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Enforceability of International Air Transport Agreements in Mexico.

Legislative procedure or
bureaucracy on its highest
level?

by Misael Arellano

OCTOBER NEWS on
Mexican Aviation

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.

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Enforceability of International Air Transport Agreements in Mexico. Legislative procedure or bureaucracy on its highest level?

by Misael Arellano

In this edition, we will make the analysis of those relevant issues faced by international carriers generated by the poor performance of Mexican authorities involved in the formalization procedure of bilateral agreements and its amendments about international air transport services. How these issues impact the international air transport development in Mexico; and up to which level the international air carriers are affected by the extremely long time that elapses from the execution of an air transport agreement by the Civil Aviation Authorities (CAA) involved and its formalization process to be valid and enter in full force in Mexico.

“...the Constitution states that the laws issued by the Mexican Congress and international treaties in accordance with the Constitution are supreme law in Mexico.”

BASIC PRINCIPLES.

In addition to the basic principles stated in the Vienna Convention on the Law of Treaties, international treaties executed by Mexico must be in accordance and observe the formalization process stated in the Mexican Constitution, as the supreme law, in which specific faculties are granted to such effect to different governmental entities and branches of the government. The Constitution address the faculty to approve international treaties executed by the Executive Branch, to the Senate. In consequence, Article 89 section X, of the Constitution states:

“Article 89. The obligations and faculties of the President are as follows:

...

X. Take care of the foreign policy and celebrate international treaties, as well as terminate, denunciate, suspend, modify, amend, withdraw reserves, and make imperative declarations about them subjecting them to the approval of the Senate. On the application of such policy the head of the Executive Branch must observe the following principles: the nation’s self-determination; non-intervention; the peaceful settlement of disputes; the proscription of the threat or the use of force in international relations; the legal equality of the States; international cooperation for development; respect, protection and promotion of the human rights and the struggle for international peace and security.

...”

Finally, Article 133 of the Constitution states that the laws issued by the Mexican Congress and international treaties in accordance with the Constitution are supreme law in Mexico. In that sense, a specific process is properly stated for the entering in full force of international treaties.

“The enactment decree issued by the President is published in the Federal Gazette and represents the last step on the process, for the enforceability of an air transport bilateral agreement...”

THE PROCESS.

We can mention three relevant steps related to the process about the legislative process involved with the execution and enforceability of an air transport bilateral agreement in Mexico:

- i) **Negotiation and execution.** The General Directorate of Civil Aviation together with the appointed representatives of the Secretariat of Foreign Affairs (SFA), starts the negotiations of an air transport bilateral agreement, considering that an air transport agreement is always in accordance with the Constitution. In that sense, the process starts with the exchange of diplomatic notes informing about the intention to execute or amend the involved agreement for international air transport services; and for such purposes the SFA has a protocol that must be followed in the negotiation of treaties¹, which basically states the analysis of precedent conditions, a draft of the bilateral agreement, the elaboration of the agenda for the negotiation rounds, communications with the legal consultant's office of the SFA; which in turn will approve the execution version of the bilateral and coordinate its signature process.

Once the negotiation process has been concluded, the execution takes place on the agreed date and place by the parties. The Secretariat of Communications and Transport (SCT) is the entity that generally signs air transport bilateral agreements, then, the SFA must pass the agreement to the Secretariat of the Interior (SI), in observance to the exclusive faculty² of this last, as the liaison amongst the facultative Federal powers, requiring for its approval.

- ii) **Approval.** The Constitution states that the Senate has the exclusive faculty for the approval of international treaties and diplomatic conventions executed by the President, as well as his decision to terminate, denounce, suspend, modify, amend, remove reserves and to provide interpretative declarations about the same³. In that sense, if the Senate determines the approval of the bilateral agreement after its review and analysis, a decree must be published⁴ in the Official Gazette accordingly. The approval decree is limited to the reference about the air transport bilateral agreement approval; the document is not published at this stage.

After the issuance of the approval decree, the Mexican government is entitled to send the diplomatic notes informing to the other party that Mexico has completed the necessary internal procedures for entry into force of the Agreement; this, in observance to the general rule stated on international treaties.

- iii) **Enactment.** Once the Senate has published the approval decree about the execution of the air transport bilateral agreement; the Executive Branch is entitled to ratify the agreement confirming that, in observance to the Constitution⁵, such agreement has been executed on the name of the President, stating his obligation to comply with, observe it, and to make it enforceable for its observance in Mexico.

The enactment decree issued by the President is published in the Federal Gazette and represents the last step on the process, for the enforceability of an air transport bilateral agreement; nevertheless, the involved turnaround times from the execution to the publication of the enactment decree generally takes more than five years with a few exemptions in which the Mexican government has relevant commercial or political interests. Just as a matter of examples we can refer to the enactment decree about the Air Transport Agreement between Mexico and Paraguay signed on December 11, 2007, that was published on the Federal

1.- Procedure PR-DGE-10 of the Secretariat of Foreign Affairs.

2.- Article 27 section XLIII of the Federal Public Administration Organic Law.

3.- Article 76 section I, second paragraph.

4.- By the Executive Branch.

5.- Article 89 section I.

Gazette on December 24, 2012 (5 years); or to the enactment decree about the Air Transport Agreement between Mexico and Uruguay signed on August 14, 2009, that was published on the Federal Gazette on October 5, 2017 (7 years and 10 months).

COLLATERAL DAMAGES TO AIR CARRIERS.

The negotiation of an air transport bilateral agreement, or the amendment to a current agreement is always generated by the necessity or increase of the international air transport services between the involved countries. In that sense, the execution of the involved agreement always pursues its immediate implementation; unfortunately, it almost never happens from Mexico's side. So, what happens with the carriers of the counter party of the air transport bilateral agreement in the meantime and which are the relevant issues that must be faced during those years in which the agreement is not applicable nor mandatory to the Mexican CAA?

The criteria of the Mexican CAA on these cases is that, considering that a bilateral agreement (or an involved amendment) has been properly signed and approved by the Senate, the authority can use its discretionary faculties to grant the requested permits to provide air transport services to/from Mexico under the same conditions and rights stated in the involved air transport bilateral agreement in process.

Unfortunately, permits granted by the Mexican CAA cannot be based on the bilateral agreement executed because it is not yet mandatory in Mexico, resulting on that such operating permits are granted for one-year validity and as unilateral permits; which means that such carriers are not subject to the umbrella of rights stated in the bilateral agreement.

"...the collateral damages caused to the foreign carriers since the execution of the air transport agreement until the issuance of the enactment decree, can be stratospheric."

Starting for the issue that a unilateral permit is one-year valid and such carriers must conduct the process for the issuance of the operating permit on a yearly basis until the publication of the enactment decree; and going up to higher economic matters regarding to be subject or not to an exemption on the payment of taxes applicable to the fuel purchased in Mexico for the operation of the public service of international air transport; the collateral damages caused to the foreign carriers since the execution of the air transport agreement until the issuance of the enactment decree, can be stratospheric.

In accordance to the above, it is essential to review the legislative process and state (in law) the way in which an executed air transport bilateral agreement must be enforceable by itself once the negotiation and execution process have been properly observed; avoiding that the last step keep a bilateral agreement in dormancy for years.

The above, because even when the foreign carrier has been properly designated by its CAA in accordance to the relevant air transport bilateral agreement, such agreement is not enforceable in Mexico, because it has not been published in the Official Gazette through an enactment decree, and such designation corresponds to an instrument that is not yet valid in Mexico.

Issuance of the Approval Decree about the execution of air transport bilateral agreement between Mexico and the Government of the Eastern Republic of Uruguay.

At the beginning of the month of October the President Enrique Peña Nieto issued the proclamation decree published in the Federal Gazette regarding the execution of air transport bilateral agreement between Mexico and the Government of the Eastern Republic of Uruguay. This bilateral agreement was signed on August 14, 2009 between Mexico and Uruguay, and enter into force on October 05, 2017. <http://www.radioformula.com.mx/notas.asp?Idn=717426&idFC=2017> October 04, 2017.

Aerospace companies will continue in Mexico with or without NAFTA.

In Mexico there are 300 companies in the aerospace industry, and the departure of the United States from the North American Free Trade Agreement (NAFTA) will not be enough reason for them to leave. At least, not in the short term. "The departure of the United States from NAFTA will result in slightly higher tariffs. In the worst case, we would have to pay 5 million dollars of fees per year. But this is not going to cause us any problems," said Craig Breese, Honeywell's Latin American president, in a panel of the 2017 Business Summit, which is being held in San Luis Potosí. <http://expansion.mx/empresas/2017/10/23/las-empresas-aeroespaciales-seguiran-en-mexico-con-o-sin-tlcan> October 10, 2017.

FAA Panel Split on Drone Tracking Details.

The FAA's panel of experts and law enforcement officials could not agree on the specifics of tracking civilian drones, such as what models should be radio tracked, and whether or not size and weight should be determining factors. The panel is wrapping up as the National Transportation Safety Board is investigating the first case of a drone colliding in mid-air with a traditional aircraft, an Army helicopter. While there were no injuries and the helicopter was able to land safely, the impact damaged one of the copter's rotors, according to a preliminary report. The panel is wrapping up as the National Transportation Safety Board is investigating the first case of a drone colliding in mid-air with a traditional aircraft, an Army helicopter. While there were no injuries and the helicopter was able to land safely, the impact damaged one of the copter's rotors, according to a preliminary report. <https://www.flyingmag.com/faa-panel-split-on-drone-tracking-details> October 12, 2017.

Missing Flight MH370 Inspires New Way to Locate Ocean Impacts.

The Malaysia Airlines flight MH370 investigation has been reopened with the help of a private firm. Its incomplete story has refused to offer closure to the families of its 239 victims and has sparked conspiracy theories. But scientists have continued investigating the impact since it occurred three and a half years ago. It's inspired one team to create a new way of locating large disturbances in the ocean, like earthquakes, meteors—and even striking airplanes. <https://gizmodo.com/missing-flight-mh370-inspires-new-way-to-locate-ocean-i-1819801894> October 24, 2017.

The Russian Industry and Trade Minister Denis Manturov has said that Russia is ready to supply and invest in Mexico.

"The aircraft is currently undergoing tests, and we will be ready to supply the Mexican market with it starting from 2021," Denis Manturov said Monday delivering a speech amid the session of the Russia-Mexico Trade and Industry Dialogue in the Mexico City. "We will additionally deliver eight more aircraft over the course of the year," Minister told reporters. The Russian official added that Moscow was interested in supplies of helicopters for both military and civilian purposes. Denis Manturov also commented on the possible assemblance of the Russian helicopters in Mexico in the near future. <https://sputniknews.com/business/201710241058484079-mexico-russia-cooperation-aviation-aircrafts/> October 24, 2017.

In this month extract was prepared by Miguel Ruelas, C. Espinosa, L. Salas, L. Caballero, C. Mondragón, R. Figueroa and J. Dorantes.

New 4th terminal to make Cancun Mexico's No. 2 airport.

The Cancun International Airport has inaugurated a new terminal projected to make it Mexico's second busiest, with an estimated 31 million passengers per year. A government statement says the 18-gate Terminal 4 increases annual capacity by about 9 million passengers and was built for a little over 3.4 billion pesos (\$177 million). The building covers more than 67,000 square meters (700,000 square feet) and expands the airport's footprint by about 37 percent. President Enrique Peña Nieto presided over Tuesday's inaugural ceremony at the airport for the Caribbean beach resort city. According to government figures, Cancun is the country's No. 1 destination for international tourists and No. 2 for domestic travelers. <http://www.foxnews.com/world/2017/10/31/new-4th-terminal-to-make-cancun-mexicos-no-2-airport.html> October 25, 2017.

Flights have dropped in price in Mexico City.

The new regulation that operates at the International Airport of Mexico City (AICM), which does not allow airlines to use known take-off and landing schedules, has benefited users by contributing to a reduction in fares. Experts explained that, lacking slots, airlines have had to use schedules with less demand to leave and land, which forced them to reduce prices to attract travelers. <http://www.elfinanciero.com.mx/empresas/por-esto-los-vuelos-han-bajado-de-precio-en-la-cdmx.html> October 26, 2017.

FAA Expects 2017 to be Safest Year on Record.

There was good news at the FAA's General Aviation Safety Summit held this week in Washington, D.C. "We're still finalizing the numbers, but it looks like 2017 will end up being our safest year yet," said FAA Administrator Michael Huerta in a speech at the Summit. The fatal accident rate has declined below one per 100,000 flight hours. The focus now turns to developing consensus standards for the new Part 23 certification rule in collaboration with industry leaders. The FAA is using data from the Aviation Safety Information Analysis and Sharing (ASIAS) to learn more about what areas could need help in making flying more safe. Finally, Huerta pointed to the mandated implementation of ADS-B, which he referred to as a "life-saving" technology. <https://www.flyingmag.com/faa-expects-2017-to-be-safest-year-on-record> October 26, 2017.

Extra security measures add to cost burden: AAPA.

Governments need to cooperate more closely with the industry when developing aviation security measures, following a year where various country's implemented new security rules unilaterally, adding heavily to security costs. Security measures should be risk-based, outcome-focused and proportionate to the probable threat, and not about the elimination of every conceivable risk, says Andrew Herdman, director general of the Association of Asia Pacific Airlines (AAPA). <https://www.flightglobal.com/news/articles/extra-security-measures-add-to-cost-burden-aapa-442689/> October 31, 2017.

DGAC issues the Mandatory Circular which establishes the rules for the compliance to the provisions of the Civil Aviation Law regarding passenger's rights.

On November 7, 2017, the General Directorate of Civil Aviation issued the mandatory Circular CO TC-03/17 which establish the rules for the compliance to the provisions of the Civil Aviation Law regarding passenger's rights. This circular will be applicable meanwhile the issuance of the modifications to the Regulations under Civil Aviation Law. <http://www.sct.gob.mx/fileadmin/DireccionesGrales/DGAC-archivo/modulo2/co-tc-03-17-06112017.pdf> November 07, 2017.

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