

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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Flight Cancellations and Denied Boarding Because of Security and Health Issues. | Misael Arellano*.

In accordance to the International Air Transport Association (IATA)¹, the annual number of passengers in 2007 exceeded 2.2 billion and although the numbers dropped the following years because security or health concerns, numbers are again rising and are forecasted to grow by 4.4% annually until 2015, according to the International Civil Aviation Organization (ICAO)².

As we have seen over the last few months, international air transportation has been seriously affected by the cancellation of flights coming from or departing to specific countries that may affect the national security of the population because of the suspicion of a pandemia spread as occurred in Mexico. In other cases, as it happened in the US after 9/11, countries also have the prerogative to cancel any scheduled international flight to or from a country considered as a public enemy or dangerous, under the principle of national sovereignty.

However these cases represent a problem that has provoked the exchange of diplomatic notes or through a complaint filed before the United Nations (UN), in this issue we want to discuss some relevant factors involved with the cancellation of flights and denied boarding because of security and health issues, and not international issues caused by a cancellation of international flights because of national security.

Flight Cancellations.

The World Health Organization (WHO) states that a WHO's member should not restrict their airspace to any aircraft for reason of awareness that an aircraft may have a case of communicable disease on board. The International Health Regulations (IHR) entered in force on June 15, 2007 for all WHO member States that have not rejected or made reservations on a timely basis; for the specific case, Article 28 of the IHR provides: "...28.1. Subject to Article 43 or as provided in applicable international agreements, a ship or an aircraft shall not be prevented for public health reasons from calling at any point of entry...", and go forward stating the concept of "*free pratique*"³ on Article 28.2: "...Subject to Article 43, or as provided in applicable international agreements, ships or aircraft shall not be refused *free pratique* by States Parties for public health reasons; in particular they shall not be prevented from embarking or disembarking, discharging or loading cargo or stores, or taking on fuel, water, food and supplies. States Parties may subject the granting of *free pratique* to inspection and, if a source of infection or contamination is found on board, the carrying out of necessary disinfection, decontamination, or deratting, or other measures necessary to prevent the spread of the infection or contamination..."

The flight cancellations process is clearly stated for members of the International Civil Aviation Organization (ICAO) and WHO, regarding the ICAO Annex 9, Chapter 2, paragraph 2.4 that states the following: "2.4 **Recommended Practice.**- In accordance with the International Health

* IN COLABORATION WITH HÉCTOR HOYOS

1.- <http://www.iata.org>

2.- <http://www.icao.int>

3.- In accordance with the IHR (2005) '*free pratique*' means: "Permission for an aircraft, after landing, to embark or disembark, discharge or load cargo or stores."

Regulations of the World Health Organization, Contracting States should not interrupt air transport for health reasons. In cases where, in exceptional circumstances, such service suspensions are under consideration, contracting States should first consult with the World Health Organization and the health authorities of the State of occurrence of the disease before taking any decision as to the suspension of air transport service.”

“...In accordance with the International Health Regulations of the World Health Organization, Contracting States should not interrupt air transport for health reasons...”

Denied boarding – Safety reasons.

In Mexico, Article 33 of the Aviation Law states the general rule to be able to board a civil aircraft stating that “...will not be able to board armed persons, in drunkenness condition or under the influence of narcotics, psychotropic or enervating...” ; however, Article 41 of the Regulation of the Aviation Law grants to the carrier the right to refuse transport, for safety reasons, to the following passengers:

- Persons trying to travel alone, suffering from any disability in terms of Article 450 part II, of the Civil Code.
- Persons who due to their behavior or health condition require special attention or could cause evident inconveniences to the other passengers or crew, or who constitute a danger or risk to themselves or to the other passengers and their goods on board.

In USA, the Aviation Safety Reporting System (ASRS)⁴ revealed that alcohol intoxication was directly involved in 43% of the ASRS passenger misconduct incidents. The study's reporters frequently suggested that passengers should be monitored for erratic behavior prior to boarding (particularly for signs of intoxication) and denied boarding if their behavior appears likely to continue during flight because the study also revealed that passenger misconduct causes significant problems to flight deck crews as well as cabin attendants.

A short resume of the study data is revealing:

- In 43% of the passenger-related incidents, flight crews experienced some level of distraction from flying duties.
- In 22% of the total study incidents, a flight crew member left the cockpit to assist flight attendants in dealing with an unruly passenger.
- Flight crews diverted to an alternate airport to deplane the unruly passenger in 13% of the total incidents.

Finally, regarding the attributions granted by Mexican aviation legislation to the carriers, as well as the ASRS study data indicated, carrier's crews are often faced with the dilemma of whether to intervene in a passenger-caused disturbance.

Denied boarding – Health reasons.

The IATA issued on January, 2009 the General Guidelines for Passenger Agents in respect of

4.- <http://asrs.arc.nasa.gov>

suspected communicable diseases, providing a basic framework of response procedures to reassure passenger agents and help them manage such an event. IATA states that a communicable disease is suspected when a traveller:

- Has a visible skin rash or,
- Has a severe cough or,
- Is obviously unwell and/or,
- Complains of any of the following:
 - Severe cough
 - Fever
 - Bruising or bleeding without previous injury
 - Persistent diarrhea
 - Skin Rash (non visible)
 - Persistent vomiting

The procedure of denied boarding because of risk of a communicable disease diverse in accordance with the companies policies. In some countries passengers may have to involve the companies Customer Complaint Resolution Official asking the traveller to obtain a medical clearance to be able to board the flight.

“...In some countries passengers may have to involve the companies Customer Complaint Resolution Official asking the traveller to obtain a medical clearance to be able to board the flight.”

Are communicable diseases a real risk on board?

Transmission of infection may occur between aircraft passengers who are seated in the same area, usually as a result of the infected person coughing or sneezing or by touch (direct contact or contact with the same parts of the aircraft cabin and furnishings that other passengers touch) but this is no different from any other situation where people are close to each other, such as on a train, bus or at a theatre. In fact, the air supply in passenger cabins is highly filtered with advanced high efficiency particulate air (HEPA) filters before being diluted and recirculated, keeping any airborne contagion to a minimum. Furthermore, if an obviously ill passenger attempts to board an aircraft, the flight crew has the authority to deny them access. Research has shown that there is very little risk of any infectious disease being transmitted on board because the quality of aircraft cabin air is carefully controlled. Most modern aircraft have recirculation systems, which recycle up to 50% of cabin air. The recirculated air passes through the HEPA filters trapping particles, bacteria, fungi and viruses, similar to the type used in hospital operating theatres and intensive care units.

For such purposes, the “WHO” issues general recommendations, however these recommendations are not 100% enforceable by carriers and they are available to be applied or not, as stated by the WHO. Furthermore, during an outbreak of a specific communicable disease, the WHO or member states may modify or add further procedures to these general guidelines.⁵

5.- WHO Weekly Epidemiological Record, Vol 80, No. 21, 2005.

Alternative Solutions to the Serving of Notices resultant from a California Court Resolution regarding Process Agents. |

Alejandra Llopis*.

On April 15, 2009, a U.S District court in California¹ ruled that Mexican defendants must be served legal notices via specific Mexican authorities designated by Mexico to receive and forward requests for the service of lawsuits. For a better understanding of this issue here is an example: A California firm suing a Mexican company in federal court must conduct service of process through the Mexican authority designated for such actions by an international treaty.

“...a U.S District court in California ruled that Mexican defendants must be served legal notices via specific Mexican authorities designated by Mexico to receive and forward requests for the service of lawsuits.”

The subject of notices abroad has been questioned and analyzed because the rules of procedure under Mexico's Federal Civil Procedures Code cannot be ignored for Mexican residents, even when the individuals in question might be located abroad. The figure of “process agent” is commonly used in several kinds of contracts and agreements for example in many aircraft lease agreements

and the important thing is to appoint a “process agent” empowered abroad that is going to be the conduct for legal notices. These agents have to accept their appointment by a letter accompanied with a power of attorney granted to such person or company, also it must be stated that he has to remain in the United States and that the failure by the process agent to notify of the process shall not invalidate the proceedings concerned. Agents acting as process agents should provide compliance and solutions for managing statutory representation, corporate transactions, jurisdictional and securities compliance, etc.

However, in the case in question the defendant in Mexico moved to dismiss based on innadequate process because the plaintiff failed to provide service in accordance with Rule 4 (f) of the Federal Rules of Civil Procedure,² that expressly authorizes the procedure of service of process on foreign business entities that in certain cases require the use of “internationally agreed means of service”, to effect service of process abroad, such as those authorized by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters of November 15, 1965, the “Hague Convention”.³

* IN COLABORATION WITH SVEIN AZCUÉ.

1.- United States District court for the central District of California. Case No. CV 08-5742-JFW (JCx).

OGM, Inc., et al –v- Televisa, S.A. DE C.V., et al.

2.- The Federal Rules of Civil Procedure (FRCP) are rules governing civil procedure in United States District (federal) Courts.

3.- The Hague Convention is a multilateral treaty governing, it allows service of judicial documents from one signatory state to another without recours to consular and diplomatic channels.

“The authority designated by Mexico to receive and forward requests for service of lawsuits from other Hague Convention member States is the Mexican Ministry of Foreign Affairs.”

The court in California resolved that the plaintiff's attempts to serve the defendant were deficient because Mexico, under the Hague Convention⁴ established a “central authority” for handling service of process. This central authority is required to undertake and receive any request for service coming from other contracting states... The authority designated by Mexico to receive and forward requests for service of lawsuits from other Hague Convention member States is the Mexican Ministry of Foreign Affairs. Therefore the court concluded that Mexico has in fact not authorized service to be effective by the alternate methods specified in Article 10 of the Hague Convention, as it is reproduced below, and that service through Mexico's central authority is the exclusive method by which the plaintiff can serve a defendant in Mexico.

“Article 10: Provided the State of destination does not object, the present Convention shall not interfere with:

- a) The freedom to send judicial documents, by postal channels, directly to persons abroad,
- b) The freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
- c) The freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination”.

Taking the above into account it is clear that Mexico has objected to the alternate methods of service. Not only to the serving process through diplomatic or consular agents. When Mexico acceded to the Hague Convention, it filed declarations in Spanish upon the Ministry of Foreign Affairs of the Netherlands, objecting to all alternative methods of service under Article 10 of the Convention. Mexican parties consequently can only be served through the central authority established precisely for this purpose. Therefore the notification provided via certified mail or personal service will not take effect.

With the resolution of the court in California, the figure of the process agent established in the agreements will not take effect on judicial notifications for Mexican parties, because the ruling

4.- Article 2. Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters.

clarifies that alternative methods of process service to Mexican defendants, via registered mail or personal service, are improper.

The only method for serving notices in Mexico is by a rogatory letter. This means that the U.S Secretary of State sends a communication to Mexico's Ministry of Foreign Affairs requesting assistance to make the notices in the required form. The Mexican Ministry of Foreign Affairs then requests a Mexican judge to handle the notification in the proper form and after it is performed the judge will remit the notification documents to the Ministry of Foreign Affairs for it to respond and answer the US State Secretary's request.

“...the ruling clarifies that alternative methods of service of process to Mexican defendants, via registered mail or personal service, are improper.”

The problem is that many of the agreements and contracts which are currently in force and effect establish the figure of the process agent, this means that a process agent has been appointed to be the representative upon who court papers may be served in any proceeding. Because of this case, it will now be necessary to set up other options for notifications in United States, and to notify defendants by means of this Mexican central authority and to follow the procedure as established by Mexican State in the Hague Convention.

In conclusion, every case has to be analyzed individually, in order to choose the best notification method to avoid affecting its validity and opting for faster and lower

cost options. With the commencement of an action against a Mexican defendant, it will mean confusion and additional time, as the service of process to Mexican parties will have to be conducted through the Mexican central authority with an understanding of the terms and time delays of this entity.

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Extract of Mexican Aviation News

A 35% decrease in reservations reported by national airlines.

The airline industry reports a decrease of up to 35% on passenger reservations on all flights due to the alerts about the Influenza virus in Mexico. The load factor has also decreased between 20% and 25%. Javier Christlieb Morales, president of the CANAERO, declared that the decrease was well understood because of the raised alert level and the preventative actions which caused the airline industry to be affected. He also commented that all national airlines have suffered losses due to the epidemic. Even though the federal government recommended that people not to travel during this contingency, the sector is now expecting an increase in flight reservations and load factor. La Crónica. 04/May/2009.

ALTA concerned about flight restrictions.

Alex de Gunten, chief executive for the ALTA group, declared that all members are concerned for the actions taken by some of its members regarding the flight restrictions on passengers coming from or going into Mexico. He said these measures are unfounded since they go against the World Health Organization recommendations and also affect passengers who want to return to their home countries. He also stated that important measures are being taken to prevent the spread of the virus, and that airlines have extreme control over passengers, proving that flight restrictions are incapable of stopping the spread of the disease. Although checking passenger for symptoms of the influenza is a prevention method, an infected passenger can board a plane and spread the infection before any symptom is present. La Crónica. 05/May/2009.

IATA: No reason to suspend flights from Mexico.

The president of the IATA, Giovanni Bisignani, declared there is no reason to suspend flights to Mexico and pointed out that the World Health Organization (WHO) never indicated that this was required. The measures and recommendations of the WHO have been followed, since the prevention of the disease is a priority. He also stated that only a few countries have suspended all flights to Mexico and some others placed passengers in quarantine for a week to prevent a spread of the virus. Milenio. 13/May/2009.

Airlines ask for a lower interest rate.

The CANAERO requested SHCP to extend the discounts to the cargo companies.

The CANAERO asked Bancomext that the loans given to the airlines have the interest rate reduced way under the one that commercial banking is imposing, as at the moment "you could not talk about real support". The representative of all the airlines asked the Development Bank to give all airlines access to the credits, since they all have cash-flow necessities and because you can't really tell which companies do or do not have a short or midterm viability. Moreover, he requested the SHCP to make available to the cargo airlines the 50 percent discount on the invoicing for the use of the Mexican air-space, since "these companies have a high use of these services and an important role in the reactivation of the economy of the country". Milenio. 13/May/2009.

Airline workers wages reduced.

Union leader Lizette Clavel assured that due to the economic crisis and AH1N1 flu airline workers have lowered their income up to a 70%. Some workers are getting paid 1000 pesos a month which is less than enough from the minimum wage. She also stated that the 15 thousand million pesos from the government destined to the restaurant, air, and tourism won't be enough to escape this crisis. Also the school re-scheduling also affected vacation time affecting job losses and wage decrease. El Financiero. 14/May/2009.

News | May

Extract of Mexican Aviation News

Airline Millionaire Rescue.

The future of Mexico's main airlines depends on the agreements where Mexicana and Aeromexico should prove to the government their viability and their willingness to restructure as a requirement to start a salvage deal estimated on 4 thousand million dollars. The groups lead by Andrés Conesa and Manuel Borja would contribute with 2 thousand million pesos each and if they do not agree the possibility of a bankruptcy would grow as an alternative. The model seems simple and raw, the government will be willing to contribute with half of the funds as long as the shareholders contribute with 500 million pesos and the Air Transport Industry Unions another 500 million pesos, accompanied with an aggressive business plan for short and long term. The worst part is that after this millionaire rescue this does not guarantee that the companies will survive the crisis. El Financiero. 18/May/2009.

Airline industry: Crossroads

The preliminary diagnosis of the industry has revealed that the industry problem is structural, and that neither a credit nor reductions in the rate of SENEAM will resolve the oversupply of aircraft seats. The authorities consider valid any business strategy that strengthens an airline, especially when the Mexican market is driven by oversupply. Despite suspension of routes and operations that are accentuated with the outbreak of influenza, it is still necessary to analyze the situation of each company to see if, from one or more mergers, there can result a number of solvent companies, and at the same time, maintain an atmosphere of healthy competition. Excelsior. 22/May/2009.

Unions seek to prevent staff cuts.

The spokesman for the pilots says that airlines must submit a transparent report of their finances. Unionized workers in the airline industry, among them pilots, said they will not allow staff cuts, in turn AeroMéxico and Mexicana have requested support measures and savings in order to continue operating, following the economic crisis due to the health risk from influenza. AeroMéxico pilots, who attended a meeting convened by ASPA, said their company and Mexicana are seeking staff cuts. However, the spokesman said that the two airlines have not formally requested a cut in the number of pilots, and to verify that the measure is necessary, they should make a careful calculation of the hours flown over the next few days. For the pilots to keep their jobs the carriers require a salary cut of between 15 and 20% for the next six months. Excelsior. 25/May/2009.

Aviation: Real rescue or just lifebelt?

Before the very serious conflict that the Mexican aviation industry endures, one of the repeated questions is if the crisis is due to mainly financial matters. Are the tyrants really the bankers and is the solution in their hands? The bankers, specifically the development banks, with Bancomext in the lead, take cover and deny to be, once more, the villains in this movie. Behind a strategic move the bankers avoid the real solution to the problems that the aviation industry lives with. They leave that to the relevant authority, commanded by Juan Molinar Horcasitas and Humberto Treviño. El Financiero. 27/May/2009.

Dozens of flights cancelled. The Mexico City International Airport is the most affected.

The airport groups within Mexico continue to report a large number of flight cancellations, despite the fact that the principal gateways for tourism to Mexico have reduced the health alerts about the risk of traveling to Mexico and the day to day life in Mexico is back to normal. Low load factors continue to cause inbound carriers to reduce the frequency of their flights, which at the same time has a great impact on the number of transported passengers and on the earnings that will be reported by the airport groups at the end of May. In the case of Mexico City International Airport, which normally handles 750 operations a day, flight cancellations as of Tuesday May 19, have gone from 42 to 92. Excelsior. 28/May/2009.

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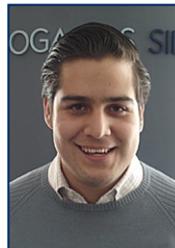
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