

# coelum.

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What's the safest exit????  
Pre-agreed rights to  
unilateral termination in  
case of default.  
by Viridiana Barquín

DECEMBER NEWS on  
Mexican Aviation

COELUM: Pronunciation: 'che-I&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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## What´s the safest exit????

### Pre-agreed rights to unilateral termination in case of default.

by Viridiana Barquín.

Self-help remedies are of significance when it comes to seeking mechanisms to obtain compensation from default of the contractual obligations by the other party under any agreement. When entering into that spectrum, a fundamental eagerness is to achieve a quick solution without having to wait for the long and tortuous judicial stages and timeframes.

*“The party in whose favor the obligation has not been fulfilled may choose to demand the enforcement or to the resolution (“rescisión”) declaring the obligation unfulfilled and demand the payment of damages.”*

The concept of the right to unilaterally terminate a contract due to the default of one of the parties thereunder (“*lex comisoría*”), appeared in the old Roman law with the contract of sale, where seller and buyer agreed that the sale will be considered as not made if the price was not paid within the stipulated period, which is actually obvious. This concept was thereafter extended to all other types of contracts but being misunderstood. For example, what happens when dealing with an aircraft lease agreement where the asset remains in possession of the party that is in default? Or being even more complex, what happens when dealing with a pledge agreement where the asset remains in possession of the lessee that it is not even the party in default, and its quiet enjoyment must be preserved?<sup>1</sup> It could be thought that in the obvious absence of receipt of the rental payments when due, and such default continues, a lessor has a clear right to recover possession of the asset, and henceforth, there is a material breach that defeats the entire purpose of entering into the contract; however, it is not that simple.

In Mexico the concept related to unilateral termination in case of an event of default is defined as “*Pacto Comisorio*”; which provides that, in case of non-compliance of one of the parties with respect to its obligations, the other party is entitled to take direct and immediate repossession of the asset over which a guarantee is constituted to reconstitute compliance of the obligation. Pursuant to Article 1949 of the Civil Code of Mexico City, even if it is not specifically included in the contract, the right to resolve obligations is implicitly understood in those reciprocal, in the event that one of the obligors does not comply.<sup>2</sup> The party in whose favor the obligation has not been fulfilled may choose to demand the enforcement or to the resolution (“*rescisión*”) declaring the obligation unfulfilled and demand the payment of damages.

However, and provided that self-help- remedies are not available under Mexican law; regardless of the option that would be elected; whether enforcement or, declaration of default with payment of damages, it cannot be

1-Actually, pursuant to Article 2883 of the Civil Code of Mexico City: “the parties may agree that the creditor will be entitled to keep the pledged property at the price that is set at the expiration of the debt, but not at the time of the conclusion of the contract. Provided that the rights of a third party will not be affected”.  
2- This has been confirmed by the Supreme Court within the AD 2883/58, 6th period, fourth part, volume XXXI, page 83 and AD 2784/78, Report of 1979, thesis 78, page 66 Federal Judicial Gazette.

exercised by the sole right of the party in whose favor the obligation has not been fulfilled, but only by effect of a resolution issued by a competent court. In fact, pursuant to Article 14 of the Mexican Constitution<sup>3</sup>, it is even forbidden as it goes against a human right (right of court defense).

*“...self-help remedies are not available under Mexican law...”*

Moreover, even in those cases where the parties have expressly and specifically consented included in the contract provisions related to the right of the other party to unilaterally terminate such contract in case of default of the other and the immediate possession (or re-possession) of the asset in question, lets say: (i) repossession of the aircraft by lessor under an aircraft lease agreement (and even that in some cases the lease termination certificate is included as an Schedule and the same duly executed by lessee would be a condition precedent); or (ii) take possession of the aircraft by pledgee/mortgagee, under a pledge or mortgage agreement; we could not set aside the following:

- **Under an aircraft lease agreement:**

In order to recover physical control of the Aircraft it is necessary to cause the title by which lessee has obtained possession thereof to be legally terminated. For such purpose, as we have explained, no ‘self-help’ remedies can be exercised or are available at law for which in absence of the consent of the lessee to agree to such termination, proceedings before a court of law must be initiated to obtain the termination of the Lease by resolution of such judicial authority. Upon termination of the lease, possession of the aircraft would be restituted to lessor in enforcement of the court order even against the will of by then former Lessee and even with the use of public force if necessary.

The administrative process for de-registration of an aircraft when lessee refuses to cooperate is very difficult to achieve without the express consent of the lessee considering that under Mexican law, the right to the aircraft registration is a right of the operator. The Mexican Aviation Registry has always refused to honor the unilateral request for de-registration of the aircraft when it has been filed by lessor or aircraft owner in consideration of the rights of lessee under the lease, which in accordance with the prevailing criteria of the Aviation Registry would violate the rights of possession of lessee without order of a competent authority, provided however that, in order to authorize the de-registration and the removal of the aircraft from the operating certificate of the lessee the original Registration Certificate, which must be, not only in possession of the Lessee permanently but also placed on board of the aircraft; would have to be delivered to the Mexican Aviation Registry for the relevant purposes. These are requirements that the lessor or owner cannot meet considering that these are prerogatives that by their nature can only be met by lessee. Moreover, eventhough that the lease is governed by a foreign law whether self-help remedies are more suitable, no foreign judgment can be directly enforced without the intervention of a Mexican court and without compliance of the applicable validation process in accordance with the Commercial Code (*“Codigo de Comercio”*) and, when applicable, the Federal Code of Civil Procedures (*“Código Federal de Procedimientos Civiles”*).

3- *“Article 14... No one shall be deprived of property, possessions, rights or freedom, except by means of judicial process dullyconducted before the previously established courts, in which the essential formalities of the procedure are complied with and in accordance with the applicable law...”*

- **Under a pledge or mortgage agreement:**

As mentioned, even that Supreme Court in some thesis<sup>4</sup> has recognized the right of the unilateral termination in case of default; the right of the party in possession (the lessee) cannot be disturbed; provided however that, if a security interest is registered Mexican Aviation Registry, deregistration cannot take place also without the consent of the creditor.

Now, that it has been described that self-help remedies are not available under Mexican law, as they are considered unconstitutional and it is not expected to be adopted in the Mexican legal system by the moment, if there is an event of default: WHAT WOULD BE THE SAFEST EXIT? CAN THE PARTY IN WHOSE DAMAGE THE OBLIGATION IS NOT BEING FULFILLED GO THROUGH THE FOREIGN LAW UNDER WHICH THE CONTRACT IS GOVERNED? Yes, if under such foreign law the right of unilateral termination is recognized, and self-help remedies are available; it can be enforced by Mexican Courts, provided and bearing in mind that, re-examination of the merits of the case pursuant to Article 1347A of the Commercial Code will have to be conducted.

For all the above, although self-help remedies are not recognized in Mexico, it is not the only way; and provided however that Mexican courts have ample experience in repossession/foreclosure proceedings involving aircraft lease agreements and equipment with foreign financiers, there are many circumstances that would play a role in each case and several successful terminations and repossession have been accomplished in the past in favour of many Lessors, Owners and Financiers with the correct study and analysis of the circumstances; and the proper application of the resources and remedies available in each specific case.

*4.- Federal Judicial Gazette, Volume XIII, June 2001, page 165, First Chamber, thesis 1a./J. 23/2001; see the judgment on page 166 of that volume. "The parties have the right to terminate the contract in whole or in part by virtue of default of the obligations set forth thereunder, by operation of law, which is not contrary to the principle that the validity and compliance of the contracts cannot be left to the discretion of one of the parties, since the parties are free to agree how to resolve the same, so it is not necessary for the court to determine the admissibility or inadmissibility of the termination, provided that the opposition of the party in default may determine the judicial intervention for the sole purpose of declaring the existence or nonexistence the default.*

## **IATA sees encouraging trends in airline safety.**

According to IATA, North Asia led the industry's safety performance with zero accidents during the first half of the year. Europe followed at a rate of 0.68 accidents per million flight sectors. Other regional rates per millions flight sectors were: North America (0.82), the Middle East/North Africa (0.99), Asia-Pacific (1.42), the Commonwealth of Independent States (CIS, 1.67) and Latin America (2.47). All these regions performed better than in the previous year. The global accident rate for the industry reached 1.20, down from 1.72. IATA points out that its members achieved a rate of 0.46 while non-members came in at 2.03. There were 23 accidents in the first half of 2017 globally, six of which involved hull losses and three of those involved fatalities. <http://atwonline.com/safety/iata-sees-encouraging-trends-airline-safety> December 05, 2017.

## **400 airports take environmental measures: ICAO.**

Approximately 400 airports around the world are carrying out or have concluded infrastructure renovation works that comply with environmental best standards. The objective of such renovations is to help reduce the emissions footprint in order to cope with the standards provided under international agreements by different countries. <http://a21.com.mx/aeropuertos/2017/12/05/400-aeropuertos-estan-adoptando-medidas-verdes-oaci> December 05, 2017.

## **IATA aims to avoid crisis by Brexit.**

As a consequence of the lack of agreement between the European Commission and the UK with regards to the terms to be imposed to the exit of the UK from the Union, UK airlines are said to face monumental challenges in the medium term. This concern was raised by Alexandre de Juniac during IATA's Global Media Day. <http://a21.com.mx/normatividad/2017/12/06/urge-iata-evitar-crisis-aerea-por-brexit> December 06, 2017.

## **Civil Aviation Law generated more than 3 million pesos for pax compensations.**

A month after the entry into force of the new Civil Aviation Law, the Federal Consumer Protection Agency (PROFECO) has claimed that it has reached 368 conciliations that has resulted in passengers receiving compensations for over three million pesos in case of flight delays. <http://www.economia-hoy.mx/empresas-eAm-mexico/noticias/8809118/12/17/Ley-de-Aviacion-Civil-ha-recuperado-Mas-de-tres-mil-lones-de-pesos-por-perdidas-de-vuelos.html> December 12, 2017.

## **It will cost more to fly from Mexico City.**

Those who take a flight in January next year from the Mexico City International Airport (AICM) will have to pay more for it. This is because as of January, 2018, the cost of the Airport Use Fee (TUA), for the use of the facilities, for domestic flights will go from 22.74 to 23.20 dollars. This increase of 2 percent, will not affect international flights who's rate will remain in 36 dollars. [http://diario.mx/Economia/2017-12-25\\_30600899/costara-mas-volar-desde-la-ciudad-de-mexico/](http://diario.mx/Economia/2017-12-25_30600899/costara-mas-volar-desde-la-ciudad-de-mexico/) December 12, 2017.

## **Plane made in Mexico will take off from the Queretaro International Airport.**

The General Direction of Civil Aviation authorized the flight tests at the International Airport of Queretaro (AIQ) of the first prototype (H1) of the composite wood and fiberglass aircraft developed by Horizontec incorporation. The prototype is the first 100% Mexican aircraft. <http://www.elfinanciero.com.mx/bajio/avion-hecho-en-mexico-despegara-del-aiq.html> December 16, 2017.

## **One Out, Three In: How Mexicana's Bankruptcy Made Mexico More Competitive.**

After the bankruptcy of Mexicana de Aviacion, the first and once principal airline in Mexico has created a more competitive environment for airlines and costumers. New and once small airlines across Mexico have gained the slots and routes formerly property of Mexicana, deriving in alternative services and more competition between airlines which has lead to better services and prices for costumers in Mexico. <https://airlinegeeks.com/2017/12/17/one-out-three-in-how-mexicanas-bankruptcy-made-mexico-more-competitive/> December 17, 2017.

## **Can bitcoin fuel aviation around the world?**

Bitcoin, the digital currency independent of central banks, countries and regulatory authorities, can be a great asset for aviation and save airlines significant amounts of cash, analysts say - and some carriers have already embraced it, including Japan's Peach and, this month, the US airline Surf Air, which announced it would support bitcoin and ethereum payments for its monthly membership and charter services. <https://www.thenational.ae/business/aviation/can-bitcoin-fuel-aviation-around-the-world-1.690130> December 24, 2017.

## **National air fleet registers 344 aircraft.**

The Mexican Aviation Authority (DGAC) reported that until the third quarter of this year the air fleet of national operating companies is integrated by 344 aircraft, with an average age of 8.6 years. According to his recent report, there are 117 A320, 68 Boeing 737, 43 Embraer 190, 22 Superjet Sukhoi, 14 B787 as well as the Embraer 145, 13 A321, eight ATR 42, to name a few. <http://canaero.org.mx/flota-aerea-nacional-registra-344-aeronaves/> December 26, 2017.

## **Urgency grows for the New Airport.**

National and international tourism authorities recognized that the need to cope with the today's demand of air transportation to and from Mexico City is high, however and that the need to conclude New Mexico City International Airport (NAICM). Alternate airports are seen as a tool that helps mitigate the needs in Mexico City. However, it is recognized that the new airport will increase the attraction of tourism to Latin America, improve connections, long-distance flights and cargo. <http://canaero.org.mx/crece-urgencia-por-el-nuevo-aeropuerto> December 26, 2017.

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