

COELUM

COELUM Pronunciation: 'che-läm, 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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The Commercial Procedures in Mexico before the Cape Town Convention. The Tortuos way to repossess an aircraft | Antonio Vázquez *

As you know, Mexico has adopted the Convention on International Interests in Mobile Equipment (Cape Town Convention) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the Protocol). These legal provisions became effective in our country on November 2007 and in past Coelums we have analyzed some of the most relevant items and its implications within the Mexican legal system. In this article we will talk about one of the most relevant aspects on procedural matters that is included in the Convention and that, in our perspective, will change dramatically the way of acting in a legal dispute before Mexican Courts, when the main objective of the plaintiff is to reposes its assets (the aircraft or the engines, or both) in an expeditious way.

The Tortuos way to repossess an aircraft in Mexico before the Cape Town Convention.

In this section we will explain about the typical process of the legal proceeding that would be followed by a plaintiff before the Mexican Courts to recover the leased assets, assuming that the plaintiff would be the lessor and that the defendant would be the lessee of the equipment, and that the lessee has become in default of its contractual obligations. We assume also that the defendant is a Mexican company with its domicile and its assets located in Mexico.

First of all, we should point out that the legal provision applicable to these kind of disputes in Mexico is the Code of Commerce that regulates all the commercial procedures. This includes commercial disputes derived from an aircraft lease agreement.

The Code of Commerce does not include any provisional measure that the Mexican Courts may apply in favor of the creditor to facilitate the repossession of the aircraft or even to immobilize the same while the legal procedure is developing. In other words, until the Cape

Town Convention became effective, there was no legal provision in Mexico that allowed a Court to order these kind of measures. This is becoming more extreme because according to our procedural system, (i) the capacities of the Judges are the ones expressly given and regulated by law and (ii) all authorities, including the judges, are obliged to specify in every act of authority in which they intervene, the applicable legal provisions that legally sustained an act of the court. As consequence and considering that the procedural laws in Mexico do not include any provision on which the Courts may rule at the commencement of the procedure or during the process (i) to immobilize the assets in dispute or (ii) to allow

“The Code of Commerce does not include any provisional measure that the Mexican Courts may apply in favor of the plaintiff to facilitate the repossession of the aircraft”

* IN COLABORATION WITH ENRIQUE BOUCHOT.

repossession by the legitimate owner, this meant that the plaintiff had to obtain a favorable final judgment to take possession of its aircraft.

Moreover, assuming that the parties had agreed in the lease agreement that the lessor may take possession of the aircraft following the first event of default of the lessee, even then the lessor cannot take possession without obtaining a prior final judgment that allowed the lease to be terminated. In addition, this lessor would not have been eligible to file a motion before a Mexican Court based on this agreement, because as we explained, the Mexican judge would have to reject this motion because there was no applicable legal provision for the court to sustain an action of this nature.¹

Until the Cape Town Convention became effective in Mexico, the only limited cautionary provisions that the lessor may request before a Mexican Court were the provisional attachment of assets of the individual (debtor) or the restriction of movement of an individual. Both are included in the Code of Commerce and may be requested by the lessor (i) before undertaking legal action against his debtor (ii) at the same time of exercising its legal action or (iii) during the legal procedure previously filed against the debtor.

These cautionary provisions are granted by the Mexican Court only if the claimant proves his founded fear that the debtor may dispose of the assets (in the case of claiming a pro-

visional attachment) or that the debtor may absent from the place in which the procedure will take place. As consequence, before ruling the cautionary provision, the claimant has to prove one of these hypothesis to the Court, and if the Court determines that it has been proved, it will grant the cautionary provision. In this case, the claimant should guaranty the potential damages that may be caused to the debtor if the cautionary provision is revoked or if the final judgment does not go against this debtor.

As you can see, before the effectiveness of the Cape Town Convention, the provisional measures available to the lessors were limited and conditioned to prove some legal hypothesis that in practice are very difficult. Among these provisional measures there was no provision available to the lessor that enabled him to recover possession of the leased assets or at least, to immobilize them.

The Reliefs Regulated in Cape Town Convention.

As stated above, the Cape Town Convention and the Protocol became effective in Mexico² on November 2007. Among the various areas in which this Convention positively affects the legal scenario of creditors that are doing business in our country, there are relevant changes in the procedural aspect. We find one of these changes in article 13 of the Convention that states:

1.- Article 14 of Mexican Constitution states: "Article 14.- No law shall have retroactive effect to the detriment of anyone. Nobody may be deprived of life, liberty, or of his hands, possessions of rights, except by means of judicial proceedings before previously established courts that comply with essential formalities of procedure..." Article 16 of Mexican Constitution states: "Article 16 - Nobody can be disturbed in his or her person, family, residence, papers, or possessions, except by virtue of a written order by a competent authority, that is founded in and motivated by legal procedural cause..." This is known as the individual guaranty of legality and is applicable to all acts of authority, including the judicial ones.

2.- Article 133 of Mexican Constitution states: "Article 133 - This Constitution, the laws of the Congress of the Union that come from it, and all the treaties that are in accord with it, that have been concluded and that are to be concluded by the President of the Republic with the approval of the Senate will be the Supreme Law of all the Union. The judges of every State will follow this Constitution and these laws and treaties in considering dispositions to the contrary that are contained in the constitutions or the laws of the States."

“Article 13 — Relief pending final determination

1. *Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to the extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:*
 - (a) *preservation of the object and its value;*
 - (b) *possession, control or custody of the object;*
 - (c) *immobilization of the object;*

2. *In making any order under the preceding paragraph, the court may impose such terms as it considers necessary to protect the interested persons in the event that the creditor:*
 - (a) *in implementing any order granting such relief, fails to perform any of its obligations to the debtor under this Convention or the Protocol; or*
 - (b) *fails to establish its claim, wholly or in part, on the final determination of that claim.”*

As we can see, the Cape Town Convention includes some speedy reliefs that a Mexican Court may order if the creditor proves evidence of default by creditor. These reliefs are focused on the preservation and retention of the aircraft or the engines, or both. These potential orders that the creditor may obtain from the Courts are only subject to the agreement of the debtor given at any time, so it is very important to include all of them in the lease agreement that both parties execute.

The new articles that are included in the Cape Town Convention now give capacities to the Mexican Courts to order any of them, because they are included in an International Treaty in which Mexico is party, and as consequence, they are now part of the Mexican Legal System. With them, the creditors now have an easier way to repossess or at least preserve the leased assets, because the Cape Town Convention does not oblige the creditor to prove any other requisites than the consent of the debtor, in order to apply any of the new articles and the declaration of the Lessor that his Lessee is in default. This represents a big difference from the original Code of Commerce.

In subsequent COELUM articles, I will analyze some specific aspects of these important changes.

Cancellation of Registration Marks by means of a de-registration power of attorney. | Viridiana Barquín *

The Mexican Aeronautic Registry is an “operator’s registry”, which means that the holder of the rights created by the aircraft registration is the party that demonstrates rights of possession of the aircraft and the party that actually conducts the operation thereof. This is confirmed by the fact that aircraft registration marks in Mexico are granted to the operators based on the specific capacity under which they operate an aircraft, namely, “XA” for aircraft dedicated to public service, “XB” for private operators and “XC” for civil government aircraft. The registration then is a right of the lessee as the operator and cancellation of the registration without the consent of the lessee is not possible unless the rights created by virtue of the registered aircraft lease agreement, as document through which the lessee demonstrates possession of the aircraft, have been terminated in advance.

We know that any aircraft lease agreement invariably includes that the obligation of lessor to deliver and lease the aircraft to lessee is subject to among others, the delivery by lessee of an irrevocable power of attorney authorizing lessor or its representative to do anything or act that may be required to obtain deregistration of the aircraft and to export the aircraft from the state of registration and jurisdiction of lessee (Mexico in this case) upon termination of the lease agreement. This power of attorney will need to be signed by grantor or its representative before a notary public in the jurisdiction where it is granted, which in this case is Mexico. The

notary must make a declaration by which it must declare to have reviewed the capacities of the individual acting on behalf of grantor, who shall be executing the power of attorney and to mention the documents that it had at sight to verify such capacities. The de-registration power of attorney is not a document that has to be registered at the Aeronautic Registry.

Considering that the cancellation of the registration is not possible without the previous termination of the lease agreement, we need to bear in mind that a de-registration power of attorney is helpful to have but is far from effective in practice to achieve de-registration of the aircraft. This is because that for as long as the lease is effective, the lessee cannot be deprived of possession of the aircraft or of the rights created by the aircraft registration. If there is a controversy between the parties, the termination of the lease needs to be ordered by a court and only thereafter can the aircraft registration marks will be eligible to be cancelled.

If the termination event is not acknowledged by the lessee, any act of an administrative authority to deprive it of its rights or possessions without order of a competent judicial authority would violate the constitutional guaranties of the lessee.

If a power of attorney is subject to the occurrence of a termination event, under our laws, this termination event, or event of default, cannot be declared unilaterally by one of the parties, regardless of what the lease agreement might say, and regardless of what the power of attorney shall state. No person acting pursuant thereto need make any determination or require a court judgment as to whether a termination event has occurred. If the termination event is not acknowledged by the lessee, any act of an administrative authority to deprive it of its rights or possessions without order of a competent judicial authority would violate the constitutional guaranties of the lessee.

For that matter any de-registration power of attorney, in spite of its shortcomings, should at least not be subject to any condition such as there being an event of default as then, in practice, it would never be able to be exercised unless a court has resolved upon the existence of an event of default and has ordered the termination of the agreement and restored possession of the aircraft back to the lessor or owner as applicable. In that case a de-registration power of attorney would then not be needed.

However, It is important to consider that any Mexican attorney of lessor or owner, who is acting on or against the lessee, pursuant a de-registration power of attorney, and who takes any action in order to (i) cause the aircraft and/or engines, parts, or aircraft documentation to be repossessed, (ii) deregister the aircraft from the Mexican Aeronautic Registry of the DGAC and (iii) export the aircraft from the United Mexican States, could be involved in a misdeed pursuant to Article 319, II, of the Mexican Criminal Law which states the following:

“ARTICLE 319. There will be imposed from six months to four years of prison, from fifty to three hundred days of fine and suspension for practicing the law for an equal term the penalty, to whom:

I...

II. Represent or help to two or more contenders or parties with objected interests in the same business or connected business, or accept the sponsorship of one of them and admit later the one of the opposite party into the same business;

Given the above, the task of registry cancellation and further repossession of an aircraft pursuant a de-registration power of attorney would present practical problems under Mexican law and would be much more complex than the same action in any other jurisdiction. Assuming that the registration mark is a right of lessee that results from the aircraft lease agreement and cancellation thereof is only possible if the lease is previously terminated, thus we may conclude that in order for the rights to de-register the aircraft may be exercised, the de-registration power of attorney should include first of all, the power and authority to the instituted attorney(s) to conduct any and all acts and execute any and all documents that may be required for the termination of the aircraft lease agreement, as a possible solution to achieve de-registration of the aircraft in a more expeditious way.

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Extract of Mexican Aviation News

AVOLAR inspected again.

The DGAC is beginning a new technical review of Avolar, only four months after completing the last review. Ten DGAC specialists, headed by Elic Jacob have arrived in Tijuana, the airline's headquarters, to inspect the four aircraft that are still in service. Excelsior 04/July/2008.

Price war predicted because of saturation of profitable routes.

Specialists have done a study in which they point that the biggest mistake that could be made by the national aeronautic industry, is that, in the effort to counteract the crisis caused by the increase in fuel costs, that airlines only operate on the traditionally profitable routes, because it would begin one of the biggest wars of prices seen in the industry. The study also shows that the concept of the Low-Cost Airline would disappear, sooner rather than later. Flying could not be as cheap as it has been due the rise in fuel costs which compel the airlines to increase the price of the services beyond the reach of many former customers. Milenio 09/July/2008

Cancelled flights from the U.S. to Mexico.

The airline crisis, caused by high fuel prices means that several foreign companies have suspended routes to Mexico and instead offer service through connecting flights with stopovers. The offered airline capacity in the international market, particularly Canada and the United States to Mexico, has fallen about 10% this year. Hardest hit are the migrant market and smaller cities in Mexico. "Continental Express will leave Monclova, the only International flight to that city. This is perhaps the first Mexican city that remains offline because of this international phenomenon". In the U.S. there are about 500 airports with commercial operations, many are in very small towns. With the current situation and the route restructuring which is taking place in the airline industry, it is estimated that about 100 small U.S. cities will be without air connections. According to information received, Continental Airlines is reducing lift from Newark (New York) to Acapulco and Newark to Cozumel. They will drop Houston-Monclova, and are also considering suspending Houston-Loreto. American Airlines suffered cuts on routes from Dallas to Zihuatanejo and Acapulco. El Universal 10/July/2008.

Despite crisis, airlines are seeking to renew their fleets.

Boeing predicts that in the next 20 years airlines will need nearly 30 thousand new aircraft. According to the aircraft manufacturer, airlines will require a total of 29,400 new aircraft, with a market value of 3.2 trillion dollars. During that time, passenger traffic will grow annually by 5%, while cargo will have an annual increase of 5.8%. While current oil prices are forcing airlines to cut capacity or decrease growth plans, Boeing's predictions on airlines seeking to replace aircraft increased from 36% to 43%. For 2027, it is expected that 82% of the current aircraft fleet will be retired, but the replacements will be more efficient. Between 2007 and 2027 it is estimated that world GDP will be maintained with a growth of 3.2% per annum. The number of aircraft in service will increase in the same percentage. The report notes that in 2027 Boeing aircraft will be more productive because each will carry about 40% more passengers. For 2027 the manufacturer expects there to be around 23,540 single-aisle aircraft in service, 8,290 two aisle and 2,630 regional models. El Universal. 10/July /2008

Market declines expected in the 2nd quarter.

Mexico has dropped three places in the ranking of the World Tourism Organization, which measures the tourism income of a country. This could be the first of much more bad news in what seems to be a difficult second quarter. In each election year the people of the United States stop traveling, Add to that the recession, the mortgage crisis and the high cost of fuel. In Mexico the large increase in the overdue payments in credit cards reflect a market under pressure. Excelsior 16/July/2008

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Extract of Mexican Aviation News

Low-cost carriers forced to abandon new routes.

Data from the Center-North, Pacific and Southeastern airports reveal that low-cost carriers showed reductions in passenger traffic. Some data showed that destinations like Minatitlán, Los Mochis, Guanajuato and La Paz had reductions of between 12% and 16% during the first six months of the year. Analysts from Banamex said that the weakest airlines such as Aviaca, Aerocalifornia, Avolar, Líneas Aéreas Azteca and Aeromar registered low occupancy figures in 2007. Milenio 21/July/2008

The Transport and Communications Secretary tries to open up the sale of jet fuel.

It proposes to end ASA's monopoly.

The SCT has a proposal ready in which they will try to encourage new companies to sell jet fuel and end ASA's monopoly. Luis Tellez head of the SCT assured that the cost of the jet fuel will not change, as its price is fixed by the Secretary of Public Funds but it will represent savings in the cost of distribution to the buyers. Humberto Treviño under secretary of Transport stated that the possibility of importing jet fuel from the USA is not viable due to the high taxes imposed on it in the United States and Europe. What is expensive is the intermediate margin between the airport and the delivery spots. He also disregarded the possibility of a subsidy from the SCT to the airlines considering that only 5% of the population has access to air transportation. There cannot be a subsidy for such a small percentage of the population. Milenio 23/July/2008

Plan to reduce fuel costs.

CANAERO will make a proposal to the Secretary of Transport and Communications and to the Secretary of Finance, to reduce the cost of fuel by some 40%. Javier Christlieb, President of CANAERO, pointed out that this measure should not be considered a subsidy not only a plan to reduce the speculative cost of the fuel and set up a reference price, from the 11.25 Mexican pesos per liter of fuel, to 6.75 Mexican pesos. "This should not be called a subsidy, because even the proposed final price is much higher than the cost of production". Milenio 28/July/2008

A new Aeronautical Policy is Urgent.

A new Mexican aeronautical policy is more than urgent, and the results of the closing of airlines such as Aerocalifornia and Express-Jet can be far harsher than expected. In a time of financial crisis for the airlines due to the increase in the price of fuel, the SCT and SENEAM have started to collect the debts the airlines have with them. During the year 2004 the Supreme Court (SCJN) resolved countless lawsuits and also declared illegal the charges for the service of air space navigation which caused a big hit to the national treasury. Hopefully there will soon be a true state policy in regards to aeronautics or history will repeat itself and airlines will close down, reversing the progress to date. Excélsior 31/July/2008

The Ministry of Finance rejects a subsidy for Jet fuel.

Juan Manuel Perez, Chief of the Income Policy at the SHCP stated that they will not consider subsidizing the cost of jet fuel. Because of rising demand it would be illogical to think of a price reduction. He stated Mexico was a country that exported jet fuel but due to the creation of the new low-cost airlines, the demand for fuel has increased. In the report issued by Miguel Messmacher Head of Planning at SHCP, he advised that Mexico registered an income of \$31,876 million pesos over the estimated budget and this will be used in the Oil Income Stabilizing Fund. El Universal 31/July/2008.

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