



# 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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# Competition Policies Applicable to Airport Services.

| Viridiana Barquín\*

The Federal Law of Economic Competition (LFCE) is designed to give operative force to the anti-monopoly provisions set out in Article 28 of the Mexican Constitution. A discussion of the context of Mexico's competition law properly begins with the text of the mentioned article. The competition policy objectives set out explicitly in the LFCE are: "to protect the competitive process and free market access by preventing monopolies, monopolistic practices and other restraints to the efficient functioning of markets for goods and services".<sup>1</sup>

In a series of Coelum articles to be written by this author a brief analysis will be made of the applicable competition policies in Mexico to diverse topics within the field of aviation. This one will be dedicated to airport services.

In 1993, Mexico adopted the LFCE and created the Federal Competition Commission (CFC) to protect the process of competition and free access to markets, through the prevention and elimination of monopolistic practices and other restrictions to market efficiency, in order to contribute to societal welfare.

The Airports Law grants powers to the (CFC) to determine if reasonable conditions of competition exist in the rendering of airport services and for the leases and considerations related to the contracts entered by and between the concessionaires or licensees and services providers. Therefore the CFC must determine if an economic agent has substantial power in the relevant market by considering the specified cases contained in Articles 12 and 13 of the LFCE and following the rules contained in articles 9, 10, 11 and 12 of the Federal Economic Competition Regulation (RLFCE). For purposes of determination of the "relevant market" as defined by Article 12 of the LFCE, the following criteria will have to be considered: 1. the possibilities of replacing the good or service; 2. the costs of distribution; 3. the costs and probabilities of other users or consumers to come to other markets.

The relevant markets relating to this subject are: 1) the rendering of the different airport services, and 2) the access and lease of spaces for the rendering of complementary services offered at each of the airports. The competitive capacity of both airport services and the complementary services such as parking, administration and operation of shuttles; loading and maintenance among others is limited by its dependence on the concessionaire of each airport.<sup>2</sup> We may say that the airport concession holding companies have substantial power over the relevant respective markets by virtue of: 1) the existence of legal barriers of entry in order to construct airports and to provide airport services; 2) the priority which the concessionaires enjoy to establish alternate airports; 3) the low technical

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## \* IN COLABORATION WITH ALEJANDRO LAVAT.

1.- Article 2, (LFCE).

2.- For purposes of their regulation pursuant to Article 47 of the Airports Law, the services provided at the airports in Mexico are classified as follows:

- I. Airport Services: those provided originally by the concessionaire or licensee of the airport (or through agreements with third parties) such as platforms, terminals, visual helps, lighting, mechanical boarders, safety, extinction of fires, rescue, among others.
- II. Complementary Services: those provided by the concessionaire or licensee of the air transport service (or through agreements with third parties) for themselves or for other users such as ramp, fuel supply, maintenance and repair of aircraft, etc.
- III. Complementary Services: those related to goods or services related to diverse products and services to the end users of the airport that are not essential for the operation of the same such as restaurants, car rental, banks, hotels, etc.

and economic feasibility to establish new airports inside the areas of influence of previously established airports; 4) that the majority of the airport services and the access to and leases for the rendering of related services, by its nature, can be offered by only one provider.<sup>3</sup>

Under these conditions, the concessionarie companies possess power to unilaterally fix prices and fees. On this regard, Article 67 of the Airports Law mentions that the Ministry of Communications and Transport will be able to establish the basis of prices and tariff regulation for airport and related services, when there is no reasonable condition of competition, with the previous opinion of the CFC. Notwithstanding, if a government entity is engaging in regulatory conduct that inappropriately restricts competition, the opinion issued by the CFC will not constitute an order with binding legal effect. Moreover, the LFCE provides no exception or protection for anticompetitive conduct by a private party on the grounds that the conduct is authorized by a government agency.

Specifically, the CFC must determine that there is a lack of effective competition in the relevant market. Considering that any economic agent who wishes to apply directly through an administrative proceeding for a concession, license, or permit, must first obtain a favorable opinion from the CFC, let us bear in mind that the CFC can disapprove the applicants request or establish conditions that will apply to any concession, license, or permit, in case that there would be any circumstances that may result in the absence of effective competition in the relevant market. It is clear that the current concessions have not been granted under the most favorable conditions of price and competition which has resulted in an obvious effect on air fees, to the detriment of the end user.

Some proposals to improve airport competition and related services would be as follows:

1. To create an independent commission to improve tariff regulation. Airport fees are set by the federal government based on a formula included in the airport concession titles, so it would be helpful to have an independent regulator who would apply the existing formula with the intent of reducing fees to the extent possible based on the lowest price for the user and the tax goal of the government.
2. To increase competition in airport services. Users should have access to a larger number of options, both in terms of airlines and providers of other services; so that airlines and consumers can choose the best option in terms of quality and price to ensure competition in areas that may be served by more than one provider. Also, revenue obtained by airport operators from airport services and other retail businesses should be included when considering the fees they can charge airlines and passengers.

We may conclude that privatization has not been the right way to solve the problem for Mexico to compete successfully in the world of air transportation. Its inefficient regulations for airport operation translate into higher airport fees, to the detriment of users who pay them as part of the cost of airfares. Prices of related airport services are also high. In a list of the 50 most expensive international airports, Guadalajara, Cancun and Monterrey airports are 11th in rank, while the Mexico City airport occupies the 19th place.<sup>4</sup>

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3.- As seen in: [www.cfc.gob.mx](http://www.cfc.gob.mx)

4.- As seen in: <http://www.glgroupp.com/News/Will-Mexicos-New-Plans-for-Airport-Competition-fly-17438.html>

# Navigation Assistance Services and use of the Mexican Air Space. | Misael Arellano

- 2nd article -

In our November 2008 COELUM edition, this author commenced the analysis of the most relevant factors involved with the Navigation Assistance Services and use of the Mexican air space (SENEAM). In this issue we will review the process that carriers must follow to make the payments for the services provided by SENEAM.

As was mentioned in November's COELUM, once a method of payment from such stated in Article 289 sections I, II or III of the Federal Law of Duties (LFD) is chosen by the carrier, the calculation system cannot be changed until the following calendar year. For that reason the carrier also has to file information about its Federal Registry of Tax Payers number (RFC) and the list of aircraft for which the duty will be paid under the chosen mechanism.

If the carrier acquires an aircraft or commences operations after the beginning of the calendar year it has the first 20 days of its operation to notify about the selected calculation mechanism for the payment of SENEAM's duties and conduct the registration of the specific aircraft before with the Aviation Registry, regardless of the payment option chosen as offered under article 289 of the LFD.

## Payment process.

**A.** Payment of duties where the calculation is made based on the orthodromic distance flown. This choice is detailed in section I of article 289 of the LFD.

In this case, duties have to be calculated by the carrier which has to file the calculation on a monthly basis through any process duly authorized by the SAT providing the declaration document within the 17 days of the end of the month in which duties were incurred. Once the payment has been made, the carrier has to file a copy of the payment form duly sealed by the offices authorized by the SAT with an electronic file containing the operations that support the payment of duties to the Ministry of Transport through the SENEAM within the following 5 days of the date of payment.

**B.** Payment of duties where the calculation is made based on the fuel consumption charged every time the aircraft is supplied with fuel. This choice is stated in sections II and III of article 289 of the LFD.

**a)** The carriers who have an executed Fuel Supply Agreement with Airport and Auxiliary Services (ASA) or any authorized concessionaire, have to make payments for all aircraft listed to use this mechanism of calculation, by making monthly

payments within the following 17 days of the month's end, through any method of payment duly authorized by the SAT.

- b)** The carriers who have not an executed Fuel Supply Agreement with an authorized entity will have to pay in cash the amounts stated in sections II and III, directly to the Fuel Supplier every time the aircraft is supplied with fuel under a calculation based on the aircraft's wingspan. These payments, collected by the Fuel Supplier have to be transferred to the Treasury of the Federation within the 10 days following the month in which the fuel has been supplied.

These payments of duties for SENEAM's services are independent of duties and payments caused by the time extension of services stated in article 150-C of the LFD<sup>1</sup>. In these cases, the LFD distinguishes between Scheduled carriers and Non-Scheduled carriers.

The Non-Scheduled carriers that use the time extension services will have to calculate and file the corresponding payment for every aircraft on the day following the provision of services. Scheduled carriers that use the time extension services, will be able to pay the applicable duties on a monthly basis for each aircraft through the corresponding operation's declaration, that has to be filed within the ten days following the end of the month in which the services were received, enclosing a breakdown of each aircraft's operation for the prior month.

If the carrier does not notify the mechanism of calculation of duties that best fulfills their needs within the first 20 business days of each year, or if applicable, within 20 days of commencing operations or the registration of a specific aircraft before the Aviation Registry as stated in the LFD, the following mechanisms will be applied:

- In case of scheduled carriers, it will be understood that they will pay using the distance method stated in section I of article 289 of the LFD.
- In case of non-scheduled carriers, it will be understood that they will pay based on the fuel uplift method stated in sections II and III of article 289 of the LFD.

In the next issue to be written by this author, we will attempt to review and analyze the payment verification procedure and the corresponding suspension procedure of Navigation Assistance Services and use of the Mexican air space due to any lack of payments.

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1.- Article 150-C.- By the services provided by the decentralized institution named 'Servicios a la Navegación en el Espacio Aéreo Mexicano' (SENEAM) the official schedule of the Airports operations, duties will be paid in conformity with the following amounts:

I. By the extension of the schedule of the air traffic control services, for every minute or fraction, a fee of \$ 9.00 MXP.

II. By the extension of the schedule of the flight information services, for every minute or fraction, a fee of \$ 9.00 MXP.

The following interview was made to Carlos Sierra, a partner of this firm, by Sherice Sánchez of the national newspaper “Excelsior” on January 30, 2009, we hereby reproduce an English translation of such interview.

## STANDARD UPDATE

# Aircraft Leasing Companies are Afraid of Mexican Companies.



Carlos Sierra

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Mexico has still a bad reputation as one of the countries where the recovery of aircraft by the leasing companies is a matter extremely complicated, particularly when the airlines with which they have executed agreements cease operating, specially after having economic problems.

So is assured by Carlos Sierra Navarro, specialist and legal counsel for several foreign leasing companies who said that authorities from our country must adapt and update the standards regarding aviation matters, as well as to apply measures complying with agreed upon in international agreements, so that aircraft leasing companies have more confidence in Mexican firms and offer them better conditions in their agreements.

“This shall help to reduce operational costs of air transportation”, stated the specialist.

Sierra Navarro stated that laws and regulations currently governing aviation activities in Mexico represent an obstacle to guarantee that lessors may recover their aircraft, especially after several airlines are declared in bankruptcy or are going through strikes.

“Recovery of aircraft in Mexico on a legal basis is a nightmare, because the laws are old, authorities make bureaucratic processes eternal and their way to conceive the rights of lessors is very limited. Very frequently, we have had to waive payments that airlines



Some companies are not using their aircraft anymore, after their operations were suspended.

**5**

companies ceased flying last year, therefore, their aircraft stayed at terminals.

**13**

aircraft from the Aviaca company were seized last week due to debts.

**1**

from November 2007, the authorities signed the International Agreement of Cape Town.

have to make, so that we can speed-up the recovery and departure of the aircraft from the country to place them with other companies abroad”, we argued.

Such situation has been presently repeated several times; during 2008, after Aladia, Avolar, NovaAir, Alma and Aerocalifornia suddenly ceased operating due to issues with authorities and/or with the finance thereof, they had several debts with leasing companies, whether due to aircraft or even for engines.

He stated that one of the biggest issues relies on the lack of update

in the Mexican Aviation Registry, entity in charge of assigning a registration number and the Mexican nationality to aircraft entering into the country.

“Nowadays, it is not possible to cancel the registry other than by a mutual agreement between the lessor and the airline, therefore, the process turns practically impossible when the companies have debts or refuse to face the problem. If the registration is not cancelled the aircraft can not leave the country to be placed abroad”, he explained.

He added that after these difficulties, expensive proceedings

have to be brought and due to the foregoing, the aircraft are abandoned. Upon failing to receive maintenance, they deteriorate and lose their commercial value.

Sierra remembered that Mexico signed on November 1, 2007, the International Agreement of Cape Town, which acknowledges the rights of the owners of aircraft and other mobile vehicles, and allows the application of remedies – such as the protection and immobilization of aircraft – which were not contemplated in the Mexican legislation.

## News | January

### Extract of Mexican Aviation News

#### Airbus is Optimistic.

Mexican airlines have not ordered any planes from Airbus for next year, however Airbus is confident that the airlines will need to replace some of their older aircraft. Disregarding the current crisis, Airbus assures that 2009 will be a good year taking into account that in 2008 about 800 aircraft were sold and 77 more aircraft have been ordered in America. Even though Mexico has not yet ordered any planes for this year, that doesn't mean that orders will not come in the near future. El Universal. 05/January/2009.

#### Passenger Decrease Expected by Mexico's Three Airport Groups.

The three airport groups that operate in Mexico are facing a complicated 2009 due to the low-cost airline's shut down which is having a great impact on domestic traffic numbers. This will affect the group's services and could increase the costs of air tickets. Reforma. 12/ January/2009.

#### Uncertainty in the Aeronautical Industry Due to the Economy.

Due to the economic crisis, a tough year is expected for the airport groups that operate the main airport terminals. The first few months of this year will be filled with uncertainty after the last year's fuel price increase and with a number of airlines going out of business. Airport investment is not recommended until this sector has stabilized over the next few months. The airport groups will suffer reduced traffic of about 1% to 9% on domestic flights due to the loss of several low-cost airlines, nevertheless international traffic is developing well as tourists choose Mexico, based on the price of the peso against the dollar. El Universal. 13/ January/2009.

#### Aviation Takes off at Mid-year.

It is expected that air passenger traffic will return to its domestic and international growth pattern by mid-year. Until that happens, airports must maintain their pace of investment to meet the needs of passengers. Mexico has a large amount of traffic with the United States. The U.S. economic downturn will however in some way impact flights to Mexico connecting to other regions of Latin America. El Universal. 14/ January/2009.

#### Federal Government to Allow International Service at Temixco Airport.

The federal government announced the agreement for an international airport "Mariano Matamoros" Temixco located in Morelos, which would enable both foreign and Mexican, aircraft to enter and exit the country. The terminal located in Temixco has the infrastructure, facilities, equipment and services to meet the needs of aircraft, passengers, cargo and mail service for international air transport. El Financiero. 15/ January/2009.

## News | January

### Extract of Mexican Aviation News

#### GAP Airports Expect Lower Passenger Traffic.

In 2009, Pacific Airport Group (GAP), which operates 12 airports in the country, is working in a difficult economic environment. It indicates a decline in total passenger traffic of between 3% and 5%. Given this situation, GAP is considering delaying additional infrastructure investments. El Universal. 16/ January/2009.

#### Amendments to the Airports Law, Articles 19 and 39.

The Federal Congress approved that the articles 19 and 39 of the Airport Law will be reformed. Article 19 was changed in the second paragraph, with an addition that says that the National Commission of Foreign Investors, has also to safeguard the ecological balance. Article 39, had an addition to includes the protection of the ecological balance. This amendment in the law came into force on December 11, 2008. Diario Oficial. 16/January/2009.

#### Airlines Insurance Policies for 2009.

In 2009, insurance companies will not offer reductions in their airline policies. In some cases there will be an increase of from the 5% to 10%. It is up to customers to find the best conditions, and a better coverage. El Universal. 19/January/2009.

#### Ministry of Communications and Transport Recommends Airline Mergers.

Due to low passenger traffic on passenger airlines, the Ministry of Communications and Transport recommended mergers or strategic alliances to address this difficult situation. Airlines should take appropriate decisions to seek strategic alliances or mergers which will have the support of the Ministry. El Financiero. 20/ January/2009.

#### Mexico to Fly with its Own Wings.

Mexico can build its first helicopter in three years using national technology. The certification process may then take a couple of years more. Reforma. 28/January/2009.

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