

# Sri Lanka - Getting the Deal Through – Ports & Terminals 2017

Authors - Savantha De Saram and Jivan Goonetilleke

## ***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?***

In Colombo there are mainly container operations:

- transshipment and domestic;
- general cargo;
- liquid and dry bulk (refineries, gas terminals – mainly via SPBM);
- bunkering ship repair;
- ship building;
- crew changes;
- ship chandelling and anchorage services; and
- off port and in port bunkering services. In Galle there are the following:
- bulk cargo;
- ship chandelling;
- off port services for crew changes;
- supplies;
- leisure craft;
- armed guard transfers via launches; and
- armoury (floating) and bunkering services

In Magampura Port, Hambantota, there are generally vehicles (rollon/roll-off vessels) at present. However, in the future, bunkering, supplies, ship repair, shipbuilding and crew change facilities will also be provided at this port. In Trincomalee there are bulk cargo (wheat and clinker mainly) and bunkering.

## ***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 creation of the Magampura Port in Hambantota is the latest addition to the international commercial ports in Sri Lanka. The establishment of privately run container terminals, especially at the Port of Colombo (South Asia Gateway Terminals (SAGT) and Colombo International Container Terminals (CICT)) has further revolutionised the port operation process. Such terminals operate on a leasehold basis from the Sri Lanka Ports Authority (SLPA) for a period of not more than 35 years, and are generally operated through a special purpose vehicle (SPV) in which a minority stake is held by the SLPA on behalf of the government of Sri Lanka.

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

State policy has evolved in relation to the main international ports from that of strict operation by the public sector to the opening of investment and operational opportunities to the private sector (including foreign entities) on a PPP-based model.

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

Presently there are no requirements imposed on either of the international ports to adhere to green port principles. However, the Magampura Port at Hambantota has been constructed as a green port and steps have been implemented by the SLPA for new developments at the Port of Colombo to be implemented in accordance with 'green port' standards. Legislative framework and regulation

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

There is no specific legislative framework governing port or terminal development or operation. All ports and port lands fall under the ownership and purview of the SLPA in terms of the SLPA Act. However, there has been a recent shift in policy towards private sector developed and operated terminals at the port of Colombo founded on a build– own–operate–transfer (BOOT) model with the SLPA through a SPV in which a minority stake will generally be held by the SLPA on behalf of the government of Sri Lanka.

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

All ports and port lands come within the domain and purview of the SLPA, under the terms of the SLPA Act.

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

The SLPA is granted wide and far-reaching powers by statute in relation to the owning of port land and the development, maintenance, operation and supply of other services relative to all ports in Sri Lanka. Basically all matters concerning ports and port lands fall within the purview of the SLPA, who, in addition to being the owners of all ports, operate them (in some instances in competition with private operators such as the JCT Terminal at Colombo, which is wholly operated by the SLPA).

**8. *How is a harbor master for a port in your jurisdiction appointed?***

The harbor master of each port is an employee of the SLPA and is appointed by the chairman and board of directors of the SLPA. In practice, the main harbor master is based at the port of Colombo, with all other harbor masters being ranked as deputy harbor masters who report to the harbor master at the port of Colombo.

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

Previously the implementation and regulation of such national competition practices came under the purview of the Public Utilities Commission of Sri Lanka, a public body incorporated by statute. Subsequently all anti-competition practices have been removed by the Consumer Affairs Authority Act. The Minister in Charge of Ports is empowered under the terms of the SLPA Act to issue regulations in relation to such rules and practices applicable to port operations. However, no regulations have been issued to date.

**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?**

There are no specific laws or regulations relating to the imposition of tariffs. Port tariffs are published by the SLPA from time to time and are applicable to terminals operated by the SLPA. Terminals operated by private entities are not bound by the SLPA tariffs and are entitled to impose and collect their own tariffs directly from service users.

**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 operation of ports is classified as an essential service, and the SLPA is under an obligation to make such services available to the Sri Lankan public without hindrance. The SLPA is empowered to enter into a contractual arrangement with the private entity in relation to the provision of port services based on negotiated terms including port access and development of such access facilities.

**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?**

The SLPA is empowered to enter into agreement with a private entity in relation to the development or operation of a port. Such a project is generally undertaken through an SPV incorporated for this purpose. The previous policy was for the majority stake in the SPV to be held by the SLPA on behalf of the government of Sri Lanka. However, pursuant to a change in policy the SLPA and government of Sri Lanka will confine its stake to 15 per cent. This is the PPP model for the proposed implementation of the East Container Terminal at the Port of Colombo.

**13. Are there restrictions on foreign participation in port projects?**

Foreign participation in port-related projects could be restricted by convention, which reflects the prevalent governmental or state policy. However, the private entity ownership of operating SPVs is currently restricted as set out above. Public procurement and PPP

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

There is no specific legislation governing PPP projects. However, such projects will be subject to the general Governmental Procurement Guidelines in force. The terms and conditions relating to the implementation of PPP projects will reflect the prevalent state or governmental policy relating to each industry at that time as framed within the general Procurement Guidelines.

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

The government of Sri Lanka is currently open to considering unsolicited proposals subject to the applicable laws governing unsolicited proposals in favour of a PPP model. The current state or governmental policy is to move towards a virtually fully privatised port operation.

**16. What criteria are considered when awarding award port concessions and port joint venture agreements?**

The main criteria in determining the awarding of projects and port concessions are:

- the highest return to the government of Sri Lanka (net present value);
- expertise based on other current port operations internationally; and
- the financial standing of such entity. The criteria followed further depend on whether the proposed project is as per a solicited proposal or unsolicited proposal. For solicited proposals there are governmental tender guidelines that are applicable, and all bids are subject to technical evaluation by a technical evaluation committee and thereafter managed and reviewed by a cabinet-appointed procurement committee. In the case of unsolicited proposals, the relevant ministry makes representations on behalf of the proposing entity to a cabinet-appointed negotiating committee for review. In both instances, the cabinet will have to approve the project and the terms and conditions of the governing concession agreement in consultation with the attorney general. Unsolicited proposals may also be submitted as 'strategic projects'. Such projects were previously considered under the Strategic Development Projects Act. However, recent governmental policy indicates that projects will no longer be considered under the provisions of this Act.

**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 specified model or standard concession agreement template. However, recent concession agreements governing the SAGT and CICT can be considered model templates for future projects.

**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?**

All projects and agreements for the implementation of port projects have to be with the SLPA, who are empowered by statute (ie, the SLPA Act) to enter into such agreement. No further statutory enactment is required to give effect to such implementation. However, the SLPA will necessarily seek cabinet approval on the negotiated terms in order to sign and enter into the underlying concession agreement. Unsolicited proposals will be considered based on their public, social and economic utility, such as substantial investment or inflow of foreign exchange; employment generation; transfer of technology; national interests; and other factors capable of changing the economic landscape of the country. Such proposals are to be directed to the relevant line ministry directly or through the Board of Investment of Sri Lanka and scrutinised by the relevant line ministry and the Ministry of Finance and Planning before submission for endorsement by the cabinet and final approval by parliament. Such projects will receive greater tax and duty waivers and concessions.

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

Port projects are generally founded on the BOOT model.

**20. Is there a minimum or maximum term for port PPPs in your jurisdiction?**

What is the average term? As per current state or governmental policy, the maximum operational term is a leasehold of 35 years.

**21. *On what basis can the term be extended?***

So far, no leaseholds have been extended beyond the initial demised period. The extension or non-extension will depend on the prevalent governmental or state policy at the time.

**22. *What fee structures are used in your jurisdiction?***

Are they subject to indexation? The fee structure will generally include:

- upfront key money;
- annual lease rentals;
- throughput-based royalty payments; and
- marine charges which are levied by and accrued directly by the SLPA. Annual payments are subject to indexation based on inflation (US Consumer Price Index), tariff increases, or both.

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

No government or sovereign guarantees are provided. However, exclusivity is granted to the SPV for the tenure of the concession agreement.

**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? The process for approval varies from port to port, largely depending on its location. However, all requisite approvals would be incorporated into the concession agreement. All other ancillary approvals required for construction, such as environmental clearance from the Central Environmental Authority and Geological Survey and Mines Bureau approval for dredging, will be specified by the SLPA and the SLPA will facilitate the obtaining of such approvals from the relevant governmental authorities. However, the responsibility for obtaining such approvals for the implementation of the project lies with the entity.

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

Yes. Harbour infrastructure such as breakwaters, capital dredging of a channel, basin development and port access are carried out by the SLPA. The rest of the construction process will generally be the obligation of the operator.

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

Adherence to 'acceptable' international construction standards (usually British Standard or Australian Standard) is generally specified in the concession agreement. The concession agreement will generally specify restrictions on foreign contractors to grant preferential consideration to local subcontractors for subcontract works.

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

The remedies will be contractual as per the concession agreement, which will generally include liquidated damages and the right to terminate where such delays are tantamount to a fundamental breach. 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? Approval for commencement of operations should be obtained by the SLPA. The timeline for such approval will be concurrent with the negotiation of the concession terms.

**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? The SLPA provides marine services, pilotage and towage services on an exclusive basis. Port operators carry out terminal operations, ship to ship and import/export services. All charges and cargo dues are collected and recovered by the SLPA directly from vessel operators and cargo owners.

**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? The SLPA will grant the operator and its authorised servants and agents access to the concession areas and access to and from such concession areas. Even though there is a railroad facility at the port of Colombo, it is not functional. There is currently no arrangement between an operator and the SLPA for the development of access routes or interconnections. However, there is nothing to restrict a prospective operator from including such development in its proposal to the SLPA.

**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 SLPA does not generally oversee private terminals. Its role in relation to such terminals will be as specified in the governing concession agreement entered into with the operator of such terminal. The SLPA may only intervene in such operations in the event of a national emergency, or under other circumstances specified in the concession agreement.

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

The SLPA shall have access to all areas of a port at any time. It may take over operations in the event of a national emergency or where the operator commits a fundamental breach of the governing concession agreement, or under other circumstances specified in the concession agreement.

**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?**

Such rights will be as per the default provisions of the concession agreement and will generally include step in or substitution rights in addition to standard provisions for liquidated damages and termination.

**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? Such rights will be as per the negotiated terms of the concession agreement which are framed on a case-by-case basis. Handback provisions will generally contain a valuation method and payment for transferred assets. 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?**

Yes. The project must be implemented through an SPV incorporated in Sri Lanka.

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

Generally yes, but subject to the negotiated provisions of the concession agreement. However, in calling for Expressions of Interest for the proposed new East Container Terminal at the Port of Colombo the government has made reference to a prospective regional investor.

**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?**

Such security provisions are generally restricted to the operator's equity stake in the SPV, which also include step in rights or right of substitution. The SLPA generally do not enter into any direct relations with the project financing banks other than as part of their commitment as a shareholder. Update and trends The shifting of governmental and state policy towards PPP-based projects, the emergence of the privately operated SAGT and CICT terminals at the port of Colombo, and the introduction of the Magampura Port at Hambanthota are recent developments which have revolutionised port operations in Sri Lanka, optimising its strategic location as a port hub in the Indian Ocean. Future developments in the pipeline include the implementation of a largely privately owned East Container Terminal at the Port of Colombo and private partnership in the operation of the Magampura Port at Hambanthota coupled with the incentive of a 1,000 hectare Free Trade Zone facility.

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

The right of variation or termination will be as per the governing concession agreement negotiated between the parties. Rights of variation will generally be on mutual agreement on the occurrence of supervening events.

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

Remedies are available as per the concession agreement. This will generally include the right to claim for liquidated damages and termination in the event of a fundamental or unremedied breach.

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

Yes. Commercial laws in Sri Lanka are founded on English legal principles, practice and authorities.

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

Disputes are settled as per the dispute resolution procedure stipulated in the concession agreement, and generally by way of arbitration in the event that such dispute is not resolved through negotiation.

© Law Business Research 2016 DL & F De Saram SRI LANKA [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com)

© Law Business Research 2016 SRI LANKA DL & F De Saram Getting the Deal Through – Ports & Terminals 2017 Port development and construction