

COELUM

COELUM Pronunciation: 'che-läm, 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.

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Amendments to the Commercial Code of Mexico on matters of procedure. | Juan Antonio Tiscareño *

In this Coelum we will study some aspects of the recent amendments to the Commercial Code ("Code") of Mexico on procedural matters, which were published at the Official Gazette on April 17, 2008, and shall enter into effect 90 calendar days after.

All legal conflicts are governed by a series of rules of procedure that regulate the various stages in which a specific trial unfolds. In Mexico, the procedural rules of commercial nature are essentially regulated by the Code, which is the reason why the knowledge of these amendments is essential for the litigator.

The recently implemented amendments also have a direct impact on the aviation business, as for example, a lawsuit brought before Mexican courts to achieve the payment of an amount of money owed by an airline in favor of another, would most likely be followed according to procedures prescribed by the Code.¹ So the ignorance of the recent amendments will surely lead the unwary parties to make mistakes in their strategies, and might cause them to fail in their attempt to obtain a favorable ruling.

The amendments to the Code cover many specific topics² that we could hardly comment in the limited space taken by this article for which in this publication we'll cover only the amendments affecting the appeals process.³

Brief definition of 'recourse' in general.

On procedural matters, a recourse is a remedy used by the aggrieved party during the trial, to request the Court of Appeals to modify or revoke the decision of a lower court. The existence of the recourse action lies in the fact that the courts can make illegal rulings deliberately or by mistake, for which the juridical systems of the entire world establish various types of recourses to combat or mitigate these rulings. Considering this, when the party at trial considers that their rights are violated by an illegal ruling, it has the possibility of filing the respective recourse that the procedural law provides. In the case of Mexican commercial procedures, the most common recourse is the 'appeal' established in the Code.

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* IN COLABORATION WITH ALEJANDRO LAVAT.

1.- The rules of commercial arbitration can also be allowed, according to the Code in article 1415.

2.- Serious studies on the subject of the procedures established by the Code in general can be found in the following works:

"Derecho Mercantil, los títulos de crédito y el procedimiento mercantil". Salvador García Rodríguez, Editorial Porrúa, México 1997.

3.- Article 1136 and subsequent of the Code.

Points to consider on the amendments in relation to the appeal.

Following strictly the order established in the Code, we believe that the most important points contemplated on the recently published amendments on this issue are as follows:

1. It expressly provides the possibility that a third party -that was not part in the trial before- with a legitimate interest, can appeal a resolution if such shall be deemed to be illegal by such party.⁴

2. It establishes that some appeals will be processed along with the appeal filed against the final judgment, these are now called appeals of "preventive processing" (*apelación de efecto preventivo*), while other appeals will be known as "of instant processing" (*apelación de tramitación inmediata*).⁵

Indeed, without going into details, depending on the type of appeal in question, there will be cases where if the appeal is filed against a resolution during the procedure, it will be admitted with a "preventive" effect, this means, that the appeal will be taken into account only if the aggrieved party also would appeal the final judgment or ruling, repeating the same grievances expressed in that 'preventive' appeal. In other cases there will be appeals of 'instant processing', which will be remitted to the Court of Appeals for immediate resolution.

If the Court of Appeals shall consider the grievances expressed in the appeal of

'preventive processing' to be founded because the lower court had committed procedural violations that affect the merits of the case, the court would revoke the ruling appealed, returning the case to the lower court so that it proceeds to replace the procedure for repairing such violations.

3. Appeal can only be filed against rulings in proceedings which value exceeds two hundred thousand pesos (nineteen thousand U.S. dollars approximately) for principal amount, excluding interest and other ancillary amounts claimed. This amount should be updated on an annual basis, according to national Consumer Price Index published by the Central Bank of Mexico (*Banco de México*).⁶

4. An appeal can only be filed against the rulings that the Code specify.^{7, 8}

Corollary.

After briefly discussing the amendments to the Code in the case of an appeal, we concluded by saying that the changes were made to decrease the burden of work that the Courts of Appeals currently face.

A second objective could be achieved by expediting the processes, and preventing litigators from appealing any kind of rulings with a legal provision that establishes that only the decisions specified in the Code can be appealed.

We will have to wait a couple of years to see the results.

4.- Article 1177 section IV of the Code.

5.- Prior to the amendments, all appeals were of 'instant processing'. Although the code does not specifically name them as such.

6.- Article 1139 of the Code, first paragraph

7.- Article 1339 of the code, third paragraph.

8.- Before the amendments, all types of rulings could be appealed.

Mexican Aviation Registry.

Nationality and Registration Marks. | Misael Arellano *

To continue with our analysis of the most important deficiencies of the Mexican Aviation Registry (hereinafter Registry), we will now discuss the issue concerning designation of nationality and registration marks, as well as the procedures for their cancelation. We will highlight the Registry's perspective and point of view as to the legality of the act itself under constitutional rights and precepts that the aeronautic legislation establishes, with the intent of safeguarding the rights and interests that an aircraft's registration mark grants to the parties involved -directly or indirectly- in its operation.

“...No aircraft may be validly registered in more than one State, but its registration mark may be changed from one State to another”.

Designation.

The annexes to the 1944 Chicago Convention of International Civil Aviation signed in Buenos Aires on September 24, 1968 grants each State absolute sovereignty regarding designation of registration marks and the registration of civil aircraft¹; requiring just the observance of the principle of “sole registration mark” established in Article 19: “...No aircraft may

be validly registered in more than one State, but its registration mark may be changed from one State to another”.

In Mexico, the Civil Aviation Law states that: “...Aircraft owned or in legal possession of Mexicans, or by foreigners exclusively dedicated to private non-commercial air transportation, may be registered in the Mexican United States. The Mexican nationality of the aircraft is acquired under the Registration Mark of the aircraft, which will be granted once the documentation referred in article 47 paragraph I of this Law is registered before the Mexican Aviation Registry...”² In accordance with the aforementioned, for the designation of nationality and registration marks, users must file before the Registry all documentation evidencing the aircraft and its engine's ownership or possession - or any other right inherent to the aircraft -, plus every other documentation that shows that the aircraft has been bought, transferred, modified, imposed or that extinguished its ownership or possession.³

Notwithstanding the above, aside from the documentation under which legal possession of an aircraft is proven, - either bought, leased or acquired under any other legal agreement between the parties -, the Registry also requires that the user proves legal presence or introduction of the Aircraft in to Mexican territory. In case of temporary importation, it is mandated that the original form of temporary petition for

* IN COLABORATION WITH ALEJANDRA LLOPIS.

1.- Article 19 of the 1944 Chicago Convention of International Civil Aviation.

2.- Article 45 of the Civil Aviation Law.

3.- Article 47 subsection I of the Civil Aviation Law.

importation be filed. In addition the parties will need to comply with all the usual formalities established for the registration of any document: apostilles, notarization and translation into Spanish in case of public or private documents issued abroad, and signature ratification before a notary public in case of signed documents executed by Mexican individuals or entities.

Pursuant to the above, a registration mark certificate is the document that grants the Mexican nationality to an aircraft in order for it to be operated in case of public transportation, by a single Mexican permission or concession holder, and in favor of whom the registration mark is issued as a right derived from its legal possession. The registration safeguards the rights of the Certificate holder by making the registered documents public so as to have legal effect and become enforceable against third parties. The registration mark certificate may be granted only to Mexican operators, who are then required to keep it on board the aircraft.⁴

Article 47, paragraph I of the Civil Aviation Law clearly establishes the documents that must be filed before the Registry with the intent of safeguarding all parties' rights with regards to the Aircraft, as well as the rights of third parties including the users' rights derived from the public air transportation services. Consequently the Civil Aviation Law makes special emphasis on mortgages or liens on these aircraft, requiring the permission or concession holder, aside from its inscription before the Registry, to request prior authorization from the Transportation Ministry.

Cancellation.

In addition to establishing the requirements and procedures to be followed for the designation of nationality and registration marks, the Civil Aviation Law establishes the conditions and procedures to be followed for the aircraft's registration mark to be cancelled. Article 46 of the Civil Aviation Law states that: *"The cancellation of the aircraft's registration mark before the Mexican Aeronautic Registry will have as consequence, the loss of its Mexican nationality and may be conducted in the following cases: I. a written request of the owner or party in legal possession of the aircraft. The Registration Mark's registry of an aircraft subject to a lien may not be cancelled, without the creditor's prior consent; II. by judicial or any other competent authority's order; III. in case of destruction, loss or abandonment of the aircraft; IV. by the expiration of the term in the case of provisional registration marks; V. because has been registered in another State and, VI. For any other cause established in the respective regulations".*

Although the above may imply that the cancellation procedure is simple and very straightforward for users, lessors and owners alike; this does not exactly happen in this way because of the Registry's poor exercise of its duties based on the ambiguous nature of precepts contained in the aeronautic legislation, specifically in the Regulation of the Mexican Aviation Registry.⁵ Under these provisions, the Registry is granted with the capacity to "qualify" the validity or non validity of the documents filed for registration or, in this particular case, for the validity of a registration mark's cancellation request. In stricto sensu, the law grants the

4.- Article 130 of the Civil Aviation Law's Regulations.

5.- Article 8 of the Mexican Aeronautic Registry's Regulations.

“...the law grants the owner the right to cancel the Registration Mark at any time, so long as he is registered and thus recognized as such before the Registry;”

owner the right to cancel the Registration Mark at any time, so long as he is registered and thus recognized as such before the Registry; however, in accordance with the criteria and tendency of the authorities to safeguard the rights of any person in possession of the aircraft or any other involved parties, the Registry exceeds its limitations and capacities stated under Article 46 paragraph I of the Civil Aviation Law and considers that authorization by such party in possession is always required in order for the de-registration to proceed and therefore it requests not only the termination of every agreement or lien that has been filed with the Registry in respect to the aircraft, but also the express consent of the aircraft operator.

As stated in previous editions of Coelum, the Registry's main objective is to publicize the acts that are registered before the same. The registration of documents grants rights, such as the designation of nationality and registration marks. It causes actions so registered to be enforceable before third parties, so that any interested parties' rights derived from obligations under the registered actions are protected. However the Registry goes above its attributions – and its capacities, both operative and legal – by attempting to “qualify” the validity or procedural quality of the documents that have

been filed. The Registry's intervention should be limited to the verification of the compliance with the formalities and requirements established in the applicable legislation solely for the purpose of conducting the registration of the documents described, and to leave the duty and capacity to decide on the legality or illegality of the operative documents of concern in each case, in the hands of the competent judicial authorities in charge of solving the controversies or conflicts that may exist between the affected parties.

The interests of the owners, lessors, lessees or any other party involved in the operation of aircraft used for public air transportation may be divergent between one and the other. For this reason, the Registry publicizes these rights and obligations to guarantee their performance and ensure fairness to all involved parties. Therefore, for the Registry to procure the protection of -or to act with the intent of protecting only- the party involved in the operation of aircraft, constitutes a violation the other party's rights.

“...to procure the protection of -or to act with the intent of protecting only- the party involved in the operation of aircraft, constitutes a violation the other party's rights.”

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Extract of Mexican Aviation News

Under pressures from Boeing, DGAC cancelled the registration mark of an aircraft leased to Azteca.

The 737-200 aircraft, has been seized by a German company, Bavaria, and by Pals VII linked to Pegasus Aviation that also had the rights in the financial lease and even in the flight concession of Azteca. In a never-seen-before measure, the DGAC cancelled the registration mark for Boeing. There is no other notice of cancellation made without the permission or request of the proprietors.

El Universal. 02/June/2008

Six airlines request fuel subsidy.

Six airlines, ALMA, Aeroméxico, Aviacsa, Interjet, Mexicana, Volaris, are waiting an answer from the Treasury Department (Secretaría de Hacienda y Crédito Público) to their request that would authorize the sale of aviation fuel at a subsidized price. Garza Alvarez, General Manager of Interjet, explains that if the Federal Government doesn't apply measures to control the increases in the price of the fuel, the industry could suffer a dramatic collapse.

El Financiero. 03/June/2008

Airlines must depend on the Treasury Department Funds for assistance.

Tellez, the head of the Ministry of Transport and Communications, explains that his Ministry has no control on fuel pricing, making impossible for him to intervene on the fuel crisis as requested by the airlines.

El Financiero. 05/June/2008

ASUR increases passenger traffic.

The traffic in May was 1,506,290 passengers compared to 1,330,254 passengers registered in the same period of 2007. The Mexican airport operator ASUR said that passenger traffic at its terminals rose by 13.2 percent in May, driven by double-digit growth in domestic and foreign travelers. ASUR operates nine airports in southeastern Mexico, including the Caribbean resorts of Cancun and Cozumel, two of the main destinations for foreign tourists in Mexico. International passengers at ASUR airports rose 15.6 percent to 814,738 in May compared to same month last year. The company serviced 691,552 passengers in its domestic terminals, 10.6 percent higher than May 2007.

El Reforma. 05/June/2008

Grupo Aeroportuario Centro Norte increases passengers 5.8%.

The Grupo Aeroportuario del Centro Norte reported today an increase of 5.8 percent in the total number of passengers handled in its 13 air terminals in May this year, compared with the same month of 2007. The airports distinguished by their growth were Reynosa, Acapulco, Ciudad Juárez and Monterrey, as a result of increased frequencies and a greater load-factor for several airlines. It was said that airports in Durango, Torreon, Chihuahua and Zacatecas were affected more by low load factors and cancellation of frequencies and routes by Aviacsa and Aerocalifornia. The airports in Chihuahua, San Luis Potosí, Monterrey, Tampico, Torreon and Zihuatanejo, showed growth, mainly from the start up of new international routes.

El Financiero. 06/June/2008

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Extract of Mexican Aviation News

Bombardier benefits from fuel price hikes.

The hike in prices of the fuel has put Bombardier in a good position because they built new generation, fuel efficient aircraft that can replace older less fuel efficient equipment. So far Bombardier's business experience in Mexico has been successful. Last May they announced a second project, valued at \$ 250 million. They will build their executive jet, Bombardier Learjet 85 in the state of Queretaro. By the end of year three the Bombardier plant in Queretaro will generate nearly 2000 jobs.

La Universal. 09/June/2008

SOS for World Aviation.

At the International Air Transport Association (IATA) annual meeting the members unanimously agreed to call on all governments, airports and aviation workers to help save the airlines from a financial crash. This request for help is because of the constant increase in the price of fuel which represents around 45% of the airline's costs. IATA states that the governments should abandon the laws that stop airlines from merging and eliminate certain taxes that only affect airlines. They also request local suppliers to update their equipment and airport managers to upgrade their facilities in order in order to reduce costs. Support is also requested from the airline workers to support the airlines and to avoid any meaningless confrontations. Numerous examples of this crisis can be seen, such as United and American airlines canceling routes and firing workers. The Brazilian Airline GOL has even returned a couple of planes because of their inability to economically sustain them. In this time of crisis, it's very important that the government, suppliers and workers all work together to avoid the coming crisis.

La Crónica. 11/June/2008

Domestic air cargo reduced on a 13%.

Under the pressure of the rising prices, some companies have lowered their use of air cargo transportation. The increase in fuel prices has already affected the air cargo business in the first quarter with the volume decreasing 12% compared to last year. While last year Mexican cargo airlines grew 18% on the international market, they have reduced their operations 33% in the first quarter. The increase in the fuel price has affected this industry as well, and people are using the air cargo transportation with less frequency as some products are no longer able to be transported by air due to the price increase.

El Reforma. 11/June/2008

The Agreement between Mexico and the European Communion is ready.

DGAC has now concluded the formalities for a new agreement with the European Communion after several months. This agreement must now be approved by the Senate in order for it to take effect. This will give Mexico a chance to re-negotiate the agreements with Spain and Great Britain, agreements in which airlines such as Mexicana and Aeromexico are interested in participating.

El Universal. 13/June/2008

Felipe Calderón stimulates aerospace investments in México.

Mexico's President Felipe Calderon met with Louis Gallois of Aeronautic Defense and Space Company (EADS), and outlines the advantages of increased investments in Mexico by EADS investment through their company Eurocopter so as to increase the helicopter market in this country. EADS is the world's second largest aerospace company under Boeing and has operated in México for over 25 years. Mexico hopes for a bigger investment so as to increase their Mexican operations.

El Financiero. 14/June/2008

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