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Challenges and Assessments of Interchange Agreements Overcoming Past Restrictions?

by Viridiana Barquín

MAY 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 how high above them those rights would extend. They decided on, Ad coelum et ad inferos, meaning that their property rights would extend as high up as the heavens and all the way down to hell.

Audio message

Challenges and Assessments of Interchange Agreements Overcoming Past Restrictions?

by Viridiana Barquín

For many years in Mexico, the idea that an airline could expand its operation to more than one international segment was practically inconceivable perhaps due to an exaggerated nationalism, but in a greater extent, one of the main arguments that the authority exposed in the past was the inconsistency that a foreign airline could be entitled to offer routes within the Mexican regional market in detriment of the national carriers and violating the freedoms stipulated in the Chicago Convention and traffic rights thereunder[1].

"And questions arise again, What about the temporary import regime set out in article 106 of the Mexican Customs Law?"

It is so that for years the bilateral agreements have encompassed numerous restrictions as for the possibility for airlines of different countries to conduct operations among different jurisdictions and the possibility of an airline to operate regionally within a foreign jurisdiction, which is actually the opposite of making the operation and commercial planning more flexible, being a considerable obstacle for the airlines in terms of profitability, so the bilateralism still have many restraints provided that none of the rights and privileges thereunder may be considered as permission to take the passengers, mail or cargo from any point of a foreign territory and transport them to another point within such foreign territory (i.e., permission to sell regional flights within foreign territory) pursuant Article 7 of Chicago Convention[2] and Article 27 of the Civil Aviation Law[3].

This has led the airlines to design figures to "surround" such restrictions, such as the strategic alliances, the code share agreements, the Interchange Agreements, and others. Therefore, and taking into account the principles of equal opportunity and economic equivalence of markets with the purpose of promoting the healthy development of commercial aviation; and, taking in certain way the model imposed and widely used in South America, the Interchange Agreements are a reality in Mexico. Defined as a contractual arrangement through which different aircraft operators of different countries agree to share the use of an aircraft and alternate the operation control of such aircraft over an established period of time, so the possession of the aircraft is presupposed to being alternated from Interchangor to Interchangee and vice versa, the Interchange Agreements are often confused with regular subleases, code share agreements or wet leases (as we already approached in previous deliveries of Coelum)[4].

So, notwithstanding the contract that gives rise to an Interchange Agreement is generally an aircraft lease agreement, the Interchange Agreements have been recently referred to as 'multiparty subleases' or 'use agreements', and that's how they have been entered and came into effect[5] which in a strict point of view could be considered as the first misrepresentation.

Although they are already in use, Interchange Agreements are not specifically ruled under Mexican law yet, but as with any other commercial agreement, both operators must have previous authorization from their aviation authority to

1.-https://www.icao.int/publications/documents/7300_orig.pdf

2.- Article 7: Each Contracting State shall have the right to refuse permission to the aircraft of other Contracting State to take on in its territory passengers, mail and cargo for remuneration or hire and destined for another point within its territory. Each Contracting State undertakes not to enter into any arrangement which specifically any such privilege on an exclusive basis to another State or airline of any other State, and not to obtain any such exclusive privilege from any other State.

3.- Article 27: In case of foreign aircraft providing commercial private aviation services, it will be conducted in accordance with the provisions of the international treaties and applicable laws. Foreign permit holders who are not authorized to carry out cabotage practices in national territory. https://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Ley_de_Aviacion_Civil.pdf

4.- Interchange Agreements – Misconceptions, Benefits and Potential Conflicts. By Jessi Saba and Miguel Ruelas. https://asyv.com.mx/images/coelum/2015/nov15.pdf

5.- As sub-lease agreements and sub-sublease agreements.

operate the aircraft under the same registration mark, so that the aircraft will be under the AoC of both carriers, but given that the operators and routes are different, both must have authorization not before the Interchange Agreement comes into force and effect but even before the Interchange Agreement is entered between them. As an example, a Mexican carrier being the lessee under the relevant aircraft lease agreement must receive previous authorization from the Federal Civil Aviation Agency ("AFAC") to enter into an Interchange Agreement[6] with a foreign carrier which must receive previous authorization as well from its aviation authority, so once the aircraft is imported into Mexico by the Mexican carrier and the Interchange Agreement comes into force, the foreign carrier must have it under its own permission for operating as well.

And questions arise again, what about the risk of loss? What about the temporary import regime set out in article 106 of the Mexican Customs Law? Bearing in mind that for aircraft to be operated in Mexico by Mexican carriers that have concession or permit, aircraft must be imported into the country, therefore; an Interchange Agreement might pose a risk to this regime? Another question is of a greater importance insofar as it refers to an event of default situation where a repossession becomes necessary. How does a non-defaulting carrier will face an action for repossession more at a point where the aircraft is not in its possession? Provided however that the repossession process can be a real hassle for the lessor.

Thus, while an Interchange Agreement must be carefully designed, drafted and analyzed from all perspectives in order to avoid all risks and exposures, to verify that all the terms and responsibilities[7] under the existing aircraft lease agreement effective with the Mexican carrier as lessee (Interchangor), apply for the foreign carrier (Interchangee) as well, provided that; the lessee should be responsible permanently and must not be released of its obligations with the lessor regardless that at some pint the Interchangee is performing any specific obligation. In that sense, although it seems obvious, the Lessor should review previously its terms and conditions and, in our opinion; should be previously notified and authorize in writing the execution of any Interchange Agreement, even if it is with any subsidiaries of lessee.

> ***"Another question is of a greater importance insofar as it refers to an event of default situation where a repossession becomes necessary."***

We see then that there are still reasonable doubts to consider that Interchange Agreements contravene (i) the bilateral system of traffic rights due to the fact that a foreign aircraft of a foreign carrier can operate regional routes in a foreign market beyond its own natural market; and (ii) the applicable customs duties and import regime.

Moreover, and notwithstanding that the Communications and Transport Sector Program 2020-2024 (*"Programa Sectorial de Comunicaciones y Transportes 2020-2024"*)[8] speaks of promoting a "greater international connectivity through bilateral air transport agreements", it does not make it clear whether this action has an opening approach or of protection of the Mexican suppliers only.

Hence, in conclusion, a more specific regulation is definitely necessary to close the circle of all these questions that remain open making debatable the full compliance of Interchange Agreements comply with international provisions.

6.- Or to enter into the "misnamed" sublease agreement and/or sub-sublease agreement as currently happens in some cases.
7.- Ex.: insurance coverage, technical aspects such as maintenance, overhaul, repair, airworthiness directives; implications related to storage of aircraft documents, etc.
8.- It is a program derived from the National Development Plan 2019-2024 ("Plan Nacional de Desarrollo 2020-2024"), carried out in compliance with the provisions of article 26, section A, of the Constitution of the United Mexican States, which establishes that the Mexican State will organize a planning system for the national development and competitiveness towards to the economic growth.
**Published in the Federal Official Gazette on July 24, 2020 https://www.gob.mx/cms/uploads/attachment/file/565614/Programa_Sectorial_de_Comunicaciones_y_Transportes_2020-2024.pdf*

SENEAM director dismissed after air incident and industry mismanagement.

The Ministry of Infrastructure, Communications and Transportation (SICT) decided to dismiss the director of Navigation Services in the Mexican Airspace (SENEAM), Victor Hernandez, due to his mismanagement of the air industry, problems with workers and the air incident on May 8, at Mexico City's International Airport (AICM), where two aircraft came dangerously close to each other. the Undersecretary of Transportation of the SICT, Rogelio Jiménez Pons, pointed out that what happened at the capital's airport was unheard of and something that cannot happen again, for which reason he will work closely with all the industry's stakeholders. *www.amp.milenio.com/negocios/destituyen-a-victor-hernandez-como-director-de-seneam* May 05, 2022.

Mexico's government takes measures to decompress the AICM.

Following the incident that occurred on May 7 at Mexico City's international airport, the private sector and the Mexican government reached an agreement to take measures to decongest the Mexico City airport. It was agreed between the parties not to modify the scheduled flights at Mexico City until the end of the 2022 summer season, thus not affecting the current offer. Likewise, no new routes will be approved at AICM. In addition, domestic cargo operations and charter flights will be transferred to AIFA immediately, and progress will be made on the necessary infrastructure works so that the terminal will be able to receive and process international cargo flights within 90 days. *www.aviacionline.com/2022/05/el-gobierno-de-mexico-toma-medidas-para descomprimir-al-aicm/* May 10, 2022.

Felipe Ángeles International Airport was a pioneer in using MIC methodology in construction: what is that?

The new Felipe Ángeles International Airport (AIFA) is the first large-scale project in the country to use the MIC (Construction Information Modeling) methodology. This methodology is used in the design of infrastructure works to carry them out efficiently, in order to avoid waste and unnecessary expenses. It is a sustainable collaborative work tool that integrates the different disciplines involved in construction and allows everyone to know where the most important column to the last service and finishing installation will be located. This represents a saving of up to 10 percent in cost and time, because through a 3D model it is possible to obtain precise quantities of materials, schedule real execution times and foresee conflicts and interferences between the different elements of the work. *www.radioformula.com.mx/nacional/2022/5/14/aifa-fue-pionero-al-usar-metodologia-mic-en-construccion-que-es-eso-715580.html* May 14, 2022.

Mexico City's International Airport case reaches the U.S. government.

Gricha Raether Palma, a member of the Colectivo Ciudadano Más Seguridad Aérea Menos Ruido, went to Ken Salazar, U.S. Ambassador to Mexico, explaining the negative effects that the redesign also represents for U.S. airlines in Mexico. He believes that the federal government has ignored the danger to more than 2 million people in 150 neighborhoods located under the air traffic of Mexico City's International Airport. Raether Palma sent a letter to Salazar, stating that the redesign lacks adequate analysis of both safety and health implications. He asks the Ambassador to inform the U.S.-based airlines and their passengers of the "dangerous" conditions they face when flying to Mexico City, so that they can make an informed decision about whether to accept the risk or not. Raether also expects close cooperation between foreign governments, airlines, passengers, and Mexican society, to convince Mexican authorities to return the airspace to the previous configuration, which has operated for 30 years. *www.proceso.com.mx/reportajes/2022/5/16/el-caso-aicm-llega-al-gobierno-de-estados-unidos-286007.html* May 16, 2022.

Analyzing the incorporation of an anti-collision system in Mexican airplanes this year.

Although it was introduced in 2010, Mexico's aeronautical authorities are seeking that airlines flying in Mexican airspace incorporate this year in their fixed-wing aircraft the Airborne Collision Avoidance System (ACAS II) version 7.1, which is a mandatory requirement of the International Civil Aviation Organization (ICAO). According to the Ministry of Infrastructure, Communications and Transport (SICT), ACAS II should be operational this year, as it is part of Mexico's agreements with the ICAO on air safety. Following the construction of the Felipe Angeles International Airport and the redesign of the airspace for coexistence with the Mexico City International Airport (AICM) and Toluca International Airport, the SICT submitted the update of Mexican Official Standard 069 SCT3-2019 to the Federal Commission for Regulatory Improvement (COFEMER) for analysis. *www.forbes.com.mx/analizan-incorporar-a-aviones-en-mexico-sistema-anticolisiones-este-ano/* May 26, 2022.

In this month extract was prepared by P. Arandia, R. Nerio, J. García, A. Pérez, A. Cervantes

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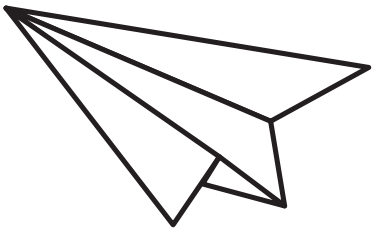

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