

“Public and Social Interest provisions”:

A case related to airport services.

by Julio Vargas

P. 01-03

MARCH NEWS on

Mexican Aviation

P. 04-05

Contributors

P. 06

sierra

April 15, 2017 year 11 | No. 12

Photo by Carlos Sierra

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.

“Public and Social Interest provisions”:

A case related to airport services..

by Julio Vargas

Public and social interest is a legal concept that emerges from the International Private Law and it is used by countries, among other things to resolve conflicts between international laws.

However in some countries like Mexico, the concept “Public and social Interest” is commonly and to some extent exaggerated used in Civil Law, and it constitutes a limit to the private will of entities and individuals in private law.

“What calls my attention highly is the fact that the judge simply overview or forgot to consider that this type of public biddings are regulated in a federal law which has also been declared of public and social interest, that is the Acquisitions, Leases and Services of the Public Sector Law..”

Many federal laws in Mexico are declared to be of public and social interest, regardless the subject matter and the lawmakers will elaborate whatever motives they have to support such declaration.

Mexican Civil and Commerce Federal Codes which regulate private civil and commercial acts between individuals provide that the execution of acts against “public interest” will be deemed void or null, except when the law expressly states the contrary. Private rights that do not affect the public interest may be expressly waived by private individuals as long as they also do not affect third party’s interests.

Furthermore, in Mexico we also have a Constitutional lawsuit (Amparo) available to private individuals and entities designed as a legal process to protect such individuals against acts or actions from public entities and authorities which may be considered that violate in general, human and civil rights that are expressly granted in our national Constitution.

Such constitutional lawsuit also addresses the issue of “public and social interest” related to the power of a judge to provide for the suspension of an administrative or authority act against individuals until final ruling.

The applicable law that establishes the rules of the constitutional lawsuit, technically named Ley de Amparo, provides for different events that order the judge to grant the immediate suspension of the authority act.

Even this Amparo Law also includes a chapter in which it provides the cases where, if requested by the petitioner, the suspension must be granted as well as it provides specific events in which suspension must be denied.

Since cases dealing with suspension in Amparo trial are not the subject matter of this analysis, reference will only be made to certain relevant part of the provision where suspension is regulated, which reads as follows:

“Article 129.- ...

...Even in cases where the suspension petition must be denied due to express provision in the Amparo law, if the constitutional court finds that the suspension denial could cause a greater impact to the social interest, then it should be exceptionally granted.”

With this brief background we will comment on a ruling regarding mexican airport regulation in a specific case where a private entity participated recently into a state bidding process for a public contract regarding the continuance of operations of a mexican airport.

At some point of the bidding process the private entity was eliminated from such contest, and considering that such rejection violated its civil rights, it filed the constitutional lawsuit against such administrative resolution which prohibit it to continue in the bidding process.

“The abusive use of the Public and social interest institution leads us to this type of conflict in which a judge must decide which public and social interest of two different federal laws shall prevail due to its importance and relevancy.”

In its motion, the entity requested to the judge to provide as to the suspension of the administrative act (state bidding process) until the amparo lawsuit was finally judged.

In its ruling under the title: *“AIRPORTS SUSPENSION SHALL NOT BE GRANTED AGAINST THE ADMINISTRATIVE PUBLIC BID PROCESS TO CONTINUE WITH ITS OPERATION, SINCE IT AFFECTS SOCIAL INTEREST AND PUBLIC INTEREST”*¹

The federal judge considered that in this particular case, he could not grant a suspension of the bidding process because in his opinion it would constitute a violation to public and social interests. In its consideration rationale the judge ruled:

“... because society is interested that the services pertaining to the general communications means shall not be interrupted and that such services be rendered efficiently by technically capable and authorized individuals or entities as well as with safety and competitiveness in all forms of transportation, specifically with regards to air transport, thus and although is true that the rejection of the suspension request may cause damage in the personal rights of petitioner and perhaps even monetary damages, it is also true that the personal interest shall not be above the existing and unpostponable public and social interest necessity to continue with the performance and operation of the airport services, that begins with the public bidding procedure due to the social relevance and importance that such air traffic services represent that cannot be paralyzed...”

At a first glance, the judge considerations appear to be undisputable, but a closer look will evidence the general and not so relevant arguments to sustain the public and social interest in this particular case.

What calls my attention highly is the fact that the judge simply overview or forgot to consider that this type of public biddings are regulated in a federal law which has also been declared of public and social interest, that is the Acquisitions, Leases and Services of the Public Sector Law (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público). This federal law provides for the public bidding procedures and it is intended to protect and safeguard, in the public and social interest, fairness, transparency, avoidance of corrupt acts and always considering the best market deals, prices and efficiency of bidders in public works.

The abusive use of the Public and social interest institution leads us to this type of conflict in which a judge must decide which public and social interest of two different federal laws shall prevail due to its importance and relevancy.

Whichever prevails will make us think if a particular federal law is not so socially relevant in the first place.

In the case of study, I believe that society is more interested in the fairness, legality, transparency and avoidance of corrupt acts in public biddings than who actually, may become the winner. Therefore in my opinion, the suspension should had been granted to the petitioner in order to prevent corruption acts, greyness and unfairness in those

1.- (Época: Décima Época; Registro: 2000188; Instancia: Tribunales Colegiados de Circuito; Tipo de Tesis: Aislada; Fuente: Semanario Judicial de la Federación y su Gaceta; Libro V, Febrero de 2012, Tomo 3; Materia(s): Común, Administrativa; Tesis: VI.1o.A.9 A (10a.); Página: 2246 AERÓDROMOS. NO PROCEDE CONCEDER LA SUSPENSIÓN EN CONTRA DEL PROCEDIMIENTO ADMINISTRATIVO DE LICITACIÓN PARA CONTINUAR CON SU FUNCIONAMIENTO, POR AFECTAR EL INTERÉS SOCIAL Y EL ORDEN PÚBLICO.)

public biddings.

Needless to say, since it is not the main purpose of this paper, that the judge also lacks of any consideration provided in the Amparo law regarding the events in which the suspension of the administrative acts must be granted. There is no provision therein that expressly prohibits to the type of suspension that the judge rejected.

So here comes the problem, which public and social interest is more important.

Airport operations are government concessions to private entities for the purpose of private commercial exploit intended to produce economic benefits for such particular entity.

As we can see, an airport operation entity is more concerned of its profits which it responds to a specific private interest of economic nature as opposed to the "public interest" of the airport service. So it is questionable if the federal law that regulates general communication means, in this case, airport operations, constitutes a superior public interest rather than the actions and conducts of government authorities which at all times have to be transparent, fair and legal related to a public bidding process to award a private airport operator entity the airport operation permit.

Whichever prevails will make us think if a particular federal law is not so socially relevant in the first place.

In the case of study, I believe that society is more interested in the fairness, legality, transparency and avoidance of corrupt acts in public biddings than who actually, may become the winner. Therefor in my opinion, the suspension should had been granted to the petitioner in order to prevent corruption acts, greyness and unfairness in those public biddings.

Needless to say, since it is not the main purpose of this paper, that the judge also lacks of any consideration provided in the Amparo law regarding the events in which the suspension of the administrative acts must be granted. There is no provision therein that expressly prohibits to the type of suspension that the judge rejected.

So here comes the problem, which public and social interest is more important.

Airport operations are government concessions to private entities for the purpose of private comercial exploit intended to produce economic benefits for such particular entity.

As we can see, an airport operation entity is more concerned of its profits which it responds to a specific private interest of economic nature as opposed to the "public interest" of the airport service. So it is questionable if the federal law that regulates general communication ways, in this case, airport operations, constitutes a superior public interest rather than the actions and conducts of government authorities which at all times have to be transparent, fair and legal related to a public bidding process to award a private airport operator entity the airport operation permit.

Air carriers may impose an Amparo claim against sanctions, says the Ministry of Transport and Communication.

The Ministry of Transport and Communication (SCT acronym for its name in Spanish) announced that air carriers are able to impose Amparo Claims before the competent Courts against sanctions they receive from the Mexico City International Airport (AICM) regarding the delayed and canceled flights. The reason is that is commonly known that this sanctions are derived of the Airport's saturation level. The way of operation is going to be through the AICM web page which has a specific section to report the possible delays and cancellations of flights. <http://www.informador.com.mx/economia/2017/710470/6/aerolineas-pueden-ampararse-ante-sanciones-dice-sct.htm> March 06, 2017.

ICAO Council adopts new CO2 emissions standard for Aircraft.

After months of debate, ICAO has adopted a new aircraft CO2 emission standard aimed to reduce the greenhouse gas emissions on the global climate. The aircraft CO2 emissions measure represents the world's first global design certification standard governing CO2 emissions for any industry sector. The Standard will apply to new aircraft type designs from 2020, and to aircraft type designs already in-production as of 2023. Those in-production aircraft which by 2028 do not meet the standard will no longer be able to be produced unless their designs are sufficiently modified. <http://www.icao.int/Newsroom/Pages/ES/ICAO-Council-adopts-new-CO2-emissions-standard-for-aircraft.aspx> March 07, 2017.

A proposal for future Airports: they'll be circular.

The Endless Runway is the name given to the new concept of a circular landing track that the Dutch scientific, Henk Hesselink, proposes to end with the actual congested air traffic. According to Henk Hesselink, the lack of capacity of the airports is the principal limitation of the air transportation growth. The Endless Runway consists in a diameter of 3.5 km that will surround the terminal building, the landing track has the dimension of three actual runways, but he assures that has the capacity of four. This idea also helps the environment because the Aircraft will use less fuel by avoiding cross winds. <http://www.eleconomista.es/evasion/nautica/noticias/8249906/03/17/Una-propuesta-para-los-aeropuertos-del-futuro-seran-circulares.html> March 09, 2017.

Sanctions to Airlines for delays and cancellations.

The Chamber of Deputies Transport Committee approved a decree that sanctioned in favor of the user for delays and cancellations attributable to airlines in air travel. The Committee on Transport reformed the Civil Aviation Law on Air Passenger Rights in order to sanction flight delays of 1 to 4 hours with payment of food and an economic penalty to the airline in favor of the user, or even discounts to the passengers for later flights. <http://www.eluniversal.com.mx/articulo/nacion/politica/2017/03/21/avanzan-sanciones-aerolineas-por-retrasos-y-cancelaciones> March 21, 2017.

Senate endorses civil aviation law damages.

For unanimity, the Senate approved reforms to the Civil Aviation Law that establish an amount of compensation for 75 times the Unit of Measure and Update, in case of loss or damage of luggage, by the airlines. In case of damage or destruction of hand luggage, the payment will be up to 40 Units of Measure and Update, in accordance with the amendment to article 62 of the Civil Aviation Law. <http://www.eluniversal.com.mx/articulo/nacion/politica/2017/03/23/senado-avala-en-ley-de-aviacion-civil-monto-de-indemnizaciones> March 23, 2017.

The U.S bans Laptops and iPads inside hand luggage in 10 airports.

Royal Jardanian was the first air carrier that announced this measure according to the new American regulation. A member of Trump's staff in the administration announced that the air carriers have a term of 96 hours to implement this measures, because the result intelligence analysis conclude that terrorist groups still attack aviation through underground explosives contained on electronic devices. So long there is no information of how long this measures are going to stand, or where did they obtain information of possible future terrorist attacks. <http://enelaire.mx/estados-unidos-prohibe-laptops-y-ipads-dentro-de-equipaje-de-mano-en-10-aeropuertos/> March 25, 2017.

Aviation key to enhancing UAE-Mexico relations.

UAE Minister of Economy Sultan bin Saeed Al Mansouri recently received Mexico's new Ambassador to the UAE, with whom he discussed ways to enhance cooperation in a number of priority areas for both countries. The meeting was held at eh ministry's Dubai headquarters and the two sides affirmed the importance of strengthening cooperation in the aviation sector because of its direct impact on the availability of broader trade and tourism opportunities. Al Mansouri further emphasised that practical steps should be taken to reinforce cooperation in the aviation sector which he explained will have a direct impact on establishing linkages and promoting advanced levels of trade and tourism exchange. <http://www.khaleejtimes.com/business/economy/aviation-key-to-enhancing-uae-mexico-relations> March 25, 2017.

Japanese Inventor creates Drone to pollinate plants.

The researcher is Eijiro Miyako, and he has invented gel that can be used to collect pollen from plants and deposit it on other plants using a micro-drone. The goal of the project is not to replace bees, which have been declining for several years, but to give farmers an alternative way to complement natural pollination. <http://www.aero-news.net/index.cfm?do=main.textpost&id=bf62a28c-bfc8-477f-97cc-d3f0b3064b90> March 25, 2017.

Interested in renewing fleet of the Mexican Air Force.

Considering that the Mexican Air Force withdrew the F-5 from its fleet of fighters in 2016, the Russian Aviation Corporation (OAK) showed intentions to make an offer to the Mexican government to incorporate in its place MiG-35 fourth aircraft Generation, manufactured by the Russian aeronautical company MiG. In addition, the Russian company would seek to encourage the growth of the aeronautics industry in Mexico through flexible financing schemes. <http://a21.com.mx/fuerza-aerea/2017/03/28/interesa-rusia-renovar-flota-de-la-fuerza-aerea-mexicana> March 25, 2017.

The Mexican Supreme Court denies public access of information for Mexico's president aircraft schedule.

With majority of six votes, the Supreme Court of Justice of Mexico, ruled against a resolution that ordered from the National Institute of Transparency, Access to Information and Protection of Personal Data ("Instituto Nacional de Transparencia, Acceso a la Información y Protección de Datos Personales" "INAI") the publicity of the flight schedules for the President's agenda. The Supreme Court ruled in favor of the Mexican Presidential Judicial Council ("Consejero Jurídico de la Presidencia") arguing that such information, whether past or future, is a matter of national security and is not to be publicly informed. <http://www.eluniversal.com.mx/articulo/nacion/politica/2017/04/3/tiran-ministros-apertura-de-informacion-de-vuelos-presidenciales> April 05, 2017.

COELUM

Monthly Digital Publication by ABOGADOS SIERRA

CONTRIBUTORS

JULIO VARGAS

Attorney at Law: Admitted to practice law in 1990. Mr. Vargas of Mexican nationality obtained his law degree at the Instituto Tecnológico Autónomo de México A.C. (ITAM). Mr. Vargas is specialized in financial litigation for over 20 years.

LANGUAGES: Spanish and English.

PRACTICE AREAS: Litigation of civil, commercial, stock market, banking, environmental, and administrative law in low courts, appellate and Supreme Court and corporate law.

e-mail: jvargas@asyv.com


sierra

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 / www.asyv.aero

The articles appearing on this and on all other issues of Terrum 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 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.