

Liabilities of Port and Container Terminal Operators

By:

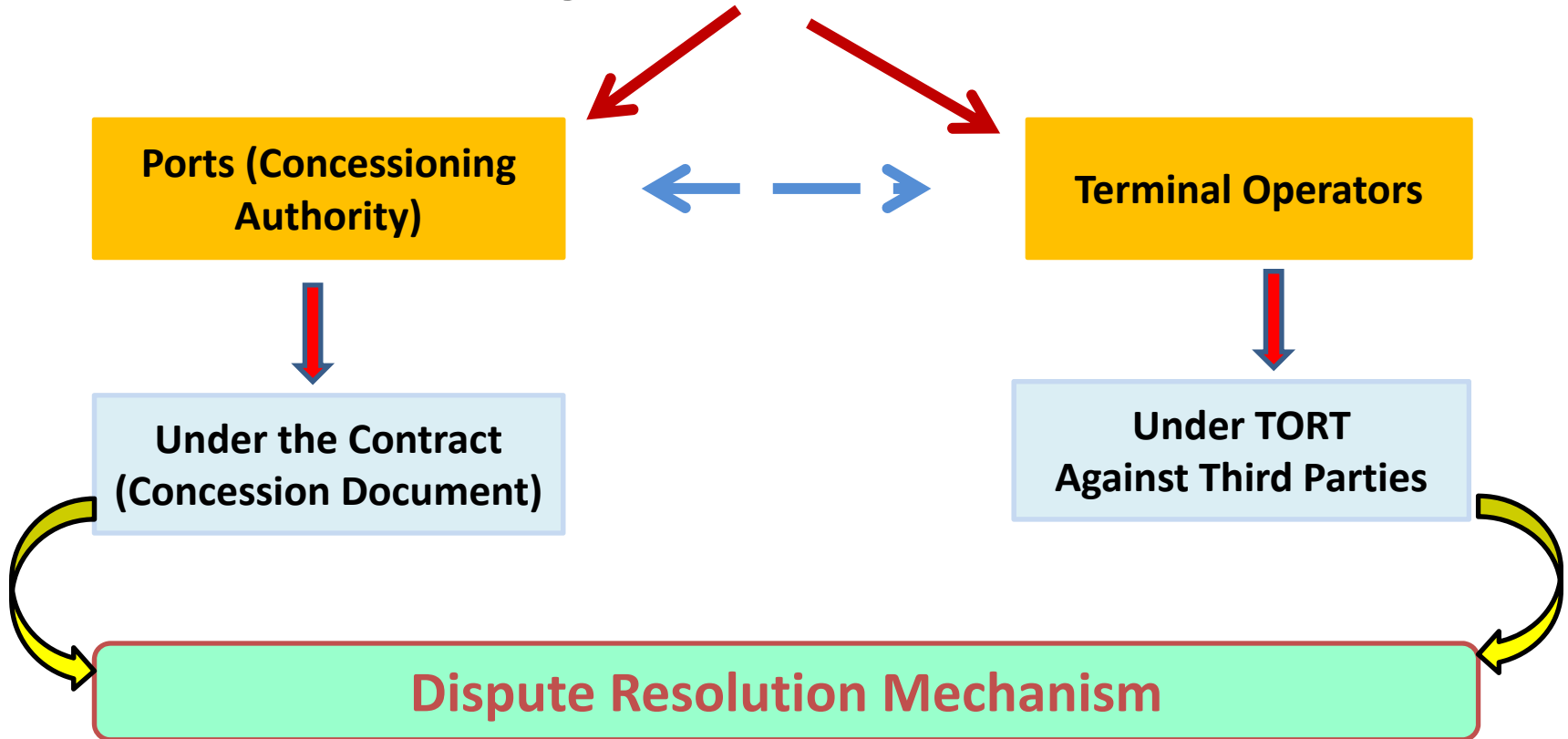
Gautam Bhatikar

ALMT Legal
ADVOCATES AND SOLICITORS



Topics covered...

Obligations and Liabilities of :



Tender Process Concession

- **Floating of Tender-** *For Construction and Operation of terminals through Open Competitive Bidding*
- **Submission of RFQ;**
- Submission & Acceptance of **Technical and Financial Bid;**
- Successful Bidder: **Concessionaire;**
- Execution of **Concession Agreement;**
- Execution and acceptance of **Performance Guarantee** and other documents



Concession Document (PPP Model)



- **Regulatory framework** laid down in Model Concession Agreement.
- **Concession Agreement** should be read in the context of Major Port Trusts Act, 1983.
- Entered into between:
 - Board of Trustees of the Port Trust (Concessioneing Authority) and
 - Successful bidder (Concessionaire)

Concession Document (PPP Model)

- **Level of Tariff** is regulated by the Tariff Authority of Major Ports (TAMP) and not by the concession agreement.
- **Period of concession:** Concession Period typically granted by the Port Trust is 30 years.
- Building and Operating is usually on a **BOT Basis**.
- **Concessionaire** agrees to pay to the Concessioneing Authority (CA) (i) Licensee Fee and (ii) Royalty- both specified in the Concession Agreement.



Concessionaire's Obligations/Liabilities

Condition Precedent:

- Obligated to Inter alia furnish a **Performance Guarantee** and **Bank Guarantee** *within a time specified* in the Concession Document.
- Failure to fulfill the Condition Precedent- liability to pay **liquidated damages** (mode of calculating the liquidated damages stipulated in the Concession Agreement).
- Conditions Precedent not complied with: **Agreement Liable to be terminated.**
- **Bid Security** shall stand **forfeited.**



Construction Phase

- Arrange necessary **financial and other resources**.
- Give **written notice** to the Port (CA) of any **modification/change** to any of the **financing documents and/or equity documents**.
- Obtain the applicable **permits from other authorities**.
- Provide **access to review progress** in the construction.
- Provide **monthly reports** on the progress of the construction.
- Complete construction within the period specified, failing which liability to pay **liquidated damages**.



O & M

Operations:

- **Maximize cargo handled** to achieve optimal utilization of the project facilities and services.
- Concessionaire required to give an **unconditional guarantee** pertaining to the annual cargo handling levels.
- Generally, the Concessionaire is **not entitled to any relaxation of its guarantee**.
- Manage and operate the project facilities and services on **first come first serve, common user basis**, open to all shipping lines, importers, shippers etc.
- May offer **preferential or priority berthing** to any one or more shipping lines or vessel owners/operators subject to applicable laws and Government guidelines.

Maintenance:

- Repair and maintain the project facilities and services in accordance with concession document.
- Obligated to replace equipment, repair and restoration of assets etc during the concession



Tariff

- Tariff regulated, Revised and Notified by **TAMP** from time to time.
- Concessionaire entitled to recover Tariff from the users of the project facilities and services.
- Concessionaire to deposit all tariff and other receipts in relation to the project facilities in the **ESCROW** account.
- Revision in tariff ONLY as per Concession Document r/w TAMP Guidelines.



Insurance

- Concessionaire to obtain **insurance cover for entire period**
- Types of Covers:
 1. Builders all risk insurance;
 2. Loss or damage to project facilities and services;
 3. Comprehensive third party liability insurance ;
 4. Workmen's compensation insurance;
 5. Marine-storage-erection insurance ;
- **Copies of the insurance policies** to be provided to the CA.
- **Renewal of policies** also to be notified to CA and furnish copies.



Concessions Authority's Obligations/ Liabilities

Condition Precedent:

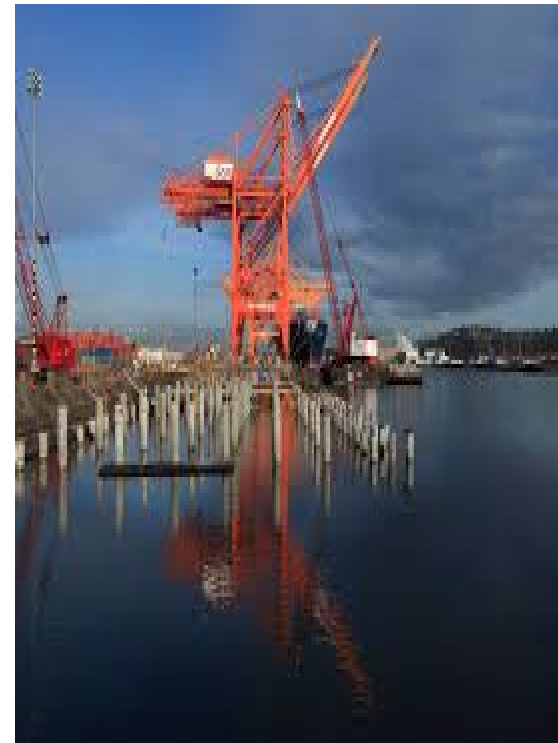
- To procure all the **Clearances** required for the project from other government authorities.
- Failure to fulfill the Condition Precedent- liability to pay **liquidated damages** (mode of calculating the liquidated damages stipulated in the Concession Agreement).
- Conditions Precedent not complied with: Agreement **liable to be terminated**.
- CA obliged to **return the Bid Security/Performance Guarantee**.



Construction Phase

Concessioning Authority's Obligations

- **Grant permits, approvals and consent** as required by the Concessionaire.
- Make available **sub-soil investigations** records carried out in the Ports Assets
- Provide assistance in providing **clearances and permits** including but not limited to **employment permits and immigration clearances**.
- Assist Concessionaire **to import** into India all **equipment and materials** required for construction.



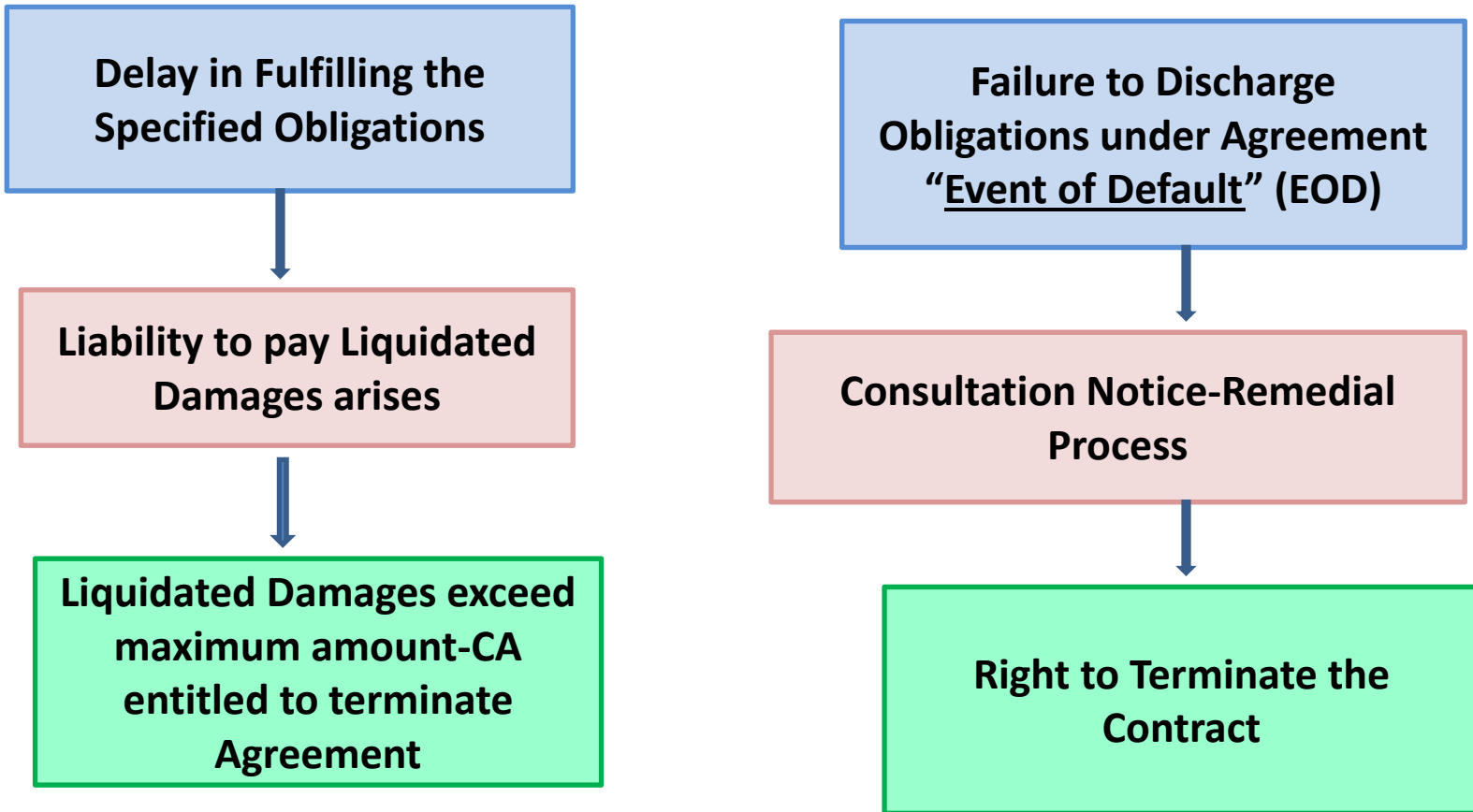
Operation Phase

Concessioning Authority's Obligations:

- To provide services like **scheduling the entry, berthing and sailing of the vessels, pilotage and towage.** *(subject to the priority berthing norms and sailing schedule - determined by the Deputy Conservator.)*



Concession Document: Liabilities/Termination



Termination-Compensation payable as provided in Concession Document- Amount depends on EOD and occurrence of Force Majeure Event...



Scenarios when Concession Agreement is terminated



**Condition
Precedent Not
complied with**



**Liquidated
Damages Exceeds
Maximum
Amount as
stipulated**



**Event of Default
by either party**



**Force Majeure
Event continues
beyond 120 days**

Concessionaire's Liabilities-Liquidated Damages

- **Liquidated Damages** (@ mentioned in Concession Document).
- Generally, the liquidated damages are **capped**.
- CA could recover the amounts with respect to the Liquidated Damages - **invoke the Performance Guarantee**.



Liabilities *qua* Third Parties

- Under **TORT** for any damage caused to any party due to **negligence/lack of care** by other, the party suffering the damage could **sue the party that caused the damage**.

Applying the same principle:

- Port Operators and the Port could be liable for any damage or loss to the cargo/goods and/ or the vessel.
- However, the Port Operators under contract with the Line get **themselves indemnified** from any claims, losses, damages and delays etc. thereby **shifting the liability** for such damage on to the Line.



Obligations of Third Parties.....

The Concessionaire often lay down **rules to Vessel Owner/Agent/Master for:**

- Submission of Pre Arrival Documents;
- Submission of Pre Arrival/Arrival Notice;
- Conditions for acceptance of the vessel;
- Anchoring and Mooring the Vessel;
- Pilot Boarding;
- Ballasting/De-Ballasting
- Report of Loss of Cargo



Resolving Disputes.....

1. Tender:

**Writ Jurisdiction: High Courts
Art. 226 & 227 : Constitution of
India**

- Tender process as laid down not followed
- Arbitrary decision

**No
Arbitration
Clause-
Court
Proceedings**

Dispute Resolution

2. Concession:

**Amicable
Settlement**

**Reference to
Expert**

Arbitration

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Need of the hour!

**Model
Concession
Agreement
one sided...**

**Speedy
approvals
and single
window
clearances
needed to
curtail delay
in execution**

**A review
mechanism
is a demand
across all
PPP sectors
at stages**

**30 year period
without
possibility of
review may
make the
project
unviable in the
long run**



Gautam Bhatikar

ALMT Legal, Advocates & Solicitors

4th Floor, Express Towers, Nariman Point, Mumbai 400 021

Board: +91 22 4001 0000, Fax: +91 22 4001 0001 DID: +91 22 4001 0206

gghatkar@almtlegal.com

