



# COELUM

COELUM Pronunciation: 'che-l&#228;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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## CONTENTS

The Reliefs Established in the Cape Town Convention  
and its Constitutionality within the Mexican Legal System.

Antonio Vázquez P. 01-04

Responsibilities or Just Attributions of the General  
Directorate of Civil Aviation (DGAC)?

Misael Arellano P. 05-06

September News on  
Mexican Aviation P. 07-08

Contributors P. 09

# The Reliefs Established in the Cape Town Convention and its Constitutionality within the Mexican Legal System.

| Antonio Vázquez \*

In COELUM of August 2008 we briefly discussed the relevance of the speedy *reliefs* that Article 13 of Cape Town Convention adds to the Mexican Legal system. Article 13 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 a 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) immobilisation of the object; and
- (d) fails to establish its claim, wholly or in part, on the final determination of that claim.

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 reliefs, 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."

In the aforementioned article, we explained that before the Cape Town Convention became effective in Mexico, our legal system did not establish any kind of *reliefs* that might help the creditor to obtain from the Mexican Courts an expeditious provisional order to preserve its assets or at least to impede the operation of those assets from its debtor during the process. Since the Cape Town Convention became effective in Mexico, the Mexican Courts may order whatever *reliefs* necessary under article 13 of the Convention.

Notwithstanding the above, the purpose of this article is to make a brief analysis to determine if these *reliefs* are in line with the Mexican Constitution. This of course, is not an exhaustive

or conclusive document, but our intention is only to analyze the most common arguments that a Mexican lawyer might bring up in order to make the case that these new measures before our Mexican courts are actually working against some of the main principles of our Constitution.

## The Supremacy of the Constitution in the Mexican Legal System

Firstly I would emphasize that Article 133 of the Mexican Constitution provides a ranking of Mexican laws in which the most important law is the Political Constitution of the Mexican States.

Article 133 of the Mexican Constitution states:

**“Article 133.** *This Constitution, the laws of the Congress of the Union that emanate there from, and all treaties that have been made and shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the supreme law of the whole Union. The judges of each State shall conform to the said Constitution, the laws, and treaties, in spite of any contradictory provisions that may appear in the constitutions or laws of the States”*

Our Mexican doctrine has written that this article 133 states the Constitutional Supremacy principle by which the Constitution is the supreme law or “lex legum”<sup>1</sup>. This means that the Constitution is the basic and main reference for the rest of the laws within the Mexican legal system (including international treaties) and as consequence, any law that is against the Constitution may be declared “unconstitutional” which basically means that it will not produce legal effects to the party that has obtained a judgment of “unconstitutionality”<sup>2</sup>.

This basic idea was confirmed by the Mexican Supreme Court of Justice in a criteria from last February 2007 in which a recent jurisprudence created by Mexican Collegiate Tribunals is based. (See article by this author in Coelum March 2007. “A Recent Decision of the Mexican Supreme Court of Justice in Connection with the Ranking of the International Treaties within the Mexican Legal System”).

## The Guarantees of Legal Security in the Mexican Constitution.

Articles 14 and 16 of the Mexican Constitution state the guaranties of legal security on which the Mexican legal system is based.

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1.- A very well-known Mexican author on Constitutional items and former President of Mexico in the 19th Century, Mr. Jose Maria Iglesias summarized this idea of supremacy of the Constitution with the following phrase: “Super constitutionem, nihil; sub constitutione, omnia”, which means: “Nothing above the Constitution; everything below the Constitution.”

2.- In Mexico, the legal effect of declaring a law or an article of a law as unconstitutional only applies to the party that obtains this favorable judicial decision.

**“Article 14** - No law shall have retroactive effect to the detriment of anyone. Nobody may be deprived of life, liberty, or of his land, possessions or rights, except by means of judicial proceedings before previously established courts that comply with essential formalities of procedure, and conforming to laws made previously before the case....”

Article 14 states the guarantees of legal certainty:

- a) The constitutional right against the retroactive application of the law.
- b) The constitutional right to a legal hearing before being judged.
- c) The constitutional right to due process of law on criminal matters, and
- d) The constitutional right to due process of law on civil matters.”<sup>3</sup>

On the other hand, article 16 of the 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 article states the guaranties of legal security in which every act of authority must be sustained. As consequence, all the acts of authority that implicates a disturbance of possessions must be contained in a written order issued by a competent authority, dully founded and motivated.

As we said before, these two legal provisions contain the basic principles of legal security in which every act of authority must be sustained. In Mexico the majority and maybe all of the legal procedures that are initiated against the legality or constitutionality of judicial orders or judgments allege violations of articles 14 and 16 of our Constitution. As you can see, it is very important and basic that all judicial resolutions must be based or must be issued in accordance with the main principles contained in these two constitutional provisions.

### **The Constitutional Nature of the “reliefs” established in the Cape Town Convention.**

According to the above brief explanation, it is very important to determine the nature of the *reliefs* established in the Cape Town Convention. This is an important issue, because according to the legal nature of the *reliefs* or cautionary provisions stated in the Convention, we will be able to determine the Constitutional requisites with which these orders should comply.

“...if the reliefs are considered “acts of disturbance”, then the requirements applicable are the ones established in article 16 of the Mexican Constitution...”

First of all, as we saw above, if the *reliefs* included in article 13 of the Convention are considered acts of “privation of possession”, the mentioned *reliefs* must comply with the requirements of article 14, which means that previous judicial procedures must take place in which the debtor has the right of defense according to the procedural formalities. On the other hand, if the *reliefs* are considered “acts of disturbance”, then the requirements applicable are the ones established in article 16 of the Mexican Constitution with previously written orders, dully founded and motivated. This difference between “acts of privation” and “acts of disturbance” has been confirmed by the Mexican Supreme Court of Justice.<sup>4</sup> The difference is important, because as you can see, the main difference between the two types of acts is that in respect to one of these (“acts of disturbance”) the debtor does not have the right of being party in the legal procedure. In the case of “acts of privation” the affected party has the right of previous defense in the judicial procedure.

### **The definition of the cautionary provisions according to the Mexican Supreme Court of Justice.**

In jurisprudence P./J. 21/98 the Mexican Supreme Court of Justice ruled that the cautionary provisions are not “acts of privation”, and as consequence the constitutional guaranty of previous defense in favor of the debtor is not applicable for these kinds of *reliefs*”. In this

jurisprudence, the Maximum Tribunal determined that the cautionary provisions are provisional resolutions whose main characteristics are (i) they are accessory (they are conditioned to a final judgment) and (ii) speedy *reliefs*. Its main objective is to guarantee the existence of a right in favor of the creditor who may be considered to suffer a privation if not granted. This jurisprudence is particularly important for our case, because the definition adopted by the Mexican Supreme Court of Justice is applicable to the *reliefs* established in the Cape Town Convention.

As consequence, we should conclude the following:

- 1.- The *reliefs* stated in the Cape Town Convention are part of the Mexican Legal System, as they are part of an International Treaty.
- 2.- The *reliefs* are in accordance to the Mexican Constitution, in particularly articles 14 and 16 that state the guaranties of legal security.
- 3.- The *reliefs* should be considered as cautionary provisions, and according to the jurisprudence of the Mexican Supreme Court of Justice, these provisions are not “acts of privation” and, as consequence, the guarantee of giving the debtor the right of previous defense is not applicable, so it is legal to order these *reliefs* without hearing the debtor, as long as the *reliefs* are accessory and are conditioned to a final result.

“In jurisprudence P./J. 21/98 the Mexican Supreme Court of Justice ruled that the cautionary provisions are not “acts of privation”...”

4.- See jurisprudence of the Mexican Supreme Court of Justice. Tesis: P./J. 40/96 titled “Deprive acts and Disturb acts. Origin and effects of Its distinction”.

## Responsibilities or Just Attributions of the General Directorate of Civil Aviation (DGAC)? | Misael Arellano

The attributions of the General Directorate of Civil Aviation (hereinafter DGAC) are clearly established in Article 18 of the Internal Regulations of the Ministry of Communications and Transport. On the other hand Civil Aviation Law states that its main purpose is to regulate the operation, use and benefit of Mexican air space, and for the development of civil and state air transport services.<sup>1</sup> To carry out this responsibility, the Civil Aviation Law establishes the attribution for the Ministry of Transport to require the DGAC to grant concessions and permits to operate the air transport services, and also to verify compliance with aviation regulations. The DGAC also has the authority to change or terminate these concessions or permits.<sup>2</sup>

As we have seen over the last months, the operations of some domestic Mexican carriers were surprisingly and immediately suspended. However some carriers were immediately released from the suspension orders due to the fact that the suspensions were not ordered by the DGAC, which is the entity entrusted with verifying compliance of the legislation and its regulations in aviation matters, and which is in direct and constant control of the operation of these airlines. The suspensions were ordered by the Ministry of Finance and Public Credit and executed through the Ministry of Communications and Transport. The Federal Law of Duties<sup>3</sup> indicates that the entity known as Navigation Services in the Mexican Air Space (SENEAM), notifies the Ministry of Finance and

Public Credit, by means of the Tributary Administration Service (SAT), the effective operations and the amount of the dues incurred for use of Mexican air space in order for the SAT to be entrusted with the collection of amounts incurred by the use of SENEAM's navigation services.

...DGAC is fully empowered to verify at any time, not only the security of the air operations but also the technical-operating and financial conditions of each airline.

Thus, when the payments of the SENEAM dues are not received, SAT notifies SENEAM of the debt situation of the airline, in order for SENEAM to require the intervention of the General Counsel of the Ministry of Communications and Transport to request the suspension of use of Mexican air space, based on the debt that such airlines have, as covered by the provisions set forth in Article 3, paragraph four of the Federal Law of Duties. Due to the foregoing, it is clear that the suspensions are in compliance with an obligations tax nature more than an administrative obligation. With these suspensions, the authority does not base its resolution on a lack of security or quality of services rendered by the airlines, however, it is also clear that such debts and anomalies in the management of the suspended airlines had to be previously observed by the DGAC

1.- Article 1 of the Civil Aviation Law.

2.- Article 6, fraction II and 84 of the Civil Aviation Law.

3.- Article 289 of the Federal Law of Rights.

under its responsibility for surveillance as set forth as attributions in Article 18 of the Internal Regulations of the Ministry of Communications and Transport.<sup>4</sup>

The DGAC is responsible for assuring compliance with the security and quality requirements as detailed in a section entitled concessions or permits, which have been issued in favor of a company to render public air transport services in the manner stated therein. Under the statement, the DGAC is fully empowered to verify at any time, not only the security of the air operations but also the technical-operating and financial conditions of each airline.<sup>5</sup>

How could an airline assure the optimum operation of its air transport services, if it is public knowledge that it is going through a delicate financial situation? Not only when it is incapable of complying with the federal tax liabilities, but also that it has been singled out before several labor and administrative authorities for the noncompliance with the payment of wages, as well as for noncompliance with the contractual obligations agreed upon with services providers, aircraft lessors, fuel suppliers, and in general, in debt with providers of all elements used to render the air transport service. Furthermore considering also that one of the main obligations of Companies holding a concession to render the national public air transport service consists in providing before the DGAC a quarterly financial report plus an annual audited financial report.

In order to be a holder of a concession to operate scheduled national public air transport service, the operator must evidence before DGAC its technical, financial, legal and administrative capacity to provide the service.

The airline must show that it can offer the quality, security, opportunity, permanency and price conditions based on the availability of hangars, of workshops and in general, on the infrastructure necessary for the performance of operations, as well as by showing that it has the technical aviation and administrative personnel capable of operating the concession.<sup>6</sup> While, it is true that these elements are indispensable requirements to grant a concession title, the DGAC is bound to verify that any concession holder keeps, at least, to the conditions which were the basis for the authorization for starting the airline, and that they are maintained during the entire time that the airline is in operation.

In conclusion, we think that it is indispensable that the DGAC, acting on its obligations and responsibilities, keep watch on the concessionaire while the concession is in force, even and specially in a narrow way on the financial situation that allows the operation to maintain its quality standards and safety conditions to the level they were authorized since the airline was initially approved to commence its operations.

...one of the main obligations of Companies holding a concession to render the national public air transport service consists in providing before the DGAC a quarterly financial report plus an annual audited financial report.

4.- Fractions II, XV and XXXI of Article 18 of the Internal Regulations of the Ministry of Transport.

5.- Fraction XXVII of Article 18 of the Internal Regulations of the Ministry of Transport.

6.- Article 9, paragraphs I and III of the Civil Aviation Law.

## News | September

### Extract of Mexican Aviation News

The aviation industry is suffering a serious crisis due to the increasing cost of oil, coupled with the slowdown in the global economy. The flight cutbacks will affect UK residents.

The president of the Irish airline, Ryanair, warned that the reduction in flights caused by the economic crisis may have a negative effect on many Britons who have bought homes abroad. Many of the half million Britons who own a home abroad made this investment encouraged by the low cost of flights to small airports served by airlines such as Ryanair. A month ago Ryanair announced a plan to cut flights next winter from London's Stansted Airport to destinations close to areas where many Britons have a second home. Other airlines have already taken similar decisions. El Financiero 01/September/2008.

Avolar will decrease low season flights by fifty percent.

The low cost airline Avolar will decrease its flights by 50% to 60% in the low season months of September, October and part of November. The airlines will operate with just four of their eight aircraft. In any case their operating permit is hanging by a thread due to the Suspension of Operations order issued by the SCT on August 4th. While Avolar was granted protection by the 6th district judge in Baja California, it came with the condition that they must file a guarantee of payment to SENEAM which now totals 131 million pesos. El Universal 03/September/2008

The crisis will get worse by the end of 2008. Advisors estimate a 40% rise in air fares.

The true effects of the aviation crisis will show its effects in the last quarter of 2008 when the loss of capital of the airlines due to the increase on jet fuel will cause an increase up to 40% in airline ticket costs. Fuel represents around 40% to 60% of the airlines costs, the fares will have to increase by the same percentage. Due to this increase, the airlines have begun canceling routes and using fewer aircraft, trying to stabilize costs. Only the economic power and administrative decisions of the airlines can decide whether to absorb the extra cost or let it affect their prices.

Milenio 03/September/2008.

Four Azteca Airlines aircraft seized to cover the debt to its workers of more than 200 million pesos.

The seizure of aircraft and some other assets such as spare parts will be used for the payment of the arrears of more than 200 million pesos that the airline owes its workers. These aircraft and other assets that still remain with the carrier will be sold to make the first settlement of the debts owed to forty-nine workers who demanded the embargo. El Reforma. 04/September/2008

Changes in the Ministry of Communications. At the worst possible time!

Right now, just as the aeronautical industry scene in Mexico is suffering, the President has decided to make some changes in the ministry, thus complicating the scene even more. Gonzalo Martinez Pous was removed as legal counsel of the Ministry of Communications and Transport to COFETEL, leaving behind the complicated legal issues of Interjet slots at Mexico City Airport, and the administrative proceedings of Aviaca and Avolar. The designation of Gilberto Lopez Meyer to be the head of ASA will also be complicated by the enormous debts that the carriers owe to this entity.

El Universal 04/September/2008

## News | September

### Extract of Mexican Aviation News

#### Challenges in the aeronautic area.

The new heads of the DGAC and ASA would step into these positions with a great amount of unfinished business and many challenges, due the crisis in the aviation industry. The name of the new head of the DGAC has not yet been given, but the challenges are big. The DGAC needs new technical, legal, and financial capital to sustain the crisis and to regulate the growth of this industry area. El Universal 12/September/2008

#### Airlines react to the crisis.

367 airplanes were operating within Mexico. The number has since decreased to 287 because most of the companies have decided to return some airplanes to their lessors or to retire some of the less fuel efficient aircraft. According to some studies, this year will end with some 300 airplanes in the air. The crisis bottomed out when oil reached its maximum price of almost \$150 per barrel, and now is experiencing an interesting reversal, which has led to oil prices of 109 U.S. dollars/barrel This change is causing businesses to rethink their aircraft return scenarios. El Excelsior 15/September/2008

#### Airline income collapses.

Due to the recent financial situation caused by fuel price increases, the airlines that fail to watch and take care of their resources, could be at risk for a reduction of income of around 10% to 15%, explains Ami Lindenberg, vice-president of Aeromar. The increase in the fuel price is only one of the many faces of the crisis. Other ones are the fierce competition that cannot be sustained by the market. This is because the prices offered by the low cost airlines aren't realistic, and the shareholders have had to provide additional capital every month to maintain operations. Mr. Lindberg says that in his opinion this is irresponsible not only for the shareholders, but also for the customers. Another factor is the devaluation of the Mexican currency, which now provides less income in US dollars, while most of the expenses are in that currency. Add to that the US financial crisis, and we have a major problem, according to Lindenberg. El Universal 15/September/2008

#### Specialist says that thanks to the aviation crisis, Mexico will end up with a maximum of six airlines.

The suspension of operations of a number of Mexican airlines and the breakdown of other companies will help to transform the air transport industry and will leave in the market only the best. The survivors will be those who can transform themselves through the provision of quality services and appropriate rates. It is considered that in addition to Aeromexico and Mexicana and its subsidiaries, the other big companies that will survive in the market will be Interjet, Volaris, Alma and VivaAerobus. El Reforma 29/September/2008

#### Impact on the airline industry rubs off onto the hotel industry.

The crisis in the aviation has had an impact on the general level of the hotel business, particularly in the corporate travel segment. Today, some companies prefer to cut costs by reducing travel, so executives must rely on conference calls or video conferences. El Universal 29/September/2008.

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