

Ports & Terminals

Contributing editor
Alex Kyriakoulis



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GETTING THE
DEAL THROUGH

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DEAL THROUGH 

Ports & Terminals 2016

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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?

In terms of 20-foot equivalents (TEUs), the 10 busiest ports in the USA in descending order are:

- (i) Los Angeles/Long Beach, California;
- (ii) New York, New York;
- (iii) Savannah, Georgia;
- (iv) Seattle, Washington;
- (v) Norfolk, Virginia;
- (vi) Houston, Texas;
- (vii) Oakland, California;
- (viii) Charleston, South Carolina;
- (ix) Tacoma, Washington; and
- (x) Port Everglades, Florida.

The primary purpose of each of these ports is the movement of containerised cargo. However, the movement of oil and gas (refined or to be refined) in and out of these ports is essential, particularly in the larger city ports. New York, Seattle, Oakland and Tacoma also support a well-defined and robust ferry system. We expect that there may be significant changes in the position of some of these ports in the coming decade, based on a number of factors. These factors include:

- the expansion of the Panama Canal, permitting the passage of larger vessels;
- the worldwide launching of larger container vessels capable of more TEUs at faster speeds;
- the increase in shipping company participation in alliances to reduce costs (by which some ports may lose a shipping line due to their joining an alliance that utilises a different port);
- the speed and extent of infrastructure investment that ports are able to roll out to modernise and streamline container distribution (by rail, truck or barge);
- the level of emissions control and enforcement in a particular state or port; and
- how swiftly ports and their terminal tenants are able to modernise and rightsize their container handling equipment and procedures, and balance potential strife with labour unions where automation is concerned.

Some predict that the expansion of the Panama Canal and the increase in the size of vessels will have the biggest negative impact on the US West Coast ports, which have the strictest emissions and environmental standards and have been the location of significant work stoppages in recent years, due to union negotiations regarding labour-versus-automation issues.

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

Over the past few decades, the model of port as landlord has emerged as the dominant theme among the US ports that are growing and modernising. In this regard, ports have become very sophisticated land managers and gatekeepers regarding how land is developed by and for port tenants

and prospective tenants. Nearly all US ports that have prospered and grown in size or throughput during this time have done so by incorporating detailed master planning of interrelated infrastructure and, whenever possible and financially feasible, improvement of inter-model transport access routes.

Additionally, since 11 September 2001 there has been substantial port reform regarding security procedural requirements, and new requirements for security infrastructure at US ports. This includes the addition of new or upgraded video surveillance devices; motion detectors; radiation detectors; port and terminal security fencing upgrades and threat detection; federal worker identity cards; upgraded customs; and border protection barriers. US government grants have assisted ports in updating their infrastructure.

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

No. There are some 360 commercial ports in the United States. Control of port development varies from state controlled ports, to special port districts, to municipal, city or county controlled ports, to a few privately owned ports. Many such seaports are overseen by port or harbour commissioners, who are appointed or elected and who bring different life, work, interests and political views to the task of port development and decision-making. Complicating the picture is the fact that the tenure of a port or harbour commissioner is typically finite, according to the applicable term of service. Therefore, governance continuity can be disrupted, and agendas and priorities on port development can change, sometimes with a change in the political party in power. Thus, while funded 'green-lit' development projects within a particular port are typically immune to changes by port decision makers, development projects in the planning or concept stage may be subject to a reboot when new policy makers or controlling political parties emerge.

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

On the federal level, applicable to all ports and marine terminals in all US states, there are a wide range of federal statutory regimes whose primary focus is protection of the environment. Among the more prominent are statutes which protect against:

- oil spills and require shoreside spill response plans (the Oil Pollution Act of 1990, 33 USC §2701 et seq);
- storage and discharge of hazardous substances (the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 USC §9601 et seq);
- other forms of water pollution (the Federal Water Pollution Control Act, 33 USC §1251 et seq, Federal Water Pollution Control Act Amendments of 1972, Pub L 92-500, Clean Water Act of 1977, Pub L 95-217 and the Water Quality Act of 1987, Pub L 100-4, collectively referred to as the 'Clean Water Act'); and
- illegal filling of wetlands in port development and illegal dumping of dredging spoils (section 404 of the Clean Water Act).

States are also free to impose their own, sometimes even more restrictive, environmental protections and 'green' policies that impact the operation and development of ports and terminals. California is the state that leads the United States with early adoption of the most comprehensive environmental protections that concern ports and terminals. The environmental

law and protections affecting ports and terminals that California has implemented include:

- oil spill prevention and response laws more stringent than OPA 90 (The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act of 1990, California Government Code §8670.1 et seq);
- enforcement of 'clean diesel engine' retrofit requirements for harbour tugs, diesel trucks and cargo handling equipment, including in some cases state financial contributions to such retrofits through grants;
- prohibitions on idling diesel trucks in port and terminal queues;
- requiring vessels calling to burn low sulphur fuel, and a spreading implementation of a 'shore power plug-in policy' for vessels in berth;
- hazardous substances management and storage, including secondary containment requirements; and
- storm water management requirements, including storm water pollution prevention management.

Other state jurisdictions in the United States have either concurrently adopted their own green port policies covering similar issues, or have followed California's lead.

Legislative framework and regulation

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

There is no overriding legislative framework for port development or operations that is applicable to all states or localities in which ports exist or are being developed. Rather, in the United States each state and local government has adopted applicable laws regarding environmental, construction and other standards. There are, however, certain federal laws that any port development project would need to ensure compliance with including environmental, financial, security and operational issues. Various federal agencies are involved in port operations, including:

- the US Army Corps of Engineers (regulating and enforcing wetlands filling and dredging operations);
- the Environmental Protection Agency (regulating and enforcing federal environmental laws and regulations);
- the US Department of Commerce (regulating various federal policies related to enhancement of maritime commerce);
- the Federal Maritime Commission (which regulates ocean common carriers, marine terminal operators and ocean transportation intermediaries who operate in US foreign commerce);
- the US Department of Transportation (which has licensing authority for the development of deep water ports); and
- the Department of Homeland Security, which oversees many US agencies including, inter alia, the following relevant to port development or operations:
 - the United States Coast Guard (regulating and enforcing laws and regulations for safety on the navigable waters of the United States);
 - US Customs and Border Protection; and
 - the Transportation Security Administration (more well known for air transportation security, but also responsible for water transportation security).

In particular, all domestic port and terminal operators must adhere to the 2002 Maritime Transportation and Security Act and have their security plan approved by the Coast Guard.

Similarly, and with regard to privatisation or public-private partnerships (PPP) in the port sector, these can in theory be undertaken pursuant to local government's general powers rights, subject always to compliance with applicable federal and state regulations.

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

See question 5. In general, there is no single regulatory authority applicable to all ports. Each port is typically subject to federal, state and local laws. In many ports the local authority will own the terminal facilities, which it will then lease to terminal operators.

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

In terms of key competencies, in general US port regulatory authorities have responded with vigour to the requirement that better environmental

practices be followed. Such practices involve port personnel, tenants, servants of the ports and tenants, shipping lines calling in the port (regarding emissions, ballast discharge, and pollution prevention), container cargo handling equipment, harbour tugs assisting vessels, truckers (emissions reductions), terminal storage practices of hazardous materials (secondary containment), storm water treatment and discharge, and terminal and vessel oil spill response plans. Over time this has made a dramatic difference in the reduction of environmental releases, and in the water quality of many ports. Typically the port authorities have the power to shut down, or legally arrange for the terminal and cargo operations to be shut down, if there is a threat to the environment that is prohibited by statute.

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

Each port may select its own harbour master under its own locally adopted methods.

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

Yes. Marine terminal agreements (MTAs) must be filed with the Federal Maritime Commission (FMC). Pursuant to section 6 of the Shipping Act of 1984, 46 USC 40,103, the FMC reviews and can reject an MTA that does not meet the standards 46 USC 40,304(b). In this regard, should the FMC determine, at any time after the filing, that the MTA may reduce competition, or produce an unreasonable reduction in transport cost, or unreasonable increase in transport cost, the FMC can sue to obtain an injunction against the MTA's operation pursuant to 46 USC 41,307(b).

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?

On a federal level, marine terminal operators are merely required to make their tariffs publically known, and they are no longer required to file their tariffs with the FMC. Tariffs are billed and collected from the users of the marine terminals according to the terms and conditions of the tariffs, which varies from operator to 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?

No.

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?

Yes, a US state or local port owning entity may enter into a joint venture with a port operator for development or operation of a port; however, ownership of the port itself does not transfer. There is no percentage threshold.

13 Are there restrictions on foreign participation in port projects?

No, not as a practical matter. In some of the busiest US ports, the majority of terminals are operated by private, foreign-owned companies. Even foreign state-owned companies operate some terminals in US ports. However, as a political matter public outcry has stopped a few foreign investment efforts in terminal infrastructure and operations. Additionally, within the last decade, US federal politicians responding to such public concern blocked one substantial proposed transfer of numerous terminals to a state-owned entity located in the Middle East. Given the widespread foreign entity involvement in operating infrastructure critical to US national security, including ports and terminals, coupled with the mandatory security oversight of the US Coast Guard and the US Customs and Border Patrol, much of the public outcry may be based on a lack of complete information on the issues and realities.

Public procurement and PPP

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

Typically, each public port authority in the US has or is subject to specific state or local legislation regarding procurement. However, as to PPP there is generally no specific controlling body of legislation.

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

This varies from state to state. However, typically a competitive bidding process is utilised seeking to achieve the best terms and best-value engineering, which does not always equate to the lowest price.

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

Generally, past experience of the party seeking the concession or joint venture, as well as:

- their financial strength, value of engineering offered and reputation;
- the cost of the proposed concession or joint venture;
- the payments structure;
- environmental hurdles;
- feasibility; and
- quality of construction and materials, if construction is involved.

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. PPP agreements in the US are generally custom 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?

This varies from state to state, but in general for a PPP that does not involve the use of federal funding, federal project approvals are not required for the PPP, with the exception that Homeland Security's various agencies involved with port security and border control must approve the security plan. Many states have coastal commissions or authorities, with master planning authority, and addressing their questions and concerns is always an early step in the process. Environmental approvals are also a major step in the pre-planning stages. The US Environmental Protection Agency (EPA) delegates certain of its authority to state environmental protection agencies, who are obligated to uphold the EPA's standards, in addition to being free to impose their own even stricter standards. Similarly, any dredging or construction over navigable waters triggers the oversight and permitting of the US Corps of Engineers, including the disposal of dredging soils. The time of year when dredging is permitted is also controlled by 'fish windows' issued by state fish and game agencies, and potentially by the EPA if the project poses a risk of impacting on endangered species.

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

The most common situation where a port grants a private operator the right to build and operate a container or bulk terminal is under a build-operate-transfer long-term lease.

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

No.

21 On what basis can the term be extended?

The term is set in the initial contract, and while it is a matter of negotiation, it is not uncommon for there to be options to extend the term of the contract. The right to exercise an option to extend the term nearly always requires that the party seeking to extend be free from default.

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

Most commonly, port property is generally leased for a fixed land rent often calculated in reference to a particular price per square foot or acre. These rents typically increase periodically as set by contract, either by a fixed percentage or consistent with an index such as the Consumer Price Index. Port operators may also pay a throughput rental fee dependent on the amount of traffic that they bring through the port. Ultimately, port authorities and operators can choose any legal fee structure and implement the same by lease agreement.

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

This is a matter of contract, and will vary from jurisdiction to jurisdiction, or from port to port. However, there is not a large body of port PPP from which to draw limiting conclusions, or to point to specific defined practices.

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?

National, state and local approvals are all required before development of a port facility. How long the process takes depends entirely on the location and scope of the project and can vary from a few to many years if the project is politically favoured, or it can languish and be indefinitely stalled if the development project does not have support at the regulatory or political levels.

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

There is no typical case. In some circumstances, a government entity may undertake parts of port construction, while under other circumstances developments may be entirely private.

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

The port operator would have to meet state and local construction standards, and comply with the directives and policies of the US Corps of Engineers regarding dredging and filling, as well as any safety requirements that might be imposed by federal agencies having responsibility for the safety of navigation (the US Coast Guard) and environmental laws (the US Environmental Protection Agency). Selection of port construction contractors is typically provided for by contractual agreements between the port authority and the developer (if any).

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

This varies from project to project. It is not atypical for liquidated damage provisions to exist in such contracts.

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?

The following are required:

- final local building department and port engineering inspections to determine that the project was constructed to code and specification;
- inspection by the local fire department to confirm 'as built' construction and fire suppression meets fire codes and has a plan and secondary containment for any intended storage of hazardous materials;
- local planning department or commission issuance of an 'occupancy and use' certificate; and
- acceptance of the project by the local port authority.

On a federal level, approval of a security plan is required from the various Homeland Security agencies. The time for approval is subject to many variables, and varies from state to state regarding local approvals. Usually it is a matter of months if the project is well thought out and constructed, but can be years if problems are discovered or political issues arise.

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?

Port operators are typically responsible for all port-related services, including maintenance, repair and security. Port operators are also normally responsible for securing their own access to utilities such as water, gas, electricity, sewer service, telephone access, etc. Port authorities, in

Update and trends

The widening of the Panama Canal is expected to increase the call of larger containerised vessels on the US Gulf and East Coasts. This has stimulated the modernisation and the modification of cargo-handling equipment infrastructure in those ports in this range who are anticipating increased throughput. At least one of these projects on the US East Coast involving container crane modernisation was a PPP. More are expected. While the US has an ageing transportation infrastructure, and the stringent environmental laws in the US make development more difficult and expensive, the PPP model holds promise of bringing the efficiency and capital of the private sector to bear on the challenge of US port development projects.

conjunction with local governments, typically provide general infrastructure that allows access to each terminal.

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?

This varies from port to port, but generally, yes. Where the port authority does provide access to rail or other facilities, it often does so for an agreed monthly rate.

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 authorities typically limit the operators' activities to various 'permitted uses' that are defined in the terminal lease. Such leases may also include a list of 'prohibited uses'. In the event that an operator engages in improper activities or uses of the terminal, the port authority may terminate the operator's right to possession and seek any damages caused by the operator's breach of the lease agreement. In some instances, the port authority may also appoint a receiver to take over the operator's business and collect rents accordingly. Particular port policies and procedures for suspension of operations due to weather, labour strikes, electricity outages or other reasons vary from port to port.

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

These circumstances are almost always delineated in the lease agreements between the port authority and the port operators. Port authorities often require that they be allowed access to inspect terminal operations, ensure conformance with the lease agreement and conduct necessary repairs or maintenance.

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?

In the event that a port operator fails to operate and maintain the port as agreed, the port authority may terminate the operator's right to possession and seek any damages caused by the operator's breach of the lease agreement. In some instances, the port authority may also appoint a receiver to take over the operator's business and collect rents accordingly. Port authorities may also conduct maintenance or repairs at their own expense and subsequently charge the delinquent operators for such services. The port authorities' remedies in these situations are almost always governed by the contract.

In more extreme instances, where a port operator's actions are criminal or in violation of statutory law, including environmental laws, local, state and federal government agencies may institute criminal, civil or regulatory proceedings against the port operator.

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?

Such matters are agreed in advance by contract between port or terminal operators and the relevant port authority. In a typical case, physical improvements made by the operators that constitute fixtures are to remain

at the termination of the operator-port authority agreement, unless the port authority requires the removal of the fixture, in which case it is to be removed and the property returned to its pre-agreement condition. A common carve-out is equipment leased from third parties that is installed as a fixture of the port operator's terminal or facility – it is generally agreed that such equipment may be removed at termination provided the facility is restored to its original condition. Moveable cargo-handling equipment is not normally transferred to the port authority at termination of the operator-port authority agreement.

Some port authorities are willing to negotiate rent credits or partial credits for operator or tenant improvement of the port facilities, which is a form of pay-as-you-go compensation for transferred assets.

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?

The use, requirement and jurisdiction of an SPV for construction or operation of a port varies from state to state in the US. However, an SPV is typically used as the contracting entity.

36 Are ownership interests in the port operator freely transferable?

No. Any transfer of ownership interests would be subject to review for compliance with, for example, federal anti-trust laws. Additionally, the port authority normally has contract transfer restrictions on port operator agreements and MTAs.

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?

Typically, yes, security is granted to project financing lenders. While there have been very few PPP port infrastructure projects in the US to date (this varies from state to state), lenders have sometimes been a member of the SPV. Lenders are concerned about many key terms, including overall cost, rate of return, financial covenants, collateral, insurance, milestone payments, events of default and remedies.

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

Typically, agreements to make infrastructure improvements in US ports are public works, subject to public bidding and government contracts practices and procedures. If the port authority wishes to expand the scope of work, then it can provide for that in contractual options, or by means of change order procedures. The bid packages make plain what procedures are employed for change orders, force majeure, or changed conditions (eg, unknown adverse environmental conditions that are discovered). If a disagreement between the port authority and the contractor develops over the scope of work or a change order, then the contractor is typically required to complete the work as defined by the port authority and make any claim for additional compensation – administratively at first, and if there is no resolution then through court litigation.

In their construction agreements or operating agreements, US ports normally include detailed termination clauses, which provide the procedures and grounds for termination. Many such contracts (particularly construction contracts) include clauses permitting the port to terminate for convenience, subject to payment of specified amounts. In the case of PPP contracts where there is risk sharing and private or public investment, termination clauses are often negotiated in detail and are more balanced because of the private investment and anticipated return by the private partners.

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

The available remedies vary by port, and ultimately depend on the contractual terms of the particular agreement between the port authority and the port operator. Many port operator agreements are lease agreements that provide that, in the event of a contractual breach, the port authority may

terminate the operator's right to possession and seek any damages caused by the operator's breach of the lease agreement. Depending upon the agreement, liquidated damages or even consequential damages may also be available. The validity of governmental liquidated damages are evaluated as of the date of entry into the agreement, and in some instances are very difficult to overcome. For example, in California, governmental liquidated damages are valid unless the party challenging them can show that they were 'manifestly unreasonable' at the time the contract was entered into.

In some instances, the port authority may appoint a receiver to take over the port operator's business and collect rents or payments due to the port. Port authorities may also conduct maintenance or repairs if the port operator fails to fulfil its contractual obligations to do so, and subsequently charge the delinquent port operators for such maintenance, repairs, services or expense.

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

Yes. All non-federal government PPP agreements are governed by the laws of the US state in which the project is located. Additionally, the PPP agreement is impacted by the applicability as a matter of law of various federal laws and regulations applicable to port operations and development, which have been previously identified.

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

Disputes that cannot be resolved through informal negotiations are customarily litigated in state courts. Less often, disputes may be resolved in United States federal courts or through arbitration. Disputes are typically only resolved through arbitration if the contracting parties consent to the same in the lease agreement or other contract governing the relation between the parties.



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