



PORT CONCESSIONS: TO RENEW OR RETENDER, THAT IS THE QUESTION

We saw a wave of port privatisation in the nineties and noughties. Governments were looking for funds to develop, construct, operate and maintain port (or terminal) facilities, and many port concession agreements were entered into between government authorities as grantors and private companies as concessionaires.



In a port development project, there are different phases such as design and construction, operation and management, and maintenance of the port facilities. Generally speaking, under a concession agreement, the grantor will grant rights to the concessionaire to develop (often on an exclusive basis) and use a port, and the concessionaire will pay concession fees and/or land lease fees to the grantor. Governments are able to obtain funding and expertise while retaining ownership of the assets. On termination, the parties will distribute the assets developed over the concession period.

Expiry of the term

Concession agreements usually last in the range of 20 to 35 years, sometimes with an option to extend. This gives the parties flexibility to agree on renewals or part ways should they wish to do so. On relatively rare occasions the term may last for 50 years or more.

Many of those concessions entered into in the nineties and noughties are due to expire, if they haven't already. Parties may now wish to consider whether to extend or renew. If not, the government may choose to operate the port themselves or retender it to another private

company (usually through a public tender process). We explore some of the legal, commercial and practical considerations below.

Renewal or extension

Under the original concession agreement, there may be an option to extend the term in accordance with the same terms and conditions, or to extend only if certain performance requirements have been fulfilled and concession fees renegotiated. Recently, for example, the Panama Maritime Authority agreed an automatic renewal of a 25-year concession with the privately-owned Panama Ports Company for terminal operations in Cristobal and Balboa.¹

The agreement may contain certain performance criteria that the concessionaire will have to meet both for performance of its contractual obligations and to qualify for renewal or extension. The grantor may require periodic reports on the timeline of construction, gross revenue, throughput and usage of port facilities. The parties may set key performance indicators (KPIs) on areas such as productivity, ship turnaround time and yard density as measurements of port performance.

It is reported that the Nigerian government was calling for a more

stringent screening process for concession renewals and urging the relevant authorities to effectively screen out companies not meeting those conditions. The conditions include significant reinvestment targets and development plans and meeting KPIs, including those on cargo throughput and revenue, together with status reports to understand the condition of existing infrastructure. Government grantors' determination to implement detailed performance measurement regimes will add challenges to the renewal process.²

Despite somewhat unsatisfactory performance on the part of the concessionaire, a government may nevertheless be keen to renew or extend the concession agreement rather than having the concessionaire walk away. Public tender processes can be costly and uncertain, and it is sometimes preferable to negotiate with a known counterparty. The renegotiation can then focus on what the parties think was lacking in the initial term and bridge the gap. They may renegotiate terms tailored to the actual development stage of the port. Activities at the port are less likely to be disrupted, even during renegotiation. Drewry³ concluded in research last year that among 27

1 Panama Renews 25-year concession to Hutchison's Panama Ports ([seatrade-maritime.com](https://www.seatrade-maritime.com))

2 Nigerian govt gives conditions for renewal of ports concession agreements | [Premium Times Nigeria \(premiumtimesng.com\)](https://www.premiumtimesng.com)

3 [Drewry - Maritime Research Opinions - Market forces driving port authorities to retender more terminal concessions](https://www.drewry.com)

“When putting these commercial initiatives into legal writing, it is crucial to ensure that what has been put into the agreement is unambiguous, enforceable and backed by clear and objective assessment criteria. The parties may also wish to strike a balance between optimising operational efficiencies and promoting environmental, social, and governance targets.”

concessions which were renewed, extended or had expired over the past 3 years, 21 were renewed or extended and the remaining 6 were allowed to expire. In mature markets, renewal instead of retendering appears to be the trend.

Retender

It goes without saying that preparing a port development project for a formal public tender process is costly and time consuming. The bidder will be asked to submit conceptual designs of the terminal and proposed operation plans. After the re-tendering process and a new concessionaire is chosen, there will often be another round of negotiations between the parties.

Drewry's research however observed that there is a noticeable increase in retendering by port authorities, especially in emerging markets. Expanding regional-based international terminal operators are consistently looking for concession opportunities in Africa, South Asia and the Red Sea, while others are also seeking further global growth. The increasing number of experienced terminal operators available brings more meaningful competition in a public tender process.

The government grantor may therefore take up the challenge and seek a new concessionaire,

especially when it has a weaker renegotiating position. While a strong concessionaire may mean that it is more capable of meeting KPIs and getting solid financial backing, it also means that the government grantor may have a comparatively weaker position in asking the concessionaire to develop the port project in a way it desires. It may also be difficult to quantify underperformance when expectations were not sufficiently developed in the initial concession agreement. A clean break with the original concessionaire followed by a competitive process may then become an attractive option.

So, to renew or retender?

Whether to renew or retender is ultimately a commercial decision. There are many factors affecting the renewal or retendering process. For instance, the market may have changed significantly since the early development of the port; government grantors have become more focussed on meeting sustainability, technology and corporate governance targets; changes in the legal and regulatory framework may also make concessions less profitable. Bargaining power also has a significant part to play in the negotiation or renegotiation exercise.

As the global concession market continues to evolve, parties to

concession agreements may opt for more industry-specific and innovative KPIs. When putting these commercial initiatives into legal writing, it is crucial to ensure that what has been put into the agreement is unambiguous, enforceable and backed by clear and objective assessment criteria. The parties may also wish to strike a balance between optimising operational efficiencies and promoting environmental, social, and governance targets. A clear understanding of the local, commercial, legal and development landscape of the particular port facilities concerned is also vital. Having these factors in mind should assist stakeholders in going through what they intend to achieve in a port development project and their negotiations to realise those objectives.

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