

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.

newsletter |

monthly digital publication by

ABOGADOS SIERRA Y VAZQUEZ

www.asyv.com

november 15, 2010

year 05 | No. 07

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The New Mexican Aviation. | Carlos Sierra.

The pathetic circumstances that affect the Mexican aviation industry these days have no precedent in its more than 100 years of existence, and have placed it at crossroads that can be seen in two different forms.

On one hand the current situation where Mexicana Airlines, the third oldest airline in the world, has entered into a tremendous crisis that has suspended its operations and has placed it on the brink of disappearance -if it cannot be saved through a thorough and imaginative business plan that appears to be further away every minute-, the downgrade of Mexican aviation safety standards to Category 2 by the Federal Aviation Administration (FAA) of the United States for not being in compliance with international safety standards set by the International Civil Aviation Organization (ICAO), the resulting effects that such has created in the limited availability of services in certain routes, the price of the tickets, the impossibility of expansion by other Mexican airlines into the United States markets that were heavily served by Mexicana and the evidently precarious conditions in which our aviation authorities work, appear to present a scenario where Mexican aviation has never been in worst condition in its many years of history.

“ The pathetic circumstances that affect the Mexican aviation industry these days have no precedent in its more than 100 years of existence...”

On the other hand, however we must not lose sight of the tremendous opportunity that this creates for the future once that we have come to realize, later that we should have unfortunately, which are the many problems of an industry that has been abandoned and poorly regulated for decades.

This seems to be a very challenging path considering the many problems affecting this industry in Mexico but we must seize this momentum to look in-deep into our industry and once and for all resolve many of the aspects that have contributed to the current crisis. The Mexican government has shown commitment to undertake this task and in many ways appears to be taking the necessary steps to create the foundations of what in the near future should result in a more sophisticated, better regulated, efficient and above all safe Mexican aviation industry.

In that context, our government must place special emphasis in returning our country to compliance with international safety standards set by the ICAO to be able to be placed once again in Category 1 by the FAA. This shall be accomplished not only by attending the specific circumstances that caused Mexico to be downgraded approximately 100 days ago, but taking this opportunity also to resolve the many structural problems that impede the *Dirección General de Aeronáutica Civil* (DGAC) from being an efficient regulator in a country in which aviation is so essential for its development. Aspects such as the training of inspectors, efficient record-keeping, a revised legal framework for certification of flight schools, for maintenance, technical expertise, improved and simplified compliance procedures for airlines, a reduction in

bureaucracy in the issuance of permits and approvals, more transparency in proceedings and the urgent need for the systematization of all procedures at the DGAC, should be among such that require urgent attention.

The DGAC, as it is apparently the plan, must even be provided of better and more modern installations and facilities that should improve the image and efficiency of an authority of such relevance. The current image of the DGAC, sadly, comes to be a reflection of its abandonment and inefficiency.

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Of no less urgent importance is the complete restructuring and systematization also of the Mexican Aviation Registry, which obsolescence makes it completely ineffective for protecting the rights that it is obliged to register and to protect. In this endeavor the legal framework under which it operates needs to be revised and updated to safeguard the rights of operators but to also respect and protect the rights of owners and creditors.

On the legal side, Mexican aviation must be provided with a better set of laws and regulations, not only on technical, regulatory, training and safety issues but also in order to protect the interests of financial parties, lenders, lessors and creditors that are so essential for the healthy development of the industry by providing the most essential of its tools, which is aircraft and the financing required to acquire the same. Many times over we have said that only with access to efficient and cost effective financing mechanisms will Mexican aviation be able to operate safe and modern aircraft at competitive costs in the future, this is essential to have a modern industry that can efficiently compete with others in the world and that can be reliable and cost efficient for the general public.

In this respect, efforts are being conducted to amend the declarations that were made by Mexico to the Cape Town Convention and Protocol¹. A proposal for such purpose has been presented to the Mexican government under the auspices of the Aviation Working Group², which is being reviewed with positive enthusiasm by the authorities and which will hopefully result in the adoption by Mexico of the declarations that will open the doors to better and more competitive financing while improving the legal certainty that lessors and lenders will have of the expeditious recovery of their assets in consistency with the Aircraft Sector Understanding (ASU)³ promoted by the Organization for Economic Cooperation and Development (OECD).

1.- *Convention on International Interests in Mobile Equipment and Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Aircraft Equipment, signed at Cape Town, South Africa on 16 November 2001.*

2.- *Aviation Working Group (AWG) is a not-for-profit legal entity comprising major aviation manufacturers, leasing companies and financial institutions.*

3.- *Aircraft Sector Understanding on Export Credits for Civil Aircraft, signed at Rio de Janeiro, Brazil on 30 July 2007.*

The design of a carefully structured aviation policy for the long term development of national and foreign airlines and markets needs to be urgently made to take advantage of the privileged geographical position of Mexico and of the importance of its many key business, tourism and cargo destinations. A more modern approach to traffic rights, a less protective bilateral structure and the changing of many obsolete rules that date back to the years when airlines were a government monopoly should be taken to create hubs, to lure foreign air traffic into the country and to permit the growth and modernization of airports while increasing the air travel options for the passengers and the economic benefit that such creates.

A policy that could foster the growth of the many services that surround the aviation industry would also improve the service capability of our airports and of the incipient manufacturing of parts and eventually aircraft. With the right policies and regulations Mexico could easily become a world class manufacturer and developer of aviation products and technologies and a world class supplier of maintenance and other services for the industry.

All of the above aspects will create a stronger, safer and more competitive Mexican aviation industry in which the downgrade to Category 2 and the failure of an airline of the importance and history of Mexicana can never occur again. The current scenario is sad and shameful but the opportunity is here to overhaul an industry that has required urgent assistance for years. If we seize this opportunity all of what is happening today would not be in vain and yet, maybe, even Mexicana will continue to fly and together with all other airlines in Mexico will have a brighter future ahead.

The Interlocutory Injunctions in the Mexican Insolvency Proceeding (Concurso Mercantil). | Antonio Vázquez.

In recent editions of Coelum, we have discussed some of the main characteristics of the Concurso Mercantil, which is the Insolvency Proceeding applicable in Mexico. As we have previously discussed, the Concurso Mercantil is the applicable procedure for those commercial entities or individuals who are facing financial problems and which by submitting a judicial petition for Concurso, may obtain the legal protection to restructure their economic situation by conciliating with their creditors to avoid a bankruptcy and to cease operations in a definitive way. This petition may be submitted by the commercial entity or individual or any of its creditors.

The Concurso Mercantil is a judicial procedure which will be instructed by a District Judge who will rule all the different stages in this procedure and will determine if the company or individual involved in the Concurso may be subject to it, and at the end if it may be declared or not in Concurso, or if it is the case in bankruptcy.

The above is a brief introduction of the main characteristics of the Concurso Mercantil. However, the purpose of our article is not to enter in an exhaustive analysis of this procedure, but only to describe one of the most important aspects included in it: The interlocutory injunctions that the Judge may order during the Concurso.

First of all, it is important to mention that according to the Mexican Insolvency Proceedings Law (Concurso Mercantiles Law), the Judge is the guide of the procedure and, therefore, will be entitled to issue any kind of orders or ruling procedural acts in order to comply with the purpose of the Mexican Insolvency Proceedings Law. However, this Law does not contain a specific provision which states all the abilities of the Judge in the procedure, so we have to analyze the complete related legislation in order to determine the faculties of the Judge in the procedure. Among these abilities, the District Judge may grant the interlocutory injunctions that may be considered necessary, in order to maintain the viability of the debtor and/or to protect the rights of the creditors. This faculty of ordering interlocutory injunctions may be included in a theoretical group of enforcement powers given to the Judge to conduct the process.

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The interlocutory injunctions are those issued at any time during the pendency of litigation for the short-term purpose of preventing irreparable injury to the petitioner prior to the time that the court will be in position to either grant or deny permanent relief on the merits. In accordance with their purpose, interlocutory injunctions are limited in duration to some specified length of

time, or at the very outside, to the time of conclusion of the case.¹

The interlocutory injunctions may be requested by the creditor, by the visitor² or may be issued by the Judge in those cases he considers necessary. In the same way, these interlocutory injunctions may be granted by the Judge since the filing of petition has been made and even during the visit period, which take place once the Judge has formally received the petition of Concurso and has appointed the visitor, and until the visitor has filed the final report of the visit to the Judge.

“...the Judge is entitled to grant any kind of injunction that he considers necessary to protect the creditors or the patrimony of the debtor, even ad-hoc injunctions.”

Article 37 of the Mexican Insolvency Proceeding Law states an exemplificative list of interlocutory injunctions that the Judge may grant, and which are the following:

- 1.- The prohibition of making payments of obligations that have elapsed before the formal admittance of the claim or petition of Concurso.
- 2.- The suspension of all kind of enforcement procedures against the assets or rights of the debtor.
- 3.- The prohibition to the debtor of making any kind of acts of transfer or encumber of its assets.
- 4.- The securement of assets.
- 5.- The prohibition to transfer monies or secures.
- 6.- Obligation by which the debtor is required to name another to represent his/her interest and be financially responsible for full judgment in case debtor defaults or disappears.
- 7.- Any other similar to the above.

As you can see, the Judge is entitled to grant any kind of injunction that he considers necessary to protect the creditors or the patrimony of the debtor, even ad-hoc injunctions.

In the same way, and considering that the Judge is guiding the procedure, we consider he is entitled to modify or even to clarify the injunctions that already has been ordered, if he considers that the situation of the debtor has changed since the moment the injunctions were granted. This criteria has been experienced recently and we consider that will create an important precedent in the Concurso proceeding, since the Judge must assure that the debtor or even the creditors are not abusing of the injunctions that have been already in effect.

1.- Blacks Law Dictionary. West Publishing Co. St Paul Minn, 1990. Sixth Edition. Pg 784.

2.- The visitor is the expert encharged of analyzing the financial viability of the debtor subject to Concurso and who will provide the Judge the financial elements to determine if the debtor will be declared or not in Concurso.

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Extract of Mexican Aviation News

Airlines are looking for Mexicana's Routes.

The demise of Mexicana de Aviación has caused reorganization within the airline industry generating opportunities for other airlines to change their business plans and enter into new markets. Since Mexicana ceased operation, the industry has started to show interesting changes with each airline, in coordination with the Secretary of Communications and Transport, making strategic changes so as to cover Mexicana's 30% market share. National airlines like Volaris, Interjet, Aeromexico, Vivaerobus and Aeromar are starting to redirect their fleets and enter new markets. El Universal. 07/October/10.

Recovery of Mexicana's leased aircraft is legal.

The actions to repossess aircraft taken by the owners of the aircraft operated by Compañía Mexicana de Aviación because of the default of payments are absolutely legal. There is no order by the authorities that prohibits the owners from recovering their aircraft. The Secretary of Communications and Transport respects the constitution and therefore they not impeding the action of recovery by the owners, since they have clearly no relation to the troubles the airline is suffering. El Financiero. 11/October/10.

Neither Mexicana nor Aviacsa will be operating by December.

The Sub-secretary of Communication and Transport, Humbert Treviño, recognized that neither Mexicana de Aviación, nor Aviacsa will be able to restart their operation by December 2010. As for Mexicana, even if they could reach an agreement with the new investors, there would not be enough time to resume ticket sales and coordinate operations. The problem is that the longer it takes, the bigger risk the company runs to fall in bankruptcy. Aviacsa on the other hand, is technically in bankruptcy, but because of a new promise by investors, and the term to announce bankruptcy has been extended for 90 days. El Universal. 19/October/10.

Foreign firms go after MX pilots.

The Pilot Union (ASPA) informed that they are now at the final phase of exams so that they can be contracted by six foreign airlines. The leader of the Union said that they have been meeting with these airlines since September. The interested airlines are Turkish Airlines, Qatar Airways, Emirates Airlines, as well as airlines from China and Hong Kong. Also, airlines such as Volaris announced the probable contract with 200 people, pilots and flight attendants, because they will soon receive three new aircraft. El Universal. 21/October/10.

SCT violates airport regulations by leaving Mexicana "slots" untouched.

For now, the Secretary of Communications and Transportation (SCT) has opted to retain Mexicana's slots. The Airport Regulation of the Airport Law stipulates that the slots could only be reserved as long as the airline is up to date with payments, which is not the case for Mexicana. This is causing trouble for other airlines, because they have increased activity but do not the necessary slots. Government needs to make a decision. El Universal. 26/October/10.

Growth of 18.8% in the number of visitors that arrived to México by air.

The Secretary of Tourism confirmed that in the period from January to September 2010, the number of foreign visitors increased about 18.8%. This indicates that the tourism in México is slowly recovering. This increase was created especially by tourists from USA, Canada and Spain. As for Latin America, the most important country in terms of tourism is Argentina. The Secretary of Tourism is expecting even more tourists because of the facilities granted for the visa processing. El Financiero. 27/October/10.

Lack of coordination between SCT and SHCP caused the change to Category II.

The lack of coordination between the Secretary of Communication and Transport and the Secretary of Estate and Public Credit provoked the degradation of the Mexican aviation industry from FAA category I to category II. The problem was that at the time that Agustín Carstens was Secretary of the SHCP, he did not approve the budget to contract aeronautical inspectors. The downgrading by the FAA was made because of an insufficient number of inspectors for the area. Milenio. 29/October/10.

Contributors



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