

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2019

GETTING THE
DEAL THROUGH

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Contributing editor
Alex Kyriakoulis
HFW

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Preface

Ports & Terminals 2019

Fourth edition

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

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

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

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

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

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

GETTING THE
DEAL THROUGH 

London
October 2018

Netherlands

Arnold J van Steenderen and Charlotte J van Steenderen

Van Steenderen Mainport Lawyers BV

General

1 Which are the key ports in your jurisdiction and what sort of facilities do they comprise? What is the primary purpose of the ports?

Several ports of significant importance to Europe are located in the Netherlands. Rotterdam and Amsterdam are generally regarded as the key ports. Other notable ports are Groningen Seaports and North Sea Port, a merger between the Zeeland Seaports (Terneuzen and Flushing) and the Belgian port of Ghent.

The Port of Rotterdam has almost every port facility imaginable, including cruise, container, general cargo, oil and gas terminals, as well as bulk terminals and a liquefied natural gas (LNG) terminal.

While the port of Amsterdam has the largest cacao and potato terminals in the world, as well as considerable gasoline terminals, the Port of Rotterdam is Europe's largest seaport, measured by the total number of containers and bulk (notably crude oil, chemicals, ores and coal) passing through each year.

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

The Dutch government has retreated from port operations in the belief that enterprise-based port services and operations would allow for greater flexibility and efficiency in the market through more competition and a better response to consumers' demands. The Dutch landlord port model is the dominant one in large and medium-sized Dutch ports. Under the landlord model, a port authority is usually a separate legal entity with the capacity to conclude contracts (including concession agreements) and to enforce standards. In the Rotterdam and Amsterdam port areas, the landlord port authorities are public limited companies and consequently not government agencies any more. These companies are highly commercialised entities, as public influence is only indirectly accomplished through the ownership interests that the Dutch state or municipal governments maintain in these public limited companies. Although legal title to the land in the port areas remains with the municipal government in most cases, the port authorities of Rotterdam and Amsterdam have leased this land in perpetuity. These lease agreements with the relevant municipal governments therefore allocate the economic ownership of the port area to the port authorities. To date, the Dutch state has only acquired an ownership interest (29.2 per cent) in the Port of Rotterdam Authority in return for financial investments from the state. These investments were necessary to realise a relatively large expansion of the port area by reclaiming land from the North Sea (Maasvlakte II), on which land modern and fully automated container terminals (APM and RWG) were built.

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

The government considers Dutch seaports to be of great significance to the Dutch economy, and therefore the government regularly publishes policy documents with regard to port development, port management and environmental and safety issues in ports aimed at safeguarding the competitiveness of Dutch seaports.

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

For the development of a port it is necessary to obtain a permit under the Nature Conservation Act. The key condition for obtaining such a permit is compensation for the main effects on the surrounding areas. For example, a special protection zone has been created that is 10 times the size of Maasvlakte II in order to meet this criterion.

Furthermore, during the tender for a concession of land for terminals on the new Maasvlakte II port area, the port authority as commissioning party also explicitly considered sustainability. The tenders submitted were assessed not only for direct commercial value to the port authority, but also for 20 per cent on sustainability, such as the way in which spatial distribution, energy, emissions and hinterland transport issues were addressed. In addition to green standards with regard to port development, port authorities have committed to CO₂ emission reductions and a variety of sustainability principles with regard to the operation of the port in their official outlooks and policy documents, such as the World Port Climate Initiative. In accordance with an agreement concluded with the Dutch government, the harbourmaster has set standards for the Safety Environmental Index. Furthermore, there is a large body of applicable international, European and national legislation that imposes environmental and safety standards on vessels, companies and regulatory and enforcement bodies active within the Dutch ports.

In 2017, the Port of Rotterdam Authority launched a campaign named Building a Sustainable Port. This port authority aims to ensure that Rotterdam's port and the surrounding area are safe, healthy and attractive and has identified three key themes: a Safe and Healthy Environment, Climate and Energy, and People and Employment. In this context, the authority's focus is on matters such as water safety, solar power, carbon capture and storage and the Port Welfare Committee. Another project recently initiated by the Port of Rotterdam Authority is Port Waste Catch. The port authority has enlisted the private sector to develop a system for removing plastic waste - particularly waste that is floating or suspended in water or airborne - from the port and port basins before it drifts out to sea. The port authority will soon be launching a pilot project in which it will test a number of these systems at the port.

Legislative framework and regulation

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

The Dutch legislator has not enacted specific public-private partnership (PPP) law in the Netherlands. PPPs and privatisation are therefore undertaken pursuant to the government's general powers. However, port development concessions may be subject to European procurement rules pursuant to Directive 2014/23/EU on the award of concession contracts, Directive 2014/24/EU on public procurement and Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and telecommunications sectors. The Dutch legislator has implemented these European Directives in a single act, the Dutch Public Procurement Act 2012 (PPA), which entered into force on 1 July 2016 and generally requires contracting authorities to put port development concessions out to tender.

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

Every local municipal government issues regulations with regard to ports within their jurisdiction, such as the Port Management By-Laws. Some municipalities have chosen to harmonise their regulations with those of other municipalities in the region. The local regulations are only in addition to the various international and national safety and environmental rules applicable within all port areas and on waterways.

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

Regulatory authorities, such as the Dutch national legislator and the relevant municipalities, have wide regulatory powers with respect to all aspects of port regulation. Many safety and environmental rules, however, are derived from international conventions, often implemented in national laws.

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

The Minister of Infrastructure and Environment and the municipal government have delegated certain public powers to harbourmasters. The harbourmasters of the ports of Rotterdam and Amsterdam are employed by the privatised port authorities. At the moment of privatisation of the port authorities, the port authorities concluded agreements with the national and local governments, which, among other things, stipulate that the appointment of the harbourmasters of the Rotterdam and Amsterdam port authorities are subject to the approval of the respective municipal governments and of the Minister of Infrastructure and Environment.

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

No. However, the Port Services Regulation (Regulation (EU) 2017/352, applicable to port services other than cargo handling), came into force in May 2017 and regulates market access to port services. The Regulation applies to the provision of the following categories of port services, either inside the port area or on the waterway access to and from the ports:

- bunkering;
- cargo handling;
- dredging;
- mooring;
- passenger services;
- port reception facilities;
- pilotage; and
- towage.

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

As the port authorities of large ports in the Netherlands have been privatised, these port authorities have set their own tariffs and lease prices. Despite the monopoly that these port authorities enjoy with regard to the economic ownership of the land in the port areas, the government has decided not to introduce specific regulations. The government maintains public influence through agreements with the independent port authorities in which a procedure for determining the annual tariffs is outlined. The national government is therefore still involved in the decision-making process, albeit in a less transparent fashion. At the EU level, however, the European Port Services Regulation could bring new restrictions to the determination of port tariffs in the near future.

Some port authorities are not privatised and are government agencies, and therefore part of the local government in which the ports are situated. Local governments are subject to the national Municipality Act and need to adhere to certain fiscal principles when they levy harbour dues on vessels in ports within their jurisdiction. For example, they need to maintain clear substantial and non-discriminatory criteria for levying taxes.

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

Port rates and tariffs in Dutch ports are calculated and invoiced in euros. The rates and tariffs imposed by Dutch ports, such as the Rotterdam port authority and the Amsterdam port authority, are stated in their respective general terms and conditions. The Rotterdam port authority also accepts payment made in almost all standard currencies, such as UK pounds, US dollars, Japanese yen and Chinese yuan. Payment in Brazilian real is not accepted. The Rotterdam port authority uses the exchange rates used by the Nederlandsche Bank. The Amsterdam port authority does not accept payment in foreign currencies; all payments must be effected in euros.

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

The state has several public service obligations with regard to the operation and safety of the Dutch waterways and ports derived from international conventions, for example those based on the International Convention for the Safety of Life at Sea 1974 (SOLAS), and from several EU regulations and directives. Some public service obligations may be satisfied by agreements and administrative licences given to private entities or persons outside the government, such as a privatised port authority. The Mayor of Rotterdam, for example, delegated his power as port safety officer to the harbourmaster, who is employed by the privatised port authority of Rotterdam.

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

Yes, this is possible and decided on a case-by-case basis. Although the government has committed to a policy of privatisation, it has formulated four policy conditions that must be fulfilled before the Dutch state may acquire shares in a private entity:

- the national public interests can only be safeguarded by acquiring a position in the private entity;
- these national public interests and how they can be safeguarded must be defined in a precise manner;
- the entity must be able to realise a return on investment; and
- there needs to be a periodic reassessment. If the circumstances leading to the decision to have the state invest in a private entity are no longer present, the government should, in principle, retreat from the private sector.

The Dutch state's investment in the Port of Rotterdam is, however, regarded as one of its few permanent investments. Notably, the Port of Rotterdam (although no longer a state entity) has recently concluded several joint ventures with other commercial entities and foreign ports and is considering more foreign investments. Examples are joint ventures with the government of Oman regarding the SOHAR Port and Freezone, with a Brazilian company for the port development of Porto Central, and with the port authorities of Antwerp, Mannheim and Switzerland for research and cooperation in the area of LNG terminals.

14 Are there restrictions on foreign participation in port projects?

In principle, there are no restrictions on foreign participation in port projects.

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

The legislation governing procurement in the Netherlands is based on European Directives 2014/23/EU, 2014/24/EU and 2014/25/EU, and was implemented in the Netherlands in the Public Procurement Act 2012 (and delegated legislation and guidelines).

With regard to port development, some more specific rules based on Directive 2014/25/EU (special sectors) are applicable to port development procurement.

There is no comprehensive legislative framework for PPPs in the Netherlands. PPP projects are usually tendered, making use of existing procurement legislation. Dutch PPP projects are typically governed by standardised design-build-finance-maintain-operate (DBFM(O)) contracts (version 5.0).

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

There are no specific rules applicable to the privatisation of Dutch government entities. Privatisation of a port authority does not necessarily involve a formal tender. Assets previously owned by a local government may be transferred or leased in perpetuity to the newly formed independent port authority, but the government has retained full ownership interest in the newly formed privatised port authority in Rotterdam.

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

In many tender procedures the award criterion is the 'most economically advantageous tender'. Commonly used sub-criteria for the award of a project are the price (net present value), the risk management plan and the value of certain risks listed in the tender guidelines (listed risks) accepted by the private party. The award of port concessions and port joint venture agreements is frequently decided by the relevant port authority or commissioning authority. For example, with regard to the Maasvlakte II project, the Port Authority of Rotterdam used the criteria below for the concession of a container terminal:

- the financial bid, including volume guarantees and revenue projections (40 per cent);
- the business plan; in other words, the degree to which the new terminal would attract new cargo to the port (25 per cent);
- the sustainability of the bid, including percentages of rail, truck and inland waterway modes of transportation that would be used (20 per cent); and
- the terminal concept, with regard to the efficiency and the quality of the proposed terminal (15 per cent).

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

Nowadays, the Dutch government regularly opts for DBFM(O) contracts to realise large public works and transport infrastructure projects. All elements concerning the design, realisation and maintenance of a building project form an integral part of one contract to be commissioned by the commissioning party to the contractor. Distinctive for a design-build-finance-maintain (DBFM) contract is that the financing of the building project is shifted to the contractor in exchange for regular payments as compensation during the running period of the contract. Since there is a link between the running period and the economic life of the realised works, the contract is usually concluded for a longer period (20 to 25 years).

A consortium is, in most cases, incorporated as a special purpose vehicle (SPV) to conclude and execute the contract for the port development with the commissioning party (government). An SPV is a private company with limited liability financed either by banks and equity capital, or by loans from the government itself, all in exchange for shares in the company. It can be said that operating a port has become an interesting business, attracting the attention of large investment groups and equity fund managers.

The Dutch government issued a standard DBFM model agreement for large infrastructure projects initiated by the national government, but parties are free to deviate from this model. Furthermore, there are guidelines that provide a decision model with regard to whether a project is suitable for PPP and if so, for DBFM. Recently, local governments have also experimented with a light version of DBFM for smaller port development projects.

For existing port areas, the relevant port authorities apply standard terms and conditions in their sublease agreements.

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

For realisation of the project a variety of permits may be required, related to the environment, construction, and occupational health and safety standards. With regard to a DBFM agreement itself, a national government agency will need to obtain approval from the Minister of Finance. Under certain circumstances, large projects financed by the government may be regarded as state aid within the European context, and in these cases approval from the European Commission is therefore sought before there can be substantial government investment in port areas. However, in May 2017 the scope of Regulation (EU) No. 651/2014 has been extended to ports. Public investments of up to €150 million in seaports and up to €50 million in inland ports, now can be made without approval of the European Commission.

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

Relatively large projects may be implemented as DBFM(O) projects. Other projects can be implemented as a classic government procurement for works, as either a 'design-build' project or a 'design-build-maintain' project.

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

There is no minimum or maximum term for concessions or PPPs. In the concession for a very large project involving a large investment from private parties, such as the newly built Maasvlakte II terminal, a term of 60 years can be applied. Usually concessions and lease agreements in port areas are concluded in 20 to 30 years. In principle, government agencies are free to determine the term. However, a term may be regarded as too long if it is not proportional to the investments that the concession holder is required to make (see ECJ 9 March 2006, C-231/06, *Commission v Spain*).

22 On what basis can the term be extended?

In principle, the term may be extended if provided for in the concession, but this is not a standard approach.

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

With regard to the land rent of existing port areas, the port authority leases or subleases plots of the port area to private companies. On the basis of those lease agreements, the port authority may charge an occupancy fee for the site (fixed per square metre or per metre of quay length) and for the facilities (if applicable). These fees may be subject to discounts specifically negotiated with the port authority. Normally, the occupancy fee is revised annually according to inflation. Concessions of port terminals may contain cargo handling fees (revenue sharing).

Additionally, port authorities may collect harbour dues for the provision of its services, which are calculated on the basis of several variables, such as gross tonnage, the type of the vessel and the type of cargo. The quay dues or berthing fees, buoy dues and dolphin dues are based on a fixed fee per linear metre of the ship (overall length). The waste fees are based on the capacity of the main engine of a ship; exemption from the waste contribution is possible provided that a number of requirements are met.

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

Generally, the government does not provide any guarantees. A concession, lease or sublease agreement inherently grants exclusivity to a port operator for the duration of the concession, lease or sublease agreement.

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

The Rotterdam Port Fund (RPF) is an independent investment fund that was established at the end of 2016. It is an initiative by the Port of Rotterdam and four private investors. RPF invests in fast-growing companies that aspire to be a part of the transition to the port of the future. The five investors together put around €50 million into the fund. They

Update and trends

As a consequence of a large-scale global cyberattack with ransomware (NotPetya), which affected companies all over the world – including a container terminal in the port of Rotterdam – Dutch ports now have a stronger general focus on cybersecurity. Resilience against cyberattacks is essential for Dutch ports. The Rotterdam port has appointed a Port Cyber Resilience Officer and a team of six ICT specialists focusing on cybersecurity every day at the Rotterdam port authority. The Rotterdam port also has a central cybersecurity hotline for the port area, which was launched on 11 June 2018. It is intended for all companies in the port of Rotterdam and industrial area. The 170 companies that fall under the Port Security Act or have a port security certificate have a mandatory duty to report cyber incidents, and are obliged to report large-scale IT disruptions to the Port Cyber Hotline.

want to finance fast-growing and innovative companies that have a relationship with the port sector. The Rotterdam port authority aims to speed up the energy transition – the transition from a port aimed at fossil fuels to the use of renewable raw materials.

Companies that invest in the ports of Rotterdam and Amsterdam are being financially stimulated. This is done on an individual and tailor-made basis, depending on the business case at hand. For this purpose, the port authorities can make use of price mechanisms that are available to them. Companies that have a clear, negative impact on the environment or that focus on the storage and transshipment of fossil fuels are no longer offered any land in the Rotterdam and Amsterdam port areas.

Port development and construction

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

For every port construction project, several permits and decisions are required, which need to be obtained from local, provincial and national governments. These include construction permits, environmental permits, operational permits, land planning decisions and even permits to reclaim land, if applicable.

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

Although the government will always instruct private parties to perform construction projects, some projects may be fully financed by the government, as private financing may be difficult to obtain with regard to certain large projects. Furthermore, in some cases the government or port authority will arrange for the necessary infrastructure (for example, connecting roads).

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

Building, safety and labour legislation may impose construction standards upon contractors. These must be strictly adhered to in order to obtain relevant permits, and to avoid administrative or even criminal liability. Independent certification is often included as a precondition of the validity of permits.

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

The contractual remedies will be outlined in the agreement between the government or port authority and the contractor or the Dutch Civil Code. Should there be violations in environmental or safety standards, the relevant authorities may additionally have criminal or administrative sanctions at their disposal.

Port operations

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

Several environmental and construction permits need to be obtained from national and local authorities. Although this is a process that takes some time, several permits may be obtained during the building process in order to prevent considerable delays.

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

Key competencies of the port authority are predominantly related to the operational side of the port. As an example, an overview of the key competencies of the port authority of Rotterdam is given below:

- Planning and access of vessels in the port area: from two traffic control centres the traffic service operators monitor all vessels which enter and leave the Port of Rotterdam or travel through it.
- The harbourmaster's division checks whether vessels comply with shipping regulations concerning environment and safety. In the event of incorrect or unsafe actions, measures are taken. In addition, systematic checks are carried out to make sure shipping companies and agents comply with the statutory administrative reporting obligations.
- As the Port Security Officer in the Port of Rotterdam, the harbourmaster holds the authority for security in the entire port, on behalf of the Mayor of Rotterdam.

Under certain circumstances the harbourmaster may grant permits, exemptions, approvals or directions. For example, the harbourmaster grants permits for the operation of communication vessels or for lashing containers on seagoing vessels. Furthermore, the harbourmaster may grant exemptions from certain provisions in the port regulations (eg, under certain conditions it may be allowed to use anchors or dis-infect vessels).

In addition to the public tasks outlined above, the port authorities typically conclude commercial lease agreements with port operators for which the port authorities charge tariffs. Furthermore, they may levy tariffs to vessels accessing their ports.

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

Accessibility and interconnectivity of port areas is one of the policy commitments of the national government. Operators generally do not finance the main access routes, as infrastructure is regarded as one of the public service obligations of the government. The national, provincial and local governments will instruct other parties to build main roads and other infrastructure, such as railways, connecting the Port of Rotterdam with the European hinterland. Private access routes within the port area may be privately owned.

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

A shutdown of operations (eg, due to an ongoing disaster), may be ordered by the relevant safety authorities (eg, the mayor of a larger town or city in the region of the port or environmental authorities).

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

The relevant lease and concession agreements may contain a provision granting a contractual right of unrestricted access to the terminal grounds by personnel of the port authority. Authorised harbourmaster division's personnel and other inspection agencies such as the Human Environment and Transport Inspectorate and environmental and safety agencies may also access port terminals regularly for inspection purposes when exercising public powers.

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

In addition to general contractual remedies, the government may have administrative sanctions at its disposal if such a breach would also entail incompatibility with permit conditions or safety and environmental regulations.

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

As mentioned before, legal title to the land in key port areas rests with the municipality in which the port is located. The municipalities of Rotterdam and Amsterdam have concluded a master-lease agreement with the port authorities of Rotterdam and Amsterdam, effectively granting these public limited companies the economic ownership of the port area in perpetuity. The port authorities may sublease the land to private port operators in order to generate revenue (this can be done through a tender procedure). In principle, the port authorities are free to agree on a transfer arrangement with the port operator on a case-by-case basis. In many sublease contracts, however, a provision is included that imposes an obligation on the service provider to return the land in the same condition as it was handed over to the port operator at the start of the lease period. Consequently, the port operator is under an obligation to remove any facilities owned by it on the land. Should the government or port authority wish to acquire any of these facilities, it may negotiate with the port operator whether any compensation will be paid for this transfer.

In the event of a (DBFM) PPP project, a transfer of the facilities to the government is generally part of the DBFM agreement. The transfer usually takes place through a transfer certificate in which all the requirements (eg, refurbishment) and procedures for the transfer of these assets are spelled out in detail.

Miscellaneous

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

In the event of a DBFM project, the Dutch government requires the parties involved to establish an SPV in the form of a private limited company. Although this is not required by law, this will normally be a private limited company incorporated in the Netherlands. If no DBFM structure is applied, port operators may in principle construct or operate a port without establishing an SPV.

38 Are ownership interests in the port operator freely transferable?

Generally, ownership interests in port operators are freely transferable. However, in the event that a new terminal were to be constructed

and operated pursuant to a DBFM agreement, this may be different. In accordance with a change of control provision in the model DBFM agreement, the transfer of ownership interests in the SPV may be subject to approval from the government entity (or port authority, if applicable). The commissioning authority may only refuse to grant this approval on limited predetermined grounds.

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

If external finance may be obtained under a PPP agreement, the port authority may agree to enter into a direct agreement with project financing banks. However, there have not been sufficient PPP port projects financed by banks to consider the direct agreement between the financing banks, contractors and the port authority as a standard approach.

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

This primarily depends on the contractual arrangement with the contractor. For example, with regard to the Maasvlakte II container terminal the port authority of Rotterdam has the right to terminate the contract in the event the terminal would cause a substantial shift of container volume from other terminals. A provision could be included that entitles the port authority to terminate the agreement at its convenience.

As a general principle under Dutch law, a party may request the judge to vary the agreement concluded in the event of unforeseen circumstances. This only applies if the circumstances are of such nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. Only in true exceptional circumstances will a court amend a contract on this basis. Although the parties cannot exclude this provision, the DBFM standard agreement contains an unforeseen circumstances provision with the aim of limiting the effect of this general principle of Dutch law.

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

These are often defined in the contract with the port operator. They vary from termination to variation or dissolution of the agreement. For certain breaches, liquidated damages may also be defined in advance. In DBFM contracts the remedies of the commissioning party are, however, restricted. The model contract restricts the remedies available to claiming specific performance before a competent court.

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

No, but usually this will be the case, as the model contracts used by the governments and their lawyers are based on the application of Dutch law. If banks are involved (DBFM), the loan documentation may be subject to English law.

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

Generally, dispute resolution clauses will be included in the concession or lease agreements, which may confer jurisdiction on a civil court, or alternatively on an arbitral panel, for disputes that arise from or in connection with the agreement at hand. The standard DBFM agreement contains a choice of forum clause in favour of the jurisdiction of a Dutch court. The parties may also be required to enter into preliminary dispute resolution procedures as a precondition to seeking a binding judgment from a civil court.

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