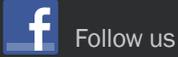


# COELUM

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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.

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# Priority Dilemma of Publicly Registered Rights and Interests on Aircraft Objects in Mexico.

by Kendra Medina.\*

In 2007, when Mexico ratified the Convention on International Interests on Mobile Equipment and the Aircraft Protocol, which was adopted on November 16, 2001 in Cape Town (the “Convention”), the Convention provisions were adopted as part of the Mexican legal system<sup>1</sup>, including the provisions concerning the registration of international interests at the international registry created pursuant to the Convention (the “International Registry”). Prior to the adoption of Cape Town Convention as part of the Mexican legal system, the rules and regulations of the Mexican Aeronautic Registry<sup>2</sup> were already in place.

However, no specific measures were taken to amend the applicable legislation of the Mexican Aeronautic Registry in order to allow for harmonic co-existence of both the Mexican Aeronautic Registry and the International Registry and when the Convention was adopted, Mexico did not make specific declarations concerning this matter either. As a result, in terms of registration timing and therefore priority, there is the latent possibility of having conflicting registrations concerning one aircraft object between the International Registry and the Mexican Aeronautic Registry. The purpose of this article is to discuss the nature of this possible conflict and the options to minimize its effects until such time as the applicable Mexican legislation is amended.

Registrations that can be made with the International Registry are categories of interests in which specific recordable rights must be qualified under the applicable domestic law. The categories are classified as: i) international interests, ii) prospective international interests, iii) assignment of international interests, iv) prospective assignment of international interests, v) recordable non-consensual rights and interests, vi) acquisitions of international interests, vii) notices of national interests and viii) subordinations of interests. An international interest is the interest held by the person to whose benefit a security agreement is entered into, by the seller under a conditional sale with title reservation agreement and by the lessor under a lease agreement. A prospective international interest is an interest that is intended to be created or provided for in the future, upon the occurrence of an event, either certain or uncertain and a recordable non-consensual right and interest corresponding to those referred to in the declarations made by a contracting State (which Mexico made no reference to).

“The categories provided by the Convention are broad enough to allow any rights and interests created under the domestic law to be registered at the International Registry.”

1.- Article 133 of the Mexican Constitution provides that, along with the Constitution and the legislation passed by the Congress, all ratified international treaties shall be deemed to be the Supreme Law of the Union and judges shall be abide by such. This article has been interpreted in a way that international treaties and federal laws shall be considered to be at the same level, above the local laws and Constitutions of the States conforming the Mexican Republic.

2.- Chapter X of the Civil Aviation Law and the Mexican Aeronautic Registry Regulations.

In accordance with the Mexican Aviation Civil law, registrations that can be made with the Mexican Aeronautical Registry, among others, are documented acts by way of which either the ownership or possessory rights to an aircraft object (including any rights in rem) are acquired, transferred, amended, affected or terminated. Lease agreements on both Mexican and foreign registered aircraft, are expressly included. The categories provided by the Convention are broad enough to allow any rights and interests created under the domestic law of the contracting States of the Convention to be registered at the International Registry. For instance, under Mexican law, lease agreements and any amendments thereof (including extensions and terminations), pledges and mortgages, and any title transfer, or related assignment of rights are basically the complete set of documented acts concerning the ownership and possessory rights with respect an aircraft object that are recordable at the Mexican Aeronautic Registry and all of them fall into either the category of contract of sale, international interests or assignment of international interests, as the case may be, either in their modality as current or prospective, depending on any conditions precedent agreed thereunder (*condiciones suspensivas*).

Consequently, there are no acts affecting the ownership or possessory rights over an aircraft object recognized by the Mexican legal framework that could not be registered at the International Registry and, provided both registries are intended to have the same purpose, which is to provide publicity to the registered acts (rights are not created by virtue of their registration, they both are declarative in nature), it is logical to conclude that the domestic registry should have either been removed or at the very least, the applicable legislation should have been amended to turn the obligation to register all documented acts affecting the ownership and possessory rights over an aircraft object with the domestic registry into an option to register. However, since there were no amendments or adaptations to the Mexican law in order to accommodate the operation and purpose of the International Registry in order to harmonize it with the Mexican Aeronautic Registry, aircraft operators, lessors, lenders, sellers, buyers and any other parties involved in transactions affecting the possessory or ownership rights over an aircraft operated or registered Mexico, face the necessity to complete the registration of any of such acts at both the International Registry and the Mexican Aeronautic Registry.

In theory, no conflict should exist when completing both registrations, provided that, as mentioned before, the international interests derived from the Convention which provisions are part of the Mexican legal system by virtue of the recognition made as such by the Mexican Constitution. However, in practice the Mexican Aeronautic Registry qualifies the authenticity and validity of the documents that are being filed for registration, as well as the logical chain of acts previously registered at the Mexican Aeronautic Registry in connection thereto, causing a difference in terms of time of registration of the acts contained in such documents with the time of registration of the international interests derived the International Registry.

The Mexican Aeronautic Registry does not have the authority to qualify whether the rights and

interests of the parties under a title transfer, an aircraft mortgage or an aircraft lease agreement are valid or not, but it does not have the authority to reject the registration based on the lack of formality required under Mexican law for a document to be subject to registration at the Mexican Aeronautic Registry (i.e. signatures on the document need to be legitimate, which can only be certified by a notary public of the place where the document was executed. Documents in a foreign language also need to be translated into Spanish, etc.).

Although it would be ideal not to have duplicate registrations at the domestic and international level, provided the wide categorization of international interest under the Convention, it certainly does not make any harm if the local registry makes sure that the documentation submitted is legitimate and follow a logic chain of registered events, particularly if the Mexican Aeronautic Registry is able to do this analysis in such a way that can accept or reject immediately the filing when one of the basic formal requirements are not met, and is not turned into a bureaucratic process.

“The time it takes for the Mexican Aeronautic Registry to complete its analysis creates a time gap between the registration of a right or interest and the corresponding registration of the international interest at the International Registry”.

However, the time it takes for the Mexican Aeronautic Registry to complete such analysis creates a time gap between the registration of a right or interest and the corresponding registration of the international interest. Contrary to the way in which the International Registry establishes the priority of the international interests which is determined on a first-to-file basis, the Mexican Aeronautic Registry establishes the priority of any underlying right on a first-to-register basis.<sup>3</sup> Because the purpose of the registration at the Mexican Aeronautic Registry is to make the underlying rights derived from the documentation filed opposable to third parties, such underlying rights are in no way affected or invalidated by the lack of registration, but the window of time between the date the international registration is completed and the date the local registration is completed may have an impact on the priority that is being determined.

The foregoing distorts what the Convention and the International Registry are pursuing in terms of immediately available information to the public on all interests registered on an aircraft object. For instance, if a mortgage on a Mexican registered aircraft is registered at the International Registry (Mortgage A), but the Mexican Aeronautic Registry rejects the registration for lack of formalities (or worst, no documentation is filed for registration with the Mexican Aeronautic Registry) and during the time no registration is completed at the Mexican Aeronautic Registry a buyer of the aircraft searches the Mexican Aeronautic Registry and based on his findings that no liens

3.- Article 21 of the Mexican Aeronautic Registry Regulations provides that all registered documents shall be opposable to third parties from the date and time on which the registration is completed or a preventive notice is made to the existing registrations.

are recorded, acquires title to the aircraft through a secured credit and actually completes the registration of a different mortgage over the aircraft (Mortgage B), which mortgage would have the priority? If a controversy ever arises in a case like this, it would be up to the relevant court under the applicable law to determine the priority, but there could be an indemnity claim already underway with respect to the bona fide party that acquired the aircraft, which would need to be dealt with under the applicable law to the title transfer transaction as an action in personam. An action in rem in Mexico to repossess the aircraft under a mortgage subject to Mexican law, would necessarily need to be enforced before the Mexican courts. Under Mexican law, all controversies must be solved in accordance with the applicable legal provisions or to its interpretation in accordance with its intended purpose and, if there is no applicable law, then the general principles of law shall be taken into account.<sup>4</sup> Since the Civil Aviation Law is a federal law and the Convention for purposes of Mexican law is considered to be at the same level, both registries, the Mexican Aeronautic Registry and the International Registry created by such legal instruments are deemed to be of equal level as well and, provided no specific legislation has been passed in Mexico to deal with any conflicts that may exist between registrations made with both registries, then any solution with respect to such conflicts would need to be solved by the courts based on jurisprudence or the general principles of law.

Unfortunately such principles are not defined or listed by a single piece of legislation or authority, but only elaborated by several doctrinal authors. The Mexican Supreme Court has issued jurisprudence in connection with the application of such principles to controversies arisen in connection with situations not regulated specifically by legislation that describe such principles as “evident, undisputable and general legal truths that enables the judge to solve the case in the same manner as if the law, if it would have ever existed, would have solved it, without contradicting the group of legal provisions which omissions need to be filled-in with such principles,”<sup>5</sup> which is not that helpful either. If the law would have ever existed, then it would have at least determined the rank each of the registries should have. Likewise, the Mexican Supreme court has issued a jurisprudence stating that international treaties preempts federal legislation. Having said that, in order to minimize the effects of a gap in time between registrations with the International Registry and the Mexican Aeronautic Registry, a solution may be, to ensure that all registrations are completed at the International Registry upon closing of the relevant transactions, that the Mexican Aeronautic Registry, after completing its analysis of the relevant documentation, should complete the registration with retroactive effects as of the date of filing and that the parties to such documentation take all necessary steps to ensure that on the filing date the relevant documentation meets all formalities required by the Mexican Aeronautic Registry, and to procure to complete both filings on the same date.

4.- Article 1324 of the Commerce Code with respect to commercial controversies and Article 19 of the Civil Code with respect to controversies of civil nature.

5.- 5a. Época; 3a. Sala; Ap. 2000; Tomo VI, Común, P.R. SCJN; Pág. 104

# Approval decree of the agreement on certain aspects of air services between the European Union and Mexico.

by *Misael Arellano*.

In June, 2011 this author referred to the agreement on certain aspects of air services between the European Union and Mexico (the Agreement) that was published in the Official Journal of the European Union on February 12, 2011. Now, one year and three months later, on May 21st 2012, the President of the Mexican United States officially published in the Federal Official Gazette a Decree, issued by the Senate on the April 19, 2012, that approves the Agreement for its observance in Mexico.

This implies that now the Mexican Government must issue the last notes addressed to the European Union to confirm the Mexican internal procedures necessary that the Agreement enter into force have been concluded. Article 7, section 1 of the Agreement states: “This Agreement shall enter into force thirty (30) days after the date of the last note with which the Parties provide written notification, via diplomatic channels, that their respective internal procedures necessary for that effect have been concluded.”

## **PRECEDENTS.**

On first and second days of December, 2010, the Adjunct Ministry of Consulting and Constitutional Studies of the Federal Executive Power “*Consejería Adjunta de Consulta y Estudios Constitucionales del Poder Ejecutivo Federal*” and the Federal Commission of Regulatory Improvement “*Comision Federal de Mejora Regulatoria*”, respectively, issued their consent for the execution of the Agreement in order to update the current relationship between the European Union and Mexico in air services matters.

The Agreement was done at Brussels, Belgium on the fifteenth day of December in the year two thousand and ten. The Agreement was signed, by the Government of the Mexican United States: the Ambassador of Mexico in Belgium; and by the European Union: the Permanent Representative of Belgium and Chairman of the Permanent Representatives Committee and the General Adjunct Director of European Commission from General Directorate of Mobility and Transport.

“The principal reason for the Agreement is to establish the criteria to designate an air carrier as a European Union air carrier so as to be able to be designated by any member state of the European Union and be allowed specific traffic rights stated on the applicable bilateral agreement executed with Mexico ”.

On February 1st, 2011 the Agreement was sent to the Senate and its Board of Directors delivered it to the United Commissions of Foreign Affairs, Europe and Communications and Transport in the ordinary session on February 03, 2011.

## **RELEVANT CONDITIONS.**

The principal reason for the Agreement is to establish the criteria to designate an air carrier as a European Union air carrier so as to be able to be designated by any member state of the European Union and be allowed specific traffic rights stated on the applicable bilateral agreement executed with Mexico.

The Agreement had added to the provisions of 13 bilateral air service agreements, without affecting existing traffic rights, that have been executed between Mexico and:

- ✈ The Federal Government of Austria on March 27, 1995.
- ✈ The Government of the Kingdom of Belgium on April 26, 1999.
- ✈ The Government of the Czech and Slovak Federal Republic on August 14, 1990.
- ✈ The Government of the French Republic on May 18, 1993; amended and concluded on January 13 and February 04, 2004.
- ✈ The Federal Republic of Germany on March 08, 1967.
- ✈ The Italian Republic on December 23, 1965; amended and concluded on August 02 and December 07, 2004.
- ✈ The Government of the Grand-Duchy of Luxemburg on March 19, 1996.
- ✈ The Government of the Kingdom of the Netherlands on December 06, 1971; amended and concluded on August 24, 1992.
- ✈ The Government of the Republic of Poland on October 11, 1990.
- ✈ The Government of Portugal on October 22, 1948.
- ✈ The Government of the Kingdom of Spain on November 21, 1978.
- ✈ The Government of the Kingdom of Spain on April 08, 2003<sup>1</sup>.

Articles 2 of the Agreement will supersede the provisions in the thirteen executed agreements in respect to i) the designation of an air carrier by a state member of the European Union; and ii) refusal, revocation, suspension or limitation of the authorizations or permissions to air carriers.

Article 3 of the Agreement will complete safety issues applicable when a state member of the European Union has designated an operator whose regulatory control is exercised and maintained by another state member of the European Union, that are included in the same agreements excepting those that were executed with the Federal Republic of Germany; the Government of the Kingdom of Spain; and the Government of the Republic of Poland.

1.- Not yet entered into force at the date of signature of the Agreement.

As described in Article 2 of the Agreement, once received, the designation issued by a state member of the European Union, the Mexican United States shall grant the relevant authorizations and permits with no delay and in an indiscriminate way if:

“ ...

*a. The air carrier is established in the territory of the designating member State of the EU under the Treaty on the European Union and the Treaty on the Functioning of the European Union and has a valid operating license in accordance with the law of the European Union; and*

*b. Effective regulatory control of the air carrier is exercised and maintained by the member State of the European Union responsible for issuing its Air Operator Certificate and the relevant aviation authority is clearly identified in the designation; and*

*c. The air carrier is owned, directly or through majority ownership, and is effectively controlled by Member States of the European Union or nationals of such countries or by the countries listed in Annex III or nationals of those other countries.*

...”

Annex III of the Agreement states the countries that will be included in the rule described in Article 2, section C of the Agreement which are: i) the Republic of Iceland; ii) the Principality of Liechtenstein; iii) the Kingdom of Norway; and iv) the Swiss Confederation. The first three countries are under the Agreement in the European Economic Area; and the last under the Agreement between the European Community and the Swiss Confederation of Air Transport.

“... there is no specific regulation, requirement or proceeding clearly predetermined by the government to conduct this kind of “negotiation” with other countries...”

## **ISSUES INVOLVED.**

As this author has said, it is sadly evident that negotiations on this Agreement, were once again performed without taking into account the real requirements and current situation of Mexican international aviation. Even when the Adjunct Ministry of Consulting and Constitutional Studies of the Federal Executive Power, and the Federal Commission of Regulatory Improvement issued their consent for the execution of the Agreement; there is no specific regulation, requirement

or proceeding clearly predetermined by the government to conduct this kind of “negotiation” with other countries. In this case, it is also evident that there is no reasonable way in which a Mexican Ambassador could properly conduct a negotiation regarding specialist aspects of air services with the Permanent Representative of Belgium and Chairman of the Permanent Representatives Committee and the General Adjunct Director of European Commission from General Directorate of Mobility and Transport.

“It looks however that the current Agreement does not contain well balanced conditions for Mexican carriers to compete with European operators”

It is very important to understand and consider that current relationship between member states of the European Union and Mexican United States in respect of air services must be updated and improved, in order grant free competition and lay out the legal basis and rules that can achieve such purposes with the continuity of services. That is because the new Agreement will open the door to designate as many European carriers as possible to be able to operate to and from Mexico, with all the routes and frequencies that the thirteen bilateral agreements allow. This is for the benefit, growth and promotion of all parties under equal conditions. It looks however that the current Agreement does not contain well balanced conditions for Mexican carriers to compete with European operators.

### Sectur presents a study.

The Ministry of Tourism (SECTUR), presented a study that has the objective to increase the air connection in México. Ten national and international airlines participated on the preparation of this study. This document details the existence of 205 potential air routes on which 89 are national and 116 international. These potential flights could result very profitable, considering that the study shows an occupancy rate of 80% on each flight unit. *Milenio. 03/May/12.*

### Jet fuel prices affect Airlines.

The increase on the fuel prices on the last months, and the several affectations of the international economic crisis, has prompted the complicated financial situation of different airlines. In opinion of the Center-North Airport Group (OMA), if the fuel prices continue to increase, different airlines may fall in an economic insolvency, stop operations or request the declararion of the bankruptcy process. OMA stated that the stop of operations of Mexicana, Aerocalifornia, Alma, Aladia, and Avolar had an important impact on this Group. *Milenio. 08/May/12.*

### SCT, Guardian of the process of Mexicana.

The Minister of Communications and Transports (SCT), Dionisio Pérez Jacome, stated that the Ministry on his charge will remain attentive to the restart process of Mexicana and will colaborate and grant the Air Operator Certificate. Perez Jacome said that “the following steps is the formalization of the creditors agreement in order to be in possibilities to demonstrate the flying habilities and this Ministry will issue the Air Operator Certificate”. *Impacto Diario. 16/May/12.*

### Russian airplanes.

After the crash of the Russian aircraft, Sukhoi SuperJet 100, there is uncertainty related with the Mexican airlines that purchased such aircraft. On April 16, the General Directorate of Civil Aviation granted the permission to use the said aircraft in Mexico. *Reforma. 10/May/12.*

## Extract of Mexican Aviation News

Mexican government analyze to subvention the airlines in their first flights. It is essential to increase the connectivity as Mexico has forty four (44) bilateral treaties that demand more routes and frequencies into and outside Mexico, that is why in addition to restructure the ways to increase tourist arrivals, the federal government is analyzing the subvention to airlines in their first conducting flights to new destinations, said the head of SCT. *Milenio Diario. 18/May/12.*

### SECTUR doubts of the return of Mexicana de Aviación.

Even when a strong skepticism exists in regards with the return of Mexicana, touristic entrepreneurs and local public officers said that even if Mexicana starts to flight again, it is so unlikely for the airline to recover the dimensions and strengths that it had. *El Financiero. 22/May/12.*

### Airlines Recover the Market.

National airlines recover part of the market that was left unattended after Mexicana de Aviación shutdown; yet, the market has not been able to reach the same levels when Mexicana de Aviación was still flying, in 2010. Bigger effort is needed. *El Financiero. 25/May/12.*

### Interjet will return to Mexicana de Aviación their routes.

Interjet will be returning the routes that they have as a loan from Mexicana de Aviación once the airline returns to the market and it is proved that all of the Concurso Mercantil proceeding was carried legally. A study about connectivity will be certainly needed, and at the adequate time it will be prepared by the Ministry of Communications and Transports, the Ministry of Tourism and the major industry players. *La Jornada. 28/May/12.*

### Mexico City International Airport vs. Mexicana de Aviación.

The Mexico City International Airport (AICM) wants to seize Mexicana's MRO, because Mexicana owes the AICM an important amount of money. The Agreement between Mexicana and the AICM is dated as of 1982. Mexicana has invested a lot of money in the constructions and improvements throughout the years, so the AICM now wants to raise the rent 460% monthly without considering such investments. *La Jornada. 28/May/12.*

In this month extract was prepared by Jessi Saba, Vera García, Samantha Garnica and Roberto Najera.

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