

# Watson, Farley & Williams

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Presentation by :  
Christopher Lowe

## **Due Diligence and Risk Mitigation in Negotiations**

# Introduction

- Due Diligence
- Concessions
- Identification of Risk
- Recurring Issues in Negotiations
- Financing

# Industry Characteristics

- Growth in World Trade
- Intra-Asian Growth
- Containerization
- Transshipment Vs. Origination & Destination
- Consolidation

# Placing the Due Diligence Exercise in Context

- Purpose of the legal due diligence
- The report
  - The “local” legal issues, e.g. forms of security

# Placing the Due Diligence Exercise in Context

- Information on the participants :
  - Corporate information (e.g. detailed searches of relevant company registries and solvency searches)
  - Financial information
  - Commercial activities
  - Profitability

# Placing the Due Diligence Exercise in Context

- Material contracts (e.g. any restriction on borrowing or giving security?)
- Standard terms of business
- Shareholders' agreement – in particular deadlock and control issues
- Pending or possible litigation
- Intellectual property, etc.

# Placing the Due Diligence Exercise in Context

- Employment – labour laws and unions
- Regulatory regimes – permits/licences/quotas
- The Concession Agreement
- Financing facilities
- Port infrastructure

# Placing the Due Diligence Exercise in Context

- Warehouse/bonding facilities
- Arrangements/contracts with port users (details of the services agreements and commitments)
- The corporate governance model for the port
- Maritime, Land and Property rights (title, ownership, etc)

# Placing the Due Diligence Exercise in Context

- Port services arrangements :
  - Pilotage
  - Tugs/towage
  - Oil storage/pipe lines
  - Container facilities
  - Security/pollution control
  - Navigational aids
- Supply contracts

# Placing the Due Diligence Exercise in Context

- The environmental audit and report on compliance with current environmental and planning legislation
- The financial balance between :
  - Concession/services fees and debt service
  - Operating revenues from port tariffs/other income
- Revenue stream
- Adequacy of insurances, etc.

# Concessions

- Government transfer
- Operator takes responsibility
- Various types of Concessions include
  - Build-Operate-Transfer
  - Build-Own-Operate-Transfer
  - Build-Own-Operate-Share-Transfer
  - Lease-Develop-Operate
  - Build-Own-Operate

# Port Concession Lender's Issues

- Award of Concession – Term + Clarity
- Arm's Length Transactions
  - Construction
  - Operation
- Termination Provision
  - Government breach
  - Concessionaire's breach
  - Force majeure
- Rate Adjustment – Tariff Flexibility

# Port Concessions Lender's Issues

- Insurance
- Lender's cure and step-in rights
- Lender's security - Assignment of Concession
- Quiet enjoyment
- Arbitration

# Identification of Risk

- Operational risk
- Construction and technology risk
- Revenue risk
- Finance risk
- Economic and Market risk
- Interest rate risk
- Regulatory risk

# Identification of Risk

- Political risk
- Currency risk
- Legal risk
- Property risk
- Environmental risk
- Security risk
- Interconnection risk

# Recurring Issues in Negotiations

- Timing
- Minimisation of legal risk
- Structural issues
- Competing interest of parties and Intercreditor issues
- Cashflow application
- Force majeure
- Insurance

# Financing

- Project Finance
- Securitisation
  - Asset Backed
  - Whole Business
- Acquisition Finance
- Leasing
- Mezzanine Finance
- Rating Agencies

# Watson, Farley & Williams

Christopher Lowe

Partner

Watson, Farley & Williams LLP

Tel: +65 6551 9190 (direct)

Mobile: +65 9825 5453

Email: [clowe@wfw.com](mailto:clowe@wfw.com)

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