



# PORT REFORM TOOLKIT

SECOND EDITION

M O D U L E 4

## LEGAL TOOLS FOR PORT REFORM



THE WORLD BANK

© 2007 The International Bank for Reconstruction and Development / The World Bank

All rights reserved.

The findings, interpretations, and conclusions expressed herein are those of the author(s) and do not necessarily reflect the views of Public-Private Infrastructure Advisory Facility (PPIAF) or the Board of Executive Directors of the World Bank or the governments they represent.

Neither PPIAF nor the World Bank guarantees the accuracy of the data included in this work. The boundaries, colors, denominations, and other information shown on any map in this work do not imply any judgment on the part of PPIAF or the World Bank concerning the legal status of any territory or the endorsement or acceptance of such boundaries.

The material in this work is copyrighted. Copyright is held by the World Bank on behalf of both the World Bank and PPIAF. No part of this work may be reproduced or transmitted in any form or by any means, electronic or mechanical, including copying, recording, or inclusion in any information storage and retrieval system, without the prior written permission of the World Bank. The World Bank encourages dissemination of its work and will normally grant permission promptly.

For all other queries on rights and licenses, including subsidiary rights, please contact the Office of the Publisher, World Bank, 1818 H Street NW, Washington, DC 20433, USA, fax 202-522-2422, e-mail [pubrights@worldbank.org](mailto:pubrights@worldbank.org).

ISBN-10: 0-8213-6607-6

ISBN-13: 978-0-8213-6607-3

eISBN: 0-8213-6608-4

eISBN-13: 978-0-8213-6608-0

DOI: 10.1596/978-0-8213-6607-3

## MODULE FOUR CONTENTS

<b>1. Introduction and Overview</b>	<b>131</b>
1.1. National Ports Commission	132
<b>2. General Approach for Drafting a Ports Law</b>	<b>132</b>
2.1. Preface	134
2.2. Definitions	134
2.3. Objectives and Functions of a Port Authority	136
2.4. Corporatized Ports—Special Considerations	138
2.5. Implementation Problems	138
<b>3. Port Authority and Terminal Operations</b>	<b>139</b>
3.1. Licensing	140
3.2. Marine Management	140
3.3. Financial Issues	142
3.4. Violations	143
3.5. Appealing Port Authority Regulations	143
3.6. Liability for Damages	143
<b>4. Port Regulations</b>	<b>145</b>
4.1. Port Operating Regulations	145
4.1.1. Vessel Traffic Management	145
4.1.2. Pilotage	146
4.1.3. Order and Safety in the Port	146
4.1.4. Reporting and Communication	146
4.1.5. Dangerous Cargoes: Transport and Handling	146
4.1.6. Pollution and Reception Facilities	149
4.1.7. Regulation of Other Port Functions	149
<b>5. Port Competition Modalities</b>	<b>150</b>
5.1 Legal Structure of Port Competition Regulation	151
<b>6. Full Concession Agreements</b>	<b>154</b>
6.1. Full Concession, Leasehold, and Land Rent	154
6.2. Full Concession and BOT Schemes	154
6.3. Full Concession Agreement Structure	156
6.3.1. Preconcession Documents	157
6.3.2. Definitions	157
6.3.3. Conditions Precedent Sample	161
6.3.3.1. Part 1—Conditions Precedent to be Fulfilled by the Operator	161
6.3.3.2. Part 2—Conditions Precedent to be Fulfilled by the Port Authority	162
6.3.4. Term of the Concession Agreement	163
6.4. Concession Parties	163
6.5. General Rights and Obligations of the Operator	164
6.6. General Rights and Obligations of the Port Authority	165
6.7. Transfer of Rights, Obligations, and Assets	166
6.8. Performance Parameters	168
6.8.1. Productivity Targets	169
6.9. Transfer of Employees	171
6.10. Force Majeure	171
6.11. Lease of Facilities	173
6.12. Site Access	175
6.13. Governing Law	175

6.14. Freedom to Set Tariffs	175
6.15. Taxes	175
6.16. Concession Fee	176
6.17. Insurance and Indemnity	176
6.18. Physical Security	176
6.19. Unclaimed Cargo and Carriers	178
6.20. Information and Communication	178
6.21. Termination and Prolongation	179
6.21.1. Termination Due to Noncompliance	179
6.21.2. Termination Compensation	179
6.21.3. Option to Continue	180
6.21.4. Bankruptcy	181
6.22. Expiration of Concession	182
6.23. Arbitration	182
6.24. Costs	183
6.25. The Tender Process and Transaction Preparation	184
6.26. Miscellaneous Conditions	186
<b>7. BOTs and Construction</b>	<b>186</b>
7.2. BOT and BTO Arrangements	187
7.2. BOOT Arrangements	188
7.3. Functional and Technical Design under a BOT Arrangement	188
7.4. Design and Construction Flaws	190
7.5. Building Conditions	190
7.6. Construction Program	191
7.7. Zero Date	191
7.8. Drop Dead Date	192
7.9. Extension Events	192
7.10. Completion Tests and Take-Over	192
7.11. Hand-Back and Transfer of Facilities	193
7.12. Lender Security	194
7.13. Change in Law	194
<b>Annex I—Checklist of Concession/BOT Agreement Provisions</b>	<b>196</b>

## BOXES

Box 1: Singapore: Transforming a Service Port into Landlord Port	133
Box 2: Panama: Enabling Legislation for a Concession	134
Box 3: Eastern Europe: Decentralizing Port Management	134
Box 4: Latin America: Allowing Private Stevedoring Operations	136
Box 5: Object of Port of Rotterdam, Ltd.	136
Box 6: Caution: Single National Ports Authority can be Hazardous to Economic Health	137
Box 7: Functions of Corporatized Port Authorities	137
Box 8: Division of Shares in Corporatized Port Authority	138
Box 9: Violated Neutrality: A Port Director with Two Hats	140
Box 10: Maritime Domain: A Potential Impediment to Port Development	141
Box 11: Marine Management Tasks to be Separated from Corporatized or Privatized Port Tasks	142
Box 12: Harbormaster's Powers and Functions	142
Box 13: Reference Clauses on General Regulations of the Authority	144
Box 14: Reference Clauses on Specific Regulations of the Authority	144

Box 15: Reference Clauses on Damages	144
Box 16: Reference Clauses on Liability	145
Box 17: Reference Clauses on Port Safety and Environmental Protection	147
Box 18: Reference Clauses on Reporting	148
Box 19: Reference Clauses on Loading and Discharging Dangerous Cargoes	149
Box 20: Reference Clauses on Waste Management	150
Box 21: The Buenos Aires Case	152
Box 22: Sample Port Competition Act	153
Box 23: Full Concession, Lease, and Rent Contracts—Landlord Port	155
Box 24: Main Schedules to a Concession or BOT Agreement	157
Box 25: Reference Clause on Term of Concession	163
Box 26: Reference Clause on Nomination of Operator of a Container Terminal	164
Box 27: Reference Clauses on General Rights and Obligations of the Operator	165
Box 28: Reference Clauses on General Rights and Obligations of the Port Authority	166
Box 29: Reference Clauses on Permitted Activities	167
Box 30: Reference Clauses on Newly Built Assets in the Concession Area (BOT arrangement)	167
Box 31: Reference Clauses on Transfer of Assets	169
Box 32: Reference Clause on Productivity Targets	171
Box 33: Reference Clauses on Selection and Transfer of Personnel	172
Box 34: Reference Clauses on Force Majeure	172
Box 35: Reference Clauses on Lease of Facilities	173
Box 36: Reference Clauses on Site Conditions	173
Box 37: Reference Clauses on Access to the Site	175
Box 38: Reference Clause on Governing Law	175
Box 39: Reference Clause on Price Discrimination	176
Box 40: Reference Clause on Taxes	176
Box 41: Reference Clauses on Concession Fee	177
Box 42: Reference Clauses on Insurance and Indemnity	177
Box 43: Reference Clauses for Security	178
Box 44: Reference Clauses on Unclaimed Cargoes	178
Box 45: Reference Clauses on Information and Communication	179
Box 46: Reference Clause on Termination by the Port Authority	180
Box 47: Reference Clause on Termination by the Operator	180
Box 48: Reference Clauses on Termination Due to Noncompliance	181
Box 49: Reference Clauses on Prolongation	181
Box 50: Reference Clauses on Bankruptcy	181
Box 51: Reference Clauses on Expiration of Concession	183
Box 52: Reference Clause on Arbitration	184
Box 53: Reference Clause on Costs	185
Box 54: Clauses on Miscellaneous Conditions	186
Box 55: Reference Clauses on Construction and Maintenance (Landlord Port Situation)	187
Box 56: Reference Clauses on Scope of a Concession Agreement (including a BOT arrangement)	189
Box 57: Reference Clauses on Construction Program	190
Box 58: Reference Clauses on Infrastructure Design	191
Box 59: Reference Clauses on Technical Design and Construction Problems	191
Box 60: Reference Clauses on Site Conditions	192
Box 61: Reference Clauses on Construction	192
Box 62: Reference Clauses on Zero Date	193

Box 63: Reference Clauses on Drop Dead Date	193
Box 64: Reference Clauses on Extension Events	193
Box 65: Reference Clause on Take-Over Tests	193
Box 66: Reference Clauses on Hand-Back of Facilities	194
Box 67: A Case of Legal Limitations Adversely Affecting a Port Concession	195
Box 68: The Case of St. Maarten	196
Box 69: Reference Clause on Lender's Security	197
Box 70: Reference Clauses on Law Changes	198



## Acknowledgments

This Second Edition of the Port Reform Toolkit has been produced with the financial assistance of a grant from TRISP, a partnership between the U.K. Department for International Development and the World Bank, for learning and sharing of knowledge in the fields of transport and rural infrastructure services.

Financial assistance was also provided through a grant from The Netherlands Transport and Infrastructure Trust Fund (Netherlands Ministry of Transport, Public Works, and Water Management) for the enhancement of the Toolkit's content, for which consultants of the Rotterdam Maritime Group (RMG) were contracted.

We wish to give special thanks to Christiaan van Krimpen, John Koppies, and Simme Veldman of the Rotterdam Maritime Group, Kees Marges formerly of ITF, and Marios Meletioui of the ILO for their contributions to this work.

The First Edition of the Port Reform Toolkit was prepared and elaborated thanks to the financing and technical contributions of the following organizations.

The Public-Private Infrastructure Advisory Facility (PPIAF)

PPIAF is a multi-donor technical assistance facility aimed at helping developing countries improve the quality of their infrastructure through private sector involvement. For more information on the facility see the Web site: [www.ppiaf.org](http://www.ppiaf.org).

The Netherlands Consultant Trust Fund

The French Ministry of Foreign Affairs

The World Bank

International Maritime Associates (USA)

Mainport Holding Rotterdam Consultancy (formerly known as TEMPO), Rotterdam Municipal Port Management (The Netherlands)

The Rotterdam Maritime Group (The Netherlands)

Holland and Knight LLP (USA)

ISTED (France)

Nathan Associates (USA)

United Nations Economic Commission for Latin America and the Caribbean (Chile)

PA Consulting (USA)

The preparation and publishing of the Port Reform Toolkit was performed under the management of Marc Juhel, Ronald Kopicki, Cornelis "Bert" Kruk, and Bradley Julian of the World Bank Transport Division.

Comments are welcome.

Please send them to the World Bank Transport Help Desk.

Fax: 1.202.522.3223. Internet: [Transport@worldbank.org](mailto:Transport@worldbank.org)





# 4

## MODULE

# Legal Tools for Port Reform

## SECOND EDITION

### 1. INTRODUCTION AND OVERVIEW

---

**T**ransformation of port structures often requires new legislation. This module identifies fundamental points to consider when developing such legislation, with examples from existing port reform regimes, although the examples provided should be used for reference purposes only. Because every country has a unique legal and institutional context, it is impossible in practice to present a model law that fits the wide variety of fundamentally different legal systems. With such a diversity of legal and policy regimes worldwide, the exact purpose of a port law may vary from country to country. Sometimes an existing law is changed to accommodate new institutional structures that were made necessary because of changed socioeconomic conditions. Other times, a law lays the groundwork for the public sector to participate in port development and infrastructure investments, or enables the private sector to carry out port activities that previously resided in a public sector monopoly. The reference provisions presented in this module are not meant to cover completely each and every issue. They have been derived from a large variety of laws, regulations, and contracts. They are meant to be used as tools for port reform to shape the legal foundation for marketable and bankable regulatory and contractual arrangements.

The examples are derived from a variety of institutional structures covering not only tasks and responsibilities of port authorities, but also related institutions such as a national ports council (or commission), a port fund,

and others. In the case of a port authority that is part of a municipality, no specific law is necessary because the legal basis of such authority is part of municipal legislation. However, the fundamental elements of this module

might still be considered in drafting such legislation.

It is often thought that the sole purpose of a ports law is to create an institutional framework to develop and manage seaports. It should, however, be emphasized that a ports law should also establish a flexible business framework that enables a port authority to compete successfully in national and international transport markets.

A ports law often creates one or more port authorities, as well as a host of other port-related bodies, such as a ports council/commission or similar advisory or regulatory body. It might also set operational conditions for private operators. Finally, such a law may regulate organizational and financial relations between public organs (such as the state, regional governments, or municipalities) and the maritime administration.

There are various legal acts that relate to ports policy, port management, and port operations. Therefore, when discussing port laws in this module, the expression “port law” includes among other policy laws, port competition laws, port privatization laws, harbor regulations, and statutes of (public) port enterprises.

### 1.1. National Ports Commission

Particularly in countries where the port sector is still under development, the national government has an important role to play. This role may be expressed in a national ports policy formally authorized by the parliament. The preparation and implementation of this policy usually is the responsibility of a transport or port ministry.

Sometimes, to involve major sectors of the ports community in the development, a national ports commission (or ports council) is established by law. Generally, the commission has an advisory role. The general objective of a national ports commission is to provide input to the development of a national ports policy. Generally, the commission provides this advice to the council of ministers through the minister of transport.

Commissions may be asked to contribute to the development of the national ports policy by offering advice on:

- The prioritization of policies that will maximize private participation in the port sector.
- The preparation of a national ports (restructuring and investment) plan based on an objective evaluation of project proposals received from the port authorities.
- The allocation of public sector funding for port development.
- The administration of an investment fund established specifically to finance port development.
- Measures to prevent monopolistic practices in the ports and to encourage competition.
- The role of the maritime sector in the overall national transport strategy and national export policies.

The president and or chairman and the members of the commission should be appointed from among persons with extensive experience in port management; shipping; inland transport; commercial, financial, or economic matters; applied science or the organization of workers; or have demonstrated their ability in other fields of port-related operations (including the fishing and the shipbuilding industries, in particular).

If a country decides to institute a ports commission, it should be empowered with the necessary tools to function effectively. Therefore, a ports commission should be assisted by an executive secretary and a small professional staff. Members of the staff should receive remuneration in accordance with applicable conditions for civil servants. Finally, the costs of the commission should be borne by the state to ensure its independent status.

## 2. GENERAL APPROACH FOR DRAFTING A PORTS LAW

A port authority is usually established by a specific ports law, either as a public or commercial entity (for example, joint stock or limited liability

company). The following two examples illustrate some key juridical attributes to be considered.

The ports law in Singapore states:

*There is hereby established a body to be known as the Maritime and Port Authority of Singapore, which shall be a body corporate with perpetual concession and a common seal, by that name, be capable of: a) suing and being sued; b) acquiring, holding, and developing or disposing of property, both movable and immovable; and c) doing and suffering such other acts or things as bodies corporate may lawfully do and suffer.*

Some countries have opted for a corporatized port authority. To that end, the Polish ports act states:

*Joint Stock Companies, administering ports of fundamental importance to the national economy, are established under this Act and operate on the basis of the Commercial Code, unless otherwise provided for by this Act.*

*Companies mentioned in paragraph one have a public service character.*

The Belgian main ports (Antwerp, Ghent, Oostende, and Zeebrugge) are regulated by the Flemish Port Decree, 1999 (Official Gazette No. 99/992). The relevant provisions (Article 4) are:

- (i) Port authorities are public entities. They possess the exclusive powers to deal with port issues. These issues cannot be transferred, either in whole or in part.
- (ii) Entities participating in port authorities shall have a public character.
- (iii) Port authorities are subject to corporate law, unless incompatible with the provisions of this decree or other legal acts.

In Asia and Africa, the institutional structures of many ports were often patterned after their European counterparts. The vast majority were public service ports responsible for all port services. Dockers were employed by the public port

authority or port trust. In these countries, new port laws are aimed at converting service ports into landlord ports, requiring the separation of public landlord responsibilities from cargo handling activities (see Box 1). New port laws regulating the tasks and responsibilities of a (public) landlord port authority have been combined

### Box 1: Singapore: Transforming a Service Port into Landlord Port

A useful example of a port authority structure change is represented by two laws enacted in Singapore. Prior to the change, the port functioned as a public service port. As the port authority increasingly became engaged in terminal operations abroad and other commercial activities, public functions and commercial functions were separated. A new statutory board (the Maritime and Port Authority of Singapore [MPA]) was set up. The commercial and marine activities of the original Port of Singapore Authority were corporatized. Two acts implemented the changes, one providing for the dissolution of the Port of Singapore Authority and the other establishing the MPA (Singapore Acts 6 and 7, 1997). The prefaces of these laws are, respectively:

- “An Act to provide for the dissolution of the Port of Singapore Authority and for the transfer of its property, rights, and liabilities to a successor company and others, to make financial arrangements for that company and for matters connected therewith, to repeal the Port of Singapore Act (Chapter 236 of the 1985 Revised Edition) and to make consequential amendments to other written laws. Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows...”
- “An Act to establish and incorporate the Maritime and Port Authority of Singapore, to provide for its functions and powers, and for matters connected therewith; and to repeal the National Maritime Board Act (Chapter 198 of the 1985 Revised Edition) and to make consequential amendments to certain other Acts. Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows...”

Source: Author.

### Box 2: Panama: Enabling Legislation for a Concession

In Panama, a concession contract was concluded between the state and a private operator. The text of the contract was included in a specific law authorizing its conclusion. The opening text of the law is: “Law of 1995, whereby Development, Construction, Operation, Administration, and Management Contract of a container Terminal in the North Coco Solo Area, Province of Colon, between the State and the Corporation Colon Container Terminal, S.A. is approved.”

Source: Author.

recently with the establishment of private operating companies in accordance with the national commercial code.

Some situations require a law to specifically regulate the development and construction of a terminal by a private operator through authorizing the award of a concession contract (see Box 2).

A ports law may be very detailed or merely set forth basic principles of port management and operation. Regardless of the form adopted for the port’s regime, to create a solid basis for clearly delineating port functions and responsibilities, a core set of provisions should be included. These provisions and their key features are described below.

## 2.1. Preface

A preface states the objective of the law and some general conditions. The approach adopted is a function of the underlying legal system. For example, some countries use a combination of statute and implementing regulations; others pass a decree that applies a privatization or concession law to a port or ports. The objective might be to create new port authorities or to reform an existing port authority. Also, the preface should indicate whether transfer of rights to private parties (for example, lease, concession, or build-operate-transfer [BOT]) is permitted. It might be necessary in such instances to make corresponding changes in laws governing public property (for example, in the case of the “Maritime

### Box 3: Eastern Europe: Decentralizing Port Management

In the past, Eastern European ports were managed mainly by centralized authorities. After the introduction of market reforms, it became necessary to decentralize port management and modernize former state-dominated structures. More independent port authorities were established, often with some form of state participation. The prefaces of the relevant laws reflect these changes:

- “The Act regulates the principles for establishing governing bodies for ports, their organizational structure, and their operation. The limits of port areas are stipulated in separate regulations. The Act is not applicable to naval ports.” (Port Law of Poland, December 20, 1996)
- This Act establishes principles of operation and management of ports and the safety of navigation within port areas.” (Port Law of Latvia, June 22, 1994)

Source: Author.

Domain”). Finally, the law should regulate the organizational, financial, and fiscal relations between the related public organs (such as the national government, regional governments, and municipalities) as well as with regulators, such as the maritime administration, the fiscal authority, and the competition commission.

Two approaches have been developed for drafting the preface of a typical port law: a preface stating only the objective of the law (see Boxes 3 and 4), or a preface of general conditions, elaborating on the objective and a number of boundary conditions. In several cases, the definitions used in the law are included in the first section.

## 2.2. Definitions

The second element of a ports law should comprise definitions of the main terms used in the law. The port business, especially as a specific mix of public and private interests and financiers, will require that the interplay of these interests be balanced and result in well-circumscribed functions. The law should likewise define maritime and port infrastructure, identifying which

are under the authority of the state and which are under the authority of a port authority. Sometimes it may be necessary to designate several types of ports, such as “ports of national interest” and “ports of regional interest,” or as in the French Ports Law of 1965, *Ports Autonomes and Ports d'Intérêt National*, with each exhibiting its own definition.

It is highly advisable to precisely define critical functions, features, and port administration bodies. In the port field, investors and lenders will review definitions of a port law closely to determine if there are ambiguities that may affect security interests or lender rights. Because there is no internationally accepted terminology, the following list is only an illustrative compilation of the most commonly used terms.

*Often words used in legal agreements are capitalized to indicate they have been defined.*

**Aids to navigation:** All floating, stationary, and on-shore objects dedicated to assisting sea-going and inland vessels in the safe navigation at sea and in inland waters including buoys, beacons, lighthouses, vessel traffic systems, tidal measuring systems, and fixed objects and markers.

**Authorized pilot:** A pilot employed or authorized by a competent authority to pilot vessels.

**Basic infrastructure:** Sea locks, breakwaters, piers, sea walls, and other protective works not directly involved in the transfer of goods; maritime accesses and canals; primary roads to and from the ports; and also railway tracks, pipelines, and buffer zones situated at the borders of the port.

**Concession:** An agreement entered into by a person with the port authority in which such person becomes entitled and obliged to provide port and marine services in a specified area of a port, or in a port in its entirety, including or excluding the right to construct, alter, and maintain basic and operational infrastructure, superstructure, and equipment, subject to the terms and conditions set out therein.

**Concessionaire:** Any person who has concluded a concession agreement with the port authority.

**Dues:** Port dues, cargo-related dues, and pilotage dues.

**Harbormaster:** The harbormaster appointed by law and such harbormaster's appointees, representatives, deputies, or delegates appointed in accordance with such law.

**Marine services and facilities:** All services performed in port areas and the approaches thereto, in respect to towage, mooring of vessels, sounding of navigable waters, the lifting of sunken vessels, salvage of vessels, fire fighting aboard vessels, and all related activities as well as the provision of facilities, vessels, and equipment to perform these activities, but not necessarily including pilotage.

**Maritime access:** Fairways, dredged channels, and other waters providing access to ports, equipped with aids to navigation for commercial sea-going and inland vessels.

**Operational infrastructure:** Port facilities and constructed works dedicated to commercial handling of sea-going and inland vessels, such as quay walls, piers, jetties, roll-on roll-off facilities, berthing aids, and also secondary connecting roads within the port area, including all appurtenances and components thereof.

**Pilot:** Any person not belonging to a vessel who has the conduct thereof.

**Port authority:** Every port undertaking agency established under the subject law.

**Port (or seaport):** One or more port areas forming an autonomous functional and economic entity, of which the boundaries are established by authority of the relevant government body and whose activities are governed in accordance with national or other relevant law.

**Port dues:** Dues levied on a vessel for entering, using, and leaving the port.

**Port infrastructure:** All infrastructure located within the seaport or in the land and sea accesses containing basic infrastructure, operational infrastructure, and superstructure.



**Box 4: Latin America: Allowing Private Stevedoring Operations**

Until the 1980s, Central and South American ports were usually part of the state and managed as public service ports. During the 1990s of the last century, many countries in the region have changed their port structures to allow private stevedoring operations. The general conditions of the Mexican ports law (1993) describe the objectives of such a law: “This Act has a public character and shall be observed in the entire territory of the State. The objective of the law is to regulate ports, terminals, marinas, and port installations, their construction, use, acquisition, exploitation, operation, and ways of administration, as well as the execution of port services.”

Source: Author.

*Port services and port facilities:* Port terminal services and facilities for handling, storage, and transportation of goods on port land and for handling of passengers carried by vessels.

*Public license:* A license granted under a port act and for the purposes of the act; a public licensee shall be construed as the recipient of a public license and subject to its terms and conditions.

*Superstructure:* Sheds, silos, warehouses, and housed facilities of all kinds, and all infrastructure and equipment not identified under basic and operational infrastructure.

*Vessel:* Includes ships, boats, air cushioned vehicles, or floating rigs or platforms used in any form of operations at sea or in port, or any other description of a vessel.

### 2.3. Objectives and Functions of a Port Authority

The third section of a ports law should delineate the objectives and functions of a port authority. Usually, a port authority exercises jurisdiction over a port territory, which should constitute an economic and functional unit. The establishment of a port authority as this legal entity is one of the major elements of a ports law (Box 5). The law provides the legal status for the port authority,

**Box 5: Object of Port of Rotterdam, Ltd.**

The Port of Rotterdam, Ltd. (Haven Bedrijf Rotterdam N.V.), established in 2004, has the legal structure of a limited liability company according to the Dutch Commercial Code. No other specific ports legislation is applicable. Article 2.1 of its statutes reads as follows:

- “The object of the enterprise is to exercise or cause to be performed the port business and within this framework the furtherance of strategic position of the Port of Rotterdam within the European perspective, both on short and long term.
- More specifically, the purpose of the enterprise is:
  - ~ The furtherance of an effective, safe, and efficient vessel traffic management, the responsibility for maintaining order and safety in the port area and the power to act as competent authority therein.
  - ~ The development, construction, management, and exploitation of the port and industrial area of the Municipality of Rotterdam.
  - ~ Contributing to the city’s development, development of port areas located therein, and the improvement of living conditions within the city and the Rotterdam region, even in case such activity is (initially) not profitable.”

Source: Author.

which might be a public entity or a corporate entity under the commercial code of the relevant country, such as a joint stock company. The law should also indicate which public entity has the right to establish a port authority in the event that the state is not doing so. This might be a region, province, city, or a combination.

In the case of corporatized or privatized port authorities, linkages will be needed to the mercantile, corporate, or commercial code. Provisions should be included on shareholding, for example, or conforming changes made to commercial or corporate laws.

There is an important point affecting port authorities established as joint stock companies. Generally, port authorities are responsible for

operating the entire port. In the event of a landlord port situation, a corporatized or privatized port authority must ensure a level playing field among many terminal operators and other service providers. To avoid conflicts of interest, the law should explicitly regulate the powers and duties of the port authority in relation to private operators with respect to investments and share participation.

Powers and duties of a port authority regarding land management require specific attention in the law. A landlord port authority is responsible for land management and overall port development. Special attention should be paid to the regulation of ownership and use of port land under the law. A port authority may own the land or have a perpetual or time-specific right to use the land. Powers to act as a landlord may need to be specifically elaborated, as well as the limitations of such powers, such as the interdiction of the sale of port land. While the authority is engaged in, or provides for, construction of operational infrastructure, the maintenance of such infrastructure constitutes a duty for the authority. The ports law should specify the exact responsibilities of the port authority and those of the state with respect to investments in basic and operational infrastructure, maritime accesses, port access roads, and rail and waterway infrastructure as well as hinterland connections.

Generally, the objective of a port authority is to efficiently and economically manage the port. In a public landlord port, its objectives should be aligned with the macroeconomic goals of the state and the needs of the region, such as the creation of jobs, strengthening of the economic structure, and so forth (see Box 6).

Fundamental port functions that should be considered in the law include (see also Box 7):

- Administration, management, and physical development of the port area.
- Maintenance, rehabilitation, renovation, and construction of basic and operational infrastructure.

#### Box 6: Caution: Single National Ports Authority Can be Hazardous to Economic Health

Since ports generally compete among themselves both in the international and national transport markets, a national ports authority, comprising all ports of a country, is not a preferred option. Occasionally, a national ports authority is established on the grounds that there is only one major port in a country with a number of smaller ports with a regional function. However, even in such a case, a more effective system could consist of an autonomous port authority for the major port, and a secondary ports directorate within the ministry of transport that exercises the overall tutelage on the national port system.

Source: Author.

#### Box 7: Functions of Corporatized Port Authorities

The Polish ports law chose a straightforward landlord model for its corporatized port authorities. The functions of the entities managing the ports include the following:

- Managing land and infrastructure.
- Forecasting, scheduling, and planning port development.
- Construction, development, modernization, and maintenance of port infrastructure.
- Acquisition of new land for port use.
- Maintenance, rehabilitation, renovation, and construction of operational infrastructure (usually the construction of basic infrastructure is a responsibility of the state).
- Establishment of contractual (concession or lease) and other conditions (public license) for private operators to provide port services.
- Coordination of berthing and unberthing of vessels.
- Ensuring public order in the port area.
- Safeguarding the port environment.
- Port marketing.
- Port security.



## 2.4. Corporatized Ports—Special Considerations

If a port authority is established as a joint stock company, matters of share issuance and capitalization arise. The ports law should include clauses pertaining to the way this is handled, consistent with the provisions of relevant commercial, mercantile, and securities laws.

One key consideration is whether a government, national or local, intends to exercise direct influence in the port authority via its shareholder's rights (for example, the nomination of the chairman of the board or the port director). In the event of a corporatized authority, the government or other public body usually owns 100 percent of the shares. In some countries, the shares are divided between a national government, local government, and other public or private shareholders in such a way that the involved public entities retain a majority voting position. In some corporatized situations, voting shares can be allocated to private investors. Once private investors have a majority voting position, the port authority can be considered as being privatized (see Box 8).

In general, due to the (semi) monopoly position of landlord ports and the public interests involved, it is not advisable to allocate shares to private investors. This may cause serious conflicts of interest; private investors mainly seek to increase shareholder value whereas the public sector may take considerations of general interest into account. Also, flotation of all or part of the stock is not considered a viable option for the same reason.

Capitalization can be effected through transfer by law of all relevant properties to the new port authority. These might include all operational infrastructure, related land, and superstructure, including such assets as equipment and other rolling stock. When a landlord port is created together with a new corporatized port authority, one or more separate operating companies with the legal structure of a limited liability company might be set up to take title to the superstructure and equipment. The value of the

### Box 8: Division of Shares in Corporatized Port Authority

One example of a government seeking to be directly involved in port management is Poland. Under the new ports law, the Polish state retains 51 percent of the shares of its corporatized national ports, thus exercising control over the board of directors, and gives these shares preferential treatment in the event of liquidation of a port enterprise. The relevant clauses are as follows:

- “A joint stock company named ‘Port Authority of Gdansk S.A.’ shall be established by the State Treasury, which will retain at least 51 percent of the company's shares whilst the Municipality of Gdansk will hold at least 34 percent of the shares.”
- “A joint stock company named ‘Port Authority of Gdynia S.A.’ shall be established by the State Treasury, which will retain at least 51 percent of the company's shares whilst the Municipality of Gdynia will hold at least 40 percent of the shares.”
- “A joint stock company named ‘Port Authority of Szczecin-Swinoujscie’ S.A. shall be established by the State Treasury, which will retain at least 51 percent of the shares, whilst the Municipalities of Szczecin and Swinoujscie will each hold 24.5 percent of the shares.”
- “The shares owned by the State Treasury and the Municipalities are registered shares and have a preferential nature, establishing priority rights to port authority assets in the event of liquidation.”

Source: Author.

initial shares could be determined on the basis of their book or market value, whichever is less.

Depending on the port policy of the country concerned, limits can be imposed on the sale of shares. In many cases a government may want to retain the right to determine port policy. This requires the possession of the majority of the voting shares, or of “golden shares.” A clause in the law guaranteeing such majority position should then be considered.

## 2.5. Implementation Problems

Implementing a new ports law presents a wide variety of issues and often results in

disagreements among the parties involved. The major issues encountered in implementing new ports laws are described below.

*Effects of port reform on the existing work force.* Port reform is often triggered by over-staffing at ports and restrictive labor practices. However, the objective of a new ports law is not labor reform, but port reform. Labor reform may be a by-product when a port must rationalize its workforce to improve efficiency and reduce costs. A ports law might set conditions for the transfer of personnel from the existing port authority to the new one. Since port reform is often accompanied by a reduction of the size of the port's workforce, the ports law may establish and regulate a port workers fund to soften the impact of labor force reductions. The fund can be used for redundancy payments or retraining programs.

*Valuation of assets and the capitalization of a new port authority.* A valuation should be conservative. Often, ports in the process of reform have to dispose of a large variety of outmoded equipment and poorly maintained port infrastructure and buildings. This obsolescence and maintenance backlog must be fully taken into consideration when assessing the value of the port's assets. Otherwise, private sector bids in port privatization may reflect significant discounts as the bidders take into account the need to pay for the substantial investments that will be required to modernize and upgrade the infrastructure.

*Replacing top management.* Ports functioning within the framework of competitive markets require a different management ethic to lead the difficult reform process and steer the new port authority safely through the shoals of competition and other commercial activities.

*Creation of a clear definition of the port area.* This definition should be established at the outset of reform and not be postponed to a later date (for example, until later decree of a council of ministers). Significant differences of opinion often arise with port cities as to which areas are part of the port and which areas are part of the

city. If a decree is required by the ports law, it should be enacted at the same time as the law itself.

### 3. PORT AUTHORITY AND TERMINAL OPERATIONS

One important issue to be considered in port laws is the relationship between a port authority and port services providers, in particular the cargo handling companies operating in the port's territory. Generally, it is undesirable for a public port authority to be directly involved in terminal operations. A port law may explicitly prohibit a port authority from providing cargo handling services. A further step to avoid conflict of interest issues would be to prohibit a port authority from being a shareholder in a terminal operating company located in its port area. Notwithstanding potential conflicts of interest, a port authority with the overall responsibility to develop the port area may sometimes opt to make strategic investments to develop a sector of the port business (see Box 9). There is an increasing trend for port authorities, particularly in the event that there is only one major terminal in a port, to acquire minority shareholding (say 10 percent) in the special purpose vehicle (or operator) constructing a terminal under a concession or BOT agreement. There are commonly two reasons for taking shares:

- The port authority wants to participate in the future profits of the terminal, and this equity participation partially offsets some concession fees.
- By acquiring shares, the port authority has the legal right to get inside information on the accounts and profits of the terminal operator. This is useful when part of the income depends on throughput (concession or TEU [twenty-foot equivalent] fees), which is usually the case in concession agreements (see Box 9).

The situation becomes more complicated when a port accommodates more than one major terminal competing against each other. In order not to compromise its independent position as

**Box 9: Violated Neutrality: A Port Director with Two Hats**

In 1998, the shareholders of Rotterdam's largest container terminal, ECT (Europe Container Terminals), decided to put the company up for sale. Agreement was reached with Hutchison Port Holdings from Hong Kong to buy the terminal. To protect Dutch interests, the Municipal Port Authority, together with the Dutch ABN-AMRO Bank, retained the majority of the shares, although Hutchison gained operational control of the terminal. The port director of the Rotterdam Municipal Port Authority was nominated as a member of the Supervisory Board of ECT, apparently in a move to exercise as much local influence as possible. This, however, clearly violates the neutrality of the port authority because the port director:

- As a public servant must represent the interests of the entire port.
- Must advise the municipality on matters involving competing container terminals in the port.
- Has the legal task as a board member of ECT to represent and defend the interests of the company and its personnel.
- Has to advise the municipality about public investments, including those regarding the ECT terminal.

The combination of potential conflicting functions may result in loss of confidence by the local port community.

Source: Author.

the landlord, a port authority should either possess shares in all terminals or in none at all.

**3.1. Licensing**

A port authority might be authorized to exercise licensing and regulatory functions with respect to marine and port services and facilities. Regulation of marine activities is related to the harbormaster's function, as well as to the transport of dangerous goods and protection of the environment (such as rules pertaining to discharge of ship wastes into port waters, tank cleaning, and the use of port reception facilities). The licensing power of the port authority with respect to port services can be extensive

because it usually has the legal power to revoke licenses for violations without administrative appeal.

The law may authorize the issuance of public licenses to operate terminals. Because public licenses require extensive oversight by the port authority and reporting by the licensee, their utility should be balanced against the bureaucratic burden for the port authority and the port licensees. The same goals may be better achieved through concession or leasehold contracts, as these are more flexible for both parties. However, in the event of inclusion of a public license authority in a ports law, rules should be set for transfer, renewal, and cancellation of a license. Unlike for a concession or lease, where breaches are matters of contract and law, license breaches fall under administrative (or even criminal) processes for their resolution.

In this regard, the following reference text may be used:

No person shall provide: (i) any marine service or facility; or (ii) any port service or facility, unless he is authorized to do so by a public license granted by the port authority.

Every public license granted by the authority shall be in such form and for such period and may contain such conditions as the authority may determine.

Usually, a corporatized port authority does not have the power to grant a public license. It can only set conditions for the provision of port services under commercial contracts (such as leases, rent contracts, or concessions) with port service providers.

**3.2. Marine Management**

Marine management tasks form part of either a national maritime administration or of a public port authority. Marine management, which is essentially a public safety task, should be performed separately from a corporatized or privatized port authority to prevent a conflicting mix of commercial and safety objectives. A ports

law should make that separation of objectives clear. Because of overriding safety concerns, which may run counter to the profit-making objectives inherent under this type of port authority, combining marine management tasks with managing a corporatized or privatized port may not be the best option for managing navigational port safety (see Boxes 10 and 11).

The function and duties of a port authority regarding marine safety and environmental protection are:

- To regulate and control navigation within the limits and the approaches to the port.
- To disseminate nautical and other relevant information to ships and all other involved parties.
- To control maritime transport and loading and discharging of dangerous goods.
- To exercise regulatory functions for the protection of the marine environment.
- To discharge or facilitate the discharge of international obligations of the port authority with respect to marine safety and protection of the environment.
- To promote measures for the safety of persons who work at or visit the port.
- To combat or to provide for combating marine accidents in the port, including fire fighting and ambulance services.
- To secure public order in the port area and to exercise police functions in cooperation with the civilian police authority.
- To play an important role in the provision of security within the framework of the ISPS (International Ship and Port Facilities Security) Code.

#### Box 10: Maritime Domain: A Potential Impediment to Port Development

A European country enacted a ports law in 1996 that included port land and even inland terminals as the “Maritime Domain.” This concept developed among Mediterranean countries to protect local coastlines from undue commercial exploitation. However, the inclusion of ports has potentially far-reaching negative effects for the commercialization of port operations and may seriously impede the reconstruction of the national ports sector.

Proposals are under consideration to put the port sector on a normal commercial footing, but the current law is still valid. The main issue to be resolved is the current law’s provision that no private property is allowed in the Maritime Domain. Relevant articles from the basic provisions included in the Maritime Domain are listed below.

*Article 48:* “The Maritime Domain is the public estate of interest to the Republic of ..., is under its special protection, and shall be used and/or exploited under the conditions and in the manner prescribed by law.”

*Article 49:* “The Maritime Domain includes the internal waters and the territorial sea, its seabed and subsoil, as well as parts of the dry

land that are by their nature intended for public maritime use or are declared as such.

In respect of these Articles, the following shall be considered as the Maritime Domain: the seashore, ports and harbors, breakwaters, embankments, dams, sandbars, rocks, reefs, mouths of rivers flowing into the sea, sea canals, and live and inanimate natural resources (fishes, minerals, etc.) in the sea and in the marine subsoil.”

*Article 51:* “There is no property or other proprietary rights in the Maritime Domain on any basis.

Anyone is free to use and/or to be benefited by the Maritime Domain according to its nature and purpose in conformity with the provisions of this law.

Special use and/or economic exploitation of a part of the Maritime Domain may be conceded to physical and legal persons (concession) provided that such use is not in contradiction with the interests of the Republic of ...

Special use of the Maritime Domain is any use that is not general use or economic exploitation of the marine domain.”

Source: Author.

**Box 11: Marine Management Tasks to be Separated from Corporatized or Privatized Port Tasks**

- Control and coordination of vessel movements in the port and the port approaches.
- Monitoring of the pilot organization.
- Dissemination of nautical and operational information to all concerned parties.
- Provision of safe berthing practices.
- Control of handling and storing dangerous cargoes and control of safe loading and discharging practices.
- Keeping law and order (together with the regular police).
- Combating marine accidents and coordination of search and rescue operations.

Source: Author.

If the harbormaster's function forms part of a national maritime administration, its powers and duties are usually regulated in a Maritime Code. Often, however, the harbormaster (port master or port captain in some jurisdictions) is part of a port authority's organization. If so, the ports law or relevant port bylaw should include a section dealing with the specific powers and duties of this function. Generally, the harbormaster may issue general and specific directions to shipping within the framework of its powers. The harbormaster is usually the operational commander responsible for marine safety and for combating the effects of incidents involving ships or terminals. At the same time, the harbormaster is involved in regulating traffic and acts as the main nautical adviser to the port authority's governing board (see Box 12).

**3.3. Financial Issues**

It is very important to regulate a port authority's financial powers and have them conform with applicable fiscal and public administration laws. A port authority, whether public or private, may do very well in attracting investment, especially from private sources, if it is managed like a commercial business. Many ports, however, are part of an overall state, regional, or municipal structure and subject to the same

**Box 12: Harbormaster's Powers and Functions**

The statutory powers and duties of the harbormaster are the focus of a port authority's safety function. They can be incorporated in a ports law or be included under a Maritime Code with a cross reference in the ports law to such provisions.

The harbormaster may:

- Ensure compliance with laws and regulations on nautical safety and international conventions aboard a vessel, including fishing vessels and other categories of vessels regardless of flag and affiliation.
- Provide for verification of vessel documents and of necessary qualifications of the crew.
- Regulate, restrict, or prohibit the movements of vessels in the port and in the approaches to the port.
- Register a vessel's arrival in and departure from the port.
- Direct a pilot service and when necessary assign a pilot to a vessel in regions not requiring compulsory pilotage.
- Direct where any vessel may be berthed, moored, or anchored and the method of anchoring (only when dealing with public quays).
- Give directions to a vessel or terminal to ensure safe transport, loading, and discharging of dangerous goods in the port.
- Inspect a vessel within the framework of Port State Control.
- Ensure the keeping of law and order in the port area.
- Coordinate the combating of marine or other incidents.
- In the event of any risk for loss of human life or damage to any property, direct the removal of any vessel from any place in the port area to any other place and the time within which such removal is to occur.
- Declare berths, locations, anchorages, and fairways that may be used by vessels and the areas that are prohibited or restricted areas.

Source: Author.

financial rules and regulations as other parts of the public administration. This is particularly the case for a public service port authority, where the administrative costs of burdensome



procurement procedures can be high, as for example when a cabinet of ministers is the only body authorized to approve the purchase of quay cranes or other high-cost equipment.

Another issue that may hamper efficient port management is a legal provision that requires approval of long-term concession agreements by a council of ministers, or even a parliament, as is the case for instance in Croatia and Yemen. A central government may define a general policy with respect to concession agreements in the port sector, but should not interfere in the detailed negotiations on concession agreements, which should (preferably) be conducted by a port authority. This obviously also applies not only to service ports but also to landlord ports.

Since a port is a functional and economic entity that often operates in a competitive market, clear financial powers for port management should be included in a ports law. These include the powers to:

- Levy charges, rates, and fees.
- Make a reasonable profit.
- Take loans and issue bonds and securities.
- Establish its own procurement rules.
- Keep financial records and to present annual audits conducted by independent accountancy firms.

Examples of legal language used to define certain aspects of financial authority include:

- Ship and port dues and charges and income from real estate, whatsoever their nature, arising in the port domain, are earned and destined for the port authority, with exclusion of all other authorities.
- The tariffs are determined by the port authority. The proceeds of the tariffs shall be sufficient to meet the financial needs of the port, including operational expenses, the maintenance of assets, the payment of interest, allocation for depreciation of assets, and other standard commercial

elements (including shareholders' dividends and a reasonable profit).

- The port authority can take loans and issue bonds and securities.

### 3.4. Violations

A ports law may explicitly list a number of specific administrative, civil, and criminal offenses and empower the public port authority to assess fines for their violation, subject to administrative or judicial appeal. Such offenses may pertain to:

- Damage to port authority property.
- Unlawful operation of port services.
- Evasion of dues.
- Unsafe operation of vessels.
- Pollution of the marine environment.

### 3.5. Appealing Port Authority Regulations

In most ports, safety and security regulations are spelled out in port bylaws. Regulations in the bylaws have a public character and bind all operators in the port area. However, a port authority may decide to issue specific regulations in addition to those which can be found in the bylaws. In that case, the operator should have an opportunity to appeal the application of such regulations, especially if their application will result in significant economic harm to the operator.

Provisions of the concession agreements may further provide the operator with the opportunity to request an expert opinion binding both parties. Pending the decision of the experts, the contested regulation of the port authority would be suspended. The general rules for arbitration of disputes contained in the concession agreement may also apply to this section (see Box 13 and Box 14).

### 3.6. Liability for Damages

The respective liabilities associated with occupancy and use of the site must be clearly presented in leases and concessions. Generally, the

**Box 13: Reference Clauses on General Regulations of the Authority**

**W**hen using the site, the Operator shall observe all regulations given by the Authority and/or any other competent government entity:

- For promoting safety in general.
- To avoid and combat fire in particular.
- To avoid danger, damages, injury, or nuisance.
- To avoid pollution of or damage to the environment and excess taxation of the soil.

*Source: Author.*

**Box 14: Reference Clauses on Specific Regulations of the Authority**

**S**hould the Operator object to the regulations given by the authority in respect to the use of the concessioned/leased property as referred to in the previous paragraph, and which are not given by virtue of any power or obligation contained in a government regulation or port bylaw, then the decision of three experts shall be binding in respect of the question whether, or to what extent, those regulations are necessary and reasonable. The provisions on Arbitration mentioned in Section [number] are equally applicable.

The Operator may invoke the decision by experts within six weeks after the day of dispatch of the letter with which the Authority notified the Operator of the regulations referred to above.

Pending the decision of the experts, the implementation of the regulation given by the Authority in respect of the use of the concessioned/leased property shall be suspended without releasing the Operator from the financial or other consequences arising out of the noncompliance with the regulation.

The costs of the aforesaid experts shall be for the account of the party who is held to be in the wrong, while, if the parties are both held to be in the wrong on one or more points, these costs shall be divided by the experts in a fair and reasonable manner.

The experts shall be notified of the provisions of this agreement to the extent that having them is important for the conduct of their work. By accepting his appointment, an expert subjects himself to the aforesaid conditions.

*Source: Author.*

operator pays for all damage caused to the site by mooring or unmooring of vessels or during cargo handling operations. In a landlord port, the port authority is responsible for maintenance of the quay wall. The responsibility for damage is therefore limited for a mutually agreed period after a vessel arrives at the quay wall (or pier). Damage to the port authority's property by a vessel can usually be recouped from a marine insurance company. The operator may be required to pay for damage even if acting pursuant to orders or instructions of officers (such as pilots) of the port authority (see Box 15).

If a port authority carries out marine services, such as pilotage, towage, and other related activities (for example, vessel traffic [radar] services), liability for the effects of default, negligence, or any other wrongful act should be limited as much as possible. Therefore, the law might contain a clause outlining such a limitation. Examples of such a clause are:

**Box 15: Reference Clauses on Damages**

**T**he Operator shall be liable to pay for all damages that are detected in the properties of the Port Authority during the time that the berth is used by a vessel or during the three months thereafter. The Operator shall only be released from that obligation if and to the extent that he proves that this damage can be attributed to a cause other than the one referred to.

The Operator shall also be liable to pay for all damages that are detected at a later stage, which may have been caused to any Port Authority property as a result of such use, without it being able to invoke that he did not act contrary to any order and/or instruction given by officers authorized by the Port Authority to do so.

If, in the opinion of the Port Authority, as a result of any use of the site, including the quay wall, damage is caused to the site, the bank protection or port works and/or the sites, or bank protections or port works in the vicinity of the leased property, the Operator shall pay the repair costs of such damage.

*Source: Author.*



- Notwithstanding the grant of any public license, the port authority shall not be liable in any circumstances for any injury, loss, damage, or cost sustained by any person as a result of any default or omission of any public license or any agent or employee of the licensee.
- The port authority shall not, where, without its actual fault or privity, any loss or destruction is caused by any vessel or to any goods or other thing whatsoever on board a vessel, be liable for damages beyond an aggregate amount [currency of country] for each ton of the vessel's tonnage.

Inclusion of such provisions should be considered in light of the overall goals for port development. For example, limitations of liability may have a chilling effect on some investors, who would have to seek someone other than the port authority to assume liability risks that exceed the limit. Therefore, the port authority should be provided with the power to waive such liabilities or readjust the liability limit.

Another liability to consider is concerns the loss or damage of goods. The concession or lease agreement should hold the operator liable for goods deposited in its custody during port operations. The operator should indemnify the port authority against liability for goods at the terminal (see Box 16).

## 4. PORT REGULATIONS

### 4.1. Port Operating Regulations

Port regulations (port bylaws) are usually issued by a public port authority and have a legal basis either in a specific law such as a Maritime Code (as in Azerbaijan), a port law (as in Singapore), or a municipal law (as in Rotterdam). Port bylaws are generally well considered and provide very detailed regulations relating to the conduct of vessels, safety, and order in the port area; the protection of the environment; the use of pilots; documentation of disembarking passengers; loading and discharging of goods; and crisis management.

#### Box 16: Reference Clauses on Liability

**T**he Operator shall be deemed to be in charge of goods deposited in its custody as from the time that:

- It has taken the goods from the shipper or any person acting on his behalf up to the time the goods are shipped or otherwise disposed of.
- The goods are discharged from ships up to the time of delivery to the consignee or any person acting on his behalf or until final disposal.
- Transshipment containers/goods are received up to the time they are reshipped.

The Operator shall indemnify the Authority in respect to any liability the Authority may incur for loss and/or damage to goods in custody of the Operator.

*Source: Author.*

Because port regulations are dependent on specific local circumstances, development of generally applicable port regulations is not feasible. Therefore, in this section only a selection of the most important issues is discussed.

#### 4.1.1. Vessel Traffic Management

Vessel traffic management focuses on the safe passage of vessels through the port area. Traffic density in a major port—especially in the case of sea-going and inland vessels using the same port waters—may require an elaborate system of traffic regulation and management. This system comprises four principal elements:

- The vessel with all its sophisticated communication and positioning equipment, such as satellite communication and anti-collision radars.
- The available port facilities, such as vessel traffic systems and modern aids to navigation, often with advanced features such as centralized digital radar displays, collision prediction, and CCTV (closed circuit television) as well as pilot boats, patrol boats for traffic control, tugs, and mooring boats.

- Clear traffic regulations consistent with International Maritime Organisation (IMO) conventions (if applicable) as well as long-established communication procedures.
- Well-motivated and trained pilots, traffic and radar operators, patrol boat crews, tug crews, and other shore personnel.

Provisions regarding these issues are found not only in port regulations, but also in pilotage laws and regulations, vessel traffic regulations, and IMO conventions.

#### 4.1.2. Pilotage

The sea or harbor pilot is the first representative of a port encountered when a sea-going vessel enters port waters. The pilot acts as adviser to the captain during the ship's transit. The efficiency of the pilot service is of major importance both for port safety and efficient traffic management.

#### 4.1.3. Order and Safety in the Port

Since it is not feasible to mention all port regulations on port safety, only those provisions that are of general application are listed here. The main subjects are:

- Berthing requirements.
- Manning of a vessel when at berth.
- Shifting of ships.
- Use of anchors.
- Use of stern- or bow-thrusters when alongside.
- Air pollution from vessels.
- Repairs aboard and alongside ships.
- Transport, handling, and storage of dangerous, hazardous, or harmful goods.
- Reporting and removing substances and objects floating in port waters.
- Fumigation of ships.
- Ships causing serious danger, damage or hindrance (see Box 17).

Generally, the harbormaster (or port captain) is responsible for maintaining good order in the port area, often in cooperation with specialized port police, and, in emergencies, with the regular police, fire brigade, and ambulance services.

#### 4.1.4. Reporting and Communication

Part of reporting and communication with the harbormaster (or port captain) is standard, such as vessel entry and departure. Expected time of arrival at the port is usually reported at least 24 hours prior to arrival and regularly updated. Departure of a ship from berth is usually reported to traffic control three hours before unmooring. There are special procedures for reporting dangerous or noxious substances carried by the ship. Border police and customs require a host of documents. In the event that a country is a member of the Port State Control Agreement, the port authority controls ship documentation to prevent substandard ships from using the port. Rules should be made by ports for captains or agents to inform the harbormaster or Captain's Room in a timely manner about goods loaded or discharged at the terminals, especially with respect to dangerous and noxious cargoes. Reports must also be made to the appropriate authority concerning any accidents or incidents that occurred on the vessel when calling at the port or alongside a berth.

Reports are usually made to the Captain's Room of the port or marine authority responsible for disseminating the relevant information to all parties concerned, such as the terminal of destination, the tug company, the boatmen, customs and immigration, ship chandlers, and others. Information is often entered into a port system serving the entire port community (see Box 18). Data communication between ship and port authorities is increasingly conducted electronically via satellite communication devices (GPS or Internet). Modern ports increasingly accept messages only in digital format.

#### 4.1.5. Dangerous Cargoes: Transport and Handling

Over the last four decades, the IMO has been recognized as the principal forum for all matters

**Box 17: Reference Clauses on Port Safety and Environmental Protection****Air Pollution**

It is prohibited to allow smoke, vapors, fumes, dust, or steam to escape from a vessel, which cause or may cause danger, harm, hazard, damage, or hindrance within or outside the port area.

The Port Authority shall publish the names of substances that may cause unacceptable stench or hindrance when being loaded into or discharged in bulk from a vessel. It is prohibited to load or discharge such substances unless the Port Authority has issued a license to do so.

**Removing Objects and Substances from the Port Water**

When a person by fault or negligence introduces an object into port water, hereby causing danger, hazard, harm, or hindrance within or outside the port area, he shall ensure:

- That the harbormaster is informed without delay.
- That the object or substance is removed from the water immediately, unless this is not practically possible.

The port authority may issue further detailed regulations in order to prevent pollution of port waters.

**Execution of Repair Works on Board**

It is prohibited to execute or cause to execute works on board a vessel with respect to renovation, repair, or maintenance in the following cases:

- When a ship is berthed in a Petroleum Harbor and the works cause open fire and/or sparks.
- When a ship is carrying dangerous goods or when it concerns a tanker for which no cleaning certificate has been issued.
- If the works are impairing a vessel's readiness to maneuver.

- If the works cause danger, damage, or hindrance.

The above shall not apply when a ship is berthed at a shipyard licensed to carry out such works.

The injunction shall only be imposed when it has become apparent that conditions imposed by the Authority have not been complied with or, in the opinion of the Authority, no effective measures can be taken to prevent or end the situation of danger, serious damage, or serious hindrance to the port area and/or the nearby population.

**Fumigation of Vessels**

It is prohibited to use or cause to be used gases on board a vessel for the purpose of disinfecting ship and cargo without a license issued by the Port Authority.

A vessel that used gases for disinfecting ship and cargo is prohibited from berthing or being alongside a berth unless a declaration from a licensed expert has been issued stating that the vessel is gas free.

**Danger, Harm, Damage, or Hindrance from Vessels**

The Port Authority may impose an injunction on the vessel to enter port, to berth, or to remain alongside a berth if the vessel, in the opinion of the Authority, causes or may cause serious danger, harm, damage, or hindrance to the port area and/or the nearby population.

**Reporting Data on Security**

- International Ship Security Certificate (ISSC) number.
- Date of issue/expiry.
- Name of organization issuing the ISSC.
- Name of ship security officer.
- Ship security threat level.

Source: Author.

affecting the safety of shipping. The transport of dangerous cargoes has been one of IMO's main responsibilities since its founding in 1958. Its rules, requirements, regulations, standards, codes, guidelines, and recommendations have been implemented by port administrations all over the world and are followed and observed by both port authorities and the ports industry. Port regulations should

be consistent with IMO rules as much as possible.

It is estimated that more than 50 percent of packaged goods and bulk cargoes transported by sea can be classified as dangerous, hazardous, or harmful. Some of the substances transported are dangerous or hazardous as a matter of safety and are also harmful to the

**Box 18: Reference Clauses on Reporting****Arrival and Departure**

The Master of a vessel shall inform the harbor-master of:

- The ETA of the vessel at the port at least 24 hours before arrival.
- The shifting of the vessel in port at least three hours prior to such event.
- The vessel's departure from port at least three (two, one) hour before unmooring.
- Damage to the vessel, the equipment, machinery, and other items that may impair maneuverability of the vessel and that may endanger the safety of the port area and/or the nearby population, directly upon occurrence of such incident.
- Other data required by the harbor-master in connection with the vessel's presence in the port area.

Notifications shall be made in digital form to the address determined by the Port Authority.

**Dangerous Goods**

The Port Authority may require reporting data on dangerous cargoes loaded to or discharged from vessels in the port, or from vessels that have not been cleaned from such substances.

The Port Authority may also require when and in what manner these data shall be provided to the Authority.

**Reporting Data on Dangerous Goods**

The following data shall be provided by the

Master of a vessel:

- Name and call sign of the vessel and the International Maritime Organisation (IMO) identification number, if applicable.
- Nationality of the vessel.
- Length, breadth, and draught of the vessel.
- ETA in port or at the pilot station, as required by the competent authority.
- Expected time of departure (ETD).
- Planned route.
- The correct technical names of dangerous or polluting goods, the UN (United Nations) identification numbers, where applicable the IMO hazard class in accordance with International Maritime Dangerous Goods (IMDG), International Bulk Chemicals (IBC), and International Gas Carriers (IGC) codes and the type of vessel as described in the International Code for the Safe Carriage of Packaged Irradiated Nuclear Fuel (INF Code), and the quantities of the goods and their location on board. In the case such goods are transported in tank or cargo containers; their identification marks and signs.
- Confirmation that a cargo list, manifest, and suitable stowage plan is available on board that accurately lists the dangerous and polluting cargoes carried on board as well as their location.
- The number of crew members on board.

Source: Author.

marine environment, other cargoes are hazardous only when carried in bulk, and some may be considered harmful to only the marine environment. Between 10 percent and 15 percent of the cargoes transported in packaged form, including freight containers, bulk packagings, portable tanks, tank containers, road tankers, trailers, unit loads, and others, fall under the above categories.

Generally, port regulations may require a license for handling specific cargoes. With respect to vessels loading and discharging dangerous cargoes, port regulations usually include detailed provisions. The port authority may prohibit loading, handling, and discharging of dangerous cargoes in harbors where such activities would be especially

dangerous to the public. Often, handling liquid cargoes such as oil, oil products, gasoline, or dangerous chemicals may only take place in designated harbor areas or zones that do not pose a threat to nearby population centers (see Box 19). The entry and presence of dangerous, hazardous, and harmful cargoes in port areas and their attendant handling should be fully controlled to ensure general safety. The passage of ships carrying dangerous cargoes is a critical responsibility of the vessel traffic system. Ships loading or discharging dangerous cargoes are usually regulated by an expert.

Cleaning of ship holds still containing residues from dangerous cargoes may need to be separately regulated and controlled. Disposal of oil and chemical wastes should also be strictly

### Box 19: Reference Clauses on Loading and Discharging Dangerous Cargoes

The authority shall make regulations for the transport, loading, handling, or discharging of dangerous, hazardous, and/or harmful goods in the port and the approaches thereto. Such regulations may concern, inter alia:

- Documents to be presented to the harbor-master.
- Berthing requirements, including tug assistance.
- Security and supervision.
- Fire prevention and accident control.
- Activities that may cause danger, hazard, and/or hindrance.
- Loading and discharging of cargoes.
- Incident reporting.

The Authority may prohibit loading, handling, or discharging of dangerous good at wharves or docks where such loading, handling, and discharging appears especially dangerous to the public.

Source: Author.

controlled and carried out through installations owned or controlled by the port authority in accordance with the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78) on port reception facilities.

With respect to vessel management, the port authority may regulate the navigation and place of anchoring or mooring of vessels carrying dangerous goods. It also might regulate the mode of utilizing, stowing, and keeping dangerous cargoes on board vessels and the conveyance within the port of any kind of dangerous cargoes with any other kind of goods, articles, or substances.

Finally, a port authority should have full information about the type and amounts of dangerous goods in the port area and about locations where those goods are stored or handled. Detailed regulations should be issued by the port authority or the competent environmental agency with respect to location and segregation of dangerous cargoes on terminals or industrial

sites. In the event of industrial or chemical sites located in the port area, the port authority should also be fully informed about possible dangers and risks with respect to explosions and damage to the environment.

#### 4.1.6. Pollution and Reception Facilities

The goal of MARPOL is to prevent pollution from ships. This has been widely adopted throughout the world. It obligates signatory states to ensure the provision of adequate port reception facilities for waste that can be used without undue delay. National legislation implementing the convention usually places responsibility for ensuring such provision on port authorities. Many ports meet the obligation by allowing suitable, qualified waste management contractors to offer services. In such cases, the authority is responsible for thorough quality control at the facility. Cleaning facilities for oil and oil wastes can often be economically exploited. However, cleaning facilities for chemical wastes generally do not offer by-products that can be extricated and marketed by a waste management contractor.

An important issue to consider is whether the port will merely facilitate the provision of these services directly to ships through licensed, qualified contractors or provide the facilities itself (shore facilities and collection barges, if necessary). In the latter case, the port is responsible for the effective removal of waste materials (see Box 20).

#### 4.1.7. Regulation of Other Port Functions

A variety of other aspects may be regulated by a port authority under a ports law, such as:

- Inquiries with respect to any case where damage has been caused by or to a vessel in port.
- Keeping and placing buoys, beacons, and other navigational aids as well as provision and maintenance of lighthouses.
- The landing of personnel belonging to an armed service.
- Cleaning of basins, works, and premises.



**Box 20: Reference Clauses on Waste Management**

No person shall provide any waste handling facility-cum-collection service unless he is authorized to do so by a public license granted by the Port Authority (or Environmental Agency).

Every public license granted under this section shall be in such form and for such period and may contain such conditions as the Authority may determine.

A public license for the exploitation of a waste handling facility may include conditions requiring the public licensee:

- To comply fully with the requirements of the MARPOL 1973/78 on adequate port reception facilities, especially with regard to Annex I (Oil), Annex II (Noxious Liquids), Annex III (Packaging), Annex IV (Sewage), and Annex V (Garbage), if and when applicable.
- To prepare itself to deal with any emergency threatening the health of the population and the pollution of the environment.
- To comply with any rules, regulations, procedures, and standards as specified in the license or which are given by a competent authority.
- To allow control and inspection of facilities and administration by any competent authority at all times.

Subject to this Section, the Authority may modify the conditions of the public license granted.

Any public licensee aggrieved by the modification of conditions by the Authority under this subsection may, within 30 days of the receipt of it, appeal to [Court] (ask for arbitration).

The Authority may give directions for or with respect to standards of performance and procedures to be observed to ensure the reliability and the environmental friendliness of the facilities and the waste collection, as well as the prevention of undue delay to vessels.

Any person who fails to comply with any direction given under this section shall be guilty of an offense.

It shall be the duty of the public licensee to provide environmentally acceptable, reliable, efficient, and economical services to the shipping community in accordance with the provisions of public license granted to it and the directions of the Authority.

- The use and manning of harbor craft (sometimes requires fire-fighting capabilities).
- Provision and maintenance of pontoons.
- Manning and use of tugs and boats.
- Special police powers for patrol boat personnel (may also be included in the harbor master's function).
- Disaster control and emergency communication procedures.
- Fire-fighting procedures and operations.
- Prohibiting the embarkation and disembarkation of persons except at such places as may be authorized by the port authority.

## 5. PORT COMPETITION MODALITIES

There are three categories of port-related competition. Interport competition arises when two ports in the same or in different countries compete for the same cargo. The scale of interport competition often depends on the size of the hinterland of the concerned ports. For example, Rotterdam competes with Antwerp, Hamburg, and Bremen for cargoes destined for Central Europe. Transshipment container trade competition often concerns an entire region; for example, in the South Asian region, the port of Colombo is competing with Singapore, Tanjung Pelepas, Dubai, Salalah, Aden, and possibly in the future with Vallarpadam. Intraport competition refers to a situation where two or more terminal operators within the same port area compete for the same type of cargoes.

Intraterminal competition refers to two or more (stevedoring) companies competing within the same terminal. This situation is rare and usually only exists within small ports operating under the service port model with independent stevedores.

In general, intraport competition is favored by both government and port users, but is not always feasible. It depends on the volume of the cargo, which may not be sufficient to allow two or more operators to run a profitable and

effective business. Establishing competition in the port sector requires four steps:

1. Assessment of sector unbundling, especially in the case of a public service port. This relates to the financial and economic feasibility of creating more than one terminal handling the same commodity.
2. Implementation of the new port management structure, if and when required.
3. Conclusion of concession or lease agreements that include tariff regulation mechanisms, if required by the absence of intraport competition.
4. Introduction of regulatory oversight by the government (port competition act), but only with respect to those tariffs that relate to a monopolistic market situation.

When intraport competition is muted or absent, the terminal operators (whether public or private) have an incentive to use their monopolistic market position to charge high tariffs (particularly for captive cargoes), which may justify regulation. The need for such regulation may lead to the creation of an independent port competition regulator. This regulatory function is usually instituted by law.

The main objective of the regulator is to ensure fair competition among competing operators in the port; control monopolies (including public ones) and mergers; and prevent anticompetitive practices. Generally, a port sector regulator has legal powers to interfere in anticompetitive practices such as:

- Use of a dominant position to prevent or lessen competition.
- Cross-subsidization from monopoly services to contestable services, where it threatens fair competition.
- Price fixing among competitors.
- When a firm or a person providing port services pursues a course that of itself has or is intended to have the effect of restricting, distorting, or preventing competition.

- Monopoly situations, which are most likely to occur in medium size or smaller ports. In many ports, only one container or oil terminal exists. Generally, when a monopoly or merger situation is not in conflict with the public interest, it may be permitted.

A port competition regulator should only be established in the event of serious threats to competitive behavior within the port. It should preferably have the character of an arbitrator rather than a court of law, and be accepted by the port community as being independent. In the case that boundaries between port authorities and terminal operators are vague or nonexistent (when a port authority not only runs its own container terminal but also owns shares in a competing facility, as is the case in Sri Lanka), a regulator might be a solution for guaranteeing a level playing field for all port operators. A regulator, however, should not jeopardize the legal powers of port authorities to operate freely in the market or the ability of a terminal operator to negotiate tariffs with its clients.

Box 21 discusses the consequences of over competition in ports with insufficient volume, highlighting the case of the Port of Buenos Aires.

In a landlord port model, the public port authority itself is the first to exercise control over excessive pricing by marine or port services providers. A well-devised concession agreement still constitutes the best means to prevent an operator from misusing monopoly power.

In Module 6, a detailed analysis is provided concerning port regulation, including competition regulation. The next section emphasizes the legislative aspects of such regulation.

### 5.1 Legal Structure of Port Competition Regulation

The introduction of a port competition act is only deemed necessary in the event that inter- and intraport competition is absent or not sufficiently developed to prevent monopolistic behavior, either by a port authority or a port operator (see Box 22). Reasons for introducing regulation in this respect are:



**Box 21: The Buenos Aires Case**

In 1993, bid documents were issued by the Argentine government offering concessions for six terminals in Buenos Aires (Puerto Nuevo). The bid was for six conventional finger piers of which two piers (numbers 1 and 2) could be bid as one. This resulted in five operating concessionaires of which one had to close down within 13 months after starting operations. From the remaining four operators, one specialized in general cargo and bulk, and three in container handling. The story of Buenos Aires was told in September 1998 by Trevor H. Bryans of P&O Ports during a World Port Privatization Conference in London.

“Unbeknown to the Puerto Nuevo bidders at the time of submitting the bid, another concession was to be granted for container operations. A fourth container terminal, called Exolgan, was developed at Dock Sud, only 8 km from Puerto Nuevo. This area falls under the Buenos Aires State Province jurisdiction, and not under the Federal government. The position then was that there were four container terminals in the Port of Buenos Aires, to handle 500,000 containers, further reducing the size of the cake, and casting considerable doubt on the achievability of the commitments made in winning the concessions.

The issue of competition, and how it is addressed in government policy, is an issue, which is fundamental to the success of privatization. Competition becomes an obsession with port authorities planning for privatization. Ports with insufficient volume to support one efficient operator, look to bid two or more concessions.

The Port of Buenos Aires is a perfect example of this obsession with competition, which has led to overcapitalization, five concessions have been let, and there is only sufficient volume for two, or at the most, three efficient container terminals.

As mentioned previously, the operator who won the concession of terminal 6 has gone bankrupt, mainly as a consequence of lowering tariffs to subeconomic rates to retain business, and since the early part of 1995 a savage price war developed, which has seen average-per-box revenues plummet from \$400 preprivatization to less than \$200 today, and they are still falling.

The current rate-of-return to terminal operators in Buenos Aires is beneath average long-term cost of the provision of the services by segmenting the market into four operators. Each terminal incurs considerably higher costs than the combined average cost of one large operator. The clients have been denied access to services provided in the most effective manner possible.

Moreover, the three terminals operating in Puerto Nuevo suffer unfair competition by the operator Exolgan at Dock Sud, operating at the Provincial Administration. It is estimated that the commercial advantage to Exolgan is approximately \$40 per box. The commercial advantage to Exolgan arises from the following:

- The ‘Tasas a la Carga,’ payable by importers/exporters to the terminal, which is then passed on to the Federal government, does not apply at Exolgan. The ‘Tasas a la Carga’ is \$3 per ton on import cargo, and \$1 on export cargo. It is collected by Exolgan, but not passed onto the Province.
- Under the terms of the bid in Puerto Nuevo, the Concessionaires had to absorb a proportion of the waterfront and AGP labor. In the case of TRP, this amounted to almost 900 people, although the terminal only required 430. Reducing this labor to the required number cost in excess of \$10M. Exolgan was not required to absorb any of the redundant or surplus labor, although that labor was originally employed at Dock Sud.
- Volume commitments were made by the Puerto Nuevo terminals as part of the bid. Shortfalls in these volume commitments must be paid for by the operators. No similar commitments were required from the operator at Exolgan.
- The rental fee payable to the Province by Exolgan is payable for the quay area only; the remainder of the land is free-hold.
- Stringent performance guarantees and bonds had to be made by the operators in Puerto Nuevo, and stipulated insurance costs covered. This was not the case at Exolgan.”

Source: Author.

- A port authority not only functions as a landlord, but also provides stevedoring services or operates a terminal. The latter is the case in Sri Lanka, where the Sri Lanka

Ports Authority owns and operates the Jaya Container Terminal, which competes with the privately operated South Asia Gateway Terminals (SAGT) managed by

**Box 22: Sample Port Competition Act**

**H**ereinafter, the main provisions of a Port Competition Act are mentioned.

The main recital of the Act may state the following:

WHEREAS it has been deemed appropriate to promote and oversee competition in the ports sector, ensure the equity of access to the ports of [country], and to create an atmosphere of confidence for port users and investors in commercial marine and port services and facilities.

NOW THEREFORE, be it enacted by the Parliament of the [country] as follows:

Important are the functions of the port regulator and the powers to interfere in the market. An example of the relevant provisions are:

- (1) The functions of the port regulator shall be to act as the economic regulator and competition authority for the ports sector in [country]:
  - (a) Upon complaint of any port user, to investigate and make orders in relation to complaints concerning alleged anti-competitive practices or abuse of a dominant position.
  - (b) Upon complaint of any port user in relation to tariffs, to investigate whether those tariffs amount to or evidence an anti-competitive practice or an abuse of a dominant position and to make an order thereon.
  - (c) Upon notification to the port regulator in terms of [subsection (2)] hereof prior to any merger of:
    - (i) A marine service provider and a port service provider.

- (ii) A marine service provider with another marine service provider.
  - (iii) A port service provider with another port service provider.
  - (iv) Upon complaint of any port user prior to or upon such a merger, to decide whether the merger situation is incompatible with the promotion of competition and to make an order thereon.
- (d) On the application of the ports authority under section [number], to review the draft of the concession agreement in terms of the said section and advise the port authority on whether any provisions thereof may be incompatible with the promotion of competition, may amount to an anti-competitive practice, or may result in an abuse of a dominant position.
- (e) In response to a complaint of any port user, to investigate whether the occurrence of cross-subsidization exists from dominant services to contestable services, and make an order thereon.
- (2) The port regulator shall prescribe the instances in which a merger notification is required to be given to it under paragraph (c).

The provisions above are an example of light regulation, only upon complaint of the port authority or the users of the port facility. However, the regulator has the option to make an order to modify the tariffs when it decides that a certain situation violates fair competition in the concerned port or port sector.

Source: Author.

P&O Ports. In this case, a port competition act was deemed necessary to prevent possible misuse by the port authority of its dominant position because it was also responsible for pilotage and towage services and creating an atmosphere of confidence for private port users and investors.

- There is only one terminal operator handling a specific commodity (often containers). In Yemen, there is only one large container terminal handling the entire national container traffic. Therefore, the

government introduced competition regulation provisions in the concession agreement with the terminal operator, although it is only applicable to domestic containers. No restrictions were put in place with respect to transshipment activities.

As indicated above, port competition regulation may either be introduced by law or be part of a concession agreement with a port operator. There is also the possibility of a merger between two port operators, resulting in the creation of a monopoly in the concerned port. In such a

case competition regulation may be necessary either in terms of tariff regulation or in prohibiting the merger for being incompatible with fair competition.

## 6. FULL CONCESSION AGREEMENTS

More elaborately discussed in Module 3, concession agreements are a relatively new development in ports. Business opinions differ about the legal nature of a concession agreement—as well as its configuration. Some concession agreements have more in common with a privatization model, while others resemble a leasehold contract. Because comprehensive privatization constitutes an unrestricted and irrevocable transfer of port land from the public to the private sector, a concession agreement, with or without BOT types of arrangements, cannot be conceived as being comprehensive port privatization, but only partial port privatization. During the last decades, application of concession agreements have gradually become the preferred method to develop public-private partnerships and are most successfully applied within the landlord port structure.

Concession agreements were originally developed for service ports. Landlord ports usually did not need concession agreements, but used leasehold agreements instead. Both types of agreements have much in common and some consider a leasehold contract to be a variant of a concession. To avoid misunderstanding, the term “full concession agreement” will be used to describe a concession in its broadest form; that is, a series of contracts that define the relationship between the government and the private sector regarding the right to exploit port land and facilities as well as the obligation to construct port infrastructure and provide superstructure.

In some aspects, a leasehold might be considered a long-term rent contract. But contrary to a rent contract, a leasehold conveys a possessory interest. Therefore, a leasehold can be transferred or sold to another private party under the conditions stipulated by the port authority.

This is a very important feature for advancing the business plan of a private investor in a port terminal.

### 6.1. Full Concession, Leasehold, and Land Rent

What differentiates a concession agreement from a leasehold? When would one instrument be preferable over another? Box 23 summarizes the formal differences and similarities.

The main reason to apply a full concession contract is fiscal. In the 1980s, many ports (especially service ports) were in dire financial straits: government-controlled, overmanned, badly maintained, without market orientation, and often not able to provide even essential port services. This situation did not occur solely in developing countries, but also in many developed countries. In developing countries, however, the financial resources necessary to modernize port facilities and to provide for redundancy payments for excess personnel were usually lacking. Concession agreements provided a timely solution: private investors provided the money to modernize port facilities and often were willing to take over some port personnel liabilities. This freed up government resources for use in other parts of the economy. For all their advantages, concession agreements do have a price, most particularly the surrender by the government of full and complete control over port development.

### 6.2. Full Concession and BOT Schemes

If the concessionaire obtains the right to construct significant parts of the operational facilities as well as the operational port infrastructure (mainly quays and land reclamation works), a concession could be combined with a BOT arrangement. In the case of legislation designating part of the infrastructure to be of a public character, the concession may be considered a public license. However, the part of the concession constituting a public license is generally not negotiable. The government authority granting the license

**Box 23: Full Concession, Lease, and Rent Contracts—Landlord Port**

Characteristics	Full concession	Leasehold	Land rent
Terms	25–35 years	10–25 years	10 years
License	Maybe, depends on legislation	Maybe, depends on legislation	Maybe, depends on legislation
Government guarantees (loan, taxes, exchange rate, and competition conditions)	Yes	No	No
Obligation to assume port personnel liability	Often, depends on local situation	No	No
Port assets may be pledged as security	Yes	Maybe, depends on legislation	No
Performance monitoring by port authority	Yes	Yes or no depending on the contract	No
Traffic guarantee by concessionaire, lessee, or renter	Yes, depends on contract	Usually not	No
Private investment in port infrastructure	Yes	No	No
Private investment in port superstructure and equipment	Yes	Yes	Yes
Tariff control by government or port authority	Depends on situation	No	No
Terminal management	Concessionaire or his chosen operator	Lessee	Renter
Payments	Fixed and variable	Lump-sum (fixed) or shared revenue	Fixed
Legal character of private party	Joint venture, often including shipping line	Mainly limited liability company	Limited liability company
Responsibility for environmental conditions	Yes	Depends on legislation	Usually not
Business plan required	Yes	Depends on contract conditions	No
Reversion of user rights after contract period	Yes	Yes	Yes
Compensation for newly built facilities	Depends on contract	To be transferred to new lessee or to be removed	Not applicable

Source: Author.

usually reserves the right to unilaterally modify license conditions.

The most important BOT arrangements combine many variations of long-term leasing with preagreed investment commitments. In port reform, the most commonly used models are BOT, BOOT (build-own-operate-transfer), BTO (build-transfer-operate), and WBOT (wrap-around BOT). These variations are described in more detail below, and also later in this module in “BOTS and Construction.”

**BOT.** Legal title to the newly constructed port infrastructure, and sometimes other assets, remains with the government or port authority until the end of the concession period. The concessionaire concludes a long-term leasehold agreement, which conveys rights similar to holding title over the land. This agreement is usually attached as an annex to the concession.

**BOOT.** It is also possible that legal title for the land is acquired directly by the concessionaire. Under a BOOT model, the parties agree to have title over all assets that are passed to the government at the end of the concession. For many large terminal operators, the BOOT model is a preferred option.

**BTO.** This arrangement addresses instances in which legislation forbids ownership by private parties for what is considered public infrastructure or part of the maritime domain. Ownership may be directly transferred to the government after construction (for example, Costa Rica, and Croatia). The investor in the terminal facility will construct the terminal on privately owned land and subsequently transfers title to the government or port authority. Generally, this form of public-private partnership is considered more complicated than the more common BOT scheme, especially with respect to liability and increased government involvement. Under the BTO model, ownership of port facilities becomes an issue for lenders and investors, particularly when fixed assets are required as collateral for financing. In such cases, lenders may require some form of government guarantee regarding adherence to the terms of the concession agreement.

**WBOT.** Finally, the WBOT concept packages a BOT with a privatization of the public infrastructure. Under a WBOT structure, existing government-owned port facilities are expanded by the private sector, which holds title only to the additional infrastructure. Under this model, a private operating company would then:

- Operate the entire port facility under a project development agreement (PDA).
- Manage the government-owned port facility under a management contract.
- Expand the facility under a concession or BOT contract.
- Have both the management contract and concession or BOT contract wrap around the PDA.

### 6.3. Full Concession Agreement Structure

While the principal framework for the relationship between the port authority and the concessionaire is specified in the main concession agreement, there are a number of other documents that form part of the concession. The concession agreement and related documents can be used in a number of circumstances, including when:

- A private operator concludes a concession agreement for an existing public terminal.
- A private operator concludes a concession agreement with a BOT arrangement for an existing terminal that must undergo large-scale reconstruction and be thoroughly reequipped.
- A private operator constructs an entirely new terminal under a concession agreement with a BOT arrangement (greenfield project).

Box 24 presents a short list of the important topics usually treated in a concession agreement and related documents, whereas Annex I presents a comprehensive potential list of concession and BOT agreement provisions.

**Box 24: Main Schedules to a Concession or BOT Agreement**

- a. Definitions
  - Definitions
  - Interpretation
- b. Conditions precedent
  - To be fulfilled by the operator
  - To be fulfilled by the government
- c. Authorized maps of development area
  - Current terminal
  - Extension works
- d. List of current terminal personnel employed
- e. Identified permits
- f. Functional requirements of the extension works
- g. Design solution
- h. Construction program
- i. Milestone achievement dates and milestone sunset dates
- j. Commissioning tests
- k. Minimum insurance covers
  - Precommissioning insurance
  - Postcommissioning insurance
- l. Maintenance policy
- m. Transfer arrangements
- n. Hand-back
  - Hand-back requirements
  - Expiry date inspection
  - Form of hand-back certificate
- o. Termination procedures
- p. Throughput
  - Annual throughputs
  - Traffic and throughput information
- r. Initial capitalization

Source: Author.

**6.3.1. Preconcession Documents**

Often, either pursuant to the terms of an award, or for purposes of securing financing commitments, the parties execute various preconcession documents that either outline the fundamental terms of the concession or become incorporated into the concession itself. Among these documents are:

- *Letter of intent (LOI)*: A preconcession agreement stating the concessionaire or sponsor's intention to design, construct, or renovate a new or existing port facility, and the port authority's willingness to establish terms for a privately operated facility under a concession agreement and to cooperate with the concessionaire or sponsor in complying with certain local requirements (for example, permits, registrations, and qualifications to do business). The LOI is prepared in accordance with draft functional specifications that were originally submitted as part of the bid documentation.
- *Detailed project report (DPR)*: A document submitted to the port authority as an outline of the functional design or general technical design and time schedules (milestones) for the various phases of the construction. Once approved by the authority, the DPR would be incorporated in the concession agreement, at which point the milestones become binding.
- *Joint development agreement (JDA)*: An agreement among members of the sponsor group that allocates project responsibilities (for example, shareholding, financing, construction, or tax advantages). This agreement might include a port authority or even a ministry.
- *Technical operations agreement*: An agreement that specifies joint use of and responsibilities for technical facilities, such as shore cranes or operational infrastructure.

**6.3.2. Definitions**

Every concession agreement includes a list of definitions to delineate precisely both the subject matter and the concepts used throughout the agreement. These definitions will vary from country to country and legal system to legal system. Outlined below are examples of the most commonly used definitions. The capitalization of a word within agreements often indicates the word is specifically defined within the definitions section of the agreement.



*Agreement:* The concession agreement, entered into between the Port Authority of [port or country] and the Operator, of which this schedule is a part, including all the schedules thereto, and as it may be amended, varied, or modified from time to time.

*Applicable permits:* Any and all permissions, clearances, licenses, authorizations, consents, no-objections, and approvals of or from any governmental authority of whatsoever nature required from time to time in connection with the ownership, development, financing, construction, operation, and management of the terminal at the Port of [name], concessioned to the Concessionaire, and for undertaking, performing, or discharging the obligations contemplated by this Agreement or the Port Services Agreement and the Site Lease Agreement, as set out in Schedule [number] hereto.

*Approved DPR:* The DPR approved by the Port Authority for the development of the various phases of the site, the approved form of which shall be signed for identification by the parties to this Agreement and shall include any amendments to the DPR approved by the Port Authority in accordance with this Agreement.

*Bank:* Every shore structure (excluding a quay wall), measured in each case from the crest line of the ground to the bed line, and including related artificial structures.

*Basic port infrastructure:* Immovable assets destined for general use of the port area, such as:

- Maritime access channels.
- Port entrance.
- Port basin(s).
- Protective works, including breakwaters and shore protection.
- Accesses to the port for inland transport (roads, rail, inland waterways, and tunnels, and so forth)

*Basic structures:* All immovable property, with the exception of such property that is subject to the right to lease. Basic structures include all

pieces of stone, foundation remains, poles, pipes, cables, scaffolding, pavements, demarcations, and structures on or at the grounds that were founded, placed, or built by the port authority or by the former users before the commencement of the right of lease as part of a concession.

*Building contract:* The contract or contracts entered, or to be entered, into between the Builder and the Operator for the construction of the works with respect to the [Name] Container Terminal or (port) facility, in a form that contains provisions approved by the Port Authority concerning its assignment to the Port Authority or enabling the exercise of other step-in rights of the Port Authority.

*Business plan:* In respect of a financial year, a plan for the business of the Operator consisting of:

- (a) The strategic and marketing objectives of the Operator for that financial year.
- (b) The operating and financial targets of the Operator including monthly income, balance sheet, and cash-flow statement.
- (c) Business and financial forecasts of the Operator for the 4 (four) financial years following that financial year.

*Change in law:* The occurrence of any of the following subsequent to the date of signing this Agreement:

- (a) The modification, amendment, variation, alteration, or repeal of any existing Law or Decree of any government authority.
- (b) The enactment of any new Law or the imposition or issuance of any new Decree by any governmental authority.
- (c) The commencement of any Law or Directive or Decree that has not yet entered into effect at the date of signing this Agreement.
- (d) Changes in the interpretation, application, or enforcement of any law or judgment by any court within the [country] having jurisdiction over the government.

(e) Any Applicable Permit previously granted, ceasing to remain in full force and effect for reasons other than breach or violation by or the negligence of the Operator, or if granted for a limited period, being renewed on terms different from those previously stipulated.

*Conditions precedent:* Shall mean the obligations to be fulfilled by the Parties prior to the Effective Date in accordance with Article [number] read with Schedule [number].

*Credit agreements:* The loan agreement(s) entered into, or to be entered into, between the Lenders and the Operator to provide finance to the Operator in order that the Operator may fulfill its obligations under this Agreement.

*Cargo handling services:* Cargo terminal management and operations including cargo handling services for stevedoring; landing; transporting; cargo consolidation; warehousing of general, liquid, or dry bulk cargoes.

*Concession area:* The port areas within the port of [name], known as [name], as more fully described and delineated in Annex [number] to this Agreement.

*Concession fee:* The monthly price per meter for the use of leased property and, in addition to such amount, a Throughput Royalty to be paid in recognition of the port authority's ownership (user) rights as specified in Section [number].

*Container services:* Container terminal management and operations, including container handling services for stevedoring, landing, transporting, and warehousing; stuffing and stripping; consolidation of containerized cargoes.

*Debt:* Any indebtedness of the Operator for the purposes of financing the investment in and enhancement, development, design, construction, commissioning, and operation of the Terminals and the Extension Works, or any other costs or expenses in relation to the obligations of the Operator under this Agreement, related thereto.

*Depreciated replacement value:* Shall have the meaning assigned to it in accordance with the

[reference to appropriate document, accounting practice, or method of depreciation].

*Effective date:* The date of fulfillment of all the Conditions Precedent.

*Financial closing:* The fulfillment of all conditions precedent to the initial availability of funds under the Financing Documents and receipt of commitments for the equity required for (Phase 1 of) the project and immediate access to funds.

*Financing documents:* All loan agreements, notes indentures, security agreements, letters of credit, share subscription agreements, subordinated debt agreements, and other documents relating to the financing of the Project, as the same may be amended, supplemented, or modified from time to time.

*Force majeure:* An event or circumstance or a combination of events or circumstances beyond the reasonable control of either party, which materially and adversely affects the performance by that party of its obligations under this Agreement and that cannot reasonably be foreseen or prevented (such as civil disturbance, armed conflict or act of foreign enemy, wars, blockades, insurrections, uprisings, sabotage, embargo, revolution or riot, action or inaction of public officials, expropriation, nationalization or confiscation of facilities, earthquakes, mudslides, lightning, typhoon, fires, storms, floods, epidemics or plagues, acts of God, and other natural disasters).

*Good industry practice:* As applicable to the Operator, its contractors, subcontractors, operators, subconcessionaires, sublessees, and all other third-party agents of the Operator, practices, methods, techniques, and standards, as changed from time to time, that are generally accepted for use in international port construction, development, management, operations, and maintenance, taking into account conditions in [country].

*Grounds:* The grounds given out in lease to the Operator under this Agreement.

*Hand-over:* The process of providing peaceful and vacant possession of and access to the Concession Area and all cargo handling equipment as well as infrastructure and superstructure by the Ports Authority for the conduct of the business of the Terminal as contemplated by this Agreement, together with such access rights as are described in the Site Lease Agreement.

*Joint development agreement:* The Agreement dated [date] between the Sponsors and, among other things, allocating project responsibilities between the Sponsors as per Annex [number].

*Law:* Any applicable [country] law, statute, proclamation, bylaw, decree, directive, decision, regulation, rule, order, notice, judicial order, judgment, or delegated or subordinated legislation, including directions or guidance, issued pursuant to any legislation.

*Lead sponsor:* [Name] having a major Equity Share as per the Joint Development Agreement.

*Lenders:* Local or foreign financial institution(s), corporations, companies, or banks providing secured and unsecured credit facilities to the Operator, including lease and hire or purchase facilities to the Operator pursuant to the Financing Documents.

*Lenders direct agreement:* The agreement between the Lenders (represented by [Name] Bank acting as Security Agent), the Concessionaire, the government and/or Port Authority, including the rights of the Lenders under the Concession Agreement, the Port Services Agreement, the Management Agreement, and the Site Lease Agreement, assigned to the Security Agent under the Assignment of Project Documents and charged under [the Commercial Mortgage] as well as the procedures and obligations of the parties in the event that the concession is terminated prior to expiry.

*Material adverse effect:* Circumstances that adversely affect: (a) the ability of the Operator to observe and perform in a timely manner its obligations under this Agreement; (b) the ability of the Operator to avail the benefits of the

Concession Agreement in accordance with the terms of this Agreement; (c) as a result of which the Operator is unable to or is prevented from carrying on the Operations of the Terminal; or (d) its exclusive right to build, own, operate, and transfer the Extension Works at the Concession Area is diminished or impaired.

*Operational port infrastructure:* Infrastructure essential to port operations, to include any or all of the following items:

- Inner port channels including turning and port basins.
- Revetments and slopes.
- Roads, tunnels, bridges, and locks in the port area.
- Quay walls, docks, jetties, and finger piers.
- Aids to navigation, buoys, and beacons.
- Hydro and meteorological systems.
- Specific mooring buoys.
- Vessel traffic management system (VTMS).
- Port land (excluding superstructure, terminal road system, and paving).
- Access roads to general road infrastructure, rail connection to general rail infrastructure, and marshalling yards.

*Port equipment:* Equipment (nonfixed assets) essential to the operation of the port, to include any or all of the following items:

- Tugs.
- Line handling vessels.
- Specialized vessels for depth survey and fire fighting.
- Dredging vessels and equipment.
- Ship and shore handling equipment (such as top cranes, gantry cranes, and grain elevators).
- Cargo handling equipment (apron and terminal), such as transtainers, top lifts, and trailers.

*Port services agreement:* The agreement entered, or to be entered, into between the Port Authority and the Operator for the provision of marine services by the Port Authority in relation to the Terminals to be operated by the Operator pursuant to this Agreement in agreed terms.

*Project:* The development, financing, design, construction, operation, and maintenance of the site in accordance to the provisions of services to the users.

*Regulatory authority:* Any authority (referred to in Article [number]) constituted by law in [country].

*Site:* The wharves, piers or quays, buildings, and other infrastructure and superstructure leased or given in concession to the Operator under this Agreement.

*Sponsors:* The Consortium selected (through a process of competitive bidding in [month], [year]), led by the Lead Sponsor.

*Terminal:* The terminal facility proposed to be developed in accordance with the terms of this Concession Agreement by the Operator.

*Transport infrastructure linkages:* The road, rail, or water infrastructure linkages agreed to in the Approved DPR, identified as material transport infrastructure required for the development or operations of the [terminal, port].

*Quay wall:* A vertical or almost vertical shore structure, including related support structures.

This list may be augmented with other items or the definitions may be expanded depending on the specific objectives of the concession and considerations of the national concession law.

### 6.3.3. Conditions Precedent Sample

Below are two sample conditions precedent, one applicable to the operator, and one applicable to a port authority.

6.3.3.1. Part 1—Conditions Precedent to be Fulfilled by the Operator. Delivery by the Operator to the Port Authority, in form and substance satisfactory to the government (acting reasonably), of the following documents:

1. A duly certified copy of the Operator's Certificate of Incorporation (and of any certificate of incorporation on change of name or certification on registration as a public company).
2. A certified copy of the Memorandum and Articles of Association of the Operator, in the form approved by all shareholders of the Operator and by the Lenders.
3. A duly certified copy of the Certificate of Incorporation (and of any certificate of incorporation on change of name or certification on registration as a public company) of the company holding the majority of the shares of the Operator.
4. A certified copy of the Memorandum and Articles of Association of the company holding the majority of the shares of the Operator, in the form approved by all shareholders of the Operator and by the Lenders (if any).
5. Certified minutes of a Meeting of the Board of Directors of the Operator evidencing:
  - (a) Consideration by the directors of:
    - i. A draft of this Agreement and the other Project Documents.
    - ii. The Operator's rights and obligations under the this Agreement and the other subsidiary agreements.
    - iii. The legal capacity of the Operator to undertake the Project and enter into and perform the Project Documents and the authority of the directors to exercise the powers of the Operator to do the same.
  - (b) A valid resolution of the directors approving the execution, delivery, and performance by the Operator of each of the Project Documents, except the Building Contract, which will be concluded with a competent Builder subject to Article [number] not later than [number] months from the Effective Date or such later date as agreed on between the parties.

6. Documentary evidence of the execution and delivery of each of the Project Documents and of the satisfaction or waiver of any conditions precedent under each of the Project Documents except the Building Contract.
  7. Documentary evidence of the receipt by the Operator of the Applicable Permits (and any applicable other Consents, if any) as listed in Schedule [number].
  8. Documentary evidence that the Operator has taken out the insurances required by Article [Number] of the Agreement (other than those insurance relating to construction that cannot be procured until after the Effective Date).
  9. A certified document made out by the Operator stating that all Movable Assets and Facilities, associated spare parts as well as warrantees referred to in Article [Number] have been accepted by the Operator and the transfer value of \$ [number] million has been paid to the Port Authority, and that the Operator holds harmless and indemnifies the Port Authority and keeps the Port Authority so indemnified against each and every liability that the Port Authority may incur to any person whatsoever and against any claims, demands, proceedings, damages, costs, losses, obligations, liabilities, and or expenses sustained, incurred, or payable by the Port Authority with respect to the Movable Assets and Facilities and associated spare parts.
  10. Confirmation of the Operator that it has satisfied itself as to the nature and extent of the conditions of or affecting the Concession Area (including climatic, hydrological, hydrogeological, ecological, environmental, geotechnical, and seismic conditions), but only in respect of the existing Terminals.
  11. Execution of the Financing Documents by all parties to such documents.
- 6.3.3.2. Part 2—Conditions Precedent to be Fulfilled by the Port Authority. Delivery by the Port Authority to the Operator, in form and substance satisfactory to the Operator (acting reasonably), of the following documents:
1. The execution by or on behalf of the Port Authority of the Port Services Agreement and the Site Lease, in the form agreed by the Operator, respectively, the Sponsor and the Port Authority prior to or on the date hereof.
  2. The receipt by the Operator of a legal opinion from counsel for the Port Authority in a form and substance reasonably satisfactory to the Operator with respect to the due authority, valid existence, execution, delivery, and performance of this Agreement, the Port Services Agreement, and the Site Lease, and confirming that all necessary government approvals, including the approval to enable the Port Authority to enter into such agreements, have been secured.
  3. Documentary evidence that all Applicable Permits currently in force at the [name] Terminal have been assigned by the Port Authority to the Operator for the remaining duration of the term of such Permits.
  4. Documentary evidence of the receipt by the Authority of all other Applicable Permits required to be obtained by it (and as listed in Schedule [number]) under law.
  5. A Certificate from the [independent expert], as Test Certifier, stating that the Commissioning Tests have been conducted in a proper manner and to the satisfaction of the [independent expert].
  6. The issuance of the Commissioning Certificate from the [independent expert], as Test Certifier, in accordance with Schedule [number] hereof.
  7. A Certificate from the Port Authority that the ownership of the Movable Assets and Facilities at the Terminals has been transferred on the Actual Hand-Over Date, by the government to the Operator



pursuant to the completion of the Commissioning Tests to the satisfaction of the Operator and/or the Sponsor.

8. Documentary evidence of the receipt by the Operator of all new Applicable Permits required to be obtained by it (and as listed at Schedule [number] under law) prior to the Actual Hand-Over Date.

#### 6.3.4. Term of the Concession Agreement

The term of the agreement is a strategic issue. It mainly depends on the respective amounts of investment the port authority and the concessionaire have made or will make. In a landlord port, standard lease contracts that involve limited investment on behalf of the concessionaire are typically 10–15 years. BOT-type agreements are usually concluded for a period of 25–35 years, with options to renew. Investments of lessors in superstructure and equipment often exceed those of a port authority by a large margin; whether this is the case or not, both parties have an interest in a mutually beneficial long-term relationship. This is especially true when concluding a full concession agreement with a BOT arrangement. Shorter term arrangements (10 years or less) are suitable for tool ports or management contracts, but in general do not provide much security or stability for the port authority and offer no major incentives to the concessionaire to improve performance or to introduce innovative operations.

Concession documents must also indicate precisely when the concession period actually starts, which can be a complicated issue. Some of the provisions come into force on signature, such as warranties, confidentiality provisions, and clauses relating to applicable law and dispute resolution. In the event of the transfer of assets or construction of infrastructure under a BOT arrangement, relevant conditions come into force upon satisfaction of waiver of pre-existing conditions. Conditions precedent deal largely with delivery and proper execution of certain documents required to give effect to or support obligations under the concession agreement.

#### Box 25: Reference Clause on Term of Concession

**T**his Concession Agreement shall commence on the [day] of [month] of the year Two Thousand and [year] and shall end, in whole or in part, on [day] of [month] of the year Two Thousand and [year].

The Operator has the option to extend the duration of this Concession Agreement by a period of maximum [number] years, immediately following the present period, taking into consideration the provisions given in Article [number]. Upon pain of lapsing of this right, the Operator shall notify the Authority in writing at least [number] years before the extension might commence that he wishes to avail himself of his right.

The effectiveness of a full concession agreement is dependent upon the fulfillment of specified conditions precedent and evidence that no circumstances exist that may result in the early termination of the agreed terms (see Box 25).

#### 6.4. Concession Parties

Parties under a full concession agreement usually consist of a port authority and a sole sponsor or a consortium of sponsors (often called a special vehicle company or special purpose company [SPC]). The consortium may not necessarily be identical to the operator, but may include the operator as a consortium member.

The amount of share capital provided for a new venture is one indication of the consortium's confidence regarding the port's prospects and future development. In developing countries, the International Finance Corporation (IFC) may be a source of share capital for the venture. Whether the port authority itself may take shares is debatable, but preferably the port authority should not be a shareholder because it could create conflicts of interest due to its role as a landlord port manager and regulator and compromise its position with respect to other port users. Based on the estimated income expected during the concession period and the infrastructure and superstructure to be constructed during the concession period, the



**Box 26: Reference Clause on Nomination of Operator of a Container Terminal**

**T**his INDENTURE made and entered into at [place] this [number] day of [month] [year], by and between the Port Authority of [name] a body corporate [a public entity], incorporated under the [name] Act No [number] of [date] and having its Head Office at [street], [city], in [country], (hereinafter called and referred to as “the Authority,” which term or expression where the context so requires or admits, means, and includes the said Port Authority and its successors or assignees) on the one hand, and the (name) Container Terminal Ltd., duly incorporated in [country] under the Companies Act of [date] and having its registered office at [name] street, no.[number], [city] in [country] (hereinafter referred to as “the Operator”), which term or expression shall where the context so requires or admits, means, and includes the said Container Terminal Ltd. and its successors and assignees), on the other hand,

Article...

The Authority hereby appoints the Operator to provide cargo handling (or container) services at the port area(s) known as [name of area], under the terms and conditions specified in this Agreement.

Source: Author.

consortium should be expected to leverage its investment with borrowed money from various sources, usually from a syndicate of commercial banks or through the issuance of bonds or other capital market instrument under an indenture.

Finally, the consortium may conclude a management contract with a professional operating company. Both the financing arrangements and the management contract form part of the concession documents (see Box 26).

### **6.5. General Rights and Obligations of the Operator**

The operator generally acquires leasehold rights and obligations when assuming the control of an existing facility under a concession agreement. The concession agreement generally limits use of the leased premises exclusively for port

purposes and for handling certain cargoes. Within these limits, an operator is free to develop the business. Detailed restrictions for cargo handling on the terminal should be avoided, with the exception of dangerous and polluting cargoes.

There are many other critical subjects to be included in a concession agreement. Two issues of main importance are:

- The right of the concessionaire to transfer the leasehold rights to a third party, including conditions under which such transfer can occur (the right to transfer should be sufficiently flexible to encourage the financing of port improvements).
- The right to own all newly constructed buildings and superstructure improvements on the premises during the lease period, with compensation by the port authority (lessor) after termination of the agreement, or, in the case of transfer to a third party, sale of such assets according to the terms of the finance agreements (in some jurisdictions it may be necessary to require such sales to comply with local procedures or applicable bulk transfer notice requirements).

Full concession agreements (including BOT arrangements) and lease agreements usually stipulate that the fixed assets revert to the port authority at the end of the lease. Transfer may be effected with or without compensation, depending mainly on the duration of the contract and the investment value of the fixed assets. It is not unusual for a port authority to pay the concessionaire or lessee the depreciated value of the assets at the end of the concession period.

Finally, a concession agreement may contain an exclusivity clause designed to prevent the concessionaire or operator and any of their subsidiaries from competing with other terminal operators for the particular traffic for which the concession was granted, within defined geographical areas and for stated time periods, as the market situation and the scope of the investments

may reasonably require. In any case, this time period must remain short enough compared to the length of the concession agreement, and not exceed a period of preferably five years after completion of the building program in the case of a BOT arrangement.

Generally, port infrastructure constructed by a concessionaire through a BOT arrangement remains the property of the port authority. With respect to movable assets placed on the concession area by the concessionaire, ownership rights over these assets generally remain with the concessionaire (with the right to pledge these assets as collateral to financiers) throughout the concession period and may, depending on the concession agreement's terms, be transferred to the port authority when the concession terminates. Some legal systems allow a concessionaire or lessee to own buildings, installations, and other immovable property located on port authority owned land (for example, in the Netherlands). Therefore, operators may use these assets as collateral for bank or shareholder financing. In countries where the port area constitutes part of the Maritime Domain, private ownership of immovable property will be considered fixtures that cannot be owned independently from the Maritime Domain (for example, in Croatia). In such cases, user rights (in some instances including the right to mortgage—but not own outright—the asset) may be allowed under the concession. Whichever is the case, the port authority should include in the concession detailed provisions pertaining to ownership or user rights over those assets that are erected by the concessionaire in the concession area (see Box 27).

## 6.6. General Rights and Obligations of the Port Authority

During the concession period, the port authority often assumes dual roles. On the one hand, the port authority serves the public interest as a regulator monitoring performance under the concession agreement. On the other hand, the port authority may possess a stake in the port enterprise as a participant in a public-private

### Box 27: Reference Clauses on General Rights and Obligations of the Operator

Subject to other provisions of this Agreement and its liability under any law, and without in any way limiting its ability, the Operator hereby undertakes and binds itself to the following at the Concession Area:

- To provide, inter alia, effective and efficient container (cargo handling) services according to the performance parameters as described in Annex [number].
- To ensure that facilities leased by the Authority are operated with due care and skill and in accordance with the terms of this Agreement.
- To repair and make good to the satisfaction of the Authority all damages and breakages to infrastructure and superstructure made by the Operator or by third parties acting under the responsibility of the Operator, fair wear and tear excepted.
- To ensure that the sites are kept clean, and that the environment is fully protected.
- To draw up rules for safe systems of work and operational procedures to ensure health, safety, and welfare of all workforce and terminal users in compliance with the applicable laws and regulations, international practices, and the authority's guidelines.
- To implement an effective safety and security system and to comply with the guidelines of all competent Authorities.
- To ensure that any safety and security remedial action requested by any competent Authority is acted upon immediately.

The Operator shall apprise the Authority of the current work schedule, the previous day's vessel operations, and the following day's vessel planning and work schedule.

Any damage to the site's environment shall be assessed and restoration costs billed to the Operator, who shall bear such costs.

Source: Author.

relationship with a private sector port user. There is an increasing trend for port authorities to become commercial actors, interacting with private terminal operators as economic partners, rather than acting as regulators. This trend is born of necessity—the port authorities and

terminal operators need each other. Therefore, it is a major challenge to find the proper balance between the regulatory relationship and the commercial interests of both parties. In this context, rights and obligations of the port authority have been modeled within the framework of a landlord port model.

Investments and capacity calculations are primarily based on traffic and throughput forecasts. In the case of a BOT arrangement requiring significant outlays by a concessionaire, the port authority (or the national government) might obligate itself not to concession, promote, or commence another competing terminal (or a terminal aggregating more than a certain capacity) in a nearby port area. If, unexpectedly, new capacity were to be created, the feasibility of a project might well be in jeopardy. There is often, especially in smaller ports, room only for one or two terminals handling a specific commodity. If the port authority is too preoccupied with intraport competition, terminal operators might end up in cutthroat competition, resulting in the bankruptcy of some of them at a time when the government's goal is to encourage sound private sector participation in the port sector (see Box 28).

In many concession agreements, the port authority constructs a list of activities that are permitted to be performed at the site. These activities should be construed as broadly as possible so the operator has maximum flexibility to develop the business and generate revenue (see Box 29).

### 6.7. *Transfer of Rights, Obligations, and Assets*

When an operator acquires an existing (former public) port facility, rights and obligations of the public sector owner transfer, along with the use (but not ownership) of the assets, to the private sector operator. When a new facility is constructed under a BOT arrangement, the new operator commissions the facility after successful commissioning tests or surveys have been conducted by an independent expert, usually a test certifier, who issues a commissioning certificate (see Box 30).

#### Box 28: Reference Clauses on General Rights and Obligations of the Port Authority

Subject to other provisions in this Agreement, the Authority shall exercise regulatory functions in respect of the conduct of port operations as detailed in the following subsections:

- Allocate berths at the request of the Operator, in accordance with established port policies, in order to satisfy the Operator's work program in the best overall interest.
- Chair Port Operations Meetings with one or more representatives of the Operator and of other port users.
- Set productivity targets and monitor the Operator's performance against set parameters (as per Annex [number]).

The Authority hereby undertakes and binds itself to:

- Provide and maintain the necessary basic infrastructure such as maritime approaches, canals, turning circles, breakwaters, aids to navigation, access roads, and so forth.
- Provide marine services including vessel traffic management, pilotage, towage, berthing, unberthing, and shifting of vessels.
- Ensure safe, orderly, and timely movement of vehicles and pedestrian traffic along the access roads.
- Maintain the security of all land and sea entrances to the port area (those existing presently and in the future).
- Provide and maintain all perimeter fencing around the port area.
- Provide any services not listed herein and on which both parties will agree by this Agreement or by any other subsequent agreement.

When providing services listed above, the Authority, in line with the operational plans and work schedule of the Operator, will ensure that all such services are provided in a nondiscriminatory way and in accordance with the Operator's needs to enable him to meet the performance targets and other objectives to be achieved.

Source: Author.

When taking over an existing facility, the following rights and obligations of the operator are usually included in the concession agreement.

**Box 29: Reference Clauses on Permitted Activities**

**W**ithout a written consent from the Authority, which refers to this provision, the site may only be used for/as:

- Loading and discharging of general cargo, dry bulk/liquid cargo, or containers.
- Transport and storing of general cargo, dry bulk/liquid cargo, or containers.
- Handling of other cargoes, only if necessary and on a limited basis.
- Stuffing and stripping.
- Controlling and guarding of general cargo, dry bulk/liquid cargo, or containers.
- Operating equipment necessary for the above.
- Repair and maintenance of containers.
- Repair and maintenance of equipment.
- Repair and maintenance of buildings.
- Providing accommodation for personnel and administration.
- Providing services to vessels.
- Providing services to customs and other government agencies.
- Providing services and accommodation to ancillary services such as, pilots, agents, ship handlers, and so forth.
- All other activities necessary to conduct efficient cargo handling operations.

The Operator is obliged to continuously exploit the site during the duration of the Concession Agreement.

A strip of one meter wide alongside the quay wall shall not be planted or built on, shall not contain roots or foundations, and shall only contain cables, pipes, roads, and rails.

The Authority may reduce the maximum permitted load(s) if, in its opinion, the condition of the quay wall provides a reason for doing so.

Permitted use shall also be taken to include the construction of the necessary buildings and/or installations for the benefit of the business of the Operator, with the exception of (service) home(s). The number, nature, and location of these constructions and/or installations shall be subject to the approval of the Authority.

*Source: Author.*

**Box 30: Reference Clauses on Newly Built Assets in the Concession Area (BOT arrangement)**

**O**perational infrastructure constructed by the Concessionaire/Operator in the Concession area, in furtherance of its business, shall be and shall remain the property of the port authority, without any claim for or reimbursement from the Port Authority/Lessor for the cost of value thereof.

Port superstructure and movable assets constructed and/or installed by the Concessionaire/Operator, in furtherance of its business, shall remain owned by the Concessionaire/Operator. At the end of the Concession period, the aforementioned assets shall either be transferred to the Port Authority after payment to the Concessionaire of the written down value of those assets, or be demolished or removed from the Concession Area.

*Source: Author.*

**Rights:**

- To succeed to and to carry on the business of the port facility and supporting services of the port authority, as established under the port law.
- To succeed to the ownership, rent, or lease of certain properties, movable and immovable, located on the terminal in the port or used by the port facility and supporting services.
- To succeed to certain rights, powers, privileges, and interests of the port authority pertaining to cargo handling operations and supporting services on the terminal.

**Obligations:**

- To succeed to certain liabilities of the port authority pertaining to cargo handling and supporting services carried out at the terminal.
- To receive and maintain all books, accounts, and documents relating or

- pertaining to the terminal and supporting services.
- To offer employment to officers and employees of the terminal and supporting services.
- To succeed to contracts and agreements entered into for the purposes of and relating to the business of the terminal and supporting services; usually, these contracts are specified in a schedule annexed to the concession agreement.
- To succeed to all actions and proceedings instituted by or against or relating to the terminal (it is not uncommon for the operator and port authority to negotiate an indemnity for liability incurred as a result of certain proceedings).

The transfer of assets to the new operator under a concession agreement requires thorough inspection and the determination of what repairs or backlog maintenance, if any, are expected to be carried out by the port authority prior to the transfer. Existing assets forming part of the operator's leasehold and their attendant condition and quality will be reflected in the concession fee. The highest concession fee (relative to value of assets transferred) is usually accorded in jurisdictions allowing for the ownership of superstructures to be transferred to the operator.

When building terminal facilities under a BOT arrangement, the operator has to design and construct the terminal, including quay walls and other infrastructure works. The design has to be carried out in accordance with functional requirements and design solutions set out in the approved DPR as well as under the construction program included in the agreement. Major aspects of the construction process will have been identified for completion by stated times, and if these milestones are not met the port authority usually has the right to assess penalties or terminate the concession. In practice, technical problems should be expected to arise. Although the operator may not alter the construction program without approval of the

authority, reasonable requests for changes to the program are usually approved. The port authority customarily reserves the right to appoint a construction observer, usually an engineer. Commission or transfer of the new assets is concluded on the basis of a commissioning certificate issued by an independent test certifier, according to the relevant provisions of the concession agreement.

The construction program included in the concession agreement is in principle binding. The completion of relevant parts of the program is indicated by the milestone achievement date. The construction, however, cannot extend beyond the milestone sunset date, unless waived or extended as a result of a force majeure event. Such date constitutes a termination event for the port authority; in other words, the port authority may terminate the concession when the operator is not able to finish the construction within the agreed-on time (see Box 31).

## 6.8. Performance Parameters

Concession agreements often include performance parameters to measure the success of the operator in managing the port or terminal. A port authority may want to highlight performance indicators and incorporate certain ones into the concession. These parameters can relate to:

- Realization of a agreed (minimum) number of ship calls.
- An agreed (minimum) quantity of cargo passing through the terminal.
- Efficient utilization of the terminal.
- Service quality.

Generally, from the port authority perspective, there may be a tendency to overregulate performance by imposing very detailed and strict parameters. This tendency appears to be more of a problem in the case of new terminals or terminals with a low level of current throughput. Detailed parameters require extensive control and limit an operator's flexibility. Also, the port authority must devote resources to their administration. Performance parameters that



**Box 31: Reference Clauses on Transfer of Assets**

The present Agreement relates to the [name] Terminal at [name] Port with associated buildings and storage area, as more fully described in Annex [number] to this Agreement, which shall form an integral part of this Agreement, and which may be modified from time to time by mutual agreement between the Authority and the Operator.

A list of facilities, buildings, equipment, and others together with a detailed inventory of the contents thereof leased/transferred to the Operator is shown in Annex [number].

A joint survey of the facilities, buildings, equipment, and contents thereof shall be effected before the time of take over, with the objective that the site should be delivered to the Operator in good working condition.

Before commissioning, the Operator may require major improvements and modifications to be effected on infrastructure, superstructure, or facilities concessioned/leased by the authority to the Operator, which he deems to be in an insufficient technical condition. The Operator shall submit such requests to the Authority for consideration. The Authority is obliged either to carry out the requested improvements and modifications at its own cost or take the insufficient technical condition of infrastructure, superstructure, or facilities into account when negotiating the Concession Fee.

All major modifications and improvements, as above, to infrastructure and facilities concessioned/leased to the Operator under this Agreement, which the Operator deems to be necessary to improve its services, shall be subject to written approval of the Authority and the costs thereof shall either be borne by the Operator or be reflected through a readjustment of the Concession Fee.

In cases where repairs or other works may have to be performed by the authority, prior to the start of operations, the Authority shall be responsible to meet the costs of repairs or other works, unless these are due to the negligence of the Operator.

Source: Author.

incentive should be given to the operator, because extra traffic and throughput results in extra revenue for the port authority. Performance parameters have produced the best results when they were established with the idea of not controlling the operator but creating a win-win situation for both parties.

There are no standard performance criteria for handling various commodities. Situations differ widely from country to country and from terminal to terminal. Much depends on labor conditions, the attitudes of labor unions, and factors such as the size and age of vessels, consignment size, and timely availability of information. Therefore, performance criteria ordinarily reflect local conditions and take into account the reality of all relevant local factors influencing a port.

A vast majority of concession agreements relate to container terminals. In this field, many items are standardized, resulting in the development of internationally accepted, detailed performance criteria.

**6.8.1. Productivity Targets**

Productivity targets are usually designed in a phased manner, taking into consideration the emerging problems that a container terminal will face during the first years of its operation. For the purpose of the concession or lease agreement, two phases are usually defined. Phase 1 constitutes the start-up period, from the date operations commence to a later point one to two years later. During this time, the new management and the workforce have an opportunity to structure operations, develop commercial policies, and engage in training various categories of personnel. Phase 2 is when the terminal is expected to work at peak efficiency, with professional management and a well-trained workforce in place. The following types of productivity targets can be included in the concession agreement's performance provisions.

*Crane productivity:* Crane productivity measures the number of equivalent container movements

are most likely to succeed are those set at a level that a port authority believes will result in the agreed-on concession fee being paid. When required levels are exceeded, a positive financial



per crane working hour. It is calculated by dividing the number of equivalent container movements handled by a crane by the number of hours the crane operated. Crane productivity is usually expressed as either the equivalent container moves per gross crane working hour or the equivalent container moves per net crane working hour (deducting all nonoperational and idle time experienced by each crane). Equivalent container moves are usually calculated as the sum of:

- Each container discharged.
- Each container loaded.
- Each container shifted to gain access to another container—counted as one move if the container is shifted within the vessel, but as two moves when it is shifted via the quay.
- Each container moved to another position on the request of the ship operator (a restow)—counted as one move if it is restowed directly to another location in the vessel and as two moves when the restow involves discharging to the quay and later reloading to a new position on board the vessel.
- Each container lifted in error and returned to the ship—counted twice.
- Each hatch cover lifted to the quay and replaced by the quayside gantry cranes (or ship mounted cranes)—two moves for every cover removed.

*Ship productivity:* Ship productivity is the output achieved per ship working hour and is used to measure the efficiency of ship operations. It is the most important indicator to ship operators and a valuable means for measuring year-round terminal performance. It is recorded and expressed in four categories:

- Equivalent container moves per ship-hour in port (calculated by dividing the total equivalent container moves by the time spent in port, measured in hours).
- Equivalent container moves per ship hour at berth (calculated by dividing the total

equivalent container moves by the time the vessel spent alongside the berth, measured in hours).

- Equivalent container moves per gross working hour (calculated by dividing the total equivalent container moves by the time the vessel is worked, measured from the start of the work to the termination of the work).
- Equivalent container moves per net ship working hour (calculated by dividing the total equivalent container moves by the gross working time, minus the nonoperational time and the idle time).

Two other categories are nonoperational time, the period when the berth is not scheduled to be worked (for example, meal breaks) and idle time, the period when work has stopped for unexpected and unscheduled reasons (for example, equipment breakdown).

*Quay productivity:* Quay productivity measures the throughput in equivalent container moves per unit of time per meter of quay length. This criterion is included to encourage the operator to successfully promote and market the terminal facilities and to increase traffic. The targets may be different for each applicable phase of the project.

*Terminal productivity:* Terminal productivity expresses activity in terms of the number of containers handled per square meter or hectare of terminal area per time unit. It is calculated by dividing terminal traffic, measured in TEUs, by the total terminal area in square meters or hectares. The targets may be different for each applicable phase of a project.

*Dwell time:* Dwell time is a measure of the time spent by containers in the terminal. It is a major indicator of the efficient use of the terminal area. It measures the period from the time a container is lifted off the ship to the time it departs the container yard. An appropriate indicator of quality of service is also the truck turnaround time from entry to exit in the terminal area when delivering or picking up a box, with

15–20 minutes being the common efficiency benchmark.

*Labor productivity:* Labor productivity figures relate traffic and terminal throughput to the total number of people employed by the terminal operator. This indicator is included to enable the operator and the port authority to monitor labor productivity and, indirectly, terminal operating costs. Labor productivity indicators may be based on the total number of hours worked by the total number of or certain categories of employees in the terminal.

*Utilization measures:* This category of indicators measures the intensity of the use of terminal resources by the operator. It includes two important indicators, the berth working index and the yard utilization index. The berth working index compares the total time vessels were worked at the quay with the total time that such vessels were berthed. The yard utilization index compares the number of storage slots occupied to the total number of available slots, and is typically calculated daily.

Performance parameters are best included in an annex to the concession agreement, with a section in the agreement referring to the detailed annex (see Box 32).

## 6.9. Transfer of Employees

When concluding a concession agreement for an existing terminal, it is common practice to engage all or part of the employees already working in the terminal or to extend an offer to join the new venture. This area is highly sensitive and should be handled with great care even before the concession is awarded. Module 7 deals with labor issues in greater detail. Another useful resource on this topic is the World Bank's *Labor Issues in Infrastructure Reform: A Toolkit*.

Often, as a result of years of neglect, unfavorable working conditions, and outdated equipment, workers lack the motivation to perform at an acceptable level. Often, they were members of unions that fought aggressively for the preservation of their jobs, sometimes resisting

### Box 32: Reference Clause on Productivity Targets

The operator binds itself to:

- Use its best efforts to reach or exceed the minimum productivity targets specified in Annex [number], which is an integral part of this Agreement and which may be modified from time to time by agreement between the parties.
- Participate in a Monitoring Committee, to be jointly established by the authority and the Operator.
- Provide the authority with monthly reports on performance and productivity in a format to be agreed between the authority and the Operator, and provide the authority with any special report that, in exceptional circumstances, the authority may reasonably request.

In the event that the Operator fails to meet the performance targets as set out in Annex [number] (one) year after commencement of operations, the authority may levy a penalty on the Operator at a rate of \$ [amount].

Source: Author.

any change that they feared could have endangered the continued employment of the workforce. New operators taking over an existing terminal must therefore anticipate a start-up period for motivation of new workers as well as for retraining. Otherwise they may face the inefficiencies of an underemployed workforce. The reference clauses should be considered only as an indication of how to approach the issue. Whether existing employees should transfer into a new operator's service on terms and conditions no less favorable than those enjoyed by them immediately prior to their transfer is a matter of negotiations among labor, the new operator, and the government (see Box 33).

## 6.10. Force Majeure

An operator cannot be held responsible for fully achieving performance goals when unforeseen and uncontrollable events intervene (force majeure). However, such events should not automatically excuse the concessionaire from its financial obligations payable under a

**Box 33: Reference Clauses on Selection and Transfer of Personnel**

The Operator shall engage professional management personnel (including top management) for the efficient and effective operation of the Terminal Area. The management personnel shall be selected from amongst persons presently in the service of [name of present terminal]. In the event that the Operator is unable to select sufficient management personnel from amongst the [terminal's] staff, the Operator is allowed to appoint suitable management personnel selected from outside the [terminal's] organization. When for certain functions no suitable candidates can be found in [the relevant country], the Authority will allow the Operator to select expatriate personnel. (Sometimes the provision of expatriate staff is an obligation—this is particularly the case when a transfer of expertise is a major objective of the concession agreement).

The Port Authority shall use all reasonable endeavors, upon request of the Operator, to obtain work permits, long-term nonimmigrant visas, and tax clearance certificates for all expatriate personnel appointed by the Operator.

The Operator shall select its labor force from amongst persons presently employed by the [terminal]. These persons will be selected by the Operator based on their skills and suitability in the discharge of their duties. Selected persons will have the option to enter into the fixed service of the Operator.

Notwithstanding the foregoing provisions, in the event any persons appointed from among the [terminal's] personnel are found to be incompetent, unsuitable, or unfit in discharging their duties within a period of one year, the Operator shall be entitled to terminate the services of that person, subject to the provisions of any employment contract.

The terms and conditions to be drawn up by the Operator shall take into account the salaries and terms and conditions of service, including any accrued rights to leave, enjoyed by the persons transferred to the service of the Operator.

*Source: Author.*

concession agreement. The operator should be encouraged to obtain insurance to cover the risks of such events as much as possible (see Box 34).

**Box 34: Reference Clauses on Force Majeure**

Upon the occurrence of a Force Majeure event, the party so affected is relieved of performance under this Agreement for the duration of the event. Notwithstanding this, the occurrence of a Force Majeure event shall not excuse the Operator from making payments due hereunder in a timely manner.

Parties agree to use all reasonable endeavors to mitigate the effects of any Force Majeure event.

*Source: Author.*

A force majeure event is any event or circumstance or combination of events that:

- Is outside the control of and unexpected by the affected party.
- Could not be avoided, prevented, overcome, or mitigated with reasonable foresight, prudence, diligence, or otherwise taking action according to good international practice.
- Results in the temporal or permanent termination of operations.
- Materially prevents, hinders, or delays performance of a party's obligations under the concession.

In most concessions, the main force majeure events are the following:

- Acts of God.
- Nuclear explosion and radioactive, biological, or chemical contamination.
- Landslides, earthquakes, tsunamis, and severe weather such as hurricanes or typhoons that result in closure of the port.
- Epidemic, plague, or quarantine.
- Blockade or closure of the port.
- Curfews or restrictions on travel within the port's country resulting from any of the matters mentioned in this list.
- War (whether declared or not), civil war, invasion, embargo, military coup,

revolution, or armed conflict on a national scale.

- Sabotage, criminal damage, terrorism, but only when the terminal is affected.
- Riot, civil commotion, or insurrection with effect on a massive or national scale.

The occurrence of a force majeure event may result in the extension of the term of the concession or the extension of the construction period after the force majeure event has subsisted.

### 6.11. Lease of Facilities

At many ports (for example, Antwerp, Rotterdam, and Hamburg) the operator may be best able to perform under a straightforward lease contract. In a concession, with or without a BOT arrangement, lease conditions form part of the overall concession. The reference clauses contained in Box 35 and Box 36 can therefore be used under both types of contracts. Lease arrangements present a number of strategic

#### Box 35: Reference Clauses on Lease of Facilities

The lease refers to allotment(s) of land marked Lot [number], and Lot [number], demarcated in red and depicted in Plan No: [number], dated [date], made by the Chief Hydrographic Surveyor and belonging to the Authority, situated at [location] within the Municipal limits of [city name] and bounded on the North by [area], on the East by [area], on the South by [area] and on the West by [area], containing in extent [number] hectares, [number] acres.

The quay walls and the banks below the ground level (yet not underground), as well as in the case of the banks, the body of water above it, are not included in the right of lease, but remain in the ownership of the Authority.

The Operator is entitled to sublet the buildings and the ground in whole or in part to a third party, or to give these in use in any other manner, only after having obtained prior conditional or unconditional permission from the Authority.

Source: Author.

#### Box 36: Reference Clauses on Site Conditions

The following conditions are applicable:

- The site is determined to be [number] square meters.
- The site is unencumbered by other limiting rights or claims, nor by other qualitative obligations and/or perpetual clauses other than those mentioned in this Agreement.
- The site is accepted by the Operator in the state in which it is found on the date the lease commences.
- Cables, pipes, and pipelines of third parties that are situated on the ground are not included in the lease.
- The authority is not liable for damages as a result of defects in cables, pipes, pipelines, and so forth.
- The Operator is liable for damages that have been caused to cables, pipes, pipelines, and so forth as a result of any use of the ground.
- The Operator shall at all times allow access for the benefit of the owners to the cables, pipes, pipelines, and so forth in the leased property for maintenance and repair work.
- The site includes quay walls and banks with foundations and piles, constructed by the Authority. The Authority is not liable for the present suitability of the quay wall construction.
- The Authority is not liable for damages of whatever nature, which might arise for the Operator from the condition of the leased property, especially not for damages caused by basic structures, pieces of stone, foundation remnants, poles, pipes, cables, anchors, sunken vessels, or any object whatsoever that may be present on or in the leased property or in the surrounding area, and/or works and/or materials or substances on or in the leased property or in the surrounding area. The ground is leased with a bottom level alongside the quay wall being part of the main yard of [number] meters below [reference] level and alongside the quay wall of the [name or number] pier of [number] meters below [reference] level. The Authority will ensure that the water depth along the quay walls will remain at the agreed level. In the event that the water depth is less than the agreed

**Box 36: Reference Clauses on Site Conditions (*Continued*)**

depth, the Authority will not be liable for damages as a result of this situation. The Operator cannot invoke the right to dredging as long as the bottom has not risen to [number] below [reference] level at a certain location along quay wall(s). The Authority is obliged to carry out dredging within a reasonable period (but not longer than three weeks) after the Lessee has submitted a request to that purpose. If the Authority fails to do so, it shall be liable for all damages resulting from the insufficient water depth along the quay wall(s).

Source: Author.

issues for consideration, the most important of which are:

- *Ownership of assets:* Generally, a new operator will invest in superstructure and equipment. Under a BOT arrangement, operational infrastructure, such as quay walls, also forms part of the investment. If the relevant legal system allows private ownership of such assets, which is not always the case, their transferability becomes a critical issue. If private ownership is not allowed, an agreement should be reached on how to compensate, at the end of the period, the operator for investments made. If it is legally impossible to compensate the operator or the transfer the assets to a third party, the duration of the agreement remains the only vehicle available for creating a bankable arrangement. Within the framework of a balanced public-private partnership, the port authority may allow the operator to own superstructure on the site, as well as grant the right to transfer such assets to third parties under certain previously agreed-on conditions, regardless of the inalienability of other port property.
- *Maintenance:* Concession terms applicable to maintenance of assets, especially infrastructure, are considered very carefully by operators and their investors. If the assets revert to the port authority at the end of the lease period, maintenance standards should be set by the port authority to avoid deterioration during the final part of the period. Maintenance of operational infrastructure is usually the responsibility of the port authority. Such infrastructure is a strategic asset and should not be allowed to deteriorate. That risk exists, however, especially if an operator is in financial difficulty, since maintenance often becomes the first victim of an operator trying to cut costs. However, in many concession agreements provisions have been included obliging the operator to maintain all assets of the terminal, including the operational infrastructure. This requires the port authority to set maintenance standards, which are usually included in one of the schedules.
- *Level of control by the port authority:* Even if legal title over assets remains with the port authority, full use and easy adaptability of the assets should be guaranteed. While the port authority should exercise some form of control, such control should be based on clear standards and be flexible to permit the operator to quickly respond to market requirements. Prompt modification and extension of the site and the superstructure may be possible based on a previously agreed-on procedures. Moreover, control standards could be uniform for the entire port area to create a level playing field for all port operators.
- *Subletting:* To allow flexible port development, the port authority should allow the subletting of ground and assets under specified conditions.

The specific content of any lease is very dependent on the site conditions and local factors. The lease usually presents in detail the responsibilities and liabilities allocated to each party. When an existing site is leased or concessioned, conditions should be enumerated clearly to give



lenders certainty of outcomes under particular “what if” scenarios.

## 6.12. Site Access

Clauses should be included in the concession agreement to fence off the site, while still allowing sufficient, unimpeded access to the site to enable the port authority to perform inspections (see Box 37). The port authority usually takes responsibility for all common areas, including road connections and pedestrian areas. An operator will seek to hold the port authority liable for all undue delays in road traffic destined for the terminal.

## 6.13. Governing Law

Most often, the governing law of the concession agreement is the national law of the country where the terminal is located. Some foreign lenders, however, require that documentation be governed by U.K.[BCJ7] or U.S. law. Issues relating to governing law, submission to jurisdiction,

### Box 37: Reference Clauses on Access to the Site

**F**ree access to the site and the buildings on the site shall have to be granted at all times to the officers and employees of the authority, including police officers and/or other persons who are authorized by the Authority, who may have been or may be appointed for the supervision of compliance with regulations and the lease conditions, or for carrying out repairs. The Authority's representatives shall have access to any of the facilities and premises to inspect and examine their condition, provided that, unless in cases of emergency or when circumstances so justify, the Operator will be informed of such inspection and that such inspection, whenever possible, shall not disturb the Operator's operations.

Free mooring opportunity must be allowed along leased quays, berths, and other mooring places for service and dredging vessels used by Port Authority employees or persons authorized by the Authority in the execution of their duties. Mooring of such vessels should not unduly disturb cargo operations.

Source: Author.

### Box 38: Reference Clause on Governing Law

**T**he Agreement shall be construed and governed by the law of the Republic/Kingdom of [name].

Source: Author.

and dispute resolution should be addressed at an early stage of the negotiation between the port authority and the operator, particularly in the case of a concession involving a BOT agreement (see Box 38).

## 6.14. Freedom to Set Tariffs

To respond to market competition, operators should have the freedom to set their own prices. The operator should be expected to negotiate periodically with its customers and may provide quantum rebates in return for increased throughput. Only in a situation when the operator is in a monopoly position might there be a reason for government interference in tariff setting. To avoid conflicts of interest with the port authority, an independent port regulator is usually given authority to oversee tariff regulation (see Module 6 for a full discussion on economic regulation). The mere fact that competing ports in the country offer lower tariffs may not be a reason for regulation of tariffs. When it can be proven that competing ports offer lower prices as a result of distorting government subsidies, the competent authorities should take measures to eliminate such subsidies, such as through a complaint to a competition authority. Thus, prices should only be regulated in case of abuse of a monopolistic position by an operator, such as in predatory pricing (see Box 39).

## 6.15. Taxes

National or local taxes for the leased site(s) are usually paid by the operator. At times, to encourage port development, certain promotional rates or tax holidays are extended to the operator during the initial phases of operation. Such incentives are a function of national fiscal policy (see Box 40).



**Box 39: Reference Clause on Price Discrimination**

The Operator agrees that the charges for his services rendered in connection with his operations on the concessioned premises shall be competitive within the port and with other competing ports having such facilities and services. The Operator shall, however, at all times have the right to increase or decrease such charges and modify the relevant rules and regulations, in accordance with sound business practices.

In the event the Port Authority (or port regulator, if applicable) receives a complaint or complaints of discrimination on the part of the Operator of the concessioned premises and the Port Authority (port regulator) concludes after thorough investigation that there are reasonable grounds to believe that discrimination has been practiced by the Operator, then the Operator, upon written notice to him by the Port Authority (port regulator) shall cease and desist from such practices.

Source: Author.

**Box 40: Reference Clause on Taxes**

The Operator shall reimburse the Port Authority for all taxes, dues, concession fees, and public levies under whatever name, including the surcharges, which the Port Authority has to pay because of the leased property or the buildings thereon.

Source: Author.

**6.16. Concession Fee**

There is no generally accepted standard for a concession fee. This fee is usually determined as the sum of a fixed fee for the use of the areas under administration of the authority and or a variable fee in the form of a throughput royalty for the right to perform cargo handling services. The fee amount is a function of local circumstances. The fixed portion may represent the infrastructure costs (and superstructure costs, if applicable) of the terminal, including financing costs. The structure and level of the concession fee is a primary element for analysis by project lenders. The variable fee is often a

function of the market position of the port overall (that is, what the market can bear) and other considerations, such as the creation of a fund for excess port workers. An important issue is the indexation of the concession fee (TEU fee). This fee is usually expressed in U.S. dollars, euros, or other hard currency. Since the term of the concession might well be more than 30 years, it is evident that there is a serious inflation risk. A concession agreement should therefore include a specific clause on indexation. Indexation should be applied to both fixed and variable fees. The easiest option is adjusting the fee periodically on the basis of a basket of currencies, such as a combination of the U.S. dollar, the euro, and the yen; the example in Box 41 is somewhat more complicated. Sponsors and operators are often not willing to provide for total compensation of inflation and try to put the risks as much as possible on the port authority.

**6.17. Insurance and Indemnity**

Insurance for employees, equipment, and vessels covering injury and damage within the concession area is typically specified in a concession agreement. Moreover, the operator is expected to indemnify the port authority against a variety of incidents pertaining to port operations and other events (see Box 42).

**6.18. Physical Security**

A concession agreement usually contains clauses pertaining to security in the port area. Generally, these issues fall under a port authority's jurisdiction, although a terminal operator also bears part of the responsibility. Since the ratification of the ISPS Code (International Ship and Port Facilities Security Code) by most maritime countries, security has improved considerably. The code applies to all commercial vessels undertaking international voyages as well as all port facilities. The concession should oblige the operator to apply the relevant provisions of the code and to cooperate with the port authority and the harbormaster within the framework of the required port security plan (see Box 43).

**Box 41: Reference Clauses on Concession Fee**

The concession fee exists of two elements:

- A Lease Rent, related to the amount of square meters of port area leased by the Operator.
- A Throughput Royalty (or TEU Fee), related to the amount of cargo/number of containers handled on the concession area by the operator.

A fixed sum of \$ [amount] per annum shall be paid by the Operator as the Lease Rent. This rent shall be paid in advance in four equal installments on January 1, April 1, July 1, and October 1 into account number [number] with [name] Bank in [place] in the name of [name] Port Authority. If the period for which the right to lease is granted does not commence on one of these dates, then the Lease funds incurred over the period between the commencement and the beginning of the next quarter will be paid on the first upcoming date mentioned above.

The amount owed to the Authority in accordance with the right to lease shall be paid in full and without any discount or debt compensation, regardless of nature.

All adjustments shall be calculated by multiplying the rent sum, which applied most recently by a fraction of which:

- The numerator is formed by the price index figure as given by [name of agency], which is

published in the seventh calendar month preceding the time of adjustment.

- The denominator of which is formed by the same price index figure, which applied in the same month a year earlier.

Should the details referred to in the previous paragraph cease to be available, then the authority is entitled to calculate the Lease Rent adjustment on the basis of any other similar index or methodology. This adjustment requires mutual agreement. If such agreement cannot be reached, then this shall be determined in the manner given in Section [number] on the basis of the advice of three experts.

The Operator will pay to the Port Authority an annual Throughput Royalty in the amount of \$ [amount] per ton cargo throughput/Twenty Feet Equivalent Unit (TEU) container handled in the concession area, regardless the manner in which it is handled or which mode of transport is used, payable in two installments after every six months (within 30 days after the end of each period). The Throughput Royalty will increase every year in accordance with the price index figure given by [name of agency] (or any other mutually agreed index).

*Source: Author.*

**Box 42: Reference Clauses on Insurance and Indemnity**

The Operator undertakes to provide the necessary and relevant insurance covers, in respect of its employees, equipment, and vessels being serviced for injury, damage to the terminal, vessels, and/or cargo when they are, at all material times, considered to be under control of the Operator.

The Operator hereby holds the Port Authority free and harmless from any and all liabilities and claims for damages and suits for or by reason of any death or injury to any person or damages to property of any kind, whether the person or property of the Operator, its subcontractors, agents or employees, or third persons, arising out of negligent or intentional act or omission of the Operator in connection with this Agreement, and the Operator shall indemnify, save, and hold harmless the Port Authority from all liabilities, charges, expenses (including reasonable attorneys' fees), and costs on account of claims, suits, and losses arising therefrom.

The Port Authority hereby holds the Operator free and harmless from any and all liabilities and claims for damages and suits for or by reason of any death or injury to any person or damages to property of any kind, whether the person or property of the Port Authority, its subcontractors, agents or employees, or third persons, arising out of negligent or intentional act or omission of the Port Authority in connection with this Agreement, and the Authority shall indemnify, save, and hold harmless the Operator from all liabilities, charges, expenses (including reasonable attorneys' fees), and costs on account of claims, suits, and losses arising therefrom.

The Operator indemnifies the Port Authority against all claims due to noncompliance by the Operator with the provisions relating to the site, which have been given by the competent public bodies.

*Source: Author.*

**Box 43: Reference Clauses for Security**

The Port Authority confirms that unless otherwise agreed under this Agreement, it shall, at its own cost and expense, provide security at the Port, generally for the prevention of terrorism, hijackings, sabotage, and/or similar acts or occurrences.

The Port Authority shall be responsible for the provisions and maintenance of all perimeter fencing around the Port and the general security within the Port, having full regard to the provisions of the ISPS Code and the law.

The Operator shall be responsible for the provision and maintenance of perimeter fencing around the Concession Area and for its own security arrangements within the Area in order to maintain the proper and orderly conduct of its business and the general security thereof. Furthermore, the Operator shall abide by and implement any instruction issued by the Port Authority aiming at enhancing the security measures within and around the Concession Area.

Subject to the rights granted to the Operator above, all organizations authorized under the ISPS Code shall be entitled, if and when deemed necessary by the Port Authority and/or the authorized organization, to deploy their security personnel in the Concession Area and the Operator shall not be entitled to any compensation for any disruption of its operations or loss or damage resulting from the Port

Authority's actions or the actions of any other organization authorized under the ISPS Code other than those resulting from its willful or grossly negligent acts or omissions.

Subject to the rights granted to the Operator, the Port Authority shall be entitled to inspect and search all vehicles and other modes of transportation including vessels entering the Concession Area or departing there from and similarly to search or question any person entering the Concession Area or departing there from, without unduly or unreasonably disrupting the operations of the Terminals.

The Parties agree to establish, review, and implement procedures as may be required from time to time under the ISPS Code.

The government agrees that it shall, at the request of the Operator, provide and procure the services of security forces of the relevant authority as may be necessary to prosecute persons for any offense committed within the Concession Area.

Any security forces ordered into the Concession Area for the purpose of protection of the persons and the property and vessels present in the Area, shall be allowed by the Operator to perform their task and duties under the supervision of the competent authority.

Source: Author.

## 6.19. Unclaimed Cargo and Carriers

Often, cargo at the port is not claimed by the rightful owners. In cases of complex customs legislation or port bylaws, warehouses filled with unclaimed cargoes may burden the operator's ability to manage the terminal and meet performance targets. Therefore, the operator will expect to set clear rules with respect to such cargoes and who bears removal responsibility and costs in conformity with custom's regulations (see Box 44).

## 6.20. Information and Communication

It is essential that a port authority is able to gain access to recent, relevant, and direct information on all aspects of port operations, including

**Box 44: Reference Clauses on Unclaimed Cargoes**

All containers, packages, and cargo deposited in the terminal and not removed at the expiry of a period of [number] days or [number] days in case of transshipment containers, may be disposed of by public auction, in conformity with Section [number] of the [name] Act, No. [number] of [year].

As regards to unclaimed containers containing perishable or hazardous goods, the operator shall dispose of such goods according to the requirements set down by the relevant authorities and as per national regulations in force.

Source: Author.

**Box 45: Reference Clauses on Information and Communication**

**T**he Operator shall install and maintain an efficient information and communication system and shall provide online information to the authority on all aspects of operations necessary for providing marine services and for monitoring.

The authority and the Operator will agree, in writing, on the type and flow of extra information that may be communicated to the authority on request.

The Authority and the Operator shall immediately inform each other of any matter that may affect the operational performance of the Operator under this Agreement, including but not limited to:

- Fire within the terminal or within the Authority's area of responsibility.
- Damages/stoppages caused by severe weather conditions.
- Industrial disputes with risks of work stoppages.
- Major damage to facilities, premises, and/or equipment.
- Pollution of the environment within the Authority's area of responsibility.

Source: Author.

marine operations and cargo throughput. The port authority should be informed promptly about all incidents occurring in the port area so that it can undertake appropriate measures in response. The agreement includes a requirement for the operator to provide such information (see Box 45).

## 6.21. Termination and Prolongation

Termination clauses of a concession agreement are of prime importance for the relationship between the port authority and the operator, especially under a BOT arrangement. The concession agreement represents a negotiated balance between the interests of the port authority (an efficient and economic use of the port land) and the operator (provision of cargo handling services on a profitable basis). Both parties are tied together in a long-term symbiotic relationship

where the fortunes of one directly bears upon the results obtained by the other. That contractual relation, therefore, should not be terminated without good cause.

The way termination clauses are conceived reflects the power balance between the two parties. An operator with alternative port locations available will not easily accept harsh termination clauses. On the other hand, a port authority should be aware that an operator might fail in the market, and valuable port land may lay unused for years if the right to terminate the concession is not clearly defined. Finally, lenders to the operator should be very careful in their analysis of these provisions to ensure their interests are protected (see Box 46 and Box 47).

### 6.21.1. Termination Due to Noncompliance

In the event the operator fails to comply with its obligations, a port authority will ordinarily have the option to terminate the agreement. Termination for cause is very serious, especially for financing parties, and should be avoided as much as reasonably possible. The operator should be given a reasonable period to demonstrate compliance with the terms of the agreement and resolve noncompliance events. However, an operator may be in financial distress, for example, and unable to pay the concession fee. In this case, the port authority may not directly terminate the agreement, but consider the seriousness and likely duration of the problem. If it is determined to be temporary, the port authority, perhaps in concert with the operator's lenders, may come to an understanding with the operator (for example, a deferred payment scheme) that avoids termination of the agreement (see Box 48).

### 6.21.2. Termination Compensation

As discussed above, every concession includes clauses on termination compensation, irrespective of the reason. The port authority or the operator may terminate the concession before expiration in the event that the other party is in material default of the agreement. Moreover, a concession may be terminated by mutual agreement after a

**Box 46: Reference Clause on Termination by the Port Authority**

The following (unless as a result of a Force Majeure or change in law that results in consequences set out in Article [number] or a default of the Port Authority) shall constitute Operator Events of Default:

- A material breach of a material provision of this Agreement by the Operator.
- Repudiation of this agreement by the Operator or the evidencing of the intention by the Operator not to be bound by the terms of this Agreement.
- Appointment of a provisional liquidator providing for winding up of the Operator, after notice to the Port Authority and due hearing, unless such appointment has been set aside within [number] days.
- The Operator is ordered to be wound up by a court or files a petition for voluntary winding up except for the purpose of amalgamation or reconstruction provided that the property, assets and undertakings of the Operator are transferred to its successor.
- The Operator abandons the construction or operation of the terminal/port and the facilities for a continuous period of [number] days.
- Persistent failure on the part of the Operator to operate and promote activities at the terminal/port and provide terminal users with services in accordance with good industry practice and in accordance with the provisions of this Agreement.
- Failure to pay the concession fee for a consecutive period of 6 months.
- Failure to comply with lawful directive given by a statutory authority connected with ports.

Source: Author.

force majeure event such as a tsunami or earthquake. In either case, the port authority is liable to pay a termination compensation to the operator since all fixed and movable assets of the terminal are transferred back to the authority. The main issue, however, is how to assess the value of the assets.

**6.21.3. Option to Continue**

Many concession agreements provide an option to extend the term of the concession. This feature

**Box 47: Reference Clause on Termination by the Operator**

The following (unless as a result of a Force Majeure or change in law that results in consequences set out in Article [number] or a Default of the Operator) shall constitute Authority Events of Default:

- Commission of a material breach of a material provision of this Agreement by the Port Authority.
- Repudiation of this Agreement by the Port Authority or the evidencing of the intention by the Operator not to be bound by the terms of this Agreement.
- Dissolution of the Port Authority and occurrence of any structural changes within the present constitution of the Authority that have a material adverse effect on the rights and obligations of the Operator under this Agreement, or the transfer of the Port Authority's undertaking and statutory powers or any material part thereof, unless such dissolution or structural change or transfer is in connection with privatization or other restructuring of all or any substantial part of the Port Authority, and the Port Authority's successor is able to perform the Port Authority's obligations under this Agreement.

Source: Author.

becomes more important in concessions with shorter terms. One may expect that concession agreements with a duration of 10 years or shorter will not generate significant investment. When there is an option to continue under balanced conditions, an operator might be tempted to take more investment risks. It is therefore in the interest of the port authority to include options to continue the agreement.

Generally, the port authority, when there is a mutually beneficial relationship between the parties, may favor extending an agreement under new conditions. Significant time and expertise may be lost if a new operator has to be found and terminal operations have to be restarted under new management. Judgments about agreement extensions depend on, among other things, the position of the port in the



**Box 48: Reference Clauses on Termination Due to Noncompliance**

**W**ithout prejudice to the conditions of Subsection [number], the Concession Agreement may be terminated by the Port Authority on the grounds of noncompliance by the Operator with one or more obligations under this Agreement. The Port Authority shall send a notice of termination to the Operator by registered mail, indicating the date of termination and the reasons thereof. There must be at least [number] of months between the day of sending the letter and the termination date.

If the Operator complies with the terms of this Agreement before the termination date, the decision of the Authority to terminate the Concession/lease shall become ineffective and shall be deemed not to have been taken.

If the Concession is terminated on the grounds of the provisions given in this Article, the Operator shall, as a result of the mere fact of the termination, forfeit a fine amounting to [number] times the sum of the annual Concession Fee owed by virtue of the provisions of Section [number], which applied most recently, and all rights of whatever nature to everything which is built on or placed in the site shall pass over to the Authority, without compensation for damages, and without prejudice to legal proceedings for compensation of damages.

*Source: Author.*

**Box 49: Reference Clauses on Prolongation**

**A**t least two years before the expiration of the concession, the Operator may require the Port Authority to take a decision concerning the extension of the period for which the concession is granted, as well as concerning the concession fee and the provisions, which shall apply for the duration of its renewal or extension. The Operator shall approach this in the manner stipulated in the following paragraphs.

The Operator shall send a written request to the Port Authority by registered mail. The request shall indicate the number of years for which the extension is requested, with a maximum period of 10 years, and the proposed concession fee. The Port Authority will inform the Operator in writing of its decision and the reasons thereof within six months after receiving the request.

The request of the Operator shall expire if he has not reached agreement with the Port Authority with regard to the extension, the amount of the concession fee, and the provisions within three months after receiving a response mentioned in the previous subsection. In that case, the Operator has the option either to have the concession agreement expire or to revert to arbitration as mentioned in Section [number].

(optional) In determining the Concession Fee for the duration of the extension, no consideration shall be given to the value of the buildings or structures in the Concession Area constructed by the Operator.

*Source: Author.*

overall market and the alternatives available to the operator (see Box 49).

**6.21.4. Bankruptcy**

The port authority will usually insist on the right to terminate the agreement in case of the bankruptcy or insolvency of the operator. Sometimes an operator will be provided an opportunity to resolve such insolvency petitions within a limited period of time (see Box 50).

There are various methods, but in general the basic principle for assessing termination compensation is the fair value of all the assets brought into, created, or installed at the concession area, including:

**Box 50: Reference Clauses on Bankruptcy**

**I**f the Operator is declared bankrupt, applies for a moratorium, or loses his status as a legal entity during the concession period, the Port Authority may summarily terminate the Concession Agreement.

In the event that more than one legal entity acts as Operator, each of them shall be separately liable for fulfilling all obligations arising from this Agreement.

*Source: Author.*



- The movable assets and facilities transferred to the operator (whether renewed or replaced).
- All other movable assets, (including intangible assets such as software and terminal management systems, subject to the terms on which they have been licensed, whether renewed or replaced, whether fixed or attached to the ground, created, installed, or provided by the operator at the terminals, including at the extension works.
- All related documentation and manuals (such as the maintenance manuals, operation and management manuals, and so forth).
- All quays and storage infrastructure that have been created or brought into the concession area and all other operational port infrastructure and superstructure created and constructed at the terminal.

The fair value is usually determined by an independent appraiser who acts as an expert, not as an arbitrator, and should have the power to obtain relevant information from the parties to make an independent assessment. In no circumstances shall the appraiser apply any earnings-based valuation methodology, or take into account any goodwill in the business of the operator for determining the fair value of the assets at the concession area. The fair value would normally be subject to addition or deduction depending on which party was in default.

There are many methodologies for determining fair value. Examples include the basis of book value of the assets minus depreciation or replacement value or using the going concern method of calculating lost future cash flow of the entity. Obviously, the contractual clauses on fair value are an important issue for negotiation between the port authority and the prospective operator when concluding a concession agreement. The methodology of determining fair market value should be agreed on and included in the concession agreement.

## 6.22. *Expiration of Concession*

Upon expiration of the concession period, the facilities built on the site and any title that passed to the operator as part of a B(O)OT arrangement will be transferred back to the port authority. In some contracts, the site may have to be restored to its original state, which could mean that the operator must demolish structures and installations that were built on the site during the concession period. Equipment would be transferred or retained as a matter of contractual obligations; it may be compensated at book or market value, or it might be removed from the site by the operator for sale or for use elsewhere. An obligatory free transfer of equipment to the port authority is not recommended due to the maintenance requirements for such equipment. If an operator knows that it may have to transfer equipment at the end of the concession period, the operator may cut back on maintenance as much as possible to save money toward the end of the period.

The concession agreement should specify the condition of the basic and operational infrastructure at the time of transfer. The port authority should monitor thoroughly the infrastructure maintenance (life cycle maintenance, routine maintenance, and reactive maintenance), and, if applicable, the superstructure throughout the concession period. Any deficiencies found during the joint inspection prior to hand-back should be corrected by the operator.

The authority should expect to receive all construction documentation for installations, power and water lines, sewerage systems, and any other systems that have been constructed underground at the site during the concession period. The operator should also remove all remnants of piles, foundations, and similar civil works before leaving the site. When the site is to be handed over in its “original condition,” all later restoration costs should be borne by the operator (see Box 51).

## 6.23. *Arbitration*

Many concession agreements include a provision for arbitration. Sometimes, reference is made to International Chamber of Commerce

**Box 51: Reference Clauses on Expiration of Concession**

**N**ot less than [number] months prior to the date of expiration of this agreement, the Port Authority and the Operator shall conduct a joint inspection of the facilities. Such inspection shall be in accordance with the requirements of the hand-back scheme included in Annex [number].

The Operator shall ensure that on the date of expiration of the Agreement, each element of the facilities complies with the requirements of the hand-back scheme included in Annex [number].

The Operator shall at the expiration of the lease period peacefully and quietly leave, surrender, and yield up the site to the Port Authority or to its agents without any claim for compensation in respect to any improvement effected by the Operator on the site and shall before leaving, demolish, at the request of the Port Authority, some or all buildings constructed by the Operator and remove any equipment, machinery, or appliances installed therein, which otherwise will be vested in the Port Authority without compensation. Moreover, other items have to be removed such as stumps of piles, piles, foundations, materials, substances, and the like.

The scope of the hand-back of assets shall include all assets prevailing at the site as at the date of transfer, and shall, inter alia, include:

- All land and buildings.
- Plant and machinery.
- Spare parts.
- Such deeds and documents as may be necessary for effectively transferring rights, title, and other interests under this Agreement in favor of the Port Authority free of all encumbrances.
- The benefits of all rights and interest in all unexpired insurance, guarantees, and contractor warranties, if so desired by the Port Authority.

- All documents, manuals, records, and so forth as may be required for the efficient operation of the terminal/port.

The hand-back (and compensation) shall relate only to tangible assets and such intangibles (such as capital dredging) identified for the purpose of the Article in the Approved DPR.

If there are piles in the site that have been placed there by the Operator and/or by other parties, the Operator shall submit a full and clearly specified drawing thereof to the Authority. The Authority shall decide how these piles should be removed and to which depth. The Operator shall strictly comply with the instructions that are given by the Port Authority. The Port Authority is entitled thereby to prescribe that one or more piles are left behind in a good condition, without the Operator being able to claim any form of compensation for the piles that will be left behind.

In the absence of clearance within three months after the end of the lease period the fences, buildings, mooring sites, installations, and in general everything that is still situated on or in the site, shall revert to the Authority.

If the site is not handed over in its original condition, after removal of everything that has been built thereon, placed therein, or brought thereto by the Operator and/or his predecessor(s) and leveled at the proper height, all costs that the Authority will incur in order to restore the site to its original condition shall be refunded by the Operator.

(optional) The Operator shall, at the expiration of the lease period, sell back to the Authority the existing quay walls and all other new mooring facilities constructed during the Concession Period. In the event that parties cannot agree on a price, the price will be determined by an Arbitration Commission appointed in the manner given in Section [number].

*Source: Author.*

(ICC) arbitration (which is the preference of most lenders) or to a local arbitration institute. Often, a specific procedure is presented in the agreement. Arbitration is often a preferred option in case of a conflict between parties. The reference clauses in Box 52 are meant for deciding on increases of the concession fee, if parties

cannot come to an agreement. This type of arbitration can also be applied to other conflicts that may arise during the concession period.

### 6.24. Costs

Costs pertaining to the use of the concessioned site are usually paid by the operator, including

**Box 52: Reference Clause on Arbitration**

In the event that the parties do not reach agreement on a new concession fee before the new period commences, the fee shall be determined by the parties in the manner given below on the basis of the advice of an Arbitration Commission consisting of three arbitrators.

In that event, the Port Authority and the Operator shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within [number] days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within [number] days of their appointment, the appointment shall be made, upon application of a party, by the [name] Court. The arbitrators shall be notified of the provisions of this agreement, to the extent that these are important for them, by the parties who appoint them. By accepting his appointment, an expert subjects himself to the aforesaid condition.

The third arbitrator will act as Chairman of the Arbitration Commission. The Arbitration Commission shall, together with a well-motivated statement of their considerations and arguments, give its decision as to the extent to which the Concession Fee must be reviewed in relation to the Fee, which was charged during the last year of the concession period.

In doing so, the Commission shall compare:

- The situation and the condition of the area with that of the other port areas, without taking into account the nature of the use or the fact that they are built on.
- The conditions under which Concession Agreement(s) concluded with other parties in the port area.

- Special circumstances under which the Concession Agreement has been concluded with those of other parties in the port area.
- In the event that within the last two years prior to the end of the concession period no other sites have been issued in concession within the area of the Port Authority, the Commission shall decide on the adjustment of the Concession Fee under observance of:
  - ~ The situation and the condition of the site.
  - ~ The conditions under which the site was concessioned.
  - ~ The special circumstances under which the site was concessioned.
  - ~ The increase or decrease of the user value of the site concerned as a result of external circumstances.
  - ~ The increase or decrease of the value of money.

If all three experts, or two of them, agree on a new Concession Fee, the Commission shall inform parties in accordance therewith in writing. If all three differ in opinion, then the new fee shall be established by the Commission at half of the total of the two estimates, which have the smallest difference between them. If the difference between the lowest and the middle estimate is the same as the difference between the middle and the highest estimate, then the fee shall be established by the Commission in accordance with the middle estimate.

A change in the fee by virtue of the provisions in this article shall, if one of the parties expresses the desire thereto, be laid down in a separate deed.

Source: Author.

the case in which the port authority holds legal title over the port land (see Box 53).

### 6.25. The Tender Process and Transaction Preparation

Under a concession, the long-term use and exploitation of port land and assets are transferred to private parties through tender. The process to achieve this transfer in an optimal manner has to be both effective and transparent. This requires taking a sequence of steps

that are logically interrelated and lead to concessioning of terminal activities under the best possible conditions for the government and port authority. The steps are explained below.

*Marketing strategy:* The first step is to ensure that a company profile reaches a reasonable number of relevant bidders (“reasonable” referring to both creating sufficient competition and avoiding large costs). The company profile comprises the most relevant information on such

**Box 53: Reference Clause on Costs**

**W**here this Agreement determines that costs, damages, taxes, and other levies by public bodies and the like are for the account of the Operator, the latter shall pay the amount stated by or on behalf of the Port Authority and shall at the same time state the reason for the payment, immediately upon the first request, without awaiting notice in default or court intervention.

All costs incurred for this Agreement and supplementary agreements shall be for the account of the Operator.

Source: Author.

issues as core activities of the offered prospect and future perspective of these activities. At the same time, the financial, operational, strategic, and other contributions expected from the bidders are specified (prequalification criteria). Further, the profile refers to the existence of an information memorandum that is available to parties that are interested in making a serious bid and are able to comply with selection criteria to qualify for negotiations. The information memorandum should include strategic, economic, and financial information on the relevant port or terminal, the main provisions of the concession agreement to give prospective bidders information on the institutional and legal background of the port sector, as well as the selection criteria.

*Selection* (prequalification): Reactions to the profile are screened in accordance with the prequalification criteria. The obtained “long list” will then be put to a further test and probably narrowed down to a “short list,” to ensure that only serious bidders submit proposals.

*Interfacing*: The short listing process, with its submission of concise information to a long list of bidders, and the need felt by the latter group to know more, will almost certainly invoke interactions between prospective bidders and stakeholders in the government or port authority. This may result in a bidders conference (pretender meeting), workshops, road shows, investor tours, one-on-one meetings, or similar events.

### *Managing the transaction to its conclusion*

(bidding stage): After short listing, the candidates are obliged to carefully review the information memorandum, which shall contain information on an array of issues. These issues are listed in the relevant task sheet. The information memorandum will then be sent to those requesting it and prequalifying. They are invited to respond to it in a prescribed standard manner. Standardizing the bids ensures rational comparison, scoring, and ranking, and also makes the whole process transparent and defensible.

After the bids have been submitted, comparing, scoring, and ranking sessions should be held under the advisory guidance of a professional port consultant. At this stage, bid standardization achieved by the identical information memoranda sent to the bidders will prove to be crucial to finalizing the selection process in a transparent and effective manner, leading to best results for the port authority. The selection process includes several phases:

- *Formation of an evaluation team*: This team might comprise representatives of several relevant ministries and the port authority. The evaluation team should be assisted by a professional port consultant.
- *Arranging the evaluation session*: Experience suggests that a thorough evaluation session of the bids will take at least two weeks, depending on the number of eligible bids received. The bidding envelopes should be opened in the presence of the press and their contents verified. The documents should then be copied and distributed.
- *Evaluating the bid*: First step in the scoring process is to design a bid evaluation chart. On the chart, an unambiguous list of evaluation criteria and a scoring range will be drawn up, later to be used by the evaluation team during the scoring process. Most importantly, scoring criteria will have to be agreed-on to sort the bidding information of the various bids into categories. For each of the categories,

and the subcategories derived from them, a predetermined number of points or a fraction thereof can be awarded, depending on whether or not and to what degree the criteria have been met.

- *Scoring process:* The scoring process itself will consist of filling in one bid evaluation chart per evaluation team member per bidder. These individual results will then be grouped on a bid evaluation results list, showing how many points the evaluation team as a whole has awarded to each bidder per category, per subcategory, and as a grand total. The ranking of the bidders will automatically emerge from this exercise.

*Negotiations* (political approval and contracting): Since concession agreements are usually very complicated, particularly when a BOT arrangement is included, the port authority's negotiation team should be professional and fully authorized to conduct the negotiations and be assisted by an (external) international port lawyer. In the event that many government departments are involved, it is advised to agree on a mandate for the negotiation team (negotiation guidelines), including the (minimum) position on important issues that constitute the main part of the concession. These issues usually are:

- Lease rent and TEU fee, minimum guaranteed throughput, and indexation.
- Term of the concession.
- Termination compensation (establishment of fair value).
- Lender security and lender's direct agreement.
- Liabilities.
- Transfer of port workers in case of the concessioning of an existing terminal.
- Construction program, milestone achievement dates, and milestone sunset dates in the case of a BOT arrangement.

In practice, negotiations may take a long time, ranging from one month to one year.

## 6.26. Miscellaneous Conditions

The concession agreement may contain provisions to cover a number of miscellaneous conditions and activities in the port, including environmental conditions, construction and maintenance of a fence around the site, advertisements, and dumping of liquids in port waters (see Box 54).

## 7. BOTS AND CONSTRUCTION

An operator managing a site under a concession or lease agreement usually obtains the right to reconstruct the site, to erect buildings, and introduce new equipment. When the site is constructed or reconstructed under a BOT arrangement, the operator also has the right to build new quay walls, to dredge channels, and create new port land. In undertaking these activities, the operator assumes some duties previously undertaken by the port authority.

Every concession agreement contains lease conditions when ownership of the site formally remains

### Box 54: Clauses on Miscellaneous Conditions

If, when carrying on businesses or when building, expanding, or changing constructions and/or installations, an environmental license or another license is required, not only this (these) license(s), but also a separate permission from the Authority shall be required by virtue of this article.

The Operator shall have to fence off the site to the satisfaction of the Authority and keep it fenced off from the public road and from the adjoining land at all times.

The partitions, buildings, mooring sites, and/or installations may only bear advertising, legends, announcements, signs, and the like relating to the business of the Operator, and also those that are prescribed by or on behalf of the government. All other advertising and the like, including that which is put up against the will of the Operator, shall be removed immediately by the Operator.

With the exception of rainwater, dumping of solid substances and liquids into the port is not allowed unless the Authority has given permission in writing to do so. This permission may include conditions.

Source: Author.



with the port authority. When ownership is temporary or definitively transferred to the operator (under BOOT or BOO arrangements), the concession agreement may include a variety of clauses pertaining to the use of the site, although such clauses may be based solely on a public license, a port bylaw, or other enabling authority.

BOT arrangements in a concession agreement are spelled out in detailed provisions covering construction, quality control, time schedules, milestones, and similar issues. One important

provision deals with the granting of exclusivity rights, guaranteeing that the port authority does not promote or permit any other competing facility in the concessionaire's port area for a certain time period (sometimes incorporated into a sponsors direct agreement) (see Box 55).

## 7.2. BOT and BTO Arrangements

BOT and BTO arrangements are frequently integral parts of concession agreements. The difference between these models is the time at which

### Box 55: Reference Clauses on Construction and Maintenance (Landlord Port Situation)

**T**he maintenance of the site at its present level shall be carried out by and for the account of the Operator.

The maintenance, the repair, and the renovation of the foundations and piles of the quay wall, the electricity channel with brush contact groove, and the connection pits for light, water, and telephone supply and appurtenances thereto, and also of the visible concrete works of the quay wall, shall be carried out by and for the account of the Port Authority.

The Operator is obliged to maintain the buildings, installations, fences, roadways, mooring sites on the site in a proper manner and, if necessary, to renew them in due time. Buildings that are run down and no longer used for business operations shall be demolished. All this shall be done to the satisfaction of the Port Authority.

All costs for the construction and maintenance of roads, sewers, electricity lines, gas and water pipes, and lighting on the site are for the account of the Operator.

If objects, liquids, or materials are present in the water, or in or on the bottom of the port or in the vicinity of the site, which, in the opinion of the Authority, do not belong there and have originated from the site or from vessels moored alongside a quay wall owned by the Operator, the Operator shall pay the Port Authority the costs that arise from the removal thereof, unless the Operator proves that the objects, liquids, or materials originate from another source.

The Operator shall indemnify the Port Authority for all claims of third parties in respect of damages that arise from the presence of the said objects, liquids, or materials, to the extent that they do not originate from a source other than is referred to above. This indemnification does not

apply to objects, liquids, or materials that originate from vessels moored alongside a quay wall owned by the Operator, which are owned by, or carrying out services on behalf of the Authority.

The Operator shall further be obliged to take such measures as shall be necessary in the opinion of the Port Authority to enable dredging and placing and removing any mooring posts and the like in the vicinity of the leased property, which entails, among other things, the fact that the Operator shall allow means of anchoring, mooring, and dredging vessels to be installed, used, and maintained by or on behalf of the Port Authority in the shore strip of the site, this at places which shall be indicated by or on behalf of the Port Authority.

For that purpose the Operator shall, at his own expense, carry out such work to its fences, buildings, mooring sites, installations, and the like as shall be deemed necessary in joint consultation with the Port Authority in order to avoid damages that could arise from the work or provisions which are to be carried out by or on behalf of the Port Authority. If, as a result of work or provisions carried out by the Port Authority, damage is inflicted to fences, buildings, mooring sites, installations, and the like of the Operator, such damage shall still be for the account of the Operator, unless the Port Authority can be held responsible for gross fault or negligence.

Without prejudice to other provisions in this agreement, the Operator shall contribute to the costs, to be borne by the Port Authority, of cleaning the surface water in the harbors and above the sloping embankments in proportion to the area of the sites bordering the harbor, and the length of the waterfront.

Source: Author.



the operator transfers the newly constructed assets to the port authority. BTOs are employed when relevant legislation does not allow for the private ownership of port assets. Transfer is conducted immediately upon the completion of construction and the operator receives the equivalent of a management contract.

The distinguishing feature of the BOT arrangement is the legal form of user rights. The concession agreement always sets out clauses that clearly define such rights. The concession entitles the operator to a right to use and exploit port infrastructure and, in the case of an existing terminal, also to use the superstructure and available port equipment.

The scope of the concession agreement appears in its preamble. The preamble typically consists of three main elements:

- The right to construct new port infrastructure and superstructure.
- The right to use of the subject assets.
- The right to exploit the site during the tenure of the concession (see Box 56).

Most concessions have a term of 30 years or more. Extension of the concession can usually be renegotiated at any time during its lifetime in case the operator plans a major investment in the port's infrastructure in return for an adjusted tariff rate reflecting changes that may have been introduced pursuant to the extension. In case no agreement for extension is reached by the end of the 30-year term, the concession ends and the right to use and exploit the port's infrastructure and other assets reverts to the port authority (or another government agency), preferably under a fixed-price formula.

## 7.2. BOOT Arrangements

Under a BOOT scheme, sometimes an operator is allowed to own the site on which improvements are to be constructed until the end of the concession period. Usually, the concession agreement specifies the value of the assets under a predefined formula (including an agreed-on depreciation table). At the time of transfer to

the port authority at the end of the concession period, the port authority pays the operator in accordance with the residual value, calculated on the basis of the established formula.

## 7.3. Functional and Technical Design under a BOT Arrangement

Generally, a port authority presents functional specifications for the facility to be constructed under a BOT arrangement. When the authority specifies detailed construction works, it becomes vulnerable to delays, construction errors, and, perhaps, the application of wrong technology or processes relative to expected port functions. Many ports simply lack the required expertise to prepare detailed technical specifications for modern port construction works.

Since new facilities are to be transferred to the port authority in due time, it is useful to engage a technical consultant who represents the port authority and reports on the progress of the work. The technical consultant can also observe the way in which the project is being constructed to meet the functional specifications and the requirement to use best practices for design, materials, and workmanship. The consultant may also assist in evaluating alternative technical solutions and advise on the best technical and cost-effective solutions.

A crucial point in the design phase is obtaining agreement on a timetable for completion of the detailed technical design. The design should include an interface element to integrate the terminal into an existing port area. The interface element takes into consideration paving levels, drainage, fencing, design and routing of underground facilities, reconstruction of existing infrastructure within the concession area, and access through neighboring port areas and terminals.

Finally, the operator is obliged to provide the port authority with sufficient detailed benchmark data to allow for evaluating and monitoring the development of the concession area as part of the approved DPR and the agreed-on construction program (see Box 57).

**Box 56: Reference Clauses on Scope of a Concession Agreement (including a BOT arrangement)**

**W**HEREAS Article [number] of the Ports Act of [date] gives the port authority of [name] the exclusive right to develop, construct, and maintain basic and operational infrastructure in its port area.

WHEREAS it is the policy of the government/Port Authority to have the new terminal constructed and operated by a commercial operator (or have the existing terminal known as [name] be reconstructed and operated by a commercial operator) under a [BOT, BOOT, BTO] arrangement.

WHEREAS the Authority has invited bids in [month] [year] for the Project, and through a process of competitive bidding selected in [month] [year] the Consortium of [name] as Sponsors, hereinafter referred to as the “Operator,” led by [name], a company whose registered office is at [location], (the “Lead Sponsor”), as identified in the Joint Development Agreement for developing the terminal/port of [name].

WHEREAS, subject to the provisions of this Agreement, the Sponsors and its designated Operator shall have the right and the obligation to finance, design, construct, equip, test, commission, operate, and maintain the terminal/port known as [name].

WHEREAS the Authority awarded a Letter of Intent (LOI) dated [date], [year], to the Sponsors to finance, design, construct, equip, test, commission, operate, and maintain the terminal/port [name] on [BOT, BOOT, BTO, and so forth] basis, (and has agreed to grant a license to the Sponsors under the [name] Act, No. [number], dated [date], for financing, designing, constructing, equipping, testing, commissioning, operating, and maintaining the terminal/port [name]).

(optional) WHEREAS the Authority has been reimbursed by the Sponsors for the cost associated with site specific technical studies that were undertaken by the Authority [at the time of approval of the Detailed Project Report] [at the time of International Competitive Bidding].

WHEREAS the Sponsors have executed a Joint Development Agreement dated [date], [year], allocating project responsibilities among Sponsors, pursuant to which the Sponsors promoted the Operator to finance, design, construct, equip, test, commission, operate, and maintain the terminal/port [name] on [BOT, BOOT, BTO, and so forth] basis and transfer

the Site and the assets thereon to the Authority on termination of the Concession Agreement.

WHEREAS a Detailed Project Report (DPR) has been prepared and submitted by the Operator, in accordance with the terms of the LOI, to the Authority on [date], [year], and has been approved by the Authority. The DPR with such modifications shall be referred to as the Approved DPR (annexed hereto as Annex [number]), and shall be treated as a part of this Agreement.

WHEREAS the Concession Area required for the development of the terminal/port [name] and the minimum area of land required to be leased to the Operator for the commencement of the construction have been identified in the Approved DPR. The Operator has agreed to construct the Contracted Assets on the Site in accordance with Annex [number] of the approved DPR.

WHEREAS on the signing of the LOI, the Operator provided a Development Guarantee in favor of the Authority for \$ [amount], which unless otherwise agreed to, shall remain in force and effect until the Zero Date.

WHEREAS at the signing of the LOI, the Sponsors provided a Development Guarantee in favor of the Authority for \$ [amount], which unless otherwise agreed, to shall remain in force and effect until the Zero Date.

WHEREAS the parties hereto have agreed to render all necessary cooperation and assistance and take appropriate action for giving effect to the terms of this Concession Agreement.

WHEREAS the Operator, being duly licensed to operate in the port, has applied for appointment to start container/general cargo/bulk services at the above mentioned terminal on the Date of Commencement of Operations.

WHEREAS the Authority is satisfied that the Operator is qualified in this field.

WHEREAS the Authority grants the Operator the right of usufruct[BCJ11]<sup>a</sup> over operational infrastructure, superstructure, and other assets by way of this Concession for the period of (30) years.

Source: Author.

<sup>a</sup>A legal term describing a situation wherein a person or company has a temporary right to use and derive income from someone else's property.

**Box 57: Reference Clauses on Construction Program**

The Construction Program is set out in Schedule [Number] in detail for all phases of the Extension Works. These phases comprise the following:

- *Phase 1* comprises the upgrading of the current Operational Infrastructure and Facilities as to enable the Operator to handle an Annual Throughput of [Number] million TEU.
- *Phase 2* comprises the construction of an additional quay structure with a total length of [number] meters and the construction of Operational Infrastructure and Facilities as to enable the Operator to handle an Annual Throughput of [number] million TEU.
- *Phase 3* comprises the construction of Operational Infrastructure and Facilities as to enable the Operator to handle an Annual Throughput of [Number] million TEU.

Subject to Article [number] and [number], the Operator shall ensure that the Extension Works are carried out:

- According to the Construction Program, subject to compliance by the Port Authority with the Dredging Program.
- So that the Milestone Achievement Date for each Milestone shall occur by the relevant Milestone Sunset Date.

The Construction Program may not be materially varied without prior approval of the Port Authority such approval not unreasonably withheld, provided always that the Operator shall provide the Port Authority with evidence

reasonably satisfactory to the Port Authority that the Milestone Sunset Dates shall still be achieved and any such approval shall be without prejudice to the rights of the Port Authority to terminate this Agreement for failure to achieve the Milestone Sunset Date.

If the actual progress of the Extension Works does not comply with the Construction Program, then the Port Authority shall be entitled to require the Operator either:

- To submit to the government a report identifying the reasons for the delay.
- To prepare and submit to the government its proposals for a revised Construction Program, showing the manner in which the Extension Works shall be carried out to ensure each Milestone Achievement Date shall be achieved by the relevant Milestone Sunset Date.

The government shall give written notice to the Operator from time to time giving details of the person appointed from time to time by the government to be the Construction Observer.

The Construction Observer shall at all times have the right to visit the Concession Area without prior notice. The Operator shall have the right to accompany the Construction Observer during his attendance in the Concession Area. The Construction Observer shall have no authority to delay or hinder any work taking place in the Concession Area.

*Source: Author.*

## 7.4. Design and Construction Flaws

During every major construction job, design and technical problems will inevitably occur. Some of these issues can be easily resolved, but others might influence the construction timetable or quality of the work. It is important that design and construction flaws be resolved in good faith consultation with the operator and its construction firm. The port authority should be ready to demonstrate flexibility without compromising the requirement that work be performed at a predetermined quality level.

In some instances, part of the work may have to be redesigned. The effects on construction

time and cost of any redesigned element(s) should be ascertained by the port authority, which should also ensure that the operator adheres to overall functional specifications (see Box 58 and Box 59).

## 7.5. Building Conditions

The construction company carrying out the work on behalf of the operator should be required in most cases to inspect the building site and the adjacent water area thoroughly before starting construction. Any obstacles in the subsoil affecting the construction should be reported and taken into consideration when executing the technical designs and obtaining permits. It is customary for the port authority

**Box 58: Reference Clauses on Infrastructure Design**

**T**he Operator shall design and construct the terminal/port facilities in accordance with the functional design set out in Annex [number] to this Agreement.

Without affecting the obligations under the preceding provision, the Operator shall comply with the design and construction methods set out in Annex [number] to this Agreement.

The Operator represents, warrants, and undertakes that:

- The technical design solution satisfies the functional design.
- Each item of the facilities (quay wall, terminal area, superstructure, and other assets) will be fit for its respective purposes.

The Operator shall complete the detailed technical design of the facilities so as to comply with the Construction Program as set out in the time table for design completion (Annex [number]).

The Operator shall submit to the Authority all interface design data, including all calculations, designs, design information, specifications, plans, programs, computer software, drawings, graphs, sketches, models, and samples.

If in the opinion of the Authority any interface design data does not comply with the requirements of the Agreement, it shall be entitled to require the Operator to amend the relevant interface design data so as to comply with these requirements.

The Authority shall be entitled to monitor the development and other aspects of the technical design and the Operator shall provide it with all relevant data promptly. The Operator shall not be obliged to adhere to possible comments of the Authority, but shall give due consideration to such comments made by or on behalf of the Authority. Any comment or approval of the Authority shall not be construed as transfer of responsibility for compliance with the Functional Design from the Operator Company to the Authority.

*Source: Author.*

to agree to provide its cooperation in obtaining construction permits and approvals from governmental authorities, including environmental oversight authorities.

**Box 59: Reference Clauses on Technical Design and Construction Problems**

**I**f the Operator and/or the construction firm responsible for carrying out the work become aware of any failure to comply with the Functional Design and/or other provisions concerning design and construction of the facilities, they shall:

- Immediately notify the Authority of the situation and provide details of the problem.
- As soon as possible provide the Authority with a written statement giving a full statement for the reasons of the problem.
- Describe in full the measures taken or to be taken to cure the problem and/or to mitigate the consequences.
- Assess the effect(s) of the problem on the Construction Program.

In case the Operator is not able to comply with the Functional Design and/or the provisions concerning the technical design and construction of the facilities, a full statement of the proposed changes including cost estimates and effects on the Construction Program shall be submitted to the Authority.

*Source: Author.*

**7.6. Construction Program**

Construction is based on a construction program that outlines completion dates for the various construction phases (milestones) as part of the approved DPR. This DPR is almost always incorporated into the concession agreement. The port authority ordinarily requires that it be notified promptly of every delay that occurs at the construction site, as well as the resulting contingency plan devised to remedy the delay (see Boxes 60 and 61).

**7.7. Zero Date**

The zero date is an important event that marks the start of construction work. By this date, all conditions precedent are fulfilled by both the port authority and the operator. Generally, the port authority fulfills all conditions necessary for the operator to commence work, while the operator concludes all financial arrangements and engages a construction firm to begin construction (see Box 62).

**Box 60: Reference Clauses on Site Conditions**

**T**he Operator shall be deemed to have thoroughly inspected the Concession Area and its surroundings, and have satisfied itself as to:

- The nature and extent of the conditions of or affecting the Concession Area, including climatic, hydrological, ecological, environmental, geotechnical, seismic, and archeological conditions.
- The adequacy of the rights of access and egress to and from the Concession Area.
- The possibility of interference by persons of any description whatsoever (other than the Authority) with access to, use of, or rights concerning the Concession Area and its surroundings, including adjacent landowners.
- The precautions, times, and work methods necessary to prevent any nuisance or interference, whether public or private, being caused by persons whose interests may be affected by the performance of the Operator's/Vehicle Company's obligations under this Agreement.

Source: Author.

**Box 61: Reference Clauses on Construction**

**T**hroughout the period from the effective date of this Agreement until the actual commissioning date for the last of the planned facilities, the Operator shall keep the Authority fully informed about the progress of the works. In that regard, the operator shall:

- Provide the Authority with monthly progress reports, in such form and containing such information as the Authority may reasonably require from time to time.
- Hold regular progress meetings to review performance of the work and discuss any coordination issues.
- Fully cooperate with the Authority's Observer, who shall be entitled to be present at any time during the performance of the work and to have reasonable access to all parts of the concession area and to all records and materials of the Operator concerning the work including attendance at the progress meetings of the work. The Observer shall be entitled to disclose all such information to the Authority and its advisers.

Source: Author.

**7.8. Drop Dead Date**

During the preparation phase, events may occur that result in delays or even cancellation of a project. The port authority as well as the operator may include provisions for termination of the concession agreement once it becomes clear that the project will fail. Therefore, a drop dead date is included in the agreement. In drafting such a clause, it is important to specify if any performance guarantees will be drawn or canceled as a result of the drop dead date (see Box 63).

**7.9. Extension Events**

In practice, construction of a major work rarely proceeds according to the original plan. In case a delay is caused by action (or inaction) of the port authority itself, the operator is usually entitled to claim liquidated damages. A force majeure might also occur, causing delays in the construction process. Such possibilities are acknowledged in the concession agreement and procedures included to change the milestone

dates and compensation paid by the operator when an extension event occurs (see Box 64).

**7.10. Completion Tests and Take-Over**

BOT schemes are mainly employed for the construction of new port infrastructure and superstructure. When newly built facilities are completed, completion tests are carried out and a take-over certificate issued by a competent expert or authority on the port authority's behalf. While verification of the civil works is required throughout the production process, it will not be possible to verify solely at the conclusion whether all work was completed in a professional manner and that proper materials were used during the process. The port authority should use its expert to inspect all work at completion and to prepare a punch list of deficiencies. The construction company then has a certain period to rectify all deficiencies. The final take-over is based on a test certificate



**Box 62: Reference Clauses on Zero Date**

**T**he Zero Date shall mean the date on which all the conditions precedent set out in Article [number] have been satisfied and the following conditions have been fulfilled:

- The environmental permit of the Ministry of [name] has been received.
- The following milestones necessary for the commencement of construction stated in the Approved DPR are complete: [milestones to be identified].
- Financial Closing has been achieved.

The Zero Date shall be achieved within [number] months from the Effective Date (namely, signing of this Agreement).

Source: Author.

issued by the certifier. After this, there is still a defect liability period during which the operator has the obligation to repair all deficiencies.

Take-overs of mechanical and electrical installations are more complicated and require a variety of tests including operational, safety, relia-

**Box 63: Reference Clauses on Drop Dead Date**

**I**n the event Zero Date is not achieved within [number] months from the Effective Date, this Agreement shall stand terminated and the parties to the Agreement shall have no liability of any nature whatsoever, subject to the clauses below.

If Zero Date is not achieved on account of failure to achieve Financial Closing, the Development Guarantee may be invoked by the Authority.

In the event the Authority has not fulfilled the covenant set forth in Article [number] within a period of [number] months after completion of inspection of facilities as per Article [number], the Operator shall be entitled to terminate this Agreement in accordance with Article [number] and the Development Guarantee shall stand discharged and shall be returned to the Operator.

Source: Author.

**Box 64: Reference Clauses on Extension Events**

In the event that the Operator fails to:

- Complete construction (or cause construction to be completed) within the scheduled construction period.
- Achieve any intermediary milestones as may have been agreed to between the parties, subject in both cases to agreed extension.

The Operator shall pay the authority liquidated damages of \$ [amount] for each day of delay up to a maximum period of [number] months. The amount of such liquidated damages will be linked to the Concession Fee payable by the Operator to the Authority based on an annual cargo projection in the Approved DPR, and shall, if so required, be realized by invoking the Construction Guarantee.

Source: Author.

**Box 65: Reference Clause on Take-Over Tests**

**A**n actual commissioning date shall occur when the “Test Certifier” issues a certificate that completion tests for civil works and installations (if any) have been successfully carried out.

Source: Author.

bility, interoperability, and endurance tests (see Box 65).

**7.11. Hand-Back and Transfer of Facilities**

Under a BOT arrangement, the facilities are transferred to the port authority at the end of the concession period, usually with (under a BOOT arrangement) or without (under a common BOT arrangement) compensation. The hand-back is concluded after a joint inspection and assessment of any renovation works (if applicable). Hand-back requirements and procedures depend on local practices. The most sensitive issue is in the level of compensation to be paid by the port authority (see Box 66).



**Box 66: Reference Clauses on Hand-Back of Facilities**

[Number] months prior to the expected date of expiry of this Agreement the Hand-Back Expert shall conduct an inspection of all elements of the Terminals including the Extension Works (the “Initial Inspection”). Such inspection shall comply with the requirements set out in the Hand-Back Requirements applicable to the respective elements of the Terminals.

Within [number] Business Days after the completion of the Initial Inspection, the Hand-Back Expert shall provide the Operator and the Port Authority with a notice (the “Hand-Back Proposals”) setting out:

- A schedule of major dilapidations on the condition of the Terminals including the Extension Works, normal wear and tear excepted.
- Determination as to the maintenance works or repair required to be carried out in respect of the Terminals including the Extension Works, in order to procure that, on expiry of the Term of the Concession, the Terminals including the Extension Works shall comply with the Hand-Back Requirements (the “Renewal Works”).
- Determination as to the Program (the “Renewal Construction Program”) for carrying out the Renewal Works over the remainder of the Term of the Concession.
- Determination as to the cost of carrying out the Renewal Works (the “Renewal Amount”).
- The Operator shall ensure that the Renewal Works are carried out in accordance with the Renewal Construction Program.

On the day on which this Agreement expires, the Hand-Back Expert shall conduct a further inspection of the Terminals including the Extension Works (the Expiry Date Inspection). The inspection shall comply with the requirements set out in Schedule [number] applicable to the relevant element of the Terminals including the Extension Works.

Source: Author.

**7.12. Lender Security**

The success of BOT arrangements is highly dependent on the ability of the operator to

attract financing for the construction work. This issue is reviewed in greater detail in Module 3 and Module 5. In many cases, lenders have recourse only to certain assets or income streams to secure repayment of their loans. Sometimes there are legal considerations that should be addressed, particularly with respect to the creation and enforcement of security interests in the host country that limit or even prohibit the granting of a lien over port assets. Such limitations present a significant stumbling block for attracting private capital to port development.

As described in Box 67, legislation restrictions may also impede investors and lenders because of a lack of definition of property rights. The situation on St. Maarten is very different. As noted in Box 68, care has been taken to maximize the lender’s security.

In a concession contract with BOT arrangements, it is generally necessary to explicitly establish the lender’s rights with respect to the affected assets. Providing for the lender’s rights entirely in the concession agreement is difficult because of the variety of financial structure options available to operators. Most BOT arrangements require debt financing by lenders (commercial banks). To facilitate the lending process, the port authority may enter into a direct agreement with the lenders; however, only one direct agreement shall be effective at any time. In such a case, the concession includes a clause obliging the port authority to negotiate in good faith during the period commencing on the date of concession and the effective date regarding the terms of the direct agreement as may be reasonably required by the lenders in connection with the debt financing, including terms to enable the lenders to exercise their rights and remedies under the financing documents (see Box 69).

**7.13. Change in Law**

Operators under a BOT arrangement run a considerable risk of applicable legislation changing during the concession period. Such change may affect operating profits and alter or negate the original exploitation conditions.

**Box 67: A Case of Legal Limitations Adversely Affecting a Port Concession**

The main elements of recent ports legislation in a European country included the following:

- Ports are part of the maritime domain as mentioned in Article 49 of the Maritime Code (MC) of the country. According to the same law, a main characteristic of the maritime domain is that within this domain there are no property or proprietary rights whatsoever (Article 51 MC). In the law, the definition of a port is as follows (Article 5 MC): A port is a water area, and with water directly connected to a land area with built-up and non-built-up wharf structures, breakwaters, equipment, installations, and other facilities intended or designed for berthing, mooring, and sheltering sea-going ships; loading and discharging of materials; embarkation and disembarkation of materials and passengers; warehousing and other cargo handling operations; production, refinement, and processing of goods; and other economic activities in connection therewith, concerning matters of business, traffic, or technology.
- Since no property rights exist within the maritime domain and subsequently within the port areas, all economic exploitation has to be based on a system of concessions (Article 51 MC) granted to companies. The MC contains detailed rules with respect to such concessions (Articles 59–72). It should be mentioned that this system is not only applicable to port operations such as stevedoring activities, but also to industrial activities in the port areas (refineries, chemical plants, and so forth).
- The national port management system is fully enumerated in the Seaports Law, 1995 (SL). The law sets out further rules for issuing concessions. Concessions for a period longer than 10 years shall be granted by the cabinet of ministers, while concessions for a period of longer than 33 years can be granted by the parliament. Concessions with a duration of not longer than 10 years can be granted by a port authority. All concessions must be publicly tendered. The former socially owned enterprises acting both as port authorities and port operators in the previous period have the right to be issued a priority concession with a duration of 12 years (Article 63 SL). There is no freedom to set tariffs. Port construction is primarily a task of the parliament. Moreover, the law lays down a very detailed planning system.

The above outlined port management system had a disastrous effect on the development of the country's ports. Main competence problems arose between the new port authorities and the former socially owned enterprises. Throughput of the country's main port fell from some 7 million tons per annum to a mere 2 million tons. No major investors were willing to risk their money under the above institutional conditions. Presently, proposals are being developed to make the Seaports Law more market oriented to attract foreign investors.

*Source:* Author.

Therefore, it should be expected that detailed provisions in the concession agreement will be negotiated to minimize the effects of such changes (see Box 70).

**Box 68: The Case of St. Maarten**

The island's bay has sufficient depth to accommodate cruise ships, which visit the island in vast numbers. Tourism (and especially cruise tourism) constitutes a major source of income for the island. Economic benefits are estimated at \$200 million per year. Some one million cruise tourists visit the island annually.

In September 1995, the island was hit by hurricanes that seriously damaged the port's facilities. This resulted in cruise ships having to anchor in the bay and transport their passenger ashore with small tenders. This solution was only accepted by the cruise lines on a temporary basis. In 1997, the government concluded an agreement with the lines charging \$5 per passenger to (partially) finance a new cruise terminal. Plans were made to expand the terminal and dredge the bay up to a depth of 10 meters.

Reconstruction of the cruise terminal became part of a corporatization scheme. The St. Maarten Cruise Terminal N.V. (joint stock company) was established as a subsidiary of the St. Maarten Holding Company N.V., jointly owned by the government of St. Maarten and the Dutch government via the Participation Company for the Netherlands Antilles NV. (NPMNA).

The main features of the concession agreement between the island government and the St. Maarten Cruise Terminal N.V., which has a BOO character, are:

- *Limited construction risk:* A turnkey contract has been concluded with an experienced

construction firm (Ballast Nedam Caribbean NV). Its Dutch parent company (one of the largest in the Netherlands) acted as main sponsor and provided a subordinated stand-by facility during the construction period. It also acted as a guarantor of the obligations of the construction firm under a fixed-price construction contract.

- *No political risk:* Elimination of political risks was achieved through extended political risk cover of the Netherlands Credit Company (NCM) (95 percent, covering among other things, breach of contract by the St. Maarten government and force majeure events).
- *No hurricane risk:* This risk is covered under the commercial insurance policy of NCM.
- *Proven cash flow:* Financing is based upon an already existing cash flow and a no-growth scenario. After completion, the debt service reserve and the maintenance reserve accounts will be funded up front, guaranteed by the St. Maarten government and covered by NCM. Direct payment from the cruise lines is facilitated by an offshore escrow account of the St. Maarten Cruise Terminal N.V. Payment is approved only by the agent bank pursuant to a cash flow waterfall. There is also significant involvement by the Dutch government, including providing equity and a subordinated loan as well as appointing a board member.

Source: Author.

## ANNEX I—CHECKLIST OF CONCESSION/BOT AGREEMENT PROVISIONS

(Related to a concession for the management and operation of an existing terminal and possible extension)

1. Introduction and recitals: Parties to the agreement, general considerations.
2. Definitions: Definitions are important and should be thorough. Usually they are included in a schedule to the agreement.
3. Conditions precedent: Those conditions that have to be fulfilled by the concessionaire and the port authority before the main provisions of the concession take effect.
4. Grant of concession: This provision sets out the exclusive right of the concessionaire to enter upon, occupy, possess, enjoy the benefits of, and use of the terminal.
5. Term of the agreement: The term of the concession is usually between 30 and 35 years for a BOT agreement. In case of a concession without BOT, the term may be in the order of 10 to 15 years.
6. Employment: Provisions regulating the position of employees of the port authority who will be taken over by the new terminal operator,

**Box 69: Reference Clause on Lender's Security**

**F**or the sole purpose of financing its implementation of the Project and the fulfillment of its obligations under the Project Documents, the Operator may assign, by way of security, the benefit of, or its interest in, this Agreement and any of the other Project Documents according to the requirements of any of the Financing Documents and create other forms of security over any movable assets or facilities, owned by the Operator, Collateral Warranty, or other property rights, forming part of its interest in the Project in favor of any Lender for the duration of the Debt financing, only, provided that:

- (a) The Lenders shall rank ahead of concession fee and lease rental payments in case of Force Majeure under Article [Number] (political events and omissions of the Port Authority).
- (b) The Lenders and the Port Authority shall rank equally in all other cases.

The Operator shall be entitled to create over its assets:

- (a) An encumbrance that (i) arises out of title retention provisions in a supplier's standard conditions of supply of goods that are acquired by the Operator in the ordinary course of its business and (ii) applies only to the goods so supplied.
- (b) Rights of set off or liens arising solely by operation of law in the ordinary course of business.
- (c) Any security interest for the purpose of or in connection with the securing of working capital facilities provided to the Operator in the ordinary course of its business provided that the total extent of liability arising upon such security shall not exceed the lower of the Termination Compensation payable to the Operator or [ % ] of the net book value of the assets of the Operator. The Operator shall always procure the discharge of Security Interests upon termination of this Agreement.

Source: Author.

especially with respect to salaries, pension rights, and retrenchment (if any). This provision obviously only applies to a situation where an existing port authority owned terminal is being concessioned.

- 7. **Transfer of assets:** This applies to the transfer of full rights and ownership, as well as leasehold or license interests (if any) in all the movable assets and facilities in the case of the concessioning of an existing terminal.
- 8. **Hand-over of the terminal:** The port authority shall hand-over the concession area, the operational port infrastructure and movable assets and facilities, and books and records in relation to the operations of the terminal (if any) by giving the sole, exclusive, and vacant possession thereof to the concessionaire.
- 9. **Exclusivity:** After the completion of the construction of a new terminal under a BOT, the new operator may be granted exclusivity rights for a limited period, usually three to five years. These rights allow the concessionaire to build up business without being directly confronted by a competing facility.
- 10. **Project:** This provision gives a general description of the project. This might be the management and operation of an existing terminal as well as a possible extension.
- 11. **Project document compliance:** The concessionaire is not allowed to materially vary the project documents. Project documents are the concession agreement, the site lease, the port services agreement, the financing documents, the design contract, and the building contract. The concessionaire may vary the building contract under certain conditions.
- 12. **Project finance:** The government or port authority acknowledge the necessary financing of the project by lenders such as commercial banks or the IFC. The government or port authority usually conclude with the lenders a lenders direct agreement. This agreement regulates the rights and obligation between the government or port authority and the lenders in the event that the concession is terminated by the government or the lenders exercise their rights under the security documents.
- 13. **Lenders security:** The concessionaire is allowed to create forms of security over any movable assets or facilities owned or leased by the concessionaire, or other property rights forming part of its interest in the project in favor of any lender for the duration of the debt financing.
- 14. **Functional requirements:** The functional requirements of the extension works comprise main characteristics of the terminal (transshipment/domestic,

**Box 70: Reference Clauses on Law Changes**

**C**hange in law shall mean the occurrence of any of the following events after the Effective Date of the Agreement:

- The enactment of any new applicable law.
- The modification, repeal, or reenactment (other than reenactment that merely consolidates or codifies existing applicable law) of any existing applicable law.
- The commencement of any applicable law which had not at the Effective Date yet entered into effect, except to the extent such applicable law was enacted prior to the Effective Date with a commencement date after the Effective Date and such applicable law takes effect on that commencement date without material amendment.
- A change in the interpretation or application of any applicable law by a judicial or other authority (including a court, tribunal, or any other regulatory authority) having the authority to interpret or apply such applicable law or any interpretation of any applicable law by such authority that is contrary to the existing generally accepted interpretation thereof.
- The revocation or cancellation (other than for cause) of any permit.
- To the extent that such Change in law has a material adverse effect on the rights and obligations of the Operator under this Agreement, and that such event has not been caused due to fault of negligence of the Operator.

Notwithstanding anything contained in the clause above, Change in law shall not include any change in tax laws or change in a law of general applicability, but which solely has an economic and financial impact on the Operator.

The Operator shall, on the occurrence of a Change in law, give notice of such change to the Authority in accordance with the provisions of this Article as soon as it may be reasonably practicable. The notice served pursuant to this clause shall provide, inter alia, precise details of the Change in law and the effect thereof on the Operator.

In the event that a Change in law renders impossible the exercise by the Operator of any of its material rights or performance by the Operator of any of its material rights and obligations—unless such obligation is waived by a person having the power to do so under this Agreement, the Operator may serve a notice for termination of this Agreement (Termination Notice) provided that, prior to service of the Termination Notice, the parties shall consult in good faith for a period of [number] days to mitigate the material adverse impact of the Change in law. In the event that parties are unable to agree to changes in the Agreement to mitigate the impact of the Change in law during the [number] day period, either party may refer the matter to dispute resolution, in such case the Termination Notice shall stand suspended until such matter has been resolved in accordance with Article [number].

The parties hereby acknowledge and agree that the Operator shall be entitled to serve a Termination Notice on the Authority, provided that the Change in law results in the physical and legal impossibility of performance of the Operator's obligations or exercise of its rights under this Agreement. The parties shall bear the respective impact of any economic consequences of the Change in law.

multiuser/dedicated), and the main construction elements such as quay lengths, types of gantries, depth alongside, and so forth.

15. Design solution: Comprises design and construction methods.
16. Design development: The port authority shall receive all calculations, designs, design information, specifications, plans, programs, drawings, graphs, and so forth in relation to the extension works and the operations and has the right of control of such documents.
17. Design flaws: Procedures to be followed when the concessionaire becomes aware of
- any failure of the design solution or the design data.
18. Applicable permits: The provision includes the willingness of the government or port authority to assist the concessionaire in obtaining the permits, licenses, and so forth to operate or build the terminal or terminal extension.
19. Concession area conditions: Before starting the construction, the concessionaire is deemed to have inspected the concession area. The government or port authority shall reject all liability for claims.



20. Archaeological items or geological items: All fossils, minerals, antiquities, wrecks, or structures of particular geological or archaeological interest on or under the concession area shall be deemed to be the absolute property of the government or port authority.
21. Building contract: The concessionaire shall have the right to and responsibility for selecting the designer and the builder and agreeing on the provisions of the design contract and building contract, without the approval of the port authority.
22. Construction program: The construction program is an important part of the concession. A detailed construction program, including milestones and milestone achievement dates, is included with one of the schedules. Every relevant part of a construction program has a milestone sunset date, which is defined as the latest date to achieve a milestone that is part of a construction program under a concession agreement. Nonachievement of a milestone sunset date constitutes a termination event for the port authority (see number 25 below).
23. Progress reviews: A provision with respect to monthly progress reports.
24. Extension events: An extension event prevents or delays the concessionaire from complying with the obligations of the concession during the design and construction period of the terminal. If an extension event occurs, the construction time will be extended.
25. Sanctions for late completion: The project elements should be completed by the relevant milestone achievement dates. Nonachievement of a milestone sunset date constitutes a termination event for the port authority.
26. Commissioning of the project phases: An appointed test certifier conducts commissioning tests during project phases that must be passed to allow the project to continue.
27. Operator's operational functions and activities: All the operational functions and activities allowed under the concession are listed in detail.
28. Port authority's port services: The port services of the port authority such as pilotage, towage, vessel traffic management, mooring and unmooring, provisions of water, and so forth are listed. Details of these services are usually included in a separate port services agreement with the port authority.
29. Berthing priorities: These priorities might be agreed upon between the port authority (harbormaster) and the concessionaire, but must be nondiscriminatory and subject always to such rules and regulations as may be made from time to time under applicable laws.
30. Security: Provision with respect to the tasks and obligations of both the concessionaire and the port authority, within the framework of the ISPS code.
31. Use of the terminals: The operator has the sole right to carry out the port operations and construction activities within the concession area. Also in this article, the issue of multiuser versus dedicated use of the terminals should be regulated.
32. Operator's operational performance standards: A port authority may set performance standards such as a minimum number of crane moves per hour, a minimum berth hour productivity, or a maximum vessel turn around time, and so forth.
33. Maintenance of movable assets, facilities, and infrastructure: In view of the fact that the terminal will be handed over to the port authority after termination or expiry of the concession, maintenance standards both for equipment and infrastructure maintenance should be included.
34. Operational subcontracting: The concessionaire or sponsor is usually given the right to conclude a management contract with a qualified operator, subject to approval of the port authority.
35. Tariff regulation: The provision may be necessary in case of the requirement to regulate the changes to tariffs for handling of domestic cargoes in the event of a dominant position of the concessionaire in a certain port or a series of competing ports.
36. Tariff setting: The concessionaire has the right to freely set tariffs without interference of the government or port authority, subject to possible competition regulation.
37. Site lease: Main characteristics of the site lease are included in this article, such as price and number of square meters of the area. The site lease itself is a separate document that is part of the concession. The lease rent should be indexed for inflation.



38. **TEU fee:** The fee is usually expressed in dollars or other hard currency for each TEU (other than restows) handled over the ship's rail. This article establishes the (variable) price per TEU per annum the concessionaire pays to the port authority during the term of the concession. The TEU fee should be indexed for inflation. The structure of TEU fee payments might include (number of) minimum guaranteed throughput levels.
39. **Bank guarantee:** The port authority may require a bank guarantee of the concessionaire with respect to the minimum guaranteed throughput levels.
40. **Refinancing:** The port authority may require approval in case of refinancing of the project. Instead of a bank guarantee, the port authority may require a performance bond for the throughput guaranteed and the overall obligations within the concession by the concessionaire, which is often based on the business plan submitted by the concessionaire in the bid proposal.
41. **Release from rents, taxes, levies, and other obligations and dues:** Sometimes the government or port authority grants the concessionaire release from taxes during a certain period. The terminal may also get a free zone status, which implies considerable tax advantages.
42. **Payments to the government:** Any payment made by the concessionaire to the port authority shall be considered as a valid settlement of the operator's obligations under the concession.
43. **Information supply:** The concessionaire shall supply specific information to the port authority on throughput or vessels on a monthly and annual basis.
44. **Legal compliance:** The concessionaire shall at all times during the term of the concession comply with all applicable laws, directives, and the conditions of all applicable permits.
45. **Change in law:** This article is necessary to mitigate the effect of a change in law that materially affects the operations and financial position of the concessionaire. It sets out detailed provisions describing which changes in law apply, such as changes in taxation, institutional conditions, nationalization, and so forth. Under certain conditions the government or port authority compensates losses sustained by the concessionaire as result of a change in law event.
46. **Force majeure:** Any event or circumstance or combination of events, whenever occurring, that is outside the control of the affected party, could not be avoided, prevented, overcome, or mitigated with reasonable foresight and materially prevents, hinders, or delays performance of a party's obligations under the concession. Typical force majeure events are tsunamis, earthquakes, or other acts of God; nuclear explosions; radioactive, biological, or chemical contamination; war, invasion, embargo, military coup, or revolution; and so forth.
47. **Insurance:** Insurance covers required by the port authority to be taken out by the concessionaire both for operations and for construction of new terminal facilities.
48. **Ownership of assets:** This relates to the right of the concessionaire to own mobile assets and (sometimes) buildings in the concession area.
49. **Option to continue:** The port authority may grant an option to continue or a right of first refusal after the expiry of the concession.
50. **(Interim) termination by the government:** This article comprises detailed events that may lead to termination of the concession by the government, such as a material breach of the concessions, nonpayment of fees, and so forth.
51. **Termination by the operator:** The concessionaire might terminate the concession when a material breach occurs by the government or port authority of their obligations under the concession.
52. **Termination procedure:** In the event of termination either by the port authority or the concessionaire, a termination procedure is agreed on that sets out detailed provisions of the rights and obligations of the parties, such as notice to terminate, remedial program, and information to the lenders of the concessionaire.
53. **Rights cease:** On termination or expiry of the concession, all future rights and obligations of the port authority and the concessionaire shall cease and the site lease and the port services agreement shall also be terminated automatically.
54. **Termination compensation:** In case of termination by one of the parties to the concession, the ports authority shall pay termination compensation. Depending on which party terminates the agreement, the termination compensation consists of a percentage of the fair value,

established by an independent expert. There are several methods to be used to determine the fair value, which should be stipulated in advance in the concession agreement. Methods used include historical cost, inflation adjusted historical cost, depreciated replacement cost, optimized depreciated replacement cost or modern equivalent asset value, and optimized depreciable value. The expert shall never apply any earnings-based valuation methodology or any goodwill in the business of the concessionaire.

55. Hand-back: After expiry of the concession, the concessionaire shall hand back the entire terminal to the port authority. This article includes detailed instructions and technical requirements and procedures on how the hand-back shall take place. This is to assure the proper state of the facilities when returned to the port authority.
56. Asset transfers on expiry or termination: It is necessary to regulate the good cooperation between the port authority and the concessionaire regarding the hand-back of the facilities to the port authority.
57. Information technology (IT) license: At the end of the concession, it might be necessary to transfer IT licenses to the port authority to guarantee uninterrupted operation on the terminal during transfer to a new operator.
58. No share or liability acquisition: This article sets out the terms and conditions in case of participation of the port authority in the capital of the concessionaire or vehicle company.
59. Employees: At the expiry of the concession, the position of the employees will have to be regulated. Usually they will be transferred to the new operator with certain conditions such as the continuation of earlier salaries and benefits as well as accrued pension rights.
60. Conflict resolution: This article sets out detailed procedures for conflict resolution including international arbitration.
61. Waiver of immunity: It will be necessary for the government and the port authority to waive most forms of sovereign immunity to create a level playing field with a private concessionaire.
62. Recognition of lenders' rights: The port authority may include in the concession a special recognition of the lenders who will be deemed to be beneficiaries under the concession.
63. Performance monitoring: A general provision in the event that a party fails in the performance of its obligations under the concession. When that failure is capable of remedy, the affected party may serve a notice on the other party requiring such other party (at its own cost) to remedy that failure.
64. Transfer committee: The committee, consisting of representatives of both the port authority and the concessionaire, is responsible for the transfer process at the termination or expiry of the concession.
65. Responsibilities: The port authority and the concessionaire shall be solely responsible for the performance of their functions and services and for all the acts, or failures to act, of itself and of its contractors, subcontractors, suppliers, and agents.
66. Liabilities: Neither the government, the port authority, nor the concessionaire shall be liable to the other for any loss, cost, liability, or expense arising from any breach of the agreement other than for actual loss directly resulting from the breach.
67. Confidentiality: The parties may agree to keep the details of the concession confidential during a certain period.
68. Disclosed data: Restriction by the government or port authority for the liability of disclosed data on the terminal or concession area.
69. Change in institutional structures: During the term of the concession, the institutional structure of the government or the port authority may change. The concessionaire agrees with the variation of the concession, provided that such variation does not affect its rights, obligations, and liabilities under the agreement.
70. Variations: Variations in the project documents shall only be valid if they are in writing and signed by or on behalf of each of the parties.
71. Applicable law: Establishment of the law applicable to the concession. This is usually the law of the country where the terminal is located.
72. Notices: Elected domiciles for formal notices to be served under the concession.

