

# COELUM

COELUM Pronunciation: 'che-l&#8m, 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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# The Creation of the Registry of Guarantees of Mobile Equipment. | Juan Antonio Tiscareño.

A significant amendment occurred to the Mexican Commercial Code, to create the Registry of Guarantees of Mobile Equipment (the Registry).<sup>1</sup> A regulation that rules in detail the Registry has not been issued and we will need to consider in the future whether the Congress intent is that the Registry performs its functions according to the rules of the International Registry established in the Cape Town Convention or not.

As it will be explained in this article, the creation of the Registry can have – at least in theory because it has not yet begun operation – important benefits for those creditors who decide to use the Registry to register the guarantees related to mobile equipment, as for example an aircraft. It is worth clarifying that the Registry will begin operation approximately one year after the publication of the amendment. (August 2010).

## Diverging opinions.

I must stress, that currently there are opposing points of view, as some experts might say that this Registry may not be used specifically to register guarantees related to aircraft, because according to the principle of specialty, there is already a specific registry for this class of equipment.

The principle of specialty indicates that if two or more laws or institutions regulating the same matter exist, one must necessarily

prevail over the others, taking into account which of these laws or legal institutions was specifically designed to accomplish the purpose intended, or is most suited to the specific case. Thus, leaning on the principle of specialization there are some experts who might argue that the Registry can not be used to register securities such as aircraft because there is already a specialized registry for such purpose the Mexican Aviation Registry.

“...the Registry can have – at least in theory because it has not yet begun operation – important benefits for those creditors who decide to use the Registry to register the guarantees related to mobile equipment...”

There are however other experts who might believe that this new Registry can be used to register aircraft guarantees, or at least they consider that the possibility exists, when taking into account that the new amendment establishes that the creation of guarantees of mobile equipment based on its provisions or in other laws, its modifications, transfers or cancellations, and any other legal act performed with or on them, will be suitable for registration in this new Registry.<sup>2</sup>

Moreover, the amendment indicates that the purpose of establishing the Registry where the guarantees will be registered is to make them public, and that all commercial documents

1.- The amendment was published in the Federal Official Gazette on August 27th, 2009.

2.-Article 31 bis 1 of the amendment. The article also states that in the guarantees on mobile equipment includes, legal acts through which a special privilege or a right to retain mobile equipment is created, modified, transferred or cancelled.

used to create, modify, transmit or cancel a guarantee on mobile equipment will be registered<sup>3</sup>. From my perspective, this provision may offer support to avoid the principle of specialty, and so it can be used to register guarantees on aircraft.

### **Advantages to the creation of the Registry.**

I believe that creating the Registry will have three major advantages: The digitization of the documents, the public availability of the registered documents and a speedy response to information requests about these documents.

The registration of guarantees shall be made digitally, using the pre-coded form established for such purposes. The Registry will generate the appropriate certificate, which will be delivered digitally to the petitioner. This will mean in addition to the advantage of digitization, that the performance and response times will be drastically faster in relation to the response times of the Mexican Aeronautical Registry, which is not digitized.

*“I believe that creating the Registry will have three major advantages: The digitization of the documents, the public availability of the registered documents and a speedy response to information requests about these documents.”*

Now any interested person may request the issuance of a certificate in respect of documents registered in the Registry.

Considering that although article 47 of the Mexican Civil Aviation Law establishes that the information registered in the Mexican Aviation Registry is supposedly public information, in practice this registry often does not fulfill its obligation, since as mentioned in other Coelum articles, the Aviation Registry is slow and ineffective, and uses ambiguous criteria for issuing certificates of registered documents, and even sometimes deny information without justification.

As I said at the beginning of this article, the advantages of the new Registry are possibilities but not yet a fact, because the Registry will only be operational in about a year.

### **Conclusion.**

The Registry opens a new window of opportunity for creditors in commercial matters in general. It is up to date and adapted to the needs of the modern world.

To confirm that the Registry can be used in case of aircraft, we will need to wait until the start of operations of the Registry. It is obvious that the Registry will have to decide whether to adopt a generous criterion, which will allow the registration of aircraft, or a restricted, narrow and rigid criterion, which will prohibit this possibility.

With the creation of the Registry, the inefficient Mexican Aviation Registry should disappear and also other registries that regulate other guarantees related to mobile equipment.

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3.- Article 32 bis 2 and Article 32 bis 4 fraction IV of the Amendment.

## COFEMER vs. DGAC. Proceeding irregularities and flaws under Mexican Law. | Svein Azcué and Alejandro Lavat.

In this issue of Coelum, we will try to explain the irregularities and illegalities practiced by different governmental agencies in regards to the legal proceedings under their jurisdiction and the requirements demanded by them. Also we cover the means to rebut, invalidate or object these proceedings and requirements when they are not required under applicable law.

“... all governmental agencies and decentralized offices of the federal public administration cannot apply any additional proceedings to those registered, nor apply them in a different way than stated in the registry...”

In Mexico, an entity was created in 2000 to improve the legal proceedings that are performed and regulated by the Mexican governmental offices. This was done in order to systematize and standardize proceedings so as to be in full compliance with the law and to prevent unnecessary requirements and uncertain payments by unifying the criteria and aiming to lower corruption among bureaucrats. This entity is known as the Federal Bureau of Regulatory Improvement (COFEMER). It is a decentralized government agency under the Ministry of Economy, whose purpose is to guarantee transparency in the operation and application of the regulations, so that the regulations generate more benefits than costs for society. All this sounds very professional and important, but how real in fact are these statements of intent?

In order to comply with its purpose COFEMER can revise new regulation projects, perform public queries, suggest proposals for specific sector regulations, register all federal legal proceedings and promote competition among private and public sectors, all under the strict and perfect compliance of the law. Article 69-Q of the Federal Law of Administrative Proceeding (LFPA) states that all governmental agencies and decentralized offices of the federal public administration cannot apply any additional proceedings to those registered, nor apply them in a different way than stated in the registry<sup>1</sup>. Therefore the only requirements should be the ones registered, assuming their compliance with the law and disregarding any further requirements required by any bureaucrat or governmental official as stated by the Federal Law of Administrative Proceedings<sup>2</sup>.

In order to comply with their objective and to register all of the federal proceedings, COFEMER created the Federal Registry of Proceedings and Services (RFTS). The RFTS is an online inventory of all the proceedings and federal formats giving transparency and judicial certainty to its users. It is a very useful

“...the information registered at the RFTS will be the strict and sole responsibility of the governmental offices or agencies that provide such information, leaving COFEMER with only the authority to issue opinions in regard to it.”

1.- Article 89 of the Political Constitution of the United Mexican States.

2.- Article 69-Q of the Federal Law of Administrative Proceeding (LFPA).

tool for the companies and citizens based on the principle that the authorities cannot undertake any proceedings that are not registered at the RFTS or demand any other requirements or obligations other than the ones contained in the registry itself. Therefore COFEMER can actually regulate and keep track of the proceedings and improve, not only the federal proceedings but any private proceeding that may be classified through their impact on the country's economy. Actually the RFTS contains 61% of proceedings regulation and 39% of services, but only the proceeding registry is classified as mandatory. The actual issue in controversy is that the LFPA in article 69-N states that the information of a proceeding provided by the Governmental Office should be received and registered at RFTS without any changes whatsoever.<sup>3</sup> Therefore the proceeding may be wrong and not duly grounded in law from the start and the RFTS is obliged to register it with no changes. Adding to the absurd, article 69-P of the LFPA states that the legality and content of the information registered at the RFTS will be the strict and sole responsibility of the governmental offices or agencies that provide such information, leaving COFEMER with only the authority to issue opinions in regard to it.<sup>4</sup> These opinions have no coercitive power and if any disagreement should occur between the COFEMER and the governmental agency or office, the Presidential Legal Council will resolve the controversy and if so ordered, the information will be modified.<sup>5</sup>

In order to highlight the conflicts and irregularities in the requirements for a legal proceeding, we will emphasize on a procedure that has become rather rudimentary and wrongly grounded in law and fact as the requirements are somewhat consuetudinary and not in accordance to law. The procedure we are referring to is the Request for the Cancellation of an Aircraft Registration Marks made to the Mexican Aviation Registry. We will first state the official law grounded requirements registered at the RFTS, and then demonstrate the actual consensual requirements coming directly from the General Directorate of Civil Aviation (DGAC) thus exposing the differences between law and fact.

The requirements stated by the COFEMER as registered at the RFTS are as follows.

**1.- Documents:** Depending if the request is made by a company or an individual person, the company should file the request through a representative that should file a certified copy of its power of attorney for acts of administration<sup>6</sup>; an individual person should file a copy of his official ID; the second document is a written petition. The third document is the original of the Registration Certificate requested to be cancelled. This last requirement is not grounded in law, in consequence it is an illegality from both COFEMER and DGAC because it is registered and published at the RFTS, based on the

*3.- Federal law of Administrative Proceedings (LFPA) Article 69-N.- The information referred to in the preceding article should be filed with the Commission in the form in which every particular governmental office or agency states and the Commission will have to register it, unchanged, within the next five working days.*

*4.- Federal law of Administrative Proceedings (LFPA) Article 69-P.- The legality and the content of the information registered at the Registry will be of strict and sole responsibility of the governmental offices or agencies part of the Federal Public Administration, who provide such information, and the Commission will only be able to give an opinion in the matter. In case of a discrepancy between the Commission and the governmental office or decentralized agency, the Presidential Legal Council will resolve the controversy and if ordered, the information will be modified.*

*5.- Ibidem*

*6.- Article 46, Fraction 1, Civil Aviation Law.*

information provided by the DGAC. In accordance to the COFEMER, these documents can be filed at the DGAC's counter or at the filling office of the Undersecretary of the Ministry of Communications and Transport (SCT).

**2. - Payment and Costs:** COFEMER states two costs for the Registration Marks Cancellation proceeding, one for the analysis and revision of the documents where there is a cost of \$20.00 Mexican pesos, and a second cost of \$462.00 Mexican pesos for the cancellation of the registration marks. COFEMER states that there cannot be a different payment demand from the ones stated in their formats and if there should be a violation of these charges, a complaint telephone line is provided for accusations. Once the request is analyzed and agreed upon, the payment must be realized in order to obtain the Cancellation document.

**3. - Response Time:** the maximum response period is 5 days after filing the request<sup>7</sup>, if the 5 day period is met and no response is yet issued, there will be an understanding that the request was denied. As to preventions, the authority has a 2 day period to advise any further requirements in regards to the documents filed.<sup>8</sup>

The requirements stated by the DGAC however are as follows:

**1. - Documents:** A Public Notarized document through which the person that files the cancellation request has power of attorney

for acts of administration, or an authorization from the Aeronautical Directorate of Control and Transport in the case of an aircraft destined for public transport; a written petition for the cancellation of the registration marks, and the original Registration Certificate or a public prosecutor certificate of loss or theft of the mentioned document obtained by the original holder of the same and the receipt of the proof of payment for the duties derived from the cancellation requested. The documents can be filed at the DGAC's counter or at the filling office of the Undersecretary of transport, but by doing so, the cancellation proceeding and response time will be largely increased due to the communications and deliveries of the request sent from the SCT to the DGAC in order for them to analyze and issue a response.

**2. - Payment and Costs:** the DGAC states a cost of \$509.51 Mexican pesos<sup>9</sup> for the cancellation of the registration marks. As we can see, the cost for the request of the cancellation of an aircraft's registration marks is completely different than such stated by the RFTS. Also the \$20.00 Mexican pesos cost required by the RFTS isn't a requirement from the DGAC, this is because it is no longer in use. This is a case where the DGAC canceled this payment and failed to notify COFEMER, again increasing the gap between both governmental agencies and ignoring the law.

**3. - Response Time:** the DGAC states that the maximum response period is 10 days after filing the request, once again

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7.- Article 32, Mexican Aeronautical Registry Regulations.

8.- The requirements stated by COFEMER were obtained through their website [www.cofemer.gob.mx](http://www.cofemer.gob.mx) visited on September 22, 2009 and personal interviews with bureaucrat officials at COFEMER'S bas offices at Mexico City.

9.- Federal Law of Duties Article 158. - For the services of expedition of the following certificates, duties will be paid in accordance with the following costs:

... IV. For the cancellation of the certificate of registration marks by request of interested part \$509.51...

contradicting themselves with yet another requirement stated by law!<sup>10</sup>

Therefore it is clear that the requirements are not the same between DGAC and COFEMER and between COFEMER and the law, with both of the authorities lacking the basic law principle that every act of authority should be grounded in law.

So, what can an affected party do against these unilateral and illegal requirements that either exceed or do not fulfill the requirements as registered and ordered by law?

As mentioned before, if any disagreement should occur between the COFEMER and the governmental agency or office, the Presidential Legal Council will resolve the matter and state the final and correct information. COFEMER also refers to a telephone line named SACTEL (Citizen Telephone Assistance System) which was created to make accusations and complaints against public officers so as to fight corruption among bureaucrats. This however does not really affect governmental proceedings. The only viable possibility resides in filing a claim at the SCT's Internal Control Office who ironically claim to base their actions in the law and therefore submit to article 69-P of the LFPA, thus avoiding their responsibility due to the legal statement in which the only and sole responsible entity for the proceedings information is the particular governmental office or agency.

Assuming that the COFEMER's job and mission is to improve the governmental proceedings, it is quite obvious that their lack of review or outdated database is in conflict with their applicable law and the obligation of the governmental offices to provide the COFEMER with updated information is far from perfect.



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*10.- The requirements stated by DGAC were obtained through informative pamphlets, personal interviews and their website [www.dgac.sct.gob.mx](http://www.dgac.sct.gob.mx) visited on September 21, 2009.*

## News | September

### Extract of Mexican Aviation News

#### The use of mobile phones is now allowed on national flights.

Starting tomorrow, the SCT advised that the use of mobile phones will be allowed on national flights. Nevertheless, this does not mean you are able to use it at any time during your flight. The restrictions on the operation of the electronic devices and mobile phones were originally made because it was considered that they could generate interference and distortions to communication signals and navigation systems. But, nowadays, with the technological progress of electronic systems which can be installed on the aircraft, it is now possible to allow the use of mobile phones during specific phases of the flight. El Economista. 02/September/2009.

#### Support for airlines.

The President, Felipe Calderón, revealed that in June the Government authorized support totaling two thousand million pesos for the airlines. Interjet has received three million pesos from Bancomext. Aeromar requested a credit of fifty million pesos. Mexicana did not agree with the credit requirements from Bancomext and Aero-méxico did not fulfill the credit requirements. Milenio. 04/September/2009.

#### Airlines show recovery on premium seat fares.

Finally airlines are starting to show an increase in the demand for premium seats, a sign of an overall economic recovery, IATA's statistics have improved, and although they have not yet reached the same numbers as in past years, the light at the end of the tunnel is in sight. Premium seats, which are the most lucrative for airlines, are a clear reflection of the economy since they are used mainly for business reasons and world commerce. El Economista 18/September/2009.

#### Mexicana allies with OneWorld Group.

Mexicana and all of its subsidiaries, one of Mexico and Central America's most important airlines, has joined the OneWorld group starting on November 10th. Mexicana reinforces its competitive and financial position and OneWorld will greatly increase its presence in Mexico, which is the 11th most populous country, the 13th economy and the 8th largest tourist destination. With this alliance all parties benefit. El Economista. 22/September/2009.

#### Lufthansa is looking at an increase of the 25% for the year 2010.

Lufthansa contemplates an increase of 25% in the number of their passengers between Mexico and Europe next year. They said that the World Cup in South Africa will mean a great opportunity for the airline to increase the number of passengers. Also the new airline, Austrian Airlines, will connect Mexico with different countries of Europe. Milenio. 25/September/2009.

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