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Are concessions for the provision of Public
Air Transport Service subject to mortgage?

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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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Are concessions for the provision of Public Air Transport Service subject to mortgage?

by Vera García.

The issue under analysis relates to the possibility to mortgage a concession issued by The Ministry of Communications and Transports (SCT) for the establishment and exploitation of the Public Air Transport Service. This will take into account that all Mexican legal entities which intend to provide a Public Air Transport Service requires a concession certificate¹, which includes the name of the concessionaire; the object of the concession; the routes and aircraft authorized and the rights and obligations of the concessionaire². This analysis will be focused on answering three principal questions:

- ✈ Is it possible to mortgage a concession or the rights derived from it?
- ✈ What is really subject to mortgage? i) the concession, ii) the concession-derived rights, iii) both?
- ✈ In the assumption that a concession is subject to mortgage, which are the limits that the law of the matter establishes?

First of all, a mortgage is a real property constituted in transferable specific goods, that are not delivered to the creditor, and which entitles in case of default of the secured obligation, payable with the value of the goods, in the degree of preference established by law.³

Based on the above, to determine if concessions for the establishment and exploitation of the Public Air Transport Service are subject to mortgage is necessary to determine if the concessions or the rights conferred on them are transferable, therefore it is relevant to refer to the specific law, the Civil Aviation Law (CAL).

Article 16 of the CAL provides that the SCT may authorize the transfer of all or part of the rights and obligations provided in the concessions; therefore goods subject to transfer are subject to mortgage according to the Federal Civil Code.⁴

“Article 16 of CAL: The Ministry will authorize total or partial assignment of rights and obligations established under concessions or permits within a term of ninety calendar days as from the filing of application, provided assignee commits to perform any pending obligations assuming the conditions established by the Ministry to such effect.”

Furthermore, article 14 of the CAL establishes revocations as a ground for terminating a concession and Article 15 of the CAL establishes the grounds for revocation, among which are the following:

- ✈ “Assignment, mortgage, encumber, transfer or disposal of concessions, permits or rights thereon conferred in favor of a government or a foreign state.”

1.- Article 9 of the Civil Aviation Law.

2.- Article 13 of the Civil Aviation Law.

3.- Article 2893 and 2895 of the Federal Civil Code.

4.- “Article 2906 of the Federal Civil Code. - only who can create a security interest can transfer, and only can be mortgaged property that can be transferred.”

- ✈ “Assignment, mortgage, encumber, transfer or disposal of concessions, permits or rights thereon conferred in favor of other persons wherever nationals or foreign, without the Ministry’s authorization”.

Derived from the above, we may affirmatively state that concessions and the rights conferred on them, may be transferable with the SCT’s authorization; in favor to a national or foreign particular person but not to a government or to a foreign state.

“...we may affirmatively state that concessions and the rights conferred on them, may be transferable with the SCT’s authorization and in favor of a national or foreign particular person but not to a government or foreign state”.

Now, considering the next point, what is really subject to mortgage? The concession, its derived rights, or both? If we review Article 93 of the General Law of Communication Means, we could say that is possible to mortgage a concession and the derived rights, as the right to operate the authorized aircraft and routes; fixed and mobile equipment used; and the use, benefits and profits generated or to be generated by the concession exploiting.

As stated in Article 93 of the General Law of Means of Communications:

“Article 93. - The mortgage includes, unless otherwise agreed:

“I. - The concession;

II. - The means of communications or transportation, with all their dependencies, accessories and, in general, everything that belongs to them, when they have been built under the concession.

III. - The fixed and mobile equipment necessary for the construction, operation, repair, renovation and maintenance of the means of communications or transportation, and their dependencies,⁵ and

IV. - The capital destined by the company for operation and administration of the means of communication or transportation, cash on hand for current business, claims arising directly from the operation and the rights granted to the company by third parties”.

In virtue of the above, we understand that concession itself is subject to mortgage and also its derived rights; however it does not entitle the mortgagee to impede or obstruct the nature of the concession. As an example, the mortgagee of a concession for the establishment and exploitation of the Public Air Transport Service is unable to sell or dismantle an aircraft; however, has the right to object the sale of an aircraft and/or the accessories, the sale of the equipment needed for the operation of the concession, as well as merging with other companies, to protect safety of his mortgage loan.⁶

5.- The mobile equipment should be property of the mortgager.

6.- Article 96 of the General Law of National Goods.

In this order of ideas, and answering the third and final question, it can be constituted a mortgage on all or part of the concession, as long as the mortgage is not referred to the last tenth of the total time for which the concession was granted, in the case of companies subject to reversal.⁷

“In virtue of the above, we understand that concession itself is subject to lien and also its derived rights...”

It is worth mentioning that the concessions for the provision of Public Air Transport Service are not reversion concessions, since the concessionaire does not return any goods of public domain of the federation to the state when the concession expires.

It is also important to note that having the required authorization for the constitution of a mortgage on an aircraft which is included in the concession; the appropriate registration before the Mexican Aviation Registry must be made,⁸ within the civil aviation section and in the folio of licenses and permits.⁹

Finally, the mortgage guaranty will be cancelled at the same moment that the concession term is complies; and, if case, the property subject to public domain of the federation will be returned to the state with all its assets, free of reversible charge accessories and responsibilities, even the obligations acquired before.¹⁰

In conclusion, is possible to fully or partially mortgage a concession with the SCT´s authorization, and with the observance of the formalities established by law. The mortgagee will have the right to receive all profits and benefits of the concession until the concessionaire pays the debt to the creditor. However the mortgagee does not have the right to sell or transfer the objects and accessories necessary to exploit the concession, having only the right to object to the sale of the necessary equipment for the operation of the concession, as well as merging with other companies.

7.- Reversal: when the concession is over, the rights object of the concession with all its accessories become property of the state, without any compensation to the concessionaire.

8.- Article 101 of the Regulations of the Civil Aviation Law.

9.- Article 10 and 11 of the Regulations of the Mexican Aeronautic Registry.

10.- Article 94 of the General Law of Domestic Goods.

The Space Protocol.

by Jessi Saba.

From the Convention on International Interests in Mobile Equipment signed at Cape Town on November 16, 2011 (the “Convention”), three different protocols derive. The first one, on matters specific to aircraft equipment, the second one on matter specific to railway rolling stock, and finally, the most recent protocol on matters specific to space assets, signed at Berlin in 2012.

The Protocol to the Convention on Matters Specific to Space Assets (the “Protocol”), has its source in the particular demand for space assets, and given that these are high value assets, there is a need for an uniform international law that supports the financing of such assets, and protects the rights of the creditors over the asset. Another important matter that has contributed to the creation of this Protocol is the benefit that all states obtain from the expansion of space-based services.

Firstly, it is important to understand the concept of the term “space asset”, which, as the Protocol defines, means any man-made uniquely identifiable asset in space or designed to be launched into space, and comprising:

- (a) A spacecraft, such as a satellite, space station, space module, space capsule, space vehicle or reusable launch vehicle.
- (b) A payload (whether telecommunications, navigation, observation, scientific or otherwise).
- (c) A part of a spacecraft or payload such as the transponder.¹

“Thus, on transactions where the space assets are in space and not on Earth, as Article 3 of the Protocol states, the asset is considered to be located in the Contracting State in which the space asset is registered.”

One of the most important aspects in any international transaction is to have correctly identified the location of the object, and to understand any implications that can possibly derive from the application of such jurisdiction. Thus, on transactions where the space assets are in space² and not on Earth, as Article 3 of the Protocol states, the asset is considered to be located in the Contracting State in which the space asset is registered.

Therefore, in order to be able to define the location of the asset, it must be registered in any Contracting State, so the system to identify such items must be exact and practical. The Protocol recognizes this need and provides, in Article VII, that a description of the asset is enough to identify it, if it contains the following:

- (a) A description of the space asset by item;
- (b) A description of the space asset by type;
- (c) A statement that the agreement covers all present and future space assets; or

1.- Article 2 (k) – (I-III)

2.- As defined by the Protocol in article 2(j): Space means outer space, including the Moon and other celestial bodies.

(d) A statement that the agreement covers all present and future space assets, except for specific items or types.³

For uniformity purposes, the Protocol, following the structure of the first two Protocols, contemplates the creation of an International Registry specifically for space assets. Each and every Contracting State will have the right, under Article XXXI of the Protocol, to design at any time an entity within their territory as an entry point for the International Registry.

As for the International Registry, the Protocol clearly states that article 16 of the Convention, which states the following, shall also be applicable for space assets:

“An International Registry shall be established for registrations of:

- (a) international interests, prospective international interests and registrable non-consensual rights and interests;*
- (b) assignments and prospective assignments of international interests;*
- (c) acquisitions of international interests by legal or contractual subrogations under the applicable law;*
- (d) notices of national interests; and*
- (e) subordinations of interests referred to in any of the preceding sub-paragraphs.”*

As for Article XXXII of the Protocol states, that in addition to Article 16 of the Convention the International Registry specific for space assets shall also provide for the following:

- (a) the recording of rights assignment and rights reassignments⁴*
- (b) the recording of acquisitions of debtor’s rights by subrogations*
- (c) the registration of public service notices under Article XXVII (1) of the Protocol⁵*
- (d) the registration of creditors notice under Article XXVII (4) of the Protocol⁶*

The main objective of this Protocol is to provide legal certainty for any creditor of a space asset that in any case of insolvency or bankruptcy they will not lose any interest on the asset, and that the Protocol will provide for financing of these assets to be more accessible, and with the International Registry,

3.- Article VIII (1) of the Protocol.

4.- Article 2 (h) and (i) of the Protocol, defines as follows “rights assignment” means a contract by which the debtor confers on the creditor an interest (including an ownership interest) in or over the whole or part of existing or future debtor’s rights to secure the performance of, or in reduction or discharge of, any existing or future obligation of the debtor to the creditor which under the agreement creating or providing for the international interest is secured by or associated with the space asset to which the agreement relates; and “rights reassignment” means a contract by which the creditor transfers to the assignee, or an assignee transfers to a subsequent assignee, the whole or part of its rights and interest under a rights assignment.

5.- Where the debtor or an entity controlled by the debtor and a public services provider enter into a contract that provides for the use of a space asset to provide services that are needed for the provision of a public service in a Contracting State, the parties and the Contracting State may agree that the public services provider or the Contracting State may register a public service notice.

6.- A Contracting State shall at the time of ratification, acceptance, approval of, or accession to this Protocol specify by a declaration under Article XLI(1) a period for the purposes of the preceding paragraph not less than three months nor more than six months from the date of registration by the creditor of a notice in the International Registry that the creditor may exercise any such remedies if the debtor does not cure its default within that period.

the creditors will be able to enforce any legal action against any third parties. Also, considering the enormous benefit that the expansion of space-based services provides to all countries, it is of vital importance to every state to sign, accept, approve and ratify this Protocol because it will not only mean economic advantages due to the gain of certainty that the creditors will have by investing in a country where the Protocol is ratified, but also, a worldwide cooperation for the expansion of space-based services.

“The main objective of this Protocol is to provide legal certainty for any creditor of a space asset that in any case of insolvency or bankruptcy they will not lose any interest on the asset, and that the Protocol will provide for financing of these assets to be more accessible, and with the International Registry, the creditors will be able to enforce any legal action against any third parties”.

Finally, the Protocol opened for signature in Berlin on March 9, 2012. The Protocol will enter into force between the Contracting States, as follows:

- (a) the first day of the month following the expiration of three months after the date of the deposit of the tenth instrument of ratification, acceptance, approval or accession; and
- (b) the date of the deposit by the Supervisory Authority with the Depository of a certificate confirming that the International Registry is fully operational.⁷

It should constitute a priority for any state to sign and ratify this Protocol, because the benefits of this Protocol are not simply economic. This Protocol will benefit human kind by providing more space-based services, given that the provision of these services will be easier after the financing of space assets and creditors' rights are protected.

7.- Article XXXVIII (1) of the Protocol

Airlines flight to its maximum historic.

The recent data reported by the airlines make us think that the total passenger traffic including international and domestic flights, will grow at a double digit rate on 2012 and will surpass the level reached in 2008, despite the aeronautic panorama looked cloudy last January, analysts of the industry consider. The economical recovery, the reduction of rates in some routes of the domestic market and the arrival of new destinies with the expansion of there fleet, has permitted to most of the airlines and airports groups to have positive results on the present year. *CNN Expansion. 04/September/12.*

Mexican Official Norm about air transport has been modified.

The Ministry of Communications and transport (SCT) modified the Mexican Official Norm (NOM) that establishes the requirements that the providers of air transport service need to fulfill in order to obtain the Air Operator Certificate (AOC). The Ministry said that the changes to the NOM-008-SCT3-2002 are for the providers of air transport service that cover the requirements to obtain the AOC in accordance to the modality of the service that they provide, which will impact in a positive way to the aviation sector. The modifications will entry into force 60 days from today and are directed to the license and permit holder of public service of air transport, and also to the permit holder to provide private commercial air transport service. *Reforma. 13/September/12.*

The Mexican Aerospace Industry signed an agreement with the German Federal Association of Aerospace Industry.

The Mexican Federation of Aerospace Industry (FEMIA) signed a memorandum of understanding with its equal in Germany, which will allow maintaining its development with competitiveness. The memorandum was subscribed with the German Federal Association of Aerospace Industry, the biggest association in that country in such industry. Through this agreement Mexico will produce industrial pieces that will be sold in Germany, and at the same time Mexico will receive German technology that will maintain the evolution on this industry. *La Crónica. 13/September/12.*

Boeing on track to reach the production goals of the 787.

Boeing is on the track to reach its new goal of production for the 787 Dreamliner. Boeing is producing 3.5 new aircraft monthly and it is planning to increase the monthly production to 5 aircraft at the end of the year, and to manufacture 10 at the end of 2013. A spokesman from Boeing said that the American company had already increased the production of global supply chain to an equivalent of five 787 aircraft monthly. *El Financiero. 18/September/12.*

Airlines in crisis generate losses of one billion pesos to GAP.

Raul Revuelta, Commercial Manager of Pacific Airport Group (GAP), informed that the airlines that had gone bankrupt in the past 14 years have generated economic losses of one billion pesos. The Manager also mentioned that the airline that has more debts with them are Aviacsa with 70 million pesos while Mexicana owes 40 million pesos. He also indicated that the economic losses are for the rate use of the Airport and spaces leasing. *Milenio. 20/September/12.*

IATA claims for more foreign investments on airlines.

The General Manager of the International Air Transport Association in Mexico (IATA), Antonio Martinez considered that it is necessary the liberation of the industry to detonate its growth and he also said that a fundamental part is to allow direct foreign investment (IED) in airlines which is currently limited to 25 percent. He said that “such adjustments are necessary, because some airlines of the region have 5 years of advantage comparing to us.” *The Economist. 20/September/12.*

Judge pushes to SCT Mexicana’s certificate.

The rector judge of Mexicana’s “concurso mercantil” Edith Encarnacion Alarcon Meixueiro, asked the authorities of the General Directorate of Civil Aviation (DGAC) to notify what else does the airline needs to obtain the Air Operation Certificate. Since October 2010, 30 different groups has shown their interest to invest capital in Mexicana. However most of the companies have not shown their financial capacity, when is one of the four rules that the SCT requires to grant the certificate. *CNN Expansión. 25/September/12.*

American Airlines plans to cut out 4,400 jobs.

American Airlines confirmed its plans on the cut out of 4,400 employees before the year ends, after the airline declared bankrupt. The spokesman of the airline informs that 11,000 employees will receive a warning that they can lose they job, this because of the requirement of the law. The most affected with this policy are the mechanics, floor employees, but the less affected are the pilots and the flight attendants. For the airline, with presence along 50 countries, the raises on the laboral costs and the price of the fuel make his debt grow, with losses valued in 162 million dollars on the third quarterly of the past year . *Reforma. 25/September/12.*

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