourism, and in particular the cruise industry, ports are the lifeblood of their economies. The rising demand of emerging markets such as the 'BRIC' countries (Brazil, Russia, India and China) has led to a significant increase in the use of containers, and to the emergence of large multi-terminal operators adept at designing, financing, constructing, operating and maintaining terminals capable of efficiently moving, storing and repairing huge numbers of containers. In addition, the commodities boom fuelled by this rising demand has contributed to increased investment in bulk cargo terminals (coal, iron ore, grain, etc), owned and operated by multinational agricultural and mining companies and commodities traders seeking to export their raw materials to the growing economies of the world.

A vast (and increasing) number of ports and terminals are globally in operation, and their operating structures, capabilities and objectives are diverse. Some ports only have a passenger or cruise terminal; others might also handle (or only handle) cargo; while others consist of one or more specialist terminals such as bulk, container or LPG/LNG terminals. Terminals may then be further segmented into gateway terminals, that is, terminals used primarily for the importing of cargo, or trans-shipment terminals which move cargo from one vessel to another smaller or larger vessel.

Constructing or developing a port or terminal generally requires significant financial investment, and governments and port authorities are not always willing or able to make such an investment. At the same time, corporatisation and privatisation of ports has been shown to lead to increased profitability and enhanced employment opportunities. There have, consequently, been major changes in the ownership and operating structure of many ports, driven by the increasingly prominent role of the private sector, both as a source of finance and as the provider of some (or in some cases all) of the services required for the successful operation of a modern port. This in turn has led to a diminished or altered role for the traditional owner and operator of a port, the port authority. Whatever the separation of roles between a port authority and a port operator or services provider, and whatever the type or location of the port, the most important party is ultimately the port customer. Without customers, any ambitious new port is destined to be a white elephant (as indeed has happened in some countries). The shipping lines, which have grown in size and influence through the increase in cargo traffic, through consolidation and through the establishment of alliances such as the 2M, Ocean 3, G6 and CKYHE alliances, are key drivers for the development of ports. The ever-increasing size of container ships being built on behalf of shipping lines (20,000 TEU capacity ships are currently under construction) means that many container terminals will need to continue to invest in their infrastructure and superstructures or equipment. The prohibitive cost of such investments is an important factor in the rise of the private sector in ports.

Getting a deal through, be it the development, operation, or the sale or purchase, of a port or terminal, requires an understanding of the roles of all the key parties involved in a port or terminal project (port authority, port operator, shipping lines, any employee unions, etc) and the dynamics between them; the legislative and regulatory backgrounds, and the different services that need to be provided at a port (marine, cargo handling, safety, etc) and who needs to provide them.

Port authorities and operators

The port authority has in most ports traditionally been its governing body and is usually part of, or supervised by, a ministry (merchant ministry, ministry of transport, ministry of public works, etc) of the country's government. Powers and duties of port authorities include establishing the standards and codes to be observed by providers and users of marine and port services and facilities; controlling the navigation within the perimeter of the port and the approaches to the port (including providing adequate navigational aids and disseminating navigational information); regulating the charges and fees payable by users of the port facilities; providing marine and port services and facilities such as towage, pilotage and berth scheduling (and where applicable exercising licensing and regulatory functions in respect thereof); and generally improving, developing and promoting the use of the port. Where the port authority is established at a national level, it may additionally be tasked with exercising regulatory functions in respect of merchant shipping, particularly in respect of safety at sea, the manning of vessels and the prevention of pollution at sea. Its functions may also include the promotion and safeguarding of a competitive, fair and efficient market (to the extent this is not the prerogative of an overarching national competition policy administered by a competition commission or similar), and developing, promoting and regulating employment and training within the shipping and port industries, promoting the development of merchant shipping, advising the government on matters relating to marine and port services and facilities (and on sea transportation generally); and representing the country at an international level (for example, at the International Maritime Organisation) in relation to marine and port matters generally. In some countries the port authority exercising the regulatory functions mentioned above may actually be a body called the 'ports regulator', with one or more separate port authorities supervising the operational aspects of the country's ports.

Many countries have, in the last few decades, succumbed to pressure to devolve the responsibility for the improvement of ports and their performance to self-sustaining (incorporated) entities, and to eliminate the provision to them of governmental subsidies and other state aid. Stakeholders such as the shipping lines calling at ports, as well as terminal and logistics operators, have been clear about the need for a modernisation of port governance practices, with a view to improving performance and efficiency. This has in large part been achieved through corporatisation. This is the process by which a public port enterprise is transformed into a private corporation (although, unless the corporatisation is followed by some form of privatisation, all or some of the equity in such corporation remains in public hands following the corporatisation). Corporatisation leads to changes in the institutional structure of the port business, which in turn often leads to the increased involvement of the private sector in the exploitation and financing of port facilities, terminals, and services. Port authorities have become more autonomous through the devolution of the decision-making from the government to the port company's directors, who are accountable to the corporation's shareholders (be they the state or private institutions or individuals). This has produced greater transparency in relation to port authority development, and prioritisation of business and customer satisfaction. True privatisation of port authorities, in other words the sale of shares in the entity that owns the port land or exercises regulatory functions, is relatively rare. For example, the privatisation of the Piraeus and Thessaloniki authorities through IPOs in the early 2000s was actually an offering of shares in companies that had concessions (see below) to run the respective ports for a finite period of time. Similarly, the subsequent

privatisation of those port authorities that was launched in 2013–2014 in the wake of the Greek debt crisis is actually nothing more than the sale of the majority stake in those two listed companies that was retained by the state at the time of the earlier IPOs. Of the larger developed countries, only the UK implemented outright privatisation of some of its ports.

The rise of concessions

The term privatisation is often used to describe something that is actually quite different to the UK model. It usually refers to the process of the port authority (or other relevant governmental body or entity with the relevant rights and powers) granting to a private party certain rights and obligations in relation to a port for a number of years under a 'concession agreement'. This is in essence a public-private partnership. In these partnerships governments (acting through the port authority) will retain, or rather create, the role of port regulator and also often act as the provider or licensor of marine services and sometimes land developers. The private party will assume the responsibility for the financing of port development and for the running of port operations, theoretically for a sufficiently long period of time to make a return on its investment. The appeal of concessions is that states can transfer a major part of the financial and operational risks in developing and operating terminals to the private sector while permitting them to retain ultimate ownership of the port land and responsibility for licensing port operations and construction activities, and thereby to safeguard public interests. Concession agreements and leasehold agreements are quite similar, and in some jurisdictions they are considered to be more or less the same thing. In practice, a concession agreement typically goes further than a lease in that it governs the entire relationship between the government and the private sector regarding the right to exploit port land and facilities as well as the obligation to construct port infrastructure and provide superstructure. A lease is sometimes entered into in addition to a concession agreement so that the leaseholder's (concessionaire's) interest in the land can be registered with the relevant land registry or cadastre.

How far a government will go in terms of transferring responsibilities for port development or operations to the private sector through concessions depends on a number of factors, including political considerations and the underlying constitution or legal regime; the financial investment capabilities and anticipated returns profile of the project; the extent of the port authority's ability and desire to provide services in relation to the port; and the power of stevedores' and other port employees' unions. Sometimes a port authority will, in addition to entering into a concession agreement, also have an interest in the company that is granted the concession. By investing equity the port authority participates in the economic success (or failure) of the concession and becomes more directly involved in port operations, but this is not always permitted. Such participation may be acceptable if there is a monopoly in the port (and there is therefore no existing or potential intra-port competition) but in other cases a conflict of interest may arise between the roles of the port authority as an investor and as the regulator of the monopoly (unless the two roles have been adequately separated from one another).

Port concession tenders

Not all countries have the necessary legal frameworks to grant concessions. In some cases there is a general law dealing with concessions, which may cover ports, but if the country is implementing a wholesale privatisation of its ports there may be a specific law in force. Sometimes a law needs to be passed specifically in order to enable the port authority to grant a concession or for the government to ratify the grant. Generally these laws set out the extent of any concession in terms of its duration and the ports services for which the port operator may or may not take responsibility under the concession. They will sometimes also deal with the right of, or as the case may be, prohibition on, the state or port authority taking an interest in the company (usually a special purpose vehicle) that will be awarded the concession.

Where the granting of a concession is permitted under such laws, the awarding authority usually runs an open tender, and awards the concession to the tenderer offering the terms which are most beneficial to the state. These tenders are usually split into phases; in the first phase tenderers typically evidence their technical qualifications and financial

wherewithal to design, construct, finance, operate and/or maintain the port or terminal (or relevant services there). Subject to satisfying the technical and financial qualification criteria, tenderers then proceed to the next round where they are given the opportunity to investigate the project further, comment on the concession terms and provide their binding offers. This round is sometimes followed by a further negotiation round with one or two of the tenderers. The need for an open tender as opposed to a bilateral negotiation with a port operator is usually driven by the existence of national procurement rules designed to ensure that the state is achieving the best possible deal available to it at the time. A tender may also assist in countering claims that the terms of the concession constitute unlawful state aid, on the basis that the tender process will have served to 'test' the market and that the terms are therefore the best achievable on an arm's-length basis. The need for a tender may also be driven by the involvement of international financing institutions such as the World Bank/IFC or the EBRD, who may require a transparent process in order to provide finance for the project. International financing institutions have shown increasing interest in the port sector, seeking ways to facilitate port reform either by providing expertise or direct financing through commercial loans or subscription for project bonds.

Some port category terminology

As a result of the changes in the way ports are organised, structured and managed following varying degrees of port reform, ports now tend to be categorised as either service ports, tool ports, landlord ports or fully privatised ports. Service and tool ports mainly focus on the realisation of public interests. Landlord ports have a mixed character and aim to strike a balance between public (port authority) and private (port industry) interests. Fully privatised ports focus on private (shareholder) interests. In a service port the port owns, maintains, and operates every available asset whether fixed or mobile. Such ports are usually ultimately controlled by the relevant ministry (public works, transport, maritime, etc) with the director of the port being a civil servant appointed by the minister concerned. The number of service ports is declining, as many former service ports are gradually becoming landlord ports. Tool ports are similar to service ports but stevedoring is usually carried out by private firms. The landlord port is characterised by its mixed public-private nature. Under this model, the port authority acts as the landlord and often as the regulatory body while private companies carry out the port operations (especially stevedoring) pursuant to a concession, as mentioned earlier. The private port operators provide and maintain their own superstructure including buildings (offices, sheds, warehouses, container freight stations, workshops), and purchase and install their own equipment on the terminal as required by their business. Fully privatised ports are, as also mentioned earlier, few in number and lead to the state no longer having any meaningful involvement or public policy interest in the port sector, although these ports are still subject to overriding laws affecting all infrastructure assets such as land planning, environmental and health and safety legislation.

Environmental issues

The heightened global environmental awareness due to climate change and health issues has not left the port sector unaffected. On the legislative side there are obligations, for example those in the EU requiring ships to burn fuel of 0.1 per cent sulphur content when within EU ports or within EU inland waterways. At the same time, when awarding concessions port authorities are increasingly examining port operators' 'green port' credentials, and proposals such as the use of cold ironing or shore power; zero emissions technology for port equipment and vehicles; sustainable power generation (wind and solar); reducing or managing water run-off; effective dust suppression systems for dry bulk cargoes (dry fog, etc); recycled concrete and other green construction materials, etc, are often required. In addition, some ports such as the Port of Rotterdam provide discounts on port dues to sustainable seagoing vessels, that is, vessels that score high on the Environmental Simulations International (an international benchmark for emissions from seagoing vessels). These developments are sure to continue and impact on the way in which ports are constructed and operated.

Australia

Amanda Davidson, Christopher G Eves and Anne-Laure Bullier

Holman Fenwick Willan LLP

General

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?

Key ports in Australia, located in close proximity to state or territory capital cities, are largely container ports importing consumer goods. Ports connected to supply chains for bulk cargoes serve the resources sector for the export of iron ore, liquefied petroleum gas (LPG) and coal. The majority of these are located in regional Western Australia and Queensland. General cargo ports, along with live cattle exports, are located in smaller regional ports from Adelaide to Darwin.

2 Describe any port reform that has been undertaken over the last few decades and the principal port model or models in your jurisdiction.

Recent port reform in Australia has restructured the regulatory framework governing port operations to facilitate the privatisation of state-owned ports, ensure open access to the port infrastructure to users and to increase supply chain efficiency. Privatisation of ports has occurred recently on the Australian east coast where the ports of Brisbane, Newcastle and Botany, among others, have been privatised and the ports of Darwin, Melbourne and Fremantle have been earmarked for sale by competitive tender over the next 12 months.

The principal model for port ownership in Australia is the landlord model. Terminal leases previously held by state-owned port authorities are sold to private investors by the granting of a long-term head lease, usually in excess of 40 years, over all port land. This head lease conveys an economic interest in land used by terminal operators. The regulatory functions of the harbour master, channel and navigation are retained by state port authorities.

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

Each state and territory government has a policy for the long-term management and development of the ports in their state. This is mirrored at a port level by each regional port authority. The policy is published and open to public comment during the policy development stage. These policies for port development comprise areas of specific focus including port operations, industry development, environmental protection, community consultation and investment triggers for future port investment and expansion.

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

Key green port principles emerging in port development in Australia include the impact of port development (both construction and operation) on the environment, including the impact of sea dumping of dredge spoil and the impact of increased vessel traffic on marine life of all kinds including on marine habitat such as sea grasses. Green port principles extend to the use of diesel in fuelling landside plants and equipment, and the move to alternative fuels for that equipment such as LPG.

For example, the Sydney Green Port Guidelines cover all stages and aspects of the operation of the port, from resource consumption to environmental quality. These guidelines aim to encourage the key players to protect the community and adopt a sustainable business approach.

Legislative framework and regulation

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

Port privatisation does not rely on the prerogative powers of state or territory governments as almost every privatisation is conducted under parliamentary approved, project-specific state legislation. The privatisations are not conducted under general PPP legislation. Under the present Australian government policy of recycling investment in economic infrastructure, Commonwealth fiscal policy provides significant financial incentives to state or territory governments to privatise port assets.

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

There is a regulatory authority for each port in each state or territory jurisdiction in Australia. Some states have announced the intention of regional groupings of smaller or more remote ports such as in North Queensland or Western Australia. This approach does not apply to capital cities' major ports which have one or a small number of ports as their regulatory focus. These port authorities regulate port operations. In addition, state economic regulatory authorities regulate port access and pricing where those functions have not been referred to the Commonwealth competition authorities.

The regulatory authority referred to in the question is usually a statutory body related to the state, territory minister for either roads and ports or transports or treasury.

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

Port regulatory authorities have the power to make subordinate regulations for port operations, vessel handling and channel and navigation aids. A network of general legislation covers matters such as occupational health and safety, terms of employment of organised labour, environmental protection (discharges to air, land and water), intermodal operations and the interconnection of the port supply chain to road and rail and the transport of cargoes and operations. Most port authorities, depending on the nature and complexities of the assets and operations to be regulated, have these competencies in-house but several contract out specialist expertise to domestic and foreign advisors. Powers of port authorities are conferred by their legislation and as such are readily capable of ascertainment upon legislative review.

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

The harbourmaster is usually employed by the responsible port authority but is appointed by the Minister for Transport or Minister for Roads and Ports. The port authority reports to the state or territory government through the relevant department, such as the Department of Transport.

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

Ports in Australia are subject to both state and national competition law. In the first instance they are subject to state or territory regulation. If a reference is made for a port's services to be subject to national competition regulation, issues such as definition of the 'market' for the 'services' are considered. The choice of the relevant regime by the access seeker is influenced by the robustness or otherwise of the state or territory regime.

The original owner and vendor of a port during a privatisation is ultimately the same as the government to whom the regulator reports. Privatisation thus facilitates a separation of the port service delivery and regulatory functions.

Major city ports (eg, Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney) are monitored at the Commonwealth level by the Australian Competition and Consumer Commission (ACCC). The ACCC provides information to the government and the community on the performance of Australia's container stevedoring industry. Part VIIA of the Competition and Consumer Act 2010 sets out the ACCC's functions in relation to monitoring the prices, costs and profits of container terminal operator companies.

Specific commodities have special treatment under the national legislation. For example, the Port Terminal Access (Bulk Wheat) Code of Conduct regulates the conduct of bulk wheat port terminal operators to ensure that exporters of bulk wheat have fair and transparent access to port terminal services. The ACCC enforces the Code and also has certain specific roles in relation to exemptions and capacity allocation systems.

For other regional ports, states and territories (except New South Wales) have an independent economic regulator that monitors the price charges for container and motor vehicle cargo services and channel services.

10 Are there regulations in relation to the tariffs that are imposed on ports and terminals users in your jurisdiction and how are tariffs collected?

Terminal operators typically pay rent to the port authority or privatised port owner and set out market independent determinations of rent (usually at short term (three to five years) intervals). Rent is levied under real property leases which are long term (10–20 years).

11 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?

There are no public service obligations created in leases or subleases in relation to port access or services. However, ports operated by government-owned companies can have public service obligations created by regulation on a case-by-case basis.

12 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?

State entities can enter into joint ventures for the development of ports in Australia with port or terminal operators. This may occur in the development of specific terminals (such as where a contribution to capital cost may reduce the payment of rent) or in the case of the development of a port as a whole where the port is dedicated to the export of products from a tied supply chain. In the case of the latter, this has only recently become subject to open access obligations.

Ports and terminals may be co-owned between the public and private sector. Co-ownership of assets occurs on a case-by-case basis and is unusual. The more common approach is that specific assets within a port are usually owned wholly by the state or the private sector operator. For example, common user facilities such as roads, breakwaters and channels are owned by the state, and the wharf ship loading and unloading facilities, stockpile, hard stand areas and berths are owned by port or terminal operators.

13 Are there restrictions on foreign participation in port projects?

Some state or territory governments seek a level of Australian domestic participation. Foreign direct investment in Australia is managed by the Foreign Investment Review Board (FIRB) under the Foreign Takeovers Act 1975 and administered as an arm of the Commonwealth Department of Treasury. Foreign investment in Australian ports is permitted subject to review on a case-by-case basis as it is considered a sensitive sector. As of 1 January 2015, the FIRB's threshold was AU\$252 million.

Public procurement and PPP

14 Is the legislation governing procurement and PPP general or specific?

Each state or territory government has PPP guidelines which regulate the procurement of private sector investment in economic infrastructure;

however, Australian ports tend to be privatised by project-specific legislation implemented in a manner which is consistent with these PPP guidelines. That is, the particular policy objectives to be obtained by each port sale usually require parliamentary authorisation at a state or territory level, but the conduct of the sale process follows the PPP guidelines for matters such as risk allocation.

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

While it is possible for a state or territory government to consider an unsolicited proposal to acquire or develop a port, the likelihood of such proceeding to completion is remote. The scrutiny of the sale process required by all stakeholders means that it is unlikely that a state or territory government would deal with such an important assets on any basis other than a formal tender.

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

Bid or proposal evaluation criteria relevant to the award of port concessions vary in the circumstances of each case but typically follow a recognised format, namely commercial, legal, technical, environmental and community evaluation criteria. In the case of a port privatisation such criteria can be summarised as follows:

- the price and the certainty of the bidder to be able to complete the transaction in the stated time;
- risk allocation or the terms and conditions on which the sale is completed;
- the proven track record of the purchaser to complete the purchase and successfully operate ports in other jurisdictions;
- the environmental track record and policies of the acquirer and the basis on which the acquirer has effectively engaged all port stakeholders such as employees, supply chain customers and operators; and
- the issues arising for the local community impacted by port operations.

17 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 form PPP agreement used among the state or territory governments as a standard form concession or lease agreement. Despite this, there is substantial uniformity in agreements used. The public bodies take advice from sale advisors, consultants and lawyers concerning the form of documents to be adopted so there is flexibility to accommodate the specific requirements of a particular port and the circumstances of a particular sale process.

18 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?

Specific parliamentary authorisations, contained in sale-specific legislation, are required for each sale.

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

In recent years, port projects have been implemented as part of a mine, port and rail development and production concession. As such, this relates to the development and export of mineral resources. Where production at individual mines was not sufficient to warrant dedicated facilities, the holder of a mining licence would negotiate with the rail and port providers to access common user facilities. Increasingly, the scale of production of bulk commodities suggests that dedicated port and rail facilities are built by either the mine, the mineral offtake customers or a combination of both. In the development of these facilities for the private sector, all forms of financing are employed from full recourse on balance sheet debt to limited recourse BOT or BOOT facilities. It should be noted that in most cases the concession arrangements provide for leasehold tenure only, so a transfer to the state or territory government at the end of the concession period is usually required.

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

The term of the port leases usually varies between 40 and 60 years, but terms of 99 years have been negotiated.

21 On what basis can the term be extended?

Extensions to the term of port leases are unusual. Extension entitlements relate only to the post-construction phase because for greenfield developments the concession period does not commence until the port is declared (to be) sufficiently complete to enter commercial operation by an independent and professionally qualified engineer. Therefore, delays during construction or variations to design extend the development period but not the concession period. Extensions to the concession period may arise from government action directed at suspending port operations where such arises from uninsured perils.

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

The majority of fees are rent fees, and between rent reviews they are subject to escalation at a rate related to the Consumer Price Index.

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

Government guarantees are rarely provided. Exclusivity arises from the nature of the rights to occupy under the head or terminal leases. As a result, economic regulation of monopoly pricing is considered to be very important.

Port development and construction**24 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?**

There are many approvals required for the commencement of construction, ranging from land use and planning approvals, building or works approvals and environmental and occupational health and safety approvals concerning the method of the execution of works or the employment of dangerous goods in the works.

For greenfield development of a port or major terminal at an existing port, the national environmental protection legislation usually requires, in conjunction with the state or territory legislation, the preparation of an environmental impact statement. This, in turn, requires study of the subject site over at least four-to-eight seasons, which may take several years.

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

Yes, the state or territory government or its agencies or authorities would typically undertake early works, assemble the land and commence planning and possibly environmental studies.

For example, the government of Western Australia considered undertaking breakwater construction on the Oakajee Port where this was seen as high risk by the private sector. In Queensland, the North Queensland Ports Authority considered the construction of a multi-user common facility to assist smaller exporters to gain economies of scale at the Abbott Point development. The dredging of Port Phillip Bay has been undertaken in preparation of the privatisation of the port of Melbourne.

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

Construction standards are required in Australia by reference to international standards for the types of work entailed in the construction. Independent certification of adherence to the required standards is essential to satisfy the requirements of the regulatory authority's permits and approvals. The private port operator may engage any suitably qualified contractor. Contractors to state or territory government agencies must usually pre-qualify to be included on a tender panel from which prices will be sought. Prequalification may require agreement by the contractor to anti-corrupt practices, labour hire terms and conditions and the willingness to adopt a standard form of construction contract.

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

All the usual remedies are available to principals, both public agencies and authorities and private investors for recourse against contractors for delays and defective work. These remedies include bonds or retention moneys to secure liquidated damages for lateness and defect liability periods during which defective work must be rectified upon written notice. Contractors may seek to limit their liability for delays and may seek to distinguish

Update and trends

The most significant development in Australia at present is the port privatisation programme, which is underway in states and territories of Australia, and which has so far resulted in very significant proceeds on sale being raised from private investors. In addition, several ports are under consideration for development to support iron ore and coal exports but given the present commodity prices these greenfield projects are likely to be delayed.

between delays to which they may obtain an extension to the date for completion from those which grant extensions and provide in addition for delay costs, usually liquidated at a pre-agreed rate per day.

Port operations**28 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?**

Usually, the port operator may commence operation immediately upon the certification of practical completion, following construction.

Compliance checks are performed by both independent certifiers and by the port operators themselves. The certification includes a requirement that the contractor has conformed with all authorities' requirements in relation to the construction of the works (for example, construction works and environmental performance (noise, traffic, waste, pollution, hazards and risk management)). Once completion is certified, contractors are released and the operations on the port can commence.

29 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 typically provides the services of port and channel navigation and those of the harbourmaster concerning vessel presentation and handling. Pilotage, tugs and bunkering are contracted out to independent contractors which may not be related to the port operator or the port authority. However, in smaller regional ports, where the port is not privatised, these services are either provided by, or closely managed by, the port authority. Where these services are contracted out to others, the port authority does not charge for them.

30 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?

In the development of greenfield ports, the state or territory government will agree to facilitate a road or rail corridor to support the port development, and may assist with compulsory acquisition of land to facilitate such as a last alternative to requiring a commercial negotiation by the port developer and the land owner. Here the state or territory governments will seek submissions on the preferred route and open the process for public consultation so all stakeholders may make submissions concerning the suitability of the proposed route.

For brownfield developments seeking to expand existing rail, road or intermodal facilities, the state or territory government will 'facilitate' the resolution of the provision of these assets and supporting services, but this may occur on a somewhat ad hoc and 'issues driven' basis. The port operator will be called upon to assist in the finance of these supporting infrastructures if the supply chain is private and tied to, for example, a specific mine development; or not called upon if the port or extension of the port is being developed in a public open access basis.

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

Port operations are regulated under the terms of their terminal lease and the rules for operations of the port. Authorities may direct terminal operators to suspend operations if events or circumstances arise which may endanger life or property.

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

Leases contain step in rights which enable terminal leases to be taken over by the grantor of the lease if an event of default has occurred which persists after notice, or no diligent cure is pursued by the terminal operator.

33 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 remedies cascade through damages and interest, step in and ultimately termination.

34 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 assets transferred to the relevant port authority on termination of a concession include the right to occupy the land and all assets connected to the land, as an operation of law, consequent to the determination of the lease. Usually this occurs without the payment of compensation by the authority. State and territory laws contain provisions for compensation to tenants for leasehold improvements, and principles of equity will relieve against forfeiture.

Miscellaneous**35 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?**

Special purpose vehicles are used in Australia on most occasions. It is not unusual for port operators to incorporate a subsidiary to operate and construct port assets in Australia. Generally, port operators will not do so 'on balance sheet' from corporate funds.

36 Are ownership interests in the port operator freely transferable?

Usually the port concession or development agreement with the state or territory authority will require that the transfer of ownership interests in the operator are subject to government approval, such approval not being unreasonably withheld. No consent is required if the operator is publicly listed on the Australian Stock Exchange.

37 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 can create security interests in the assets and undertaking under the port lease or concession agreement. A priority agreement between the state or territory government and the trustee for security holders is usually required, preserving the lenders' rights to step in and cure a default by the borrower or port operator prior to termination by the state or territory government. Typically, the state or territory government's right to terminate will be suspended under the priority agreement while the banks are diligently pursuing a cure.

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

Port leases or concession agreements may be terminated in the event of default which continues unremedied, for a stated period. It is most unlikely that such a default would comprise a payment default as most of the lease premium or rental or concession payments would be made upfront on grant. All agreements may be varied by further agreement. Termination may be available for a performance default, but cure periods would tend to be longer than for a payment default.

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

All the usual rights of damages are available to state or territory government for contractual breach by a port operator. Equitable remedies of specific performance are much more difficult to obtain for breach of performance obligations where extended supervision may be required.

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

It is usual for PPP concessions and lease agreements to apply in and be governed by the laws of the state or territory where the assets are located and the obligations under the agreements are performed. It would be most unlikely for an Australian state government to govern the concession arrangements using the laws of a foreign jurisdiction.

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

It is unlikely that disputes would arise between a state or territory government and a port authority, given that the latter effectively reports to the former. Disputes arising between port authorities and port operators are usually settled by discussion among senior executives or, failing which, by expert determination where the subject matter permits or litigation in a court of competent jurisdiction.

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China

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General

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?

Port facilities in China are grouped into five regions based on their geographical locations: Bohai Rim Region (main ports: Dalian Tianjin and Qingdao); Yangtze River Delta Group (main ports: Shanghai and Ningbo); South East Region, Pearl River Delta Group (main ports: Shenzhen, Guangzhou and Xiamen); and South West Region.

These ports are classified into eight logistics networks based on the types of cargo. These are: coal, crude oil, iron ore, container, grain, automotive, roll-on roll off and passenger terminals.

The top five ports in China as at the end of 2014 are Shanghai, Ningbo-Zhoushan, Qingdao, Tianjin and Guangzhou.

The primary purposes of the ports are to provide import and export, domestic trade and trans-shipment services.

2 Describe any port reform that has been undertaken over the last few decades and the principal port model or models in your jurisdiction.

Since the 1980s, the port industry in China has undergone significant reforms.

Before the 1980s, ports in China were centrally owned and administered by the Ministry of Transport.

After 1984, all major ports were transferred to a 'dual administration' system. In this system, the Ministry of Transport and the local governments were jointly responsible for the administration of ports. The Ministry of Transport retained the macro-controlling power of formulating port laws, regulations, policies and development plans at the national level, while local governments (through their designated port authorities) assumed the functions of port regulations, policies, planning, construction and operations in their respective municipalities.

In the early 2000s, another reform was implemented resulting in the decentralisation of the port industry in China. Following a notice from the State Council in 2001, 38 major ports under dual administration were transferred to the corresponding local governments. The previous port authorities were split into two arms: administration and commercial. The administrative functions were transferred to the local port administration bureaus established by the relevant local governments, and the local port corporations retained business and assets of their predecessors and assumed responsibilities for port operations. Since decentralisation, the Ministry of Transport still deals with regulation and planning matters that are of national and regional significance. However, the actual implementation of port planning and regulation enforcement are carried out by individual local port administration bureaus.

The public-private joint venture model is the current predominant model for private investors to invest in the port sector in China. Under this model, the local state-owned port corporation enters into a joint venture with the private investors (either local Chinese or foreign companies) to jointly develop, construct and manage a specific port project.

More recently, a number of local port corporations went public by reorganising their terminal assets and listing them on the stock exchanges, such as the Shanghai International Port (Group) Co, Ltd on the Shanghai Stock Exchange and the Qingdao Port International Co, Ltd on the Hong Kong Stock Exchange.

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

Port development is highly regulated in China. The Ministry of Transport in Beijing is responsible for the overall port planning at the national level, and the local governments are responsible for the planning and implementation of ports in their respective municipalities. The most recent overall plan for port development in China is set out in the National Plan for Coastal Port Layout issued by the Ministry of Transport on 16 August 2006 and the 12th Five-Year Plan (2011–2015) endorsed by the National People's Congress.

Under these plans, port facilities in China are grouped into five regions and eight logistics networks (see question 1). The targets for port development at a national level for the five-year period (2011–2015) include:

- building of 440 new deep water berths;
- increase of coal terminal handling capacity by 310 millions tonnes;
- increase of crude oil terminal handling capacity by 100 million tonnes;
- increase of iron ore terminal handling capacity by 390 million tonnes; and
- increase of container terminal throughput by 58 million TEUs.

The Chinese government is in the process of formulating the 13th Five-Year Plan (2016–2020), taking into consideration recent developments, trends and policies such as the growth of domestic consumption, global economics, development of the Western Region, growth of the inland river terminals and the increase of larger vessel size.

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

Under China's 12th Five-Year Plan (2011–2015), the Chinese government has set a national target of reducing energy consumption by 16 per cent per GDP unit and carbon dioxide emission by 17 per cent per GDP unit. Further, according to China's 12th Five-Year Plan (2011–2015) for Reduction of Energy Consumption for Road and Waterway Transport, construction companies of port facilities are required to reduce their energy consumption by 8 per cent and emission of CO₂ by 10 per cent within the five year period (2011–2015). The Five-Year Plan also sets out general energy saving recommendations for port operators, including optimising the water-railway connection, updating rubber tyre gantry cranes from diesel-powered electricity to city electric power supply, building facilities for vessels' use of on-shore electricity and greater utilisation of renewable energy.

Before commencement of a port facility, a construction company is required to submit an energy saving assessment report to the relevant government departments for approval. The report must specify the energy consumption reduction measures and anticipated energy consumption. Without such approval, the project will not be approved and the construction works cannot commence.

In May 2015, the Chinese government also introduced a voluntary campaign where port operators can participate in the green port grading system on a voluntary basis. This allows participating ports to be graded on an open basis and to receive subsidies based on the grading awarded by the local governments.

Legislative framework and regulation

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

There is a comprehensive legislative framework in China governing the planning, development, management and operation of ports in China. Key legislation includes the PRC Law on Ports, the Administration Provisions on Ports Planning, the Provisions on Completion and Acceptance of Port Construction and the Administration Provisions on Port Operation and Management. Other PRC laws and regulations on project approval, foreign investment, land use rights, sea area use rights, coast line use rights, environmental protection and sea environment protection are also important.

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

Yes, the Ministry of Transport in Beijing is responsible for port planning and regulations that are of national and regional significance.

The local port administration bureaus are in charge of port planning and regulations that are of local nature.

The local port corporations exercise commercial functions and are responsible for the construction and operation of local port facilities.

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

The key competencies and powers of the Ministry of Transport include planning, formulating policies, guidelines and legislations, managing marine safety and security, providing emergency response and giving industry opinions on infrastructure investment project approvals, at the national and regional level.

The local port administration bureaus are primarily responsible for the overall planning; formulation of policies, guidelines and legislation; administration of coastline, land and water areas; and provision of emergency response at the local level.

The local port corporations are responsible for the commercial construction and operation of local port facilities.

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

There is no harbourmaster for ports in China. The duties of a harbourmaster are carried out by the local port administration bureaus.

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

The PRC Anti-monopoly Law and its implementation regulations are the main national competition rules in China. Other relevant laws and regulations include the PRC Pricing Law, the PRC Anti-Unfair Competition Law and the Guidelines on Merger Filing of Acquisition of Domestic Companies by Foreign Investors.

10 Are there regulations in relation to the tariffs that are imposed on ports and terminals users in your jurisdiction and how are tariffs collected?

There is a great deal of legislation regulating the setting and collection of port tariffs in China. Such legislation sets out the tariff rates for domestic trade, the tariff rates for foreign trade and the categories of tariffs to be driven by market demand. Most of these tariffs are collected by the port operators. Some of the tariffs are collected by the port operators on behalf of the Ministry of Transport, the local port administration bureaus or other relevant government authorities.

11 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 local governments in China are responsible for ensuring that the construction of roads and rails and the provision of utilities are compatible with the master port planning in their respective localities. They usually carry out these obligations through their relevant subsidiaries or subcontract some of the obligations to private subcontractors.

12 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?

Joint ventures between local state-owned port corporations and one or more private companies are the predominant model for Chinese or foreign private port operators to participate in the development and operation of port facilities in China. There is no legal requirement that state-owned port corporations must hold majority shareholding in such joint ventures. However, private port investors often decide to allow majority shareholding to the local port corporations to take advantage of the port corporations' political influence and local connections.

13 Are there restrictions on foreign participation in port projects?

Foreign investors are permitted to participate in the development, construction and operation of port facilities in China subject to a number of criteria and approvals. These include the willingness of a local port corporation to enter into a joint venture with the particular foreign investor, approval from the Ministry of Commerce or its local branch on foreign participation, and project approval from the National Development and Reform Commission or its local branch. The establishment and operation of the joint venture company must also comply with the requirements under the relevant PRC laws and regulations, the main ones being the PRC Company Law, the Sino-foreign Equity Joint Venture Law and their implementation regulations.

Public procurement and PPP

14 Is the legislation governing procurement and PPP general or specific?

There are general procurement laws that must be followed by Chinese government authorities. In particular, prescribed tender procedures must be followed for construction projects involving contribution or financing by the Chinese government, financing or assistance granted by international organisations or foreign governments, or large public infrastructure facilities.

The Chinese government also recently issued the Administrative Measures for Concessions for Infrastructure Facilities and Public Utilities Projects (June 2015) which set out certain concession models (such as build-operate-transfer (BOT), build-own-operate-transfer and build-transfer) that may be adopted by a government for construction and operation of infrastructure facilities and public utilities.

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

In China, port construction and operation projects are led by local port corporations. Reputable, qualified and suitable private investors are invited to participate in a port project in the form of a joint venture. Such project is not subject to any formal tender process. However, a private port investor must demonstrate to the relevant local port corporation that it is the most suitable joint venture partner for the particular project (also see question 16).

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

The criteria often used by a local port corporation in awarding a port joint venture agreement to a private investor include:

- previous port construction, management and operation experience;
- financial capability, reputation and creditworthiness; and
- the ability to increase throughput and access to the customer base.

Political connections and local relationships are also important.

17 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 joint venture agreement that is used for port projects in China. However, most port joint venture transactions follow a similar format. Common transaction documents for a PPP joint venture include:

- a joint venture agreement which sets out the terms and conditions governing the rights and obligations of each participant to the joint venture;
- the articles of association setting out the management and the

corporate governance of the joint venture;

- a lease agreement for any port facilities leased to the joint venture; and
- an asset transfer agreement for any port assets transferred to the joint venture.

The terms of these transaction documents are negotiated between the relevant local port corporation and the private investors.

18 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?

For a joint venture involving foreign participants, the main government approvals and registrations include approval from the National Development and Reform Commission, the Ministry of Commerce, the State-owned Asset Supervision and Administration Commission, the State Administration of Foreign Exchange and the State Administration for Industry and Commerce, or their respective local branches.

No specific law is required to be passed for the implementation of a port PPP agreement in China.

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

Port privatisation in China is typically implemented on a partial BOT basis. Local port corporations usually take responsibility for the construction of both the infrastructure facilities (such as the breakwaters, navigational aids, approach channels, quay walls, wharves and container yards) and the superstructure, and then transfer them to the joint venture company for management and operation for the duration of the joint venture term. Sometimes the joint venture companies are also given the right to construct the superstructure. At the end of the joint venture term, the land, the infrastructure facilities and all fixtures attached to the land are transferred back to the government. The moveable assets are distributed to the joint venture partners in proportion to their equity ratios after settling all outstanding liabilities of the company.

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

The maximum term for port PPPs in China is 50 years. The average term is between 30 and 50 years.

21 On what basis can the term be extended?

The term can be extended subject to agreement from the local port corporations and approval from the relevant government authorities.

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

A private port investor will be required to make a capital contribution (usually in cash) in proportion to the ratio of its equity interest in the joint venture company. The cash capital contributions will then be used to pay the local port corporation for the value of the port facilities built, leased or transferred by the local port corporation and to the government for the right to use the land, sea area and coastline. The value of these facilities and rights must be determined by a qualified valuation institute and approved by the State-owned Asset Supervision and Administration Commission or its local branch.

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

The local port corporations usually do not grant any exclusivity to private port investors. Sometimes they may agree to give the private port investors the first right of refusal to participate in future port projects within the specified geographic region and duration.

Port development and construction

24 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?

There are a number of government approvals that must be obtained before the construction works are permitted to commence at a relevant port. The main approvals are:

- pre-project approvals, including approvals for the commencement of the preliminary works, the project location, environment protection, sea environmental protection, the use of land, sea area and coastline, safety and energy saving;
- project approval, including feasibility study report; and
- approval for the design and construction works.

The duration that it takes to obtain these approvals varies, depending on government policies, overall port planning, the relationship between the relevant local port corporation and the government (at both central and local levels), and the demand and supply for port capacity at the relevant time.

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

The local government and its relevant departments are responsible for the construction of public facilities such as road and rail consistent with the overall port planning. The relevant local port corporation usually undertakes the construction of the port infrastructure (eg, dredging, land reclamation, quay walls and wharves). The superstructure is usually undertaken by the local port corporation, but sometimes also by the joint venture operating company.

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

The construction of port facilities must adhere to the requirements set out in the PRC Construction Law, the Administrative Regulations on Construction of Ports and other relevant laws, regulations and industry standards. Contractors may be engaged to carry out certain aspects of the construction works but these contractors must satisfy the required qualifications, skill and capital requirements.

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

The responsible construction companies or contractors are required to give warranty on the quality of the construction works during the specified or agreed warranty period. They will be required to rectify any defect and pay for any damages caused. In some cases, fines will be imposed and the responsible company or contractor may be ordered to suspend its business, or have its qualification downgraded or revoked.

Port operations

28 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?

Once the construction works have been completed, inspected and accepted, the main government approvals and registrations required for a port operator to commence operation at a relevant port are:

- approval from the Ministry of Commerce or its local branch (for any foreign investment in the project);
- approval from the State-owned Asset Supervision and Administration Bureau or its local branch (for transactions involving state-owned assets);
- foreign exchange approval; and
- issuance of the business licence and the port operating permit.

The duration that it takes to obtain these approvals varies, typically ranging from a few months to two to three years, depending on the speed of negotiations between the local port corporation and the joint venture partners, government policies, and the demand and supply for port capacity at the time.

Update and trends

Currently, foreign investments in China are primarily governed by the Sino-foreign Joint Venture Law, the Sino-foreign Joint Cooperation Law, the Wholly Foreign Owned Law and their implementation regulations. In January 2015, the Chinese government released a draft Foreign Investment Law for public comment. This draft law, if adopted, will fundamentally change the way in which a foreign investment regime operates in China for the past three decades.

A continuing trend is the higher barrier to entry into China's port sector for a foreign investor. With a weakening outlook for Chinese growth, sluggish growth of global economy, limited supply of undeveloped coastlines and less reliance on foreign capital and operations experience by Chinese port corporations, finding a good investment opportunity in China's ports market becomes ever more challenging.

29 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?

A joint venture port operating company typically provides loading and unloading, storage, trans-shipment and warehousing services. The local port administration bureau typically provides pilotage, towage, berthing, vessel shifting and other relevant administrative services through the relevant subsidiaries and charge for such services in accordance with the statutory rates set out in the relevant port charge regulations.

30 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 local port corporations generally are reluctant to give any commitments in relation to access to hinterland. In situations where a local port corporation leases or transfers the completed port facilities to a joint venture company for operation, the local port corporation may sometimes agree to guarantee that the port is connected to paved and well maintained roads and railways at the time of the lease or transfer.

31 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 requirements on port operations are set out in the PRC Administration Regulations for Port Operation and other relevant PRC laws and regulations. A port operator is required to apply for a port operating permit by submitting an application together with relevant supporting documents to the local port administration bureau. The port administration bureau will only issue the port operating permit if it is satisfied that the port operator satisfies all of the requirements. The local port administration bureau also conducts inspection from time to time, including interviewing employees, inspecting and photocopying relevant information. A port operating permit may be suspended or revoked if a port operator ceases to satisfy any of the conditions set out in the regulations or the permit conditions, including refusal to give priority to emergency response or failure to comply with the safety requirements.

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

The local port administration bureaus may access the port area to conduct inspection of port operations from time to time, and may suspend or revoke a port operating permit if the operations fail to satisfy the conditions set out in the relevant regulations or permit conditions. The local port administration bureau usually does not take over port operations. If there is any concern, it is likely to raise the issues and discuss them with the relevant local port corporation, which is also a shareholder of the joint venture operating company.

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

See question 31.

34 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?

All land in China is owned by the state. A port operator only has the right to use the land for the duration of the land use right certificate. At the end of the joint venture term (which often coincides with the expiration of the land use right certificate), the land and all improvements and fixtures on the land will be returned back to the government free of charge. All remaining movable assets will be distributed between the shareholders of the joint venture company in proportion with their shareholding ratios after paying off the outstanding liabilities.

Miscellaneous

35 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?

A separate port operating company is usually set up for each phase of the port construction and operation project. This port operating company must be incorporated in China.

36 Are ownership interests in the port operator freely transferable?

Transfer of direct ownership interest in a port operating company is subject to the right of first refusal of the other joint venture parties, and approval of the relevant Chinese government authorities. Whether a party has any right to transfer an indirect ownership interest in the port operating company will depend on whether there is any change of control restriction in the joint venture contract.

37 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?

It is highly unusual for a shareholder of a port operating company to grant security interest over its equity interest in the joint venture company. This is because it is difficult for a secured party to enforce the security interest when any transfer of equity interest in the joint venture company is subject to the right of first refusal of the other joint venture parties and approval of the relevant Chinese government authorities. A private port investor often makes a cash contribution to the joint venture company and funds this cash contribution through internal cash flow or financing at the parent company level.

The local port administration bureaus are in charge of local port planning and regulatory matters. They do not get involved with the operational matters of a joint venture company and do not enter into any direct agreement with the project finance banks.

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

A joint venture contract for the construction and operation of a port facility may only be varied by written agreement between the joint venture parties and approval of the relevant Chinese government authorities.

A joint venture contract may be terminated early on the grounds set out in the joint venture contract or pursuant to relevant Chinese laws and regulations. These include a prolonged event of force majeure; breach by a joint venture party; unprofitable operation (subject to materiality or otherwise agreed threshold); nationalisation of the operating company's substantial assets; or a change in foreign exchange law which prevents the remittance of profit distribution by a foreign investor.

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

A breach of contract by a private investor will entitle the local port corporation and other joint venture parties to claim for damages, enforce the compulsory acquisition clause or terminate the joint venture early.

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

A port joint venture agreement is required to be governed by Chinese law.

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

A dispute between a local port corporation and a foreign port investor is often settled through international arbitration. The parties are encouraged to first settle the dispute through friendly consultations before submitting it to arbitration.

Dispute resolution by foreign courts is not recommended due to the difficulty in enforcing a foreign court judgement in China.

Dispute resolution by local Chinese courts is also not recommended due to the perceived lack of independence of the Chinese judiciary from other branches of the Chinese government, a varying quality of Chinese judges, incidents of corruption, and regional protectionism (particularly where the interests of state-owned companies and hence Chinese state or public interests are implicated).

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General

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 the UK are the ports of Grimsby and Immingham; London; Milford Haven; Tees and Hartlepool; Southampton; Liverpool; Felixstowe; and Dover.

Immingham has specialist liquid bulk and coal-handling terminals and roll-on roll-off (ro-ro) and lift-on lift-off (lo-lo) facilities. At Grimsby, 0.5 million vehicles are imported each year via its dedicated ro-ro berths.

The Port of London handles dry and liquid bulk, as well as cargo from ro-ro and container vessels.

Milford Haven handles liquid bulk including crude and refined oils, liquefied petroleum gas and liquefied natural gas.

Tees and Hartlepool handles bulk cargo.

Southampton has a container terminal, ro-ro terminal, a major cruise terminal and liquid bulk facilities that are primarily used for crude oil.

Liverpool handles bulk cargo and also ro-ro and container vessels. It is also used as a trans-shipment port for cargoes bound for Ireland and Scotland.

Felixstowe handles container ships and ro-ro traffic.

Dover is a ferry port and handles ro-ro cargo vessels.

2 Describe any port reform that has been undertaken over the last few decades and the principal port model or models in your jurisdiction.

Port ownership in the UK falls into three categories:

- privately owned ports;
- 'trust ports'; and
- municipal ports owned by local government authorities.

In the last 30 years there has been a move towards the private ownership model, in particular for the larger UK ports. Privatisation of smaller ports has been slower, and most smaller ports adhere to the trust ports and municipal ports models.

Prior to 1983, the ports industry was largely nationalised. In 1983 the state-owned ports operator, the British Transport Docks Board, was privatised under its new name, Associated British Ports, with its shares being offered to the public. Most of the larger state-owned ports were sold in and since 1983.

Trust ports are generally run by self-governing independent statutory bodies whose constitutions are instituted by Acts of the UK Parliament. With exceptions such as the port of Dover and the port of Milford Haven, most trust ports are small harbours handling predominantly leisure and local fishing vessels. In the 1980s and early 1990s, the UK government advocated the privatisation of trust ports, culminating in the Ports Act 1991. However, as mentioned above, privatisation of trust ports has been slow. The UK government has published guidance concerning trust ports' governance – *Modernising Trust Ports* – and trust ports are subject to several statutory duties, including duties of maintenance.

Finally, some ports continue to be owned and operated by local authorities. On the whole, these ports tend to be small and handle low tonnages, with the exception of the port of Portsmouth.

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

In January 2012, the Department for Transport presented to the UK Parliament its National Policy Statement for Ports (NPS). This document sets out the framework for decisions taken relating to port development in England and Wales, in particular the UK government's conclusions on the need for new port infrastructure.

The NPS states that the UK government's ports policy is to encourage sustainable long-term port development to cater for economic developments in the long term, to allow judgments about when and where new port developments might be made to be taken on the basis of commercial factors by developers operating within a free market environment, and to ensure that all developments satisfy the relevant legal and environmental obligations, including objectives under the relevant European Directives. In summary, a market-driven policy encouraging competition is the primary basis of policy, as it has been since the 1980s.

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

Ports and port development in the UK are subject to UK and EU environmental legislation.

In particular, projects could be subject to the requirement under the European Environmental Impact Assessment Directive (Council Directive 85/337/EEC, as amended) to produce an Environmental Statement describing the environmental impact of the proposed developments. If the Directive applies, it could require a significant amount of assessment and analysis to be undertaken prior to the project's commencement. Producing an Environmental Statement would include an assessment of measures taken to reduce ships' greenhouse gas emissions, as well as any increase in emissions caused by inland transport generated as a result of the port development. The UK government requires Environmental Statements to take into account the projected changes in the UK's climate that will result from climate change. Similarly, formal assessments may be necessary under the UK's Habitats and Species Regulations.

The UK's planning and pollution control regulations impose a series of obligations that require certain projects to be environmentally sustainable and to minimise pollution. In the context of port developments, 'nationally significant projects' may require licences from UK government authorities, and parties considering projects should consult the Marine Management Organisation (MMO) (for projects in England) or the Welsh government (for projects in Wales) to establish whether any licences are required. In particular, this might involve obtaining permits under the 'Environmental Permitting' regime, which covers, among others things, projects with waste disposal and management facilities.

Legislative framework and regulation

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

Port development

The NPS sets out the broad framework applying to the ports development policy and details the legislation that applies to the development of ports. In particular, the Planning Act 2008 (in combination with the Localism Act 2011) states that a party planning to undertake a 'nationally significant infrastructure project' must submit its plans to the Planning Inspectorate, which will consider the proposals in light of the relevant legislation and

the NPS. Following this review, the Planning Inspectorate will send the proposals to the Secretary of State with a recommendation as to whether permission should be granted or refused. In addition, in most cases port developers must obtain a licence from the MMO, pursuant to the Marine and Coastal Access Act 2009.

Port operation

Each port is overseen by a competent harbour authority (CHA) appointed by statute. CHAs are responsible for the management of the port. The CHA's constitution will depend on how the port is incorporated. For instance, private companies can be the CHA in the case of private ports, while in the case of a trust port the CHA will usually be the port's board of directors. A CHA's powers and duties are prescribed by a wide range of general and specific legislation. Some regulations apply to each CHA, including the guidance in the Port Marine Safety Code and statutes such as the Merchant Shipping Acts and its related secondary legislation. Other legislation either devolves powers to the CHA to exercise on a semi-discretionary basis (for example, the Pilotage Act 1987) or is specific to a certain port or ports. This specific legislation normally takes the form of Harbour Revision Orders or Harbour Empowerment Orders for which CHAs can submit applications. These Orders principally concern either matters of port development or the alteration or reconstitution of the powers held by the relevant CHA.

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

There is currently no single national regulatory authority entirely responsible for oversight of the UK's ports sector. The European Commission is considering the implementation of a Ports Services Regulation pursuant to which the UK would be required to appoint such a regulator.

In the absence of a single regulator, a series of bodies are responsible for regulating and licensing certain aspects of port development and operation (see question 5).

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

The key competences and powers will primarily be determined by the content of the legislation specific to each port's CHA. In addition, every port or harbour has general competences and powers, mainly related to the general duties to ensure the safety, maintenance and conservation of the port. In addition, there are several pieces of UK government-issued guidance applying to ports which, while lacking the full power of law, are authoritative guidance on issues such as corporate governance and port management. Examples of such government-issued guidance include the Port Marine Safety Code and, in the case of trust ports, *Modernising Trust Ports - Second Edition*, sometimes abbreviated to 'MTP2'.

8 How is a harbour master for a port in your jurisdiction appointed?

In the case of specific ports with a partly naval function known as 'dockyard harbours' (Portsmouth and Plymouth in England and Wales), harbour masters (with the title 'Queen's Harbour Master') are appointed by a UK government minister pursuant to the Dockyard Ports Regulation Act 1865.

Otherwise, CHAs have the power to appoint a harbour master, whose primary responsibilities are detailed in the Harbours, Docks and Piers Clauses Act 1847.

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

Ports in the UK are not subject to specific national competition rules, although they are subject to the general competition rules that apply to the UK market.

10 Are there regulations in relation to the tariffs that are imposed on ports and terminal users in your jurisdiction and how are tariffs collected?

Given that the powers of a CHA can vary from port to port, the local acts of parliament applying to a specific port (if any) may empower a CHA to levy a harbour due. The Harbours Act 1964 also governs the imposition of harbour dues by CHAs, as does other legislation such as the Harbours, Docks and Piers Clauses Act 1847.

The tariffs that are imposed on ports and terminal users by port operators are subject to competition laws and rules, in particular in relation to abuse of a dominant market position (see question 9).

The collection of tariffs will depend on the preferred practices of any given CHA or port operator.

11 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 state does not have any public service obligations in relation to port access or services. As noted in question 5, the government has set out its policy for the ports industry, which includes guidance in respect of the evaluation of applications for consents to develop port projects, and may impact on any conditions attached to any such consent granted on a case-by-case basis.

12 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 is no specific legislation in place that would hinder the UK government (or rather a state-owned entity) from entering into a joint venture with a port operator for the development or operation of a port in the UK. However, given the fully privatised system which is implemented in respect of most large ports in the UK, this is not common practice.

13 Are there restrictions on foreign participation in port projects?

There are no restrictions on foreign participation in port projects in the UK. However, the government may seek to intervene in any projects or matters adversely affecting national interests, including where there is a risk of sanctions (as was the case in the recent North Sea gas dispute between the UK government and Mikhail Fridman) and where there may be serious health and safety and environmental risks.

Public procurement and PPP

14 Is the legislation governing procurement and PPP general or specific?

The government's new PPP framework – PF2 – was introduced in 2012 and is subject to guidance issued by the UK Treasury. It is not specific to any industry. In the context of procurement, the government has introduced the Public Contracts Regulations 2005, which could apply to aspects of PPP and PF2 transactions. The Regulations were enacted pursuant to EU directives concerning the free movement of goods and services.

In addition, it is worth noting that the UK Treasury's guidance on procurement has indicated that, under PF2, procurement will increasingly be handled by the central government as opposed to the public authority (eg, local council) directly concerned with the project, as was the case under the previous regime (the Private Finance Initiative).

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

Port concessions and joint ventures with the government are not common in the UK. Generally speaking, the NPS provides that where there has been a material change in circumstances which necessitates the review of the NPS, in whole or in part, and it is in the national interest that a case should be decided quickly, the Secretary of State has a reserve power to intervene and take the decision, ensuring that proposals for nationally significant infrastructure can be considered without delay. Generally speaking, contracting authorities, that is, state, regional and local authorities, bodies governed by public law and associations formed by one or several of such authorities or bodies are subject to UK public procurement regulations.

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

The NPS provides the framework for decisions on proposals for new port development and, for the benefit of planning decision makers, sets out the approach they should take to proposals including the main issues that will need to be addressed to ensure that future development is fully sustainable. It also details the need for new port infrastructure and the positive and negative impacts it may bring.

The guidance included in the NPS encompasses economic impacts; commercial impacts; competition; tourism; environmental impact assessment; Habitats and Species Regulations assessment; criteria for 'good design' port infrastructure; pollution control and other environmental regulatory regimes; climate change mitigation and adaptation; common law nuisance and statutory nuisance; hazardous substances; and health and security considerations. Other relevant criteria include, among other things, biodiversity and geological conservation; flood risk; traffic and transport impacts; waste management; water quality and resources; air quality and emissions; and socio economic impacts.

17 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 that is used for port projects. As noted above, port project applications are considered and port project consents are granted on a case-by-case basis.

18 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?

See question 5.

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

Port projects in the UK are implemented on a case-by-case basis, and in practice most port projects have been based on fully privatised port models.

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

No. As there have been no port PPPs in the UK, one cannot speak of an average concession term.

21 On what basis can the term be extended?

See question 20.

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

Given that most port developments in the UK have been based on fully privatised port models, there are no fee structures as such. However, the port projects will be subject to taxation in the usual way.

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

No.

Port development and construction

24 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?

For a 'nationally significant' development, an application must be made to the Planning Inspectorate, which will give a recommendation to the Secretary of State (see question 5). Such developments will be those which will lead to a port having an annual capacity of 0.5 million TEU for container terminals, 0.25 million movements for a ro-ro terminal, five million tonnes of other traffic for bulk and general cargo terminals, or a weighted equivalent including all three of such categories. In addition, the Secretary of State has the power to determine that certain projects are of national significance even if they fall below the relevant threshold, in which case the plans will be referred to the Planning Inspectorate.

Further consents and licences may be required, depending on the nature of the plans, under a variety of legislation and regulations. In particular, MMO consent will be required.

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

No, however the NPS will apply to associated development, such as road and rail links, for which consent is sought alongside that for the principal port development. The NPS sets out that non-ports associated development should be considered on a case-by-case basis, using appropriate

assessment methods consistent with the NPS and with applicable official guidance.

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

As noted in question 16, the guidance included in the NPS for planning decision-makers includes criteria for 'good design' for port infrastructure. This criteria sets out that the decision maker needs to be satisfied that the port infrastructure developments are sustainably designed and, having regard to regulatory and other constraints, are as attractive, durable and adaptable (including taking into account natural hazards such as flooding) as they can be. In so doing, the decision maker should satisfy itself that the applicant has taken into account both functionality (including fitness for purpose and sustainability) and aesthetics (including its contribution to the quality of the area in which it would be located) as far as possible. Finally, in considering applications, the decision maker should also take into account the ultimate purpose of the infrastructure and bear in mind the operational, safety and security requirements that the design has to satisfy.

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

As any agreements relating to the construction of the port will be entered into between the project applicant or port operator and a third party contractor, any remedies available to the project applicant or port operator will be subject to negotiation between such parties and will vary on a case-by-case basis, depending on factors such as the nature of the works and the bargaining powers of the parties.

Port operations

28 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?

See question 24.

29 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?

In fully privatised ports the owner or operator provides all the services or grants licences or concessions for third parties to provide them. Trust ports are owned and operated by the same party, providing all services. With municipal ports, typically the port authority will provide services relating to dredging, lighting, safety, navigation and pilotage while the port operator will manage day-to-day matters such as cargo handling.

30 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?

See question 25.

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

See question 5.

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

This will depend on the by-laws of the CHA, any legislation empowering the CHA and the terms and conditions for the operation of the CHA.

33 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 UK government's approach to the ports industry is to intervene only where there is demonstrable 'market failure', and this is rare.

34 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?

Given the fully privatised model that applies to most port projects in the UK, there are no obligations on port operators to transfer assets to the port authority or government. In the case of trust ports and municipal ports, this is not relevant.

Miscellaneous

35 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?

As applications for port projects are considered and granted consent on a case-by-case basis, this will depend on the conditions attached to a consent approving any particular project. Generally speaking, there is no nationality requirement.

36 Are ownership interests in the port operator freely transferable?

The ability to freely transfer ownership interests in the port operator will depend on the terms included in the constitution of the port operator, together with the terms of any relevant joint venture or shareholders agreement relating to the port operator. There are no laws (other than possibly competition rules) restricting the transfer of shares.

37 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?

Given the fully privatised nature of most port projects in the UK, the private parties participating in the project can generally offer security over the assets of the project.

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

This may be achieved in accordance with the terms and conditions agreed by the signatory parties to any such agreements.

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

Given the fully privatised model that applies to most ports in the UK, this question is not relevant.

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

There are no port PPP agreements in the UK. The laws of the jurisdiction governing the project agreements are a matter for agreement between the parties that are signatories to any such agreements. Generally speaking, we would expect that such agreements would be subject to English law.

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

The regime for settling disputes will be subject to negotiation and agreement between the parties participating in the project.

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Ports & Terminals
ISSN 2397-0316



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