

# COELUM

COELUM Pronunciation: "che-l&#228;m," 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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# The Montreal Convention of 1999 and the Rights of the Passengers within the Mexican Legal System.

| Juan Antonio Tiscareño\*

The purpose of this article is to explain the carrier's liability regime regulated by the "Convention for the Unification of Certain Rules for International Carriage" (the Convention), as well as some of its implications for users of air transport services.

Historically, the Convention was designed in Montreal, Canada<sup>1, 2</sup> and was created to recognize the need to modernize and consolidate the Warsaw Convention and related instruments, and the importance of protecting the interests of users of international air transport. It is an international law signed by numerous countries, which gives legal certainty to operations in airspace around the world. In this article we will concentrate our efforts in explaining the carrier's liability and also the rights of the passengers and other users of air transport.

## Carrier's liability

The Convention contains a special chapter concerning the regulation of the carrier's liability and the way to indemnify the damage caused to the users of air transport. This is very important because, as said in previous articles of the Coelum<sup>3</sup>, international treaties like this Convention, are, under the laws of Mexico, even above federal laws, and the authorities are obliged to obey them.

The particular relevance in the Convention, in regards to the liability regime, is that establishes the concept of strict liability, which means that the user affected or damaged should not prove the guilt or fault of the carrier, but on the contrary, the carrier must prove that the user affected acted negligently.

The carrier's liability is divided into the following categories, according to the Convention:

**1. Death and injuries of passengers.-** In the case of death or injury of a passenger, the carrier is liable for the sole reason that the accident that caused the death or the injury has occurred on board the aircraft or in the course of the operations of embarking or disembarking the aircraft.

**2. Damage to baggage.-** The carrier is liable in case of destruction, loss, or damage to checked baggage upon the condition only that the event which caused the destruction, loss or damage

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### \* IN COLABORATION WITH ALEJANDRA LLOPIS.

1.- As of December 2008, there were 87 signatories to the Montreal Convention, including the United States, European Union (EU), Canada, China, Japan, Korea and Mexico.

2.- For a more extensive introduction of the Montreal Convention of 1999 see the article by Mario Molina, "Mexico and the Montreal Convention of 1999", Coelum, October 2006.

3.- A complete explanation of the ranking of an International Treaty can be found in the article by Mario Molina, "The ranking of the International Treaties in Mexican law", February 2007.

“The particular relevance in the Convention, in regards to the liability regime, is that establishes the concept of strict liability, which means that the user affected or damaged should not prove the guilt or fault of the carrier, but on the contrary, the carrier must prove that the user affected acted negligently.

took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.

**3. Damage to cargo.-** The carrier is liable for damage sustained in the event of the destruction, loss of or damage to cargo, upon the condition only that the event which caused the damage took place during the carriage by air.

For the exoneration of the liability, the carrier must prove the negligence or other wrongful act or omission of the person claiming compensation.

The above mentioned rules are general, but they are useful to give us an idea of the principles from which the Convention was inspired.

### **Amount of the compensation**

To calculate the amount of the compensation due by the carrier, the Convention uses the concept called “Special Drawing Rights,” as defined by the International Monetary Fund. The Special Drawing Right is the result of a calculation based on the most important currencies of the world.<sup>4</sup> The Convention establishes strict limits on the minimum amount of compensation to be paid to the users affected, but the carrier can establish higher amounts of compensation or not restricted to any limit.

It should be emphasized, as we can see, that the Convention provides the users helpful tools to defend their rights and patrimony, to make the carrier responsible, and forcing them to compensate -economically speaking- the users for the damage created.

### **The carrier’s liability in the Mexican Federal Law of Consumer’s Protection**

The primary objective of the Federal Law of Consumer’s Protection (The Law) is to promote and protect consumer rights and ensure fairness, certainty and legal security in relationships between suppliers and consumers<sup>5</sup>. In other words, the law regulates in general the relationship between consumers and suppliers, covering a large universe of individuals, in which airlines,

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4.- For example, in the case of In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogram, unless the consignor has made, at the time the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.

5.- Article 1 of the Law.

passengers and other users of air transport are included.

The Law also indicates that the rights provided under the law do not exclude other rights deriving from international treaties or conventions to which Mexico is a signatory. It is important to note that the law never mentions the Montreal Convention, because it concerns only general issues. Regardless of international treaties, the Law provides penalties for suppliers of products and services that incur liability.

It is an accepted principle that in general, the interpretation and enforcement of the law corresponds to the Courts specially designed for that purpose. This principle is provided in article 17 of the Mexican Constitution. In addition, different instances have been created to solve conflict between particulars. The conflicts between providers and consumers can be solved by the Consumer Protection Agency (the Agency). It is an authority responsible for enforcing the Law we have mentioned. Thus, a consumer affected by a provider of air transport service can file his complaint in the Agency, or can file the complaint directly in the correspondent court to decide the conflict.

Although it is true that there is a procedure for parties in conflict to reach an agreement in the Agency, and where appropriate, compensate the consumer for the damage, if the agreement does not materialize, the consumer will not be compensated for damage by the resolution granted by the Agency, as there is no legal way to force the provider to do so in the Agency. In this case the Agency

will grant a resolution to decide if a fine or penalty must be imposed to the provider due to the violation of any legal provision, and of course, the penalty is not intended to compensate the user of the air transport service, but to punish the airline for the violation of the Law.

Indeed, when a passenger requests the Agency to file a complaint against an airline, due to the violation of their rights, for example, for the damage caused to its baggage, the Agency will receive the complaint, and will notify the airline for the holding of a hearing, but if the parties fail to reach an agreement, the Agency will leave the rights intact so that they may exercise those rights in the manner and form most suitable to their respective interests,<sup>6</sup> so the user will need to sue the airline before a court to be compensated.

## Conclusion

We strongly believe that the Montreal Convention could be applied to benefit of the users of air transport services. It is recommended that both the airlines and users are aware of this Convention for the understanding of its legal implications.

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6.- See the chapter concerning to the "proceedings", article 99 and subsequent.

# Navigation Assistance Services and use of the Mexican Air Space. | Misael Arellano

- 3rd article - Payment verification and suspension procedures.

In our past edition of COELUM, this author reviewed the process that carriers must follow to make the payments for the services provided by SENEAM. In this issue we will analyze the payment verification procedure and the corresponding suspension procedure of Navigation Assistance Services and use of the Mexican air space due to any lack of payments.

The last two paragraphs of section I of Article 291 of the Federal Law of Duties (LFD) states that once the carrier has calculated, paid and filed the SENEAM duties: "...The Communications and Transport Ministry (SCT) through SENEAM, will check the information provided by the users and in the scenario in which differences are exposed on payments of duties, the clarification of differences will be requested to be filed within 15 days after the declaration was filed before SENEAM. The users have 3 days to prepare and file the clarification following this request. If differences persist, SENEAM will advise the carrier about the amount required for payment within 3 days of the notification. The Communications and Transport Ministry through SENEAM will advise the situation to the Treasury Department in order for it to perform the payment requirement of the corresponding duty.

In the case in which the carrier fails to fulfill with the filing of the proof of payment or the calculation documents of the operations in question, SENEAM will communicate this fact to the SAT, who will perform the payment requirement of the corresponding duty. The SCT through its General Direction of Legal Affairs will communicate to the carrier about suspension of use and enjoyment of the air space as stated on the last paragraph of article 3 of this law<sup>1</sup>..."

For the calculation and payments effects, Article 292 of the LFD clearly states the only situations on which operations do not generate the SENEAM duties:

"Duties referred to in this chapter will not be paid, for flights conducted by domestic or foreign aircraft with the following purpose:

- I. Render search and rescue services, help in disaster zones, epidemic combat or fumigation, nonprofit medical aid, social assistance and those that attend emergencies domestic or foreign.

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## \* IN COLABORATION WITH SVEIN AZCUÉ.

1.- Article 3, last paragraph: "...In case the contributor fails to file the proof of payments within terms stated by this Law (LFD), the government department in charge of providing the service, or use and enjoyment of Federal goods, will stop providing it..."

- II. On diplomatic missions accredited by the Ministry of Foreign Affairs, as long as reciprocal treaties exist.
- III. Training Flights performed by aviation flight schools.
- IV. Destined to the testing and certification of radars and radio aid to the airspace navigation property of the SCT.
- V. Those that participate on aerial festivals organized by the aeronautical authorities.

Likewise, no duties shall be paid for aircraft that belong to the armed forces, those destined for public and national safety, and such that do not utilize engines or turbo reactors to sustain flight."

“SENEAM must assure and guarantee at all times that every aircraft in flight at that time can safely arrive to its destination airport, or could finish their current operation.”

Once the payment requirements have been given to the operator, without any favorable response issued by the operator (payment or clarification of noticed differences) SENEAM files before the SCT's General Direction of Legal Affairs the request to apply the suspension of use and enjoyment of the Mexican air space for debtor carrier.

The notification of suspension duly issued by the SCT's General Direction of Legal Affairs has to be notified under the procedure and legality stated for such effects by the Law of Administrative Procedures, granting to the carrier a 24 hour term, counted from the reception of such notification, to be able make the total payment of the required amount including penalties and extra charges for delayed payment, in order to avoid the suspension of use and enjoyment of the Mexican air space. The carrier's suspension also has to be notified to the SCT's General Directorate of Aviation (DGAC) and to SENEAM, so that under the applicable legislation, they can undertake the necessary actions to make effective this suspension. Likewise, the Ministry of Treasury (SHCP), SAT and the Costumer Protection Agency Office (PROFECO) have to be notified about the carrier's suspension.

It's very important to note that SENEAM must continue providing the navigation assistance services and use of the Mexican air space for 24 hours after the suspension notification has been given so as to assure and guarantee at all times that every aircraft in flight at that time can safely arrive to its destination airport, or could finish their current operation. In the same way, as International Legislation states, any aircraft that over-flies Mexican air space, will be allowed to proceed. This means that the suspension inside Mexican airspace for domestic flights or flights landing on Mexican territory is independent from international over-flights.

## News | February

### Extract of Mexican Aviation News

#### Mexicana goes for the trade pact, opts to renew its fleet and for a systems conversion.

Mexicana is very busy with the fleet renewal of its low-cost subsidiary carrier Click, the conversion of its passenger reservation systems so as to allow it to join the commercial airline OneWorld alliance and with the opening this year of two additional long-range routes. Before the end of the summer, Mexicana will join the 11 partner OneWorld, an alliance that will give access to almost 700 airports in nearly 150 countries, and over 8,500 daily flights. With the migration of its systems to the Amadeus platform, the Mexican company will be ready to operate in OneWorld and participate in the booking of flights from their website, operated by its members via their own connections. "It will be a radical change in systems. This work has involved more than a year of effort." El Universal. 04/February/2009.

#### Aeromexico increased its destinations to fly 11 new routes with seven EJR-145 aircraft.

Mexican airline Aeromexico has announced that its subsidiary, Aeromexico Connect, will fly to eleven domestic destinations this year with seven 50 seat EJR-145 aircraft. Aeroméxico operates 105 aircraft and is composed of Aeromexico, the regional carrier Aeromexico Connect, the charter carrier, Aeroméxico Travel and EMA, which is dedicated to aviation maintenance. La Crónica. 05/February/2009.

#### Mexican airlines are studying alliances.

Because of the difficult situations faced by domestic airlines, the only firms expected to survive will be those that meet passenger demand and have competitive pricing. Mexico's airlines, hotels and the tourism infrastructure of the country will have to conform, not just in terms of price, but the quality that the market calls for. Fares offered by airlines will be a key aspect in attracting passengers. They will have to conform to meet demand and the prices they can afford to move passengers from one destination to another. El Economista. 05/February/2009.

#### Mexicana launch new airline.

The Ministry of Communications and Transportation gave Mexicana a new concession to operate a low-cost airline. With an investment of US\$7 million, Mexicana Inter will begin operations on March 15 with an expectation to operate on 24 routes. The new airline will be operating with a fleet of 13 CRJ-200 aircraft from Bombardier, each with capacity of 50 passengers. El Universal. 05/February/2009.

## News | February

### Extract of Mexican Aviation News

#### Bombardier Aerospace will lay off 10,360 workers.

The affected employees are from plants in Canada, Northern Ireland and the U.S. They announced the dismissal of ten-thousand temporary workers and 350 permanent workers.

El Financiero. 06/February/2009.

#### New flights from Mexicana.

The start up of new flights could reduce the decline of service estimated by GAP (the Pacific Airport Group). GAP had expected a decline of between 3 and 5 percent. Mexicana announced that their new airline will fly the routes previously operated by Alma de Mexico, and that all departures will be from Guadalajara Airport. Milenio. 06/February/2009.

#### Mexicana prepares to fly to China.

Mexicana Aviation Group is looking to reach the Asian market after Aeromexico announced the possibility of canceling their flight that operates Mexico City-Tijuana-Shanghai. With the opening of the route Mexico City - Madrid, Mexicana expects to transport about five- thousand passengers this year.

Milenio. 11/February/2009.

#### ASUR needs support for the new Riviera Maya Airport.

ASUR will participate in the tender for the new airport in the Riviera Maya, Quintana Roo. Eduardo Perez Motta president of the Federal Competition Commission stated that while the group would have an advantage by having an airport nearby, they might also have a problem supporting the new airport. On the other hand if other participants could not join the tender, the approval to proceed would not be given.

Milenio. 12/February/2009.

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