

Ports & Terminals

Contributing editor
Alex Kyriakoulis



2017

GETTING THE
DEAL THROUGH

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South Africa

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

Bowmans

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, 25 km north of Port Elizabeth. This was established in 2003 following the promulgation of the Port of Ngqura Establishment Act No. 77 of 1998.

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.

Development of an LNG terminal (land-based and or floating (FRSU)) and additional bulk capacity, as well as the expansion of the South Dunes precinct, the addition of a new liquid bulk terminal and the acquisition of new tugs are planned for the port in the period leading up to 2022, which additions are estimated at the value of R3,7 billion. A new ship repair terminal, dry dock and dig out basin are also on the horizon.

Durban

As South Africa's foremost multi-cargo port, this is a key trade gateway between Far East trade, South-South trade, and East and West Africa regional trade, as well as trade between Europe and the United States. The port boasts 58 berths with a fresh water pipeline to all berths 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 dock, two floating docks and a slipway. The port has a ro-ro terminal for car cargo, as well as several container terminals. The entrance channel to the port has been widened and deepened to allow safer navigation for vessels up to 9,200 TEUs.

As part of the mapped out infrastructure projects for the next 10 years, several planned expansions or upgrades are in the pipeline for the port of Durban. These include the expansion of Durban Container Terminal (DCT) Pier 1; deepening and lengthening of DCT Pier 2 to safely accommodate larger neo-Panamax vessels and sustain terminal capacity; the creation of further container capacity at other terminals such as the ro-ro and Maydon Wharf terminals through the acquisition of new equipment, including mobile cranes and various infrastructure upgrades; the infill of the Salisbury Island Naval base; upgrading of the dry dock; and the reconstruction of the sheet pile quay walls for berths 12, 13 and 14. Future plans include a new dedicated passenger terminal and tug jetty. The port will further acquire three new dredgers and eight tugboats.

The proposed dig-out of the old Durban international airport to create a new container and bulk liquid port has been put on hold until 2032.

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 and the port provides a multi-purpose container terminal and refurbished ship repair facility.

Planned in the short term is the acquisition north of the multi-purpose container terminal for back-of-port operations. In the medium term, lengthening the main breakwater, adding a new secondary breakwater and deepening the channel entrance are all planned.

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 comprises mainly of container terminals, but a manganese loading facility is planned, coupled with the planned relocation of existing manganese facilities from Port Elizabeth.

Development of a bulk minerals (including manganese) export terminal worth an estimated R8 billion is currently under way as part of the relocation of the Port Elizabeth manganese facilities, with two existing deep water berths to be equipped for this purpose in the short term. The port will gain two 70-80 ton bollard pull tugs in the short term. Looking further into the future, the dig out of the Coega River valley is planned in order to create six additional liquid bulk berths and access to a new tank farm and liquid bulk terminal. This expansion would include four new liquid bulk berths in anticipation of a relocation of liquid bulk facilities from Port Elizabeth in 2019.

The port has also been identified as a potential site for a land-based LNG terminal and possibly also a FRUSU.

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.

With the planned relocation of the manganese ore and liquid bulk facilities to the Port of Ngqura, new space for development has opened up. In the short term, relocation of the car handling facility from the Charl Malan quay to the old manganese site is planned. Maritime commercial activity, fishing and break-bulk terminals are also on the map for expansions, with land adjacent to the port's south-east boundary to be absorbed into the port for back-of-port activities. In the medium term, there are plans to expand the container terminal, including the deepening of the three container berths and reconfiguring of one terminal for rubber tyre gantry stack operations. In the long term, the addition of a new seaward basin is planned.

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.

Short-term development plans include the acquisition of land south of the port, as well as transformation of the quayside previously occupied by fishing activities for maritime commercial, commercial logistics and back-of-port activities. In the medium term, a new

small-craft harbour is planned for construction along with a breakwater. Long-term plans include the potential lengthening of the existing main breakwater.

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 ro-ro terminal as well as bunkering facilities at some berths and via barge. One of the defining features of the port's fishing vessel repair facilities is the synchrolift, which is mostly used to transfer fishing vessels from a raisable platform into a repair yard.

A new luxury cruise terminal is planned, entailing an estimated investment of 179 million rand. Once completed the new terminal will accommodate the port's current and future passenger vessel fleet. The upgraded facility will also house retail and hospitality services. Medium-term plans for the harbour include expanding the container stacking seaward with additional berths in the Schoeman Basin and in the long term there are plans to build an outer basin. Short-term plans include the expansion of the container terminal to increase capacity and the expansion of the landside area of the harbour for ship repair, as well as the development of 160 hectares of the Culemborg site for back-of-port commercial logistics.

The harbour's new and independent fuel storage and distribution facility (Burgan) is the first project under the government's Operation Phakisa programme to be implemented, with 650 million rand to be invested over the first two years of development. Environmental approval for the terminal has been granted, and it is due to be completed in 2017; it will be used for the storage and distribution of both locally produced and imported fuels.

Saldanha Bay

This multipurpose iron ore and crude oil port houses five berths, two fishing quays for vessels, fishing vessel repair facilities and 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.

A planned investment of 9.2 billion rand by a public-private partnership (PPP) will see Saldanha Bay established as an oil and gas hub. Construction on a crude oil terminal worth 3.1 billion rand has begun and is expected to be completed by the fourth quarter of 2017. Work has also begun on an offshore supply base, which will lead to the port attracting oil rigs for maintenance and repair. A concession has been awarded to a private entity to build and operate an LPG terminal. The latter is planned to be brought online during the second quarter of 2017. The port has also been identified as a potential site for a land-based LNG terminal and possibly also an FRSU.

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 occurred 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, Transnet National Ports Authority (TNPA) and directed the latter to corporatise: that is, unbundle from the parent company, Transnet SOC Limited (Transnet), which is a multi-divisional state-owned company (SOC) involved in the 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 TNPA;
- economic regulation;
- determining complaints against TNPA by port users and hearing appeals by port users against decisions of TNPA; and
- fostering competition within the ports.

All of the ports in South Africa are landlord models.

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 developing the ocean economy.

Operation Phakisa is a government initiative to stimulate development in targeted areas, including marine transport and manufacturing activities, such as ship building, 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 of these key areas.

S24 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 TNPA with the responsibility to develop the ports whilst balancing the need for environmental sustainability. 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.

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.

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 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 TNPA, 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, 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 TNPA only. The PRSA is also responsible for economic regulation of the ports and TNPA requires PRSA approval of its tariffs each year. 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 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 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 TNPA with powers and responsibilities with regard to port development and maintenance. 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, TNPA manages port activities and fulfils each port's regulatory function, making licensing agreements with the operators of port facilities in order to facilitate service delivery. Lastly, 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 harbourmaster for a port in your jurisdiction appointed?

In terms of s.26 of the NP Act, the CEO of 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 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 harbourmaster, as well as providing a functional definition of the 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 jurisdictions and how are tariffs collected?

The tariffs of TNPA are regulated by the PRSA. In August of each year TNPA must submit its tariff proposal to 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 having regard to a Regulated Asset Base (RAB) of TNPA and allows TNPA an overall revenue requirement which includes an allowance in the weighted average capital cost (WACC) element of the methodology for risk undertaken by TNPA in its investment. The PRSA then allows a percentage increase in the total revenue required by TNPA which is then reallocated by TNPA amongst port users.

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 an SOC). The obligations of 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 the 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 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 Broad-Based Black Economic Empowerment (B-BBEE) would be taken into account, 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 the 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 award 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, TNPA or Transnet procurement guidelines usually require a tender process. The principal criteria which 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 proposal specifying the requirements of 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.

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 TNPA, the provisions set the bar for best practice and we would therefore expect 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 para-statal 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, amongst other things, on 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 TNPA:

- cargo dues;
- port dues, covering all marine costs;
- vessel traffic services (VTS) 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 (THC).

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, currently concessions are not given to port operators, but are rather given to terminal operators. Any terminal operator or indeed port service provider may tender to operate in response to an invitation from 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. Refer to 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 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 TNPA undertake the 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 delay 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 thereof from 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, 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.

Update and trends

Operation Phakisa has seen the rise of terminal developments, which are key items on the government agenda, and of Transnet. Substantial progress on terminal projects described above, such as Cape Town's fuel storage facility, Saldanha's LPG terminal and the proposed LNG terminals in one or more ports suggest that South Africa is open for business, with commitment being shown from the public and private sectors.

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 TNPA for services rendered such as pilotage. The tariffs charged to port users are listed at question 22 and the services provided by TNPA are described at 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 and 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 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 periodically to submit to TNPA a detailed report of licensed operations during that financial year, including the quality and level of services provided. 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.

TNPA may cancel or for a reasonable period suspend the 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.'

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, 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 the suspension or cancellation of operating licenses 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 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 TNPA to be a port operator and TNPA is ultimately state owned. Conceivably Transnet could be sold by the state. The NP Act does not contemplate anyone other than TNPA as a port operator and does not permit TNPA to contract out or licence 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 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 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, TNPA, as the port authority, has never entered into a PPP agreement in respect of a port. It is not therefore possible to answer this question categorically, but we see no reason why in particular circumstances a PPP with TNPA should not provide substitution rights for the benefit of the lenders, provided that 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?

Refer to question 33.

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

Yes.

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, TNPA. As the port authority is part of Transnet, an 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 so-called 'shareholder compact' – an 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 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, 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 TNPA and the principal terminal operator, TPT, again this is usually resolved in-house at executive level between the executives of TNPA and TPT. Technically it

could, however, be referred to arbitration pursuant to the licence agreement between TNPA and TPT. It is understood that 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 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 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 in its own right has no enforcement procedures. The referral of complaints against and disputes with TNPA to the PRSA is not mandatory and may be resolved through court or arbitration procedures, as each situation presents itself.



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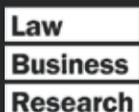
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