

# Ports & Terminals

*Contributing editor*  
**Alex Kyriakoulis**



**2016**

GETTING THE  
DEAL THROUGH

GETTING THE  
DEAL THROUGH 

# Ports & Terminals 2016

*Contributing editor*

**Alex Kyriakoulis**

**Holman Fenwick Willan LLP**

Publisher  
Gideon Robertson  
gideon.roberton@lbresearch.com

Subscriptions  
Sophie Pallier  
subscriptions@gettingthedealthrough.com

Business development managers  
Alan Lee  
alan.lee@lbresearch.com

Adam Sargent  
adam.sargent@lbresearch.com

Dan White  
dan.white@lbresearch.com



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

© Law Business Research Ltd 2015  
No photocopying without a CLA licence.  
First published 2015  
ISSN 2397-0316

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2015, be advised that this is a developing area.

Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



## CONTENTS

<b>Global overview</b>	<b>5</b>	<b>Nigeria</b>	<b>65</b>
Alex Kyriakoulis Holman Fenwick Willan LLP		Ben Unaegbunam Adepetun Caxton-Martins Agbor & Segun (ACAS-Law)	
<b>Australia</b>	<b>7</b>	<b>Panama</b>	<b>69</b>
Amanda Davidson, Christopher G Eves and Anne-Laure Bullier Holman Fenwick Willan LLP		Joel R Medina and Rudy Cedeño G Icaza, González-Ruiz & Alemán	
<b>Brazil</b>	<b>11</b>	<b>Paraguay</b>	<b>73</b>
Juliano Lazzarini Moretti and Renata Mendes Moreira Lima Lazzarini Moretti Advogados		Raúl Prono Toñanez and Juan Pablo Palacios Velázquez Palacios, Prono & Talavera	
<b>Canada</b>	<b>18</b>	<b>Peru</b>	<b>79</b>
Shelley Chapelski and Greg Lewis Bull, Housser & Tupper LLP		Francisco Arca Patiño and Carla Paoli Consigliere Estudio Arca & Paoli Abogados SAC	
<b>China</b>	<b>22</b>	<b>Russia</b>	<b>84</b>
Connie Chen and Joyce Fong Holman Fenwick Willan LLP		Alexander Mednikov Jurinflot	
<b>Croatia</b>	<b>27</b>	<b>South Africa</b>	<b>88</b>
Maja Dotlić and Gordan Stanković Law Firm Vukić & Partners Ltd		Andrew Pike, Mark van Velden, Norma Wheeler and Karl Laureau Bowman Gilfillan	
<b>Germany</b>	<b>33</b>	<b>Sri Lanka</b>	<b>93</b>
Benjamin Hub, Gernot-Rüdiger Engel and Imke Rohmert Luther Rechtsanwalts-gesellschaft mbH		Savantha De Saram and Jivan Goonetilleke DL & F De Saram	
<b>India</b>	<b>38</b>	<b>Turkey</b>	<b>97</b>
Krishan Singhania, SN Verma, Yadunath Bhargavan and Mayank Pradhan Singhania & Co		Esin Çamlıbel and Grace Maral Burnett TURUNÇ	
<b>Indonesia</b>	<b>43</b>	<b>United Kingdom</b>	<b>101</b>
Arfidea D Saraswati, Gabriella MC Ticoalu and Tara Priscilla Ogilvie Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)		Alex Kyriakoulis and Joseph Botham Holman Fenwick Willan LLP	
<b>Japan</b>	<b>48</b>	<b>United States</b>	<b>105</b>
Mitsunari Taketani Tagawa Law Office		Rupert P Hansen and Marc A Centor Cox, Wootton, Lerner, Griffin & Hansen LLP	
<b>Mexico</b>	<b>53</b>	<b>Venezuela</b>	<b>110</b>
Juan Carlos Serra and Rodolfo Barreda Basham, Ringe y Correa		José Alfredo Sabatino Pizzolante Sabatino Pizzolante Abogados Marítimos & Comerciales	
<b>Netherlands</b>	<b>60</b>		
Charlotte J van Steenderen and Sebastiaan H Barten Van Steenderen MainportLawyers BV			

# South Africa

Andrew Pike, Mark van Velden, Norma Wheeler and Karl Laureau

Bowman Gilfillan

---

## 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?

There are eight ports in South Africa, the most recently developed of which is Ngqura, 25km north of Port Elizabeth.

#### Richard's Bay

One of the world's leading bulk ports, Richard's Bay is a gateway port to the hinterland of Northern KwaZulu-Natal, Gauteng and Mpumalanga, with extensive rail links to these areas. The port comprises 23 berths, with bunkering facilities available at three of these, as well as bunker barge facilities. The port houses six cargo-handling terminals, as well as covered and open storage facilities. There is a repair berth at the small craft port.

#### Port of Durban

As South Africa's foremost multi-cargo port, the Port of Durban is a key trade gateway between Far East trade, South-South trade, East and West Africa regional trade as well as trade between Europe and the USA. The port boasts 58 berths, each with a freshwater pipeline, and contains several commercial fishing quays. Cruise traffic facilities are provided at the dedicated passenger terminal. The port provides a dedicated bunkering berth as well as dedicated ship repair facilities at a dry dock, two floating docks and a slipway. The port has a roll-on/roll-off terminal for car cargo, as well as several container terminals.

#### Port of East London

The only commercial river port on the South African coastline, the port consists of 11 commercial berths, with a dedicated grain terminal. Fuel and gas oil bunkering are available via road tanker.

#### Port of Ngqura

One of the fastest growing ports in the world, Ngqura handles industrial bulk for the hinterland, transshipment cargo and imports and exports from across the globe. The port mainly comprises container terminals, but a manganese loading facility is planned, coupled with the planned relocation of existing manganese facilities from Port Elizabeth.

#### Port of Port Elizabeth

This gateway port to expanding markets is ideally strategically positioned along the South African coastline. It comprises 12 berths, tug and fishing trawler jetties and a container terminal. The port handles dry bulk, liquid bulk and general cargo.

#### Port of Mossel Bay

Mossel Bay is a fishing port and the home of the Mossgas project which is owned by PetroSA, a state-owned company. It comprises five quays and two offshore mooring facilities, as well as a multipurpose general cargo berth.

#### Port of Cape Town

This container and general cargo port is known for fruit and fish exports. The port comprises 34 berths, sophisticated fishing vessel facilities for processing catches and maintenance of the world fishing fleet, an Agri and

roll-on/roll-off terminal as well as bunkering facilities at some berths and via barge.

#### Port of Saldanha

This multipurpose, iron ore and crude oil port houses five berths, two fishing quays for vessels, fishing vessel repair facilities, semi-automated cargo handling facilities for the crude oil and iron ore terminals as well as dry bulk and general cargo storage facilities. Additional liquid bulk storage and processing facilities are planned.

---

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

The principal port reform which has taken place arose in 2005 with the promulgation of the National Ports Act No. 12 of 2005 (the NP Act) together with its Regulations. This only came into effect in 2006 and redefined the role of the national port authority, the Transnet National Ports Authority (TNPA) and directed the latter to corporatise (ie, unbundle) from the parent company, Transnet SOC Limited (Transnet), which is a multi-divisional state-owned company (SOC) involved in logistics of ports, terminals, rail and pipelines. In addition, the NP Act introduced a new independent ports regulator, the Ports Regulator of South Africa (PRSA) responsible for:

- monitoring the activities of the TNPA;
- economic regulation;
- determining complaints against the TNPA by port users and hearing appeals by port users against decisions of the TNPA;
- fostering competition within the ports.

All of the ports in South Africa are landlord models. A new port is currently being planned at the site of the old Durban International Airport (just south of the existing port of Durban: the Durban dig-out port or DDOP) and is likely to be operational in 2025.

---

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

Policies such as South Africa's 'White Paper on National Environmental Management of the Ocean' (2014), 'National Development Plan 2030' (2012) and 'National Commercial Ports Policy' (2002) express the commitment of the South African government to develop the ocean economy.

Operation Phakisa is a government initiative to stimulate development in targeted areas, including marine transport and manufacturing activities such as shipbuilding, repair and refurbishment. Port development initiatives to arise from Operation Phakisa include plans to pursue inter alia the construction of a deep-water oil rig repair facility at Saldanha Bay, and the establishment of a vessel repair facility at Richards Bay.

---

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

There are eight key areas of port environmental sustainability: dredging, ballast water, habitat restoration, air quality, water conservation, energy conservation, material conservation and waste handling. The National Environmental Management Act 107 of 1998 (NEMA) promotes the environmental principles of equitability and sustainability, and regulates activities and aspects such as these key areas.

Section 24 of NEMA provides for the creation of the National Environmental Management - Environmental Impact Assessment Regulations 2014 (NEM-EIA). In order to give effect to the principles of integrated environmental management in NEMA, the impact on the environment of certain listed activities must be reported to the relevant authority and an environmental authorisation obtained before the commencement of such activities. As part of the NEM-EIA listing notices, Activity 26 in listing notice 2 of 2014 (Activity 26) relates to the development of ports. The listed activities therein require environmental authorisation from the Minister of Environmental Affairs (being the competent authority) following all the stringent authorisation requirements of NEMA, before commencement.

The NP Act vests the TNPA with the responsibility to develop the ports while balancing the need for environmental sustainability. The TNPA has an overarching environmental policy which it encourages each port to follow verbatim, or implement into its own environmental management system, following the guidelines of ISO 14001 (an internationally accepted framework for the creation of an environmental management system). In light of this, many ports have their own purpose-suited policies in terms of issues such as ballast water regulations and dredging regulations.

The TNPA requires each port to develop a strategic environmental assessment of their port regarding development plans, in accordance with the Department of Environmental Affairs guidance document for Strategic Environmental Assessments.

The TNPA ensures that any listed activities in the NEM-EIA are properly evaluated and are not commenced before proper authorisation is obtained. This policy is enforced on port tenants and terminal operators contractually, through lease agreements and the like, wherein they are obliged to inform the TNPA of any intention to engage in a listed activity and follow the environmental authorisation process.

Chapter 4 of the Ports Rules in terms of the NP Act provides for general environmental regulations applying to all ports in South Africa including prevention of pollution, deposit of harmful matter (including oil), cleanliness of the quayside, adherence to ballast water management plans, waste reception facilities, compliance with waste management plans, vessel emission regulations and protection of wildlife.

## Legislative framework and regulation

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

The legislation governing port development and operations in South Africa is the NP Act. In terms of section 10(1) of the NP Act, all ports in South Africa fall within the jurisdiction of the TNPA. The TNPA's main function in terms of section 11(1) is to 'own, manage, control and administer ports', and in so doing it must inter alia 'plan, provide, maintain and improve port infrastructure'. The government has no general powers in relation to privatisation or PPP in the port sector.

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

The regulatory system is somewhat complicated. Prior to the coming into force of the NP Act in 2006, the TNPA was the landlord for all ports. Transnet Port Terminals (TPT - another division of Transnet) was (and remains) the operator of many of the terminals, including the various container terminals at different ports. TNPA is self-regulated and was and remains the regulator of TPT. To an extent, it regulates other activities within the port.

In 2006 the PRSA was constituted. This is an independent regulator whose role is inter alia to monitor and oversee the activities of the TNPA only. The PRSA is also responsible for economic regulation of the ports and the TNPA requires PRSA approval of its tariffs each year. The PRSA has ancillary functions of regulating competition in the ports and regulating the provision of adequate, affordable and efficient port services and facilities. Most of this is done in the context of its regulation of the TNPA. The difficulty, however, is that the PRSA has no jurisdiction over TPT, meaning that the only regulation of the tariffs of the latter is by TNPA, which sits within the same corporate stable as TPT. Despite the fact that the NP Act requires the TNPA to corporatise soon and thereby obtain a measure of independence from TPT, for pragmatic and historical reasons this has never happened.

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

The NP Act vests the TNPA with powers and responsibilities with regard to port development and maintenance. The TNPA is also charged with providing marine-related services out of the ports, such as providing infrastructure for containers, dry bulk, liquid bulk, break bulk and the automotive industry; as well as dredging, aids to navigation, ship repairs and marine operations. As part of the provision of these services, the TNPA manages port activities and fulfils each port's regulatory function, making licensing agreements with operators of port facilities in order to facilitate service delivery. Lastly, the TNPA is responsible for navigation and assistance of the manoeuvring of vessels within each port's limits and along the coast.

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

In terms of section 26 of the NP Act, the CEO of the TNPA may appoint such persons as he or she deems fit for proper discharge of the functions of the authority. There are internal procedures followed by the TNPA with regard to their hiring policies, but it is ultimately the CEO who makes the final decision, as mandated by the NP Act.

Section 74(3)(a) of the NP Act further lays out the functions and discretionary powers of the harbour master, as well as providing a functional definition of his or her position.

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

No. The Competition Commission (constituted under the South African Competition Act 89 of 1998) and the PRSA have concurrent jurisdiction over port-related competition issues.

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

The tariffs of the TNPA are regulated by the PRSA. In August of each year, the TNPA must submit its tariff proposal to the PRSA. The latter then subjects the proposed tariff to a public consultation process pursuant to which the PRSA explains and opens to public debate the methodology to be utilised in determining the tariff. In principle, the tariff is determined with regard to a regulated asset base of the TNPA and allows the TNPA an overall revenue requirement which includes an allowance in the weighted average capital cost element of the methodology for risk undertaken by the TNPA in its investment. The PRSA then allows a percentage increase in the total revenue required by the TNPA, which is then reallocated by the TNPA among port users. The PRSA has recently released a position paper on tariff strategy which is intended to be an industry agreement on the percentage allocation of particular tariffs among the lease holders, shipping lines and other port users. For example, the tariffs pertaining to vessel repair infrastructure are proposed to be apportioned as to 40 per cent by lessees, 15 per cent by terminal operators, 15 per cent by cargo owners and 30 per cent by shipping lines.

Tariffs are collected through ships agents acting on behalf of the shipping lines and cargo interests at the ports who pay for cargo dues and marine services. Tariffs payable by lease holders are collected indirectly through rentals.

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

The state has public service obligations imposed on it by the NP Act, through the vehicle of Transnet (being a SOC). The obligations of the TNPA are discussed in question 7.

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

Section 56 of NP Act allows Transnet to enter into agreements in relation to inter alia design, financing, construction and operation of port terminals or facilities, and for the provision of services at a terminal or in the port generally.

Transnet may enter into such a joint venture subject to the provisions of the Public Finance Management Act (1 of 1999) (PFMA). The PFMA requires that before concluding any 'significant' joint venture, partnership or similar transaction Transnet must notify the National Treasury and seek approval from its executive authority, the Minister of Transport. There is no statutory guidance for determining what would qualify as 'significant'. Nor is there any statutory minimum or maximum percentage threshold for Transnet's stake, but where the venture is to be involved in performing functions which the TNPA is obliged to perform under the NP Act (which it is not empowered to delegate), Transnet would have to retain control of the venture (similar to majority shareholding or voting rights in a company).

### 13 Are there restrictions on foreign participation in port projects?

There are no specific restrictions on foreign participation in port projects. However, it is very likely that Broad Based Black Empowerment (B-BBEE) would be taken into account, as per Transnet's supply chain policy. The B-BBEE Act 53 of 2003 and codes of good practice issued in terms thereof are aimed at promoting the participation of black South Africans in ownership and management structures of enterprises. The act provides that every organ of state and public entity must take into account and apply any relevant code of good practice in developing and implementing a preferential procurement policy. An explanation of the B-BBEE laws is beyond the scope of this publication.

## Public procurement and PPP

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

It is general.

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

Firstly, the limited extent to which port privatisation is currently allowed under the NP Act is discussed in question 12.

Secondly, Transnet's default position is that a formal tender is required. Transnet's supply chain policy provides that in 'material and compelling circumstances' the Board Acquisition and Disposal Committee may authorise a deviation from the policy.

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

To our knowledge, there have been no port concessions or port joint venture agreements in any of the ports of South Africa. Terminal concessions are possible and a number of privatised terminals operate in South Africa.

In compliance with the NP Act and PFMA Act, the TNPA or Transnet procurement guidelines usually require a tender process. The principal criteria which the TNPA would follow in awarding terminal concessions are:

- fairness and transparency;
- social equity, including B-BBEE and preferential procurement; and
- value for money in terms of competitiveness and cost effectiveness.

A detailed request for a proposal specifying the requirements of the TNPA and inviting the submission of bids will be published. Basic common qualifying criteria are the submission of an original tax clearance certificate and a certificate issued in terms of the B-BBEE Act certifying the level of the applicant's contribution to B-BBEE in accordance with various criteria. Foreign entities, without a B-BBEE score, wishing to tender, will often seek to partner with a B-BBEE-compliant local company.

Having said that, it is conceivable that the new proposed Durban dig-out port will be awarded on a build-own-operate-transfer (BOOT) (or similar) concession basis. Although no criteria have yet been stated, we would nonetheless expect the same or similar criteria to be followed.

The last port project undertaken was that of the Port of Ngqura which was financed and built exclusively by Transnet. The TNPA was appointed as the landlord in accordance with the Port of Ngqura Development Act No. 77 of 1998. The planned Durban dig-out port may or may not follow the same model, but if it does not then it will likely be a build-operate-transfer (BOT), BOOT or similar model.

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

There is no model PPP agreement. The PPP Unit of the National Treasury has, however, issued Standardised PPP Provisions in its Practice Note No. 1 of 2004. While these provisions are not applicable to the TNPA, the provisions set the bar for best practice and we would therefore expect the TNPA to be guided by the provisions.

The provisions describe the key issues likely to arise in a PPP and provide how these should be dealt with in a PPP agreement. These are general and not specific to port projects.

The provisions identify circumstances where an approach to an issue is not prescribed, but rather recommended or suggested (based on value for money considerations).

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

No specific law needs to be passed (unless an entirely new port is to be developed).

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

Up until the present date, all port projects have been fully developed by Transnet or its state-owned predecessors, so there is no current precedent for any new port project other than fully funded, built and operated by the state or a parastatal organisation.

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

No. A definite term is likely to be agreed based on, among other things, the time required for the operation of the facility to generate sufficient financial return for the project to pay for itself and to make the PPP sufficiently profitable to be attractive to the parties participating. We do not believe that one could point to an average term, but in relation to a capital intensive port project our view is that the term is likely to be anything from at least 20 to 30 years.

### 21 On what basis can the term be extended?

The PPP agreement might contain contractual terms for renewal or extension of the agreement.

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

Fixed land rents are collected from lease holders within the port precinct. In addition, the following tariffs are collected by the TNPA:

- cargo dues;
- port dues, covering all marine costs;
- vessel traffic services charges;
- berthing services and running of lines;
- tug assistance;
- pilotage;
- light dues;
- passenger levy; and
- port service licence and permit fees.

In addition, the terminals themselves charge terminal handling costs.

All TNPA tariffs are reviewed annually by the PRSA (see question 10). TPT tariffs are regulated by the TNPA. Other terminals self-regulate.

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

The government might, but is unlikely to issue guarantees. Exclusivity would only be granted where the circumstances would not render this anti-competitive, for example where the contract is for the construction and operation of a port or port facility, as opposed to the provision of port services.

---

**Port development and construction**


---

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

As discussed above, concessions are not currently given to port operators, but rather are given to terminal operators. Any terminal operator or indeed port service provider may tender to operate in response to an invitation from the TNPA. Public procurement is explained in question 16. It is possible that a specific concession will be given to the operator of the DDOP. Failing a concession, legislative approval would need to be granted, depending on the circumstances. (See question 28 for more on legislative approval.)

In terms of the NEMA, environmental impact assessments must be conducted for new development projects and such assessments must be approved by the Department of Environmental Affairs. See question 4 for further details.

There are so many variables that no general timeline can be given for obtaining the requisite approvals before construction can commence.

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

In terms of the NP Act, it is the duty of the TNPA to 'plan, provide, maintain and improve port infrastructure.' A terminal owner or operator will be responsible for infrastructure to the extent that it is specific to the terminal. Depending on the size of a port project, one could expect to see the TNPA undertake construction or financing of at least some portion thereof. The government would typically attend to hinterland access through PPPs, SOCs or private concessions.

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

Whether a terminal operator can appoint any contractor it wishes depends on the terms of its licence and the project in question. Generally, private terminal operators can appoint any contractors they wish. Any development in South Africa must be constructed in accordance with the National Building Regulations and Building Standards Act 103 of 1977.

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

Typically the relevant construction contracts will specify the available remedies. Contractual penalties and the customer's right to terminate are usually negotiated to cover delays attributable to the building contractor. In the event of defects, construction contracts will often provide that the customer can require the building contractor to remedy the defects at the contractor's expense or the customer can remedy the defect and claim the costs of the contractor.

---

**Port operations**


---

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

In terms of existing ports defined as such in the NP Act, the TNPA, being a quasi-governmental statutory body exercising exclusive competences of a sphere of government, does not require any government approvals to commence operations.

A new port would need to be determined by proclamation by the Minister of Transport in terms of section 10(2) of the NP Act naming it a port, as defined. In this situation the only bar to commencement would be this proclamation. In terms of a completely newly constructed port however, this would not fall within the definition of a port in terms of the NP Act, and before operations could commence new legislation defining and regulating it as such would have to be promulgated.

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

Terminal operators are typically liable for rental, and port users are liable to pay the TNPA for services rendered such as pilotage. The tariffs charged

to port users are listed in question 22 and the services provided by the TNPA are described in question 7.

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

There is insufficient precedent for PPPs in the port sector to provide a firm answer to this question. Where ports are TNPA-owned and operated, the state usually attends to hinterland access. We believe that at a commercial level such commitments would need to be made in any PPP agreement being put out to tender where the scale of the investment or success of the venture are significantly dependent on such access (which in the case of rail, at least, is within the control of Transnet). Requirements for the financing of such infrastructure would depend on the circumstances prevailing (such as the transport links already in place) and the commercial realities.

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

The NP Act provides as follows in respect of the oversight duties of the TNPA.

The latter is obliged to ensure that any concession to a port service provider must provide for monitoring and annual review of operational performance. Terminal operators are required to periodically submit to the TNPA a detailed report of licensed operations during that financial year, including the quality and level of services provided. The TNPA is empowered to conduct routine inspections and furthermore terminal operators are required to report incidents material to operations, such as labour disputes, fire and pollution.

The TNPA may cancel or for a reasonable period suspend a licence of a terminal operator if the terminal contravenes or breaches any condition of its licence in particular defined circumstances.

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

These aspects are legislated in the NP Act. During office hours a representative may enter 'any premises occupied by a licensed operator to inspect any activity, process, building or facility therein.'

The TNPA can take over operations if it has suspended or cancelled the licence of an operator and 'it considers that such cancellation or suspension would materially affect the movement of cargo or passengers in a port.'

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

In terms of general contractual principles, the TNPA would be entitled to cancel the contract for a material breach and sue for specific performance or loss arising from the breach. This would be in addition to rights in terms of the NP Act with regard to suspension or cancellation of operating licences outlined in questions 31 and 32.

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

Currently, leases between the TNPA and terminal operators or port facilities usually provide for a tenant to waive any claim for improvements made to the leased property.

---

**Miscellaneous**


---

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

An operator would be permitted, but not required, to operate via an SPV, but the SPV would probably be required to provide parent company guarantees. It would not need to be incorporated in our jurisdiction.

**36 Are ownership interests in the port operator freely transferable?**

No. There is no precedent for anyone other than the TNPA to be a port operator, and the TNPA is ultimately state owned. Conceivably Transnet could be sold by the state. The NP Act does not contemplate anyone other than the TNPA as a port operator and does not permit the TNPA to contract out or license its core functions under section 11, namely to 'own, manage, control and administer' ports.

Sections 56 and 57 permit contracting out the operation of terminals or facilities within the port, but not the port as a whole. Amendments to the legislation would be required to permit operation of the port generally by anyone other than the TNPA. In terms of operators of port terminals or facilities, there is no general restriction on a change in ownership of the operator, although section 58(2)(a) empowers the TNPA to make limitation on such transfer a condition of the licence.

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

To our knowledge, the TNPA, as the port authority, has never entered into a PPP agreement in respect of a port. It is therefore not possible to answer this question categorically, but we see no reason why in particular circumstances a PPP with the TNPA should not provide substitution rights for the benefit of the lenders, provided that the TNPA approves of any substitute nominated.

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

Section 56 of the NP Act sets out the criteria for the awarding of a port facility operator's licence. The licence will typically be granted on a concession basis over a fixed term. The concession is subject to normal concessionary contractual terms and only a material breach by the concession holder which is not cured in terms of the dispute resolution procedure in the concession agreement will permit the variation or termination of the agreement. The rights of the concession holder will be protected in terms of South African common law, the NP Act and the Constitution of South Africa.

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

See paragraph 33.

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

Yes.

**Update and trends**

Certain small fishing harbours were recently identified by the government for rehabilitation, upgrading and redevelopment. There was also an announcement that new harbours would be developed. This initiative might herald the declaration of some of those harbours as ports. This, together with the recent expansion of the new port of Ngqura (which commenced commercial operations in 2009), plans for the DDOP and the current Operation Phakisa port development initiative being promoted by the government, suggests a trend towards expansion of the port network in South Africa, and the central role of Transnet (through the TNPA) as a port authority. With the growing reluctance of the government to plough further investment into SOCs, and reconsideration by the ruling party of its stance on privatisation, we foresee a possible opening up of port development and operation to private interests via PPPs.

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

Any dispute between the government and the ports authority are generally informally resolved in discussion at executive level and (ultimately) ministerial level with the executive of the port authority, the TNPA. As the port authority is part of Transnet, a SOC, and also the operator of the port, this dispute resolution procedure remains the customary dispute resolution method. Having said that, most SOCs usually have a confidential 'shareholder compact' (or agreement) with the oversight ministry which would typically contain some sort of dispute resolution procedure. As a last resort, the parties could make use of the courts, but this would be most unusual.

Technically, the government could make use of the PRSA to resolve disputes with the TNPA, but as the latter is a division of a SOC, it is largely open to the state to dictate policy as necessary. In addition, the TNPA would fall under the jurisdiction of a sitting parliamentary portfolio committee which would have an oversight role and should be able to resolve disputes which arise with government.

To the extent that disputes arise between the TNPA and the principal terminal operator, TPT, again this is usually resolved in-house at executive level between the executives of the TNPA and TPT. Technically it could, however, be referred to arbitration pursuant to the licence agreement between the TNPA and TPT. It is understood that the government is currently formalising aspects of its SOC framework, which is expected to include dispute resolution procedures.

All other disputes between port users, private terminal operators and the TNPA may be resolved through the office of the PRSA which has a sitting tribunal. Unfortunately, although the PRSA can give directions, interdict actions on the part of the TNPA and so on, the only way that these can be enforced is if an order of the PRSA is made an order of court by way of a formal application. The PRSA has no enforcement procedures in its own right. The referral of complaints against and disputes with the TNPA to the PRSA is not mandatory and may be resolved through court or arbitration procedures, as each situation presents itself.

**BG** Bowman Gilfillan  
AFRICA GROUP

Andrew Pike  
Mark van Velden  
Norma Wheeler  
Karl Laureau

a.pike@bowman.co.za  
m.vanvelden@bowman.co.za  
n.wheeler@bowman.co.za  
k.laureau@bowman.co.za

165 West Street  
Sandton  
Johannesburg 2146  
South Africa

Tel: +27 11 669 9000 / +27 31 265 0651  
Fax: +27 11 669 9001  
www.bowman.co.za



## Getting the Deal Through

Acquisition Finance	Dominance	Licensing	Real Estate
Advertising & Marketing	e-Commerce	Life Sciences	Restructuring & Insolvency
Air Transport	Electricity Regulation	Loans & Secured Financing	Right of Publicity
Anti-Corruption Regulation	Enforcement of Foreign Judgments	Mediation	Securities Finance
Anti-Money Laundering	Environment & Climate Regulation	Merger Control	Securities Litigation
Arbitration	Executive Compensation & Employee Benefits	Mergers & Acquisitions	Ship Finance
Asset Recovery	Foreign Investment Review	Mining	Shipbuilding
Aviation Finance & Leasing	Franchise	Oil Regulation	Shipping
Banking Regulation	Fund Management	Outsourcing	State Aid
Cartel Regulation	Gas Regulation	Patents	Structured Finance & Securitisation
Construction	Government Investigations	Pensions & Retirement Plans	Tax Controversy
Copyright	Healthcare Enforcement & Litigation	Pharmaceutical Antitrust	Tax on Inbound Investment
Corporate Governance	Initial Public Offerings	Private Antitrust Litigation	Telecoms & Media
Corporate Immigration	Insurance & Reinsurance	Private Client	Trade & Customs
Cybersecurity	Insurance Litigation	Private Equity	Trademarks
Data Protection & Privacy	Intellectual Property & Antitrust	Product Liability	Transfer Pricing
Debt Capital Markets	Investment Treaty Arbitration	Product Recall	Vertical Agreements
Dispute Resolution	Islamic Finance & Markets	Project Finance	
Distribution & Agency	Labour & Employment	Public-Private Partnerships	
Domains & Domain Names		Public Procurement	

Also available digitally



# Online

[www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)



# iPad app

Available on iTunes



Ports & Terminals  
ISSN 2397-0316



THE QUEEN'S AWARDS  
FOR ENTERPRISE:  
2012



Official Partner of the Latin American  
Corporate Counsel Association



Strategic Research Sponsor of the  
ABA Section of International Law