

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2018

GETTING THE
DEAL THROUGH

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Ports & Terminals 2018

Contributing editor
Alex Kyriakoulis
HFW

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Senior business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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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 vessel calls, Houston, TX stands as the country's busiest port, driven by its massive tanker trade. The rapid growth of domestic petroleum production over the last five years has led to rapid development in new export facilities in Houston and other Gulf ports for crude, condensate, refined products and liquids. The first US liquid natural gas (LNG) export terminal, located in Sabine Pass, Louisiana, came into service earlier this year. The Delaware River ports around Wilmington, NC, and Philadelphia, PA, have also seen new investment in liquid petroleum gas and LNG facilities.

For container shipping, the adjoining 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 such as New York, Norfolk, VA, Charleston, SC and Jacksonville, FL are important gateways that expect further growth from the expansion of the Panama Canal.

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 last 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.

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 since 2007.

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.

Slightly more federal legislative attention has been paid to cargo and shipping infrastructure recently. In December 2015, Congress passed its most recent five-year transportation funding plan, the FAST (Fixing America's Surface Transportation) Act. While this bill remains primarily focused on highways and other surface transportation priorities, it does devote more attention to ports and the freight-handling industry than its predecessors, targeting close to \$11 billion in funding for freight programmes. Among other things, the bill increases seaport eligibility for new infrastructure grants and other financing, creates a dedicated funding stream for multimodal freight projects, and provides new policy direction on freight networks to the Department of Transportation. Still, these changes are likely to have only evolutionary, not revolutionary, impacts on the federal role in funding and steering port development.

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, several ports in recent years have implemented clean truck initiatives, using combinations of grants and regulations to remove older diesel trucks from port service.

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, including the following:

- Barring 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 §§ 41102(c), 41106 (2) and (3).
- Allowing for elective publication of rates, regulations and other practices in online 'marine terminal operator schedules' which are enforced as an implied contract. 46 USC §§ 40501(f).
- 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 §§ 40301(b), 40302(a).

For more details on the FMC's authorities over terminal operators, see the agency's online guide for terminal operators.

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 United States Department of Agriculture and United States 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 terminal leasing, it is particularly important to highlight the role of the FMC, especially the potential uncertainty injected into terminal agreements by the Shipping Act and its non-discrimination provisions. For example, litigation has been under way for more than eight years, brought by Maher Terminals before the FMC against the Port Authority of New York and New Jersey, regarding Maher's lease terms. In 2008, Maher filed a complaint against the port authority alleging that the differential terms between its and APM/Maersk's leases (which were negotiated in the late 1990s) violated 46 USC § 41106(2) in offering an 'unreasonable preference' to APM/Maersk. A federal appeals court recently overturned an FMC order dismissing Maher's complaint, reviving the litigation before the agency. As a result of this dispute and the underlying uncertainty (apparently even on the part of the FMC) as to exactly what level of parity the Shipping Act requires, the port and operator in this case have had to contend with extraordinary economic uncertainty about the fundamentals of their lease deal for nearly two decades. Accordingly, ports and operators need to look for ways to prevent carefully crafted long-term public-private partnerships (PPP) agreements from being unravelled by the Shipping Act.

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 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.

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?

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.

13 Are there restrictions on foreign participation in port projects?

Yes. The Exon-Florio law, 50 USC Appendix § 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 UAE-owned DP World, and some members of Congress continue to press for even tighter restrictions.

Public procurement and PPP

14 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.

15 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.

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

While 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?

17 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.

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?

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.

19 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.

20 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.

21 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 20.

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

See question 16.

23 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.

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?**

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.

25 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.

26 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.

27 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**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 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.

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?

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 §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.

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?

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.

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?

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.

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 39.

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?

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

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 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.

36 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 above). 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.

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?

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.

38 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.

39 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.

The Port of Oakland recently dealt with the bankruptcy of a major long-term PPP terminal operator tenant. Reflecting on that experience recently in a presentation before the American Association of Port Authorities, 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.

40 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.

41 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, relaying on the same facts but different legal standards and authorities in each proceeding.

It is important to note that 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).

BLANK  ROME LLP
COUNSELORS AT LAW

Matthew J Thomas

mthomas@blankrome.com

1825 I Street NW
Washington DC 20006
United States

Tel: +1 202 772 5971
Fax: +1 202 772 1672
www.blankrome.com

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Ports & Terminals
Private Antitrust Litigation
Private Banking & Wealth Management
Private Client
Private Equity
Private M&A
Product Liability
Product Recall
Project Finance
Public-Private Partnerships
Public Procurement
Real Estate
Real Estate M&A
Renewable Energy
Restructuring & Insolvency
Right of Publicity
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Securities Litigation
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