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AVIATION LAW: RECENT DEVELOPMENTS IN LATIN AMERICA

The current reawakening of interest in civil aviation legislation which has occurred in these United States¹ can also be found among the Latin American countries. Thus, in August of 1954 Argentina enacted a new aeronautical code.² The next year, Venezuela followed suit with its new aviation act³ and El Salvador in December 1955 enacted a new aviation code.⁴ All of these legislative enactments would merit close study and would offer, no doubt, valuable information, practical as well as comparative, in this ever increasing field of law. However, due to the practical considerations of location and of aeronautical interests and activities both domestic and international, the Venezuelan enactment is of greater import to our readers. Therefore, our comments will center mainly on this codification with sidelights on other Latin American enactments as well.

Venezuela's present code is not its first codification in the field of aviation law. On the contrary, during the last quarter of a century Venezuela produced no less than five major legislative enactments in this field,⁵ of which the latest appears to be by far the most comprehensive although, of course, quite similar in many ways to its predecessors. A discussion of the most important topics only, covered by this act, would transgress by far limitations of space imposed on this type of note. Therefore the present discussion will be confined to problems with international or conflict law implications, or to those which are of paramount practical interest. The following topics will be discussed: jurisdictional, particularly conflict law, aspects of the act; limitations of carriers' liability; and interests in aircraft.⁶

International and Conflict Law Aspects. Art. 2 of the Venezuelan act expressly restates the basic rule that the air space above the territory of Venezuela is subject to its national sovereignty. This provision found also in the previous acts of 1941 and 1944, is in accord with currently

1. At the present time there are numerous bills before Congress proposing either modifications or a complete revamping of the Civil Aeronautics Act of 1938.

2. *Codigo Aeronautico Argentino*, Law no. 14,307 (1954). Among recent discussions, note Videla Escalada, *Breve Analisis del Codigo Aeronautico*, 33 *REVISTA DEL COLEGIO DE ABOGADOS DE BUENOS AIRES* 23 (1955) and Lena Paz, *Exposicion y Comentario del Nuevo Codigo Argentino de Aeronautica*, 10 *REVISTA DE LA FACULTAD DE DERECHO Y CIENCIAS SOCIALES* 605 (Buenos Aires, 1955), also Santa Pinter, *Sintesis de la Doctrina Argentina en Derecho Internacional Aereo*, 8 *BOLETIN DEL INSTITUTO DE DERECHO COMPARADO DE MEXICO*, no. 22, 63 (1955).

3. *Gaceta Oficial de la Republic de Venezuela*, April 21, 1955.

4. *Diario Oficial-Republica de El Salvador*, December 23, 1955.

5. Laws of July 25, 1930, October 13, 1936, July 23, 1941, July 14, 1944, as amended July 25, 1945; for an English translation of the 1941 law, see the one by Brinsmade in 13 *J. AIR L.* 260 (1942). Note also Brown, *Regulation of Air Navigation in Venezuela*, 8 *J. A. L.* 577 (1937).

6. See Delascio, *Comentarios sobre Derecho Aeronautico* (1955), for a comprehensive survey of the subject matter.

accepted rules of international law as restated in conventions (*e.g.*, the Paris Convention on aerial navigation⁷ as well as the Chicago Convention on international civil aviation).⁸ This position is, moreover, in accord with our own legislative enactments.⁹ These views, however, have not always been universally held. At a period when aviation started Fauchille, in his classical work on the subject, advanced the proposition that the exercise of sovereignty in the air space is impossible and that this space should be free like the *mare liberum*, except for a kind of territorial layer up to 300 meters, which should be within the exclusive jurisdiction of the territorial sovereign.¹⁰ While this view is now defunct, there remain, particularly in some quarters of Latin American legal thought, remnants of this concept, such as belief in an absolute right of innocent passage through the airspace of another nation. Actually, such passage has been conceded to be a privilege granted by the sovereign, which is now incorporated in the International Air Services Transit Agreement.¹¹

Following the principle of exclusive sovereignty over the air space above the national territory, the Venezuelan act (Art. 4) provides that

All civil aircraft within Venezuelan territory or flying over it, including the crew, passengers and goods transported therein, are subject to the jurisdiction and control of the Venezuelan authorities.

It is apparent that this provision is in accord with generally accepted principles of international law and cannot be seriously challenged. However, it is to be pointed out that the effect of this principle as established by the Venezuelan act, is onesided in its effect since the same rule does

7. Paris Convention on Aerial Navigation, Octo. 13, 1919, provides:

Art. 1. The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. . . .

8. Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 STAT. 1180, provides:

Art. 1. The Contracting States recognize that every state has complete and exclusive sovereignty over the air space above its territory.

Art. 2. For the purposes of this Convention the territory of a state shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state.

9. Sec. 6 (a) of the Air Commerce Act of 1926 (Act of May 20, 1926, 44 STAT. 568, as amended) provides in part:

The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above all inland waters and the air space above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction.

10. Guy de Montella, *Principos de Derecho Aeronautico* 71 (1950).

11. International Air Services Transit Agreement, 59 STAT. 1693, provides:

Sec. 1. Each contracting State grants to the other contracting States the following freedoms of the air in respect of scheduling international air services:

(1) The privilege to fly across its territory without landing;

(2) The privilege to land for non-traffic purposes.

The privileges of this section shall not be applicable with respect to airports utilized for military purposes to the exclusion of any scheduled international air services. . . .

not prevail where Venezuelan aircraft fly over foreign territory. In these latter situations the strict territorialistic principle of unmitigated applicability of the *lex loci* is modified, to a considerable extent, by the other concept which relies on the quasi-nationality of the aircraft. This shift of position is expressed in Art. 6 of the Venezuelan act which reads:

All events and juridical acts occurring aboard a Venezuelan aircraft during a flight outside of Venezuela, are subject to Venezuelan laws, except those contrary to the safety or public policy of the underlying foreign country; criminal acts committed aboard any aircraft flying over foreign territory if they have effect or are intended to have effect in Venezuelan territory, as well as juridical acts occurring on foreign aircraft flying over Venezuelan territory, the subject to Venezuelan laws.

It is to be pointed out, in the first place, that the applicability of Venezuelan law to acts happening while a Venezuelan aircraft is in flight over foreign territory, appears inconsistent with the principle established in Art. 2 of the same act establishing unlimited sovereignty over the airspace. Disregarding this principle, the Venezuelan act has adopted, in regard to its own aircraft when flying over foreign territory, the applicability of the quasi-national law of its aircraft, mitigated in some respects by the public policy of the foreign sovereignty. In addition, Venezuelan law is declared to control, at least with effect to Venezuelan courts, all criminal acts committed not only on Venezuelan aircraft (which rule, by the way, is already expressed by the first part of Art. 5) but also on aircraft of foreign registry when in flight over foreign territory where the criminal acts involved affect interests situated in Venezuelan territory. This constitutes a rather broad extension of the protective principle justifying extraterritorial applicability of one country's criminal law. It remains to be seen whether or not this rule may be held compatible with general principles of international law, particularly since in the leading case on the point, *Lotus Case*,¹² the act involved was committed on the high seas, *i.e.*, within an area under no territorial sovereignty. In addition, the compatibility of these provisions intended to give municipal statutes an extraterritorial effect also will have to be checked against Art. 5 of the Chicago convention which has been adopted by Venezuela.¹³ However, it is to be kept in mind that, as a matter of expediency, such extraterritorial effect of municipal law will not be objected to by other countries as long as in the exercise of such jurisdiction the country enforcing the extra-territorial rules does not impede, obstruct or interfere with the jurisdiction of the country within whose airspace the event in question occurred.

At this point of the present discussion, it will be interesting to notice that the Argentine code adopted a less territorialistic, and, consequently,

12. P.C.I.J., Ser. A, no. 10 (1927).

13. See Article 5 of the Chicago Convention of 1944.

a more flexible and desirable solution. The Argentine code distinguishes between foreign privately and publicly owned airplanes. With regard to foreign publicly owned aircraft, the code (Art. 184) waives all jurisdictional claims by providing that such aircraft, including acts performed on it when over Argentine territory, will be "governed by the law of the flag and adjudicated by the same courts". On the other hand, the rule in regard to foreign privately owned aircraft does not, like that in the Venezuelan act, impose the territorial law upon all occurrences on board such an aircraft when in flight over the national territory, but declares the law of the subjacent territory to apply only in regard to acts and occurrences having close connection with the country below or interests there located. Thus, Art. 187 of the Argentine code provides that Argentine law shall control and Argentine courts shall take jurisdiction whenever acts on foreign private airplanes flying over Argentine territory, violate Argentine laws concerning public security or military or fiscal matters, or when they disregard rules of air navigation, or when they affect public security and public policy or interests of Argentina or of persons living there, or in cases where the first landing after such acts occurred takes place in Argentina (Art. 187). Of course, private Argentine aircraft are subject, as to the occurrences on board when in flight over Argentine territory or in space under no sovereignty, to Argentine laws and are amenable to Argentine courts (Art. 186, 1). However, if acts have occurred on board an Argentine airplane in flight over foreign territory, then Argentine courts will take jurisdiction and apply Argentine laws only if a legitimate interest of Argentina or of persons there domiciled is involved, or if the first landing after the fact, act or forbearance occurred in Argentina (Art. 186, 2).

Comparing these provisions with the law in force in this country, it is to be stated at the outset that, at least with regard to torts and crimes, the *lex loci actus* will control in the United States. With regard to juridical transactions, *e.g.*, contracts, the law applicable will have to be determined according to the controlling conflict law of the forum, in federal courts, under the *Erie-Klaxon* doctrine. Except for provisions contained in the Death on High Seas Act¹⁴ covering torts, the only statutory provision applicable is contained in section 7 of Title 18 U.S.C. (as amended July 12, 1952, 66 Stat. 589). However, this statute applies only to criminal acts committed over the high seas, or over waters within admiralty jurisdiction and "out of the jurisdiction of any particular State". It should also be noted that, in this respect, the amendment of July 12th mentioned above did not adopt a straight quasi-nationality of the aircraft contact but rather expounded the contact of ownership "by the United States or any citizen thereof or to any corporation created by or under the laws of the United States, or any State, Territory, etc."

14. 41 STAT. 537, 46 USC §§ 761-768.

As an additional consideration in this connection, it may be noted that the effect of Art. 5 of the Venezuelan act is also to be tested against Art. 11 of the Chicago Convention (1944)¹⁵ as well as against Art. 6 (a) of the air transportation agreement between the United States and Venezuela.¹⁶

Limitation of Liability. The principle of strict though limited liability characteristic of claims for damages in air transportation is being followed also by the recent Latin American enactments. The Venezuelan act (Art. 46) provides for a list of maximum amounts available in specific situations, namely: in case of death or permanent disability, 20,000 Bolivares (\$6,000); for permanent partial disability, up to 10,000 Bolivares (\$3,000); for temporary partial disability, up to 5,000 Bolivares (\$1,500), and in cases of loss or damage to hand baggage, up to 100 Bolivares (\$30).

In regard to freight or invoiced baggage, Art. 47 provides for strict liability in cases of loss, damage or delay, within the following maximum limits: loss or damage to freight, up to 20 Bolivares (\$6.00) per kilogram gross weight; delay in delivery of freight, up to an amount equal to the transport charges; loss or damage to invoiced baggage, up to 500 Bolivares (\$150) per piece.

It is interesting to note, however, that Venezuela has adopted the Warsaw Convention¹⁷ where different limitations are established. It would appear, therefore, that the applicability of the Venezuelan maximum rules is limited to situations not covered by the Warsaw Convention, particularly to noninternational flights as defined by the Convention.¹⁸ It is indeed a unique situation to find the carriers' liability under municipal law limited

15. Article 11 of the Chicago Convention of 1944 provides:

Subject to the provisions of this Convention, the laws and regulations of a contracting State relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, shall be applied to the aircraft of all contracting States without distinction as to nationality, and shall be complied with by such aircraft upon entering or departing from or while within the territory of that State.

16. Article 6 (a) of the Air Transport Agreement between the United States and Venezuela, 1953, TIAS 2813, provides:

(a) The laws and regulations of one contracting party relating to the admission to or departure from its territory of aircraft engaged in international air its territory, shall be applied to the aircraft upon entering or departing from navigation, or to the operation and navigation of such aircraft while within or while within the territory of the first party.

17. Convention for the Unification of Certain Rules Relating to International Transportation by Air (Warsaw, 1929) was adhered to by Venezuela effective Sept. 13, 1955.

18. By way of reminder, it may be noted here that Warsaw Convention limitations of liability are: death or injury to passenger—up to 125,000 francs (N.S. approximately \$8,291.00); loss or damages in transportation of goods or checked baggage—up to 250 francs (U.S. approximately \$16.58) per kilogram of weight; loss or damages to passenger's hand baggage—up to 5000 francs (U.S. approximately \$331.67). The Warsaw Convention limits given above are currently in the process of being doubled by a Protocol to the Convention.

even more than under the standards established by the Warsaw Convention. As a matter of further interest it may be added that Art. 54 of the new act establishes for these classes of claims a short period of limitations, namely one year, while the Warsaw Convention allows for a longer period.¹⁹

Rights in Aircraft. In countries of Latin America, the creation of security and other interests in aircraft without simultaneous possession by the mortgagee requires statutory authority in view of the civil law hostility to chattel mortgages. Art. 62 of the Venezuelan act reflects this attitude, stating that:

Aircraft are movables of a special nature, susceptible to mortgages provided (these interests) are registered or recorded in the Air Registry of the Republic of Venezuela. The transfer of property and liens which may be imposed must be clearly recorded in the Air Registry; without this such acts will have no effect in regard to third parties.

This provision is particularly important in regard to the Convention on the international recognition of rights in aircraft, to which Venezuela is a signatory.²⁰ The Convention imposes upon all contracting countries the duty to recognize rights in aircraft of the types listed in the Convention, provided they are properly constituted under the law of their registry, and, in addition, regularly recorded there under the applicable law. Consequently, Venezuela will, after ratifying the Geneva Convention, have to recognize foreign created interests in aircraft registered in other contracting countries, *e.g.*, in the United States, and, on the other hand, will have the ability to create such rights under its own law and claim their international recognition under the Convention.²¹

Considering the comprehensive scope of the new Venezuelan as well as the Argentine aviation acts, these enactments are not only commendable and progressive, but will, undoubtedly, serve as a model for similar legislative efforts in other Latin American countries.

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19. Article 29 of the Warsaw Convention provides for a two year limitation on bringing an action under the Convention.

20. Convention on the International Recognition of Rights in Aircraft (Geneva Mortgage Convention 1948). TIAS 2847. This Convention is not yet ratified by Venezuela.

21. For a comprehensive consideration of the conflict of law aspects of the Geneva Mortgage Convention see Bayitch, *Conflict Law in U.S. Treaties*, 9 MIAMI L.Q. 127-131 (1955).