

# Contract matters: Legal considerations in airport PPPs

---

By John Crothers & Christopher Boyce

*International law firm Gide Loyrette Nouel, based in Paris, has worked on airport concessions for Malé International Airport (Maldives) and Bamako International Airport (Mali), as well as airports in Tahiti, Tunisia, Congo, Saudi Arabia, and Mauritius. As is the case in most public-private partnership (PPP) projects, the legal issues encountered fall into two broad categories: legal and institutional framework requirements, and contractual aspects of PPPs. This article examines these issues with a particular focus on airport concessions.*

Airport projects offer lawyers different perspectives from the average traveler. Boutique shops in the airport terminal are observed from a revenue stream perspective; passenger volumes and flight schedules are observed for competing airport routes and growth potential; existing infrastructure and airport practices are observed so that comments can be fed into general project discussions. In short, with each visit to the project

location, there is the opportunity for the lawyer to be observant. Ultimately, the more observant the lawyer, the more informed they will be at every stage of the project and the more capable they will be of providing creative solutions to problems that will inevitably arise.

## LEGAL AND INSTITUTIONAL FRAMEWORK REQUIREMENTS

In addition to being familiar with the aviation sector, legal advisors entering into discussions on airport PPPs will need to be capable of advising on a variety of legal areas, including public procurement and PPP laws, company law, project finance, property, and arbitration. Depending on the jurisdiction, it is common for international firms to partner with local firms so that they can advise on local law issues, such as land, foreign investment, and securities legislation.

The starting point for any project is asking: “What is the legislative framework required to enable a PPP project?” If none exists, the grantor may ask: “Do we need a PPP law?” Several approaches can be adopted, depending on the political and commercial climate. These vary from drafting a general PPP law, to including PPP in a sector-specific law, or using existing public procurement legislation (even if not best adapted to PPPs). In some jurisdictions a special law to allow the single specific project may be necessary.

Another question that often arises is “Do we need a PPP agency?” The purpose, establishment, and competence of an agency are all important considerations. Such agencies serve as the “institutional memory” of a well run PPP program, providing resources, best practice, and general expertise. However, because every project is unique, the discussion must be customized to the individual project, and the sector-specific experts (ministry of transport, airport agency) must be on board.

---

## KEY CONTRACTUAL ASPECTS

The more observant the lawyer, the more informed they will be at every stage of the project and the more capable they will be of providing creative solutions to problems that will inevitably arise.

Several key structuring issues need to be considered by the grantor prior to launching a PPP, none more so than the concession versus privatization issue. On the one hand, and in favor of the concession model, is that delegated management of a strategic national asset leads to an improved level of service and guarantees a continuous revenue stream. On the other hand, a strict privatization may result in a cash windfall, which can be very attractive to developing governments for obvious reasons. The problem is that the proceeds go to the government and not to the project. In the concession versus privatization discussion, it is advisable to adopt a flexible approach and not remain wedded to a strict either/or scenario. One viable alternative for cash-strapped governments is a concession with an upfront payment and a profit-sharing mechanism.

---

In any event, the legal framework must allow for a fair and transparent procurement process. Effectively, the legal advisor’s first concern should be to create the proper legal foundations for a PPP project to be successful from the pre-procurement phase through the lifetime of the project.

For both brownfield and greenfield airport projects, environmental issues must not be neglected. For brownfield projects, environmental audits are recommended to establish a baseline to cut off responsibility between the Grantor and the new investor for pre-existing environmental liabilities. For greenfield projects, there are numerous other issues that must be addressed at the start. Who owns the land on which the airport is to be constructed? Are there rights of way that need to be considered? Indeed, both of these questions raise the issue of whether ownership of land by a private investor is possible, or even necessary, in an airport project.

From an operational perspective, there are certain key issues that need to be considered. First, the key performance indicators must be clearly

---

In many developing countries, the international airport is the access point to the rest of the world. Reputations are made or broken based on the perceived airport experience.

---

stated (and must be attainable). Secondly, the penalties must be well calibrated to ensure that they incentivize and do not punish too harshly.

Or, if the airport concession is an extension of an existing airport or certain functions are being transferred from one airport operator to the other, what provisions should be contained in the concession contract to ensure stability of operations and to provide for management of disputes? Finally, the usual issues of termination and compensation on termination, change in law, and *force majeure* will need to be carefully considered and negotiated.

Of course, financial provisions must also be understood by the legal team. From the outset of the project, aviation and non-aviation charges need to be clearly identified and allocated. Provisions for the charging, payment, and collection of fees need to be included in the project contract. In addition, to what extent should expansion and development costs be covered by air side and land side fees or by way of an “airport development charge”? Is such a charge even in compliance with the constitution? Who should pay the charge (the passengers, airlines, or grantor)? And who should receive the proceeds, the grantor or the operator? Clearly, these are commercial issues to be discussed with the relevant project advisors, but the legal team should be aware of, and should be willing to advise on, each of these issues from kick-off to completion.

Other key legal/financial issues to be considered from a contractual perspective include:

- Adjustment of aviation fees for inflation.

- Triggers for capacity investment and hand-back requirements with sufficient capacity at the end of the concession period.
- Government support and guarantees.

## WHY IT MATTERS

In many developing countries, the international airport is the access point to the rest of the world. Reputations are made or broken based on the perceived airport experience. Grantors need to create multidisciplinary teams made up of public sector experts and PPP agencies (if available), as well as financial, technical, and legal advisors to best structure successful airport projects. The team will structure the transaction, create the bidding documents, and draft the PPP contract.

Legal and financial aspects of PPPs are a foundation for something much larger. Airports are not just buildings, but a source of national identity and pride: they are a returning citizen's first taste of home and a tourist's and business person's first glimpse of a city's riches. ✈

