

# 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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## The Sale of 'Slots' or Landing Rights in Mexico. | Carlos Sierra\*

*The legality of the assignment or transfer of rights resultant from a concession or of the concession itself under a private agreement.*

Originally concessions were granted by the State to individuals mainly because the State itself did not have the technical experience nor the financial power to undertake the activities subject thereto.

A concession can be defined as: "A legal act by which the public administration grants under a limited time to an individual, the right to render a service or to use and exploit goods of the State in accordance to the laws that regulate such specific concession."<sup>1</sup>

The granting of a concession is based on an act of administrative nature in which the concession is a series of acts by which the state confers to private individuals certain rights and special advantages over the state's property and domain under the understanding that certain obligations must be followed. The question then arises as whether the concessions or the rights derived therefrom can be transferred or commercialized by virtue of private agreements between the concessionaires and third parties.

The short answer to the above question is that this cannot be made of course without the consent of the State. Under articles 27 and 28 of the Mexican Constitution the concession is referred to as the act in which the right to exploit goods of public domain as well as public services is granted to individuals.<sup>2</sup> We should not mistake concessions with other administrative acts such as licenses, permits or authorizations through which the state grants the exercise of a preexistent right, with a concession in which the state grants a new right in the individual's benefit to exploit a public domain good or render a public service.

In order to better understand the argument of whether a concession or the rights derived from such concession can be transferred by virtue of a private agreement, there are three theories that are useful to understand the nature of this figure of administrative law:

The first theory sustains that a concession is an agreement between the State and an individual and that the nature of the agreement can be private or public. Detractors of this theory sustain that the State would impose itself always as an authority and thus cannot act under a private agreement in which the State would act merely as an individual considering that the rights of both parties are naturally unequal.

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\* IN COLABORATION WITH SVEIN AZCUE.

1.- Humberto Delgadillo Luis, Lucero Espinosa Manuel. "Compendio de Derecho Administrativo" Editorial Porrúa, 1994. Pags. 328-329

2.- Mexican Politic Constitution.

The second theory is based on the intention of the State to grant rights unilaterally to a private individual that fulfills the requirements to comply with the obligations conferred thereto. This act is derived from a 'grant of rights' from the State, where the individual's intention to accept is only a requirement for the act to be valid, for which the act is therefore not an agreement in formal terms. We need to take in consideration that the granting of the concession implies the exercise of the State's discretionary capacities, therefore, upon the individual's request to transfer the concession or the rights derived therefrom the State, can in a justified manner, agree or not to such request unilaterally considering what is best for the public interest.

A third theory explains the concession as an unilateral decision from the State to grant the same regulating it under the corresponding laws. This would be made together with certain agreements derived from the concession that are entered into regarding specific matters and subjects.

We can derive from the above that a concession is not resultant from a private agreement but from an unilateral manifest of the intention of the State granted discretionally, where the individual's intention cannot interfere in the creation of rights and obligations for they are already established beforehand in the laws that regulate the concession as an administrative act.

“...a concession is not resultant from a private agreement but from a unilateral manifest of the intention of the State granted discretionally...”

## The Aerocalifornia-Interjet case.

In accordance with this analysis, we would like to discuss whether the recent transfer of certain rights resultant from a concession conducted by Aerocalifornia -a Mexican carrier that went bankrupt after being determined to be in debt for a large sum in air traffic control duties- in favor of Interjet -a relatively new low cost carrier, was possible and legal under the basis of the concession regime that applies to public air transportation services.

We should begin by saying that Aerocalifornia held a concession that allowed it to operate in and out of Mexico City International Airport (MEX), while Interjet -presumably under more limited concession rights- was impeded to operate in and out of such terminal.

Upon ceasing its operations Aerocalifornia reached a private agreement with Interjet by which it transferred to the latter all of its rights to operate certain slots at MEX, a right that Interjet was not eligible to obtain under the limited rights contained in its concession.

The initial reason why a handful of starting new air carriers were not eligible to operate in and out of Mexico City was the extreme saturation of the MEX only existing terminal and the governmental policy to develop the Metropolitan Airport System conformed by various airports in the vicinity of Mexico City. In accordance with this, these new carriers were strictly banned from access to MEX regardless of the availability of slots. In theory, as a matter of policy, such air carriers were not eligible to operate to Mexico City Airport even at non-peak hours as the concessions received to provide air transport services by these carriers were. in their terms, exclusive of access to Mexico City.

The text of a typical concession to provide public air transportation services granted by the Mexican State states that the beneficiary of the concession can request authorization from the authority to assign totally or partially the rights and obligations derived from the concession. In this case the authority can authorize such request within a ninety day period as long as the assignee shall not be a government of a foreign state and as long as it commits to fulfill all of the obligations firstly imposed to the original concessionaire as well as any others that may derive from the concession itself. It is important to say that in order to be eligible to the assignment described above the assignee must comply however with the requirements that would be required from the original concessionaire.

In the case related to Aerocalifornia and Interjet, in order for such assignment to be formally and legally correct, the assignment should have been made of the rights of the concession of Aerocalifornia itself, which subject to the approval of the State, would result in the subrogation by Interjet in the original rights of Aerocalifornia -which included the rights to operate to and from MEX. To that extent the operation by Interjet would become possible: (a) under its own original concession to all airports to which it was already allowed to operate and (b) to and from MEX under the rights of the transferred concession from Aerocalifornia.

The above would have been legally possible under the described concession regime as, with the approval of the State, any private individual meeting the requirements involved could be eligible to receive a concession or to be a transferee of the rights of another concessionaire.

Why is it then that the legality of the transaction in question has been challenged intensely by other carriers and entities? The reason in opinion of these authors is that it was apparently documented differently and, paradoxically, in a form that would cause the transaction to be questionable if not outright illegal.

The transaction as it was presented consisted apparently in the private agreement between Aerocalifornia and Interjet for the purchase by the latter of the slots that the former had at MEX. If this was the case simply, it not only failed to have the approval of the State, which would have been required in advance and which was subsequently obtained however, but it was entered between a party that was originally eligible to operate such rights and another that was not eligible to acquire them.

In other words, this meant that the more limited rights of the concession granted to Interjet would make it ineligible to acquire rights from another concessionaire holding broader capacities. The acquisition by Interjet of the slots of Aerocalifornia then was impossible because Interjet failed to have a concession that would allow it to acquire rights from a concessionaire that was able to operate to MEX while Interjet was not.

As we can see, we only intend to suggest how it is interesting to point out how the failure to document this transaction properly could cause the intentions of Interjet to be legally possible or legally impeded as, once again, in the event that the transaction would consist in the assignment of the concession itself, it would be possible, as if it shall consist in the sale of the slots themselves to an illegible carrier it would be clearly illegal.

# The Mexican Constitution principle against the retroactive application of the law. | Juan Antonio Tiscareño \*

## Introduction.

Article 14 of the Mexican Constitution,<sup>1</sup> is one of the pillars on which the Mexican legal system rests. It contains four of the most important guarantees of legal certainty:

- a) The constitutional right against the retroactive application of the law in detriment of any person.
- 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.

These are the four *guarantees* that firmly and effectively sustain other fundamental human rights set forth in the Constitution and in international treaties and conventions signed and ratified by the competent authorities of the Mexican State.

In this COELUM we will focus only in the first of the constitutional rights mentioned above, that is, *the principle of non-retroactive application of the law*.

## Explanation of the principle according to the Supreme Court of Mexico.

As we said earlier, the Mexican Constitution prohibits the retroactive application of the law, and this ban extends to international treaties, federal and local laws, etc. This situation takes special significance when the Mexican State signs an international treaty that brings obligations to other countries. On aeronautical matters for example, the Convention on International Interests in Mobile Equipment Convention and the Protocol to the Convention on matters specific to aircraft equipment has just entered into force<sup>2</sup>. That is why it is important to know in which cases this or other treaties could be applied and when can not, because of the problem of the retroactive application of the law. This Convention<sup>3</sup> establishes in its “Declarations” that unless

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### \* IN COLABORATION WITH ALEJANDRO LAVAT.

1.- **Article 14.** *No law shall be given retroactive effect to the detriment of any person whatsoever.*

*No person shall be deprived of life, liberty, property, possessions, or rights without a trial by a duly created court in which the essential formalities of procedure are observed and in accordance with laws issued prior to the act.*

*In criminal cases no penalty shall be imposed by mere analogy or by prior evidence. The penalty must be decreed in a law in every respect applicable to the crime in question.*

*In civil suits the final judgment shall be according to the letter of the juridical interpretation of the law; in the absence of the latter it shall be based on the general principles of law.*

2.- Mexico acceded to the Convention and the Protocol on 31.07.2007, but they entered into force until 01.11.2007.

3.- Article 60.

declared by a Contracting State at any time, the Convention does not apply to *pre-existing rights or interests*, which will retain the priority they enjoyed under the applicable law before the effective date of the Convention.<sup>4</sup> As we shall see later, the definition of *pre-existing rights or interest* conforms somehow to the theories applied by the Supreme Court of Justice of Mexico in their rulings.

The prohibition of giving retroactive effect to the laws is directed to the legislature and other various government agencies responsible for carrying out the performance of its application, and is reflected in the principle that, *laws should only be applied to events that occurred during their term*, the application of its terms to events prior to its validity would be retroactive. When under the force of a law an event occurs and it produces all of its legal implications, the prohibition to give retroactive effect to the law is met only by applying the current law. The difficulties in implementing such prohibition arise with regard to events which occurred under a law which is no longer in force or without any law that may regulate this event directly, and whose legal consequences are still active when a new law enters into force. It is in these cases where the question arises: Is or is not the application of the new law retroactive when applied to the legal consequences of events that occurred prior to its validity?

“The prohibition of giving retroactive effect to the laws is directed both to the legislature and also to the various government agencies responsible for carrying out the performance of its application, and is reflected in the principle that laws should only be applied to events that occurred during this term.”

The Supreme Court of Justice has attempted to respond to this question using the following theories:

1. “Theory of the acquired rights”. - According to this *classic* theory, the acquired rights are those that have entered in our domain, by a contract or by virtue of a resolution or judgement for example. It is also important to emphasize that this theory has been the one most commonly used by the Supreme Court.
2. “Theory of the abstract and concrete legal situations”.- This theory was applied by the Supreme Court to affirm that the retroactive application of law is forbidden when it affects specific legal situations that occurred during the previous law.
3. “Theory of the immediate implementation of the law”. - In this theory the retroactive application of the law is illegal when it is enacted to correct the conditions of legality of an act or to modify the effects of an act that has already occurred.

## Conclusion

As we saw, the prohibition of retroactive application of the law in detriment of any person is a fundamental right in the Mexican legal system. All federal and local authorities are obliged to abide by this principle without exception.

Considering that the Supreme Court has resolved the disputes over the interpretation of the principle of non-retroactivity of the law applying several theories, it is clear from our point of view that there is no unique criteria to resolve this problem.

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4.- A declaration was lodged by Mexico in relation with article 60, and it says that the Convention will not be applicable to the pre-existing rights or interests as defined by the Convention, constituted prior to the date of the entrance into force for the United Mexican States of this international instrument, consistent with its national law. Those rights and interests will retain the priority they enjoyed under Mexican law prior to that date.

# UNDER THE AUSPICES OF THE AMERICAN FOUNDATION FOR INTERNATIONAL UNIFORM LAW

**The Cape Town Convention after 2.5 Years –  
participatory seminar on advanced contract, registration and transaction practices**

**11 November 2008; Fordham Law School, New York**

**In association with the Aviation Working Group and its Legal Advisory Panel,  
Aviareto, Ltd., International Registry Advisory Board and Fordham Law School**

(Coordinating sponsors / hosts: Fulbright & Jaworski, Holland & Knight, McAfee & Taft, and Vedder Price)

This participatory seminar is the third program to review the Cape Town Convention since its entry into force. It builds upon a two similar seminars, one in the US, the second in Europe, and will tap into, and internationalise, the experience learned from the high volume of transactions that have occurred under the Cape Town. Many of those involved in the development and practical implementation of the treaty will be involved in this program. All those with an interest in the treaty should attend. CLE Credit will be available at an extra charge noted below.

The specific objective of the seminar is to review contract practices, registration, and legal issues after nearly two and a half years of experience. The seminar will approach these items on an applied, not conceptual, basis.

How have things worked in practice?  
What has experience shown?  
What should practitioners know?

By extension, what should the International Registry Advisory Board (**IRAB**) take into account in advising Aviareto? What is prudent transactional and professional adviser practice? How should clients be advised?

The format of the seminar will be participatory, not a series of presentations. It will be divided into three sessions:

- (i) contractual implications of the treaty, from commercial as well as legal perspectives on how to structure transactions so as to take full advantage of the convention and how best to convert a non-CT transaction into a CT-transaction (**Advanced Contract Practices**);
- (ii) registration with the International Registry (**Registration**); and
- (iii) closing a deal and coordination of related issues, legal opinions for transactions and registrations governed wholly or in part by the treaty (**Legal Issues**) and discussion of legal issues of preemption and post closing remedies not covered by legal opinions;

Each session will have one framework-setting presentation, lasting one hour (**overview**). It will be given by that session's chair (**session chair**) with one or more of the facilitators (**facilitators**) who will then work with the attending participants (**participants**) through the core session (**core session**). The core sessions will be largely unstructured, save for the review and discussion of basic materials setting out hypothetical examples, concrete problems and the like all couched in terms of transaction settings (**practice examples**).

The session chair and each facilitator will work with a subset of the participants (goal: 50 each) (**break-out exercise**), and will report back to the larger session. The participants are expected to carry the topic discussions (**topic discussions**) and may guide it in any direction that they think appropriate. The conference chair (in consultation with the session chairs) will summarize the views of the seminar and outline topics worth further analysis (and consideration at a possible future event in this series).

A program is attached. Please note that time allocations are approximate.

## THE CAPE TOWN CONVENTION AFTER 2.5 YEARS

The non-refundable fee payable by each participant (including speakers) for the seminar is US \$1,000 without CLE Credit and US \$1,100 with CLE Credit, and **all net proceeds go to the American Foundation for International Uniform Law**, a charitable organisation that supports the development of international commercial law, including the work of UNIDROIT. As this is a fund-raising event, all participants (and others) are encouraged to make supplemental contributions to the Foundation. Fees and contributions are deductible to the extent permitted by applicable law.

Registration for the seminar is limited to 200, on a first-in-time basis. *Please register your interest by e-mail to: Laurie.Craig@hklaw.com*

### PROGRAM

**08h00: Continental Breakfast**

**08h30: Chairmans' Comments**

- A. Report on Global Ratifications and Implementation
- B. Report on Official Commentary, 2<sup>nd</sup>, and Volume II of Contracting Practices

**09h00: Keynote: State Obligations, Compliance, and Remedies under the Cape Town Convention**

**09h30: Section I: Contract Practices**

- ◆ Presentation on Practice/Current Issues
- ◆ (Session Chair) Open Discussion / Break-Out (Facilitators/All Participants)
- ◆ Review, Summary, and Recommendations (Session and Conference Chairs).

**11h30: The Relationship Between the Cape Town Convention and State Law**

**12h30: Lunch**

**13h30: Session II: Registration with the IR**

- ◆ Presentation on Current Practice / Issues (Session Chair)
- ◆ IR Status, New Procedures and Regulations, Generation Two "Closing Room" Demonstration (Aviareto)
- ◆ Open Discussion / Break-Out (Facilitators / All Participants)
- ◆ Review, Summary, and Recommendations (Session and Conference Chairs)

**15h45: Session III: Legal Issues, Closings and Opinions**

- ◆ Presentation on Practice/Current Issues (Session Chair)
- ◆ Open Discussion / Break-Out (Facilitators/All Participants)
- ◆ Review, Summary, and Recommendations (Session and Conference Chairs).

**18h00: Cocktail Reception**

### CONFERENCE CO-CHAIRS:

- ◆ Jeffrey Wool (Secretary, AWG; Freshfields; Chair, IRAB)
- ◆ John Pritchard (Holland & Knight LLP; Chair, Legal Advisory Panel)

### SESSION CHAIRS:

- I. Donald Gray (Cassels Brock);
- II. Frank Polk (McAfee and Taft); and
- III. John Pritchard (Holland & Knight)

### SPECIAL REGISTRY PARTICIPANT:

- ◆ Rob Cowan (Managing Director, Aviareto)

### SPECIAL U.S. STATE DEPARTMENT PARTICIPANT:

- ◆ Hal Burman, U.S. State Department

### SPECIAL LAW PROFESSOR PARTICIPANT:

- ◆ Susan Block-Lieb, Fordham Law School

### FACILITATORS:

- I. James Tussing (Fulbright & Jaworski L.L.P), Member IRAB ;  
Marty Jacobson (Simpson Thacher & Bartlett)
- II. F. Scott Wilson (Pratt & Whitney; member, IRAB);  
Jack Gilchrist (DeBee and Gilchrist);  
and  
Robert Peregrin (Daugherty, Fowler, Peregrin & Haught); and
- III. Catherine Duffy (A&L Goodbody);  
Dean Gerber (Vedder Price)

*For NY attorneys, this program is appropriate for both newly admitted and experienced attorneys. All reasonable efforts will be made to seek CLE credits from other jurisdictions, if needed, for which this program meets approval criteria.*

*Please contact Fordham Law School to inquire about this program's financial assistance policy at [cle@law.fordham.edu](mailto:cle@law.fordham.edu).*

## News | August

### Extract of Mexican Aviation News

#### Legal action against Aerocalifornia.

The Consumer Federal Attorney has established a “class action” against Aerocalifornia to allow users who were affected by the suspension of its activities to be refunded their money and also granted them a bonus. The Federal Consumer attorney said that the legal action to protect consumers will be similar to that was already implemented against Azteca Airlines. Article 26 of the Federal Law of Consumer Protection allows the Profeco, representing the passengers affected, to go before a judge, who decreed that there were damages to consumers because of the omission of service, and through a judgment forcing the supplier to compensate and pay for this omission. El Universal 19/August/2008.

#### The jet fuel supply is not a problem.

##### Some airlines specialists claim they have no problem with the way ASA supplies fuel.

Specialists in some airlines confirmed that they had no problems with the way ASA is supplying fuel. Javier Christlieb Morales, president of Canaero stated that the airlines have had an arrangement with ASA for over 10 years for the supply of fuel and haven't had any problems. The importance is that there are no differences between the temperature from when it's measured and the temperature that the fuel has when it gets to ASA or the airlines to avoid volume variations. Every airline must have an operations representative that verifies the amount supplied and agrees to the weight and volume of the supplied fuel so as to avoid any mistakes. El Universal 21/August/2008.

#### Court resolves against Avolar.

The fourth collegiate court in the fifteenth circuit resolved against Avolar under the SCT's resolution to suspend their operations. Notwithstanding Avolar's debt with SENEAM is for over 150 million pesos for the use of air space. In accordance with the resolution, the airline must pay immediately. Due to the airline's financial circumstances it is probable that the carrier will be soon in financial predicament and the authorities will require the suspension of operations that was prevented with the protection granted by the sixth judge in Tijuana. El Universal 21/August/2008.

#### Business Times.

Around twenty of Aeromexico's share holders represented by Jose Luis Barraza are willing to sell their shares to Mexicana. Banamex-Citi invited these people to consider the contingency that the aviation business represents. Each of the share holders invested around 5 million dollars and they will be looking for a profit. Excelsior 21/August/2008.

## News | August

### Extract of Mexican Aviation News

#### Communication failure in more than 30 USA airports.

A failure in a communication center of the state of Georgia, in the United States, had caused cancellations and delays in at least 30 of the main airports of USA. This information had been provided by the FAA, which also assured that there was no security problem and that the system break down was due failure in the communication between the FAA central in Georgia and the center in Salt Lake City. Milenio 25/August/2008.

#### SPANAIR: a tragedy that could have been avoided.

The recent accident of the airline Spanair, where 153 passengers lost their lives, is not an isolated incident. The accident shows the relation between economic problems, fierce competition, and the security trouble in the airlines operations. According to the information given, the engines of the MD-82 aircraft had failures and problems that caused the tragedy in Barajas. The result is that now the airline will have to spend more money in the accident compensation than it would have done for the maintenance of the aircraft. La Crónica 25/August/2008.

#### Airport shares down-rated.

BBVA Bancomer down-rated their recommendation of the shares of ASUR, GAP and OMA, due to the airline crisis caused by the high price of the fuel. In a report the Mexican Bank explain that they have changed their recommendation for the shares of ASUR from "buy" to "higher than market", for the GAP and OMA shares from "buy" to "hold". The over capacity and the constant rise in fuel prices are forcing a market adjustment, that could even mean a closure of many airlines. Excelsior 26/August/2008.

#### Mexico City needs more airports.

México City needs more airports in order to reduce the rates currently charged. The directive of the National Business Travel Association (NBTA) also said that it is necessary to improve the aviation climate with a merger of Aeroméxico and Mexicana. Excelsior 26/August/2008.

#### AICM: Guadalajara, Tijuana & Cancún will lose passengers because of the air crisis.

It is expected that by next December there will be a reduction in SEAT capacity when compared with December of 2007. It is estimated that the International Airport of Mexico City will have a reduced weekly passenger count of 74,984 seats. The reduction of weekly arrivals for all the airports of the country will be approximately 9% for the home market and 20% for the international market. As a result of the high prices of fuel, all airlines will retire old less fuel efficient aircraft. El Financiero 26/August/2008.

## Contributors



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Attorney at law by the 'Universidad Nacional Autonoma de 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](mailto:csierra@asyv.com)



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