

Concessions and Allocations in the context of airports
and air transport.

By Natalia Deschamps



TERRUM

July 15, 2024
Year 19 No.02

Audio Message



Concessions and Allocations in the context of airports and air transport.

By Natalia Deschamps

The Mexican legal framework provides a clear delineation of the provisions relating to “concessions” in the field of airports and air transport. These regulations are pivotal for the efficient, safe, and compliant development and operation of airport infrastructure and air transport services, in accordance with international and national standards. However, the regulatory landscape for “allocations” in airport and air transport matters is not as well-defined.

This article delves into the details of both figures, highlighting their respective benefits and identifying potential areas for improvement.

“These regulations are pivotal for the efficient, safe, and compliant development and operation of airport infrastructure and air transport services, in accordance with international and national standards.”

The Concept of Concession

In a legal context, a concession is an administrative act by which the State grants individuals the right to exploit a public asset or provide a public service under certain conditions for a specified period of time. Specifically, a concession allows a person or company to use, manage or operate public assets or public services, subject to the conditions and limitations set out in the relevant legislation.

In the air transport sector, the Civil Aviation Law stipulates that a concession from the Ministry of Infrastructure, Communications, and Transport (SICT) is required to provide regular national air transport services. Notably, this concession is exclusively available to Mexican legal entities. Those seeking to obtain a concession are required to:

- i. Demonstrate technical, financial, legal, and administrative capacities as required by the Civil Aviation Law;
- ii. Prove their ability to provide services that meet the quality, safety, timeliness, permanence, and price standards set by relevant authorities;
- iii. Possess aircraft and air equipment that comply with technical safety, airworthiness, and environmental requirements; and
- iv. Have experience in the sector, either directly or through associated Mexican commercial companies, to ensure the viability and safety of operations.

“... a concession allows a person or company to use, manage or operate public assets or public services, subject to the conditions and limitations set out in the relevant legislation..”

Concessions are granted for up to thirty years and may be extended if the obligations outlined in the law and the concession title are met, service quality improvements are made, and any new conditions set by the SICT are accepted.

A concession is also required for the administration, operation, exploitation, and, if applicable, construction of airports. These concessions are granted exclusively to entities established under Mexican law.

For the SICT to grant concession titles or approve extensions, it must obtain a favorable opinion from the Ministry of Finance and Public Credit (SHCP) regarding the project’s economic profitability. This profitability is evaluated by comparing the projected revenues with the project’s costs over the evaluation period.

Airport concessions are granted through a competitive bidding process, which includes the publication of call for bids, submission of proposals, evaluation of the applicant's legal, technical, administrative, and financial capacities, and issuance of a decision by the SICT. These concessions can last up to fifty years, with the possibility of additional extensions.

Allocation titles

The head of the SICT has the authority to grant allocation titles to state-owned entities of the Federal Public Administration for the administration, operation, exploitation, and construction of airports without requiring a public bidding process. These allocation titles are of indefinite duration, ending only when it can be demonstrated that there is no longer a cause of public utility, public interest, or national security reasons. Allocation holders are subject to the same obligations as concessionaires but are prohibited from transferring their rights and obligations to third parties.

"These allocation titles are of indefinite duration, ending only when it can be demonstrated that there is no longer a cause of public utility, public interest, or national security reasons."

Similarly, the head of the SICT can grant allocation titles to state-owned entities for the provision of regular national air transport services. These titles also have an indefinite term and end under the same conditions as airport allocations. Allocation holders are subject to the same obligations as concessionaires and are prohibited from transferring their rights and obligations to third parties.

Criticisms of the allocation figure

The figure of allocation has been subject of criticism due to the following factors:

1. **Executive Branch Discretion:** Allocations are justified by causes of public utility, public interest, general interest, or national security reasons, which are within the competence of the State. However, Article 14 Bis of the Airport Law and Article 10 Bis of the Civil Aviation Law do not specify who must demonstrate the absence of these causes, potentially allowing the State to act as both judge and party. Furthermore, the lack of a public bidding process grants the executive branch a considerable degree of discretion, which can lead to favoritism or non-transparent decision-making.
2. **Negative Impact on Competition:** Allowing state-owned entities to oversee both an airline and an airport can create a conflict of interest, where the entity may favor its operations over those of private airlines. The Federal Economic Competition Commission (COFEC) has highlighted that this could impede equitable access to airport infrastructure and affect fair competition.
3. **Ambiguity in Termination of Allocation titles.** The Airport Law and the Civil Aviation Law state that the term of an allocation is indefinite and ends only when it is proven that there is no longer a cause of public utility, public interest, general interest, or national security reasons. The question of who is responsible for demonstrating the absence of these causes remains unanswered, leading to a lack of transparency and accountability.
4. **Restrictions on the Participation of Airlines and Airport Concessionaires.** The Airport Law establishes clear restrictions to prevent cross-participation between airlines and airport concessionaires. Airlines and their controlling, subsidiary, or affiliated entities cannot own more than 5% of the ordinary shares of an airport concessionaire, and the same restriction applies to airport concessionaires in airline share capital. The purpose of this restriction is to prevent conflicts of interest and anti-competitive behaviour. Currently, it is not permitted for airline groups to gain control of an airport concessionaire company. Conversely, airport concessionaire groups that participate in the capital of airlines are not allowed to acquire control over them.

In accordance with the provisions of the Airport Law, the aforementioned control restrictions do not apply to state-owned entities that hold an allocation title.

5. Payment of Airport Fees. According to the Federal Law of Rights, both allocation holders and concessions must pay fees for the use, enjoyment or exploitation of federal airports. Concessionaires are required to pay 9% of their gross income from airport, complementary, and commercial services, while state-owned entities with allocation titles are subject to a reduced rate of 5%.

Conclusions

The Mexican legal framework governing concessions and allocations in airport and air transport matters is primarily designed to ensure the efficient, safe, and competitive provision of these services. However, the existing provisions have sparked considerable debate concerning the extent of government discretion and its impact on competition. The following points are to be noted:

- Transparency. It is imperative that the processes for granting concessions and allocation titles are conducted with transparency and based on objective criteria. This approach will help prevent discretionary practices and ensure the competitiveness of the sector.
- Maintaining a fair and competitive environment. The necessity of guaranteeing a fair and competitive environment is evident, therefore, the restrictions on cross-participation between airlines and airport concessionaires must be maintained to prevent conflicts of interest and ensure that all operators are able to access airport infrastructure on an equitable basis.
- Clarity in termination responsibilities. It is of the utmost importance that the law be explicit in delineating the responsibility for demonstrating the absence of causes for the termination of allocations. This is essential to ensure transparent and fair process.
- Aligning with COFECE recommendations. In light of the recommendations from COFECE, it is crucial that any legal reforms do not compromise fair competition and equitable access to airport infrastructure.

"Despite the foundation of the existing legislation on concessions and allocations in the airport and air transport sector, adjustments are needed to ensure transparency, fair competition, and operational flexibility."

As mentioned, the process of obtaining a concession entails meeting distinct requirements compared to those applicable to state-owned entities. While this is not inherently unlawful, this disparity accentuates the existing gaps, discouraging investment in the aviation industry and imposing additional burdens and obstacles on established industry participants.

Despite the foundation of the existing legislation on concessions and allocations in the airport and air transport sector, adjustments are needed to ensure transparency, fair competition, and operational flexibility. In order to bring the legislation in line with international best practices and the recommendations of COFECE, it is essential to make adjustments to the legislation.

TERRUM

NATALIA DESCHAMPS

Associate

Natalia has over 15 years of experience clients in aviation finance transactions involving Mexican airlines, operators and governmental entities, as well as other providers of air transportation service. She has participated in multiple transactions related to the acquisitions, leasing and financings of private and commercial aircraft, helicopters and engines, representing lenders, lessors and owners, in the structure and implementation of guarantee schemes and regulatory work before Mexican authorities.

Education

- Attorney at law by Universidad Panamericana.
- Master in Administrative Law by the Universidad Panamericana.
- Diploma in Aviation Law by the Instituto Tecnológico Autónomo de México (ITAM).
- Advisor Level I in International Sustainable Business (ISB) by the International Association for Sustainable Economy (IASSE).

Memberships

- Member of the Mexican Contact Group for the Aviation Working Group

Engagements

- Coordinator and Professor of the Diploma Program in Aviation Law at Instituto Tecnológico Autónomo de México (ITAM).

Languages

- English
- Spanish



Prol. Reforma No. 1190 25th Floor,
Santa Fe México D.F. 05349
t. (52.55) 52.92.78.14
www.asyv.com / www.asyv.aero

Find us in



Audio Message



www.linkedin.com/company/asyv



The articles appearing on this and on all other issues of Terrum reflect the views and knowledge only of the individuals that have written the same and do not constitute or should be construed to contain legal advice given by such writers, by this firm or by any of its members or employees. The articles and contents of this newsletter are not intended to be relied upon as legal opinions. The editors of this newsletter and the partners and members of Abogados Sierra SC shall not be liable for any comments made, errors incurred, insufficiencies or inaccuracies related to any of the contents of this free newsletter, which should be regarded only as an informational courtesy to all recipients of the same.