

Role of lawyers to enhance bankability of Port Projects in India

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Sep 2015

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CHANGING CONTOURS OF RISKS IN PORTS

- § I am a project financier turned PPP lawyer - have been with ports from early PPP days helping in MCA evolution and later in financing port projects - all weather friend
- § Earlier focus of PPP on service delivery and entry criteria on track record as operators with sound financials to stay long and compensation in case of premature termination linked to profits foregone as going concern
- § With focus on project completion and given successful project completion by non core players in other sectors, entry-criteria on project development/construction credentials in related sectors and compensation in case of premature termination focus on asset value
- § Significant Change in commercial and legal risks over time warrant careful project structuring.

DEMAND & TARIFF RISKS in PORT CONCESSIONS-1

- § Traffic risk: in federal ports- operator to guarantee certain cargo volume DECIDED BY THE PORT AUTHORITY. Non achievement of Minimum traffic volume in 3 consecutive years is an event of investor default leading to termination of concession. Traffic is a key risk hence.
- § Risks of unanticipated changes -judicial decisions banning export or import of cargo which was factored by the operator and lack of provisions in concession agreement to negotiate a compromise
- § Regulatory risk still remains : Tariff cap is set by the regulator sometimes retrospectively reduced leading to demand for refund to users leading to regulatory risk and litigation. Post 2008 tariff cap for a terminal /port is set on a pre determined normative cost plus return formula. Risk is the ability to guess future tariff cap as it is dynamic - ie the highest normative tariff among terminals in a port.

DEMAND & TARIFF RISKS in PORT CONCESSIONS-2

- § Royalty risk: Operator is obliged to share a percentage of normative revenue (which was bid by him) .
Normative revenue= Actual traffic in tons * Normative tariff per ton cap set by regulator (not actual net tariff which may be competitively lower) . Risk is that actual royalty percentage is higher than what was bid
- § Freedom to index tariff is a risk-: With competition, actual market tariff goes down but royalty payable goes up if Indexed tariff goes up
- § Minimum traffic guarantee is a double whammy- it forces operators to drop tariff and increase demand - while contractual risk goes down with subdued tariff, financial risk increases as it eats into profits .

Risks in administering concession agreement

- § Evaluating operator's performance under the concession
 - § Failure of the port trust to provide land for storage, clearances, dredging, connectivity in time-
 - § Independence of independent Engineer
- § Risk of termination of concession owing to political or other events - compensation is based on asset or debt and ignores loss of profits to the investor arising from premature termination of concession.
- § Risk of timely dispute resolution - no statutory expert cum judicial body- disputes referred to arbitration- Risks of prolonged arbitration in case of disputes between operator and port trust/government - arbitration award challenged in court

Competition law concerns and risks

- § Port trusts operate in competition with private terminal operators. They also provide access to the port such as land for storage and operations, entrance channel and pilotage, how do we ensure that there is no abuse of dominance ? .
- § Merger and acquisition in port industry - risk of clearance by Competition Commission of India
- § Agreements with users and suppliers (dredging, equipment, O&M) could be challenged under competition law as anti competitive.

Risks arising from poor PPP and Project Structure by the port authority

- § PPP guidelines, project structuring, risk allocation between the government and investors , tariff , PPP model are policy decisions beyond the purview of Courts.
- § Courts refrain from interfering with the PPP policy decision unless it is arbitrary, opposed to public policy or suffer from procedural impropriety .
- § Courts would not interfere in the wisdom of the policy decisions .(Wednesbury principle)
- § No legal recourse for Project structure Risks

Judicial risks in PPP projects

- § Is PPP Concessionaire extension of the State under Article 12 of Constitution with attendant obligations of the public sector on commercial decision making? (Flemingo case- Bangalore International Airport BIAL and MIAL)
- § SPV may be subject to procurement rules of the State, subject to RTI if it is discharging statutory functions or has obtained land at concessional rates or has obtained financial aid from the State

LAWYER'S ROLE IN RISK MITIGATION & VALUE CREATION -BIDDING STAGE

- § To negotiate with the port authority to enable bankable project structure
 - § Negotiate for modular investment pre bid phase – to phase investment in tandem with traffic build up- e.g: : Vallarpadam container terminal
 - § Negotiate pre bid for a dynamic revenue model e.g: economic corridor rights in Dhamra port concession
 - § To negotiate for a contract review periodically to revisit respective rights and obligations of operator and port authority- e.g: investments, performance norms, technology, judicial decisions and environment norms

- **Construction :**

- § to design appropriate EPC contract to transfer concession risks back to back

- § **Financing**

- § To negotiate flexible financing structure (debt/ equity/mezzanine) with financiers (Lenders, PE) for drawing /repaying funds and to hedge positions on forex and interest rate and tenure

LAWYER'S ROLE IN RISK MITIGATION & VALUE CREATION - OPERATIONS

§ To enable compliance with competition law without compromising on commercial interests by vetting of contracts with users and by facilitating mergers or consolidation

E.g: Review of competitive position in the industry to become an essential part of legal due diligence for acquisition

- To establish the case for abuse of dominance by the port authority in case of providing access to pilotage, towage,

§ To mitigate challenges similar to procurement rules of the State, a lawyer can assist to streamline decision process and document certain key decisions for posterity and records

§ To enter into O&M contract for transferring concession risks back to back

LAWYER'S ROLE IN RISK MITIGATION & VALUE CREATION - INVESTMENTS

- § To design appropriate JV agreement with co investors to enable sharing risks and rewards equitably
- § To structure investment vehicles to capture value separately from new activities as SEZ and to facilitate induction or change of shareholders
- § Structure JV with connectivity projects- rail or road

Port business is getting
smarter - Smart ports call
for smart lawyers as well..

"The power of the lawyer is in
the uncertainty of the law." -
Jeremy Bentham

THANK YOU