

COELUM



COELUM Pronunciation: 'che-läm, 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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Aircraft Repossessions. | Carlos Sierra

The legal framework of Mexican law. (second delivery of two)

II. Insolvency Proceedings.

Insolvency proceedings in Mexico are regulated by the Law of Insolvency Proceedings “(Ley de Concursos Mercantiles)”, which also regulates the bankruptcy procedure of companies or merchants, when applicable. The insolvency procedure in Mexico is known as “concurso mercantil” and is the process that regulates the reorganization of insolvent merchants and provides -subject to the terms of such law- protection against its creditors. When an insolvency proceeding is initiated by the lessee or by any third party in respect of lessee, Title Third, Chapter Two, Articles 70 through 71 of the Law of Insolvency Proceedings regulates the process that a lessor must follow to cause the court to consider the lease terminated and to return the Aircraft or equipment to the lessor, or owner as applicable. It is important to state that pursuant to certain amendments to the Law of Insolvency Proceedings dated 12 December 2007 the mere commencement of the ‘concurso mercantil’ by the lessee cannot be considered ‘per-se’ as a default under the lease, being necessary always to obtain a resolution from the bankruptcy court ordering the termination of the lease.

The established procedure for such purpose requires the filing by lessor, or owner, of a separatory incident “(incidente de separatoria)”, within the ‘concurso mercantil’. In resolution of this incident, the court will allow the lessee as debtor to determine, with the intervention of the conciliator “(conciliador)” appointed by the court, whether it shall comply with the lease and honor its obligations thereunder in

favor of lessor. In the event that lessee shall not accept to meet its obligations and comply with the lease, the bankruptcy court would proceed to consider the lease terminated and to order the return of the Aircraft or equipment to lessor, or owner, as applicable.

It is important to mention that by being Mexico a member state of the Cape Town Convention and Protocol, which became effective in Mexico on 1 November 2007, and provided that the lease in question shall not be considered as a pre-existent interest in accordance with such instruments, considering that based on the declaration made by Mexico the Convention and Protocol are not applicable to interests of such kind. The procedure described in the Law of Insolvency Proceedings is consistent with Alternative “B” of Article XI of the Protocol, which Mexico has elected to apply and pursuant to which the period within which the lessee shall determine whether it intends to comply with the terms of the lease once the separatory incident has been initiated, shall be such that the parties to the lease shall agree within the contract.

It is interesting to find that, as of the day this is being written, no other member state of Cape Town has selected Alternative “B” of Article XI of the protocol to be applicable in case of insolvency of the debtor.

III. Enforcement of a Foreign Judgment.

A foreign judgment would be enforceable in

Mexico as such process is contemplated under the Commercial Code⁴ which have been recently amended effective December 31, 2008. A judgment seeking to be enforced however must comply with the requirements stated in Article 1347A of the Commercial Code and upon compliance thereof the foreign judgment should be validated under a process known in Mexico as “(homologación de sentencia)”, which means that it shall be assumed by a Mexican court as if such would have been issued by the same.

The ‘homologación’ proceeding is lengthy and technically complex given the substantial differences that exist between the rules of civil procedure that are applicable in Mexico’s civil law system and the procedural rules that are applicable in common law systems, from which the judgment ordinarily generates such as New York or England for example.

The enforcement of a foreign judgment is impossible when such shall be resultant from the exercise of rights ‘in rem’, for which such shall not even be attempted when the Aircraft or equipment shall be located in Mexico.

Paradoxically, this situation always becomes an issue when the aircraft lease agreements are regulated by foreign law. Lessors that are

parties to such agreements have a tendency to consider that the regulation thereof by foreign law provides them with a more expedite access to their remedies considering also that such is the law with which they are generally more familiar. It must be considered however that, in practice, the enforcement of an aircraft lease agreement subject to foreign law against a Mexican lessee and in respect to an Aircraft located in Mexico has proven to be a far more complex ordeal that it is to proceed against lessee under a contract regulated by Mexican law and subject to the jurisdiction of the courts of Mexico. As I have mentioned above, the validation of a foreign judgment is a very complex process that has very little chances of success and which in practice duplicates the time involved in the recovery of the Aircraft, considering the timeframe involved in obtaining the foreign judgment, plus the time that it would take to validate the same before a Mexican court, which, if successful, would take nearly as long, or possibly longer, than it would take to proceed against lessee under an ordinary commercial procedure under Mexican law and before a Mexican court.

In this analysis it is also very important to consider that by Mexico becoming a member state of the Cape Town Convention, the

4.- (a) The obligation which enforcement is requested is not contrary to Mexican public order or Mexican law, unless otherwise provided by foreign treaties or conventions to which the United Mexican States has become a member State; (b) The judgment has not been issued as a consequence of the exercise of an “actio realis”; (c) The judgment has been issued by a judge of competent jurisdiction in accordance with international generally recognized rules which are compatible with Mexican law; (d) The judgment has been notified personally to the defendant in order to guarantee its rights of defense in accordance with Mexican law; (e) The judgment contains the necessary requirements in order to be considered authentic, its enforcement has been requested to the competent Mexican court by means of a rogatory letter attaching the original judgment duly translated into Spanish; and the party executing the judgment has provided an address for notification within the jurisdiction of the Mexican courts from which execution is being sought; (f) The judgment is final in the jurisdiction where obtained; (g) The action in respect of which such judgment is rendered is not the subject matter of a lawsuit among the same parties pending before a Mexican court; (h) The courts of the jurisdiction where the judgment is rendered recognize the principles of reciprocity in connection with the enforcement of Mexican judgments in such jurisdiction.

enforceability of its provisions and the validity of any registered international interests must be recognized by Mexican courts and - however defective as a result of the unfortunate declarations with which these instruments have been approved- would still be enforceable against lessee causing Mexican law, which now includes these applicability of the international instruments, to be more amicable to the rights of the lessor. As of the date this is written, and to the extent of this author's knowledge, no cases have been resolved under Mexican courts in application of the Cape Town Convention and Protocol, although such instruments have clearly enhanced the rights and abilities of the lessor to procure a more expeditious enforcement of its remedies and the recognition of its registered international interests. In example of this we can cite the applicability of the process for relief pending final determination contained in Article 13 of the Cape Town Convention, that, although lacking of implementing regulation in Mexican law that can allow a court to apply these remedies efficiently -which is an aspect in which legislative work is still required to be undertaken- must be applied by the Mexican courts opening the ability to deprive the lessee of the capacity to operate the aircraft and procuring its maintenance and preservation while the proceedings are in course; this was not an aspect contemplated by Mexican law that it is now permitted under Cape Town and for which there would be no need to recur to a foreign court to procure such remedies and relief.

For the reasons above it is the opinion of this author that making the lease subject to Mexican law, including the applicability of Cape Town as approved by Mexico -I insist, however defective-, and to the jurisdiction of Mexican courts would allow the repossession of an Aircraft to be accomplished within a much shorter period than it would be by making the lease subject to foreign law and jurisdiction.

The above are the formal proceedings through which repossession of an aircraft would be accomplished under Mexican law and before the jurisdiction of a Mexican court.

IV. Other Available Proceedings.

In practice, we have recurred to other proceedings that have provided a solution in specific cases and that have allowed the recovery of aircraft and other assets solving documentary or factual deficiencies that we have encountered and have been able to overcome by initiating certain actions available under Mexican law.

Chief among these actions are the cautionary provisions "*(providencias precautorias)*" that are contemplated as preparatory means for trial under Chapter XI, Fifth Book, Title First "*(Libro Quinto, Título Primero)*", articles 1168 through 1193 of the Commercial Code. First of all we must be careful to distinguish this action from any cautionary of temporary relief measures such as the already referred which are described under Article 13 of the Cape Town Convention, and which up to the approval of such instruments were not available under Mexican law.

The cautionary provisions provide to the creditor the right to exercise an '*ex-parte*' action,

outside of an insolvency process and in the understanding that such should not have commenced, to demonstrate to a commercial court that reasonable fear exists that the debtor, given a need-to-be-proven weak financial condition could dispose of or dilapidate its assets in prejudice of the amounts owed in favour of such creditor, which in this case shall be the lessor. Several elements need to be placed by the claimant in front of the court, in whichever number and form it can gather the same for such purpose, to allow the court to determine if such fear is substantiated. When the court shall determine that this fear has been reasonably proven by lessor, it grants the right to exercise cautionary provisions in the form of an attachment of assets of the lessee to guaranty the result, if favourable, of the forthcoming suit for the rescission of the lease that the claimant must initiate within three days after it has placed such attachment upon the assets of the lessee that for such purpose shall be determined by the lessor.

This has proven to be a very useful tool, notwithstanding the disadvantage that in order for the attachment to be placed, the court would require lessor to place a bond for roughly ten percent of the amount claimed in order to respond for the damages that could be caused to lessee in the event that lessor shall not prevail in the suit to be initiated to claim the amounts owed and the repossession of the Aircraft.

The main advantage of this action is that as it is *'ex-parte'* it is not notified to the lessee until the moment when the attachment has been placed allowing it to be expeditious and for the lessee not to be able to impede or to act against such action by lessor. In practice, we have exercised this remedy and enforced

the right to place the attachment against the operating accounts of a particular lessee causing enough pressure to force the return of the aircraft and the restructure of the amounts owed in a very effective form.

As mentioned, a rescission process must be initiated right after the attachment is placed against lessee which in the end causes the process to become similar to an executive commercial procedure, with the disadvantage of the bond that needs to be provided in the cautionary provisions attachment and not in such related to the executive commercial process. The cautionary provisions however allow the lessor to proceed in such form when the documents are insufficient or inadequate to conduct an executive commercial process for which it has proven to be a very useful tool in resolving claims in which the most appropriate documentary elements are not available.

The Latest Amendment to the Mexican Code of Commerce Applicable to the Rules for Enforcement of Foreign Judgments In Mexican Territory. | Antonio Vázquez

On December 30th, 2008, the latest amendments to the Code of Commerce and the Federal Code of Civil procedures were published in the Official Federal Gazette, becoming effective on December 31th, 2008. Both laws state the principles, rules and terms applicable to commercial and federal civil procedures in Mexican Territory. Among the published amendments, there is a specific one which refers to the requirements for the enforcement of foreign judgments before Mexican courts. This amendment consists basically in an addition to one of the preexisting requirements in connection with the jurisdiction of a foreign court. We consider that this amendment is particularly important in aviation matters, because many of the agreements lease related to leased aircraft may be litigated before a foreign court and after obtaining a final resolution before this jurisdiction, the lessor may initiate the enforcement of the judgment before a Mexican court to obtain aircraft repossession or the payment of the unpaid lease payments.

For a better understanding of the addition described in this article, please find a transcription of the relevant portion of article 1347-A of the Code of Commerce in which the added text is shown in bold letters, which is identical to article 571 of the Federal Code of Civil Procedures. Both legal dispositions refer to the requirements of foreign judgments, in order to be enforceable before Mexican courts:

*“**Article 1347-A.** - Judgments and resolutions rendered abroad may be executed if the following conditions are met:*

...

III.- That the judging justice or court rendering a judgment was competent to deal with and render a judgment on the matter pursuant the rules acknowledged by International Law compatible to those adopted by this Code; **The foreign courts tribunal shall not have jurisdiction when in the acts from which the resolution that is intended to be enforced, shall exist a clause of submission only to the jurisdiction of Mexican tribunal.**¹

1.- The underlined paragraph is the effective amendment to the Mexican Legal System effective December 31th, 2008.

“This amendment consists basically in an addition to one of the preexisting requirements in connection with the jurisdiction of a foreign Court”.

The amendment consists of the addition of par. III of article 1347-A to include the specific non-jurisdiction of a foreign court when in any of the legal acts related to the judgment that will be enforced there is included a jurisdiction clause appointing the Mexican court as the only exclusively court to hear the dispute. Our interpretation of this amendment is that if this submission clause exists and a foreign court ruled the case, the judgment will not be enforceable before the Mexican courts. It is important to emphasize that this addition refers to the existence of a submission clause that specifically appoints in an exclusive way to a Mexican court as competent. In other words, if the submission is not exclusively for a Mexican court, this non-jurisdiction of a foreign court will not apply and, as consequence, the foreign judgment will be enforceable if the rest of the requirements of article 1347-A are observed. In our experience on reviewing and enforcing lease agreements that foreign lessors execute with Mexican Lessees, we have reviewed many jurisdiction clauses in which the parties agree on several criteria to appoint a competent court to hear a dispute related to the lease, and between these different options of competent courts sometimes a Mexican court is included as a competent one. If this is the case, we consider that if the lessor initiates its legal action before a foreign court this amendment of article 1347-A will not be applicable, and if this appointment is not against the international rules of jurisdiction, the judgment that the foreign court issues will be enforceable before a Mexican court.

In addition of the above, we consider that this amendment is consistent with the rules of jurisdiction contained in the Cape Town Convention and the Code of Commerce and it will have important application in the enforcement of foreign judgments before Mexican courts.

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Extract of Mexican Aviation News

[Airline sector will continue to plunge.](#)

Depending on how the economy develops in the current financial crisis, aeronautical markets will be negatively affected. In the best case scenario, things will continue as they are today. It is important to note that during summer 2008, oil significantly increased in price, reaching over 140 dollars per barrel. It then plummeted to 55 dollars per barrel in November. Today, fuel rates have stabilized and prices may remain stable for next year. This however hasn't meant complete stability as airlines are still facing labor costs, airports services and the weakness of the peso against the American dollar. El Universal. 01/December/2008.

[More shut downs are predicted for the Aeronautical Industry.](#)

Isaac Volin Commercial Director of Mexicana states that with the exception of Alma, only marginal airlines have shut down, so there is still room for consolidation within this sector, even though the global economic outlook is pessimistic. Mexicana's commercial director states that the airline is now prepared to compete in the market, specially since they have invested 70 million dollars to update their processes and internal systems. The company has invested large amounts in their structure within the maintenance area, and image updating including new aircraft paint jobs. The important message is now to send out a signal to all costumers about a transformed operational and commercial airline. Volin won't forecast the economical results, but he states there will be no negative numbers for 2008 and in normal conditions the upcoming year could be a better one with the expectation of the impact of the economical recession. Exonline. 03/December/2008.

[3000 jobs at stake due to the airline crisis.](#)

High fuel prices and a decrease in ticket demand were important causes for airlines ceasing their operations in 2008. More than 3000 jobs are at stake in the airline sector due to the crisis that this industry is going through and which might cause the shutdown of two more airlines in 2009 adding to the six airlines already shut down in 2008. Jobs at risk are pilots, flight attendants, ground control and maintenance. In order to face the crisis, the International Civil Aviation Organization (ICAO) announces that new strategies based on new methodologies of training, new aircraft and a united front of the aeronautical community that will start in 2010 to guard against upcoming events. Milenio. 08/December/2008.

[Ministry of Communications and Transport calls for upgraded pilot medical exams.](#)

The current regulation is inadequate and must catch up with current medical science. The Rules of Preventive Medicine in Transport were published in 1988, so they are inadequate, outdated and backward compared to the state of the medical science today. It is now necessary to update the medical science rules of air transport in order to bring it in line with scientific and technological development. El Universal. 09/December/2008.

[Two difficult years for aviation](#)

2008 and 2009 will be difficult years for the airline industry, due to taxes and duties that the various governments charge to airlines that hinder the smooth running of the sector and impeding their development. It could be a difficult year for the rest of the world's economies, particularly since the economic recession will not only affect the passenger transport industry. It will also be affected by a strong dollar. Air-cargo is also expected to have a strong decrease as a result of the downturn in the industrial production. La Cronica. 10/December/2008.

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Extract of Mexican Aviation News

[Crisis leaves 32 older airplanes grounded.](#)

Besides leaving cities unconnected, the airline crisis leaves Mexico positioned for a new challenge. The closure of five airlines in the last half of the year has grounded thirty-two older aircraft with high fuel consumption. These aircraft, known as “second” and even “third hand” because of their age and model, will be hard to sell. This is especially true when added to the three-hundred which remained on the ground in the United States due to the decision of American, Continental and United Airlines to move them out of their fleets. These aircraft now have no place in the Mexican domestic market because they are too expensive to operate. El Reforma. 17/December/2008

[Airport connection to diminish air traffic in the AICM.](#)

The development of the North Arch project (Arco Norte) would be one of the biggest projects in aeronautical structure of the present administration, and would consist of the interconnection of the airports of Toluca, Cuernavaca and Puebla with the purpose of improving the operations of the Mexico City International Airport (AICM). Instead of a new secondary airport for Mexico City, the Ministry of Transport and Communications has chosen to use the advantages of these airports, that by themselves do not have the infrastructure to be a secondary airport for Mexico City. Luis Tellez, Minister of Transport and Communications explained “we are studying the options that exist and the possible airport combinations”. In the following months there can be important investments in the extension of the capacity of those three airports. El Financiero. 18/December/2008

[Pemex will open its travel needs for bid.](#)

Pemex will open for bid between national aviation companies, suppliers and travel agents “Reservation Services and ticket issuing for the air transportation services of Petróleos Mexicanos, subsidiaries and affiliated companies to national and international destinations from 2009 through 2011 for scheduled routes and concessions.” El Universal. December 18, 2009.

[Airlines stopped their investments in Puebla.](#)

The attraction of airlines to the state of Puebla has stopped because of the economic crisis of this year in the aviation industry. Next year tourism is expected to fall. El Universal. December 19, 2008.

[Vacations expected to help airlines.](#)

CANAERO expects that the Christmas season will help to decrease the economical crisis for the airlines. The year-end holiday period is a long time waited break for the airlines in the middle of the crisis, even though sales may not be so numerous to generate profits. Excelsior. 22/December/2008.

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