COELUM

COELUM Pronunciation: 'che-l&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.

newsletter |

monthly digital publication by

ABOGADOS SIERRA Y VAZQUEZ

www.asyv.com

april 15, 2009

year 03 | No. 12

CONTENTS

Applicability of the Cape Town during insolvency proceedings. A brief point in favor of Alternative A.

Carlos Sierra*

The purpose of this article is to make a brief analysis of the two alternatives that exist within Article XI of the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment (the "Protocol") which can become applicable during the insolvency proceedings of parties that are considered as debtors in respect to international interests created within the context of the Convention.

The Protocol outlines two alternatives that the member States of the Convention can choose from in order to determine how the rights of possession in respect to aircraft objects can revert to the lessor. These alternatives can be said to be aimed to restrict the ability of reorganizing debtors and insolvency administrators to retain the use of aircraft after the commencement of an insolvency proceeding.

In Mexico, in similar form to what is provided under Alternative B – or at least in full consistency-, the Law of Insolvency Proceedings *"(Ley de Concursos Mercantiles)"* requires the conciliator to state whether it will comply with the obligations that it has undertaken under the agreement or whether it intends to terminate the same. It is the subsequent duty of the court to order the termination of the agreement and the eventual separation of the asset from the concurso estate.

In consideration of the above, it is important to mention that while Alternative B seems to be more compatible with the current provisions of the Law of Insolvency Proceedings, Alternative A cannot be said to be necessarily in conflict with its terms. In my opinion, the principal difference lies in the form in which each alternative approximates to the rights of the debtor to maintain possession of the aircraft when the insolvency proceedings initiate and how the agreement by which possession was vested on the debtor can be assumed to be terminated when such debtor becomes obliged to return the aircraft object.

> "In my opinion, the principal difference lies in the form in which each alternative approximates to the rights of the debtor to maintain possession of the aircraft..."

In any contractual relationship by which the property rights or the security interest of the creditor are subordinated to the rights of quiet enjoyment of the debtor, the termination of the right of the debtor to continue in possession of the asset can be accomplished by (i) the mutual agreement of the parties, (ii) the expiration of the term of the contractual relationship, or (iii) by the unilateral termination by the creditor in the event of a default of the debtor in accordance with the provisions stated in the agreement.

The above means that in order for the debtor to become obliged to return possession of the aircraft object to the creditor, it is not in all cases necessary for the termination of the title by which the debtor is in possession of the asset to be previously ordered by a court. This is not to say that a court order would not be required in Mexico when the debtor shall

*** IN COLABORATION WITH ALEJANDRA LLOPIS.**

oppose to such termination or shall refuse to return the aircraft -considering that no self-help remedies can be used to enforce any rights of the creditor against the debtor and that leave of court is condition for the enforcement of remedies under the declaration made by Mexico in relation to Article 54 of the Convention-. The termination of the right of possession of the debtor by way of the termination of the contractual relationship is required in order for the debtor to be obliged to return the asset to the creditor, however, in accordance with this author's interpretation of Alternative A, such termination of the contractual relationship does not necessarily require to be ordered by a court.

Differently stated, the above can be said to be true in some form under both alternatives, being one of the principal differences among them that Alternative A does not imply that the debtor has the right to determine upon prior request -that needs to be formulated through the court- whether the contractual relationship shall continue or not by stating whether it intends to meet its contractual commitments within a certain agreed period as Alternative B states. Alternative A permits the debtor to retain possession of the aircraft object whenever it has cured the defaults incurred within the waiting period; this alternative states however that in the event that it shall not, the debtor must proceed to return the aircraft by the end of the waiting period without the need for any further intervention of a court, which causes the aircraft recovery process to be substantially more efficient.

To sustain the viability of this alternative within the context of Mexican law, it is important to consider that there are various cases in which courts have agreed that contractual relationships have been validly terminated when the creditor has properly served the termination notice in accordance with the terms stipulated in the corresponding contract and in consideration of the required procedural rules of Mexican law for the delivery of notices. In one particular case in which our firm conducted the separation of several aircraft from an insolvency process during the pre-Cape Town years, but already under the current Law of Insolvency Proceedings, the court determined that the aircraft could be separated from the insolvency process and possession returned to its owners, without the need for the debtor to make any determination as to whether it intended or not to meet its contractual commitments. This determination was made by the court in recognition that the leases of such aircraft had already been validly terminated by the notices that the lessor had served for such purposes in due course and thus that the right of possession of the debtor had been extinguished. The court in this case sustained that the lessee was therefore already obliged to return the aircraft to its legitimate owners without previously ordering the termination of the lease.

If Alternative A would have been applicable to the above referred case the already notified termination of the lease would have been equally valid and binding on the debtor which would have been simply obliged to return the aircraft by the end of the waiting period. In this particular case, the lessee would not even have had the right to cure the defaults because the contractual relationship was no longer in effect.

"...under Alternative A it would not be necessary –as Alternative B and the current Law of Insolvency Proceedings otherwise require- to assume "prima facie" that the contractual relationship remains in effect..."

In other words, under Alternative A it would not be necessary –as Alternative B and the current Law of Insolvency Proceedings otherwise require- for the recovery of an aircraft in an insolvency proceeding to assume "*prima facie*" that the contractual relationship remains in effect in recognition of the continuing right of possession of the debtor, which results in the procedurally lengthy and perverse requirement to ask the defaulting debtor whether it intends to honor its commitments and cure its defaults or whether it intends to terminate the contract. As I have mentioned above, under Alternative A, in the event that the debtor shall oppose to return the aircraft at the end of the waiting period, the judge would need to intervene to order the aircraft to be forcefully returned to the creditor, the difference being vis-a-vis alternative B that the judge would not need to rule in respect to whether the debtor maintains or not any rights of possession.

Considering the above, the question raised by many is whether the described treatment of the rights of the debtor which are considered terminated at the end of the waiting period under Alternative A is violatory of the rights of possession of the lessee and thus of Article 14 of the Mexican Constitution, which states that no party can be deprived of any rights or possessions without order of a competent authority. To respond to this question we need to consider that the rights of quiet enjoyment and possession of the debtor are subordinated to the compliance of its obligations under the contract, failure to comply with these create the right of the creditor to terminate the relationship and to recover the aircraft. These rights and obligations under an insolvency need to be reinforced by the establishment of a period of time within which the failure of the debtor to cure the default would entitle the creditor to recover possession and to claim this right before the court in the event that the debtor shall fail to meet this obligation to return. This is in no way violatory of the rights of the debtor to the extent that it is always entitled to continue in possession of the asset to the extent that it has cured the defaults within the referred waiting period and to the extent that it does not imply that the creditor would be entitled to enforce any such rights through self-help in any way.

"The fact that it is inconsistent to a certain extent with the provisions contained in the Law of Insolvency Proceedings, does not cause Alternative A to be contrary to the Constitution or to the Mexican civil law system..."

Alternative A in consequence means nothing else than a more expeditious way to resolve the right of the creditor to recover possession of its assets. The fact that it is inconsistent to a certain extent with the provisions contained in the Law of Insolvency Proceedings, does not cause Alternative A to be contrary to the Constitution or to the Mexican civil law system, but, on the contrary, it creates the need for the Law of Insolvency Proceedings to be urgently modified to permit the modification of the corresponding declaration and the adoption of Alternative A.

Effects of Pre-Strike or Strike Actions in Mexico.

Antonio Vázquez.

This article will deal with one of the most tortuous and difficult sceneries in which an owner of assets who has given possession of its property to a third party may face: The notice served to such third party (individual or legal entity) from the union about potential strike or even realization thereof. Let's use as illustration an actual example within Mexican aviation industry, that unfortunately in practice has become very common: A leasing company that has placed aircrafts under lease to a Mexican airline company, the latter failing to perform with lease agreements and simultaneously the notice served to this lessee from its Union about going on strike. First questions would be: Which are the effects of such strike notice? Which are the cases when such notice may be delivered? Which are the effects that this notice may cause on the aircraft granted under lease? In this article we will try to provide the most important answers.

First of all, the Federal Labor Law "*(Ley Fedeal del Trabajo)*" states the cases that may be subject to strike. The most common are: (i) Obtain from employer execution of a collective bargaining agreement or review thereof upon termination of an effective term; (ii) Obtain the execution of industry-wide labor agreement or review thereof upon termination of effective term[1]; (iii) Claim performance with a bargaining agreement or nation-wide labor contract; (iv) Claim of a salary review. As abovementioned, these are the most common cases notwithstanding the Federal Labor Law governs many more, including support to strike movements. It is also important to point out that cases for strike notice service are very common and they practically occur every year. Thus, for example, a review to a collective bargaining agreement is performed every year as sometimes such review implies negotiation of its clauses and at other times review of economic conditions under agreement. Thus, it is pretty common that a union serves strike notice to a company every year in order to initiate such negotiations and very rarely such strike notice service ends with an actual strike and cease of operations. It is merely a standard way to initiate, from the labor legal viewpoint any negotiation between the company and the union, as will be explained below.

Another aspect that we must take in consideration is the fact that the right to serve such strike notice is vested only to the Union. This notice is filed before labor authority known as the Board of Conciliation and Arbitration (which may be federal or local, depending on the corporate activity of the employer; in the particular case of the aviation industry, this activity is under the jurisdiction of the Federal Board), and such authority has no capacity to qualify such request or refuse to serve employer a strike notice only to review if the mentioned request complies with the legal formalities and if the case subject to strike is one of the stated in the Mexican Law previously mentioned above, therefore, the fact is that unions are entirely free to initiate a strike notice service every time they so deem fit.

1.- The difference between a collective bargaining agreement and an industry-wide labor agreement consists that the first one (collective bargaining agreement) applies to a particular business or company. In the case of the industry-wide labor agreement, this one applies to an entire branch of industry or line of business.

Stages of Strike Proceeding.

The Federal Labor Law states the strike proceeding, and the Supreme Court of Justice has made a construction of the stages, which are the following, including a brief a description of their effects[2] :

a. First stage: This stage initiates from the filing of petition by workers union up to order to serve notice to employer. During this stage, the reason is stated including purpose without forgetting date and time of cease of operation, performance with admissibility requirements is verified by the authority and, if satisfied, service of notice to employer will be ordered, if the request is inadmissible, pertinent actions will be denied terminating the proceeding.

b. The second stage also known as pre-strike covers from service of notice to employer up to just before cease of operations. Notice in the petition results in the legal effect of appointing employer as depository of the company affected by the strike preventing employer to dispose of any asset of the company; furthermore, any and all judgments and seizures on such property remain pending, except if of labor nature and collection of tax credit, in terms foreseen under the law. Also, in this stage is held a conciliation hearing before the Conciliation and Arbitration Board to attempt the parties an agreement without any prior judgment regarding the existence or justification of the movement; if the parties fail to reach an agreement, the number of workers who must continue working will be set in those events in which company's safety, production goods or resumption of jobs may be affected prior the inception of the strike.

c. The last stage covers the very moment operations are ceased up to resolution of the conflict in its entirety. The inception of strike poses a pause to work relations effects as well as any processing of applications and conflicts of economic nature throughout the entire time there are no operations. Within seventy-hours following inception of strike, a ruling of strike nonexistence may be requested whenever requirements for admissibility are not satisfied or purposes foreseen under the law are not met, thus, employer would be free from any liability and workers would be given twenty-four hours to resume operations warning them that their failure to comply will result in termination of their labor relationship.

Efects of Pre-Strike and Strike Actions.

In our study, the legal effects on the property of third parties both in second stage (pre-strike) as well as during third stage (strike) are very important.

As already mentioned, there are two main effects that originated in the pre-strike and which go on during strike:

a. Appoint employer as depository of the corporate property and, therefore, employer's inability to dispose of such property. Notwithstanding Federal Labor Law does not literally

2.- To know entire wording of applicable jurisprudence, refer to Thesis: 2a./J. 79/98 by the Second Chamber of the Supreme Court of Justice.

specify such prohibition to employer of disposing of corporate property is limited to own property without affecting third party property (such aircraft under lease), it has been construed by the federal Courts that this prohibition to make disposal of the assets of the company should not include third party property. However in practice, labor authorities, unions, employers once a pre-strike has been initiated, they all rather not to authorize the disposal of any property (including third party property) whatsoever refusing under such logics to return leased aircraft arguing a breach to prohibition of disposing of corporate property. The consequence is the risk that repossession of such property may be subject to (i) the resolution of the labor conflict or (ii) to the attachment of the lease aircraft made by the union in the strike period, that may give the right to the owners of these assets to file a third part claim against this attachment. As you can see, in the meanwhile the owners of such property would have to initiate all kind of legal actions which in general are not swift to resolve in order to recover their lawful property.

b. Suspension of any kind of judgment execution and seizure of corporate property. Just like in the above, notwithstanding Article 924 of the Federal Labor Law governing such prohibition has been declared as an unconstitutional provision by the Supreme Court of Justice, such unconstitutional status does not render nullity of the legal provision, what it actually occurs is that the affected party (a third party attempting to execute a judgment in order to recover own aircraft) must argue such unconstitutionality at the time there is an attempt by any authority to apply article 924 and as consequence, for example, to prohibit the enforcement of the resolution that ruled the repossession. Just like in the above case, this is not always as swift as it should be, because the affected party will be obliged to file for a legal proceeding for constitutionality control "(amparo)" which may take a number of months.

The "*ratio legis*" of prohibiting employer to dispose of corporate property as well as the suspension of judgment execution against employer property used to be related to worker protection and prevent employer to declare its own insolvency and not to be liable to labor credits, or else, that employer faked legal proceedings against itself so that the result would be insolvency. Notwithstanding, there has been a deviation to the intent of the law and now such pre-strike effects have resulted in abuse by the company and unions which are taking advantage of pre-strike effects to prevent return of property to their respective owners in order to force an inequable negotiation between lessors and lessee. The fact that Union has capacity to easily initiate a pre-strike and immediately cause strike effects and the reality that such pre-strike period may last forever, bring as consequence, that the owners of leased property remain unprotected from such labor proceeding, in addition to the fact that the labor law regulates no particular remedy in favor of such owner. Therefore, in any negotiation with a company who may suffer labor issues one must take into account such reality and attempt to prevent being in the middle of a scenery as tortuous as described.

News | March
Extract of Mexican Aviation News

Airlines loose Eight Thousand Million Dollars in 2008.

Airlines lost around 8000-million dollars, most of it in the fourth quarter of last year. Loses where even greater than expected due to the world wide financial crisis. A study showed that airlines have reduced their operating capacities to confront this crisis but not even that gave a positive result as passenger traffic dropped, causing even more loses for the airlines. Reforma. 03/March/2009.

Latin-American Airlines withstand the World Crisis.

The Latin-American Air Transport Association (LATA) announced the increase of 6% in the passenger transport sector in 2008 even though the economic crisis. LATA a group of over 39 of the most important Latin American and Caribbean airlines reported an increase in their passenger traffic compared to last year. They stated that 2009 will be filled with great risks when considering the negative impact the world crisis will have on the airlines. They also reported an increase in the distance traveled as well as the number of seats sold, while cargo flights had a sales decrease. El Financiero. 03/March/2009.

Air Traffic Drops on January.

The International Organization of Air Transport (IATA) announced a fall in air traffic this January. The president of this organization made a call out to improve security and efficiency on the product delivery to fight this crisis. This indicates that the crisis to come is even worse than expected. Experts believe that this year, air cargo will come down 5% resulting in a 9% fall on the income the airlines expected of around 54 thousand-million dollars. Milenio. 04/March/2009.

Airlines Lighten luggage; Looking to Reduce Costs.

In order to deal with the economic crisis, airlines are looking for cost reductions on airport services and fuel, they also seek to reduce their costs to the lowest possible level by running engines for the shortest time possible, reducing the water weight on board. Everything possible is being done so as to reduce costs and maintain jobs and investments in the airlines. The idea is not to get government aid, but for the government to establish better investment conditions to provide for growth within the industry, instead of just surviving the crisis. El Economista. 04/March/2009.

World Air Traffic Falls 6.2% Due to Crisis.

The world's air passenger traffic registered a fall of 6.2% in January 2009 compared to last year's sales. The Air Cargo sector decreased by 22.2% over the same period. The airports with increased activity in Latin America were Cancun, Lima, Buenos Aires and Sao Paulo. North American airports showed a reduction of air traffic except Charlotte, North Carolina and Indianapolis. La Crónica. 05/March/2009.

In this month extract was prepared by Juan Antonio Tiscareño, Alejandra Llopis, Alejandro Lavat and Svein Azcué.

News | March
Extract of Mexican Aviation News

The Airline Industry Lost 6000 Jobs.

The Mexican airline industry has lost more than 6000 jobs from August 2008 to date, and is expected to lose more by July. Therefore, during the 43rd National Congress of the Independence Trade Union, it was announced that an agreement was signed of between the Union and Aeroméxico, Seat and Ema, which aims to keep their workers jobs despite the economic crisis. Reforma. 09/March/2009.

Mexico receives boost from the French Aviation Industry.

Our country will manufacture helicopters, planes and satellites as a result of investment projects and developments with France. To this end there will be a spill-over of 800 million dollars to cover in addition, nuclear energy, bio-fuels, automotive projects and telecommunications. At the meeting of the High Level Group between Mexico and France, the presidents Nicolas Sarkozy and Felipe Calderón pledged to boost the "Small and Medium Businesses", and to develop a political agenda to advance a common agreement within the G-8 and G-20 for a new world economic order. El Financiero. 10/March/2009.

Airline Industry still in Decline.

February saw a continued worsening of aviation activity in the country, in an industry that is still not taking off this year. This despite expectations put forth by the federal government that more international passengers would be attracted because of the depreciation of the peso against the dollar. The closing of Aerocalifornia, Avolar, Aladia and Alma in the second half of 2008, and the reduction of frequencies from Aviacsa, VivaAerobus and some of the United States carriers also impacted the performance of the airport groups in Mexico during the second month of 2009 when compared to February last year. El Universal. 17/March/2009.

Recession will Cause Losses of 4,700 Million US among Airlines Worldwide.

The world's airlines are expected to lose 4,700 million dollars this year as a result of the recession that has reduced both the number of passengers and cargo demand, said IATA. IATA had estimated in December that the industry would lose millions of dollars in 2009. El Economista. 24/March/2009.

Official Norm for Airspace Operations.

Due to the increases of activity of the national air fleet, the Ministry of Communications and Transport of Mexico (SCT) yesterday issued the rule establishing the parameters that aircraft must meet to ensure safe transportation. NOM-091-SCT3-2004 refers to the reduced vertical separation minimum (MRVSM) that the crew of the aircraft must follow during operations within Mexican airspace. La Crónica. 25/March/2009.

In this month extract was prepared by Juan Antonio Tiscareño, Alejandra Llopis, Alejandro Lavat and Svein Azcué.

Contributors

CARLOS SIERRA

Attorney at law by the 'Universidad Nacional Autornoma 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

ANTONIO VÁZQUEZ

Attorney at Law: Admitted to practice law in 1991. Mr. Vázquez of Mexican nationality obtained his law degree at the Universidad Nacional Autónoma de México (UNAM). Mr. Vázquez attended post-graduate studies in Civil Law, Corporate Law, "Amparo" Financial and Procedural Law, Civil and Commercial matters. Mr. Vázquez has been Professor of "Amparo" in UNAM and Lecturer at various universities throughout Latin America. Currently Mr. Vázquez is member of the International Bar Association. LANGUAGES: Spanish and English. PRACTICE AREAS: Arbitration, Civil Law, Civil Litigation, Amparo, Corporate Law and Foreign Investment. e-mail: avazquez@asyv.com

ALEJANDRA LLOPIS

Attorney at Law: Admitted to practice law in 2008. Ms. Alejandra Llopis, of Mexican nationality obtained her law degree at Universidad Universidad Anahuac del Norte, Edo. Mexico. LANGUAGES: Spanish and English. e-mail: allopis@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