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Airport BOT & Concession Agreements – Legal and Regulatory Issues - Checklist

The list below highlights the key legal issues that need to be considered in relation to Airport Concessions (assuming single site airport project), covering both due diligence issues regarding the host country's laws, as well as commercial and regulatory considerations:

Airport Specific Issues

Legal Framework

- Is the Concession a Contract or a Lease?
- Who is the Grantor and is it duly authorized by:
 - Civil Aviation Authority?
 - Ministry of Trade?
 - Finance Ministry?
 - Military?
 - Municipality?
- Is Grantor a legal entity?
- Ability for Grantor to amend agreement unilaterally -is there a concept of balancing contracts implied into the contract by the law in the case of changes/ hardship?
- Governing Law – is there a potential to choose?
- Dispute Resolution – is the court system appropriate or should there be an alternative form(s) of dispute resolution?
- Sovereign Immunity – does the Grantor benefit from sovereign immunity? If so, is it possible for it to waive such immunity?

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Scope of Concession?

- What is the functional scope of the concession?
- What is the term of the concession?
- Design specification
 - Who is responsible for design specification? Often public authority sets this – relevant issues include size of planes to use airport, length of runway, size of gates.
 - Does public authority establish outline of design or commission third party to prepare detailed design? Consider liability issues.
 - Noise and pollution standards (in law, regulations, international treaties etc) – what happens regarding changes in law and regulations?
 - Architectural specifications – often airports are national icons and public sector may wish to have major input into architectural design/ have this prepared by third party leading architect firm – what is interface between architects and project company? How is this to be managed?
- Vires - what is within the Grantor's power to delegate? Even if within power to delegate, what is deemed appropriate to include in scope? Especially, what is landside and airside? (Typically, concessionaire is responsible for landside and the Grantor or government for airside)
 - What duties fall under which category? (e.g., baggage handling, on board catering, fuel supply)
 - Who is responsible for air traffic control?
 - Who is responsible for route agreements with airlines? If with public, is there undertaking to ensure minimum levels of domestic and/ or international routes?
 - Customs and immigration – will this remain with Government?
 - Security - will this remain with the Government?
- Transport to and from airport – is there to be public transport available to city center? Is this desired or guaranteed (benefit of potential for more passengers)? Can government add public

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transport link at later time? If not public transport link, will there be possibility of exclusive arrangements with certain taxi firms?

- Parking - what are rights of concessionaire regarding parking – will scope include provision of parking? Can concessionaire set parking charges or will these be set or capped by a regulatory entity?
- Sub-concessions/ secondary developments - does and should the concession include:
 - the right to grant sub-concessions? (Major potential sources of revenue)
 - secondary developments? Are there limits? (Major potential sources of revenue)
 - If so, what are the arrangements re security of sub-concessions, staffing, revenues (should these be shared with Grantor)?
- Exclusivity – will government undertake to ensure that other airports are not built within a certain geographic scope? Are there exclusions to exclusivity – such as military bases? Will exclusivity extend to particular air routes (assuming this is not in control of concessionaire)? Will Government undertake not to build high-speed rail links, etc., that could serve as competition to airport?
- Currency of liabilities (existing and new)?

Regulation

- How is the airport to be regulated? How much freedom does concessionaire have over its activities? What access will concessionaire have to the regulator and to challenge the decisions of regulator? Is regulator part of Government or independent? Will regulation cover safety and security?
- Usually, there is more regulation regarding airside activities, but even landside may be regulated – e.g., price charged for airport parking.
- Air traffic control is heavily regulated.
- Air routes are highly regulated (and subject to bilateral treaties, etc.).

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- Prices charged for airport tax usually set by regulator – does concessionaire have any involvement in setting airport tax? Can it appeal against levels it deems too high or too low?
- Fuel supply – price and identity of supplier might be regulated.
- Other?

Procurement

- Potential conflict of interest – can competing airports bid?
- Can foreign state owned entities (SOEs) or airports bid? (national security issues) - Key factor may be whether airport has any military use.
- Is concessionaire to be subject to public procurement rules regarding sub-contracts?
- What procurement regime applies? Are there competing municipal, state or federal procurement regimes?
- Are there constraints regarding procurement regarding re-financing of the project?

Concessionaire Obligations

- Concession Fee – one off fee, annual payments or revenue sharing mechanism?
- Minimum Investment required by concessionaire?
- Design/Build Specifications (see Scope above) and Deadline for completion
- Operating Standards
- Expansions – are these to be subject to a separate agreement or part of the same arrangement – if so, are the terms to be pre-defined?
- Refinancing Gains – if project is refinanced, is there a profit sharing mechanism?
- Fuel Supply – is there an existing monopoly supplier? Is it possible to change supplier or establish a commercial deal? How is fuel to be taxed (will government give undertaking not to change this or compensate for increases in tax?)? How is fuel supply regulated? Are prices fixed by regulator? What is the currency for payment of fuel?

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Personnel

- Are existing personnel to be transferred from public sector? If so, do public sector pay arrangements apply? Are there limits to be included in agreement on numbers that may be laid off or made redundant? Can employees get bonuses and performance incentives? Can there be a transfer or can only this be by secondment? If so, will the project company have right to discipline, hire and fire?
- Are employees unionized? If so, what consultation is required or recommended with unions?
- Is there to be a priority for project company employees to be drawn from local sources?
- What are security checks to be made on personnel? Will some personnel be supplied by private sector – e.g., security personnel?
- What happens to personnel on hand back of concession?

Existing Business

- Is this the expansion of an existing airport? If so...
- Existing Contracts – route agreements with airlines, fuel supply agreements, etc. What can be changed? Are these within control of the concessionaire? Other contracts include sub-contractors such as baggage handlers, airline caterers, etc.
- Existing Personnel – are there any legal or contractual obligations concessionaire obliged to follow? See Personnel above.
- Environmental Conditions – what is to happen about existing liabilities regarding the environment? Will concessionaire only be responsible for environmental liability arising after date of contract? What about latent defects? Is it possible under law to assign only some of these liabilities to concessionaire? Are there public duties or liabilities that are assumed by concessionaire?
- What is the currency of existing liabilities?

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General Concession Issues

Property Rights

- What type of property rights can be granted by Grantor to concessionaire? Will rights be sufficient to enable concessionaire to project finance the arrangement?
- What rights will the concessionaire have to sub-let or franchise to sub-concessionaires?
- Is there a distinction between moveable versus immovable property?
- Hand back Requirements - are there any legal constraints or requirements? What additional requirements should be built into the contract?
- What liabilities (environmental and other) are attached to concession? Are there various public liabilities attached?

Revenues

- What are revenue sources? Are these sufficient to cover costs, obligations, concession fees and concessionaire profit?
- Types of Revenues – airport taxes, fees from sub-concessions, parking, secondary development.
- Existing Revenues – air routes (are these guaranteed to continue?)
- Determination of Rates (Regulated versus Unregulated Revenues)
- Reserved Revenues for investment.
- Taxes on Revenues and Free Trade Zones or other exemptions.
- Place and Currency of Revenue Collection.

Restoring Economic Equilibrium

- Is there any legal doctrine giving court power to redress imbalances causes to the contract due to unforeseeable events?
- Compensation Events versus Relief Events – what events should give rise to compensation of either party versus relief from liability?

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- Uninsurable Force Majeure – what happens in this event? Who carries the risk?
- Environmental/Geotechnical Archeological Discoveries – who carries risk?
- Change Orders – do these give rise to compensation – is there a de minimis that needs to be met before compensation is payable? Will compensation be achieved through adjustment of tariffs or otherwise?
- Change in Law – should concessionaire be protected against general changes in law and/ or changes targeted specifically at the airport industry or concessionaire?
- Government Delays – who should bear the risk?
- Utility Delays – who should bear the risk?
- Awarding authority defaults – what are these? What are the consequences?

Concessionaire Default

- Events of Default
- Failure to complete construction on time – liquidated damages or termination?
- Bankruptcy
- Other Material Breach
- Remedies
- Liquidated Delay Damages
- Suspension
- Step-In/Cure Rights – of Grantor and Lenders
- Termination
- Damages
- Liability Caps (Should there be liability caps? Are there exclusions in the law against caps, e.g., re criminal liability?)

Grantor Default

- Events of Default

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- Material Breach
- Expropriation and Other Political Events
- Sovereign Credit Rating (reduction therein) – consequences?
- Remedies
- Termination – should concessionaire have right of termination for grantor default?
- Compensation

Termination Compensation

- Termination for Grantor Default
- Termination for Convenience
- Termination for Force Majeure
- Termination for Concessionaire Default

Insurance

- Scope of Insurance
- Payment of Premium
- Commercial Unavailability
- Use of Proceeds/Lender Security
- Total Loss – What happens in this event? Will proceeds be available to concessionaire or to lenders or Grantor?

Sponsor Support

- Minimum Investment required?
- Transferability and Change in Control – should there be period of time when key sponsors are required to remain as shareholders in Concessionaire?
- Performance Bonds

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- Contingent Equity – should there be a requirement for this? In what cases should this be able to be called?

Lender Security Package

- Is the concessionaire able to grant security over moveable and immovable property to lenders?
- Can it grant security over
 - revenue streams and receivables and accounts (both onshore and offshore)
 - future property
 - insurance proceeds
 - share pledges (onshore and offshore)?

Lender Direct Agreement

- Is it possible to enter into direct agreements?
- Acknowledgement of Security – how is this achieved?
- Direct Payment of Compensation – is this permissible?
- Is it possible for lenders to have cure/step-in/substitution rights?
- Notice of Default
- Clarifications and Amendments

Other Issues

- Proposal Bonds
- Escrow of Proposal Documents