

COELUM

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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.

Airline Liability in Mexico for Death of Passengers or Third Parties on International Flights.

by Mario Molina and Kendra Medina.

Part 2 of 2".

In the previous edition of COELUM, we addressed the conflict created between the provisions set by an international treaty and the ones in a local law applicable to civil matters, particularly concerning the indemnification to which a passenger is entitled for damages caused by an airline, as a result of certain amendments made to Mexican labor laws. This conflict consists of determining whether a passenger's successors or family members have the right to claim damages, due to an event that caused the passenger's death, without having to prove any negligence on behalf of the airline, up to the amount established by the Montreal Convention¹ or up to the amount established by Mexican domestic law.²

As discussed, these amendments may have important repercussions, such as possible increases in insurance premiums for airlines operating international flights to or from Mexico. Also, it is worth noting that in accordance with applicable Mexican law, flight permits granted to foreign carriers to fly to and from Mexico could actually be revoked if the airline fails to indemnify damages under the terms provided by Mexican Civil Aviation Law.³

However, the scope of this article is limited to discuss the dilemma a Mexican court could face when resolving a matter of this nature, since both the Montreal Convention and the Mexican Civil Aviation Law seem to regulate the same event, although each provides for a different minimum compensation for the victim (or family members) in the case of a passenger's death on an international flight. While the Montreal Convention provides for approximately USD \$175,000.00,⁴ the Mexican Civil Aviation Law provides for approximately USD \$308,000.00.

Given the characteristics of the authorization to provide international air transportation services in Mexico to foreign carriers,⁵ a Mexican Court would be competent to resolve a claim of this nature if a Mexican citizen decided to contest the ability of the carrier to indemnify the victim or its family members by the minimum amount provided by the Montreal Convention, as opposed to the one provided for in the Mexican Civil Aviation Law:

Assuming a Mexican court is competent to resolve a matter of this nature, the analysis that needs to be done is if a Mexican court will have legal grounds to determine that, since the domestic law provides for a higher compensation, the Montreal Convention should not be applied, and instead the carrier should calculate the voluntary compensation in accordance with the provisions of the Mexican Civil Aviation Law. In other words, if the Mexican court would be able to legally prefer the application of the domestic law versus the international treaty, if the plaintiff claims that the regulation with the highest compensation should prevail. In connection with this choice, there is Mexican case law that has developed in light of the reform concerning the protection of human rights in Mexico that took place in 2011⁶, favoring a pro-personae approach when interpreting norms that could affect human rights (the "Human Rights Reform").

1.- *The Convention for the Unification of Certain Rules for International Carriage by Air adopted in 1999 in Montreal, to which Mexico is a party.*

2.- *The Mexican Civil Aviation Law.*

3.- *Article 15 of the Civil Aviation Law.*

4.- *113,100 SDRs (Special Drawing Rights on the date this article was written).*

5.- *In accordance with Article 25 of the Mexican Civil Aviation Law such services may be provided if an authorization for such purposes is granted by the Mexican Civil Aviation Law and, one of the requisites to obtain such permits is to have a legal representative with domicile in Mexico.*

6.- *Article 2 of the Mexican Constitution was amended in order to expressly provide that, in connection with the application of any norms concerning human rights, such norms shall be interpreted in accordance with the Mexican Constitution and the international treaties, favoring at all times the widest protection to the persons.*

Before going to the core of the matter, it is important to remember that this conflict exclusively involves the compensation which the victim's family is entitled to receive from the airline, regardless any matter related to negligence, as the responsibility derived from negligence has never been capped or limited.

"In this scenario of novel constructions of the law in Mexico, we find that it is foreseeable that if the hypothesis regulated by the Civil Aviation Law and the Montreal Convention occurs, under the specific circumstances that grant the plaintiff the ability to file a claim before a Mexican Court, it is likely that a controversy between applying an international treaty that is "less generous" for the victim than a domestic general law (as is the case of the Civil Aviation Law), which clearly grants more benefits to the affected person, will arise."

The Montreal Convention vs Mexican Civil Aviation Law

The Mexican Civil Aviation Law expressly provides that air transportation within the Mexican air space shall be governed (equally, without any distinction whatsoever) by the Civil Aviation Law and by the international treaties⁷ and that, certain particular aspects shall be governed in accordance with the international treaties to which Mexico is a party, for instance, insurance policies in connection with international air transportation are required to meet the conditions provided for in the international treaties⁸; permits granted by the Aviation Authority in connection with international regular air transportation⁹ and the provision of international air transport services¹⁰ shall be provided in accordance with the international treaties. Also, the domestic air transport services provided with foreign registered aircraft¹¹, the transportation of dangerous goods, such as explosives, weapons and dangerous substances¹², baggage limits¹³ established by each airlines shall be in harmony with what is provided by the international treaties.

However, when dealing with how an indemnity is calculated in the event of damages caused by the airline to its passengers (and third parties), Civil Aviation Law makes no distinction if the calculations provided for in its article 62 are applicable to air carriers when providing domestic or international air transportation services. Therefore, the resulting amounts of the calculations provided for in such article are applicable to both domestic and international flights¹⁴.

Notwithstanding the foregoing, Mexico became a signatory of the Montreal Convention, which not only specifically regulates and provides for a compensation for the damages caused by an airline to its passengers on an international flight, but its ratification by Mexico took place after the Mexican Civil Aviation Law was issued. However, the amendments to the Mexican labor laws are more recent than the Montreal Convention.

7.- Article 4 of the Civil Aviation Law.

8.- Article 74, *idem*.

9.- Article 21, *idem*.

10.- Article 24, *idem*.

11.- Article 27, *idem*.

12.- Article 34, *idem*.

13.- Article 50, *idem*.

14.- In accordance with the general principle of law within the Mexican legal system "where the law does not make any distinction, no distinction shall be made".

Formerly, the criteria to determine which set of regulations should prevail (along with other principles of interpretation) between an international treaty and a domestic law, was limited to following the hierarchy established by the Supreme Court of Mexico. However, as we mentioned before, within the context of the Human Rights Reform, now the Mexican courts are obliged to weight which interpretation of the applicable Law gives individuals the greater legal benefits, regardless of any hierarchy that may have been determined. However, the capability of a court to make this decision is not absolute, to the extent that it can choose to apply any of the conflicting set of rules.

Law interpretation in accordance with the Human Rights Reform.

Pursuant to article 133 of the Constitution, the legislation passed by the Mexican Congress and the international treaties to which Mexico becomes a party in accordance with the applicable rules provided by the same Constitution, shall be “the Supreme law of the entire Union” and the courts shall be subject to such legislation, regardless any conflict between any such laws and the international treaties, and the laws or constitutions of the States (Mexico has 32 States). Therefore, the Mexican Constitution is considered as the legal norm of highest hierarchy in Mexico, with which any other legal norm is required to be consistent with in order to be valid, including the international treaties to which Mexico is a party.

Accordingly, the Mexican Constitution provides same hierarchy to the general laws (as opposed to federal or local laws, which are reserved to be issued by either the Federation or the States per the rules provided thereto in the same Constitution) and the international treaties. Supporting case law has been issued by the Supreme Court, confirming that domestic and international laws are considered one same set of rules, which shall be harmonically interpreted, but which validity is defined by the supreme law, that is the Mexican Constitution.¹⁵

Such thesis was confirmed by the Human Rights Reform, as the amended article 2 of Constitution provides that all the domestic laws regulating human rights must be construed in accordance with the Constitution and the international treaties to which Mexico is a party. Regardless of the apparent limits of the text, it has been considered to be the starting point to modify a number of well-established criteria in almost all aspects of Mexican Law, and because as a result, now all domestic laws can be interpreted in a more flexible and not in a strictly formal manner, as is the general rule in civil law systems. An illustrative example of this has been the recent precedents of admissibility of in-trial appeals that were previously banned by the Mexican courts.

In this scenario of novel constructions of the law in Mexico, we find that it is foreseeable that if the hypothesis regulated by the Civil Aviation Law and the Montreal Convention occurs, under the specific circumstances that grant the plaintiff the ability to file a claim before a Mexican Court, it is likely that a controversy between applying an international treaty that is “less generous” for the victim than a domestic general law (as is the case of the Civil Aviation Law), which clearly grants more benefits to the affected person, will arise.

There are very strong arguments on each side, and at this point, more questions than answers: Why should a Mexican court should apply an international treaty that is not only contrary to a domestic law but is less generous? Is the right to claim compensation for death a legal entity that should be construed as a human right? Even

15.- Thesis issued by the Supreme Court with the subject “CONSTITUTIONAL CONSTRUCTION. WHEN DEFINING THE SCOPE OF A CONSTITUTIONAL PROVISION, PRINCIPLES OF CONGRUENCY AND SISTEMIC INTERPRETATION SHALL BE USED” (“INTERPRETACIÓN CONSTITUCIONAL. AL FIJAR EL ALCANCE DE UN DETERMINADO PRECEPTO DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS DEBE ATENDERSE A LOS PRINCIPIOS ESTABLECIDOS EN ELLA, ARRIBANDO A UNA CONCLUSIÓN CONGRUENTE Y SISTEMÁTICA”; published on the page 25, volumen XXXIII, February 2006 of the Judicial weekly publication of the Federation).

in such case, shouldn't an international treaty that specifically regulates international air transportation be applicable to a claim that arises from an international flight? Would the Human Rights Reform allow the Mexican courts to choose between domestic laws and international treaties in this context? Would not such conduct interfere with the powers of the legislative branch¹⁶?

Even though there is no statutory provision or case law that specifically supports the preference of one over the other, according to the Civil Code the courts must resolve any matter ensuring that the rights of the parties involved are respected equally. Article 20 of the Civil Code provides that "in the event of a conflict of rights, if no express statutory provision is available, the controversy will be resolved in favor of the party that is trying to prevent incurring damages and not in favor of the party trying to obtain a benefit or gain. If the controversy concerns the same type of rights, the matter shall be resolved protecting equally such rights to the extent possible".

Additionally, the Supreme Court has given some insight by ruling that if the application of the international treaty and the domestic law is not possible on a harmonic basis, then a pro-personae or pro-homine criterion must be applied, without hierarchizing the sources of law, only to the extent permitted by the Constitution. In other words, if the Constitution does not limit the exercise of the human right(s) in question, irrespectively of the source (international treaty or domestic law) the exercise of the human right in question must be recognized and protected.

Consequently, in the event of conflict between an international treaty and a domestic law in connection with the exercise of a human right, a pro-personae or pro-homine criterion must prevail and preference will be given to the set of rules that are more favorable to the exercise of such human right, within the scope of the limits sets by the Constitution, regardless of this right being provided by the international treaty or the domestic law involved in the conflict.

Conclusion

Although there is no express statutory provision, nor specifically applicable case law that would help to solve the controversy that will arise in a matter that may be brought before the Mexican courts involving a conflict between the Mexican Civil Aviation Law and the Montreal Convention with respect the compensation an airline should provide to the victim (or family members) in case of death in an international flight, the existing statutory provisions and most recent case law applicable in a conflict involving an international treaty and domestic laws, confirm that the Constitution and the international treaties are altogether the touchstone under which all the other legislation should be construed from and therefore, in any such case, a congruent and systematic interpretation approach of both body of rules should be followed, but the current tendency indicates that as long as any regulation provides wider benefits, the Courts will make it prevail.

It is difficult to predict what the Mexican courts will rule on the nature of the right to receive a compensation as a human right, or if under this new paradigm the courts are authorized to not apply an international treaty, however in the opinion of the authors, regardless of the specifics of each case, their criteria and resolutions must always depart and arrive to the premise that the Constitution and the international treaties are the main parameters for their judicial performance.

16.- The legislative branch in Mexico is the Congress, which is composed by the House of Representatives and the Senate. Either can submit a law initiative so that the other can review and vote. According to Article 76 of the Constitution, the Senate is in charge of approving or rejecting any international treaty initiative.

ALTA Member Airlines Passenger Traffic Increases 7.8% as the year comes to an end.

ALTA Member Airlines Passenger Traffic Increased 7.8% with over 13 million passengers in October only, as revealed by the recently published analysis. There is a clear boost in the Airline Passenger Market as transportation percentages have maintained a higher level than last year. The airlines that have increased their passenger numbers include three Mexican airlines, Aeromar, Aeromexico and Volaris. The other group members are Aerolíneas Argentinas (includes Austral), Avianca, Copa Airlines, GOL, Insel Air, LAN Group, TACA Group, TAM and TAM Mercosur. *ALTA. December 04, 2013.*

UK, France, Germany oppose the European Union Carbon Plan Charge.

The European Union states of Britain, France and Germany propose scrapping the EU plan to make all aircraft pay a carbon charge for using EU airspace, according to documents seen by Reuters news agency. The combined weight of these three powers means there is a strong chance they will get their way, pleasing trading partners such as China. In a joint document, Britain, France and Germany say they are concerned about "the political acceptability and practical implementation of an airspace-Emissions Trading Scheme". EU diplomats, speaking on condition of anonymity, said many, but not all of the 28 member states agreed that the European Commission's proposal to charge flights using EU airports for their emissions in EU airspace was not practical. *Aviation Wise. December 06, 2013.*

American Airlines and US Airways merger finalized.

The new airline, which will be known as American Airlines, will provide nearly 6,700 daily flights to more than 330 destinations in more than 50 countries. It will have a combined workforce of over 100,000 employees. As part of the merger settlement with the DOJ announced in November, both US Airways and American Airlines agreed to give up several hundred slots at airports across the US. Those slots were intended for low-cost carriers such as JetBlue and Southwest Airlines, in order to keep prices low for consumers who might be hurt by the increasing consolidation in the US airline industry. Analysts cheered the news, noting that this was the final merger in a long series. Now, there are three main US carriers: United, Delta, and American. *BBC News. December 09, 2013.*

Mexico City's airport with dreams of expansion.

The head of the Secretary of Communications and Transport, (SCT for its acronym in Spanish; Ministry of Communications and Transportation), Gerardo Ruiz Esparza, has announced the latent possibility of expanding the Mexican capital's airport. The saturation of the airport obliges federal authorities to ponder a fast and effective solution. Thus, the federal government has given up the possibility of relocation or the construction of a new airport and therefore will consider the expansion of the already existing International airport. The expansion is still to be analyzed by engineers, but Ruiz Esparza has made it extremely clear that the development of new runways and terminals will not expropriate homes, as the expansion is to be made within state owned lands around the existing airport. *CNN Expansion. December 10, 2013.*

The Airplane cell phone dilemma.

US Congress is debating the possibility of allowing cell phones while airborne. Some members of the US Congress are seeking to ban airlines from allowing cellphone calls while an aircraft is in the air, as it appears that broadband access above 10,000 feet will be granted by several airlines. The security analysis has been thorough and the only prerogative left to deny access is the annoyance to other passengers by having cell phones used throughout the flight. Airlines however suggest that the business possibility and the profit for providing this service is paramount. *Aviation News. December 11, 2013.*

In this month extract was prepared by Vera García, José Manuel Muñoz, Miguel Ruelas and Patricia González.

Airbus Aims to Reduce A340 Operating Costs.

Aiming to reduce exposure to potential residual-value guarantee (RVG) claims for the A340 twin-aisle quad-jet, Airbus plans to recertify the aircraft to carry 475 passengers, while Rolls-Royce works to improve the type's engine efficiency and maintenance costs. The European manufacturer told a stakeholders' forum on December 4 that with increased capacity and lower maintenance charges and ownership costs, the A340-600 can compete against the Boeing 777-200ER and -300ER and replace larger 747-400s. Airbus expects airworthiness approval by the beginning of 2015, according to Airbus A340 asset-management vice president Andreas Hermann. *AIN Online. December 17, 2013.*

In-flight Internet and Wireless In-flight Entertainment.

Aeroméxico, Mexico's global airline, together with Gogo, the pioneer in wireless in-flight digital entertainment solutions, announced today that they have agreed on the principal terms and conditions relating to providing in-flight Internet and wireless in-flight entertainment service – Gogo Vision – on at least 75 aircraft. As part of providing end-to-end solutions for any fleet anywhere, the new service will utilize Gogo's Ku-band satellite service for Aeromexico's 737 aircraft, and Inmarsat's SwiftBroadband satellite service for their regional jets. Gogo expects both its connectivity service and Gogo Vision to be available to Aeroméxico passengers in the second half of 2014. *The State Journal. December 19, 2013.*

Good times for the airline industry.

The much-maligned airline industry is in the middle of resurgence, according to the airline industry itself. The International Air Transport Association (IATA), the trade group for the world's biggest airlines, said this month that it hit a record \$19.7 billion in 2014, an increase of more than 50% on the \$12.9 billion estimate made for 2013. Driving the trend, IATA says, are "improvements to the industry's structure" (read: big airline mergers) and lower jet-fuel prices. Jet fuel is the single largest expense for airlines, so if its price falls, their profits generally rise. Still, airlines' industry-wide net profit margins are not big: 1.8% of revenues in 2013, with 2.6% of revenues expected for next year. It seems that getting oil out of the ground and then refining and selling it, remains a far more profitable business than flying planes. *The Economist. December 22, 2013.*

IATA Shifts Safety Compliance to Airlines.

The International Air Transport Association (IATA) is partly shifting responsibility for compliance with its operational safety audits (IOSA) to airlines themselves under the new enhanced version of the program (E-IOSA). According to Giancarlo Buono, IATA's regional director for safety and flight operations in Europe, the E-IOSA process will require operators to continuously monitor their own compliance with the IOSA standards, but IATA itself will still conduct the current biennial "snapshot" audits. E-IOSA becomes mandatory for all IATA members in September 2015. The IOSA Standards and Recommended Practices (Isarps) comprise more than 900 items that contribute to airline operational safety in the areas of organization and management, flight operations, operational control and flight dispatch, aircraft engineering and maintenance, cabin, ground handling and cargo operations, and security. *AIN Online. December 23, 2013.*

In this month extract was prepared by Vera García, José Manuel Muñoz, Miguel Ruelas and Patricia González.

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