

COELUM

Monthly Digital Publication by
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Photo by Viridiana Barquín

April 15, 2014 year 08 | No. 12

The Standarization of
Aviation Business Practices
vs the Discretionary Power
of the Authority.

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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 Standardization of Aviation Business Practices vs the Discretionary Power of the Authority.

by *Viridiana Barquín*.

The aircraft finance industry has been strengthened far from what was expected a few years ago due to the crisis. Today everything seems different with the occurrence of Asian banks into the sector and the healthy development of the role of the Irish and other traditional financiers known for their predominant role in the industry. It therefore becomes increasingly necessary that the aviation business practices become more internationally standardized, and in the context of aircraft finance and aircraft security, it is essential that the process of the local registries would not become an exception. But what happens when the authority considers necessary, in a unilateral way, to order to any of the parties involved, certain conditions that are not even stated by the applicable law?

“...Article 16 of the Mexican Constitution imposes the authority the obligation to justify and support the acts which may involve any affect in possessory or property rights.”

For this edition of Coelum, we will approach the topic of the right of the administrative authority, such as the Mexican Aviation Registry (“RAM”), to impose as a condition to proceed with the registry of the operative documents involved in the transactions related to aircraft financing, the obligation to file some other additional documents that, are not only not relevant for the transaction, but also not mandatory, pursuant to any applicable law. This right of the administrative authority is defined under Mexican Law as “Discretionary Power” (“*Facultad Discrecional*”).

As a general rule, administrative acts are named by criteria strictly defined by the law and Article 16 of the Mexican Constitution imposes the authority the obligation to justify and support the acts which may involve any affect in possessory or property rights. Nevertheless, the exception to the rule are those actions of authority in which there is a free field of action due to the absence of an express legal provision for the specific acts that they should affect. The above mentioned freedom of action granted by the law to the administrative authority is what is known as discretionary power. It is the free appraisal that the law grants to the authority to estimate in a precise way every particular case and on the basis of this to determine the limits of its action. The Discretionary Power is limited to those cases in which there are several possible concurrences whose elements are not previously regulated or that the principle of equity will remain better protected by the estimation from the authority in each individual case¹. But the Discretionary Power does not mean freedom of the authority to act without the burden of justifying their action. Therefore these administrative acts should be limited by the law and must distinguish between what is the result of the mere will or arbitrariness of the authority and what, by contrast, has the support of an act duly founded and motivated and indeed the authority usually does not indicate the legal support for the use of such discretionary power, and only has argued that it based on Article 11 (I) of the Regulation of the Mexican Aeronautical Registry, which states that, all acts related to the property or possessory rights on the aircraft. All the individuals are therefore entitled to appeal against any administrative act when affecting its rights or property?² Now, as for the impact of this right of the authority in the topic of the healthy development of the transactions related to the aircraft financing mentioned at the beginning, many are the cases that might be brought, but this article will summarize some of the most common cases.³

1.- *Teoría General del Derecho Administrativo*. Miguel Acosta Romero.

2.- *Facultades Discrecionales de la Administración. Los Administrados Tienen Interés Jurídico para Impugnar su Ejercicio cuando afecte sus Derechos*. Décima Época. Registro: 2002304. Instancia: Tribunales Colegiados de Circuito. Tesis Aislada. Semanario Judicial de la Federación y su Gaceta. Libro XV, Diciembre de 2012, Tomo 2. Materia Común. Tesis: IV.3o.A.26 A (10a.). Página: 1331.

3.- <http://www.reuters.com/article/2014/01/24/aviation-finance-idUSL5NOKY29220140124>. Consulted on March, 17, 2014.

For example, the registration of the interest of a lender or any financing bank does not require any consent, permission or approval from the lessee and no other filings, registrations, licenses, consents, approvals, exemptions or certificates are necessary in Mexico to record and perfect such interests (other than the filing of the documents by which such interest is constituted). Pursuant to Mexican law, the effect of recording Lender's interests before the Mexican Aeronautic Registry ("RAM") is to protect their rights under the Lease and over the aircraft and comprises public notice to third parties in respect to such right and interest. Although no consent, permission or approval from the lessee and no other filings, registrations, licenses, consents, approvals, exemptions or certificates are required under Mexican law for the authority to proceed with the recordation of the documents by which an interest of a lender is constituted, it has become a common practice to receive an official request from the authority to provide the consent of the lessee as the operator, in order to proceed with such registry.

"...these administrative acts should be limited by the law and must distinguish between what is the result of the mere will or arbitrariness of the authority and what, by contrast, has the support of an act duly founded and motivated."

There is no legal support for requesting such consent in a transaction where the lessee is not a party and where the right to the quiet enjoyment of the aircraft by lessee is not affected in any way. So, why a unilateral requirement of this nature should be fulfilled? Moreover, why is the consent of the operator necessary for the rights of an aircraft lease agreement to be assigned? It is important to note that this request has been received even if a typical "Notice and Acknowledgment" or "Lessee Consent" had been filed and although this issue could be easily resolved by requesting the lessee to execute a consent in the form required by the RAM. We are of the opinion that if there is any lease security assignments/liens (or any other transaction to which the lessee is not a party but which is advisable to have registered locally), this current position of the RAM should not be relevant because it is not applicable from a legal perspective, and it imposes unnecessary additional actions that imply time, cost and efforts to the parties.

Furthermore, if the above described request to provide a consent from lessee might seem excessive, even more excessive is the example whereby in the event of the prepayment of a credit and the resultant filing of the relevant termination agreements and notices to the lessee, the authority has requested, in addition to the above mentioned consent of lessee (being once more a transaction to which lessee is not a party) but also the consent of such company that has ceased to be a creditor and who has no longer any interest over the aircraft or the lease. In this case, we have also faced that the position of the authority is to not remove from the certificate of registration (in cases of Mexican registration marks) the documents that supported the rights of the parties that had previously been the creditors, despite the fact that these rights are no longer in force and effect and there are no more rights in favor of such previous creditor over the aircraft. The authority just proceeds to record the termination agreement, not removing as it should be, from the certificate of registration, such acts that were previously registered but are no longer in effect, in order to, as have been advised by to the RAM, keep the sequence of registration acts that are or "had been" related to the aircraft.

Given the examples described above, not with the intention of identifying obstacles, but to urge practical solutions; this article does not attempt to note an abuse of the Discretionary Power of the RAM, on the contrary, and aware that the use of such right by the authority is intended to protect the rights over the aircraft, this author finds it appropriate however, to submit a proposal in order to have an approach with the authority towards to define normative standards and to agree on a single line of action that will lead to a more efficient process in all its stages, by giving priority to the principle of reasonableness for the benefit of the aviation business practices.

Mexican Government finishes bid to revive Mexicana's bankruptcy.

A Mexican judge has finally declared Mexicana Airlines in state of bankruptcy and ordered the sale of the debt-ridden company's assets, since no credible new investor expressed real interest in the air carrier. Mexicana stopped flying in 2010 because its financial problems after being one of Latin America's oldest continually operating airlines. It began flying in 1921, after carriers like Australia's Qantas and Colombia's Avianca. The Federal Judiciary Council said the decision meant an administrator will be appointed to start selling off the company's assets to repay the airline's obligations. *Times Colonist. April 7, 2014.*

EU backs compromise on plane CO2 emissions.

Aviation is a fast-growing source of CO2 emissions, blamed by experts for contributing to global warming. The EU will not levy a carbon emission tax on airlines when their planes are outside European airspace, the European Parliament has decided. The exemption for airlines will apply until 2017, by which time a global deal on aviation emissions may be in place. An EU tax will still apply for flights inside the EU. The new rules followed difficult talks with EU governments. *BBC NEWS. March 4, 2014.*

Learjet 75 Goes on Latin American Demo Tour.

The new Bombardier Learjet 75 began a nearly four-week Latin America demonstration tour. The light jet, which received FAA certification in December, will visit cities in Mexico, Panama, Colombia, Guatemala, Brazil and Chile. It will be on static display during Aero Expo in Toluca. The Learjet will also be showcased at several events and stops throughout the region. *Ainonline. March 4, 2014.*

SENEAM selects Airbus ProSky solution.

Metron Aviation, part of Airbus ProSky, will work with SENEAM to deploy its Harmony solution as a trial, to demonstrate the benefits Air Traffic Flow Management (ATFM) in Mexico. SENEAM, whose vision is to engage all stakeholders and support airspace users and its end customers, not only wants to work on better flow management, it also wants to introduce the Collaborative Decision Making (CDM) concept. The objective is to ensure that airlines and their passengers benefit from this initiative. Mexico air traffic experienced more than a nine per cent growth last year and will double by 2025. With such a forecast, ATFM is key to the ATM modernisation needed and is recommended by ICAO. *Air traffic Management. March 4, 2014.*

Peña Nieto praises aeronautics industry.

Mexico is advancing on the right route, in order to have an important aeronautics industry in the future, President Enrique Peña Nieto said on Monday. Peña Nieto's comments were made during the inauguration of the TechOps Aircraft Maintenance, Repair and Checkup Center in Querétaro. According to Peña Nieto, exports from Mexico's aeronautics industry during 2013 grew 9 percent over 2012, adding up to \$5.4 billion in total exports, making Mexico the sixth-largest aircraft provider to the United States. He added that the number of people employed by the industry grew 9.3 percent, which he said is a clear example of the great potential of Mexico's aeronautics industry. Mexico's aeronautics industry is concentrated in the states of Baja California, Querétaro, Nuevo León, Chihuahua and Sonora, employing 32,000 workers in what Peña Nieto called "dynamic aeronautics clusters." *The News. March 4, 2014.*

Boeing 787 Dreamliner arrives to Mexico.

Boeing 787 Dreamliner Aircraft, N787BX, also known as Boeing's ZA003 newest product, landed on March 7th in the Mexican Capital. The purpose of the landing in Mexico was part of Boeing's International Campaign to show its newest product to clients and customers. The airplane was on exhibit for two full days, in order for Chief Executive Officers, General Directors and other employees of Mexican Airlines to get to know the famous Dreamliner. So far, the exhibit was extremely successful as Mexico is the only Latin American country that has petitioned for several Dreamliners to fly in its skies. *Fly-news.es. March 8, 2014.*

Malaysia Airlines shares fall 18% after jet disappearance.

A multinational team has been looking for Flight 370 since Saturday after it disappeared en route from Kuala Lumpur to Beijing. Shares in the firm recovered some of the early falloff, but are already down more than 30% for the year. China Southern, which operated Flight 370 as a code share, also saw its shares fall by more than 3%. Malaysia Airlines has been struggling as low cost carriers have increased competition in the region. A planned share swap with budget airline Air Asia was called off in 2012, after pressure from Malaysia Airline's unions forced the firm to scrap the proposal. In 2013, Malaysian Airline System, the firm that operates Malaysia Airlines, reported a loss of 1.17bn ringgit (\$360m) compared with a 432m ringgit loss in 2012. *BBC News. March 10, 2014.*

INTERPOL implores country to update international passenger documents with INTERPOL's archives.

As a result of Malaysian Airlines Flight MH370 vanishing into thin air, investigation suggests that at least three people on board were flying with fake IDs. INTERPOL in Frankfurt, held a press conference stating that such events are extremely grave, and should not go undetected. INTERPOL is preoccupied that most of such events go completely unnoticed and part of the responsibility resides in airline and airport security failures. This adds up to around a billion passengers per year who fly globally without proper ID corroboration according to INTERPOL estimates. The International Police suggests and urges all countries to update national archives with their own archives, as there are currently over 39 million stolen passports in circulation. *El País. March 11, 2014.*

IATA Launches Lithium Battery Shipping Guidelines.

The International Air Transport Association (IATA) announced the release of the first edition of the Lithium Battery Shipping Guidelines (LBSG) providing comprehensive guidance on how to safely ship lithium batteries and products containing Lithium batteries. The LBSG brings together all of the relevant content of the IATA Dangerous Goods Regulations and UN Manual of Tests and Criteria, as well as detailed examples on packing, marking, labeling and documentation. Lithium batteries are safe to transport provided that they are designed, tested, manufactured and packaged in accordance with the global transport safety standards. Therefore it is essential that shippers comply with the relevant dangerous goods regulations to meet their safety obligations. *IATA News. March 21, 2014.*

Bombardier Delivers First Global 6000 aircraft for a Mexican Customer.

Bombardier delivered the first Global 6000 during a ceremony at its facility in Montreal, to its new owner, Aero Angeles. "We are delighted to see the first Global 6000 enter service in Mexico," said Bombardier Business Aircraft regional vice president of sales for Latin America, Stephane Leroy. "Mexico and Latin America are key markets for Bombardier." Bombardier expects to deliver more than 2,300 business jets in Latin America over the next 20 years. *Ainonline. March 25, 2014.*

Aviation fuel 14% more expensive in Latin America: IATA.

The International Air Transport Association requested the governments of Latin America to focus on tax, infrastructure and regulation subjects, because the price of the fuel in the region, is 14 percent more expensive than the world average, for example in Brazil the price of the fuel is 17 % more expensive. *El Financiero. March 26, 2014.*

Cancun Aiport an economic paradise for Mexico.

Cancun's International airport has become one of Mexico's most pivotal international connecting points, if not the first. Quintana Roo's Governor, Mr. Borge Angulo, has mentioned that Cancun's airport is the gateway that connects the Mexican Riviera Maya with the rest of the world, Mexico's biggest touristic destination. There are major economic benefits from an airport that receives flights from over 80 different countries. *Reportur. March 27, 2014.*

Research will define aviation project for Tizayuca.

The Secretary of Communication and Transportation of Mexico, Gerardo Ruiz Esparza, stated that once that they have the results of the research being undertaken in order to extend the operative capacity of airports in the Valley of Mexico, that has its principal axis on the International Airport of Benito Juarez, in the capital city of the country, it will then determine what type of aviation project will be developed at Tizayuca. *Milenio. March 29, 2014.*

A French Enterprise opens an airplane fuselage factory in Sonora.

Latecoere, the French aeronautic industry firm, opens in the capital city of Sonora. It is the first factory in the country manufacturing aircraft fuselages, with an investment of 29 million dollars in a project designed to supply the two of the world's principal aircraft builders, Boeing and Airbus. *El Financiero. March 29, 2014.*

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