

# COELUM

COELUM Pronunciation: 'che-l&#38;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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## Mexicana, Aeroméxico and the Federal Competition Commission | Viridiana Barquín

Mexicana and Aeroméxico are well known for their ongoing economic and financial difficulties which have prevented any sustainable and uniform development. The financial restructuring began in 1994 when different banks took possession of both companies, an operation that was authorized by the Ministry of Communications and Transportation before the Federal Economic Competition Law went into force. In May 1995, the Federal Economic Competition Commission was asked to authorize the creation of a company to be called *Corporación Internacional de Aviación* (CINTRA) which would control and hold the shares of Mexicana, Aeroméxico and their subsidiaries.

The Commission approved and authorized the incorporation of a controlling company subject to the condition that this association would only have a term of three years, and subject as well, to certain measures that would guarantee the independent commercial performance of Aeroméxico and Mexicana in order to eliminate the anticompetitive risks of this concentration. Both companies appealed arguing that a three year term was not enough to allow for the financial reorganization of the airlines and that the Mexican aviation industry required a long term rehabilitation program that would guarantee their growth in order to be able to compete at an international level.

In its second analysis, the Commission also considered the information obtained from the authorities and aviation experts, market competitors, pilots and cabin staff, ground-personnel worker unions, providers of tourist services and legislators interested in the industry. Thereafter, the Commission permitted the incorporation of the controlling company CINTRA, that would operate for an indefinite period.

The functions of CINTRA would be the creation and coordination of operating synergies and formulas for making the fleet and services more efficient, and provided that the conditions of the competition prevailing in the relevant air transportation markets would be periodically reviewed by the Commission.

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The Commission evaluated the operation of the combined carriers within the notification procedure in order to ensure that there were no anti-competitive practices, and to consider the participation in the relevant markets due to the substantial power represented by both companies. Article 17 of the Federal Economic Competition Law provides that in the investigation of concentrations of ownership, the Commission must consider any indication of damage or attempts to damage the competitive process.

The Commission has to ensure the ownership concentration does not unilaterally fix prices or substantially restrict the supply of goods or services in the relevant market without opportunity for other competitors to compete or potentially offset such power.

Notwithstanding the foregoing, there are several legal and administrative restrictions to enter into the market:

- The rendering of regular public air transportation services requires a concession from the Ministry of Communications and Transportation. The Civil Aviation Law establishes that financial, technical, juridical and administrative capacity must be demonstrated to obtain a concession. The direct foreign capital participation in Mexican airlines is also limited to 25%
- The bilateral treaties signed by Mexico stipulate that only the airlines of each country may operate international flights and also limit the number of airlines between two cities and the flights frequency. These treaties also exclude cabotage services.

- The operation of a new route requires authorization from the General Director of Civil Aeronautics which is totally discretionary, pursuant the Civil Aviation Law.
- In the Slot Schedule Committee of Mexico City Airport, the disputed time schedules are assigned based on seniority, thus placing new companies at a great disadvantage.

While Aeroméxico and Mexicana could be classified as companies with substantial power within their relevant markets, it is important to note that the above mentioned restrictions are circumstances out of their control. In spite of the reasons for authorizing the concentration of Aeroméxico and Mexicana which was to allow their financial and economic rehabilitation, the Commission resolved that both companies had to be sold separately.

One of the factors that made it difficult to resolve the dissolution by CINTRA, was that the federal government retains certain shares of both companies since they were privatized in the late eighties, and thereafter many more shares reverted to the State through the Bank Savings Protection Fund (FOBAPROA).

Mexicana experienced a very long sales process and Aeroméxico recently received a purchase offer. In any case, adequate measures must now be taken to prevent the repetition of the deplorable chapters in the history of Aeroméxico and Mexicana, which has been characterized by many and varied financial and economic problems, including the imminent threat of insolvency and potentially even of bankruptcy..

## Aeroméxico Nowadays | Adolfo Samaniego

Things have not been easy for Aeroméxico for the past 13 years. The situation has been aggravated in the first quarter of 2007 due to losses of \$1,174,000.00 MXP<sup>1</sup> (\$106,000,000.00 USD) together with high fuel and operational costs, and not taking into account the aggressive competition from low cost airlines. All of the above have compelled the Mexican Government to undertake the sale its shares<sup>2</sup> on the Mexican stock market, which was planned for this month, or accept the recent<sup>3</sup> offer from private investors. In that originally regard, it would be interesting to know if the sale of shares or acceptance of the offer would be allowed under Mexican Law. In other words, are companies with governmental majority participation allowed to sell their shares, just like any other corporation?

For the specific case of Aeroméxico, during the Mexican economic crisis of 1994-1995, the Mexican Government acquired, through the Bank Saving Protection Fund (FOBAPROA)<sup>4</sup>, the shares of those companies (Aeroméxico among them) which were unable, due to the extremely high interest rates, to pay their debts to the banks. Consequently the Federal Government acquired 62% of Aeroméxico's capital stock. This situation still exists to the present day.

In accordance with the above, we have reviewed the chapter related to the Administration, Alienation, and Control of Assets Procedures of the IPAB Law<sup>5</sup>, which indicates that the sale of assets, including shares, belonging to the IPAB<sup>6</sup> must be made through public bidding. However if the Board of Governors of said Institute determines that such procedure will not allow the company to get the best possible price for its shares, the board can authorize the selling of assets through solicitation, in accordance with the rules, terms and conditions established by the IPAB<sup>7</sup>.

Furthermore the IPAB Law says that third parties specialized in dispersal of assets may assist the Institute for such purpose, in order to obtain the best income from the sale of assets.<sup>8</sup> However such sales must be carried out in accordance with the special commercial characteristics of operational, banking and commercial practices.<sup>9</sup>

## CONCLUSION

In order to answer the main question of this article, we conclude that selling Aeroméxico's shares on the stock market or the acceptance of the best offer from a private investor are viable solutions in accordance to Law. However the Mexican Government will have to make a very detailed analysis in order to decide which option is better for the State and Mexican air transportation.

<sup>1</sup> El Universal, August 22, 2007, Alberto Aguilar, Column "Nombre, Nombres y...Nombres"

<sup>2</sup> In the case of Aeromexico, Government entities own 62% of the airline capital stock in accordance with the following scheme: IPAB: 45.37%; SHCP: 10.16%; NAFIN: 6.47%

<sup>3</sup> Private investors such as Moisés Saba Masri and Alberto Saba Raffoul, who are shareholders of TV Azteca, Hyatt & Crown Plaza, among other business, have made a public offer to buy Aeromexico's shares for 97.9MD, approximately \$0.17 USD per share. (El Economista, August 23, 2007).

<sup>4</sup> Fondo de Protección al Ahorro (FOBAPROA), an entity created as part of a banking recovery program in 1990, which later on was substituted in 1998 by the Saving Bank Protection Institute (Instituto para la Protección del Ahorro Bancario -IPAB-)

<sup>5</sup> Published in the Federal Gazette on January 19, 1999.

<sup>6</sup> IPAB own 45.37% of Aeromexico's capital stock

<sup>7</sup> Art. 64, First and Second Paragraph of the IPAB Law.

<sup>8</sup> Art. 62 IPAB Law.

<sup>9</sup> Art 63 IPAB Law.

## News | August

### Extract of Mexican Aviation News

#### Advances in Aviation: A slow but constant growth

The growth of the sector shows a slow but increasing trend, which needs to accelerate. In Mexico only 10 per cent of the population flies. The low-cost airlines already have 16% of the national market. Most of the increase comes from regular passengers who are looking for savings.

El Universal, 01/ August / 2007

<http://www.eluniversal.com.mx/columnas/66552.html>

#### Aerospace cluster in Mexico is taking off

At least 20 factories related to the aerospace industry now are based in Nuevo León, forming a cluster of service and manufacturing companies. According to the figures of the State Government these companies exported 65 million dollars in products and services in the first quarter 2007, producing a year-over-year growth of 75 per cent.

Reforma, 08/ August / 2007

<http://www.reforma.com/negocios/articulo/399/796676/default.asp?Param=4&PlazaConsulta=reforma&EsCobertura=false&DirCobertura=&TipoCob=0>

#### Air Berlin will buy its main rival LTU

Air Berlin, the second biggest carrier in Germany, received the green light from the German Federal Cartel Office, an anti-monopoly authority, to acquire its main rival LTU. The Authority determined that the acquisition of LTU, a tourism tour and business operator, which was completed last March, does not represent a monopoly practice by Air Berlin.

El Financiero, 09/ August / 2007

<http://www.elfinanciero.com.mx/ElFinanciero/Portal/cfpages/contentmgr.cfm?docId=72852&docTipo=1&orderBy=docid&sortBy=ASC>

#### Financial condition of Mexicana has plummeted

Just a year and a half after the sale of Mexicana, the carrier has not lived up to expectations, but will have to face to the high impact of a financial and operating restructuring in order to recover its viability. To achieve its goals, Mexicana must reduce its costs by 25% and also make modifications to the Flight Attendants Collective Agreement.

El Economista, 10/ August / 2007

<http://www.economista.com.mx/impreso/articulos/06256D5C0004662986257332007C001A>

#### Plans to reduce the price of aviation fuel

The National Chamber of Air Transport (CANAERO) is negotiating with the Transportation Ministry, Airports Auxiliary Services (ASA) and Pemex, to reduce the price of aviation fuel, which currently costs more than seven pesos per litre.

Excelsior, 10/ August / 2007

<http://www.nuevoexcelsior.com.mx/main.aspx?pid=55&idioma=27&parent=99999999.5.&noticia=45069&categoria={CATEGORIA}&ruta=Buscan%20reducir%20el%20precio%20de%20la%20turbosina>

## News | August

### Extract of Mexican Aviation News

#### The Aviation industry plans for Puebla

The Tourism Ministry will invest in Puebla to support Puebla's Hermanos Serdán airport located in Huejotzingo, in order to increase tourism to the area which has turned into one of ten states with higher tourism revenues. The airport authorities expect to finish this year with a higher volume of air traffic

El Universal 16/ August / 2007

<http://www.eluniversal.com.mx/columnas/66552.html>

#### CNBV approves Saba's offer to acquire Aeroméxico

The Comisión Nacional Bancaria y de Valores (CNBV) authorized the offer to purchase Aeromexico, made through the Protection Institute Savings Bank (*Instituto de Protección al Ahorro Bancario*). CNVB will however analyze the offer and will fix a minimal price of reference for the transaction. Moisés Saba Masri and Alberto Saba Raffoul offered 99 million dollars for the company.

Milenio, 23/ August / 2007

<http://www.milenio.com/mexico/milenio/nota.asp?id=541527&sec=5>

#### The legal ruling of the JFCA comes into force

The legal ruling that resulted from the economic conflict between Mexicana and the Union of Flight Attendants came into force on August 29, after the period allowed by the Conciliation and Arbitration Federal Organization (*Junta Federal de Conciliación y Arbitraje*) for the parties to reach an agreement. The legal ruling of the JFCA resulted in a modification of the flight attendants collective agreement. This resulted in a saving of twenty five million dollars to Mexicana.

Milenio, 30/ August / 2007

<http://www.milenio.com/mexico/milenio/nota.asp?id=543762&sec=5>

#### ASA airports return to normal activities

The airports of Chetumal, Campeche, Ciudad del Carmen and Poza Rica have resumed normal operations. Due to the imminent arrival of hurricane Dean a week ago, Airports & Auxiliary Services (ASA) suspended operations as they could not guarantee the safety of the personnel and passengers. Hurricane Dean left in its wake broken glass, damaged doors, windows and roofs.

Reforma, 29/ August / 2007

<http://www.reforma.com/negocios/articulo/402/803460/>

#### Aeromarmi: The first national plane manufacturer.

Aeromarmi is the first national company to build aircraft in Mexico. The company builds two-seater aircraft with a market price of \$90,000. Aeromarmi wants to be known as an aeronautical industry that can compete with foreign companies, and a company that will provide safe, efficient airplanes for its customers.

El Financiero, 29/ August / 2007

<http://www.elfinanciero.com.mx/ElFinanciero/Portal/cfpages/contentmgr.cfm?docId=76567&docTipo=1&orderby=docid&sortby=ASC>

## Contributors



### VIRIDIANA BARQUÍN

Attorney at Law: Admitted to practice law in 2007. Ms. Barquín, of Mexican nationality obtained her law degree at Universidad La Salle, Mexico City and attended post-graduate studies in International Business by Universidad La Salle, Barcelona, Spain; Airline Contract Law by International Air Transport Association (IATA), Geneva, Switzerland and International Arbitration by Escuela Libre de Derecho, Mexico City. LANGUAGES: Spanish, English and Catalan. PRACTICE AREAS: Aviation Law, Aircraft Contract Law and Corporate Law. e-mail: [vbarquin@asyv.com](mailto:vbarquin@asyv.com)



### ADOLFO SAMANIEGO

Attorney at Law: Admitted to Practice law in 2001. Mr. Adolfo Samaniego, of Mexican nationality obtained his law degree at Universidad Panamericana, Mexico City. LANGUAGES: Spanish and English. PRACTICE AREAS: Aviation Law, Corporate Law and Real Estate. e-mail: [asamaniego@asyv.com](mailto:asamaniego@asyv.com)

ABOGADOS SIERRA Y VAZQUEZ

Prol. Reforma N° 1190 Piso 25  
Santa Fé México D.F. 05349  
t. (52.55) 52.92.78.14  
f. (52.55) 52.92.78.06  
[www.asyv.com](http://www.asyv.com)  
[mail@asyv.com](mailto:mail@asyv.com)