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*COELUM is Latin for air space or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed meaning that their right of property would extend as high up to the heavens and down to hell.*

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## Ambiguity in Mexico's laws makes it hard to predict developments in Aviation.

Editorial

The field of Mexican Aviation has been developing very quickly and the regulations have not kept pace with this development. Consequently Sierra Y Vazquez's lawyers pay special attention to the study, investigation and analysis of Mexico's Aviation Regulations

According to a recent article published by the *Reforma* Newspaper, written by the noted journalist, Alberto Aguilar<sup>1</sup> "This is a great opportunity that many of the service providers on this field should take advantage of, considering that the incorporation of new companies like Miguel Alemán's Interjet, Pedro Aspe's Volaris, Avolar owned by Jorge Nelune and Alejandro Burillo's Ave will double the size of Mexico's current air fleet".

Sierra Y Vazquez's specialists are very doubtful that the market, as it currently exists has the ability to absorb this enormous expansion of air lift in the short to medium term. "It is necessary to develop a long term air-transportation policy that will encourage reasonable growth, eliminate tariff distortions, and to do the same regarding air routes", affirms Alberto Aguilar.

He comments as well, that one of the main problems at Secretaría de Comunicaciones y Transportes managed by Pedro Cerisola, is the process of deregulation.

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<sup>1</sup> <http://busquedas.gruporeforma.com/utillerias/imdservicios3W.DLL?JSearchformaTs&file=MEX/REFORM01/00717/00717291.htm&palabra=sierrayvazquez&sitereforma>



In Europe for example, bilateral agreements have been declared illegal, thus establishing open-sky air routes for regional airlines. This is the environment where low cost projects like Easyjet, managed by Andrew Harrison and Bonderman's Ryanair have acquired great popularity.



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Aguilar affirms in his column, which is dedicated to the Sierra y Vazquez firm, "that the main airlines that were once an international aircraft stigma, have now disappeared. These adjustments are the main challenges that the designers of the Mexican national aircraft regulations have to face, in order to taking care of under- served markets".

The opinion leader, Aguilar emphasized that the charter boom has represented an alternative and has helped to loosen legal requirements, due the needs of the major wholesalers. We have to remember that Ciudad del Cabo's Agreement signed in 2000 seemed to ease the repossession of leased aircraft. Mario Molina is going to dedicate an article in this Newsletter about this subject.

The business journalist, who widely read in Mexico, concluded that the direction of aviation development in our country is uncertain because of the unclear legislation. He added that this factor raises the price of the aircraft operations, even for the new airlines.

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## The Cape Town Convention. Good or Bad? Carlos Sierra

In 2001 a diplomatic conference was held from October 29 through November 16, for the adoption of the proposed UNIDROIT/ICAO Convention on International Interests in Mobile Equipment signed at Cape Town, South Africa on November 16, 2001 (the "Cape Town Convention"), which was applied to aircraft by virtue of a protocol thereto, which was signed on the same date (the "Protocol"). The Protocol, which is applicable to matters specific to aircraft equipment, has finally come into force on March 1, 2006, when it was ratified by the required number of states for such purpose. In light of its effectiveness, we must analyze to what extent this convention fulfills its intended purpose and to what extent, particularly in Mexico, such instrument will effectively produce the expected benefits.

### *The Cape Town Convention is good, but no slam – dunk!*

Important as it is for the aviation industry at large, the Cape Town Convention and its Protocol as applied to aircraft, has entered into force in a number of jurisdictions where it is expected to increase the certainty required by lessors and financiers throughout the world to maintain the viability of the leasing of aircraft in countries where the applicability of local laws make the recovery of such assets during dire default situations, primarily by lessees, a very difficult and risk-plagued task that has caused certain jurisdictions such as Mexico, to be considered of high risk, or outright non-eligible to receive leased aircraft through international transactions.



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Needless to say leasing constitutes a preferred form of acquisition of aircraft throughout the world and in many cases it is the only accessible form for acquisition of high cost commercial aircraft by companies with low capital availability in countries where the economic situation make impossible the purchase of modern, safe aircraft.

This in consequence creates a paradox that the Cape Town Convention intends to resolve, as it allows creditors' rights to be more easily recognized and thus enforced, reducing the legal and economical exposure of placing aircraft in traditionally high-risk countries with complex and sometimes unsophisticated legal systems and with recurrent problems that affect their economies and the economy of airlines. The increased certainty that this would produce is expected to generate savings of millions of dollars over the life of financing transactions.

While Mexico is not as bad as some jurisdictions in which the recovery of aircraft and the ability of creditors to obtain the recognition of their rights has become an unbearable risk.



There are well known examples of the extreme difficulties that can be found in this area. The question now is, whether the Cape Town Convention and Protocol constitute an adequate instrument to resolve such aspects in this country.

***Consider carefully your choice of Court of Jurisdiction. Mexico may well be the best choice.***

It is fair to say that on many occasions the difficulties found have resulted from a combination of factors that have contributed to the slow and legally challenging task of recovering aircraft and debt from defaulted airlines. Among such factors we can list the lack of contractual provisions that could allow the enforcement of the creditors rights before Mexican courts in an expeditious and diligent manner, being important to consider to this respect that aspects such as the choice of foreign law and the agreement of jurisdiction of courts other than Mexico, among others.



*Abogados Sierra y Vázquez*

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*The fear of submitting a contract to Mexican law and jurisdiction is unfounded and, at the end, has proven to be very counterproductive for creditors and lessors, particularly considering the time consuming nightmares of enforcement that always result from foreign international legal regime for the creation, perfection and priority of security, title retention and leasing interests in aircraft equipment, railway rolling stock and space assets, which will be underpinned by an International Registry. It has been estimate that such a regime*

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All of this places tremendous restraints on the ability of pursuing the liability of a defaulting lessee in the jurisdiction of its place of residence, where it is more vulnerable and where remedies can be obtained and enforced in a much more expeditious manner. It is important to state that lessors have traditionally required for leases to be subject to the law and jurisdiction of countries like the United States or England with which they feel familiar and comfortable and that the use of the law and jurisdiction of the country of the lessee has traditionally been disregarded as a risk for the rights of the lessor; this is understandable although, without discussing the merit of this reasoning in regards to other jurisdictions, it is important to mention that in our experience in these matters we have found the courts of Mexico to be sophisticated enough to handle these type of transactions and the applicable provisions of Mexican law and the available jurisprudence to be thorough and sufficient to resolve a breach of contract situation expeditiously, effectively and fairly for the parties involved.



In the opinion of this author the fear of submitting a contract to Mexican law and jurisdiction is unfounded and, at the end, has proven to be very counter productive for creditors and lessors, particularly considering the time consuming nightmares of enforcement that always result from foreign judgments issued against lessees or parties domiciled in Mexico.

*The recording of the lease is not enough to protect ownership.*

Another factor is the defective recording of rights that sometimes causes the rights of creditors and lessors to be unenforceable in Mexico. The Mexican Aeronautic Registry needs for this to be achieved in adequate form to be expressly informed of all registration steps expected, being important to consider that the mere recording of the lease does not adequately protect the rights of ownership of lessor or other parties in respect to the aircraft, being the filing of a bill of sale for that matter the only document that would cause such rights to be recognized in full.

The Cape Town Convention and the Protocol applicable to aircraft are not effective yet in Mexico as enforceable international instruments. The Convention was however passed by the Mexican Senate on 27 April 2006, although it still needs to be enacted by the executive branch in order to become effective.

In approving the Convention and Protocol, the Senate approved the text with the Declarations that were recommended by the executive

In approving the Convention and Protocol, the Senate approved the text with the Declarations that were recommended by the executive branch of government, these declarations, as passed, make the instrument in fact useless for the purpose for which it was intended by UNIDROIT and ICAO causing the same, in certain aspects, to create a worst scenario than such that is applicable without such instrument being in place.

*The Mexican Constitution takes precedence.*

The Declarations in question make the enforcement of the remedies stated in the Convention to be contingent to the order of a Mexican court that would allow the recovery of the aircraft and other aspects. This declaration was in fact expected since Mexican law forbids clearly under Articles 14 and 16 of the Mexican Constitution for any person to be deprived of any right or possession without being first defeated in due process or by order or competent authority. Mexican law, as a civil law regime, does not allow the self-help remedies that under common law regimes permit the prompt recovery of the asset subject matter of a lease or security interest. These remedies as stated in the Convention and the Protocol were impossible to be assumed by Mexican law in contradiction of the applicable constitutional guaranty of due process.

Other declarations however could have been avoided or considered in more adequate form, for instance, when during insolvency of a debtor or lessee a court hearing the insolvency with the



intervention of a liquidator or, under Mexican law, a conciliator, would need to resolve on the continuance of the agreement in compliance of the obligations of the insolvent lessee or on the return of the asset to its owner, the Mexican Law of Insolvency Proceedings (*Ley de Concursos Mercantiles*) provides a separator procedure that, in all, would consume no more than approximately sixty days for the resolution in question to be obtained.

In the declaration No. 2 made by the Mexican Government in regards to Article XI of the Protocol, an irrational period of five years was approved for the insolvency administrator or the creditor, as applicable in an insolvency proceeding to resolve whether it would cure all defaults and perform all future obligations under the agreement or to give the creditor the opportunity to take possession of the aircraft object. This makes the applicability of Article XI of the Protocol to be more damaging to the interests of lessors and creditors than to apply Mexican law in respect to these matters as it is currently in effect.

*Declarations made by Mexico have caused the protocol to be far from the ideal instrument.*

The above is merely an example of how the declarations made by Mexico have caused the Protocol to be far from the ideal instrument to resolve controversies resultant from the lease of aircraft objects in this country. While, the Convention and Protocol still need to become applicable in Mexico after they are promulgated by the Mexican Government and while Mexican

courts will still need to apply such instrument in resolution of cases to come to determine what is the criteria of application of such instrument, in the view of this author, caution must be exercised before agreeing outright for the Convention and Protocol to regulate upon an aircraft lease transaction, whenever such becomes applicable, in lieu of other provisions that, considering the declarations with which it has been approved, and considering the essential contradictions that an instrument of such nature has with Mexico's statutory civil law system, could be more advantageous for the parties than plainly subjecting the transaction to the terms of the Protocol.

The discussion of this subject should certainly be more profound as it is worth of more thorough review and analysis. This brief article however intends to put a question mark on the viability of such instrument to resolve the long lasting problems related to aircraft leasing in Mexico.



*Abogados Sierra y Vázquez*



## Extraterritoriality or security safeguard?

Adolfo Samaniego



*Abogados Sierra y Vázquez*

In response to the September 11, 2001 attacks, airport security measures and safety measures related to flight operations has been a fundamental issue for the United States Government, however in the present article we will discuss if these measures are justified when they are applied by American authorities in airports which are under the sovereignty, suzerainty and protection of other State.

Airport inspections performed by the Transportation Security Agency (TSA)<sup>1</sup> at Mexican airports has been a regular practice since 2002, the year in which this agency assumed Federal Aviation Administration's (FAA)<sup>2</sup> civil aviation security functions<sup>3</sup>. In accordance with the Code of Federal Regulations (CFR), TSA agents are enabled to make inspections "at any time or place" to airport tenants in respect to its airport security programs<sup>4</sup>. Under such basis, Mexican airports in which American air carriers operate regularly are visited by TSA's personnel in order to verify airport security and aircraft safety measures. During these visits agents evaluate national measures and make recommendations in regards to the application of some procedures, which are similar to those applied in American airports. In my opinion the latest example of the result of the afore mentioned recommendations is the bidding process organized by the Mexican North Central Airport Group<sup>5</sup> in respect to the design, construction and implementation of a checked baggage revision system, which in all cases involves the installation of TSA's certified explosive detection systems.



*Abogados Sierra y Vázquez*

- 1 The Transportation Security Administration (TSA) was created as part of the [Aviation and Transportation Security Act](#) passed by the [U.S. Congress](#) and signed into law by President [George W. Bush](#) on [November 19, 2001](#).
- 2 The Federal Aviation Administration (FAA) was created as part of the Department of Transportation in 1967, and it is responsible for the advancement, safety and regulation of civil aviation in the United States of America.
- 3 February 17, 2002
- 4 Code of Federal Regulations, Title 49: Transportation, Part 1542: Airport Security, Subpart A: General, Article:1542.5 Inspection Security, Paragraphs A and B.
- 5 Grupo Aeroportuario del Centro Norte: Airport business group in the North central part of México in charge of the administration of the following airports: Acapulco, Cd. Juárez, Chihuahua, Culiacán, Mazatlán, Monterrey and Zihuatanejo.



In accordance with the Mexican legal framework is there any regulation that may allow foreign authorities to make inspections in Mexican territory/airports? Mexican Air Law and its regulation do not mention anything related to such theme, therefore might we understand TSA inspections as a sign of American extraterritoriality<sup>6</sup> over Mexican airports? Article 133 of the Mexican United States Constitution establish that international treaties executed in accordance with said Carta Magna, executed or to be executed under the authority of the President with the approval of the Senate shall be considered as supreme law.

In that respect, we have to bear in mind that México is a signatory State of the Convention on International Civil Aviation of 1944<sup>7</sup>, whose Article 25<sup>8</sup> establishes that each contracting State undertakes to provide measures of assistance to foreign aircraft in distress in its territory by allowing, subject to control by its own authorities, authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstance.

In accordance the above:

- a. May we have to understand the faculties granted by the American Government to the TSA in order to inspect foreign airports as an internal and valid measure to safeguard the security and safety of U.S. civil aircraft, with its main intention to avoid another September 11?

- b. As an infringement of foreign countries' sovereignty? Or
- c. As a legal measure based on International Law, well-founded and acceptable in accordance with the legal system of the country who receives the inspections?

*Gentlemen, the topic in in the table let us start the debate...*



*Abogados Sierra y Vázquez*

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6 Extraterritoriality: Extension of the power of a nation's law in a foreign country.  
 7 Better known as the Chicago Convention.  
 8 Article 25, Aircraft in distress.





## This month's extract of Mexican aviation news:

- **Senate demands air fare reform.**  
TV Azteca y El Financiero. 1 / jun / 2006
- **ASSA and Aeromexico agree on an original stewardess retirement system.**  
Yahoo Noticias. 7 / jun / 2006
- **Strikes turbosina (aviation Fuel) to airlines.**  
Milenio. 8 / jun / 2006
- **From now on ASSA is not operating the Toluca airport.**  
Reforma. 8 / jun / 2006
- **Mexico will have to invest 30mdd in renewal of air fleet.**  
Milenio. 12 / jun / 2006
- **Airlines with problems because of fuel's price.**  
Excelsior. 12 / jun / 2006
- **AICM Terminal in Mexico City will be ready in October: Cerisola.**  
El Universal. 14 / jun / 2006
- **More than 1,200 mdp as a budget for runway widening at Toluca Airport.**  
El Universal. 16 / jun / 2006
- **Low cost airlines will invest 1,330 mdd over five years.**  
Milenio, Vanguardia y El Universal. 19 / jun / 2006
- **Leave out 23 millions of pesos per month because of Aerocalifornia temporary closed**  
La Crónica. 22 / jun / 2006
- **SAT reimburse \$2,600 millions of pesos to 14 big companies: audit.**  
La Jornada. 23 / jun / 2006
- **Volaris claims an 18% market share.**  
Tiempo Digital. 26 / jun / 2006
- **Determine new charge to air ticket regarding security concept.**  
Reforma. 26 / jun / 2006



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## ABOGADOS SIERRA Y VÁZQUEZ

Prol. Reforma N° 1190 Piso 25

Santa Fé

CP. 05300

México D.F.

T. (52.55) 52.92.78.14

T. (52.55) 50.93.29.63

[www.asyv.com](http://www.asyv.com)



Editor:



[www.mierveran.com](http://www.mierveran.com)