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COELUM is Latin for air space 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.

AIR AND SPACE LAW, AS A DISCIPLINE OF LAW AND A BRIEF OVERVIEW OF CERTAIN FORMATIVE EVENTS OF THE XXth CENTURY

Carlos Sierra

At the dawn of a new year, it is always tempting to review the essence of certain aspects that rule our day-to-day life, and for us lawyers, our day-to-day practice. In giving in to this temptation, I would like to review briefly the perennial question: "What is Air Law and where does this discipline come from." Questions such as these are often posed by professionals of other fields as well as by legal practitioners. In this article I will discuss certain aspects related to the practice of this discipline and I will also describe briefly a series of formative events that allowed this discipline to be developed into what Air Law is today.

I. A discipline of law.

The term "Air Law", most commonly used in Europe, explains the nature of the scope that this field intends to regulate, air space (or in latin *coelum* as this publication is entitled). The same discipline, known as "aviation law" by most practitioners in North America and other regions, or aerospace law by the preference of others, is a subject of study, that together with Space Law, can be applied, as Professor Peter Haanappel discusses, "to the status of and to activities in or concerning geographical areas other than the surface of the earth".¹

It is important to state as well that air and space law are disciplines that are derived and dependant from other areas of law. I consider that the well

¹ P.P.C. Haanappel, The Law and Policy of Air Space and Outer Space, Kluwer Law International 2003, Preface, p. v.



prepared air and space lawyer cannot fully understand and achieve the objectives of this discipline without the knowledge of general law and without the understanding of the nature of air and space law as a discipline derived from principles of other areas of law such as maritime law, private international law and public international law.

It is necessary then for the air and space lawyer to understand that although air law is considered an autonomous discipline, it cannot be easily practiced without an interdisciplinary approach. The sovereignty approach that the states have taken since the First World War in order to lay down the rules that permit the transit of aircraft over the sovereign airspace of other states, make necessary for an all-round air and space lawyer to possess qualities that allow him/her to understand the principles of property law, as it was based on principles such as the rights of use of the air space above the ground. The bilateral nature of the agreements that regulate the use of airspace throughout the world based on sovereignty

principles cause the air lawyer to be knowledgeable of contract law, while the nature of the events that take place in the aviation environment make necessary to understand the law of torts as well as several other disciplines.

II. The formation of Air and Space Law.

In the formation of Air and Space Law as we know it nowadays, and which has become thoroughly regulated over the years, a countless number of events have played a key role in its development. The most relevant of such events in view of this author are briefly described in the following paragraphs.

The Flight of Aircraft. It is relevant to understand that air law as such did not properly exist until the time when aircraft were able to fly and the notion of air law was conceived and developed in full during the 20th Century. The right of use of air space above the ground was determined earlier and limits were conceived to such right beyond the area where the owner of the underlying land would be able to

actually use such airspace. This idea in my view provided the basic principles of how the use of airspace became regulated when the transit of aircraft over the territory of states and over the property of others became possible. As said then, air law came to exist when aircraft became able to fly. This, I consider, is the most formative event for the development of air law during the 20th Century.

The Concept of Sovereignty. Air law as such came to be considered an independent branch of law after the First World War when international legal instruments and case law on the subject began to be produced.

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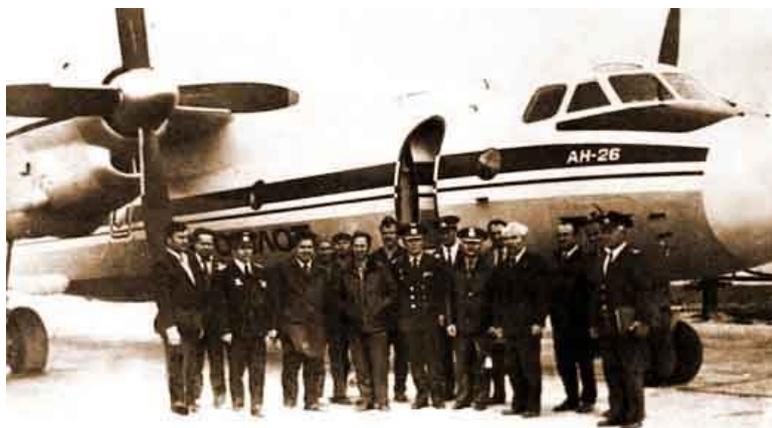
This was the time when the concept of sovereignty over the airspace above each state became the rule and gave way to the implementation of the bilateral agreements that today continue to regulate the rights of use of sovereign airspace throughout the world. With the enactment of the Convention Related to the Regulation of Aerial Navigation, known as the Paris Convention of 1919, the discussion as to whether air space would be considered as a free-for-all geographical territory or as a sovereign right of each state became settled when in Article 1 of this convention it was stated that the contracting parties recognize complete and exclusive sovereignty of the air space above its territories.²

The Warsaw System. From the perspective of private air law, a crucial formative event was certainly the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1929, more commonly known as the Warsaw Convention, together with the conventions and other protocols that conform the Warsaw system and where the liability of the air carriers towards the passengers became regulated in respect to personal injury or death as well as for loss, damage

or delay of property.

The Chicago Convention. The Chicago Convention on International Civil Aviation came to replace the above referred Paris Convention of 1919 together with other instruments that were effective during the period between the two world wars; this convention adopted in Chicago in 1944 was another substantially formative event of air law, from the perspective of public air law. It applies to civil aviation and civil aircraft and regulates various aspects such as safety, security, facilitation etc, although it did not contain any provisions related to commercial matters. This convention codified the rule on national sovereignty in airspace under Article 1, where it states that all contracting states recognize the sovereignty of other states in respect to the air space above their territories.³

The birth of Space Law. During the 1950s and 1960s a new discipline was born, which in accordance with Professor Haanappel came to modify the nature of air law and in particular its autonomy as a separate branch of law. Space law was created as a result of the legal implications of what came to be understood as the exploration and use of outer



² Ibidem, p. 3

³ Ibidem, p. 18.



“The Warsaw and Montreal conventions still coexist while more and more states become adhered to the later, which will eventually replace Warsaw as the international instrument that will regulate the liability of air carriers throughout the world”.

space. The *corpus iuris spatialis* consisting of five international United Nations conventions of which the most relevant is the Outer Space Treaty of 1967 was developed over a period of around fifteen years between 1964 and 1979. During the 1970's the high expectations that the exploration and use of outer space created around the world, notwithstanding the cold war, gave way to a new principle when the above referred conventions declared outer space to be the “Common Heritage of Mankind”, when the use and exploration of outer space was declared to be reserved only for peaceful purposes and when astronauts were declared to be envoys of mankind...⁴

The Montreal Convention. The Convention for the Unification of Certain Rules for the International Carriage by Air, signed in Montreal in 1999, was also formative of air law as it succeeded and modernized the liability regimes that were originally regulated by the Warsaw Convention. The Warsaw and Montreal conventions still coexist while more and more states become adhered to the later, which will eventually replace Warsaw as the international instrument that will regulate the liability of air carriers throughout the world.

We shall see which other formative events will continue to regulate this very dynamic industry. In my view, the attack against the World Trade Center in New York in 2001 will have a major effect on air and space law through the change of various rules and procedures, particularly in respect to security and safety and in a form yet to be seen. Several rules and regulations that affect the present and future of air transportation have derived from this event and will continue to have an impact in the development of modern aviation. In addition to this, a more competitive environment, together with the need to de-regulate and to adopt policies that can permit the long term investment in an area that has not been particularly profitable since it was born, will post the challenges to come not only from the commercial and economic standpoint, but certainly from the stand of the laws and regulations that will shape this industry in the years to come.

⁴ See: Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies of 19 December 1966; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies of 5 December 1979; Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space of 13 December 1963.



COMMENTS ABOUT JURISDICTIONAL MATTERS CONCERNING MEXICAN LAW AND THE CAPE TOWN CONVENTION

Antonio Vázquez

The main purpose of this article is to discuss some concerns about matters of jurisdiction between the provisions of the Convention of International Interests on Mobile Equipment, the Protocol on Matters specifically related to Aircraft Equipment, and applicable commercial legislation in Mexico.

First of all, as we have said in previous articles of Coelum published in the last months, the Convention of International Interests on Mobile Equipment (the Convention) and the Protocol on Matters specifically related to Aircraft Equipment (the Protocol) have been approved by the Mexican Senate and in the next weeks this approval must be published in the Official Gazette of the Federation. Although this Convention and its Protocol are not at the moment enforceable law within Mexico, its application will be valid within a few months.

make comments about the legal provisions related to the matters of jurisdiction stated in the Convention, the Protocol and the commercial Mexican Law:

First of all, articles 5 of the Convention and VIII of the Protocol state:

“Article 5. Interpretation and applicable law...

3. References to the applicable law are to the domestic rules of the law applicable by virtue of the rules of private international law of the forum State.”



“Article 42. Choice of forum...

1. Subject to articles 43 and 44, the courts of a Contracting State chosen by the parties to a transaction have jurisdiction in respect of any claim brought under this Convention, whether or not the chosen forum has a connection with the parties or the transaction. Such jurisdiction shall be exclusive unless otherwise agreed between the parties.

2. Any such agreement shall be in writing or otherwise concluded in accordance with the formal requirements of the law of the chosen forum.”

Articles VIII, XXI and XXII of the protocol state:

ARTICLE VIII- Choice of law...

1. This article applies only where a Contracting State has made a declaration pursuant to Article XXX (1).

2. The parties to an agreement, or a contract of sale, or a related guarantee contract or

For that reason, it is important to



subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part.

3. Unless otherwise agreed, the reference in the preceding paragraph to the law chosen by the parties is to the domestic rules of law of the designated State or, where that State comprises several territorial units, to the domestic law of the designated territorial unit.

CHAPTER IV JURISDICTION

ARTICLE XXI- Modification of jurisdiction provisions...

For the purposes of Article 43 of the Convention and subject to Article 42 of the Convention, a court of contracting State also has jurisdiction where the object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of registry.

ARTICLE XXII. Waivers of sovereign immunity...

1. Subject to paragraph 2, a waiver of sovereign immunity from jurisdiction of the courts specified in Article 42 or Article 43 of the Convention or relating to enforcement of rights and interests relating to an aircraft object under the Convention shall be binding and, if the other conditions to such jurisdiction or enforcement have been satisfied, shall be effective to confer jurisdiction and permit enforcement, as the case may be.

In accordance with the above provisions, Mexico declared that Article XXX of the Protocol will apply, so the article VIII of the said Protocol will apply.

As consequence, if the parties have agreed to apply Mexican Law concerning jurisdictional

“Mexico declared that Article XXX of the Protocol will apply, so the article VIII of the said Protocol will apply”.



matters, we need to review the consequences of this choice.

In connection with the jurisdiction principles, the applicable legal provisions of the Convention and the Protocol, state the following:

Articles 42.1 of the Convention and XXI of the Protocol include some important rules that modify the general criteria of the jurisdictional rules traditionally applicable in Mexico. For example:

a) Article 42.1 of the Convention states that the courts chosen by the parties to a transaction have jurisdiction in respect of any claim brought under the Convention, whether or not the chosen forum has a connection with the parties or the transaction.

b) Article XXI of the Protocol provides that a court of a contracting State also has jurisdiction where the object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of registry.

The jurisdictional rules applicable in Mexico are the ones included in the Code of Commerce. The Code contains various requisites to consider the validity of the jurisdiction clause. If one of the following requisites is not observed, then the jurisdiction clause will not be valid:

1. The parties must make an express waiver of the jurisdiction that according to its domicile would be the applicable.
2. The parties must appoint a court based on one of the following criteria:

- a) A competent court of the domiciles of the parties.
- b) A competent court of the place of compliance of the obligations of the contract.
- c) A competent court of the place where the assets of the contract are based.

As we said, article 42 of the Convention does not provide the obligation of the parties to appoint a Court that has connection with the parties. This requisite is against the general criteria applicable under the Code of Commerce.

Moreover, Article XXI of the Protocol states that a Court of a contracting State also has jurisdiction where the object is a helicopter, or an airframe pertaining to an aircraft, for which that State is the State of registry. This will be a new criteria that our domestic law does not contain.

In my personal opinion, in case of a discrepancy between the rules stated in the Convention and the Federal Law, the rule that will prevail must be that of the International Treaty.



LATIN AMERICAN AIRLINE LEADERS FORUM, SPONSORED BY ASYV

This past November, our firm “Abogados Sierra y Vázquez” had the honor to be a sponsor of the Latin American Airline Leaders Forum, organized by the Latin American Air Transport Association (ALTA) in Cancun, Mexico. This event gathered together the major airlines and other Latin American aviation industry participants.

Several issues were addressed during the event. These included the evolution of Internet ticketing, the vision of airlines in North and South America in accordance with Wall Street, the increasing cost of airports, the future of alliances and the current and future situation of the aviation industry in Latin America.

ALTA, concluded that in countries such as Mexico, Ecuador, Costa Rica and Argentina, the cost of airport services have increased disproportionately and ALTA issued a strong statement denouncing this as a major industry problem. “The monopolistic practices among airport authorities in Latin America have to stop now ...” said ALTA Executive Director, Alex de Gunten.



Andrea Valencia, Mario Molina, Antonio Vázquez and Adolfo Samaniego



Carlos Sierra with Antonio Vázquez

In particular in respect to Argentina, the problem was denounced as most severe. The government and the airport operator Aeropuertos Argentina 2000 (AA2000)¹ have not taken into consideration the standards issued by the International Civil Aviation Organization (ICAO) and are therefore in violation of the Chicago Convention.

ALTA called for a new independent regulatory body to be created in Argentina to avoid the abuses that have occurred due to the monopolistic practices of AA2000. This proclamation was approved by the 33 airlines that make up ALTA’s membership, all of whom declared their unanimous condemnation of the AA2000 agreement and called for new action to be taken to prevent further monopolistic abuses of this kind.

This forum, proudly sponsored by Abogados Sierra y Vázquez, was held from November 29 through December 1st of 2006 with the attendance of more than 450 delegates, representing more than 45 airlines from Latin America and the Caribbean of which 35 were represented by their CEOs. Also attending were industry related companies from all over the world.

¹ AA2000 controls 33 airports in Argentina and was awarded a 30-year concession for airport management on 11 February, 1998. On 23 August 2006 AA2000 signed a new modification to the original agreement that affects both the travelling public and airlines, as it imposed disproportionately high fees on international operations.



THIS MONTH'S EXTRACT OF MEXICAN AVIATION NEWS

o 10.9 million Dollars were returned to shareholders of Mexicana

The shareholders of Mexicana Group, who bought Mexicana and Click airlines with their subsidiaries on December 2005, will receive 10.9 million Dollars (121 million pesos) for an adjustment of price from the 165.5 million Dollars initial cost that they paid for this company. The acquisition was closed in 154.6 million dollars. This adjustment was provoked partly as a result of hurricanes "Katrina" and "Wilma", which affected the finances of Mexicana, and consencuently affected its value.

Milenio. 04 / Dec / 2006

<http://www.milenio.com/mexico/milenio/nota.asp?id=459995&sec=5>

o Monterrey will create a low cost airport

The government of Monterrey, Nuevo León, asked permission to the SCT to turn one of its airports into the first low cost airport in Mexico in order to permit its use by the aircraft of low cost airlines.

Excélsior. 06 / Dec / 2006

<http://www.nuevoexcelsior.com.mx/main.aspx?pid=670%2byguAwYA%3d&idioma=27&parent=8d7stF7VCc7wwTdAwJNKQgu8tty8NV2c¬icia=8786&categoria=%7bCATEGORIA%7d&ruta=Crearn%2bpuerto%2bareo%2bde%2bbaj o%2bcosto>

o The Mexican skies in Delta's map

Commencing this year, the offer of Delta Air Lines flights with destination in Mexico will increase by about 75 per cent, action that will help Delta to become the airline with most growth in operations in the country. During the month of June, Delta Air Lines had six destinations and it foresees to increment to 20 in the first quarter of 2007.

Excélsior. 07 / Dec / 2006

<http://www.nuevoexcelsior.com.mx/main.aspx?pid=670%2byguAwYA=&idioma=27&parent=8d7stF7VCc7wwTdAwJNKQgu8tty8NV2c¬icia=8901&categoria={CATEGORIA}&ruta=jA%20despegar!>

o Transportation of domestic passengers grows 8 per cent during 2006

The Mexican aviation sector closes 2006 with a growth of 8 per cent in the transport of domestic passengers in comparison with 2005. The DGAC said that this percentage allows a "historic" closing on this period. While the expectations of growth worldwide are merely of about 4 or 5 per cent.

Tiempo Digital. 08 / Dec / 2006

http://www.tiempo.com.mx/not_detalle.php?id_n=18347

o Low cost airlines control 16.5% of the domestic market

The domestic Mexican aviation market, which is of 19 million passengers, showed an increase of 6.2 per cent during the first six months of 2006, while the low cost airlines showed a growth of 16.5 per cent. According to estimations, during the prior three years the domestic market transported 25 million of passengers. In 2010, three of every 10 passengers will use low cost airlines.

Milenio. 11 / Dec / 2006

<http://www.milenio.com/tampico/milenio/nota.asp?id=447567>



o **Volaris reaches its goals before it expected**

After nine months of having initiated operations, Volaris already paid off the capital contributed by its shareholders, registered a positive flow in its operations and reached profitability in its routes. All these good news will cause Volaris to accelerate its plans to acquire eight more aircraft for it which will require an investment of 440 million Dollars in order to conform a fleet of 14 aircraft.

El Universal. 11 / Dec / 2006

<http://www.eluniversal.com.mx/finanzas/55282.html>

o **New airlines will operate from Querétaro**

Querétaro Internacional Airport's plan contemplates two low cost airlines and one more charter airline, this will mark the operations of the airport as a secondary terminal to Mexico City International Airport. The airlines that will start operations in Queretaro Internacional Airport are: Avolar, Alma and RepublicAir.

Reforma. 11 / Dec / 2006

<http://busquedas.gruporeforma.com/utilerias/imdservicios3W.DLL?JSearchformatS&file=MEX/REFORM01/00821/00821024.htm&palabra=salen%20vuelos%20a%20queretaro&sitereforma>

o **VivaAerobus will open 15 new routes in 2007**

VivaAerobus, low cost airline, will open 15 new routes from Monterrey, Nuevo León, next year it foresees to have eight aircraft as a part of an investment of 50 million Dollars. The new flights will be to: Cuernavaca, Querétaro, San Luis Potosí, Hermosillo, Puerto Vallarta, Villahermosa, Durango, Torreón, Mexicali, Mazatlán, Zacatecas, Mérida, Morelia, Aguascalientes and Ixtapa/Zihuatanejo.

Milenio. 12 / Dec / 2006

<http://www.milenio.com/index.php/2006/12/11/22608/>

o **Volaris enters ALTA**

Volaris has adhered to ALTA on which it was preceded by Mexicana, Aeroméxico, Aerolitoral and Click. ALTA is integrated by 33 airlines, which generate together income of more than 16,000 million dollars at year, operate more than 700 aircraft and employ more than 70 thousand people in diverse countries.

Milenio. 14 / Dec / 2006

<http://www.milenio.com/index.php/2006/12/13/23350/>

o **United Airlines and Continental discuss possible merger**

The discussion about a possible merger among United Airlines and Continental has returned. If this operation is reached, its impact would be negative to the Mexican market, according to the *Asociación Sindical de Pilotos Aviadores* (Airline Pilots Association), because the merger of these airlines will result in an airline with between 1,200 and 1,300 aircraft, while the fleet of all mexican airlines together does not amount more than 300 aircraft.

This merger could result to be one of the biggest airlines in the world, with US market participation of 19.6 per cent higher than such of American Airlines, which is the first in that country with 15.7 per cent of participation.

Milenio. 15 / Dec / 2006

<http://www.milenio.com/mexico/milenio/nota.asp?id=464416&sec=5>

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NEWSLETTER



ABOGADOS SIERRA Y VÁZQUEZ

Prol. Reforma N° 1190

Piso 25

Santa Fé

CP. 05300

México D.F.

T. (52.55) 52.92.78.14

F. (52.55) 52.92.78.06

www.asyv.com

DESIGN



www.mieryteran.com

