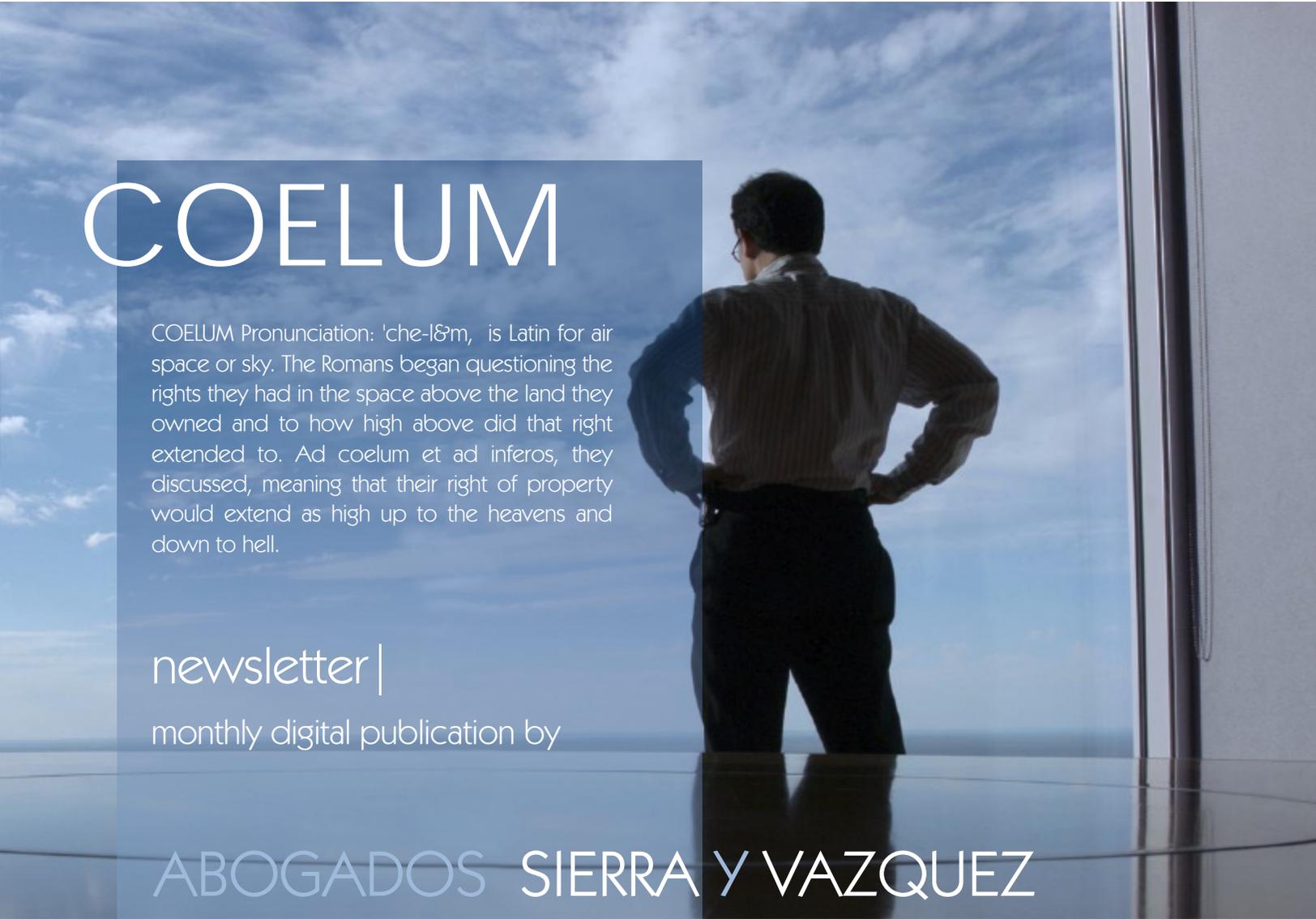


COELUM



COELUM Pronunciation: 'che-l&m, 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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One Year



Carlos Sierra



Antonio Vázquez



Mario Molina



Adolfo Samaniego

With this number we are proud to celebrate one year of this publication. One year after which many goals have been achieved and many projects and dreams have become a reality at this firm. One year in which we have attempted to reflect the evolution of our work through this modest source of information and study.

To celebrate this anniversary we have modernized the format of Coelum, enhanced the research and quality of its contents and improved the edition and the form in which this publication will be distributed, all in the hope of creating a much closer relation with our readers and to better serve this industry with a more thorough analysis of the most relevant legal topics every month.

We are very pleased to portrait our work and expertise in aviation through these pages and will continue to improve as we continue to be the standard bearer in aviation law in Mexico.



Alejandro Lavat



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Enforcement of Arbitration Awards Related to the Breach of Agreements Involving Aircraft Objects.

(a civil law system approach) | Carlos Sierra

(Presentation made by the author at the Arbitration in Maritime and Transportation Disputes Seminar on April 28, 2007 in Hamburg, Germany).

The purpose of my presentation will be to describe certain aspects that need to be considered when submitting certain controversies to be resolved by arbitration, and how the enforcement of the resultant award under certain circumstances can find difficulties in statutory legal regimes, particularly when the arbitrators resolve in respect to certain aspects of a controversy.

The problem that I would like to discuss arises when it comes to enforcement of foreign arbitration awards.

In relation to this, it is relevant to say that the enforcement of foreign arbitration awards is clearly contemplated and allowed under Mexican law. In this respect Chapter IX of the Commercial Code deals with the recognition and enforcement of arbitration awards and it is also important to mention of course that Mexico is also a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards of 1958 (June 10, 1958.)

Considering the above, foreign arbitration awards are fully enforceable by all means and the law is clear to state that such enforcement will be fully recognized by the courts of Mexico.

ARTICLE 1461 of the Commercial Code:

ARTICLE 1461. An arbitration award, regardless of the country in which it has been dictated, shall be recognized as binding and, upon presentation of a formal petition to the court, it shall be enforced in accordance with the provisions of this chapter.

The party invoking the award or requesting its enforcement shall present the original of the duly authenticated award or certified copy of the same, and the original of the arbitration award referred in articles 1416 paragraph i and 1423 or certified copy of the same. If the award or agreement shall not be written in Spanish, the claimant shall present a translation of such documents made by an official translator.

In respect to enforcement in Mexico however, several aspects need to be taken into consideration particularly in respect to the enforcement of awards resultant from controversies resolved under foreign law.

Article 1461 of the Commercial Code states the above clearly and in consistency with the New York Convention.

Enforcement of Arbitration Awards Related to the Breach of Agreements Involving Aircraft Objects

ABOGADOS SIERRA Y VAZQUEZ
Arbitration in Maritime and Transport Disputes
April 28, 2007 Hamburg, Germany

For the enforcement of foreign arbitration awards, an obligation exists under Article III of the New York Convention not to require conditions that can be said to be more rigorous than such applicable to national arbitration awards.

In order to meet this obligation Mexican law has established a single legal regime that is applicable for the enforcement of local and foreign awards.

Article 1415 again of the Commercial Code states this, also in consistency with the New York Convention:

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ARTICLE 1415 of the Commercial Code:

ARTICLE 1415. The provisions of this title shall apply to domestic commercial arbitration, and to international commercial arbitration when the seat of the arbitration shall be in national territory, except as provided in international treaties of which Mexico be a member state or in other laws that shall determine a different procedure or provide that certain controversies may not be resolved by arbitration.

The enforcement practice however as Mexican author Francisco Gonzalez de Cossio says must also follow the same principle, which means that the local courts should not impose more onerous conditions for the enforcement of foreign awards than they do for local awards.

By "conditions", the term clearly refers to procedural conditions as well as to any other sort of requirements that may be imposed, directly or indirectly upon the parties that intend to enforce an award.

The aspects that we need to take into consideration, not only when the award has been issued already, but throughout the arbitration process,

can generally be said to be of procedural form. Although, particularly when the award is to be enforced in a Civil law jurisdiction, we must also consider that it needs to be related to matters that can be legally resolved through arbitration.

In Mexico and in many other Civil law jurisdictions, the matters that can be resolved through arbitration can be said to be such that are restricted to aspects that do not need to be resolved by Mexican law as a matter of public order. To such effect we need to consider for instance that matters related to family law cannot be resolved through arbitration and in respect to matters involving aircraft objects, for instance, arbitration cannot be used to resolve controversies related to aircraft registration. I will refer to this matter in more detail in a few minutes.

In aviation, and particularly in respect to the lease or sale of aircraft objects, all arising controversies that can be resolved through arbitration are of commercial nature and in principal, we could say that the law permits such controversies to be freely resolved through arbitration in most cases.

Here however, before we submit the matter to arbitration, we must distinguish the nature of the controversy considering that mobile assets such as aircraft are subject of rights in rem.

A foreign arbitration award resultant from a controversy arising between the parties to a contract, for instance an aircraft lease, can be enforced in accordance with the described legal provisions, but we must consider that such enforcement is likely to be possible only in respect to the rights of the parties under the contract but not actually to such rights that the law expressly requires to be resolved under a certain mechanism or under Mexican law.

Here we need to take into consideration that the enforcement of an award can find difficulties

when it deals with aspects which resolution cannot be submitted to arbitration because the law requires for such to be resolved either by judicial means or in different form, (an example of this can be the one I mentioned earlier related to the deregistration of aircraft), and we also need to consider other aspects that can be resolved through arbitration but not under laws different than the laws of Mexico.

In example of cases that cannot be resolved through arbitration, the Civil Aviation Law states that the de-registration of aircraft can only be accomplished through one of the mechanisms contemplated in Article 46:

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ARTICLE 46 of the Civil Aviation Law:

ARTICLE 46. The cancellation of the registration marks of an aircraft at the Mexican Aeronautic Registry shall constitute the loss of its Mexican nationality and can be conducted in the following cases:

- I. Pursuant to a written request of the owner or legitimate party in possession of the aircraft. The registration of an aircraft subject to a lien cannot be cancelled without the consent of the creditor;
- II. By judicial order or of other competent authority;
- III. In the event of destruction, loss or abandonment of the aircraft;
- IV. For expiration of the term in respect to provisional registrations;
- V. For becoming registered in another state, and
- VI. For any other cause stated in the corresponding regulations.

This means then that an award through which an arbitration tribunal would order the cancellation of the registration marks of an aircraft would not be recognized by the Civil Aviation Authority as a valid form to obtain such cancellation.

What happens however when the arbitration award pretends to resolve a controversy that involves the rights of possession to the aircraft object, or any other object for that matter, when it shall be located in the country where the arbitration award intends to be enforced?

This question places a more challenging scenario than such that would merely involve the enforce-

ment of an award related to rights in personam of the parties arising from an existing contract.

In my view, the principal challenge would derive from the ability of the arbitrator, or of the arbitration tribunal to apply foreign law when they would face the resolution of a controversy related for instance to the rights of ownership or to the rights of possession in respect to an aircraft, even if such foreign law has been chosen by the parties to be the law under which the arbitration is resolved and even if such may well be the law of the contract that has been agreed by the parties.

Under a hypothetical scenario, we could have an arbitration award issued for instance under New York law, ordering a lessee under a defaulted aircraft lease agreement to return possession of the leased aircraft to the lessor or possibly to the owner of the aircraft if other than the lessor depending on the circumstances. Under this scenario, the enforcement of the award would become problematic considering the following:

Article 13 of the Federal Civil Code states the rules that need to be applied to determine applicable law. In respect to this, paragraph III states that the constitution, regime and extinction of rights in rem in respect to the lease and temporary use of movable assets shall be regulated under the law of the place where such shall be located, even if its title holders are foreign.

The above provision is of public order and cannot be waived or otherwise agreed by the parties in a contract or, for that matter, in an arbitration clause.

In accordance with Article V(2)(a) of the New York Convention and in accordance with Articles 1457(II) and 1462(II) of the Commercial Code, the validity of an award can be questioned when such is referred to controversies that cannot be resolved through arbitration.

That a controversy may be resolved through arbitration would be dependant on the provisions of applicable law, which can be one of several laws, such as the law applicable to the contract, the law of the place where the arbitration is conducted or others, however to the extent that a Mexican judge must determine whether the award can be enforced in Mexico or not it must determine that the matter can be subject of arbitration only in accordance with Mexican law.

The Mexican rule in respect to the ability to resolve certain controversies through arbitration can be summarized by saying that all controversies that are not related to a matter of public order, that do not prejudice the rights of third parties or that are not expressly excluded may be resolved through arbitration.

In my view if a controversy of this nature is agreed by the parties to be subject of arbitration, the arbitration clause for an Aircraft Lease for example should contemplate the possibility that the aircraft repossession or the rights in rem of the aircraft owner be then resolved under Mexican law by the arbitration tribunal in order to meet the requirements of Article 13 as this needs to be taken into account in order to make this aspect able to be resolved through arbitration.

Other aspects that need to be taken into consideration relate to the formalities that are a substantial part of statutory civil law regimes. For reasons not of substance but of form the enforcement of the arbitration award can become very cumbersome and at some point even impossible. To prevent this, careful attention must be given to the formalities that need to be observed by the parties in order not to compromise the validity of the arbitration process and of the resulting award.

Issues also such as the capacity of the parties and of the individuals acting on their behalf should be carefully documented in compliance with notarial certifications and other requirements of Mexican law to prevent such from becoming arguments that the party against whom the enforcement is attempted can raise it its defence.

Here the question again is whether the court that is presented with the award can enforce the same, or whether the enforcement would be impeded by the provisions of Article 13, for instance. The issue is debatable as some could argue that the will of the parties in the resolution of commercial disputes can be broader than in the resolution of civil controversies.

I would like only to leave this point by saying that that this would certainly be a case in which the enforcement would become involved at least in complications and delays that, in my view, serve to illustrate the difficulties of enforcing foreign arbitral awards particularly in civil law countries, and that the mere controversy that a situation such as the one described above would create could serve to entertain the enforcement for several months and for the affected party to challenge the enforceability of the award, maybe successfully.

New Anti-Terrorism Measures In Mexico | Adolfo Samaniego

On April 26, 2007, during the last ordinary session of the 60th legislature of the Mexican Senate, new reforms to Mexican criminal law were approved in order to change the description of terrorism and to penalize new criminal acts related to it. The changes were made so as to include areas that were not described in our criminal legislation in 1970, when terrorism was first considered as a punishable crime in Mexico.

Although Senate's decision was to reform the law so as to describe new criminal concepts such as terrorism cover-up and financing of terrorism, it is also intended to adapt the content of international treaties to Mexican legislation. It was important to reform Mexican law with regard to international treaties which relate to criminal activities that were not considered in the Mexican legal system. It is important to reform it so the signatory state could be enabled to exercise its jurisdiction and apply the corresponding punishment. The absence of the criminal description and its penalty can generate severe consequences at national or international levels.

These consequences at national level could be seen in cases in which the authorities were not be able to prosecute a probable criminal if the description of the unlawful activity and its corresponding punishment is not duly ordered in Law. This being in accordance with third paragraph of article 14 of the Mexican Magna Carta, that establishes that in criminal judgments, no castigation will be imposed by mere analogy if crime and punishment are not exactly described in Law¹.

Consequences at international level can be explained as follows: If Mexico does not have the competence to investigate, prosecute and punish terrorist acts, it would be unable to extradite a terrorist. This would allow for the impunity of acts that are considered as crimes by the international community.

To sum up, the Senate's approval of the changes to Mexico's criminal law means that Mexico has now completed the requirements established by UN Security Council Resolution 1373², in which all states shall:

- Prevent and suppress the financing of terrorist acts.
- Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists.
- Criminalize the willful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.
- Freeze, without delay, funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.
- Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts by entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.

¹ *Nullum crimen nulla poena sine lege*

² September 28, 2001

News | May

extract of Mexican Aviation news

GAN handles 1.16 million passengers in April

Grupo Aeroportuario del Centro Norte (North Central Airport Group) reported that in April of this year, it handled 1.16 million passengers in its 13 airports, 17.8 per cent more than in April 2006. This increase was due to a 27% growth in domestic traffic.

El Financiero. 10 / May / 2007

<http://www.elfinanciero.com.mx/ElFinanciero/Portal/cfpages/contentmgr.cfm?docId=56768&docTipo=1&orderBy=docid&sortBy=ASC>

Delta Air Lines comes back to life; risks persist

Delta Air Lines emerged from bankruptcy last week and 400 million shares of its new stock began to be negotiated on the New York Stock Exchange under its former symbol DEAL. The former shareholders were eliminated and the past creditors were not guaranteed by Delta now that they are the holders of new shares. Staff, managers and the Guarantee Benefit Corporation also received shares.

El Excélsior. 10 / May / 2007

<http://www.nuevoexcelsior.com.mx/main.aspx?pid=55&idioma=27&parent=99999999.5.¬icia=30994&categoria={CATEGORIA}&ruta=Delta%20Air%20Lines%20vuelve%20a%20la%20vida,%20persisten%20riesgos>

Boeing delivers its first new generation aircraft

Boeing delivered its first 737-900ER "New Generation" aircraft to its launch client, Lion Air, the largest low cost airline in Asia. According to Boeing, the 737-900ER has substantial economic advantages over rival models, including a 9% operating cost advantage per trip; a per seat operating cost saving of 7%, and 1,046 kilometres more range than the Airbus A-321.

El Financiero. 15 / May / 2007

<http://www.elfinanciero.com.mx/ElFinanciero/Portal/cfpages/contentmgr.cfm?docId=57649&docTipo=1&orderBy=docid&sortBy=ASC>

Cancun's Terminal 3 opens

Cancun International Airport's Terminal 3 initiated operations with the arrival of approximately 900 passengers aboard three airlines coming from The United States and Spain. The new state of the art terminal was inaugurated by the President of Mexico on May 17.

El Universal. 18 / May / 2007

<http://www.eluniversal.com.mx/columnas/65260.html>

Azteca Airlines says they are ready to operate

Aztec Airlines advised that the airline is ready to fly again if the aeronautical authority will allow it to do so. A number of its aircraft have already gone through a major maintenance program and others have been replaced with newer equipment.

Reforma. 25 / May / 2007

<http://www.reforma.com/negocios/articulo/772854/>

News | May

extract of Mexican Aviation news

ASSA denounces Mexicana contract violations

The Asociación Sindical de Sobrecargos de Aviación (Association of Flight Attendants) complained that Mexicana continues to violate its Collective Agreement with ASSA. For example, it lowered the pensions of retired Flight Attendants without there being anything in the Agreement that allows for this and used the excuse that it is "in a bad financial state".

Economista. 25 / May / 2007

<http://www.economista.com.mx/articulos/2007-05-24-37053>

New agreement to benefit aeronautical industries

Mexico and The United States will sign the Bilateral Agreement of Aeronautical Security (BASA), which will give big opportunities for Mexican exports of aircraft equipment and aircraft. The DGAC said that this bilateral agreement will allow for a 3% reduction in the costs of aeronautical sector industries now established in Mexico.

El Economista. 28 / May / 2007

<http://www.economista.com.mx/impreso/articulos/06256D5C00046629862579E80062B7D0>

Interjet has 15% of low cost market

Interjet reported that in 2007, it estimates carryings of 2 million 100 thousand passengers. This is a major increase over 2006, its first year of operation in which it carried 1 million 500 thousand passengers. Interjet estimates that it has 15% of the "low-cost" market, and about 8% of the total national market.

Milenio. 28 / May / 2007

<http://www.milenio.com/mexico/milenio/nota.asp?id=513967&sec=5>

Mexico City Airport passengers grow 2.5%

In the first four months of the year, Mexico City Airport handled 8,159,188 passengers, which represents an increase of 2.5% compared to the same period in 2006. Most of the passenger increases were from Aeroméxico, Mexicana, United Airlines and Air France.

El Economista. 29 / May / 2007

<http://www.economista.com.mx/articulos/2007-05-28-37275>

Aeroméxico emerges from a turbulent period

Aeroméxico achieved its assignment: It prevented 1,550 Flight Attendants from calling a strike vote and 850 pilots from signing an agreement of productivity with the company. Then the Aeroméxico's Flight Attendant Union approved the zero increase that the company proposed some weeks ago. No increase to the Flight Attendants this year will mean savings to the company of 10.5 million Pesos.

Reforma. 31 / May / 2007

<http://www.reforma.com/negocios/articulo/774860/>

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