

# 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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# Legal Implications of Aircraft Acquisition and Lease by the Mexican Government. | Viridiana Barquín.

The Mexican public sector requires considerable volumes of raw materials, final products, goods, services and undertakes enormous infrastructure projects. This article is a brief analysis of the applicable rules for the acquisition or lease of aircraft by Mexican public entities and provides a concise description of the process and the advisable methods to be used to cure defaults in the event that the public entity fails to fulfill any of its obligations under the relevant contract.

The laws applicable to the public contracting in Mexico are: (i) The International Treaties, (ii) the Constitution of the United Mexican States, and (iii) the Law of Acquisitions, Leases and Services of the Public Sector and its Regulations. As established by the Constitution, the acquisition, lease and sale of all kinds of products and other services of any nature will be accomplished as a general rule through “public bidding” (*licitación pública*) by means of a public offering in order to assure the best possible conditions for price, quality, financing and opportunity.<sup>1</sup>

The public biddings are determined in two categories:

- I. National. The participants can only be Mexican companies or individuals and the goods must be produced in Mexico, with at least fifty per cent national content. This will be determined bearing in mind the cost of production of the goods, less sales promotion, marketing, royalties, shipment and financial costs.
- II. International. The participants can be Mexican companies or individuals and companies or individuals of foreign nationality and the goods may be of national or foreign origin.

The International public biddings may only be authorized:

- a. When it turns out to be mandatory pursuant to established international treaties.
- b. When due to previous marketing research, the goods are not offered by national suppliers in the quantity or quality needed, or at a suitable price.
- c. When once having been published as a national bid, there is no suitable offer or no national participant can fulfill the applicable requirements.
- d. When it is stipulated for the contracts financed with external credits granted to the federal government or with external collateral.<sup>2</sup>

Following the dispositions of the Law of Acquisitions, Leases and Services of the Public Sector (hereinafter, LALSPS), the Ministry of Economy will determine the rules that the public entities will comply to promote the participation of Mexican companies. During the international public process of acquisition and/or lease of products, when comparing the prices offered, the public

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1.- Article 134 of the Constitution of the United Mexican States.

2.-Article 28 of the Law of Acquisitions, Leases and Services of the Public Sector.

“Public entities will be able to contract acquisitions, leases and services, without using the procedure of public bidding, through two different procedures: (i) invitation to bid may be given to at least three participants or (ii) by direct adjudication...”

entities will give preference to the acquisition of goods produced in Mexico with a margin of ten per cent of preference over the price of imported goods<sup>3</sup>. Notwithstanding, in the event that public bidding is not suitable to assure the above mentioned conditions, the applicable laws will establish the basis, procedures, requirements and necessary elements to grant to the Mexican State the principles of economy, efficiency, effectiveness and impartiality. It is LALSPS which specifically provides the rules involved with the programming, budgeting, contracting, expense and control of the acquisitions by the Mexican government, provided that the application of LALSPS, will be without prejudice to that established under international treaties. In addition, the foreign participation in international biddings may be denied if there is no treaty entered between Mexico and the country of which the participant is national, and that country does not grant reciprocal treatment to Mexican bidders, suppliers, goods or services. For reference, listed below are the free trade agreements with a government acquisition chapter, signed by Mexico:<sup>4</sup>

- |                         |                                    |                            |
|-------------------------|------------------------------------|----------------------------|
| 1.- TLC North America,  | 2.- TLC Mexico-Colombia-Venezuela, | 3.- TLC Mexico-Costa Rica, |
| 4.- TLC Mexico-Bolivia, | 5.- TLC Mexico-Nicaragua,          | 6.- TLC Mexico-Israel,     |
| 7.- TLC Mexico-Chile,   | 8.- TLC Mexico-European Union and  | 9.- TLC Mexico-Japan.      |

Public entities will be able to contract acquisitions, leases and services, without using the procedure of public bidding, through two different procedures: (i) invitation to bid may be given to at least three participants or (ii) by direct adjudication, of which the following may be applicable to aircraft acquisition or leasing:

- A. For military or navy purposes, or for items necessary to guarantee national safety.
- B. Where there are justified reasons for the acquisition or lease of goods of specific marks.

## LIMITATIONS OF THE ADMINISTRATIVE CONTRACTS

In the development of private law activity, the public administration enters into almost all types of contracts foreseen by the civil code commercial, even though it is evident that in the administrative contracts there is not full legal equity between the parties, as they may be amended unilaterally by the administration due to unforeseen circumstances that make compliance impossible within the terms originally stipulated. So in this case the public administration is in a privileged position. For example, as part of the conditions precedent under an ordinary aircraft lease agreement, the lessee has to provide a certified copy of a resolution of a board of directors of lessee approving the terms of, and transactions contemplated thereby; however, in accordance with Article 25 of LALSPS, the public entities may only enter into acquisitions and leases, with the previous approval of the Ministry of Public Function and the investment budget and current expenditure authorization. Regarding the economic capacity, against the right to require the financial statements of lessee to verify the good standing of

3.- Article 14 of the Law of Acquisitions, Leases and Services of the Public Sector

4.- <http://www.funcionpublica.gob.mx/unaopsf/unaop1.htm> consulted on October 19, 2009

lessee, in the administrative contracts, the other party will only have the option to review the annual program of acquisitions, leases and services of the respective public entity and the spending for acquisitions, leases and services will be subject, to the specific provisions of the "Expenditure Budget of the Federation" (*Presupuesto de Egresos de la Federación*) and to the provisions of the "Law of Budget, Accounting and Federal Public Expenditure" (*Ley de Presupuesto, Contabilidad y Gasto Público Federal*) and other applicable provisions<sup>5</sup>. Moreover, as mentioned before, while the public administration is entitled to require guarantees, penalty clauses and as many other terms and conditions as the public administration may consider at its sole discretion, the other party it is not entitled to negotiate or require the specification on the contract of any reciprocal terms and conditions.

### **GOVERNING LAW, MEANS OF ENFORCEMENT AND JURISDICTION.**

The contracts entered with the Mexican government pursuant the LALSPS shall be governed by and construed in accordance with the federal laws of Mexico and any legal action or proceeding arising out of or relating to such agreements shall be brought in the federal courts of Mexico. However, the contracts entered abroad with respect to goods to be used outside of Mexico, will be governed by the laws of the country on which the document is executed but construed as applicable in accordance with the LALSPS<sup>6</sup>. Suppliers will be able to file claims and complaints before the Ministry of Public Function, that arise in connection with the breach of the terms and conditions of the contracts with the public entities in order to have a hearing of conciliation in order to solve the controversy. The filing of the complaint and its handling by the Ministry of Public Function, does not suspend the effects of the contract or the acts derived from it. Nevertheless, the fulfillment of an obligation or the exercise of a right may be deferred by mutual agreement, until the result of the conciliation process is achieved<sup>7</sup>.

### **SOVEREIGN IMMUNITY.**

Pursuant to Article 10 of the United Nations Convention on Jurisdictional Immunities of the State and its property, of which Mexico is signatory, if a State enters into a commercial transaction with a foreign company or individual, and if under the applicable rules of private international law, a dispute relating to the commercial transaction comes within the jurisdiction of a court of another State, the first cannot invoke immunity of jurisdiction before the court in a proceeding arising out of that commercial transaction. Notwithstanding, as specified by Article 3, this Convention is without prejudice to the immunities enjoyed by the State under international law with respect to aircraft or space objects owned or operated by such State.

In conclusion, it is clear that entering into an aircraft lease or purchase agreement with the Mexican government could jeopardize the position of the lessor or seller on the grounds that there is no margin of negotiation of the terms and conditions, and the legal remedies available will be subject to interpretation of the applicable law and to questions of sovereign immunity. Notwithstanding the afore described circumstances, the public contracting in Mexico is possible and practicable, provided that a detailed legal advice plus an exhaustive prior analysis of the risks will be the key to determine the weaknesses, strengths, risks and opportunities of each transaction.

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5.- Article 6 of the Law of Acquisitions, Leases and Services of the Public Sector.

6.- Article 16 of the Law of Acquisitions, Leases and Services of the Public Sector.

7.- Article 74 of the Regulation of the Law of Acquisitions, Leases and Services of the Public Sector.

## The Legal Effect of a Strike Over Property of Third Parties: Deposit or Attachment of Assets? | Antonio Vázquez.

In this article we will continue reviewing the legal effects that are produced in the pre-strike and the strike procedures over assets of third parties. Unfortunately, we have been involved in the last two years in at least three strike procedures of Mexican airlines that have affected aircraft or engines of lessors. As you can see, the problem is not as unusual as it should be, so it is an aspect that the lessors should take in consideration when its lessee is discussing general defaults, which usually are not only related to the non compliance of the leases, but also include its economic and legal obligations as employer. For this reason, we consider it very important to make a brief summary of the legal and factual problems that the owners of assets may face when the lessee has been served notice of a pre-strike or a strike procedure.

“The Federal Labor Law does not literally specify that the prohibition to an employer of disposing of corporate property is limited to its own property without affecting the property of third parties...”

As we explained in last April's Coelum, the pre-strike and strike procedures may be initiated based on the limited cases stated in the Federal Labor Law (*Ley Federal del Trabajo*). In that article we also explained the stages of the strike procedure and the general effects that each stage produces.

As we described in that article, there are two main effects that originate from a pre-strike which continue during a strike:

- a) Appoint the employer as depository of the corporate property which results in the, employer's inability to dispose of such property. The Federal Labor Law does not literally specify that the prohibition to an employer of disposing of corporate property is limited to its own property without affecting the property of third parties (such as aircraft under a lease), so in practice and as a consequence of a deficient criteria that the labor authorities apply for these cases, the mentioned labor authorities, unions and employers, once a pre-strike has been initiated, are generally unwilling to authorize the disposal of any property whatsoever (including third party property), refusing under such logic to return leased aircraft, arguing a prohibition to dispose of corporate property. The consequence is the risk that any attempts of repossession of such property may be subject to (i) the resolution of the labor conflict or (ii) to the attachment of the leased aircraft made by the union during the strike period. This may give the right to the owners of these assets to file a third part claim against this attachment, but, as you can see, meanwhile the owners of such property would have to initiate all kinds of legal actions which in general are not swift to resolve, in order to recover possession their lawful property. In the next paragraphs we will discuss in detail this specific problem.
- b) The second main effect produced once the employer has been served of the

pre-strike or strike procedure is the suspension of any kind of judgment execution and seizure of corporate property. Just as above, notwithstanding that Article 924 of the Federal Labor Law governing such prohibition has been declared unconstitutional by the Supreme Court of Justice, such unconstitutional status does not nullify the legal provision<sup>1</sup>. What actually occurs is that the affected party (a third party attempting to execute a judgment in order to recover its 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 as 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.

## **ARTICLE 921 OF THE FEDERAL LABOR LAW, STATES A DEPOSIT OR AN ATTACHMENT OF ASSETS?**

As we explained before, article 921 of the Federal Labor Law states that the employer becomes depositary of the company<sup>2</sup>. But, what is the meaning of this kind of deposit?

First of all, we may say that the deposit is in general, an "act by which a person receives the property of another, binding himself to preserve it and return it in kind... The giving of the possession of personal property by one person to another, with his consent, to keep for the use, benefit, and safekeeping of the first or of a third person. Something intrusted to the care of another, either for a permanent or a temporary disposition."<sup>3</sup>

As we can see, the elements of the deposit according to the civil law are the following:

- a) The deposit is created by the owner in favor of a third party, giving to him the possession of the asset.
- b) The main purpose of the deposit is that the depositary keeps the asset subject of deposit to preserve it and eventually, to return it to the owner.

However, if we analyze the deposit stated in article 921 of the Federal Labor Law, we may conclude that it has some important differences:

- a) The deposit is created by Law. As consequence, in our opinion, the Law as the

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1.- Article 107 Paragraphs I and II of the Constitution of the United Mexican States provides for: "All disputes mentioned in Article 103 shall be subject to the legal forms and procedures prescribed by law, on the following bases:

I. A trial in amparo shall always be held at the venue 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 representation as to the law or act on which the complaint is based..."

2.- Article 921 of the Federal Labor Law states: "Article 921.- President of the Conciliation and Arbitration Board or authorities referred to in fraction II of the abovementioned article, shall be strictly responsible for remitting the employer a copy of the petition to hold a strike within a forty-eight hour term following receipt thereof.

Notification shall derive in the employer becoming the depositary of the company or premises affected due to the strike, with the obligations and liabilities inherent to its position for the entire term of the notice."

3.- Black's Law Dictionary. West Publishing Co. 6th Ed. 1990. page 438.

original source of creation of this deposit should state that the mentioned deposit is related only to assets owned by the employer, but not to assets of third parties on which the employer is only a possessor. However, because article 921 does not include this limitation, in practice the authorities and the Unions include in the deposit all kind of assets, creating as consequence enormous problems for third parties acting in good faith who had given the possession of its property to the employer.

- b) Apparently the main purpose of the deposit stated in article 921 is not only that the depositary keeps the assets subject of deposit to preserve it, but also to maintain them as guaranty of the payment of workers. In this particular point, we face another trouble: Article 921 does not expressly contemplate an attachment of the assets of the company. In fact, the mentioned provision establishes a “deposit” over the company, not an attachment. Both legal figures have different characteristics and purposes. However, in practice the labor authorities and even the Courts apparently have considered the deposit of article 921 as an attachment of assets, which seems to be contradictory with the nature of one figure and another, as will be explained below:

As we know, the attachment is *“the legal process of seizing another’s property in accordance with a writ or judicial order for the purpose of securing satisfaction of a judgment yet to be rendered”*<sup>4</sup>. In accordance to this definition that is applicable to all kind of attachments, not only the labor ones, we may say that the intention of the Federal Labor Law is to establish an attachment over the assets of the company and not a deposit, because one of the main purposes is to secure the potential credits of the workers. The problem is that article 921 refers specifically to the figure of a “deposit”. Moreover, the strike procedure provides in ulterior stages the right in favor of the workers and/or the Union to seize property of the employer. This is a different attachment from the “deposit” that article 921 states, so it is a little bit strange and contradictory that an attachment may be placed in two different procedural moments.

This discussion is not a theoretical one. It produces important consequences and problems for third parties in the strike procedure. An example:

Article 976 of the Federal Labor Law states the “tercería” which is a third party claim by which a third party may challenge an attachment placed on its assets, in order to obtain the cancellation of said attachment. Some criteria indicate that as long as the figure of article 921 is a deposit, the third party affected should not be able to file the “tercería” stated in article 976, and will have to wait until an attachment is placed on its property during the strike procedure. However, there is another criteria that sustained that notwithstanding that article 921 states a “deposit”, the “tercería” that originally is created to challenge attachments may be filed. Moreover, there is a third criterion which establishes that a “tercería” may be filed against the deposit, and later against the attachment that the workers may place in the strike procedure. As you can see, this lack of clarity in the Law creates also confusion in respect to the legal actions that may be initiated and the procedural phase in which these may be submitted.

This is a clear example of the problems that may be created when a legal provision is not clear and subject to different criteria of interpretation, but moreover, a factual and legal problem in which a lessor may be involved in case that lessee is served of a pre-strike or strike procedure.

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4.- Black’s Law Dictionary. West Publishing Co. 6th Ed. 1990. page 126.

## News | October

### Extract of Mexican Aviation News

#### [Aeroméxico will pay its debt.](#)

Aeroméxico rejects a possible merger with Mexicana. The company is focused on recovery from the industry crisis. Aeroméxico's debt for this year is 390 million pesos. Bancomext has authorized the financing of a billion pesos for the company. *Excélsior*. 01/October/2009.

#### [Aviacsa's legal proceedings continue.](#)

It has been two months since Aviacsa initiated legal actions to resume its operations, and they do not know how long the current judgment lasts. The airline estimates that it will take three months to pay back their clients, whether performed via cash refund or by substitution of old tickets for new valid ones. They hope for the judge's resolution as soon as possible in order to finally indemnify the damages. *Excélsior*. 01/October/2009.

#### [Aviacsa will try to come back as a low-cost carrier.](#)

Aviacsa plans to return with a low-cost business plan, trying to recover the market they lost last June with the suspension of operations. Their objective is to copy the United States low-cost airline profile with a competitive edge in Mexico. A Trust Fund will be created to hold the shares giving the new shareholders more security in their investment and making it less risky to invest in Aviacsa. *Milenio*. 07/October/2009.

#### [Mexico: 8th market for aerospace investors.](#)

The aerospace industry in Mexico has become one of the most important in manufacture procedures and above countries like the US and China. It accounted for 33 billion dollars from 1990-2009. Recent studies have shown that Mexico has become the 8th destination for to aerospace investors. With over 190 companies in the sector and the great ongoing development, there have been recent announcements by Bombardier, Cessna and Aermnova within the Mexican market. The notable growth experienced in the sector is because of the expertise of workers, low costs and the strategic geographical location of Mexico. *Milenio*. 08/October/2009.

#### [Airlines are badly wounded.](#)

The President of Mexican Association of Travel Agencies stated that "all airlines are badly wounded" since the reduction in passenger transport has continued throughout this year. The fact that so many new airlines entered the market caused an over supply of seats, and this created a fare war. Some airlines have come through the harsh time because of investor's money or the approval of credits by Banxico, as is the case of Mexicana and Aeromexico. But without a government policy on the matter and with the full responsibility resting on the private sector it is difficult to move past this crisis. *La Cronica*. 10/October/2009.

## News | October

### Extract of Mexican Aviation News

#### Executive Aviation Expands.

One of the sectors that have experienced a big change in the last few years is executive aviation. Private flights once were reserved for politicians and big enterprises, but are now being used by medium size businesses that seek more efficient use of their time, while maintaining more confidentiality. This year executive aviation in Mexico has increased from 1.5%-2%, taking into account that Mexico's GNP will fall around 7%. This has been reflected in executive airlines increase their fleets, routes and creating more cost accessible quotations. In accordance to the DGAC, Mexico is the third most important country for private flights, having the biggest air-taxi fleet in Latin American consisting of around 499 private jets. El Financiero. 14/Octubre/2009.

#### Mexico City's Airport fees, the most expensive in Latin America.

The airport fees in Mexico City Airport have an important difference from the rest of the airports in Latin America: they are higher than other region terminals. There needs to be a regulation over the whole region to balance the airport fees so as to increase the efficiency of the operations of airlines that are barely surviving. This would allow the airlines can operate within the continent with more efficiency and to use the "same game rules". Some of Mexico's terminals are three times more expensive than the fees of the rest of the airports in the region. Some Central American Airports have introduced a reduction of up to 50% in their fees in favor of the industry, due to the crisis. In other cases the fees were frozen for six months. El Financiero. 16/October/2009.

#### ASUR income down by 27%.

ASUR reported a decrease of 27% of its income caused by the world economic recession and the swine flu pandemic. Passenger traffic decreased an overall of 13.86 %, 8.36% in domestic travelers, and 19.01% for international passengers. This reduction has caused a 1% decrease in the value to share holders. Reforma. 22/October/2009.

#### Mexicana's credit for 100 million dollars with Bancomext is ready.

Mexicana closes the Bancomext credit deal for 100 million dollars. This is part of the support that the government created because of the Influenza problem. The guarantee will be covered by nine A320 aircraft, three engines, and a land in Tuxpan that was valued by the government at 66 million pesos. The airline will wind up financing of 30 million with the AVB bank and another one for 350 million pesos with ASA. The rest of the resources will be to strengthen its liquidity in a very complicated year for the aviation industry. El Universal. 23/October/2009.

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