

New Law on Seaports: What to Expect

On 17 May 2012 the Parliament of Ukraine passed a new law, entitled the Law of Ukraine "On Seaports of Ukraine" (the "Law"). The main provisions of the Law will become effective on 13 June 2013¹ and will establish a general legal framework for administration, operation and development of seaports in Ukraine.

Current Situation

Currently, no separate legislative act regulates the legal status and activity of seaports in Ukraine. Seaports are usually state-owned enterprises operating port facilities on state-owned land. As a result, most state-owned port facilities (such as quays) can neither be privatised nor leased by private entities.

Private entities have, to date, been investing in seaport facilities, including seaport terminals, through various types of cooperation agreements with the state, which allow them access to port land and facilities. However, in many instances the effectiveness of such agreements is dubious from a legal standpoint and, as a result, companies have been reluctant to invest substantial amounts in upgrading port facilities and banks have been reluctant to provide significant finance in relation to such.

New Approach

The new Law seeks to overcome some of these issues and will expressly permit private enterprises, along with state enterprises, to carry out business activity in the territory of a seaport. It also contains a number of significant guarantees for private entities interested in investing in Ukrainian seaport infrastructure.

In particular, private seaport operators will now be able to own buildings, lease quays and to independently conduct their business activity without interference on the part of the port authorities. The Law guarantees equal treatment of private companies and other entities operating in seaports. Private seaport operators will be entitled to freely dispose of their private property and extend their presence in seaports.

Seaport Facilities

The Law will recognise two types of seaport facilities, namely:

Key issues

- Current Situation
- New Approach
- Seaport Facilities
- Ownership Issues
- Privatisation of Seaports
- Land Issues
- Public Private Partnership
- Seaports Administration
- Interim Regime

Contacts

If you would like to know more about the subjects covered in this publication or our services, please contact:

Jared Grubb
+380 44 390 5885

Olexiy Soshenko
+380 44 390 2213

Dmytro Orendarets
+380 44 390 2217

To email one of the above, please use
firstname.lastname@cliffordchance.com

¹ A number of provisions which establish an interim legislative regime for the existing seaport operators and facilities and are aimed at bringing the current seaport operation model in line with the Law became effective on 13 June 2012. Such provisions are discussed in more detail in "Interim Regime" section below.

- strategic seaport facilities (such as, waterside structures, seaport infrastructure in common use, navigation equipment and vessel trafficking systems); and
- non-strategic seaport facilities.

According to the Law, state-owned strategic seaport facilities cannot be disposed of, save that:

- quays can be leased; and
- control over quays, railways and motorways, communication lines, utility objects and engineering lines can be temporarily transferred as a part of a concession,

however, non-strategic seaport facilities can be fully privatised.

State-owned quays will be able to be leased by private persons for a period of up to 49 years. The Law prescribes that a concession in relation to any state-owned quays, railways and motorways, communication lines, utility objects and engineering lines by private entities is permitted within the scope of a concession of the relevant seaport and a concession agreement can be executed for a period from 10 to 50 years.

Ownership Issues

It is important to note that any strategic seaport facilities, other than those referred to in the paragraph below, which are constructed after the Law becomes effective will automatically be considered to be state-owned. Therefore, even if a strategic seaport facility is developed by a private company, it will be owned by the state upon its completion. However, the state is obliged to compensate the private company for its investment in the development of such seaport facility.

The above rule does not apply to certain strategic seaport facilities, such as, quays, piers, bulwarks, dams, breakwaters, anchorages, access channels and other waterside structures. These structures, if financed by private entities, are deemed to be privately owned.

The new Law will also clean up certain existing ownership issues by confirming ownership of seaport facilities (which can be owned privately) where they have been legally acquired by private persons prior to the Law coming into effect.

It is important to note that under the new Law seaport operators will not be able to operate quays unless such are registered with the Registry of Waterside Structures and the Seaports Registry of Ukraine. This rule will not apply to quays which have been properly registered with the Registry of Waterside Structures before the Law coming into effect.

Privatisation of Seaports

The Law permits privatisation of state-owned non-strategic seaport facilities. Privatisation can be done by way of:

- acquisition of state-owned seaport enterprises as going concerns;
- purchase of shares in seaport companies; or
- acquisition of certain state-owned non-strategic seaport facilities (subject to certain conditions).

A tender is required for an acquisition from the state of a seaport as a going concern or a purchase of 100 per cent of the state's shares in a seaport company.

A tender is not required for a private company to acquire state-owned non-strategic seaport facilities if such company has entered into a lease agreement in respect of such facilities prior to the Law coming into effect. In addition, in order to be eligible for acquiring such facilities, the company should have invested an amount equal to at least 25 per cent of the facilities' residual book value as of the date of its privatisation. It is not possible to acquire separate port assets other than through this process.

If the acquisition of a state-owned seaport is undertaken by purchasing it as a going concern, a private investor will be entitled to acquire an up to 49 years leasehold over:

- state-owned quays located within such seaport; and
- state-owned land plots underneath such quays and other seaport facilities.

The private investor will enter into the relevant lease agreements for the quays and the land plots simultaneously with the execution of the sale and purchase agreement for the seaport as a going concern.

Land Issues

The Law stipulates that land plots located within the boundaries of a seaport may be in state, municipal and private ownership subject to certain exceptions, such as:

- land plots underneath strategic seaport facilities or land plots designated for the activities of the Seaport Administration of Ukraine, which cannot be privatised or otherwise alienated; and
- any land reclaimed from the sea for the purposes of further development of a seaport, which will be deemed to be owned by the state.

The state is permitted to grant private entities with long-term leases over reclaimed land. Unfortunately, the Law remains silent as to whether or not the state should compensate private companies for their investments made in reclaiming such land or whether such lease will be granted automatically. In our view, private investors should agree any compensation or lease in their relevant agreements with the state before reclaiming any land.

Public Private Partnership

The Law expressly permits private enterprises to cooperate with the Administration of Seaports of Ukraine in developing port infrastructure using various types of investment agreements, including various PPP structures. The Law sets out that investing in state-owned strategic seaport facilities may be done by way of their repair, modernisation, reconstruction or construction.

The Law envisages that investments made by private companies into state-owned strategic seaport facilities will be compensated in accordance with the terms set out in any agreement between the private companies and the Administration of Seaports of Ukraine and provides wide powers for the state authorities to enter into such agreements and to use port fees and other income to make payments thereunder.

Seaports Administration

The Law envisages that seaports will be administered and managed by a new administrative body, entitled the Administration of Seaports of Ukraine, and its local branches. The Administration of Seaports of Ukraine will be responsible for:

- operating and maintaining state-owned seaport facilities;
- rendering dispatching services in seaports;
- carrying out safety measures and rescue works in seaports; and
- working out and implementing seaport development strategies etc.

Pursuant to the Law, private entities will be entitled to participate in the management of a seaport through a seaport council. The seaport council will be an advisory body consisting of the head and the captain of a seaport and representatives of private seaport operators. The seaport council will be able to consider amendments and supplements to the seaport development plan and the seaport regulations and resolutions. However, the views of the council will not be binding upon the port administration.

Interim Regime

The Law guarantees that its implementation will not lead to the expiration of any agreements for the usage of seaport infrastructure, which were executed by private companies with state-owned seaports or state authorities prior to the adoption of the Law. Furthermore, any permitting documentation for the construction of seaport facilities, which was issued before the Law was adopted, will remain valid.

Under the new Law, seaport terminals will be subject to registration with the Seaports Registry of Ukraine. However, the Law stipulates that seaport terminals, which existed as of the date of the Law, are considered to be operational, regardless of the date of their actual registration with the Seaports Registry of Ukraine.

Such terminals, regardless of whether they are located within the boundaries of a state-owned seaport enterprise or not, should be included in the boundaries of the seaport whose water surface they use or another nearby seaport. The Law stipulates that such terminals, including any parts isolated from the main area of the seaport, are deemed to be included in the boundaries of such seaport.

The Law entitles private owners of underwater structures (such as channels, operational waters of quays etc.) which were constructed before the Law was passed (and which are registered with the Registry of Waterside Structures) to sell such structures to the state. If someone wishes to sell an underwater structure, the state is obliged to buy it at its market value as determined by an independent valuer.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

Clifford Chance, 75 Zhylyanska Street, 01032, Kyiv, Ukraine
© Clifford Chance LLC 2012
Clifford Chance LLC

www.cliffordchance.com

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Casablanca ■ Doha ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Istanbul ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Perth ■ Prague ■ Riyadh* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Sydney ■ Tokyo ■ Warsaw ■ Washington, D.C.

*Clifford Chance has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh.