



World Bank Seminar on Port Reform

LEGAL TOOLS FOR PORT REFORM

by

**Christiaan van Krimpen LL.M.
Legal Counsel
Aqaba Development Corporation
Hashemite Kingdom of Jordan**

April 2nd, 2008

Introduction

Ports represent an Intensive Mix of Public and Private Interests

- ✓ Ports are children of their time.
- ✓ Many established port management structures became obsolete after the introduction of market oriented economies.
- ✓ Globalization in transport weakened monopolistic position of many ports.

History

Dominance of Public Sector

- ✓ Former Communist Bloc: ports were part of Ministry of Transport and/or National Shipping Line.
- ✓ Continental Western Europe: Landlord ports (NW) and Tool Ports (Mediterranean)
- ✓ UK: Port Trusts (Service Ports)
- ✓ USA: Port Authorities (Landlord)

More History

Dominance of Public Sector

- ✓ Asian and African port structures were usually copied from the former mother countries.
- ✓ UK-oriented types of Service Ports dominated the scene.
- ✓ In South America, many National Port Authorities were created as part of the State structure.
- ✓ Majority of world ports in 1980s: expensive, inefficient, overmanned and poorly maintained.

Present Situation

Main Trends

- ✓ Landlord Ports became dominant model
- ✓ Port Authorities evolved into infrastructure operators
- ✓ Shift of investments from public to private sector
- ✓ Port operations were privatised
- ✓ Rise of the global terminal operators

Legislation

Port Legislation

- ✓ Most countries enacted new ports laws, creating the institutional framework for the relation between the State, the port city and the Port Authority. Main issues are:
 - Establishment of National or local port authorities
 - Legal status of Port Authorities
 - Financial and fiscal relations between the government (national and/or local) and the Port Authority
 - Ownership of port land and port/terminal infrastructure

Privatisation

Privatisation of Port Authorities

- ✓ Port authorities are usually part of the public domain. Only in a few countries port authorities are fully privatised (UK, New Zealand).
- ✓ Privatisation of a port authorities means that the port land is privately owned.
- ✓ Disadvantages:
 - Public sector loses long term development options.
 - Port land subject to speculation
 - Possible creation of private monopolies

The Changing World

Institutional Structures

- ✓ Port authority as part of national or regional government (Germany)
- ✓ Port authority as corporate entity by law (Latvia, Sri Lanka, Gujarat, Tanzania)
- ✓ Corporatised Port Authority by law (Australia, Poland)
- ✓ Corporatised Port Authority on the basis of the Companies Act (The Netherlands)

Objectives

Objectives of a Port Authority

- ✓ The objectives of Port Authorities differed from country to country.
- ✓ In general, a Port Authority is charged with the efficient and economical management of the port.
- ✓ It should make a profit to enhance its long term development but should not make excessive profits!
- ✓ BUT.....

Paradox

Vankrimpen's Law

The worse the Port Authority,
the higher its profits....

The Preferred Choice

Landlord Port The Preferred Choice!

- ✓ World Bank encourages Governments to establish landlord-type Port Authorities.
- ✓ Changing from a Service to a Landlord Port requires a fundamental change of applicable laws and regulations.
- ✓ Full privatization (including public functions) is considered an undesired option.

Traditional Activities

Traditional Activities Landlord Port

- ✓ Land development and management
- ✓ Construction of port infrastructure
- ✓ Regulation of safety, security and environment
- ✓ Nautical tasks (optional)
- ✓ Granting and monitoring concessions & leases
- ✓ Representing the port community and furtherance of terminal operators

Non Traditional Activities

Non-traditional activities Landlord Port

- ✓ Development of value added services, Distriparks, WTC, port community systems.
- ✓ Training of port and terminal managers.
- ✓ Integration with inland transport services.
- ✓ Development of inland terminals.
- ✓ Transformation into a Global Terminal Operator (Port of Singapore).

Corporatisation

Corporatised Port Authorities

- ✓ Trend to corporatise port authorities, either under *Lex Specialis* or under the Companies Act.
- ✓ The public interest requires that at least majority of the shares always be and remains to be owned by the public sector (State, regional government and/or the port city).
- ✓ No share ownership by private port operators and transport related firms should be allowed.

The Traditional Way

Money Rules The Waves

- ✓ Traditional Landlord Ports invested in basic port infrastructure and port sites (quay walls and land reclamation) mainly from retained earnings.
- ✓ They derived their income from port dues (for vessels) and land lease (from port operators).

Transition

Transition from Service Port to Landlord Port

- ✓ In the 1980s and 1990s the vast majority of world ports changed its management structure.
- ✓ Many of them required massive investments for modernisation and labour reform.
- ✓ Where would they get the necessary money?

The New Way of Financing

New Sources of Finance

- ✓ The State (often difficult or impossible)
- ✓ The International Finance Institutes (World Bank, Asian Development Bank, American Development Bank, IFI, Kuwait Fund)
- ✓ The Private Sector (Port users, banks) through PPPs.

Public Private Partnerships

Concessions

- ✓ What Concessions? Port or Terminal.....
- ✓ Concessions are an alternative to public financing of operational infrastructure.
- ✓ Concessions combined with BOT schemes became an accepted phenomenon in the industry.
- ✓ Time repeats itself. Concessions were used in Holland as far back as the Seventeenth Century.

Concessions

What Is This Thing?

- ✓ Public License or rights grant by a Port Authority to operate, maintain and transfer a port terminal for a certain period of time.
- ✓ BOT: Build, Operate Transfer, the right to construct a port terminal as part of the concession.
- ✓ Site Lease Agreement for the terminal area.
- ✓ A number of related agreements including a Lenders Direct Agreement, if required.

Main Characteristics

Main Characteristics

- ✓ Right/license to perform port operations during some 25 - 35 years, depending on investment profile.
- ✓ Site Lease Agreement for the same period.
- ✓ Transfer of terminal and assets to Grantor after termination or expiry.
- ✓ Payment of royalties and lease rents.

Concession + BOT

Advantages

- ✓ Land is not sold and will be returned to Port Authority or Government after concession period.
- ✓ Part of investment risks transferred to Private Sector.
- ✓ Via agreed performance criteria port operations can be monitored.
- ✓ Concessionaire stays in the port for a long time guaranteeing a steady income for Port Authority.

Main Tasks and Services

Concessionaire's Tasks and Services

- ✓ Employing port workers on fixed contracts.
- ✓ Berthing vessels.
- ✓ Stevedoring.
- ✓ Internal transport and storage.
- ✓ Maintenance of infrastructure, superstructure, equipment.
- ✓ Achieve agreed performance criteria.

Royalties

Alternatives

- ✓ Royalties can be agreed:
 - as a fixed, or variable amount per unit (TEU, metric tonne) depending on quantities;
 - as percentage of the Gross Revenue of the Terminal (may vary between 5% and 20%).
- ✓ Minimum Guaranteed Throughput
 - this represents the amount of Royalty to be paid in any event, irrespective of the actual throughput of the terminal.

Termination Compensation

Principles

- ✓ The Port Authority always pays termination compensation at expiry or early termination of the concession.
- ✓ A terminal concession without termination compensation is not bankable.
- ✓ The amount of termination compensation depends on the way the concession is terminated and by whom.

Termination Compensation

What does the Port Authority pay?

- ✓ Termination may occur as a result of:
 - termination in the national interest;
 - expiry of the concession;
 - a major breach of one of the parties;
 - Force Majeure.
- ✓ Compensation may be paid on the basis of Fair Value or a percentage of the net book value of the investments and movable assets .

Termination Compensation

Health Warning

A Port Authority should avoid under all circumstances to pay Fair Value in case of termination or expiry.

Exception: termination in the national interest.

Bankability

Investment Requirements

- ✓ The ownership of the port land and terminal infrastructure constructed by a Concessionaire under a BOT remains with the Port Authority.
- ✓ The Concessionaire cannot mortgage the terminal area or infrastructure.
- ✓ The Concessionaire needs security for the bank to finance its investments in the terminal.
- ✓ The banks in principle accept limited recourse financing on the basis of a Lenders Direct Agreement.

Change in Law

Concessions are forever....

- ✓ A concessions comprise provisions on change of law events.
- ✓ During the term of the concession changes in laws and regulations may make the entire terminal business unprofitable.
- ✓ In such case the Port Authority may consider compensation such as allowing higher service charges, extension of the term of the concession or pay a (one time) compensation.