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Title and Liens on Rolling Stock from a Mexican Law Perspective.

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"DILIGITE JUSTITIAM QUI JUDICATIS TERRAM." "Ye who judge the earth, give diligent love to justice"

Title and Liens on Rolling Stock from a Mexican Law Perspective.

by Kendra Medina.

The advantages of the development of the rail industry worldwide have been widely discussed from an environmental, efficiency and urban planning stand point. There is no doubt that the development of this industry, either for cargo or passengers, would have important spillover effects for any economy, and particularly that of Mexico, with the demographic growth of the last few years and its concentration in a few main cities, as well as its strategic geographic location with respect to the United States of America.

Notwithstanding the great importance of certain rail projects currently in progress in Mexico,¹ greater investment in the rail industry is required, either from the public or private sector, or from domestic or foreign investors. The current legal framework permits any of these combinations of investment sources,² but it is important to be aware of the types of guarantees that such investors can expect to be able to obtain in exchange. In this article we will explore the different kinds of guarantees a rail transport operator can provide to any financing party under Mexican law, particularly those in rem.³

In accordance with Mexican law, rail transport service is a priority economic activity and in order for any person to provide rail service, they must obtain a concession title from the Ministry of Communications and Transport. Rail operation is highly regulated; the competent authority is federal and the rights over the assets used for providing the service are subject to a special regime. The assets or goods that are used to provide rail services (either passenger or cargo) can be non-movables (rights of way, railway, control post, terminals and signs) or movables (rolling stock).

“The goods used to provide public rail transport services are considered to be national goods as they are for common use by the public”.

The goods used to provide public rail transport services are considered to be national goods as they are for common use by the public. This is the railway and its integral parts, which include the auxiliary services. Although there is no definition of what is an integral part of the railway under the National Goods Law, in accordance with article 14 of the Rail Service Law, it can be deduced that integral parts are those that make up a railway when such shall be considered as a general mean

1- For instance, the Matamoros-Brownsville Project, the Ciudad Juarez Relief Road, the Suburban railway for the Guadalajara metropolitan zone and Chalco-La Paz-Netzahualoyotl suburban railway system, as mentioned in the previous Terrum edition (July 2012).

2- Permitted foreign investment is up to 49% on Mexican concessionaries that provide public transport services (Art. 17 of the Rail Service Law)

3- Guaranty in rem refers to the guaranty where the beneficiary is entitled to enforce the rights that the right-holder would have to over a specific property (i.e. ownership rights, usufruct and security interests).

communication,⁴ which cover the rights-of-way, traffic control posts, signs and all those items that are necessary for their operation (tunnels, bridges, electric substations, etc.). The auxiliary services include the passenger and cargo transfer terminals, maintenance shops for rolling stock and other rail equipment and supply centers for the operation of such equipment.

National goods are subject to the public domain regime, which means the any actions related thereon are non-lapsable, and the goods are non-transferable and not subject to embargo. The movable rail equipment (rolling stock, traction engines or maintenance vehicles that transit over the railway), are by exclusion, not considered to be national goods and therefore, not subject to the public domain regime, but to a regular private regime, which means they can be transferred and used without any limitation whatsoever, except for an applicable right of preference that the State has in view, they are indispensable for rendering the service.⁵

Although the concession title granted to exploit a railway and provide rail transport services do not grant any rights in rem, but only personal rights to use the rail system, the National Goods Law leaves the regulation of the rights over the national goods that conforms a rail system to the Rail Service Law, which provides for the possibility to place a lien over such rights.⁶

“...rail operators do not have an extended range of options with respect the assets that make up a rail system which can be use as guarantee for financing purposes.”

Consequently, rail operators do not have an extended range of options with respect the assets that make up a rail system which can be use as guarantee for financing purposes. Personal guarantees and equity are the most recurrent forms of guarantees, but both are limited. The first, to the personal asset worth of the guarantor and the second to the limits sets by applicable law. The only assets that can be used as guarantee are the rolling stock, movable rail equipment and the concession rights. The concession rights are less likely to be attractive to creditors in view that the enforcement of a lien over any such rights would imply to be eligible to become a rail operator under Mexican law.

The liens that can be placed over the property rights of movable rail equipment are any kind of liens permitted under Mexican law, which basically are two: pledge and mortgage.⁷ The Law of General Means of Communication allows the placement of any kind of lien over movable assets that are integral part of a communication system, including the mortgage. Although the pledge is

4- Not all railways are general ways of communication, only those that (i) communicate two or more federal entities; (ii) are located within 100 km of the border zones or 50 km along the coast (except for urban systems that do not cross a border and do not operate outside the metropolitan area); and (iii) are connected with other railway with the characteristics described in (i) and (ii), and provide public service. (Art. 3 of the Rail Service Law).

5- Art. 14 of the Rail Service Law.

6- Art. 13 of the Rail Service Law.

7- Arts. 92 and 93 of the general Ways of Communication Law.

not expressly mentioned, probably because the nature of such lien is to transfer possession of the asset in benefit of creditor, it could also be an option if such is placed making the express notation that the possession of the pledged assets shall not be transferred to creditor.

With respect the liens that can be placed on the concession rights, the Law of General Means of Communication does mention the mortgage as the ideal form or guarantee. However, important limitations apply to the placement of this (or any other) lien:⁸

- Under no circumstance the mortgage shall be placed in benefit of foreign governments or States.
- The duration of the mortgage shall not include the last tenth part of the duration of the concession.
- A statement shall be made by the creditor that he agrees that the national goods shall revert to the Mexican nation upon termination of the concession.
- The creditor shall not interfere with the exploitation of the concession rights, nor oppose any amendments thereon, except for the transfer of the whole or material part of the system, and the merger of the debtor with other companies, so long it implies a risk to the credit.

In addition to the foregoing, unlike the aviation registry, the Mexican rail registry is not public.⁹ Although the registration of any acts on such registry is not a condition precedent to its validity, no proper publicity can be given to such acts. Any liens placed on rolling stock can be publicly announced by being registered at the Mobile Assets Guarantees Sole Registry (known as RUG, *Registro Unico de Garantías*),¹⁰ although such registration is not an obligation of debtor under Mexican law. However, the liens placed on the concession rights can be registered only at the Mexican rail registry.

The above mentioned particularities of providing rolling stock and certain rights over a concession title as guarantee to secure credits, as well as the characteristics of the registration of such guarantees, makes it hard for rail operators to obtain financing from the private sector.

8- Art. 94 and 95 of the general Ways of Communication Law.

9- Art 204 of the Rail Service Regulations.

10- Please refer to Coelum Edition July 2011 (“Registry of Guarantees on Mobile Assets” by S. Azcue).

The National Construction Chamber is working with SEMARNAT. The National Construction Chamber (CMIC) is working in a committee with the Ministry of Environment and Natural Resources in order to improve the construction waste management practices. The committee will be working in the approval of regulation 161 which will create construction waste to be in line with the regulations adopted by developed countries. Business News America. 17/August/12.

Supreme Court rejects Telmex appeal.

Telmex – the biggest telephone company in Mexico – has been rejected in its effort to obtain a license to offer a TV service. Mexico's Supreme Court of Justice rejected Telmex appeal and sent back the case to a lower appeal court. The basis of the rejection is that Telmex does not fulfill the obligations of the 2006 Convergence Agreement. Business News America. 20/August/12.

Rail investment decreases in 2012.

Both private and public investment in Mexican rail for 2012 is expected to drop 24.3% compared with 2011. An expected investment for infrastructure of about 8.7 billion pesos is planned for 2012. The main reason for such a decrease is a drop in the private investment. Since President Felipe Calderon mandate, about 49 billion pesos have been invested in rail infrastructure. Business News America. 31/August/12.

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