ADDRESSING PORT DEVELOPMENT CHALLENGES

SHIPPING ACT CONSIDERATIONS

1. Marine Terminal Operators
   • Definition
     ➢ “marine terminal operator” means a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier, or in connection with a common carrier and a water carrier subject to sub-chapter 11 of chapter 135 of title 49, United States Code
   • Affiliated terminals vs. independent terminals
   • Operating ports vs. non-operating ports
   • Citizenship of port operators

2. Different Treatment vs. Undue or Unreasonable Preference or Prejudice
   • Comparison terminal to terminal, lease to lease
   • Changed (more onerous) terms
   • Failure to enforce
   • Response to market conditions/competition
   • Most favored nation
   • Non-compensatory terms

3. Termination of an Existing Tenant
   • Preference allowed/required
   • Refusal to negotiate
   • Exclusive dealing cases
   • Refusal to deal
   • Boycott
   • Right of first refusal
   • Impact of nationwide shortage of facilities/space
4. Procedures for Leasing/Renewals/Terminations/Negotiations
   • Requirement for written procedures/rules/criteria?
   • RFP/procurement vs. negotiation
   • Unequal information
   • Informal relations among existing parties
   • Market surveys
   • Strategic plans
   • Documentation of decision
     ➢ Record in FMC litigation
     ➢ E-mails
   • Subordinates records vs. decision maker
   • Public access to lease documents

5. Port Productivity Requirements.
   • Easy in theory
   • Can be complicated in practice
   • Unjust discrimination questions
     ➢ Implementation of new requirements
     ➢ Does a Port always have the right to make its best deal?

6. Public Policy Issues
   • Abolition of carrier antitrust immunity in Europe
   • FMC rulemaking in NVOCC service contracts
   • Commission on antitrust immunity in U.S. trades