

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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Restructure and Enforcement of Rights – The Transaction Agreement under Mexican Law. | Carlos Sierra*.

Default and distress scenarios due to the economically weak position of the airlines have assumed major proportions in the current experiences of aircraft owners, financiers and operators in recent months. The current state of the aviation market is leading to an increase in defaults, workouts re-structures and repossessions. In addition to this, a default event may occur for many other reasons than the obvious non-payment of lease rentals or lapses in insurance, licenses, authorizations or registrations. A third party may claim an unexpected lien; unanticipated navigation charges may suddenly appear; a plane may become inadvertently involved in a fleet detention, a strike; interpretations of documentation may differ among jurisdictions, etc.—the possibilities are literally endless. No contract or repossession insurance policy can list all the contingencies.

In civil law jurisdiction such as Mexico, this creates substantial challenges for the unwary lessor that assumes that the enforcement of its rights as spelled out under an ordinary operating lease can be as expeditious as such are designed to be under the common law self-help mechanisms that the majority of current lease agreements are conceived to contain, overlooking that such self-help capabilities are not enforceable in Mexico. In Mexico, as we have endlessly repeated, the way through a court is unavoidable.

The question then remains as to how can a lessor or owner be able to enforce its rights without going through endless court proceedings to prove the default of the lessee and how can it prevent the abuse by the lessee of the leased asset while the lessor is able to obtain the required court order and recover possession.

As we have discussed in prior deliveries, the applicability of the Cape Town Convention, in spite of its shortcomings in Mexico, can be useful to provide lessor with certain remedies that Mexican law did not afford lessors to have before. But being the enforceability of Cape Town severely diminished in result of the unfortunate declarations with which it was adopted in Mexico, is there anything else that can be done?

This article will describe an option that has been implemented in successful form on various occasions: "The Transaction Agreement".

Upon occurrence of a default by a lessee, the service of a default notice from lessor to lessee is the first step to commence the process to resolve the existing breach of contract as it allows lessor to state and reserve its rights under the lease and to let the lessee know the specific defaults incurred under the lease agreement in preparation for the commencement of proceedings to enforce its rights in absence of lessee's cooperation. In absence of lessee's cooperation under an ordinary lease, court proceedings are the only form in which lessor can procure the recovery of its asset and the payment of amounts due.

When lessee cooperates and the possibility exists to restructure in some form the defaulted obligations however, before the enforcement of rights becomes the only available option and taking advantage of any requests that lessee might make to lessor to receive certain relief in its payment obligations, it is useful to take the opportunity to document the restructure agreement of the parties in a form that would permit the more expeditious enforcement of the rights of the lessor under the lease to expedite the recovery of the aircraft and the collection of the outstanding debt averting court proceedings altogether. In first instance for such purpose the result of any concessions that lessor could agree to give in favor of the lessee through the restructure process should be traded for an unconditional waiver by lessee of the defenses that it would ordinarily have under the lease by way of the execution of what under Mexican law would consist of a transaction agreement.

A transaction under Mexican law by definition, as provided in Article 2944 of the Federal Civil Code (*"Codigo Civil Federal"*), means an agreement by which the parties make reciprocal concessions in order to resolve a current controversy and to prevent a future one. In order to meet the test required under such definition, the default incurred by the lessee must be regarded as the controversy that the parties would intend to resolve under a transaction agreement.

In order to be enforceable the transaction agreement must contain certain elements such as:

- The recognition by lessee of the amounts due which shall conform the sum of its indebtedness;
- The statement of the obligations that lessee would have to meet shall it enter into a default under the transaction agreement and of the rights that lessor would be able to enforce in such event;
- The description of the indebtedness as a liquid and determined amount;
- The description of the agreement as a transaction agreement;
- The execution thereof under a public deed or preferably as a judicial agreement.

By executing the transaction agreement as a judicial agreement, such document would become the mechanism through which the lessor would be able to terminate the contractual relationship with lessee and enforce its rights to repossess the aircraft without the need to prove the original default incurred by lessee under the lease or to initiate lengthy court proceedings.

To continue meeting the requirements that a transaction must include by definition, the execution of a transaction agreement must involve reciprocal concessions which may include among others:

- (i) The right to the early termination of the aircraft lease agreement;
- (ii) The recognition of debt and the acknowledgement of the amounts owed by lessee;
- (iii) The amendment of certain terms of the aircraft lease agreement and/or the execution of replacement aircraft lease agreements, for instance, to incorporate the terms of the Cape Town Convention and Protocol when such would not be already applicable to the lease;

- (iv) The deferral of rent, the extension of the lease term, the modification of the rent payment obligations of lessee among other commercial agreements or concessions;
- (v) The right of lessee to prepay the rent indebtedness, or any portion thereof, at any time, with or without premium or penalty.
- (vi) Any others that the parties shall mutually agree.

Now the question becomes how to enforce the terms and conditions of a transaction agreement without prejudice to the laws by which the parties originally decided that the lease agreement would be governed. For such purpose, considering that the aircraft is located –or is likely to be located- in Mexico at the time when enforcement of the transaction agreement shall be attempted, by signing the transaction agreement, lessor and lessee should irrevocably consent that it shall be construed in accordance with the federal or local laws of Mexico and that any legal action or proceeding arising out of or relating to the transaction agreement shall be brought under Mexican courts. The parties should further agree that the transaction agreement by being a public instrument, or by being a judicial agreement, shall be attached with enforceability (*ejecución*), shall be conclusive as a firm and final judgment and will be able to be enforced in any jurisdiction within or outside Mexico by suit on the judgment constituted by such transaction agreement. In any action or proceeding arising out of or relating to any breach or default in respect with the transaction agreement, the applicable means of compelling (*medidas de apremio*) shall be applicable in accordance with Mexican law as such are available to be ordered by the enforcing court, such as imposing a fine or even imprisonment to the individuals involved in the event that lessee shall refuse to comply with the obligation to pay or to return the leased asset.

Therefore, under a transaction agreement, in the event that lessee shall fail to pay the indebtedness in accordance with the transaction agreement, lessor shall immediately become entitled to the attachment of assets of the lessee from the day when such payment obligation became due and remained unpaid in accordance with the terms of Article 420 of the Federal Code of Civil Procedure of Mexico ("*Código Federal de Procedimientos Civiles*"). Lessor shall have the rights contemplated in Articles 421, 424 and 426 of the Federal Code of Civil Procedure, applicable in lieu of the Commercial Code (*Codigo de Comercio*), including the right to attach sufficient assets to guarantee the payment of the indebtedness, agreeing that the only accepted evidence that the lessee may be able to produce against the enforcement of the rights of the lessor, in accordance with Article 1397 of the Commercial Code, shall be the evidence of payment of the amounts due. In summary, the transaction agreement is a mechanism through which a lessor can resolve a controversy resultant from a default incurred by a lessee through the restructure of the rights and obligations of the parties and through the improvement of the enforceability of its rights within a substantially reduced period in consideration of the avoidance of court proceedings that the transaction agreement signed in form of a judicial agreement can provide.

There are several formal means through which a public instrument or a judicial agreement can be documented. The discussion of which would be a matter of a future delivery of Coelum by the authors of this text.

AVIACSA: The Never Ending Story. An Example of the Legal Defense through the Amparo Process. | Antonio Vázquez*.

One of the main legal institutions of the Mexican system and in particular, regarding to those procedures of defense of individuals against the arbitrary acts of authority, is the procedure known as amparo (Amparo).

The Amparo Proceeding is a Constitutional procedure which main objective is to review the constitutionality of the authority acts; that is, to say in simple words, a jurisdictional proceeding whereby all individuals or entities within Mexican territory who live in Mexico¹, whether Mexicans or foreigners, who may be affected due to an act by the authority, may claim or ask for an Amparo, this means, for the protection of the federal justice against the unconstitutionality authority acts. The Amparo Proceeding may be initiated, not only by individuals, but also by legal entities, that may be affected by any kind of acts by the authority. The main effect of the Amparo Proceeding consists in that the act by the authority that may be ruled as unconstitutional in the Amparo Proceeding shall not produce any legal effect against the claimant if its declared as unconstitutional in such Amparo Proceeding².

In the Amparo Proceeding, there is a specific legal institution that may be as important as the final judgment itself: The suspension of acts by the authority (Suspension). This Suspension

“...The Amparo Proceeding is a Constitutional procedure the main objective of which is to review the constitutionality of the acts by the authorities; that is, to say in simple words, it is a jurisdictional proceeding whereby all citizens who live in Mexico.”

is a kind of interlocutory judgment that may be ruled as (i) Provisional Suspension which will be temporarily effective until the District Judge or the Collegiate Tribune (The Amparo Courts) issue the resolution of the final suspension, (ii) Final Suspension: This will have effect throughout the Amparo Proceeding and will end until the process is finally ruled. This order will have the consequence of suspending the effects of the acts which will be the subject to be discussed by the Amparo Courts in order to avoid a legal situation whereby, the potential damages that may be caused to the claimant of amparo (quejoso) will become final or impossible to be restored. As already said, in some cases, the Suspension may be more important than the final judgment itself, because the Suspension may be useful to the claimant to avoid the application of the arbitrary act by the authority. Following, we will review a specific case of what we are saying: The recent case of the Mexican Airline named Consorcio Aviaxsa (commercially known as Aviacsa):

* IN COLABORATION WITH ALEJANDRO LAVAT.

1.- According to article 1 of the Constitution of the Mexican United States: “Every person in the United Mexican States shall enjoy the guarantees granted by this Constitution, which cannot be restricted or suspended except in such cases and under such conditions as are herein provided.”

2.- Article 107 Paragraphs I and II of the Constitution of the Mexican United provides: “All controversies mentioned in article 103 shall be subject to the legal forms and procedure prescribed by law, on the following bases:

I. A trial in amparo shall always be held at the instance of the injured party.

II. The judgment shall always be such that it affects only private individuals, being limited to affording them redress and protection in the special case to which the complaint refers, without making any general declaration as to the law or act on which the complaint is based...”

First of all, we would like to mention that the purpose of this article is not to express a particular opinion about which of the parties involved in the legal dispute may be right, but only to use the Aviacsa case as a useful academic practical example of how the Amparo Proceeding and Suspension in particular may apply in practice.

“...Aviacsa has been served three different orders to suspend its operations, all of them issued by administrative authorities. Two of them has been issued by the Ministry of Transport and the other one, was issued by the DGAC.”

A BRIEF SUMMARY.

In the last five weeks, AVIACSA has been served three different orders to suspend its operations, all of them issued by administrative authorities. Two of them have been issued by the Ministry of Transport and the other one, by the DGAC.

Before these three orders were served to Aviacsa, this company initiated an Amparo Proceeding on April 17, 2009, that was filed before the Fifth District Judge of San Luis Potosi, Mexico, under file number 309/2009 (Amparo Proceeding 309/2009). The claimed acts were the imminent order of suspension to render the public service of air transport and the order of suspension to receive the services for the use, enjoyment and benefit of Mexican air space.³

On April 24, 2009, the Fifth District Judge granted the final suspension and ruled “to keep things

“just as they are” and not to have the claimant being suspended from using, enjoying and benefiting from the Mexican air space, nor to aircraft flying both, the national and international authorized routes used to render the air transport service granted under concession by the Federal Government, as set forth in the air navigation letters, that is, with the characteristics referred to in the concession which has been detailed and in order for not having the rendering of the air public service granted under concession by the Federal Government suspended to the claimant.”

This judgment that ruled to suspend the enlisted acts was served to several authorities, including, among them, the Ministry of Transport and the DGAC.

On June 2, 2009, the DGAC suspended AVIACSA’s operations based on some inspections practiced on the aircraft and arguing that the same showed security issues. AVIACSA alleged that this suspension of operations violated the suspension judgment mentioned above.

On June 4, 2009, Aviacsa filed a second amparo proceeding against the order of suspension issued by the DGAC. The competent Court that has to deal with this second procedure (Amparo Proceeding 470/2009), is the same District Judge who originally heard the Amparo Proceeding 309/2009, this is the 5th District Judge in San Luis Potosi, who ruled a provisional suspension judgment whereby AVIACSA was allowed to continue operations. This provisional suspension was appealed by the DGAC and on June 11, 2009, the Ad quem revoked the provisional suspension. As consequence, the DGAC issued a second

3.- The information was obtained in the website www.cjf.gob.mx/internet/expedientes.

suspension of operations against AVIACSA. However, on the same date and having elapsed only a few hours after the announcement by the DGAC of this second suspension of operations, the 5th District Judge ruled the final suspension regarding the Amparo Proceeding 470/2009 and AVIACSA recovered its capacity to reinstate operations. Nowadays, this final suspension has been appealed by the aviation authorities and is pending to be ruled.

“...AVIACSA has failed to comply with its obligations as concession holder, and the aviation authorities are filing all the legal proceeding they have available to enforce this lack of compliance.”

Meanwhile, in the Amparo Proceeding 309/2009 the final suspension originally obtained by AVIACSA was revoked by the Second Collegiate Tribunal. As consequence, on July 6 2009, a third order of suspension of operations against AVIACSA was then issued by the Ministry of Transport, based on the payments the airline has not made. In this case, the suspension of operations is related to the inability of AVIACSA to use the Mexican Air Space, based on the failure to make the payments due to this use. According to what has happened in the last weeks, it is clear that AVIACSA will file another suit of Amparo, but it is also that the legal arguments shall be less as months elapse.

CONCLUSION.

The opinions on the AVIACSA case are opposed: Some of them alleged that there is

a clear intention of the authority to terminate with the existence of the company in order to help other low cost airlines. Other opinions are based on the fact that AVIACSA has failed to comply with its obligations as concession holder, and the aviation authorities are filing all the legal proceeding they have available to enforce this lack of compliance. As we said before, the purpose of this article is to review a real, practical case in which a corporation has been using the Amparo Proceeding and specifically the Suspension, as a legal tool to be heard before the Courts against the acts by the authorities that may be considered as illegal.

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Extract of Mexican Aviation News

Aviation crisis worsens; staff cuts expected.

The Union announced that there are going to be around 300 staff cuts at Aeromexico and Mexicana. This is because the economic crisis and the flu contingency that made it necessary to reduce the workforce by 10%. The economic conditions of the companies are not the best, so the workers have sacrificed between seven and ten-thousand pesos a month. This will generate a very complicated situation to negotiate in the coming months. *El Economista*. 03/June/2009.

CFC: Airline mergers will only be possible with an open market.

The actual position of the CFC, which is crucial for the approval for the merger of the two main airlines in the country, is that for mergers to happen, it is compulsory that the SCT allows new competitors to enter the market. This is not only for the opening of new flight routes but also for a new slot system for the Mexican airports which actually are mainly managed by Mexicana and Aeromexico. The merger of the two airlines could lead to a monopoly, and so the SCT says that the end result has to be in the best interest of the users. *Excelsior*. 05/June/2009.

A predicted 9 billion dollars of airline loses.

In March, IATA predicted that loses for the airline industry would rise to 4,700bd. All the airlines in the world will lose predictably 9 billion dollars this year, said the IATA, almost twice the estimate made just 3 months ago. This is because the increase in the fuel cost coupled with low passenger demand has created a crisis without precedent for the aviation industry. "This is the toughest situation that the industry has ever faced", declared Giovanni Bisignani, general director and executive president of IATA. "I am realistic. I do not see facts that back up optimism", added Bisignani. There is however some sign of optimism. John Leahy, chief of sales of the aircraft manufacturer Airbus, said that 2009 will be difficult, but United Airlines plans to order of up to 150 new aircraft from Airbus or Boeing, demonstrated that the market was beginning to change course. The cancellations are not as much of a problem as the delay of payments. I do not think that we will have many more cancellations", declared Leahy. *Reforma*. 08/June/2009.

All the airlines are broke: SCT.

Humberto Treviño Landois Subsecretary of Transport stated that the airlines in Mexico have combined debts of around 3,707 million pesos which means they are broke and gaining negative capital. Also none of the airlines are receiving any credits based on support of the sector. The sub-secretary also stated that until the aviation industry restructures there will be no financial aid and any mergers or sale of airlines will be done among existing companies and the SCT will not intervene. The aviation industry problem is that there are too many seats chasing too few passengers. The various debts vary from fuel, to airport services and taxes. There are even existing debts from airlines that are no longer in operation, making it harder to collect and where necessary to apply different legal measures to do so. Treviño Landois stated that only Mexicana de Aviacion and Interjet are up to date with their payments to SENEAM, but the rest are drastically increasing their debts. *El Universal*. 10/June/2009.

Government credit line offered to carriers.

The federal government has provided the conditions for airlines to access a credit line of three million pesos to cover the loss of liquidity caused by the outbreak of influenza. So far Interjet and VivaAerobus are in the process of review and accreditation, while Aeromexico and Volaris are working to deliver the guarantee that the Government is asking from all the airlines. *Excelsior*. 17/June/2009.

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Extract of Mexican Aviation News

SCT: The aviation sector of the country needs an urgent transformation.

The Secretary of Communications and Transport, Juan Molinar Horcasitas, stated that the aviation sector of the country needs an urgent restructuring, with the purpose of getting a bigger proportion of passengers flown by Mexican airlines. Molinar said because of the crisis that this sector is going through, is necessary to make each operation viable. He also said that aviation in the country has gone through a three fold crisis: the economic recession, the increase in fuel prices and the recent flu scare. He indicated that the flu epidemic problems have been successfully overcome and with this the number of air passengers has started to increase. El Universal. 23/June/2009.

Two more years are expected for the aviation sector crisis.

Whether or not the experts start to find optimistic scenarios for the world economy, the crisis has not yet left the aviation industry. This sector is going through its worst crisis ever as the long distance business trips routes have seen such a drop off in their passenger traffic that they may not ever recover from it. Airlines such as British Airways have reported million dollar losses and are now looking to merge with other airlines looking to cut their losses. Excelsior. 18/June/2009.

Discard AICM suspend airlines into debt.

Aeromexico and Aviacsa have debts with the AICM, which add up to 380 million pesos, however they have not been suspended as they are in negotiations to pay overdue debts. Aviacsa advise that they are in negotiations to restructure the debt of about 41 million pesos, while Aeromexico will sign over a building that it owns at terminal 2 in order to satisfy their debt. Milenio. 24/June/2009.

CANAERO denies that consolidation in aviation industry will bring stability.

Javier Christlieb, President of the CANAERO, declared that a drop in national air transport capacity to be accomplished by mergers or a reduction of the number of competitors will not bring stability to the sector as proposed by the SCT. He also stated that conditions that Bancomext has requested for the restructuring credits are vague since it is not only the air transport sector that needs it and anyway there has been a reduction of available seats of nearly 30% in any case mergers do not guarantee a reduction of costs. Part of the readjustments that have already been implemented consist of renegotiations with aircraft leasing companies, new labor contracts and a reduction of salaries on corporate level so as to confront the debts airlines have accrued. Milenio 29/June/2009.

ASPAs protests the firing of pilots.

ASPAs (Syndicate Association of Air Pilots) stated that Aeromexico and Mexicana plan to fire a total of 234 pilots due to the present crisis. Aeromexico has already fired 32 pilots and plans to reduce its pilot work force by 17.6 %. ASPAs also stated that legal action will be taken because the airline also broke an agreement signed by both parties regarding to the preservation of work for all pilots. On the other hand, Mexicana notified ASPAs of the need to fire 84 pilots and to demote 31 from captain to copilot. This request was denied. The workers of both airlines state that the companies are profitable even though they claim the opposite and that the proof of this is the creation of other subsidiaries of these main airlines. Reforma 29/June/2009.

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