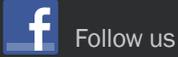


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COELUM Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

The Credit Crunch and its Implications on Aircraft Financing.

by Viridiana Barquín.

The most common schemes for financing commercial aircraft proceed, in general terms, as follows: The borrower provides basic information about the prospective aircraft to the lender. The lender performs an appraisal of the aircraft's value and a title search based on the aircraft's registration number in order to confirm that no liens or title defects are present. Thereafter, the documentation for the transaction is prepared: the loan, a security agreement which establishes a security interest in the aircraft, so that the lender may repossess it in the event of default on the loan and, as is advisable for aircraft to be operated by Mexican carriers, a Mexican law mortgage. On closing, the transaction documents are executed and funds are released. But what happens when some time after the transaction documents have been executed, certain reasons appear that make necessary the transfer and assignment of the rights constituted pursuant to this financing transaction?

“The global economic crisis is having an impact on the loans related to the aviation sector. Various German, French and other banks have now retreated from the aviation finance market.”

The global economic crisis is having an impact on the loans related to the aviation sector. Various German, French and other banks have now retreated from the aviation finance market. European banks, which have lately been the keystone of aviation lending, are restructuring operations to meet new financing guidelines imposed by the banking authorities. Lenders which have been reliable sources of aircraft funding and leasing in recent years, are now trying to sell off their aviation exposure to companies interested in contracting their credit supply and in order to comply with the new liquidity ratios.¹ In accordance with this global economic crisis, some lenders could be forced to do certain adjustments such as to amend the existing loan agreements and to transfer and assign the rights and obligations derived there from.

“The following, under a Mexican law perspective, describes the necessary steps to document the assignment of the rights of a creditor in respect to the security interest constituted through the documents entered into for the purpose of providing security for the payment obligations constituted under a loan agreement entered for the purpose of financing the acquisition of an aircraft ”.

1.- Airline Business Journal, February 2012, “For a Few Dollars More”, page 40.

The following, under a Mexican law perspective, describes the necessary steps to document the assignment of the rights of a creditor in respect to the security interest constituted through the documents entered into for the purpose of providing security for the payment obligations constituted under a loan agreement entered for the purpose of financing the acquisition of an aircraft (“existing loan”). In consideration of the transfer and assignment agreement by which the rights and obligations of creditor under the existing loan are being transferred and assigned between the existing lender as assignor and the new lender as assignee and potential beneficiary of the rights of lessor under the lease, the most common steps to be taken are: (i) to enter into a loan transfer agreement; (ii) to enter into an assignment of the Mexican law mortgage agreement; and (iii) to enter into a lease security assignment; these last two for the purpose of continuing to provide security to the payment obligations under the loan, and to release assignor of its rights, liabilities and obligations under the same, and for the assignee to assume them, all on the terms and conditions contained therein.

Of all this amendments, it is important to distinguish those which are related to real or property rights (Latin “*in rem*”) and those related to personal rights (Latin “*in personam*”).² The rights resulted from a mortgage are totally property rights (*in rem*) and as it has been previously explained in past issues of Coelum, it is much more practical to have a mortgage under Mexican law for enforcement purposes considering that the aircraft is operated by a Mexican carrier.³ Therefore if there is a Mexican law mortgage constituted to secure the payment obligations under the loan, the same should be registered before the Mexican Aviation Registry at the time when it was entered into, consequently, in order to amend the existing registration and to list the new lender as creditor, a mortgage assignment agreement must be entered and filed for registration, which in consideration of the loan transfer and assignment agreement being entered into, would serve to amend the terms of the registered mortgage. Upon execution of such document, the same must be filed for registration at the aviation registry in order to properly perfect and establish the rights of the new lender as assignee and creditor under the mortgage, without prejudice to any other requirements stated by applicable law.⁴

The rights resulting from the security assignment (both the security assignment previously entered to ensure compliance of borrower’s obligations under the existing loan, as well as the transfer and assignment entered thereafter to document the rights of the new lender) are personal rights (*in personam*), as such rights are not related to the property of the aircraft but with the

2.- See Coelum “Convenience of entering into mortgages regulated by the law of the place where the asset is located”, June 2008.

3.- Article 13 paragraph II of the Federal Civil Code. “ARTICLE 13: The Determination of Applicable Law shall be made pursuant the following rules: II. The constitution, regime and extinction of rights in rem over real estate, as well as the contracts for the lease and the temporary use of such goods, and the movable assets, shall be governed by the law of the place of their location, even if their beneficiaries are foreign.”

4.- Article 14 of the Regulation of the Mexican Aeronautic Registry. “ARTICLE 14: Documents issued abroad in addition to the applicable legal formalities, when they are written in a language other than Spanish, they must be translated by a certified translator authorized by the Supreme Court of Justice (“Suprema Corte de Justicia”) of the Federal District of Mexico or of the federal entities.”

legal relationship between the parties. The choice of law to govern the security assignment will be upheld as a valid choice of law, binding and enforceable in any action in the courts of the United Mexican States. Therefore, in order to document the transfer and assignment by which the rights and obligations of creditor under the existing loan are assigned from the existing lender as assignor to the new lender as assignee, a lease assignment must be entered and filed for registration, as done with the aircraft mortgage assignment. Upon registration at the aviation registry, the mortgage and the security assignment will be recognized to evidence a first priority interest of assignee on the assigned interest under the laws of United Mexican States and be opposable to third parties. In addition, the international interest constituted now in favor of the new lender in respect to the security interest created under the mortgage and the security assignment must be registered at the International Registry, upon such registration, the mortgage assignment and the security assignment will be recognized against third parties in any Contracting State under the Convention and no further filing is required or advisable under the Convention⁵ for the international interest to be effective against third parties. It is also important to note that the mortgage and the security assignment do not need to be registered as a condition to the legality, validity, enforceability or admissibility of the same; once such documents have been properly executed, the rights, title and interests there under are validly transferred and such transfer is effective and enforceable as of the date thereof under the laws of United Mexican States, provided that, the effects of registration are to evidence a first priority interest of the assignee on the assigned interest and be opposable to third parties.

Moreover, and in order to have the new lender as potential beneficiary of the rights of lessor under the lease, covered by all the ancillary and preliminary documents intended to repossess the aircraft in the event of default on the loan, it is advisable that a new deregistration power of attorney be granted by Lessee in favor of the new lender in addition to lessor.

In conclusion, all actions described above, require a very careful analysis of the particular case, so that a proper legal advice of all other tax, administrative and regulatory implications is essential, and it should be especially noted that such advice does not end with the execution of the assignment documents and/or the filing of the same before the Mexican Aeronautic Registry but a further follow up has to be accomplished in order to verify that the security interest constituted through the assignment documents has been registered and the new lender listed as creditor.

5.- Convention on International Interests in Mobile Equipment and the Protocol to the Convention on Matters Specific to Aircraft Equipment as in effect in the United Mexican States from 1 November 2007.

The Air Operator Certificate (AOC).

by *Alejandro Lavat*.

In this edition of Coelum we will analyze the importance of the AOC as well as the requirements to obtain it, and its historical importance for legal and aviation safety.

An AOC refers to a certificate issued by the national aviation authority in favor to an aircraft operator in order to allow it to use an aircraft for commercial purposes. This requires the operator to have personnel, assets and a system in place to ensure the safety of its employees and the general public. The certificate will list the aircraft types and registration marks to be used, for what purpose and in what area, specific airports or geographic region.

The air carrier certification process is designed to ensure that the applicants are able to design, document, implement, and audit safety critical processes for two purposes:

1. Comply with international and national regulations and safety standards.
2. Manage hazard related risks in the operating environment¹

The purpose of the certification process is to determine whether an applicant is able to conduct business in a manner that complies with all applicable regulations and safety standards and allows the managing of the hazard related risks in to operating systems. The process is designed to cancel the certification of applicants who are unwilling or unable to comply with regulations or conform to safe operating practices.

“An AOC refers to a certificate issued by the national aviation authority in favor to an aircraft operator in order to allow it to use an aircraft for commercial purposes. This requires the operator to have personnel, assets and a system in place to ensure the safety of its employees and the general public. The certificate will list the aircraft types and registration marks to be used, for what purpose and in what area, specific airports or geographic region”.

An AOC can be granted for one or more of the following activities²:

- ✓ Aerial Surveying
- ✓ Aerial spotting
- ✓ Agricultural Operations
- ✓ Aerial Photography
- ✓ Aerial Advertising

1.- http://www.faa.gov/about/initiatives/atos/air_carrier/intro_to_part121_cert/

2.- Article 6, Section VI of the Civil Aviation Law and NORM008-SCT3-2002

- ✓ Fire Fighting
- ✓ Air Ambulance or aeromedical operations
- ✓ Flight Training
- ✓ Charter (Low and high capacity)
- ✓ Regular Public Transport (Low and high capacity)

A low capacity operation is when the operation of the aircraft is under 38 passenger seats. High capacity is above that number.

Requirements:

- ✓ Sufficient personnel with the required experience for the type of operations requested.
- ✓ Airworthy aircraft, suitable for type of operations requested.
- ✓ Acceptable systems for the training of crew and the operation of the aircraft (Operations Manual).
- ✓ A quality system to ensure that all applicable regulations are followed.
- ✓ The appointment of key accountable staff, who is responsible for specific safety critical functions such as training, maintenance and operations.
- ✓ Carriers Liability Insurance (for Airlines) Operators are to have sufficient insurance to cover the injury or death of any passenger carried.
- ✓ Evidence that the operator has sufficient economic resources to fund the operation.
- ✓ The operator has sufficient ground infrastructure, or arrangements for the supply of sufficient infrastructure, to support its operations into the airports requested.

According to the United States Department of Transportation and the Federal Aviation Administration, to maintain an airline air carrier operating certificate in the category of fitness, an air carrier must maintain the following three standards³: adequate financing, competent management, a willingness to comply with applicable laws, and regulations.

In 1944 Mexico signed the Convention on International Civil Aviation held in Chicago, Illinois, USA, which states that all air operators must have an Air Services Operator Certificate once it establishes that it meets the necessary requirements, to provide security for users of air transport services and property of others on land.

“It is very important to clarify that the Ministry of Communications and Transportation (SCT) cannot grant a provisional AOC, because this figure is not contemplated within the civil aviation law and therefore cannot be issued”.

3.- <http://www.dot.gov/affairs/1999/dot4199.htm>

The Regulation of Civil Aviation Law, provides that for the start of operations of a licensee or permit holder, such persons must satisfy the technical requirements to ensure that services are provided with safety, quality and timing. It is of interest to the Federal Government to proceed as soon as possible to establish the technical requirements to be met by licensees and permit holders of air transport public service, as well as the licensees of private air transportation service business, with the purpose of ensuring the safety of air operations. For this purpose the Mexican government has issued the following:

NOM-008-SCT3-2002⁴, to formulate technical requirements to be bound by licensees and concessionaries of public air transportation service for obtaining the certificate of air operator, and technical requirements to be fulfilled by the permit holders of a private air transport service business.

In Mexico there are still many people who believe that an AOC can be granted without meeting all the requirements, and that they may obtain a “provisional” or “temporary” AOC, disregarding the legal framework.

It is very important to clarify that the Ministry of Communications and Transport (SCT) cannot grant a provisional AOC, because this figure is not contemplated within the civil aviation law and therefore cannot be issued.

Moreover, article 16 of the Mexican constitution establishes among other things, that all acts of authority must be grounded and motivated in law⁵...,” in that sense, granting a provisional AOC would be a violation of this constitutional provision.

The Civil Aviation Law, in Article 9, section first, establish that those interested in obtaining the concession to provide the public service of air transport, must demonstrate their technical, financial, legal and administrative capacity⁶.

The Regulation of the Civil Aviation Law, Article 19, Section II, paragraphs a and b, indicates that for granting a concession, and therefore and AOC, the investor applicant must present documentation proving their economic and availability of financial resources or funding sources

4.- <http://www.sct.gob.mx/fileadmin/DireccionesGrales/DGAC/Marco%20Jur%EDdico%20y%20Regulatorio%20Normativo/Normativo/Normas/NOM-008-SCT3-2002%20REQS%20TECNICOS%20-%20AOC.pdf>. A NOM is any “technical regulation of mandatory compliance issued by the competent departments to establish rules, specifications, attributes, guidelines, or requirements for a product, process, facility, system, activity, service or production or operating method, and those relating to terminology, symbols, packaging, marking or labeling and relating to its enforcement or implementation.”

5.- Article 16 of the Political Constitution of the United Mexican States.

6.- Law Aviation Article 9

in addition to an investment program consistent with the characteristics of the service they claim to provide, with a projection for a term not exceeding three years⁷...”

Article 133 of the Chicago Convention provides that “signatory countries are obliged to provide airworthiness certificates that entitle their airlines and must check economic, technical aptitude endorsed on a license, which will be recognized “as long as requirements equal or exceed the minimum standards established in the implementation of the agreement⁸.”

After all the above we can conclude that the AOC cannot be granted to those who do not meet the legal requirements. For the authority to grant a provisional AOC would be illegal and unfair and to the detriment of other air competitors. They should give the same treatment to all. Also assuming that the SCT could issue a provisional certificate, that act would be the pattern for many individual requests on a provisional basis if authorization was given in any type of proceeding, with the simple statement that they will meet requirements in the future, all of which would create legal uncertainty.

7.- Regulations of the Civil Aviation Law, Article 19

8.- Convention on International Civil Aviation, Chicago (1944), Article 133.

Extract of Mexican Aviation News

With a Jalisco's Government Trust destined to rescue ALMA, a group of entrepreneurs launch AeroJal.

In March 2009, the bankruptcy of Aerolineas Mesoamericana (ALMA) was declared. Nevertheless, a group of entrepreneurs supported by the governor of Jalisco, Emilio Gonzalez Marquez, are working in a new project with the consultancy of Max Bertoli Pitteri, former operations manager of Mexicana Link who is making the efforts on behalf of the new company AeroJal, in the Ministry of Communications and Transport. The seed capital of AeroJal comes from a trust created by Gonzalez Marquez's Administration destined for the rescue of ALMA. *Excélsior. 07/March/12.*

Airlines Seek Fair Competition.

Jose Luis Barraza, President of AeroMexico declared that the Mexican air industry has to improve its competitiveness against the foreign and needs to create a new aeronautic policy with clear rules that provide certainty to the investors. The entrepreneur revealed that the National Chamber of Aerotransport (Canaero) is preparing a new aeronautic policy, and it will be explained to the presidential candidates. In the proposals are included the transparency in the rules of operation, certainty in routes and slots, and more competitive prices for the use of the air space. *CNN Expansión. 09/March/12.*

Costs curb the aviation in Mexico.

The high taxes and airport costs have curb the Mexican aviation of the first international levels, blocking the rise of the airlines and discouraging more foreigner tourists into the country, says the Vice President of the Council of VivaAerobus Management. According to the employer, Mexico should put greater attention on these points, as the Mexican airports are 10% more expensive than the world average, and 7% more expensive than the EU terminals. *El Universal . 12/March/12.*

Send to fly low rates.

The gap between the low-cost rates airlines and traditional airlines is not only smaller every day, but sometimes the cost of low-cost airlines has higher prices. This because in Mexico there isn't the necessary infrastructure for airlines that started operations with low-cost mode to continue to do so as in other countries. *Reforma. 13/March/12.*

Airlines, under the scrutiny of Senate.

The Senate will discuss an amendment in order to perform continuous surveillance of aviation companies, to avoid economic insolvency. *El Economista. 20/March/12.*

See good potential in the aviation sector.

After a 4% growth in 2011, the aviation in Mexico is ready and mature to be more productive and offer better services to generate a good return to investors in the sector, considered the Vice president of Sales for Latin America of Boeing, Van Rex Gallard. *El Economista. 20/March/12.*

Will be analyzed the selling of Mexicana's Airplanes.

According to Bancomext, each airplane costs 6 to 7 million dollars.

The National Foreign Trade Bank (Bancomext) could sell Mexicana's nine airplanes to four American lease companies to recover the amount of credit awarded the airline, said the president of the banking institution. *Reforma. 22/March/12.*

The CNT request new airport for the DF.

The president of the National Tourism Confederation requested to the federal authorities to build a new airport for Mexico City. Thus, if the airport is saturated completely, will be operationally ineffective and will put the safety parameters in danger. *El Economista. 26/March/12.*

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