

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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Aircraft Repossessions. | Carlos Sierra

The legal framework of Mexican law.

(Due to its size, this article will be published in two consecutive deliveries of Coelum)

This has been a very complex year for the Mexican aviation industry which has found itself immersed in what is probably the deepest crisis in its history. The recent boom in new low cost carriers that started to operate mostly during 2006 has not only not offered the services that it intended to but it also disrupted the market in many city pairs and proved the voiced and urgent need for a consistent and thorough long term aviation policy in this country.

Six recently created airlines (Azteca, Avolar, Aladia, Aerocalifornia, Novaair and Alma) have permanently ceased operations within the past three months leaving thousands of people unemployed, thousands of stranded passengers, substantial debt with all of their creditors and a very tarnished reputation for authorities and for the aviation industry in general.

In respect to aircraft leasing, upon demise of these carriers, Mexico proved once again, with embarrassment, to be a jurisdiction of low judicial efficiency and in which uncertain rules, inconsistent policies and tremendously bureaucratic authorities have caused most recent repossession cases to be difficult, expensive and uncertain.

It is fair to say that none of the recent cases were still subject to the terms of the recently ratified Cape Town Convention and Protocol Specifically Related to Aircraft Equipment¹ considering that the lease agreements under

which such aircraft were placed by lessors with the different airlines were entered into before November 1, 2007 which caused these to be considering pre-existing interests to which such international instruments do not apply.

The Cape Town treaty, in spite of the declarations made by Mexico in respect thereto -which we have discussed in prior deliveries of Coelum- should provide more certainty and a more effective legal framework to cause repossessions to be more expeditious in the future.

In this article, and in the context of the recent repossession cases referred, I would like to describe the available legal framework that needs to be considered to conduct the repossession of aircraft objects located in Mexico by means of a judicial proceeding.

In this article, I will refer only to the recovery of physical control of the Aircraft, which is such that requires the intervention of judicial courts in absence of cooperation from Lessee. I will not refer herein to the process required for de-registration of the aircraft as such has been also addressed in previous articles appearing on this newspaper.

In order to recover physical control of the Aircraft it is necessary to cause the title by which Lessee has obtained possession thereof to be legally terminated. For such purpose, no 'self-help' remedies can be exercised or are available at law for which without consent of the Lessee

¹- *Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment of 16 November 2001.*

to agree to such termination, proceedings before a court of law must be initiated to obtain the termination of the Lease by resolution of such judicial authority. Upon termination of the Lease, possession of the Aircraft would be restituted to Lessor in enforcement of the court order even against the will of the former Lessee and even with the use of public force if necessary.

I. *Commercial Litigation Proceedings.*

In absence of an insolvency proceeding known as a '*concurso mercantil*' or a bankruptcy process being in course, both of which in Mexico are regulated by the Law of Insolvency Proceedings ("*Ley de Concursos Mercantiles*"), and to which we shall refer later in this article, there are two different kinds of proceedings by which actions can be initiated against Lessee to obtain the rescission of the Lease and the subsequent order to repossess the Aircraft. Through these proceedings a judgment can also be obtained in respect to the right of Lessor to collect any amounts owed by Lessee as a result of its failure to meet its obligations under the Lease. The two proceedings described below are resultant from the breach of the obligations of Lessee under the Lease which are cause for the right of Lessor to claim the exercise of its remedies thereunder, including but not limited to the right to terminate the Lease. It is important to point out that the ability to follow either of these proceedings is contingent with the form in which the relationship of the parties has been documented as will be explained below:

i. Ordinary Commercial Procedure ("*Juicio Ordinario Mercantil*").

An aircraft lease agreement is a commercial contract in nature and by such it must be resolved in Mexico under the rules established under the Commercial Code ("*Codigo de Comercio*"). In accordance with this, the provisions of the Fifth Book, Title Second ("*Libro Quinto, Título Segundo*"), Articles 1377 through 1390 regulate the ordinary process which merchants have available to claim the rescission of the Lease or the mandatory fulfilment of the breached obligations thereunder. This procedure involves the filing of suit against the Lessee in this case claiming either of the above two options, which in order to repossess the asset would need to be the rescission of the lease, and demonstrating the default incurred by the Lessee under the Lease. This process involves three instances, (i) before a lower civil court², which shall hear the case, resolve on evidence provided by both parties, hear their pleadings and issue a judgment, (ii) the appeal that can be filed to be resolved before an appeals court ("*sala de apelaciones*") integrated by three magistrates and which can be -and is in practice regularly- filed against the lower court judgment, and (iii) the '*amparo*', which is a mechanism of constitutional control that shall be resolved by a federal district judge when that resolution of the lower court has been ratified, revoked or modified by the appeals court in a form in which the party requesting the '*amparo*' deems to be in violation of its constitutional guarantees.

2.- In Mexico civil courts of first instance are competent to hear proceedings of civil and commercial nature.

ii. The Executive Commercial Procedure “(Juicio Ejecutivo Mercantil)”.

This process, regulated under the provisions of the Fifth Book, Title Third “(Libro Quinto, Título Tercero)”, Articles 1391 through 1414 of the Commercial Code is almost identical to the Ordinary Commercial Procedure and involves the same stages and requirements, although such are resolved within shorter statutory periods making it in fact a more expeditious process than the ordinary commercial procedure. The principal difference among these two proceedings is however that in the Executive Commercial Procedure the plaintiff is able to obtain the order for the securement of enough assets of the Lessee that would serve as guarantee of the amount of its claim from the very moment when the process shall initiate. This allows plaintiff to be certain that in the event it shall prevail in its claim against Lessee after all instances have been exhausted, there will be enough assets to guaranty that the indemnity obligations of Lessee as ordered by the resultant judgment will be able to be met in full, eliminating the risk that Lessee shall be found not to have enough assets to honor the payment obligations to which it shall be condemned after a long and tedious ordinary commercial procedure.

“... there are two different kinds of proceedings by which actions can be initiated against Lessee to obtain the rescission of the Lease and the subsequent order to repossess the Aircraft”.

As I mentioned above, the ability of the plaintiff to proceed in accordance to one or the other process depends on the instruments that it shall have available when it shall substantiate its claim. Alas to proceed to file a claim under a commercial executive procedure, it shall be the holder of a public instrument, or as it is described in Article 1391 of the Commercial Code of an instrument that is ready or suitable for enforcement.³ For the purposes of this, in absence of another public instrument that Lessee shall have provided to Lessor, upon construction and formalization of the Lease, it is advisable for such to be certified by the parties in a public deed before a Mexican notary public in order for it to become a public instrument that can be used to file the required claim for rescission of the Lease in case of default of the Lessee under a commercial executive procedure.

To be continued in the next number of Coelum

3.- The documents suitable for enforcement are:

I. A firm and final judgment, considered ‘res judicata’ and a non-appealable arbitration award, in accordance with Article 1346 attending the provisions of Article 1348;

II. The public instruments, as well as the testimonies ‘testimonios’ and certified copies of the same issued by public notaries;

III. The judicial confession of the debtor in accordance with Article 1288;

IV. The credit instruments;

V. The insurance policies in accordance with the law on the subject;

VI. The resolution of experts designated in the insurance policies to calculate the amount of the event, attending the provisions of the law on the subject;

The judgment in the provisional remedies according to the Mexican Commercial Code. | Juan Antonio Tiscareño*

As we saw in a past edition of the Coelum,¹ the Mexican Commercial Code does not provide effective provisional remedies for a creditor to obtain from a Mexican Court an order to preserve his assets or at least prevent the use of these assets during the judicial process.

We were able to show that since the Convention on “International Interests in Mobile Equipment” (the Cape Town Convention) and “The Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment” came into force, creditors now have a much more effective way to recover or preserve their assets before a default on its debtor².

Regardless of the above, in this article we will analyze how a judgment issued by a court in the case of granting a provisional remedy, is to be made with all the legal substantial and formal requisites, and we also need to discuss which kind of judgment would include those requirements within the Mexican legal system.

Article 13 of the Cape Town Convention lists the provisional remedies or speedy reliefs that can be used, subject to a final judgment by the Court. Article 14 determines the required procedure for them to become effective. The

Cape Town Convention also establishes that in general the procedure for granting a provisional remedy is the one prescribed by the law of the country in which it is to be applied (the Mexican Commercial Code in our case). That is, we need to apply the domestic law of our country in relation to these court proceedings. Therefore, we need to study the Code to identify the substantial and formal requirements of a judgment that would grant a provisional remedy in a Mexican Court, and also to discover which kind of judgment would be the one used in this kind of case.

The chapter of the Commercial Code³ about “Provisional remedies” says nothing on this subject, so there is an important and astonishing lack of guidance in this chapter.

“The Cape Town Convention also establishes that in general the procedure for granting a provisional remedy is the one prescribed by the law of the country in which it is to be applied”.

* IN COLABORATION WITH SVEIN AZCUE.

1.- See the article of Antonio Vázquez, “The Commercial Procedures in Mexico before the Cape Town Convention. The tortuous way to repossess an aircraft”, Coelum August 2008.

2.- See the article of Antonio Vázquez, “The reliefs established in the Cape Town Convention and its constitutionality within the Mexican legal system”, Coelum October 2008.

3.- Article 1168 and following.

The chapter of the Code concerning “judgments”⁴ establishes a classification between interlocutory and final judgments. The *final judgment* is the one that “decides the principal business of the case” and the *interlocutory judgment* is the one that “decides an incident, incompetence, or a delay motion”. As we can see, these definitions do not help us to solve the problem, because a provisional remedy is neither an incident or an incompetence, nor a delay motion, so we remain unable to answer the question: What kind of judgment should be used to grant a provisional remedy?

“Based on the experience gained in our practice of litigation, we conclude that the judgment that grants a provisional remedy must be an interlocutory judgment”.

Based on the experience gained in our practice of litigation, we conclude that the judgment that grants a provisional remedy must be an interlocutory judgment. Indeed, as we have stated, the resolution that grants a provisional remedy must contain several formal and substantial requirements that can only be covered by this kind of judgment and not by a simple execution order. These requirements are settled in part by judicial practice and court precedent, and in other parts by the Code.

Article 1077 of the Code says that all resolutions must be “clear, precise, and consistent with the motions of the parties, resolving everything they have requested”. This article relates to

the substantial requirements of judgments: consistency, motivation and exhaustiveness, but it does not specifically refer to the formal requirements: the “*resultandos*” (which is the section of the ruling of a court where the facts alleged by the parties are discussed), the *whereas* (the section that contains the legal reasoning of the judgment), and finally the *rulings* of the court (the section of the judgment containing the court’s ruling on the claims made by the parties to the suit). Such formal requirements, since they are not expressly identified by law but by the judicial practice and court precedents, are important because they allow the judge to grant a coherent judgment that is clear, motivated, exhaustive, and consistent as stated in article 1077. Also, we sustain that the requisites are never fully complete in a simple execution order, as we have the opportunity to observe in our daily litigation practice. Therefore we come to the final conclusion that the granting of a provisional remedy must be by means of an *interlocutory judgment*.

“Therefore we come to the final conclusion that the granting of a provisional remedy must be by means of an interlocutory judgment”.

4.- Article 1321 and following.

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Proposal to Decrease the Charge for Air Space Use.

The President of the Labor Commission of Congress has considered a proposal to avoid the loss of more jobs in 2008-2009. In order to ease the current aviation crisis a proposal to decrease the charge for the use of Mexican airspace was filed before Congress through the modification of the fares established in the law of rights. The objective would be to ease the financial crisis and thus avoid job losses. El Economista. 03/November/2008.

China could shake Boeing and Airbus.

China expects to plane on the market by the year 2020 a 150-seat passenger aircraft that will compete with Airbus and Boeing, according to the Minister of Industry and Information, Miao Wei. The National Company of Commercial Aircraft of China (CAAC) would be in charge of the design and production of the aircraft. The production would begin between 2011 and 2015. El Excélsior. 04/November/2008.

Mexican Airlines may take up US Airline's cancelled routes.

The cancelled routes to México are an opportunity for Mexican Airlines. Even though the fuel prices are high and the peso has devalued there are still some profitable routes that could be operated by Mexican airlines. Aeromexico and Mexicana have not yet chosen any of the routes, but are expected to do so in the near future. There is an agreement between USA and Mexico under which three Mexican airlines can operate the same routes to the United States and vice versa, therefore the opportunity of exploiting a route and still obtaining a profit might be achieved. El Financiero. 05/November/2008.

Thousands of aviation jobs have been lost .

Due to the crisis within the aeronautical sector, thousands of jobs have been lost. An important factor was the shut down of companies such as AeroCalifornia, Lineas Aereas Azteca, Nova Air and Aladia. Over 300 pilots have lost their jobs this past year, and around 600 pilots are expected to end up unemployed by the end of 2008. The aeronautical industry has had to face not only the companies shut down, but also the fuel price increases and when adding to this the commercial efficiency programs, many jobs have been lost. The International Air Transport Association estimates around 5,200 job loses for 2008. El Universal. 05/November/2008.

SENEAM expects a reduction in income due to the airline suspensions.

The General Director of SENEAM, Agustin Arellano, has indicated that the suspension of AeroCalifornia, Novair, Aladia and Avolar would bring about a reduction of the income. SENEAM expects that at the end of 2008 the net income for the services provided by SENEAM would be reduced by 3%. El Economista. 10/November/2008.

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Southwest Airlines and Volaris could come to an agreement.

The biggest low cost airline in the US is interested to operate in Mexico. The approval by the authorities of both countries is still pending. Southwest Airlines announced that they are preparing to set up an agreement with Volaris to operate in Mexican territory. They are creating a company that will allow their clients access to new routes in Mexico and US. Negotiations and authority approvals are taking place, but the official statement would be public around 2010. Other possible options could be a frequent flyer program and cargo services. El Financiero. 11/November/2008.

Mexican Airlines, a profound crisis.

Mexican aviation is expected to enter into a recession period at the end of this year, with a critical prospect for 2009 because of the collapse in pricing and the reduction in demand. The President of CANAERO, Javier Christlieb, pointed out the need for the airlines to analyze their internal workings to be more efficient and to lower costs of operation, resulting in a reasonable ticket price. La Crónica. 12/November/2008.

Ticket Prices will rise.

Expect an increase of between 2 and 5 per cent on fares for domestic routes in Mexico for next year. While globally it is estimated that airfare pricing could increase up to 5 percent for 2009, in Latin America planned increases are between 3 and 5 per cent. Among the reasons that will increase the prices of airline tickets are the reduction in airline capacity, driven in part by the consolidation and liquidation within the industry, along with fuel costs. Another influence will be the depreciation of the peso, especially when a significant portion of airline costs are in dollars. This is in addition to the reduction of seats on low fare routes, more uncertainty about the future price of the aviation fuel and consolidation of airlines and alliances. El Reforma. 19/November/2008.

GAP analyzes the acquisition of more airports.

GAP reveals their intentions to acquire airports in Latin America and the Caribbean, because these are regions that share both language and geographical proximity among themselves and with Mexico. They indicated their intentions to buy the shares of Dominican XXI Century Airports (Aerodom), the main airport company of the Dominican Republic that controls the principal airports. Milenio. 24/November/2008.

The surcharge is in addition to air fare. The prices are in line with supply and demand.

The extra fuel charges being made by the airlines will be incorporated as part of their air fares. In 2008 the airlines decided to charge passengers extra charges for fuel due to the high cost of oil, which traded at more than 140 dollars a barrel by mid-year. However, as the price fell, not all airlines did the same with their surcharges, which are now part of the fare. El Universal. 24/November/2008.

Contributors



CARLOS SIERRA

Attorney at law by the 'Universidad Nacional Autonomade México' (UNAM), has coursed post-graduate studies in civil and commercial law at the 'Escuela Libre de Derecho', international law courses imparted by Duke University and the 'Universite Libre de Bruxelles', aviation contracts law at IATA and LLM studies in Air and Space Law at Leiden University in the Netherlands. After being in-house counsel for Mexicana Airlines, he has been in private practice for fourteen years advising lessors and financiers in transactional work related to the leasing and finance of aircraft and the enforcement of their rights during default, liquidation and bankruptcy proceedings. Mr. Sierra has written several articles related to aircraft finance and leasing, the Cape Town Convention and Protocol, repossession of aircraft, aviation law and Mexican commercial law and is currently a member of the Legal Advisory Panel of the Aviation Working Group. e-mail: csierra@asyv.com



JUAN ANTONIO TISCAREÑO

Attorney at Law: Admitted to practice law in 2006. Mr Antonio Tiscareño, of Mexican nationality obtained his law degree at Universidad Panamericana, Mexico City and attended post-graduate studies in Civil Litigation by Universidad Panamericana, Mexico City. LANGUAGES: Spanish and English. PRACTICE AREAS: Commercial Litigation and Civil Litigation. e-mail: jtiscareno@asyv.com



SVEIN AZCUE

e-mail: sazcue@asyv.com

ABOGADOS SIERRA Y VAZQUEZ

Prol. Reforma No. 1190 25th Floor
Santa Fe México D.F. 05349
t. (52.55) 52.92.78.14
f. (52.55) 52.92.78.06
www.asyv.com / www.asyv.aero
mail@asyv.com

members of **advoc** www.advoc.com

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