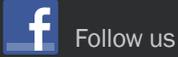


# COELUM

Monthly Digital Publication by ABOGADOS SIERRA Y VAZQUEZ



July 15, 2012  
year 07 | No. 03



Obligations of a Judicial Depositary of  
an Aircraft in a Commercial Proceeding.  
*Juan Antonio Tiscareño* P. 01-03

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.

JUNE NEWS on  
Mexican Aviation P. 04-05

Contributors P. 06

# Obligations of a Judicial Depositary of an Aircraft in a Commercial Proceeding.

by Juan Antonio Tiscareño.

The figure of the judicial depositary (*a person that is entrusted with something for safekeeping*) is commonly used in litigation practice. The designation of this person –court aide–, due to an attachment proceeding, brings along a lot of legal consequences that must be taken into account by the petitioner of such attachment. In this article, I will make a brief summary of the obligations that a judicial depositary of an aircraft must comply with during a commercial litigation according to the Federal Code of Civil Procedures of Mexico (FCCP).<sup>1</sup>

First of all it is important to mention that the FCCP is the applicable code in this case, in a supplementary way, considering that there is a loophole in the Commercial Code on this matter. Having said that, in order to list the essential obligations of a judicial depositary of an aircraft, I will give a brief example.

Suppose that a creditor who has an enforcement instrument –for example a promissory note – with the acknowledgment of a debt already past due, against a company who owns an aircraft, and who chooses to file a lawsuit to recover his money. In Mexico, an enforcement instrument (along with the provisional remedies established in the Commercial Code and the reliefs of the Convention on International Interests in Mobile Equipment<sup>2</sup>) gives the possibility to a creditor of obtaining an order to seize in a precautionary manner, assets of the debtor sufficient to cover the amount of the debt, before the judicial process to recover the debt starts (this is the major advantage of this kind of process in comparison with an ordinary process, in which the plaintiff must wait for success in trial in order to attach assets of the defendant). The creditor obtains the attachment of the aircraft of the debtor (the right to designate the judicial depositary of the assets is given at the beginning to the debtor, but if this party does not want to exercise his right to designate the depositary, such right will pass to the creditor).

Once the depositary has guaranteed the exercise of his charge, he has to comply with a series of obligations, depending of the type of assets that are in custody.

“The designation of the depositary does not generate responsibilities automatically.”

1.- The rules provided by the FCCP are of general use for any kind of assets that are in deposit, that is, there are no special rules for the depositary of an aircraft.

2.- The reliefs pending final determination established in article 13 of the Convention on International Interests in Mobile Equipment (Cape Town, 2001) may interact with the order of seizure provided by the Commercial Code. The Convention provides additional measures -reliefs- not contemplated by the Commercial Code, that could be used by a creditor such as (a) preservation of the asset and its value; (b) possession, control or custody of the object; (iii) immobilization of the object; (d) lease or management of the object. It is important to note that the Convention is an international treaty and for that reason is located hierarchically above the Commercial Code, however in this specific matter there is no conflict between laws nevertheless the Convention as stated above provides a major number of reliefs than the Commercial Code.

The obligations of a judicial depositary of an aircraft are:

1. Guarantee the exercise of his charge and take possession of the aircraft.
2. Keep the aircraft and protect the aircraft in the place of the deposit.
3. Advise of any event related to the aircraft.
4. Not use or alter the aircraft.
5. Return of the aircraft.

### **1. Guarantee the exercise of this charge and take possession of the aircraft.**

The designation of the depositary does not generate responsibilities automatically. First, the depositary must guarantee the exercise of his charge with a surety bond or a real estate property, and then he must take formal possession of his charge. The aforementioned rule does not apply if the depositary is the debtor; in this specific case the law authorizes the exercise of the charge of depositary without granting any guarantee.

The depositary will receive the aircraft under formal inventory.

When the aircraft which is going to be seized is affected by a previous attachment, no new depositary will be appointed; the depositary previously designated will remain in its charge to take care of all subsequent attachments, and shall inform this situation to the courts that ordered them. If the depositary is removed, the designation of a new depositary will be notified to the other courts.

### **2. and protect the aircraft in the place of the deposit.**

The second obligation, and the most important, is keeping and protecting the aircraft, which will be conserved at court's disposal.

The depositary, when receiving the aircraft, will inform the court the location where the aircraft is parked, and will obtain the court's authorization for the storage expenses if needed.

If the depositary could not make the expenses, he will inform the court, so that in a hearing, the parties will agree the manner of handling the expenses; if no agreement is reached, the court will impose that obligation to the party that placed the attachment over the aircraft.

“The depositary must inform the court about any situation that could affect the aircraft.”

### **3. Inform of any event related to the aircraft.**

The depositary must inform the court about any situation that could affect the aircraft. This obligation is very relevant because is a movable asset that could easily deteriorate if it doesn't receive the proper maintenance. The court has broader faculties to order any kind of remedies in order to avoid the deterioration of the aircraft.

### **4. Prohibition of using or modifying the aircraft.**

Taking into consideration that the aircraft must be at all times at the court's disposal, is obvious that the depositary is not authorized to use it or alter it in any way. The violation of these prohibitions could provoke criminal sanctions against the depositary.

### **5. Return the aircraft**

The judicial depositary must deliver the aircraft to person that the court designates, at the moment the court request it.

One important rule that must be mentioned<sup>3</sup> is the one related to the attachment of an aircraft that the debtor has leased. In that case the lessee will be notified of the attachment, with the objective that such party may know that all the subsequent rent payments must be made to the judicial depositary, and warned of double payment in case of disobedience.

Finally, another significant rule is that the depositary and the attaching creditor, when it is appointed creditor, will be joint and several obligors of the acts performed by the depositary in the exercise of his charge. When the depositary is the appointed by the debtor, the depositary will be the unique obligor.

“The judicial depositary must deliver the aircraft to person that the court designates, at the moment the court request it.”

*3.- Article 459 of the FCCP*

### Sixty Six new potential routes for low-cost airlines.

The Ministry of Tourism (“Sectur”) detected 66 routes that are operated by land transportation, which can be a potential market for the low-cost airlines, this because they guarantee levels of occupation of 80 percent. These destinations include the northern and some southeast cities in Mexico.

*El Economista. 01/June/12.*

### Mexicana bets on international routes.

As part of the reoperation project, Mexicana de Aviacion, pretends to recover all of the routes owned before entering the concurso mercantil proceeding. Mexicana’s principal objective is the international market, also big domestic flights such as Guadalajara and Cancun. *Milenio Diario. 02/June/12.*

### Ministry of Tourism – Positive expectation for the General Tourism Law.

The Ministry of Tourism (“Sectur”) considers that before the present federal administration finishes, the General Tourism Law, which has been on standby since 2009, should be published on the Federal Official Gazette. *El Financiero. 06/June/12.*

### Airlines violate the limit of foreign capital legally permitted.

Only three national airlines (Interjet, Aeromar, and Magnicharters) respect the Foreign Investments Law which provides a maximum of 25% of shares from freeing investors. Miguel Aleman Magnani, CEO of Interjet, mentioned that the rest of the Mexican enterprises need to be investigated, because they have pass the established limit. *Milenio Diario. 07/June/12.*

### Airlines expect profits for 2012.

Airlines worldwide expect profits for this year 2012, even though the industry was preparing for a crisis due to the European debt. IATA expects for airlines worldwide to have a profit of 3,000 million dollars. Tony Tyler, director of IATA, informed that business for European airlines is deteriorating rapidly because of the economic crisis, resulting in great losses, and European airlines are preparing to deal with the crisis. *El Financiero. 11/June/12.*

In this month extract was prepared by Jessi Saba and Mauricio Castillo.

### Price of fuel have not yet affected the tickets price.

The raise on the price of the fuel by 30% that took place in May 2001 and until last month, forced the airlines to reevaluate their total costs. Such raise caused for the fuel to represent almost 44% of the total costs and the airlines, yet, CEO's of Interjet, Volaris and Aeromexico agree that this fact has not yet affected the tickets price. *El Financiero*. 12/June/12.

### Mexico City International Airport vs. Mexicana.

The legal department of the Mexico City International Airport (the "AICM"), has officially requested Mexicana de Aviación to return the AICM the MRO currently used by Mexicana. The AICM has been in several discussion with Mexicana in order for Mexicana to return the MRO due to the that such airlines owes the AICM many rents. *El Economista*. 13/June/12.

### The Ministry of Communications and Transports – position before the Mexicana crisis.

Mexicana de Aviación return of operations is getting harder with every single day. One of the main factors that is affecting Mexicana's return is the position that the Ministry of Communications and Transport (the "SCT") has adopted. The SCT requested the presence of the police in order to stop the members of the Union from a manifestation and blockage which affects third parties rights. SCT explained that the workers' rights have been attended and safeguarded, so they will not allow any more manifestations or blockages. *La Jornada*. 14/June/12.

### Mexico opens up to other airlines.

The Mexican Government has demonstrated an opening towards foreign airlines, in order for more of these foreign airlines to fly to touristic centers and elevate the level of connectivity. *El Universal*. 21/June/12.

### The National Chamber of Air Transportation announces routes.

The National Chamber of Air Transportation (the "CANAERO") announced that during the second semester of this year 2012, airlines will inaugurate 1,500 new weekly frequencies to different destinies, both national and international. *La Jornada*. 27/June/12.

In this month extract was prepared by Jessi Saba and Mauricio Castillo.

## Juan Antonio Tiscareño

Attorney at Law: Admitted to practice law in 2006. Mr Antonio Tiscareño, of Mexican nationality obtained his law degree at Universidad Panamericana, Mexico City and attended post-graduate studies in Civil Litigation by Universidad Panamericana, Mexico City. LANGUAGES: Spanish and English. PRACTICE AREAS: Commercial Litigation and Civil Litigation. e-mail: [jtiscareno@asyv.com](mailto:jtiscareno@asyv.com)

## ABOGADOS SIERRA Y VAZQUEZ

Prol. Reforma No. 1190 25th Floor  
Santa Fe México D.F. 05349  
t. (52.55) 52.92.78.14  
f. (52.55) 52.92.78.06  
[www.asyv.com](http://www.asyv.com) / [www.asyv.aero](http://www.asyv.aero)  
[mail@asyv.com](mailto:mail@asyv.com)

The articles appearing on this and on all other issues of Coelum reflect the views and knowledge only of the individuals that have written the same and do not constitute or should be construed to contain legal advice given by such writers, by this firm or by any of its members or employees. The articles and contents of this newsletter are not intended to be relied upon as legal opinions. The editors of this newsletter and the partners and members of Abogados Sierra y Vazquez SC shall not be liable for any comments made, errors incurred, insufficiencies or inaccuracies related to any of the contents of this free newsletter, which should be regarded only as an informational courtesy to all recipients of the same.