COELUM

COELUM Pronunciation: 'che-l&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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The Latest Amendment to the Civil Code of Mexico City which incorporates the Improvidence Theory in the Contracts. | Antonio Vázquez.

Last January the Civil Code of Mexico City was amended in order to modify article 1796 and to add articles 1796 bis and 1796 Ter.[1] These changes and additions which took effect on January 22nd state the following:

*"**Article 1796.** Contracts become perfect just by the consent of the parties, except for those that must satisfy the formalities required by law. As from when contracts are perfected, the parties thereto are not only bound to comply with that agreed expressly, but also to the consequences that, according to their nature, are in accordance with good faith, use or the law, **except for those contracts that come under the circumstances established in the following paragraph.***

Except for aleatory contracts, when extraordinary national events occur during the interval of contracts subject to term or condition, or contracts of continuing performance, which may not be foreseen and that make the obligations of one of the parties more onerous, said party may take action to attempt to reestablish the balance between obligations, using the procedure established in the following article." (The empathized paragraph is the addition made to the original text of this provision)

The new articles establish the following:

***Article 1796 Bis.** Under the circumstances referred to in paragraph two of the preceding article, the parties are entitled to ask for the contract to be amended. The request must be submitted within thirty days of the extraordinary event occurring and must specify the reasons on which it is founded.*

The request for amendment, on its own, does not entitle the requesting party to suspend performance of the contract.

If the parties fail to reach an agreement within thirty days of the request being received, the requesting party shall be entitled to go to court so that the dispute may be settled. Said action must be filed within the next thirty days.

If it is decided that said action is admissible in view of the events referred to in the preceding article, the defending party may:

1) *Adjust the obligations so as to reestablish the original balance of the contract, as decided by the court; or*

1.- Amended published in the Official Gazette of Mexico City on January 22, 2010.

2) *Settle the contract under the terms of the following article.*

Article 1796. Third. *The effects of fair amendment or rescission of the contract shall not apply to services rendered prior to the extraordinary and unexpected event occurring, instead, any such amendments shall apply to those services rendered after the event. Therefore, rescission shall not proceed if the party affected is in default or has acted fraudulently.*

As will be explained in the following paragraphs, this amendment to the Code, which now validates the Improvidence Theory, represents a substantive change to our civil tradition, that, before this legal reform was not applicable to our civil law in Mexico city.

BACKGROUND.

Cannon law created the Improvidence Theory applicable in contracts, based on the Latin principle *Rebus sic stantibus (if the things remain in the same way)* "that is a name given to a tacit condition, said to attach to all treaties, that they shall cease to be obligatory so soon as the state of facts and conditions upon which they were founded has substantially changed".[2]

According to this idea, it was immoral for a creditor to take advantage of new circumstances to obtain illegitimate profits from his debtor. Based on this the affected debtor, who is then in the difficult situation of complying with his obligations, may invoke this principle in order to terminate the contract or amend it to restore the contract's equity.

This canonic idea did not have many followers, because it may create a lack of confidence between the contractors, as long as either of the parties can decide not to comply with its respective obligations by arguing a change in circumstances that will then lead to a lack of legal security.

Contrary to the Improvidence Theory, our Civil Law took the principle of Pacta sunt servandae which states that "agreements (and stipulations) of the parties (to a contract) must be observed".[3] This means that no matter how the circumstances may have change since the date of execution of an agreement, the parties are obliged to comply according to the stipulations contained in the contract.

"...this amendment to the Code, which now validates the Improvidence Theory, represents a substantive change to our civil tradition, that, before this legal reform was not applicable to our civil law."

2.- Black´s Law Dictionary.St Paul Minn, West Publishing Co. 1990 Sixth Edition, page1267.

3.- Op cit. Page 1109

DIFFERENCE BETWEEN THE IMPROVIDENCE THEORY AND THE IMPOSIBILITY OF COMPLIANCE.

Usually there is confusion between the Improvidence Theory and the impossibility of compliance. The theory of the Impossibility of Compliance is based in the principle "Nobody is obliged to do the impossible" which refers to the protection of the parties in the event that a part of the contract cannot be performed due to causes which are outside of the control of the parties and could not be avoided by the exercise of due care. These causes are usually known as acts of God or force majeure. An act of God is defined as "an act occasioned exclusively by forces of nature without the interference of any human agency:" [4] On the other hand, force majeure refers in Mexican Law to those unavoidable human acts which may be foreseen or not but that causes the impossibility of performance, as for example a war, a strike or an act of authority. The main difference between these acts and the ones referred on the Improvidence Theory is that the first must constitute an overpowering event which causes the impossibility of performance and the acts referred in the Improvidence Theory are those that produce more onerous obligations, but do not create an impediment to comply.

THE AMENDMENT OF THE CIVIL CODE OF MEXICO CITY.

As you can see, the amendment to the Civil Code incorporates the Improvidence Theory giving the right to the affected party of asking for the amendment of the contract if an extraordinary national event occurs that may create a more onerous obligation than originally agreed. The affected party is now allowed to ask for this amendment only if it is not in default and if this right is exercised within thirty days of the alleged event taking place. This petition does not give the right to the debtor of suspending his performance under the contract.

If the parties do not agree on the amendment within the term of thirty days, the petitioner will have thirty days to claim the necessary amendment to the contract before the Court, in order to recover its equity or the rescission of the contract. In any case the effects of the amendments will be applicable for the future pending obligations. However the rescission will not be allowable if the plaintiff is in default or acts in fraudulent way.

It is important to mention that these provisions are only applicable in Mexico City, since the amended Civil Code is a local one. Moreover, these provisions are not applicable for commercial contracts, in which the applicable law is the Code of Commerce or the Federal Civil Code. However it is important to take this amendment into consideration on those cases in which the parties agreed as applicable law the laws of Mexico City.

"...the amendment to the Civil Code incorporates the Improvidence Theory giving the right to the affected party of asking for the amendment of the contract if an extraordinary national event occurs that may create a more onerous obligation than originally agreed."

4.- Op cit. Page 33

Labor Court Criteria Regarding Third Party Assets. | Svein Azcué.

There has been much discussion about the criteria used by the Labor Courts in Mexico regarding third party assets. In labor matters such as strikes and bankruptcy procedures a claim made by the company's employees may be resolved by the unconstitutional action of seizing not only the company's assets but also third party assets that could in possession of the company through a lease.

Here is a brief background on labor issues in Mexico: Labor issues in Mexico are governed by the Federal Labor Law which sets forth the rules and regulations regarding labor relations, labor unions and labor courts (Board of Conciliation and Arbitration). the pre-strike and strike procedures may be initiated based in the limited cases stated in the Federal Labor Law, for example employers are not permitted to dismiss employees without just cause; If they do so, the employee has a right to file suit for re-instatement or indemnification. The labor courts will presume that the person stating he was your employee is in fact your employee and that you dismissed him without cause. When the employee is declared dismissed without just cause, he/she is to receive three months salary plus all other perks granted to the employee for his work (payable upon dismissal). If the compensation is not paid when the employee is dismissed (like when there is a labor lawsuit), then the employer is to pay all salaries that would have been earned during the period in which this delay took place (assuming that the employee won the labor lawsuit), up to the payment date, which may increase the labor debt to significant amounts.[1] Pursuant to article 113 of the Federal Labor Law all owed salaries and indemnifications owed to employees **have preference over any other credit** and therefore are first in line to collect over all of the employer´s assets before any other creditor.[2]

The above mentioned process is also applied when the suit is initiated by a worker´s union as a preamble of a strike; the pre-strike and strike procedures may be initiated based in the limited cases stated in the Federal Labor Law and the labor court can order for the seizure of all of the company´s assets in order to ensure the payment of all labor debts. All these debts should be paid with the company´s remaining assets, or at least that is what logic of the situation would suggest. However a very controversial criteria is applied by the Mexican Labor Courts, which has wrongly been based on article 921[3], have resolved that all assets in possession of the Mexican company, including leased aircraft, can and will be considered as part of the bankrupt company's

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1.- Labor Law of Mexico and Business, Penner Vernon, 2002.

2.- Federal Labor Law, Art. 113.- Wages earned in the last year and the indemnifications due to employees are preferred over all other claims, including those who have a real estate warranty, tax and the Mexican Institute for Social Security over all assets of the employer.

3.- As discussed in previous edition of Coelum of November 2009 the employer becomes a depositary of the company's assets involved in the proceeding.

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."

goods and therefore can and will be used to cover all of the labor debts. This criteria needs to be considered and analyzed because the Labor Courts in Mexico have exceeded their authority and therefore, represent a threat to any aircraft lessor due to the lack of legal certainty. These courts have ruled against the basic property rights of the assets by declaring third party property as part of the bankrupt company's goods and therefore these goods can be withheld from the original owners to fulfill the lessee's labor obligations.

"What can a lessor do to protect its leased aircraft from ending up involved in an unfortunate and unconstitutional procedure?"

With the knowledge of the recent rulings issued by the Labor Courts, we are obliged to ask ourselves the question: What can a lessor do to protect its leased aircraft from ending up involved in an unfortunate and unconstitutional procedure? As a first suggestion, the basic proof of property ownership would be the registration of the property title in an international or domestic registry. However while the registration of the aircraft in an International registry could be helpful, it could be rejected or ignored by the Labor Courts due to its international nature and differing jurisdictions. The second option could be the registration of the aircraft upon the Public Registry of Property and Commerce ("RPPC") in Mexico City, but an aircraft is considered as personal property or "*bien mueble*" and therefore its property title as an aircraft could not be registered upon the RPPC because only real estate property titles are able to be registered by the RPPC, however the RPPC regulations allow the registration of heavy machinery property titles regardless of the fact that these items are considered personal property assets due to their specific characteristics and aircraft engines can be considered as heavy machinery and therefore are able to be registered upon the RPPC. A third option could be the notarized notification to the worker´s union of the existence of an aircraft lease agreement and therefore the acknowledgement by the union of the lease and property of the aircraft of its lessor. A fourth option could be the registration of the aircraft with the Registry of Guarantees of Mobile Equipment of Mexico City, as discussed in the Coelum edition of October 2009. This is a new registry that is in process of creation in Mexico City, that will allow the registration of mobile equipment such as aircraft and therefore evidencing the property of the aircraft through a legal document issued by a public registry. In a judicial view, article 976 of the Federal Labor Law states the "*tercería*" which is a third part claim by which a third party may challenge an attachment or seizure placed on its assets, in order to obtain the cancellation of such attachment. However there has been some contradictory rulings in the Labor Courts regarding the *terceria*, through which judges have rejected the evidence filed by the lessors proving the ownership of the aircraft and ignoring the illegality for the court to attach or seize any assets that are not property of the company in conflict. This regardless of the fact that these aircraft are leased and therefore the property of such assets remains at all times with lessor.

When taking all of the above into consideration, it is important to note that the criteria issued by the court has not been strictly legal and has still gone as far as to relinquish lessors of their aircraft by considering them as part of the bankrupt company's assets and therefore responsible for its labor obligations and debts. Because of this, precautionary efforts need to be taken by lessors such as the registration of property titles in a Mexican or International Registry in order to avoid the potential loss of their aircraft through any labor or strike proceeding any lessee may be involved in.

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Extract of Mexican Aviation News

Tourism limited by high prices and lack of connections.

Lack of connections and high rates are the main factors that limit travelers from using national carriers for transportation to any Mexican destination. SECTUR (Ministry of Tourism) announced that Low-Cost Airlines will offer more low fare tickets for this summer season. El Economista. 02/June/2010

The aviation industry will take two years to recover.

IATA considers that the aviation sector will recover from the economic crisis within two years with the ongoing efforts of the United States and Asia; in Europe, however, the recovery will be slower due to several factors, which include the volcanic-ash cloud from Iceland and the lack of political will to make progress towards "One European Sky". Excélsior. 03/June/2010.

Airlines expect 2010 earnings of almost $2,500 Million USD.

The International Air Transport Association (IATA) predicted that airlines will earn almost $2,500 million USD in 2010. Although this is a very optimistic prediction, it is subject to many factors that could alter the result, such as strikes, constant changes in oil prices and airport and navigation costs. Yet, not all the regions of the world will have the same benefit. Regions such as Europe will continue to operate in red numbers because of the ash cloud that closed the air traffic for a while, while Asia, North America, Middle East, and Latin America continue to recover. La Cronica. 07/June/2010.

Mexicana cracking under the strain?

Without the endorsement of Nacional Financiera (Federal Government), the possibility of eliminating a large amount of the current of debt becomes impossible as Mexicana de Aviación finds itself in deep trouble with its creditors. Creditors are looking to Mexicana for payment of a number of the aircraft that are under lease, as the monthly payments were not made because Mexicana was paying the Nacional Financiera the credits for a loan of $720 million pesos. The company, hurting for cash, is giving un-heard-of sales for the summer vacation season, which could backfire with accusations of causing damage to the market. El Universal. 07/June/2010.

In this month extract was prepared by Juan Antonio Tiscareño, Alejandro Lavat, Alejandra Llopis and Jessi Saba.

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Extract of Mexican Aviation News

Mexico City-Dallas Fort Worth International Airport: top route from Latin America.

The Mexican market for tourists and businessman makes this the most important route in Latin America for the Dallas Fort Worth International Airport. Every year about three million Mexicans arrive at this airport, either as visitors to this Texas city, or to make onward connections to other destinations. El Financiero. 09/June/2010.

Costs are threatening the aviation industry in Latin America.

According to Alberto Cortes, director of purchasing and the aeronautic material committee of Latin American Air Transport Association (ALTA in Spanish), the increase of taxes, the disparity in the price of fuel, the high cost of services at airports as well as high interest rates on credit cards are factors that threaten the competitiveness and development of the aviation industry in Mexico and Latin America and may cause airline begin to turn to foreign destinations. Airport taxes might not be so bad if they were actually reinvested in aviation infrastructure. El Universal. 18/June/2010.

Interjet convinces Inbursa and Televisa, but what about Protego?

Interjet has shown its interest in buying Volaris, and has finally convinced the two partners, Carlos Slim (Inbursa) and Emilio Azcárraga (Televisa), who initially did not agree at all. But as weird as it seems, the objection to the purchase now comes from another partner, Discovery America, of the Protego investment fund (Pedro Aspe). The odd part is the following; why would an investment fund still be interested in operating an airline? Rumor has it that they are putting pressure on Interjet to get a better price for Volaris. Alemán Magnani, president of Interjet has big plans for his airline and is looking to expand to the point of becoming the second or third air operator in México. Excelsior. 21/June/2010.

ASUR to buy 49% of the Mexican Airport Investment Company (ITA).

Fernando Chico Pardo, president of ASUR (Southeast Airport Group) signed agreements to acquire the 49% of ITA. The following was advised in a communication sent to the Mexican Stock Market which stated that the purchase is conditional on the approval of the authorities. ITA says that they are a strategic partner of ASUR, and the both companies have a technical assistance agreement which gives ASUR a perpetual license in Mexico to use technical assistance and the “know-how” that ITA has made available over the period of the contract. Excelsior. 22/June/2010.

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