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Practical applicability of one relief established by
the Cape Town Convention in respect to aircraft.

Juan Antonio Tiscareño P. 01-02

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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Practical applicability of one relief established by the Cape Town Convention in respect to aircraft.

by Juan Antonio Tiscareño.

In this article I will describe some of the recent experiences that our firm has acquired in litigation cases before Mexican courts, related to the applicability and effectiveness of one of the reliefs established in the Cape Town Convention, when attempting to immobilize an aircraft which is in possession of the lessee.

The common problem of recovery of aircraft in Mexico

It is a typical situation that when an aircraft lease agreement is breached by the lessee due to non-payment of rent and the aircraft is in possession of the lessee and at his disposition. During this default period unfortunately, the lessee can use the aircraft at will, although he is in breach of his obligations. This situation is very distressing for the lessor, because the aircraft could be misused or abandoned in an unknown location, or even cannibalized by third parties if the appropriate security measures are not being taken. In such scenario, one of our main concerns as legal advisors of the lessor, along with the payment of rents overdue, is to be aware of the exact location of the aircraft, and if possible immobilize it in order to repossess it as soon as possible.

Before the Cape Town Convention entered into force, Mexican laws didn't provide speedy and effective measures in order to achieve immobilization of an asset owned by the creditor. The standard practice in these cases, was to initiate an *ordinary commercial procedure* (as stated in the Commercial Code) that ended up with a resolution of the court in favor of the lessor, which granted, among other things, an order for the recovery of the aircraft after two or maybe three years of litigation. During the process, the aircraft was exposed to a lot of dangers, and of course couldn't be immobilized. Thus there was a long term period of risk to the detriment of the lessor. That situation has changed now; in our firm we've recently tried different processes with positive results, using one relief established in the Cape Town Convention, as I will explain in the following paragraphs.

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The argument for obtaining the court order of immobilization of aircraft has been grounded in article 13, 1, c) of the Cape Town Convention which establishes the following:

“Article 13. Relief pending final determination

1. *Subject to any declaration that it may make under Article 55, a Contracting State shall ensure that a creditor who adduces evidence of default by the debtor may, pending final determination of its claim and to extent that the debtor has at any time so agreed, obtain from a court speedy relief in the form of such one or more of the following orders as the creditor requests:*

(...) ¹

(c) Immobilization of the object;”

1.- Article 13 of the Cape Town Convention contains additional reliefs such as the preservation of the object and its value or the possession, control or custody of the object, etc., although we will not study them in this analysis, they are available for any creditor that meets the requirements of the Convention..

I think is convenient to highlight some aspects of this article with the purpose of understanding it correctly:

- **A creditor who adduces evidence of default by the debtor:** To obtain an order of immobilization, the lessor as creditor must argue a default. In the example of an aircraft lease agreement breached due to nonpayment of rent by the lessee, the lessor only needs to adduce such default; however it is advisable to introduce as evidence the agreement. Another good example of this idea would be to introduce a document which contains an acknowledgment of debt, and is preferable to a document that only provides the formula for the calculation of the debt. In our experience we have initiated enforcement procedures with documents which contain both characteristics: a liquid amount and a formula for estimating interests or other amounts.
- **The obtaining from a court of a speedy relief, pending a final determination of a claim:** The order of immobilization will be subject to a final determination of the court; the lessor may obtain the relief, but this privilege does not necessarily mean that the court will grant a final ruling in favor of lessor, therefore it is important to make a prior analysis in order to know if there are more chances of success than of failure in obtaining a final ruling in benefit of the lessor, because in case of failure it is likely that the lessee could claim compensatory damages and lost profits due to the immobilization order.
- **The debtor has accepted that such speedy relief could be used against him:** In our example, this means that at some moment, previous to the request of the relief directed to the court, the lessee has accepted that the lessor could use in case of default of the aircraft lease agreement, the relief of immobilization established in the Cape Town Convention.

“To obtain an order of immobilization, the lessor as creditor must argue a default...”

Another issue important to address is that according to the Cape Town Convention², the order of immobilization could be preceded by the imposition of any terms that the court considers necessary to protect the debtor, in case the creditor in implementing the order of immobilization, fails to perform any of its obligations under the Convention, or fails to establish its claim, wholly or in part, on the final determination of that claim³. What we have experienced is that the court in some cases requests a guarantee as a requirement for the issuance of the order⁴.

As we can see, none of the requirements established in article 13 of the Cape Town Convention are complicated. They can be easily fulfilled by having an agreement with this provision. In my opinion, what could be more difficult is to put this relief into practice with local courts that have limited knowledge or not knowledge at all, of the Cape Town Convention. For that reason it is essential to prepare an exhaustive and precise request of relief, which explains thoroughly the legal basis of the relief of immobilization, its extent and consequences. It is also desirable that the Mexican laws somehow adopt the reliefs recognized in the Cape Town Convention, in order to facilitate their applicability in all litigation procedures.

2.- Article 13, 2, a) and b) of the Cape Town Convention.

3.- The imposition of terms by the court is only a possibility; in some cases, the order of immobilization is granted without the requirement of any terms at all. This situation depends of the special circumstances of the case.

4.- The criteria for establishing the amount and terms of the guarantee are not delimited in law. It is usual that the court determines an amount of 10% of the value of the asset as guarantee, however this is only an option, the court could determine a superior or minor amount, according to the circumstances. The guarantee is usually created in the form of a bail bond or a deposit-in-court certificate.

Aerospace Suppliers get an Impulse.

The growth acceleration company “Impulso” is launching a program in order to identify, and integrate fifty enterprises that are dedicated to the aerospace industry in various areas and activities. The national program of aerospace preparation also known as PNPA (for their acronym in Spanish) is looking to increase the participation of medium and small national companies in this sector. The PNPA have as a final objective to indentify the companies with the potential and to introduce them to others in the industry. *Reforma. 03/December/12.*

Mexican airlines carry 11% more passengers.

The seven airlines that operate in Mexico carried 23,167,800 passengers between January and October of this past year according to the General Directorate of Civil Aviation (DGAC). This represents an increase of the 11% compared to 2011. This is the result of great momentum that this industry is experiencing in this country said the Executive Chief of the Aerospace Transportation Chamber (Canaero). Canaero insists that if the demand continues to increase, it will be necessary to have a new international airport. *Reforma. 04/December/12.*

Expected increase of PAX traffic with the Peña administration.

Passenger traffic is expected to increase at least by double compared to the economy of the country in this new presidential period. Both the economy and fuel are now stable, which will allow airlines to increase their fleets and expand into new markets, while allowing for more passengers to fly with better service. *CNN. 05/December/12.*

Aerospace sector keeps waiting for more dynamism after the changes in the SCT.

After the changes in the Ministry of Transportation and Communications, the DGAC is hoping that the operations will be a more dynamic, stronger, and fairer, and will operate with more transparent regulations. Guillermo Heredia Executive Chief of the Aerospace Transportation Chamber (Canaero), of the sector mentioned that if the sector continues with this kind of increase, the new airport project will move ahead sooner than expected. *Cronica. 10/December/12.*

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

An amendment to Airports Law has been approved.

The chamber of deputies approved an amendment to the Airports Law in order to conciliate the competitiveness between airlines. It is now a job of the Ministry of Communications and Transport of Mexico to design and to establish service schedules with new criteria and to grant concessions to operate airports. The responsibilities of the Ministry are to design, formulate and establish policies and programs for the development of the national airport system. *Reforma. 10/December/12.*

Federal Government postpones the norm regarding child travelers.

The federal government postponed the obligation to present a notarized letter when a child wants to leave the country or to enter the territory by air or sea without his parents or guardians. The reason of this decision was the lack dissemination about the subject, also the lack of training of the airport personnel, airlines and migratory authorities, also the problems in the the application of the norm, because there were some aspects on the regulation that were not clear. *Reforma. 24/December/12.*

New Airport is pending.

The alternative airport for Mexico City was one of the subjects that was not solved by the last administration, and now is one of the challenges for the new administration. In words of the Minister of Communications and Transport of Mexico, Gerardo Ruiz Esparza, due to the fact that the metropolitan airport cannot grow any more, the possibility will be analyzed of building a new airport with the existent infrastructure. However, the economic package of 2013 does not include any budget for the building of a new airport. *El Financiero. 26/December/12.*

Mexico seeks to be a larger supplier in the aerospace industry.

This coming year, Mexico is seeking to increase the business of supplying components used in the aerospace industry by 50 to 60 percent. Mexico is actually the main supplier for the USA and number 6 for the European Union. The aerospace industry is a young market and can be exploited in several ways and with the new programs and effective legislation it can be very dynamic. *Excelsior. 31/December/12.*

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