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The relation between Mexican labor disputes and a possible "Total Loss" of an aircraft.
by Vera García.

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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 how high above them those rights would extend. They decided on, Ad coelum et ad inferos, meaning that their property rights would extend as high up as the heavens and all the way down to hell.

The relation between Mexican labor disputes and a possible "Total Loss" of an aircraft.

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In previous articles of COELUM, we have talked about aircraft repossession and certain aspects that have caused important delays for the lessors/owners to repossess their asset such as inefficient judicial procedures, Cape Town implementation in Mexico, Deregistration Powers of Attorney, etc. However, in practice, there are other circumstances such as ongoing labor procedures that have surprised lessors or owners of aircraft at repossession, such scenarios are not always contemplated in the transaction documents. This paper will analyze the context of Mexican labor procedures and the definition of Total Loss in aircraft lease agreements as a possible tool to protect lessors/ owners from the consequences of an aircraft attachment ordered by the labor authorities.

An example of labor procedures against a lessee is the strike procedure related to or resulting from the annual review of the collective agreement filed by workers unions against a lessee. In this scenario, aircraft could remain at the airline´s facilities for a considerable period or a period equal to or exceeding the remainder of the lease term, as strikes in Mexico could take several months and in accordance with chapter XX of the Federal Labor Law have three main stages[1]:

> **Stage 1:** takes place from the filing of the request sheet *(pliego de peticiones)* to the notice or call to strike *(emplazamiento a huelga)*.
> **Stage 2:** or pre-strike: takes place from the call to strike to the suspension of labors - this notification **will produce the effect of constituting the employer (lessee), for the entire term of the notice, as the depository of the company or establishment affected by the strike,** with the faculties and responsibilities inherent to the position. Furthermore, at this stage, the conciliation hearing is held before the Conciliation and Arbitration Board (the "Board"), in which the parties will seek an agreement, without prejudging the existence or justification of the strike.
> **Stage 3:** takes place from the suspension of labors to the final resolution. The outbreak of the strike suspends the effects of labor relations and the processing of requests and conflicts of an economic nature, during the period of work suspension. Within seventy-two hours after the start of the strike, a declaration of its non-existence may be requested for not meeting the law requirements. The strike could be resolved by either an arbitration award issued by the person or commission freely chosen by the parties or by the judgment of the Federal Court of Conciliation and Arbitration if the workers or employer submit the conflict to its decision following the ordinary procedure or the procedure for collective disputes of economic nature[2].

During Stage 1 or throughout the process, unions could request the precautionary attachment (embargo precautorio) established in article 857 of the Labor Federal Law on all assets found at the airline's facilities. As we can all agree, an aircraft that is not the lessee's property should not be attached. However, frequently and to ensure the protection of the assets of the company, labor tribunals order precautionary attachments on all assets found at the lessee´s facilities that are presumably owned by lessee until proven otherwise.

The board may order any or all precautionary measures requested by the workers arguing that the source of work could be at risk. In accordance with Federal Labor Law, in the event of precautionary attachment, the lessee is appointed depositary[3] of the attached asset, without the need to accept the position or protest to perform it, with all the responsibilities and faculties inherent therein, observing the applicable provisions of Law. In the case of a legal person, the depositary will be the general manager or director and at the request of the workers or interested party, the labor board will request the registration of the precautionary attachment before the Public Registry of Property[4].

After that, the lessee shall be notified of such attachment when it receives the call to strike issued by the labor authorities. However, as the assets are presumably owned by the lessee, the actual owner of the aircraft is not notified of such attachment. Therefore, until

1.- https://sjf2.scjn.gob.mx/detalle/tesis/195400. Consulted on January 30, 2022.
2.- Article 920-938 of the Federal Law of Labor. Last Updated: June 12, 2015: https://www.gob.mx/cms/uploads/attachment/file/156203/1044_Ley_Federal_del_Trabajo.pdf
3.- According with article 2522 of The Federal Civil code, the depositary is obliged to keep the asset in the condition it was received it, and shall return the asset when the depositor requests it, even if when the deposit is constituted for a term and it has not terminated. In the conservation of the deposit, the depositary will be liable for the impairments, damages, and losses that the asset suffers due to malice or negligence.
4.- Article 863 of the Federal Law of Labor. Last Updated: June 12, 2015: https://www.gob.mx/cms/uploads/attachment/file/156203/1044_Ley_Federal_del_Trabajo.pdf

the owner becomes aware of such act, he can fight against such order. For the purposes of obtaining the lifting of the attachment on goods owned by third parties, the owner should prove at the appropriate procedural time that the aircraft is not property of lessee and that such attachment is illegal by filing an amparo or a third-party action exclusive of property *(terceria exlucyente de propiedad)*[5].

The third-party action exclusive of property will be processed and resolved by the Plenary or by the Special Board that knows of the main trial, substantiated incidentally (this means that the third-party action does not suspend the main procedure, it would only suspend the act of auction (remate)). If the third-party action is declared admissible then the Board will order the corresponding lifting of the attachment[6]. According to the law, the procedure to obtain an order in favor of the owner could take around 3-6 months. However, in practice the procedure could take much longer due to excess workload.

As we can see this is a long procedure in which the lessor or owner takes a significant amount of time and money to recover possession of the aircraft, and after that, it is likely that the aircraft will not be in its best condition, that the corresponding maintenance services have not been properly or timely provided or even the aircraft has been cannibalized by the workers. Furthermore, labor procedures in Mexico work differently from other judicial procedures. Frequently, they are very partial to the workers and workers' unions are very strong in Mexico and could be put into the equation in an important way.

For the reasons stated above, it's very important to include references in the aircraft lease agreements that make lessee liable in this case of such labor procedures scenarios and make the lessor/ owner able to obtain the Agreed Value from lessees or insurances companies for more than x number of days after lessees lose control or possession of the aircraft due to a labor proceeding. The lease agreement should establish that the lessee should assume responsibility for indemnity and if required or desired, pass the indemnity responsibility to an insurance company. However, in case the insurance does not pay, for any reason, the main party responsible in accordance with the lease should still be lessee.

This could be achievable by including the necessary/required references in the definition of "Total Loss". For reference, aircraft lease agreements always include a definition of Total Loss including references such as: *a) the actual, constructive, compromised, arranged, or agreed total loss of the Aircraft or any Engine; b) the Aircraft or any Engine being destroyed, damaged beyond economic repair; c) confiscation and forfeiture of the Aircraft or any engine; d) hi jacking, theft, disappearance, seizure, or requisition for use or hire of the Aircraft or any Engine which deprives any Person permitted by this Agreement to have possession and/or use of the Aircraft of its possession and/or use for more than x consecutive days or x days beyond the scheduled Expiry Date in the case of requisition for use or hire by the government of the State of Registration*.

Also, aircraft lease agreements normally include a definition of "Total Loss Date" to establish the date in which the above references shall take effect. This last definition is also relevant because it defines the causes of Total Loss and their consequences on the aircraft lease agreement:

- *if the Aircraft or the Airframe suffers a Total Loss, the Termination Date shall be the date when Lessor receives the full amount of the Agreed Value.*
- *Lessee shall pay the Agreed value of the Aircraft (most aircraft are insured on agreed value basis) x days after the Total Loss Date or x days after the date of receipt of insurance proceeds in respect of that Total Loss.*

After having analyzed these two definitions normally included in the aircraft lease agreements and for the reasons mentioned in the context of labor disputes, it would be highly recommended that the parties include in the definition of "Total Loss" a reference to when the lessee is appointed as depositary due to a labor proceeding and/or deprived to have possession and/or use of the aircraft of its possession for more than x consecutive days. *e) "the requisition of title or other compulsory acquisition, confiscation, seizure, forfeiture, detention, or any similar event occurs* ***in connection with any labor proceedings****, including any case where the Lessee is appointed as depositary in each case in accordance with the relevant provisions of Mexican law after x days of such act."* In the same way, as commercial airlines use tailor-made policies and generally undertake to cover all risk of physical loss or damage to aircraft, except those which are specially excluded in the policy, the above reference should also be included in the certificate of insurance.

5.- Article 976 of the Federal Law of Labor. Last Updated: June 12, 2015: https://www.gob.mx/cms/uploads/attachment/file/156203/1044_Ley_Federal_del_Trabajo.pdf
6.- Article 977 of the Federal Law of Labor. Last Updated: June 12, 2015: https://www.gob.mx/cms/uploads/attachment/file/156203/1044_Ley_Federal_del_Trabajo.pdf

What Comes Next for the Aerospace Industry?

Despite the fact that aviation continues to face challenges, it has made a sluggish but steady recovery. Travel restrictions persisted in the first half of 2021, causing alarm among industry associations since they hampered air connectivity, harming the industry and jeopardizing jobs. Despite increasingly stringent regulations, Mexico did not impose any limits on domestic or international travel. The drop in demand for foreign travel, as well as a lack of interest in traveling within Mexico, had an impact on local carriers; the propagation of the new Omicron version poses a new difficulty for the aviation sector, as travel limits are not a long-term answer to COVID-19 variant control. Nonetheless, the loosening of health restrictions on flights, safe tourism, and COVID-19 booster shots may result in future increases in the sector's numbers. *www.mexicobusiness.news/aerospace/news/what-comes-next-aerospace-industry?tag=aerospace* January 04, 2022.

International Airport Felipe Angeles is operating 6 commercial flights during its inauguration.

On March 21st the International Airport Felipe Angeles will have its inaugural day in which 6 commercial flights are programmed to operate on its installations (although roughly 150 military flights are scheduled). Only two Mexican low-cost airlines have announced operations at the new airport, which will cost a total of 75 billion pesos and aims to relieve congestion at Mexico City's International Airport (AICM). Since January 1, Servicios a la Navegación en el Espacio Aéreo Mexicano (Seneam) has been operating the AIFA control tower prior to its inauguration. So far, no international flights are expected to arrive or take off from the Felipe Angeles Airport. *www.aviacionaldia.com/2022/01/aifa-operara-solo-6-vuelos-comerciales-el-dia-inaugural.html* January 08, 2022.

AICM Accumulated Debt Since 2020.

The Mexico City International Airport (AICM) closed in 2021 with a pronounced drop in passengers and soaring rental debts, which are expected to continue affecting the airport as the Omicron variant spreads. In an official report, AICM explained that businesses within the airport have been allowed to defer rental payments for May, June, July and August 2020 for 12 months plus interest, as well as reduced lease rates by 25 percent from September to December 2020. However, the airport did not implement discounts during 2021, the main reason why debts jumped 90 percent. As of September 30, 2021, 243 companies owed AICM $1.99 billion pesos (US$97.5 million dollars) from the rent of commercial spaces and other services. Among the debtors are currency exchange stores, restaurants, taxi services, car rentals, duty-free stores but more importantly, airlines both local and foreign. *www.mexicobusiness.news/aerospace/news/aicm-accumulated-debt-2020?tag=aerospace* January 13, 2022.

UNAM, AEM and NASA to develop climate observatory.

In conjunction with the National Aeronautics and Space Administration (NASA), the Mexican Space Agency (AEM) and the National Autonomous University of Mexico (UNAM) will build an observatory to study climate change and its relationship with phenomena that harm life on our planet. The Mexican Observatory of Climate and Atmospheric Composition (OMECCA) project will build a data station that will be linked to NASA's GeoCarb satellite (Geostationary Carbon Cycle Observatory). The observatory will collect data on chemicals found in the atmosphere such as carbon dioxide, methane, and carbon monoxide, allowing scientists to investigate climate change and monitor phenomena such as ecosystem stress. *www.a21.com.mx/aeroespacial/2022/01/17/desarrollaran-unam-aem-y-nasa-observatorio-climatico* January 17, 2022.

Air cargo grow 6.9% in 2021.

According to the International Air Transport Association (IATA), global air cargo flow increased 6.9% in 2021 compared to the same period in 2019, the greatest result since 1990 and second only to 2010's 20.6 percent increase. In 2021, air cargo had a fantastic year. It was a significant source of revenue for many airlines as passenger demand remained constant due to COVID-19 travel limitations. Such situation is possible because economic conditions have continued to support air freight growth, with global goods trade up 7.7% in November compared to pre-crisis levels and global industrial production up 4.0 percent at the same time. *www.a21.com.mx/aerolineas/2022/01/25/carga-aerea-con-alza-de-69-en-2021* January 25, 2022.

In this month extract was prepared by A. Fragoso, P. Arandia, R. Nerio, R. Mancilla, J. García, S. Robles, Alexis Pérez.

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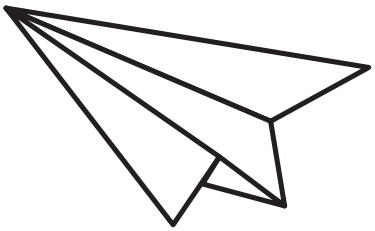

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