

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2019

GETTING THE
DEAL THROUGH

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Alex Kyriakoulis
HFW

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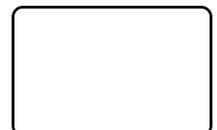


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Preface

Ports & Terminals 2019

Fourth edition

Getting the Deal Through is delighted to publish the fourth edition of *Ports & Terminals*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on the United Arab Emirates.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alex Kyriakoulis of Holman Fenwick Willan LLP, for his continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
October 2018

United States

Matthew J Thomas

Blank Rome 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?

The US has a large and diverse marine terminal industry. In terms of total tonnage (foreign and domestic), the port of New Orleans, LA, is the nation's busiest, serving as a hub for dry bulk cargo (eg, grain, coal, steel and ore) and liquid bulk cargo, including a growing petroleum and petrochemical export market. Houston, TX, stands as the country's busiest port for foreign cargo by tonnage, driven by its massive energy trade.

For container shipping, the San Pedro Bay ports of Los Angeles and Long Beach, when viewed together, are the country's biggest gateway. However, the Port of New York and New Jersey is a close second, and East Coast ports Savannah, GA, Norfolk, VA, Charleston, SC, and Jacksonville, FL, are important gateways as well.

In South Florida, the ports of Miami and Port Everglades represent key hubs in the trade with Latin America and the Caribbean, and are also home to the country's largest cruise terminals. And in the middle of the country, the Mississippi River (the country's largest waterway) and the Great Lakes continue to have their own thriving and diverse marine terminal industries. Accordingly, drawing broad generalisations about the domestic terminal industry, and its challenges and opportunities, can be difficult.

Good sources of official data about maritime cargo types and volumes include the Army Corps of Engineers Waterborne Commerce Statistics Center and the US Department of Transportation Maritime Administration (MARAD) Maritime Open Data Portal.

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

For container terminals (and also most large breakbulk, general cargo and roll-on, roll-off (ro-ro) facilities), the most common operating model is the landlord port, whereby the berth and backlands are owned by a state or local port authority and leased to a marine terminal operator. For large terminals, the trend has moved towards longer lease terms and greater infrastructure investment by the lessee terminal operators, in order to meet the critical financing needs for port infrastructure repair and expansion.

However, for historical and local reasons, this ownership model can vary from port to port. For example, in some major ports like Virginia, the facilities continue to be operated by a single government-owned corporation, although private stevedoring companies can compete within those terminals. Similarly, Port Houston is an 'operating port', rather than a 'landlord port', and has invested heavily on new infrastructure and technology at its two container terminals in recent years.

Also, while private ownership of container ports is relatively uncommon, private ownership of liquid and dry bulk terminal facilities (petroleum, grains, ores, etc) is more commonplace. The country's largest independent operator of bulk terminal facilities is energy and infrastructure giant Kinder Morgan Energy Partners LP. It and several other large pipeline and infrastructure operators (generally structured as master limited partnerships) have invested billions of dollars in

developing bulk cargo terminal facilities in recent years, buoyed in large part by the growth of the US energy sector.

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

In the US, port development is influenced by numerous overlapping laws, regulations and policies at the federal, state and local levels.

At the federal level, the US government has not played a significant role in directing maritime and port development, particularly as compared to other modes, such as highways and mass transit. Unlike those other modes, ports and shipping have not enjoyed regular annual formula funding, often leaving the maritime industry to pursue other funding sources without the benefit of an overarching national strategy.

The American Association of Port Authorities (AAPA) is the trade association that advocates for the port industry as a whole when dealing with the US Congress and executive agencies on port funding and policy. Congress in 2017 adopted marginal funding increases for some key AAPA priorities, including a discretionary multimodal grant programme, funding for Army Corps of Engineers dredging and navigation projects, and port security grants. However, current funding levels fall far short of the US\$66 billion investment that AAPA has identified as necessary to maintain and modernise key waterways, build adequate road and rail intermodal connectors and update port infrastructure.

Given the lack of a firm federal hand in the development of the country's ports, it has fallen to state governments and local port authorities to develop their own policies and strategies for financing and implementing growth strategies, and for attracting new cargo streams to and through their regions. This landscape has produced a US port industry that is dynamic and competitive, as individual ports fight to secure their places in the market.

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

Marine terminal operators must be aware of myriad environmental laws, regulations and programmes at the federal, state and local levels. For example, close attention must be given to air quality initiatives that aim to reduce harmful emissions from vessels (through the use of shore power and other initiatives), as well as cargo handling equipment, drayage trucks and other emissions sources. The Environmental Protection Agency (EPA) maintains a Ports Program with goals to reduce air pollution and greenhouse gases, achieve environmental sustainability for ports and improve air quality for near-port communities. In September 2016, the EPA released a National Port Strategy Assessment outlining strategies for reducing air pollution and greenhouse gases at US ports.

Terminal operators may face emission restrictions at the state or local level as well, or as key terms of their terminal leases. For example, under the California Environmental Quality Act (CEQA), if a project will have significant environmental impacts, the agency undertaking or permitting that project must impose all feasible mitigation measures. This requirement means that new terminal projects, which invariably bring more throughput, must adopt significant measures to offset the corresponding emissions requirements from the resulting truck, rail and equipment operations.

Clean air is not the only environmental issue terminal operators face, however. Other critical compliance issues include storm water runoff management and treatment, which must meet EPA-prescribed

local permit requirements under the under the National Pollutant Discharge Elimination System (NPDES), as well as tightening rules for vessel ballast water management, which are subject to NPDES and Coast Guard regulations. Other regulatory schemes for wetlands protections (including disposal of dredge spoils), handling and storage of oil and hazardous substances and protection of endangered species also impact terminal construction and operation.

Also, as discussed further below, marine terminal construction generally triggers a requirement for an environmental impact study under the National Environmental Policy Act and similar state legislation, analysing all projected environmental impacts from the project. As a result, environmental factors and mitigation options are often a leading consideration in any decision to build or rebuild US port facilities.

Legislative framework and regulation

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

There are numerous overlapping legislative and regulatory regimes that apply in the ports sector.

At the federal level, a special legislative scheme applies to marine terminal operators (including public ports) that serve 'common carriers' in the international trade – that is, vessels holding themselves out to the public carrying cargo for multiple shippers. Under the Shipping Act of 1984, the Federal Maritime Commission (FMC) regulates marine terminal operators that furnish wharfage, dock, warehouse or other terminal facilities in connection with common carriers in the international trade, or a mix of domestic and international common carriers.

The Shipping Act provides for the regulation of various aspects of marine terminal lease agreements and terminal operations, and bars terminal operators from engaging in various 'prohibited acts'. Several of these prohibitions involve relatively vague 'reasonableness' determinations, which fall to the regulators to determine on a case-by-case basis (often after extensive litigation). For example, regulated terminal operators are prohibited from engaging in unjust or unreasonable discrimination, or failing to maintain 'just and reasonable regulations and practices relating to or connected with receiving, handling, storing or delivering property' (46 USC sections 41102(c), 41106 (2) and (3)).

In 2017 and 2018, the FMC has been conducting a fact-finding investigation and public hearings to try to bring about more reasonable (ie, efficient and transparent) industry practices in connection with demurrage and detention practices in US ports (ie, the sums paid for shippers exceeding free time in storing cargo in the terminal and failing to timely return carrier equipment).

The Shipping Act also has measures providing for the elective publication of rates, regulations and other practices in online 'marine terminal operator schedules' – that is, tariffs – that are enforced as an implied contract (46 USC section 40501(f)). It also provides for the mandatory filing and regulation of agreements among terminal operators, or between terminal operators and ocean carriers, to discuss or fix prices, or to engage in cooperative working arrangements. Such agreements enjoy statutory antitrust immunity (46 USC sections 40301(b) and 40302(a)).

The Shipping Act is only one of many federal legislative schemes applicable to ports, however. As noted above, the EPA regulates ports from an environmental perspective under the Clean Air Act, the Clean Water Act and other statutes. The Coast Guard is responsible for vessel safety and navigation, and also for port security under the Maritime Transportation Security Act. The Army Corps of Engineers is responsible for dredging in US ports and harbours. Workers in US ports are subject to health and safety protections under the Occupational Safety and Health Administration (OSHA), and are covered by a special workers' compensation scheme, the Longshore and Harbor Workers' Compensation Act, administered by the Department of Labor. Numerous federal agencies play a role in policing the flow of cargo and persons through US ports, especially Customs and Border Protection, the Animal and Plant Health Inspection Service of the US Department of Agriculture and US Citizenship and Immigration Services. Hazardous materials storage and handling are subject to a regulatory scheme administered by the US Department of Transportation Pipeline and Hazardous Materials Safety Administration.

Particular types of specialised terminals may be subject to their own legislative regimes. For example, deepwater ports (eg, offshore terminals like Louisiana Offshore Oil Port) are permitted by the Department

of Transportation, while onshore LNG export terminals fall under the lead jurisdiction of the Federal Energy Regulatory Commission.

At the state level, the states will generally have a legislative code setting out a legislative framework for port matters. For example, the California Harbors and Navigation Code sets out an extensive legislative scheme for port financing, governance of harbour districts, bond authority, pilotage, vessel operations, safety, salvage, sanitation and numerous other matters. The charter or authorising legislation of the particular local port likely prescribes particular rights and authorities as well, making for a complex interplay of state, federal and local legal schemes.

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

See question 5.

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

See question 5. In the context of getting terminal deals through, it's particularly important not to overlook the role of the FMC. The Shipping Act has 'reasonableness' and non-discrimination provisions, which can be a strong incentive for ports to use competitive bidding processes to award leases and concessions to potential operators. As the shipping industry continues to consolidate, marine terminals are feeling the pressure to follow suit; the FMC has oversight to ensure that cooperation and joint ventures between terminals do not unreasonably stifle competition in the ports sector.

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

The appointment of a harbourmaster varies from port to port based on local legislation. In many non-US jurisdictions a harbourmaster is the official primarily responsible for ensuring compliance with navigation, safety and security statutes; however, in the US many of those responsibilities are vested in the Captain of the Port, a United States Coast Guard officer. Similarly, key customs decisions in US ports lie with the Area Port Director, a Customs and Border Protection Official.

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

Ports that serve only domestic shipping, or that serve only 'tramp' operators (ie, tankers and other vessels that sail on charter for a single charterer, rather than multiple shippers), are fully subject to federal antitrust laws and their state counterparts. However, as noted above, terminals that serve common carriers enjoy a limited antitrust immunity under the Shipping Act, but in return their agreements with carriers and other terminals are subject to rigorous oversight by the FMC. In practice, determining whether a terminal serves common carriers and is subject to the Shipping Act can be a difficult and fact-intensive inquiry.

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

Under the Shipping Act of 1984 and FMC rules (specifically, 46 CFR Part 525), marine terminal operators are authorised, but not required, to publish marine terminal operator schedules setting forth their rates, regulations and practices. The benefit to terminal operators is that:

[a]ny schedule that is made available to the public by the marine terminal operator shall be enforceable by an appropriate court as an implied contract between the marine terminal operator and the party receiving the services rendered by the marine terminal operator, without proof that such party has actual knowledge of the provisions of the applicable terminal schedule. (46 CFR 525.2(a)(2))

State or local law may also provide particular rules regarding the validity and enforcement of marine terminals tariffs, for example, making them enforceable as akin to local ordinances, but this varies from state to state.

11 Are there restrictions relating to the currency applied to the tariffs or to any fees that are payable by a port operator to the government or port authority? Are any specific currency conditions imposed on port operators more generally?

Although not expressly mandated, all US port transactions are handled in US dollars as a matter of course.

12 Does the state have any public service obligations in relation to port access or services? Can it satisfy these obligations through a contract with a private party?

Under the Shipping Act of 1984, marine terminal operators (including public ports) are subject to fairness and non-discrimination standards that apply to their dealings with carriers, cargo owners, and other waterfront business (stevedores, tug operators, line handlers, etc). Also, marine terminal operators cannot unreasonably refuse to deal with any party. Accordingly, ports and terminals that serve common carriers have a public interest obligation that can be at odds with their narrow commercial or financial interests.

13 Can a state entity enter into a joint venture with a port operator for the development or operation of a port in your jurisdiction? Is the state's stake in the venture subject to any percentage threshold?

As a general matter, yes, a public entity can enter into a joint venture with a private sector operator, and there are no general limits on equity participation levels. However, in practice, such joint venture structures have not been used regularly in the port sector. Rather, public entities have turned over terminal development and operation rights and responsibilities to private operators through leases, concession agreements, exclusive or preferential use agreements or other contractual structures.

14 Are there restrictions on foreign participation in port projects?

Yes. The Exon-Florio law, 50 USC Appendix section 2170, specifies the process by which foreign investments are reviewed, regardless of sector. The US president has the authority under this measure to block proposed or pending foreign 'mergers, acquisitions, or takeovers' of 'persons engaged in interstate commerce in the United States' if they are found to threaten to impair national security. To take such action, the president must conclude that other US laws are inadequate or inappropriate to protect national security, and have 'credible evidence' that the foreign investment will impair national security.

The Committee on Foreign Investment in the United States (CFIUS) is the interagency committee that serves the president in investigating and reviewing the national security implications of foreign investment under this section. The investigative authorities and procedures for CFIUS were significantly strengthened in 2007 in response to the attempted takeover of P&O Ports US marine terminal operations by United Arab Emirates-owned DP World. In 2018, CFIUS reportedly raised concerns about a takeover by China's COSCO Shipping Holdings Co of a large container terminal in Long Beach, California, as part of COSCO's deal to buy shipping line Orient Overseas International Ltd.

Also in 2018, in August Congress passed the Foreign Investment Risk Review and Modernization Act of 2018 (FIRRMA) to significantly broaden and strengthen CFIUS, providing additional measures for countries of special concern (likely meant to target China), specifically adding maritime real estate transactions and critical infrastructure investments to CFIUS' scope, and implementing various procedural changes to increase CFIUS' impact.

Public procurement and PPP

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

The legislation directly controlling the administration of port procurement and PPP agreements is specific to the port's state or locality. In some areas it might be maritime-specific, but often it is the same set of standards that apply to public procurement across many sectors.

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

This issue turns on a case-specific review of the procurement rules that apply in the state or locality where the port is sited. There are no federal port procurement authorities. However, if a port authority awards a terminal concession without a fair, open and competitive process, it places itself at higher risk of facing a complaint of unreasonable discrimination and refusal to deal from an aggrieved competitor under the Shipping Act of 1984.

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

Although ports' priorities vary from case to case, generally port authorities are looking at an economic cost-benefit analysis for a port project. Over the term of the agreement (which can extend for decades), they consider what the bidder is promising for annual payments and how it is structured. Rental payments can include fixed fees and components based on acreage, throughput (and minimum annual guarantees), revenues or other factors, sometimes making direct comparisons between competitors difficult. Of course, long-term capital investment is a crucial factor as well, as ports are increasingly looking for private sector operators and investors to finance infrastructure investments that are out of reach for financially strapped state and local governments.

Managing risk is an important factor as well: for example, who bears the risk if world trade and port volumes decline, the port is hobbled by climate change or environmental factors, the surrounding road and rail infrastructure fails, or myriad other risk factors come to pass?

The financial soundness and the legal and regulatory track record of the bidder and any partners, lenders or other backers is also closely examined. Insurance, indemnities and remedies in default are also key terms that ports examine closely.

Port authorities often look beyond the four corners of the property at the broader impacts of a terminal proposal: does the bidder have the right incentives and wherewithal to grow the amount of cargo and carriers coming to the port? How will the deal impact waterfront labour unions? How will the ecosystem of other maritime businesses surrounding the port be affected? How is the bidder proposing to meet its environmental compliance responsibilities and also address community concerns regarding pollution, congestion, noise, social justice, security and other issues?

18 Is there a model PPP agreement that is used for port projects? To what extent can the public body deviate from its terms?

No, these agreements vary from deal to deal. The FMC maintains an online library of marine terminal operator agreements, which provides examples of some terminal leases and other agreements.

19 What government approvals are required for the implementation of a port PPP agreement in your jurisdiction? Must any specific law be passed in your jurisdiction for this?

There is no federal authorisation required for terminal agreements, although the FMC can go to court to seek and have one enjoined if it is found to be substantially anticompetitive, unreasonably impacting shipping prices and service. (The FMC has never successfully done so.) The legislative framework and authorisations required for port PPP deals are generally established at the state or local level.

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

The most typical approach is a landlord port awarding a lease to an operator under a build-operate-transfer (BOT) model.

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

Marine terminal lease agreements can range from just a few years to several decades; there are no fixed limits. In one recent particularly high-profile PPP, the State of Maryland in 2009 awarded a 50-year lease for the operation of Baltimore's main container terminal, an important East Coast port. Elsewhere, private operators have signed leases for smaller facilities (eg, Jasper County, SC, and Texas City, TX) for terms exceeding 90 years.

22 On what basis can the term be extended?

Terminal leases often include optional extension periods, negotiated by the parties. However, decisions regarding additional lease extensions beyond those set out in the lease often implicate many of the same economic, legal and policy concerns as new awards, especially if competing bidders are seeking an opportunity to take over the facility. See question 21.

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

See question 17.

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

These are contractual issues that are negotiated on a case-by-case basis. Any exclusivity agreements that give a port operator a monopoly over particular services in the relevant market (as defined akin to the antitrust laws) will be at risk of a challenge before the FMC, where the parties may need to demonstrate that the benefits of the exclusive arrangement outweigh the adverse impacts on competition and trade.

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

On a federal level, there are no standardised incentives set forth for investors in port facilities; however, parties developing significant port facilities generally seek to negotiate incentives and other favourable terms on a case-by-case basis with the relevant state government or local port authority.

Port development and construction**26 What government approvals are required for a port operator to commence construction at the relevant port? How long does it typically take to obtain approvals?**

Numerous federal, state and local regulatory requirements must be satisfied before commencing construction of a new marine terminal. These requirements can vary significantly from project to project, depending on state and local laws and project details. However, the most significant aspects of this process are the environmental reviews required under the National Environmental Policy Act (NEPA) and its state counterparts, like the California Environmental Quality Act (CEQA).

This environmental review process (and any related litigation) can stretch on for several years. One well-known example is the development of the China Shipping Container Terminal in the Port of Los Angeles. In March 2001, the port issued a permit to construct the terminal, and entered into a lease with China Shipping for the facility. Shortly thereafter, a lawsuit was filed in both state and federal courts alleging that the port failed to comply with the requirements of CEQA for a full analysis of the project's environmental impacts. California courts ordered a partial halt to ongoing construction and ordered the preparation of a project-specific environmental impact statement/report (EIS/EIR). While part of the terminal was allowed to come online in 2004 as part of a settlement agreement, the final EIS/EIR was not concluded until 2008. It incorporated a number of mitigation measures, including concessions related to aesthetics, air quality, noise, and transportation. Construction was not completed until 2013, and certain issues related to the implementation of some of the mitigation measures still continue to this day. Accordingly, the importance and impact of these environmental reviews cannot be overstated.

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

Historically, most port infrastructure construction was the responsibility of the public sector agencies. However, tightening government budgets, declining port revenue growth and increasing demand caused by larger ships, shoreside congestion, demands for environmental mitigation and other factors have pushed the market towards more creative PPP arrangements and private sector financing and construction of port infrastructure.

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

Construction must comply with all applicable federal, state and local codes and regulations (including the Army Corps, Coast Guard and EPA, as well as those of state and local authorities). Qualification of contractors is generally controlled by contract and local regulations with the relevant port.

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

These are key contract issues that must be negotiated and addressed in the drafting of any engineering, procurement and construction agreement.

Port operations**30 What government approvals are required in your jurisdiction for a port operator to commence operations following construction? How long does it typically take to obtain approvals?**

See question 5. In addition to meeting all local requirements relating to building codes, fire codes, hazardous materials storage and handling and other unique port-specific approvals, terminals must comply with numerous federal operating requirements, as detailed above. For example, FMC-regulated terminals are required to register with the agency before commencing operations, facility security plans must be filed with the Coast Guard, Longshore Act cover must be secured under Labor Department rules and compliance with federal environmental permitting requirements must be established.

An equally important undertaking, however, is securing agreements for port labour. In several markets this may require becoming part of a collective bargaining unit and participating in multi-employer pension and benefit plans under the relevant union's collective bargaining agreement, pursuant to the Employee Retirement Income Security Act (ERISA) and related legislation.

31 What services does a port operator and what services does the port authority typically provide in your jurisdiction? Do the port authorities typically charge the port operator for any services?

It is difficult to generalise, as no two port authorities take an identical approach to dividing responsibilities between the port authority and the tenants or other service providers, and usually the fine details of the relationship are subject to negotiation and contract. However, it is not uncommon for a port authority to assess wharfage and dockage charges on a vessel calling there for use of the berth, even for cargo that is being unloaded from the vessel to a leased terminal. In some ports, cranes and other cargo handling equipment may belong to the port as well, to be operated for a fee. In some ports, tugs and pilots are the responsibility of the port, or a related commission.

One key overarching principle to keep in mind is that public port authorities and local government cannot impose taxes or fees on cargo moving through the port, other than bona fide user fees for services and benefits arising from use of port facilities or services. These restrictions derive from the Shipping Act and the Rivers and Harbors Act (33 USC section 5), as well as the Tonnage Clause of the US Constitution. Accordingly, it is not uncommon for ports to adopt fees supporting port security, first responders and even some shared environmental and infrastructure improvement. They are largely foreclosed from charging carriers and tenant terminals simply for using or navigating the port's harbours and waterways.

32 Does the government or relevant port authority typically give any commitments in relation to access to the hinterland? To what extent does it require the operator to finance development of access routes or interconnections?

Given the widespread concerns regarding congestion and emissions around US ports (particularly container terminals), negotiation over inland transportation linkages, especially the financing and development of rail access and roadway improvements, are key commercial elements of many terminal deals.

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

See question 5.

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

With regard to taking over port operations, terminal leases generally have detailed provisions regarding remedies for breach, including the standards and processes for a landlord port to terminate a lease. Regarding access, port authority officials and other regulators, including Coast Guard, Customs, APHIS and other agency representatives, routinely visit terminal operations as part of their oversight roles. Such access is generally provided for in terminal agreements.

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

See question 41.

36 What assets must port operators transfer to the relevant port authority on termination of a concession? Must port authorities pay any compensation for transferred assets?

This issue is generally addressed in the text of terminal lease agreements. Generally, infrastructure, buildings, fixtures and other improvements (but not moveable equipment) revert to the landlord port at the end of the lease term, but tenants may seek prospectively to negotiate compensation for such investments.

Miscellaneous

37 Is a port operator that is to construct or operate a port in your jurisdiction permitted (or required) to do so via a special purpose vehicle (SPV)? Must it be incorporated in your jurisdiction?

As a general matter, the use of SPVs is commonplace for structuring the ownership of terminal businesses, although they are not strictly required. Decisions as to structure generally are driven by financing, liability and tax considerations, rather than particular requirements for the use of SPVs or other corporate forms.

38 Are ownership interests in the port operator freely transferable?

For the most part, yes, although some sales may require clearance on antitrust or national security grounds (under the CFIUS process described in question 14). Of course, terminal leases and financing agreements may include change of control provisions that require counterparty assent if there is a sale of the underlying interest in the venture.

39 Can the port operator grant security over its rights under the PPP agreement to its project financing banks? Does a port authority in your jurisdiction typically agree to enter into direct agreements with the project financing banks and, if so, what are the key terms?

In general, yes, an operator can grant security to financing banks, although the structuring of such deals varies on a case-by-case basis. Ideally, a port authority would like as much protection and recourse as possible in the event of a tenant default, so guarantees, performance bonds and letters of credit from the operators, lenders and other backers can be sought.

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

Issues of termination and amendment of port agreements are matters of contract law, subject to the terms of the agreements themselves and the contract law of those jurisdictions.

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

If a terminal operator defaults, the port may bring suit, and has at its disposal all contractual rights and remedies available under its agreement and under the contract law of that state. Securing an award of damages or an injunction might provide little practical relief, however, against a failing operator.

In 2017, when Hanjin Shipping Company went into bankruptcy, its Port of Long Beach became a hotly contested asset in the bankruptcy proceedings, and ultimately was allowed to be sold. Similarly, the Port of Oakland in 2016 dealt with the bankruptcy of a major long-term PPP terminal operator tenant. Reflecting on that experience in a presentation before the AAPA, Port of Oakland general counsel Danny Wan highlighted some sensible steps that ports can take at the outset to guard against tenant default and insolvency. Those include an emphasis on due diligence (understanding the tenant's financials and corporate structure) and careful use of security deposits, guarantees, waivers of certain statutory protections (like the requirement to proceed against tenant assets first), letters of credit and performance and payment bonds. More broadly, he noted the need for tenants to have 'skin in the game' by making capital investments at the outset of the lease. All of these strategies are aimed at providing ports with viable avenues for economic relief in case of a tenant default.

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

As a practical matter, yes, port leases are usually required to apply the law of the project state. However, often other agreements relating to the financing, construction and operation of a terminal might apply the laws of New York, Delaware or other US states. Accordingly, in the case of a default or breach, multiple interrelated agreements and the laws of several US states might come into play.

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

Litigation between port authorities and operators may play out in state or federal courts depending on the identity of the parties and other jurisdictional issues. However, certain marine terminal disputes may also be raised before the FMC under the broad 'reasonableness' standards of the Shipping Act. It is not unusual to see some terminal disputes brought before both the courts and the FMC in parallel, relying on the same facts but different legal standards and authorities in each proceeding.

Some US port authorities are organised as agencies or instrumentalities of the state government, and therefore enjoy sovereign immunity from suit under the US Constitution, potentially leaving aggrieved operators with no recourse to pursue claims for lease or statutory violations. See *Federal Maritime Comm'n v South Carolina Ports Authority*, 535 US 743 (2002).

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