

# 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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# Documenting a Transaction Agreement by Means of Public Instrument or Judicial Agreement. | Viridiana Barquín.

On a past delivery of Coelum, we discussed the legal options by which a lessor or an owner are entitled to enforce their rights without going through endless court proceedings to prove the default of the lessee and also how to prevent the abuse by the lessee of the aircraft while the required court order is being obtained to recover possession. On such we described the “Transaction Agreement” as the most successful form that has been recently implemented to reach that objective. Now, as mentioned at the end of that article, we will describe the means through which a Transaction Agreement in the form of a *public instrument* or a *judicial agreement* can be documented.

A *public instrument* is the notarized document in which a legal transaction or commercial arrangement will be contained. As determined by the applicable law<sup>1</sup>; while the falsehood or nullity of the notarized instrument, record, testimony or certification, is not declared, these documents constitute full evidence of the will of the parties to enter into the agreement which is recorded in the instrument, that the representations and guaranties are true and correct, and that the mutual covenants and agreements are binding thereupon and also that the corresponding formalities have been observed. Furthermore, under the all public instruments, it is only the “public deed”, the document through which the parties may give written evidence and certainty of the scope of the specific terms and conditions of the transaction agreement.

“...in case of breach by lessee of the transaction agreement executed as a judicial agreement, and more specifically, in the event of the occurrence of an event of default under the transaction agreement, the transaction agreement will produce all necessary effects and shall be immediately enforceable as if a final judgment had been pronounced without prejudice to enforcement by lessor of any other rights it may have under the transaction agreement, the lease the applicable law and/or through ordinary proceedings.”

It is important to make a distinction between the effects of a transaction agreement that has been recorded as a public deed and a simple ratification. By the ratification, the Notary Public will attest to the identity of the individuals appearing before him and confirm that such individuals are authorized to sign the document. The signature of the officers authorized to execute the document on behalf of the lessor (or the owner), the lessee and any other parties involved in the transaction, and its recognition with the respective ratification of content, will be vested in any document that may be written in language different to Spanish, without need of translation and without responsibility for the Notary, and only a simple declaration of the

1.- Article 156 of the Notarial Law for the Federal District (Ley del Notariado para el Distrito Federal).

interested party about the content of the document and of what this consists will be included on the protocol. This means that by a simple ratification, the parties will not be entitled to enforce the terms and conditions of the transaction agreement as it could be done through a public deed.

Now, as the other alternative to permit the more expeditious enforcement of the rights of the lessor under the lease towards the recovery of the aircraft and the collection of the outstanding debt, we will describe the *judicial agreement*. The *judicial agreement* is the agreement between the parties (as contenders in a litigation or possible contenders in a potential litigation) through which they decide to terminate the existing controversy.

“Both mechanisms have the same effects, which are the avoidance of the court proceedings and in consequence, the enforceability of the rights and obligations of the parties within a substantially reduced period and with the applicable means of compelling (*medidas de apremio*) which will be applied in case of breach or default.”

The mechanism to execute a transaction agreement as a *judicial agreement* is before the judge or by means of a hearing. Conducted by the Center of Alternative Justice (CAJ) of the Superior Tribunal of Justice of the Federal District of Mexico in resolution of an existing controversy. If the parties agree upon its terms, the document becomes final as it is known in Mexico as to “*res judicata*” (*cosa juzgada*) and does not admit appeal or any further legal remedy. Therefore in case of breach by lessee of the transaction agreement executed as a *judicial agreement*, and more specifically, in the event of the occurrence of an event of default under the transaction agreement, this document will produce all necessary effects and shall be immediately enforceable as if a final judgment had been pronounced without prejudice to enforcement by lessor of any other rights it may have under the transaction agreement, the lease, the applicable law and/or through ordinary proceedings.

In summary, as a judicial agreement, the transaction agreement may be documented through a contract executed before the CAJ or as a public instrument, the transaction agreement may be documented in a public deed. Notwithstanding, both mechanisms have the effect of the avoidance of the ordinary court proceedings, by means of a judicial agreement, the enforceability of the rights and obligations of the parties may be completed within a substantially reduced period, with the applicable means of compelling (*medidas de apremio*) which will be applied in case of breach or default without the obligation to carry out the ordinary procedural stages. The analysis of the amounts owed, the defaults incurred and the animus of cooperation of the lessee, will be the key point to determine what is the most practicable for each particular case.

## The “Extinction of Ownership” and its Consequences. |

Juan Antonio Tiscareño.

In a previous article, we made a brief analysis of a new law, called the Federal Law of Extinction of Ownership, which main objective is to seize illegal goods and assets acquired by criminals, and also to reduce drastically their criminal financial capacity. In conclusion we stressed that it will be very important to analyze the final version of the Law, due to its impact on all the commercial fields.

On May 29, the final version of the Law was published in the Federal Official Gazette, and the new Law will come into effect 90 calendar days from the date of its publication (Aug 27, 2009).

This Law regulates the second paragraph of article 22 of the Mexican Constitution. In this article we will focus on explaining the concept of “extinction of ownership” and some points of the process that needs to be followed to achieve “extinction of ownership”.

“...The “extinction of ownership” is the loss of rights to certain goods and assets without any compensation or payment for the owner or the person that behaves as the owner..”

### **Concept of “extinction of ownership” and rights of the aggrieved and third parties.**

The “extinction of ownership” is the loss of rights to certain goods and assets without any compensation or payment for the owner or the person that behaves as the owner. The goods and assets seized by the Government will be sold for the benefit of the State, or otherwise applied through diverse social assistance programs. The “*action of extinction of ownership*” may proceed for any reason, over any goods or assets, regardless of who has acquired them, if it is proved that those goods or assets are linked with criminal activities or are the product of a felony.

In the proceeding, the right of legal hearing and due process of law will be respected, allowing a third party, a victim or aggrieved party to present evidence and any action it deems appropriate.

This means that the judge must:

- I. Ensure that the aggrieved party can prove the legal origin of the goods and assets, its good faith, and that he was prevented from knowing about their illegal use.
- II. That the goods and assets were not used to commit a crime, or are the result of a crime, or have been used or intended to hide or be mixed with the products of crime.

Even if an aggrieved party or its legal representative fails to appear at the proceeding, the State shall assign a public defender to represent it, thus ensuring that its rights are not violated by the authority in the proceeding. The judge will accept any kind of evidence to prove that the property or the goods should not pass into the hands of the State.

### **The judgment and its effects.**

If the judge considers that there is sufficient evidence, he will grant a judgment declaring the “extinction of ownership” of the goods and assets. Otherwise, he will order the return of property or the goods for which the owner or aggrieved party has proven its legitimate origin.

The judgment shall be effective even for the pledgee or mortgagee or any other guarantee provided by law, except that the holder of such guarantee must prove the pre-existence of the credit and if necessary, the measures necessary for the issuance and use of the credit, otherwise, the judge will declare the extinction of guarantee.

*“We can expect that this Law will make significant impact on all economic areas and businesses.”*

### **Perspectives and consequences in the aviation field.**

We can expect that this Law will make significant impact on all economic areas and businesses. Essentially, the project discussed at the Senate was approved, so the comments I made in my previous article are still valid.

Undoubtedly, the purpose of law is noble: to limit the illegal actions of organized crime. However, in achieving that goal, the authority can affect third parties who have nothing to do with the crime committed. Remember the example of my previous article: *A company leases an aircraft for cargo transportation, but the lessee uses it for drug trafficking. Later, in a routine check, the authority found drugs inside the aircraft.* In this example, the company has nothing to do with the drug trafficking, but can be affected in an “extinction of ownership” proceeding. The company will need to hire the services of a law firm to prove that the subject matter of the contract is legal, and that the company could had no knowledge of the illegal activities that took place on the aircraft, and could never have known drug trafficking was being conducted on the aircraft.

*“Undoubtedly, the purpose of law is noble: to limit the illegal actions of organized crime.”*

It is recommended that aircraft owners, lessors, lessees and any person who owns property that at one time may be used or connected with a crime remain in contact with its legal counsels in order to have an appropriate legal advice in these cases in which they can be involved regardless of their guilt or liability.

The period of the application of the law has not commenced. In the next few years we will get to know more about its application by the authorities and its consequences and effects. It will be also important to study the court precedents that arise over time.



## News | July

### Extract of Mexican Aviation News

#### Airlines face more obstacles.

The cost reduction policies taken by AeroMexico and Mexicana in order to survive the economic recession have had a major effect on their employees. The labor unions of the Aviation Industry have protested these measures and will undertake legal action against airlines who ignore past year's agreements and take unilateral decisions concerning the firing or salary reductions of any of its members. El Universal. 01/July/2009.

#### Airlines report loses in the millions.

All around the world airlines all together lost more than 3 billion dollars during the first quarter of 2009, declared IATA and they foresee a loss of 9 billion dollars by the end of the present year. IATA stated that the decrease in demand for flights and the reduction of goods produced as a result of the recession, have deeply affected the income of airlines. This problem was there even before the recent rise in oil and fuel prices so this problem will affect the weak incomes the airlines expect for the next few months. La Cronica. 01/July/2009.

#### Mexicana offers 25% cut in wages to pilots.

Mexicana made three proposals to the pilots union regarding the 84 pilots listed for dismissal: 1.- That the 84 pilots take a leave without pay for five to eight months and be reinstated to their jobs in the first or second quarter of 2010. 2.- Accept up to 25% reduction in benefits for the remainder of this year and 2010. 3.- That the Productivity Agreement signed by 810 pilots in October 2006 be extended until October 31, 2012. The pilots union has not yet informed its members about these proposals. La Crónica. 02/July/2009.

#### The Consumer Protection office received 34 complaints against AVIACSA.

The Consumer Protection office reported that it has received 34 complaints against the airline AVIACSA and 12 phone calls related to this. It is evaluating the possibility of promoting a group to represent those affected. El Economista. 08/July/2009.

#### AVIACSA reported that 17 of their aircraft have been released for use.

AVIACSA reported that the aircraft that were grounded by the Ministry of Communications and Transport on June 2 are back in service. It was reported that of the twenty five aircraft originally suspended, three are in "major" maintenance and therefore may not be incorporated into the fleet immediately and two others were leased, and were returned to the leasing company. Milenio. 16/July/2009.

## News | July

### Extract of Mexican Aviation News

#### [Mexicana-Aeroméxico merger, frozen.](#)

After almost three months of intense negotiation and pressure in search of a merger of AeroMéxico and Mexicana, everything indicates that once more, the possibility of establishing a single, merged airline was put off yet again. The arrival of the summer season means an improvement in demand for flights and that allows hopes for 70% load factors. That has put a stop to the urgency of finally finding a solution to aviation in Mexico, something that has been urgent for years. The good news is that the emergency is gone. The bad news is that after the emergency has passed the preoccupation of government, employers and unions to sit down and design a strategy for our country's aviation is also gone. El Financiero. 17/July/2009.

#### [AeroMéxico will fire 290 workers.](#)

ASSA reported that once the period of summer vacations is over AeroMéxico will fire 290 staff members, under the argument that the airline cannot contain the severe crisis the sector is living at the moment. Even though the federal authorities announced that the economic recession has reach bottom and the recovery is soon to come, AeroMéxico is not just announcing cuts of 140 posts, but now they say that effective in September they will have to cut 290 workers. Milenio. 20/July/2009.

#### [AeroMexico reaches agreement.](#)

Aeromexico, administrated by Andrés Conesa Labastida, has just reached an agreement with the Flight Attendant Union Association lead by Lizette Clavel. The highlights are an increased option for voluntary retirement and the possibility for permission to leave work without payment. The aforementioned agreements were accepted in order to try and avoid more job losses and for the union and company to work together to confront the crisis in aviation. El Financiero. 22/July/2009.

#### [The AVIACSA case affects cargo sales.](#)

Aviacsa's suspension of operation has seriously affected the air cargo business, at least in Chiapas and Quintana Roo. Around 8 tons of cargo a day are affected, taking into consideration that Aeromexico can only transport 2 tons of cargo on a 50 passenger aircraft. Because of the lack of railroads, the cargo, such as flowers, coffee and exotic fruits from the region depend entirely on air transportation. All of the export goods are flown to Tijuana, Nogales and Laredo border cities, to be sent on into Canada, USA and Europe. The cancellation of orders has begun and small businesses will have to fire some employees to deal with the crisis. It is in mid-high season that this commerce is being chocked as the demand for cargo space is much higher than the current carriers can offer. El Universal. 22/July/2009.

## Contributors



### VIRIDIANA BARQUIN

Attorney at Law: Admitted to practice law in 1999. Ms. Barquín, of Mexican nationality obtained her law degree at Universidad La Salle, Mexico City and attended post-graduate studies in International Business by Universidad La Salle, Barcelona, Spain; Airline Contract Law by International Air Transport Association (IATA), Geneva, Switzerland and International Arbitration by Escuela Libre de Derecho, Mexico City. LANGUAGES: Spanish, English and Catalan. PRACTICE AREAS: Aviation Law, Aircraft Contract Law and Corporate Law. e-mail: [vbarquin@asyv.com](mailto:vbarquin@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](mailto:jtiscareno@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](http://www.asyv.com) / [www.asyv.aero](http://www.asyv.aero)  
[mail@asyv.com](mailto:mail@asyv.com)

members of **advoc** [www.advoc.com](http://www.advoc.com)

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