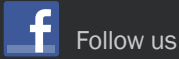


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COELUM Pronunciation: 'che-l&m, is Latin for airspace or sky. The Romans began questioning the rights they had in the space above the land they owned and to how high above did that right extended to. Ad coelum et ad inferos, they discussed, meaning that their right of property would extend as high up to the heavens and down to hell.

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The Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, *A brief comparison exercise...*

by Carlos Sierra.

Within the framework of the Cape Town Convention, signed in Cape Town, South Africa on November of 2001, which created an international legal regime for the protection of interests of owners and creditors in mobile assets and provided the basis of a registration system to allow these rights to be protected in result of cross border transactions, the Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock, which has become known as the Rail Protocol was adopted in Luxembourg on February of 2007 following the footsteps of the already effective Protocol to the Cape Town Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft, which in respect to aircraft and aircraft engines was adopted in November of 2001 and entered into effect in 2006. The Rail Protocol is then the second of the three initially contemplated protocols that is adopted under the auspices of International Institute for the Unification of Private Law (UNIDROIT) as part of the Cape Town Convention which are to include aircraft and aircraft engines, railway rolling stock and space assets such as satellites, the last of which is currently in draft form.

“The Rail Protocol is then the second of the three initially contemplated protocols that is adopted under the auspices of International Institute for the Unification of Private Law (UNIDROIT) as part of the Cape Town Convention...”

Just as it is the case with aircraft, the financing of railway stock requires the certainty of a uniform legal framework in order to induce the more extensive participation of the private sector. According to Howard Rosen, chair of the Railway Working Group, it is estimated that railways currently invest approximately USD 33 billion per year in rolling stock which needs to be supplemented with additional private investment.¹ This, as it is the case with aircraft, can only be achieved if certainty is provided that the assets involved can be repossessed and the amounts owed can be effectively collected from the debtor during default and insolvency scenarios.

1.- Howard Rosen, The Luxembourg Rail Protocol in a Nutshell, as appearing in www.railworkinggroup.com on 4 August 2011.

The Rail Protocol intends to recognize and regulate the security interests of creditors, which are to be registered under an international registry that, just as it was the case with the Aircraft Protocol, will be created for such purpose. The importance of this registry is paramount considering that the interests related to mobile assets such as railway stock are rarely subject of registration at local registries. The intended registry will also be Internet based and will be available for all kinds of railway rolling stock.

Notwithstanding its similarities, and the fact that the Rail Protocol was conceptualized based on the experience of its older brother, the Aviation Protocol, there are several differences that need to be mentioned briefly between the two protocols. The differences in question arise from several aspects that are intrinsic to the nature of the assets involved in each case as well as to the service that is provided with such assets. As David Golden of Vedder Price discusses in his article cited below, both public services are essential to the transportation of individuals and freight between communities, in that sense rail can be considered of more massive reach than aircraft, which could lead to much more disruption in the event that railway stock is repossessed and, for instance, an entire community could be deprived of access by rail vis a vis the case of aircraft. The Rail Protocol provides then for the possibility of states making a declaration stating that certain stock is declared to be used for services of public importance, which would cause the creditor to continue providing the public service to which such assets were dedicated by the debtor in exchange of government compensation. This is a feature that is not available in the Aviation Protocol.²

“The Rail Protocol intends to recognize and regulate the security interests of creditors, which are to be registered under an international registry...”

The Rail Protocol also differs from the Aviation Protocol in the form in which the assets are identified. Identification of aircraft equipment by serial number, make and model is simple, however, when it comes to railway stock such is not necessarily possible in cases when assets do not have serial numbers for example or such numbers are not easy to inspect or also when railway stock is identified by identification reference numbers generated through a specific agency such as the UMLER numbering system used in North America, or the RIV/RIC numbering system that is used in Europe, numbers that can be reused or applied to various assets at the same time. In that sense the registry will have the task to create an identification number or system of allocation of identification means for registered railway stock.³

2.- David S. Golden, *The Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Railway Rolling Stock*, Vedder Price, Equipment Finance Newsletter, September 2010.

3.- Golden, Op cit.

The most important difference however between the Rail Protocol and the Aviation Protocol is related to insolvency. The Aviation Protocol allows contracting states to choose the application of their own existing laws by making no declaration in regards to Article XI in respect to the available alternatives A or B, or to adopt one of these alternatives, which under Alternative A, would enable a creditor to repossess equipment following the expiration of a state-specified waiting period unless the default is cured; or under Alternative B, would require the creditor to comply with state law requirements before repossession.⁴ The Rail Protocol provides an additional Alternative C, which, a middle ground between the creditor-friendly Alternative A and the more pro-debtor Alternative B. Under Alternative C, the debtor can cure all defaults within a certain specified period and within such period can also apply to obtain an order from a court that would suspend the enforcement of the rights of the specific creditor to repossess the assets in the understanding that the debtor in such case would be obliged to maintain and preserve the equipment and would be obliged to continue making payments to the creditor of the amounts payable as if no default had taken place.⁵

Together with the UNIDROIT, the Intergovernmental Organization for International Carriage by Rail (OTIF) initiated the process to select a registrar to be appointed to organize and operate an international registry of railway rolling stock, which would operate in similar form to the already existing aircraft registry. The Rail Protocol will enter into effect when a minimum of four states have ratified it and the registry has initiated operations.

“The Rail Protocol provides an additional Alternative C, which, a middle ground between the creditor-friendly Alternative A and the more pro-debtor Alternative B...”

Mexico has not ratified this instrument yet but as it has adopted the Cape Town Convention as well as the Aviation Protocol already, it would be useful if it would consider the ratification of the Rail Protocol as well. Much work needs to be done in regards to the form in which the Cape Town Convention and the Aviation Protocol have been adopted and about the inadequate set of declarations that were made in respect thereto. We hope that Mexico will be more cautious to adopt the Rail Protocol in the right form from the beginning and, when it does, to enable the country to join the community of nations that will be ultimately benefited by the adoption of a legal regime that protects the rights of creditors fostering investment and much more favorable financial terms.

4.- Aviation Protocol, Article XI.

5.- Railway Protocol, Article IX.

FAA Public Meeting Regarding Ownership Trusts Agreements and Aircraft Registration.

by *Alejandra Llopis*

The FAA has continuously changed the structures used to finance, lease and operate aircraft and has guided the development of the non-citizen trust in conjunction with the statues and regulations, recognizing the changes and globalization of the aviation industry.

Over the past 40 years or more, NCTs¹ have been utilized for the U.S. registration of aircraft owned by trustees for the benefit of non-citizens, and these uses have been extremely beneficial to the U.S. in terms of economic benefit and global competitiveness.

In previous articles the author wrote about the concerns of the FAA regarding the “NCTs”, and the fact that this figure has had many interpretations, all directed to avoid the “citizenship simulation”. For that reason the FAA held a public meeting that took place at Oklahoma City on June 1st to obtain opinions from interested members of the Aviation Industry regarding NCTs. A number of people from the Aviation Working Group’s (AWG) Industry Consultative Group² attended the meeting in order to exchange information and views.

“Over the past 40 years or more, NCTs have been utilized for the U.S. registration of aircraft owned by trustees for the benefit of non-citizens, and these uses have been extremely beneficial to the U.S. in terms of economic benefit and global competitiveness.”

Consultative Group Responses

The Consultative Group attended the June 1, 2011 public meeting held by the FAA in respect to the concerns of the FAA regarding the use of the non-citizen trusts. The public responded several questions to the FAA discussion. The most important questions and responses will be briefly explained:

Question 1: What are the appropriate obligations to impose on a trustee of a trust with beneficiaries that are neither U.S. citizens nor resident aliens in order to satisfy the statute

1.- “NCTs” is a figure that consists on transferring the title to a U.S. citizen. These trusts are commonly used in order to meet the citizenship requirements for the registration aircraft in the US.

2.- This Consultative Group is formed under the AWG. The group believes that the approach to NCTs should be solution-oriented, taking into account and advancing established regulatory, economic and commercial objectives. Their goal is to continue to lead and facilitate U.S. aviation safety and to achieve important economic and commercial objectives.

and regulations? This question is focused on trustee obligations. The answer is based on the current regulations and the obligations required of trustees. A U.S. citizen trustee acting on behalf of a non-U.S. citizen beneficiary can fulfill the requirement under section 44102 of the U.S. Code that states that a citizen of the United States is eligible to register an aircraft, so in order to proceed with the registration the trustee is obligated to submit the following items to the FAA.

a) *“copy of the documents that legally affect a relationship under the trust”*: The Owner Trust Agreement and all the documents related to it are the only documents that will affect the relationship between the trustee and the trustor under the trust. This relationship is established pursuant to the Owner Trust Agreement entered into between the trustee and the trustor.

The FAA has sustained the criteria over the years that agreements by the trustee providing another with possession, use and control of the aircraft, such as leases, operating agreements or other forms, are not to be considered documents legally affecting the relationship under the trust.

b) *“the trustee submit an affidavit of citizenship attesting that non-citizens do not have more than 25 % of the aggregate power to influence or limit the exercise of the trustee’s authority”*: This requirement is a powerful limitation on the non-citizen’s beneficiary control over the trustee when they are combined with the covenants and agreements made by the beneficiary in the owner trust agreement. This has the power to take any action that is considered necessary in order to protect the interests of the United States; the owner trustee is permitted to seek any advice of the trustor before taking any action, but is not obligated to follow such advice.

The trustees that act as owner trustee of the U.S. registered aircraft take the responsibility to be free from any control from the non-citizen beneficiary. This freedom is demonstrated in a number of ways. For example: In most cases, trustees requires that the beneficiary provides them with relevant documents related to the ownership of the beneficiary, then the trustees screen this information against governmental and regulatory databases to ensure that the trustees are not doing business with prohibited persons and that acting as trustee will not put the trustees at risk of contravening the laws or interests of the United States.

Question 2: In the case of a trust with beneficiaries that are neither U.S. citizens nor resident aliens, which rights and actions must be prohibited on the part of the beneficiaries in order to satisfy the statute and regulations? Non-U.S. citizen beneficiaries should be prohibited from acting or instructing the trustee to act in any manner contrary to applicable laws, regulations,

courts orders or other lawful directions of a government agency with jurisdiction over the trust or the aircraft.

The Group pointed out that the current limitations provide that the trustor has no right to direct, influence or control the trustee in the performance of the trustee's duties under the trust agreement in connection with matters involving the ownership or operation of the aircraft.

Question 3: Which forms are needed to ensure possession, use or operational control of an aircraft by a trustee to its beneficiaries that are not U.S. citizens? The U.S. Code does not expressly permit or prohibit any forms of granting possession, use or operational control of an aircraft by a trustee to its beneficiaries that are not U.S. citizens or residents aliens.

The trustee must convey or facilitate the conveyance of the right to use, possess and operate to the person or business entity who will be undertaking those activities, these rights could be further transferred through a series of parties, subject in each case to compliance with FAA operational control requirements. The trustee may or may not be a party of that arrangement, and it is probable that the beneficial owner will contract directly with the operator or such other party. Over the years, the FAA has not accepted filings or submissions of operating agreements or other similar agreements granting a right to use, possess or operate an aircraft unless constituting a lease.

Question 4: How may a beneficiary that is not a U.S. citizen or resident alien participate in the decision to remove a trustee in accordance with the statute and regulations? The beneficiary has the power to remove the trustee, although this power is limited because they cannot own more than 25% of the aggregate or voting power to direct or remove the trustee, but they can own more than 25% of the beneficial interest.

Question 5: Which, if any, knowledge and information requirements are appropriate for the FAA to impose on trustees of trusts with beneficiaries that are not U.S. citizens or resident aliens? This question is based on the information that the trustee should provide to the FAA as described below:

- *Information about the beneficiary:* This information would enable the FAA to contact the operator to obtain maintenance or other information whenever necessary.

The Consultative Group considered that the FAA should implement some suggestions to ensure that the trustee obtains the information mention above. For example: The FAA could issue a Memorandum which summarizes current obligations under the Owner Trust Agreement.

- *Information about maintenance records, hangar location etc:* The trustee is not responsible for maintenance and operational records.

Following this public meeting, the resolution of the FAA considering the points of view of the Consultative Group with respect to the NCTs has not been published. The questions explained and described above are a summary of the Consultative Group Responses. The FAA is concerned about the information that a trustee has or can obtain about its trustor or beneficiary and the operator of the aircraft. Another concern is regarding the documentation in a transaction where documents that may affect the relationship between the trustor or beneficiary under the trust are not duly filed before the FAA.

It is important that in the resolutions, the FAA abstains from imposing retroactive effects on aircraft already registered through an NCT because that would be devastating to the industry and related parties.

“Following this public meeting, the resolution of the FAA considering the points of view of the Consultative Group with respect to the NCTs has not been published.”

Over the years, the financing, leasing and operating arrangements for aircraft of all types have changed. Today, aircraft sales, leases, financing and other transactions which involve parties from many locations that need to use NCTs; for that reason, the FAA could try to rely on the trustee as its primary contact and should not expect the trustee to be the operator, since that is not the owner trustee’s role in an NCT.

Request to stop delivery of Mexicana's slots.

Mexicana's Ground Workers Union filed an amparo claim to prevent the General Direction of Civil Aviation (DGAC) from giving Mexicana's international slots (take-off and landing times) to Volaris, Aeromexico and Interjet. DGAC recognizes that the slots of Mexicana cannot be granted to another company because the company is in a concurso mercantil proceeding.

Reforma . 05/July/11.

4.1% less passenger traffic from GAP

The Mexican airport operator Grupo Aeroportuario del Pacífico(GAP) stated that the passenger traffic at its terminals decreased almost 4.1% year over year because of a reduction in national and international travelers. *EL Economista*. 06/July/11.

DGAC headed for a major transformation.

Following the return to FAA Category One, Mexico is now 10th in the lists of scheduled audits by the FAA. Mexico is now a priority. American auditors, who for years had tolerated deficiencies within DGAC, arrived at the DGAC in July and found 58 problems of which four could not be overcome. At this time the DGAC has fulfilled the requirements of the FAA. By November the DGAC will have new offices, and more improved systems. *El Universal*. 06/July/11.

Workers request that Mexicana be included in the 2012 Budget.

The leader of the Union Association of Flight Attendants demanded that the legislative branch include in the 2012 budget a heading to allow for the rescue of Mexicana de Aviación.

Excelsior. 07/July/11.

Defend the seniority in designation of slots.

Faced with the request for an amendment to the Mexico City regulations, by which the oldest airline would not have right to ask for more slots for an equitable allocation, the president of the Board of Directors of Aeromexico (Amex), José Luis Barraza, declared that they disagree with this decision, because they must take into account the needs of all companies. The director of the DGAC explained they do not have any problem in offering more slots to allow for the growth of daily routes and operations. *Milenio*. 08/July/11.

In this month extract was prepared by Jessi Saba and Samantha Garnica.

Mexicana's shutdown effected Tourism.

Insecurity, and Mexicana's shutdown, has effected tourism in Mexico drastically. During the first quarter of the year, the tourist flow dropped by about 3.8%. Mexicana's shutdown has also affected connecting passengers, causing drastic reductions for the Mexico City International Airport. The Ministry of Tourism is bud getting several million pesos to boost tourism to Mexico. *El Economista. 18/July/11.*

Airlines will start using biofuel.

The Ministry of Communication and Transportation said that from Thursday, different airlines will start using bio fuel on commercial international flights. They explained that Mexican aviation is initiating a new era, reducing gases harmful for the environment and is developing bio fuels. Airport and Auxiliary Services (ASA) advised that bio fuels can be substituted totally or partially for regular aviation fuel. *El Economista. 22/July/11.*

Interjet is waiting for better times before listing on the Mexican Stock Exchange.

Interjet is being very cautious regarding its listing on the Mexican Stock Exchange. First they are waiting for the international market turbulence to subside. Interjet confirmed that this delay in the listing has had no negative effects on the airline's expansion plans. They are looking forward to transporting almost twice the number of passengers this year, compared to last year. *Excelsior. 23/July/11..*

Airport and Auxiliary Services (ASA) airports operate in the red numbers.

Half of the eighteen airports that ASA operates in Mexico operate in the red and are losing more money by the day. They are looking forward to moving at least half of those airports into the black next year. ASA recognized the fact that foreign airlines help increase the passenger flow because of the type of aircraft they have which lets them take advantage of small airports, something that national airlines either do not want or do not have the proper aircraft for such flights. *Reforma. 25/July/11.*

In this month extract was prepared by Jessi Saba and Samantha Garnica.

Carlos Sierra

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