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CONTENTS

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PASSENGERS PROTECTION: DEVELOPMENT AND ANALYSIS

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1 INTRODUCTION

The support of Community legislation favouring passengers, set forth by Regulation (EC) No 261/2004 of 11 February 2004[1], has been strengthened in recent years through the interpretation of domestic and Community law, which tends to place a presumption of blame with the carrier where an inadequacy arises within a contract of transport[2].

There are, however, areas where the legal debate has become particularly heated, involving the most controversial spheres of community law. More precisely, this is in relation to the interpretation of the 'exceptional circumstances', which exonerate carriers from their obligations to provide economic compensation, as provided in Article 7 of the Regulation (EC) No.261/2004. It also includes the extension of the protection provided in the cases of denied boarding, which is different from overbooking, by applying those rules which protect passengers in cases of lengthy delays. Nor should the consequences of booking tickets online be overlooked, particularly in relation to the possibility of exercising one's own rights to rescind the contract or remove unduly burdensome clauses from it.

To meet these contentious issues, 13 March 2013, the European Commission published its proposal to amend Regulation 261/2004, which clearly shows its desire to strengthen the rights of passengers in EU air transport, balancing this need with the interests of the airline industry in a perspective of proportionality.

2 CANCELLED FLIGHTS, DENIED BOARDING AND DELAYED DEPARTURE

In the case of cancelled flights, the most controversial aspect of Regulation (EC) 261/2004 relates to the reimbursement set out in Article 7 which is not obligatory where its cause is not attributable to the carrier. If it can be proved that the cancellation happened because of exceptional circumstances, which could not have been

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avoided even if all reasonable measures had been taken, no compensation will be due to passengers[3].

Interpretative doubts have been raised in relation to the applicable limits of the exemption on the basis of 'exceptional circumstances', since the regulations, by way of non decisive provisions such as "considering" simply refer to examples along the lines of: political instability, inclement weather incompatible with the possibility of a flight, security risks, unexpected safety shortcomings of the flight, strikes, and air traffic control decisions.

The absence of a precise rule has inevitably favoured abuses on the part of air companies, which in cases of flight cancellations, turn to the exceptional circumstances in order to avoid paying out financial compensation.

In the interpretation of the law[4] it has been affirmed that where an air carrier has respected the minimum requirements for air maintenance, this is not *per se* sufficient to be able to demonstrate that that carrier has adopted 'all possible measures' in the sense of Art 5 (3) of the Regulation and to release it from the obligation to pay the pecuniary compensation. Article 5 (3) of the Regulation must be interpreted as meaning that a technical problem with an aeroplane which causes flight cancellation, is not included within the notion of 'exceptional circumstances' unless the problem derives from events which, by their nature or origin, are not inherent in the normal course of the carrier's activities and are outwith its effective control.

The air carrier, at the moment of flight scheduling, must consider the risk of delay and must predict a predetermined time limit that will allow it to go ahead with the flight once the exceptional circumstances have been resolved. This provision should not be interpreted as a way of enforcing the scheduling of a generalised minimum time limit applicable to all carriers in all situations in which exceptional circumstances may arise. Instead, the assessment of the carrier's ability to guarantee a flight must be made by seeking a balance between the length of the requested time limit and ensuring that this is not unreasonably burdensome compared to the capacity of its business at that particular moment.[5]

Despite the cited legal interpretations, it would be desirable to insert a definitive list of exceptional circumstances in the Regulation, possibly accompanied by the provision of traditional exemptions, such as Act of

God and force majeure or at least have the Commission publish guidelines on the interpretation of exceptional circumstances, in order to ensure uniform application.

With the recent community judgment of 4 October 2012 (procedure C-22/2011)[6] it has been established that Regulation (EC) 261/2004 deals with denied boarding in its entirety and therefore, not only with reference to specific cases of overbooking, but also to all situations in which the measure is adopted by the carrier[7], not being able to apply to the case in question the exemption of exceptional circumstances. For the Court, the reorganization of flights on the part of the air carrier, caused by overarching exceptional circumstances (in the case of an employee strike) does not justify denied boarding and above all does not exonerate the air company from the obligation to provide financial compensation.

It appears clear that the norms contained in the regulation, in the case of denied boarding, on the one hand grant the passenger an effective form of financial compensation for the inconvenience suffered; on the other hand they are unable to discourage carriers from resorting to the practice of overbooking, a practice well known to the legislator and disciplined rather than explicitly prohibited[8].

Equally full of loopholes is the concept of delay[9], whose evolution owes itself to the interpretation of the case law. The Regulation does not offer a definition of a late flight; it falls entirely to the carrier to respect the itinerary in its every part, from the flight schedule to the hour of arrival, providing some form of protection which must be adhered to if the predicted time limits are exceeded.

In Article 6, the obligations of protection at the carrier's expense are subordinated to a suggestion which is purely subjective, given the adverb 'reasonably'. This creates a risk in that it is difficult for the passenger to seek a remedy when the carrier doesn't adhere to the provided obligations. The provisions of the Warsaw Convention and Article 19 of the Convention of Montreal sanction only the rule that the air transport must be effected in a certain time, without defining specifically what this may be, and without indicating the initial or final moments in which the obligation of the air carrier may be considered as fulfilled.

In general terms, if the passenger can prove that they have suffered damage as a result of the delay, they will have recourse to compensa-

compensation as provided by the Convention of Montreal or a payment up to a maximum of 4.150 DSP. Such sums, however, must be documented and justified by the actual need to withdraw funds in relations to the hours of delay. Moreover, depending on the provisions, the payment is not obligatory if the carrier can demonstrate that all necessary measures in seeking to avoid the delay were taken, or alternatively if it demonstrates that it was impossible to adopt these.

Outwith the realm of attributable lateness constituting non-fulfilment and unlike denied boarding or flight cancellations, in the case of delayed departure there does not seem to be any immediate compensation due to passengers; there is no explicit reference in the regulations to the protection of Article 7 of Regulation (EC) 261/04.

The Regulation has introduced a *sui generis* institute that includes both attributable lateness and therefore non-fulfilment, and non-attributable lateness and therefore overriding impossibility. Bringing both possibilities together into one discipline (if they satisfy the requirements), the precedent is aiming to standardise the concept of lateness within a 'reasonable' time, in the resounding silence of explicit provisions.

The European Court of Justice[10] has clarified the concept of cancellation as opposed to lateness. It held that Articles 2, letter l) 5 and 6 of the regulation must be interpreted to mean that a delayed flight, regardless of the length of that delay, may not be considered cancelled when it is carried out in accordance with the original schedule provided by the air carrier. The judgement then specified the tolerable limit of any delay and the specification of the minimum time for a delay to be considered 'extended', therefore bringing delays in line with cancellations. In the reasoning, it can be noted that in cases where the delay to passengers is equal to or above three hours, or in cases where passengers reach their destination three hours or more after the scheduled time, compensation relative to cancellations will come into force. Such compensation may be reduced by 50% when the delay remains inferior to four hours and will not be due if the air carrier shows that the delay was caused by exceptional circumstances beyond its effective control, as implicitly provided in Art 19 of the Montreal Convention.

The carrier, therefore, if unable to 'reasonably' foresee a delay falling within the time-scales indicated in Article 6 of the Regulation (therefore substantially greater than five hours) will not be exempt from responsibility for the delay in the performance of the service, ac-

from responsibility for the delay in the performance of the service, according to the evidential regime of Article 19 of the 1999 Montreal Convention.

The obligation deriving from Regulation (EC) 261/2004 was upheld by Community law[11] to be compatible with and even complementary to Article 29 of the Montreal Convention. The consequence is that if the delay itself causes losses to passengers that would give them the right to be indemnified, they may raise an action in order to obtain payment on an individual basis within the limits provided by the Montreal Convention.

Since the Regulation (EC) 261/2004 is independent of the regime provided by the convention of Montreal, as confirmed by the judgement of the Court of Justice of the 23 October 2012, Nelson et al, C-581/10 and C-629/10.

Additionally, it has been further clarified that the time limit within which direct actions to obtain compensation must be raised is established in conformity with the rules of each member state on prescription of the action. The biannual prescription fixed in Article 29 of the Warsaw Convention and Article 35 of the Montreal Convention is not applicable to such financial compensation actions.[12]

Unduly burdensome clauses and right to information on fares

An alternative point of view is offered by the insertion of burdensome clauses within contracts concluded online and the duty to inform passengers of charges at the moment of booking.

It should be immediately noted that all the protection offered by the internal rules regarding consumers do not apply to the contract of transport, as expressly provided by Article 3(2) of Directive 1997/7/EC, the latter recognised in Article 55 of the Consumer Code, which explicitly excludes that rules relating to 'preliminary information', 'written confirmation of information' 'right to rescind' and 'execution of the contract' may apply to contracts of services relating to transport.

The European Court of Justice took some time to express itself on the matter in a case regarding a hire contract of automobiles which was concluded over the Internet.[13] On this occasion, the Court clarified that the extension provided by Article 3 (2) of Directive 1997/7/CE relates to the entire sector of transport and that the community legislator will-

willingly did not opt for the expression "contrast of transport" , but rather for the wider interpretation of "contrast of the carrying out of services relating (…) to transport". In this way, he meant to include the combination of contracts which regulate transport services and therefore, those which involve the transport of a customer and of their belongings.

Therefore, with reference to the unduly burdensome clauses inserted in the contracts of air companies, there has been a notable judgement from the Tribunale di Barcelona (Sentencia numero 5/2010 del Juzgado de lo Mercantil numero 1 de Barcelona) on the subject of a fine imposed upon a passenger who did not bring his pre-printed boarding card with him. The judgement, relying on Article 3 of the Montreal Convention, reaches the conclusion that despite the lack of an express provision as such, the duty to provide a boarding card can be considered as an essential obligation of the carrier and may not fall to a passenger even if the carrier is low cost. The Spanish judges held the clause in question to be abusive and it will be considered null and void.

Community law dictates precise rules regarding the information to be provided to the passenger with regard to tariffs, even from the beginning of the booking process and even when the purchase takes place via the Internet.[14] The final price to pay must always be indicated and must include all applicable fees for passengers and goods as well as all taxes, rights and supplements which are necessary and foreseeable at the moment of publication. Optional price supplements must be communicated in a clear and transparent way at the start of any booking process and their acceptance must be on the basis of explicit consent on the part of the passenger.

In addition to judicial bodies, executive authorities have often intervened in this area. A recent intervention by Antitrust[15] applied sanctions on some air companies for not indicating, within the booking process, the existence and the amount of special fees for payment by credit card. In particular, Antitrust, on the basis of community legislation, has paused to reflect on the lack of clarity around the effective price of of tickets in advertisements in newspapers and internet sites, as well as in the online booking system. It found that applying credit card supplements separately from the price, failure to provide information, or indeed providing incomplete information on this additional cost were all unfair practices. Furthermore, with the same provision, the market and competition authority punished some companies where the fare conditions or the general transport conditions in the booking process

conditions in the booking process were only published in English on their websites.

A recent ruling by the Administrative Court of the Italian region Lazio[16] rejected recourse presented by a low cost air company and affirmed that where there exist different ways of paying with no additional charges, the onus of payment with credit card will be published and made clear to the user from the beginning of the procedure.

The cost of overweight baggage incurred by passengers in order to allow them to fulfil their own obligations, has no justification in the contract, where it is not as much as mentioned, dealing with an activity necessary for the creditor of the performance of transport.

Online check-in, originally seen as an advantageous alternative to passengers, compared to the traditional airport check-in, has become the only way of checking-in for free, due to the increased costs to the carrier of traditional methods. From this perspective, the practice adopted by companies, even if less advantageous to the passenger, seems legitimate, leaving a choice between the free check-in method and one which incurs a payment.

What appears illegitimate however is the contractual provision, recently adopted by some companies, to call for an additional payment even in order to check-in online, which had remained the only way to check in without paying.

Through separating from the ticket price what is an essential service in the carrying out of the transport, an unjust economic advantage is obtained from a service which ought to be included within the price; this risks encroaching upon the unity of the contract of air transport of persons.

It has already been seen, as in some European legal systems, that contractual clauses which provide extra charges in the absence of a boarding card printed by the passenger, have been held abusive and illegitimate. Drawing from the arguments sustained in the judgement, one could correctly assert that payment of an additional fee for check in is an illegitimate practice. Provision of a boarding card should be viewed as an instrumental obligation of the carrier within the contract of transport and should not be transferred to the passenger, who must also bear the additional cost.

2 CONCLUSIONS

The case and the issues examined show the gaps and gray areas of Regulation 261/2004, so much that on 13 March 2013, the European Commission published a proposal (COM/2013/0130) amending and supplementing it.

The proposal will be subjected to the ordinary legislative procedure of the European Union, having the European Parliament and the Council of Ministers still need to review and approve this provision. As this process is unlikely to be completed until the early part of 2015, detailed analysis seems premature at this stage[17].

The proposed amendments relate to the most important provisions: the express right of compensation for flight delays, although extending the tolerance threshold to a minimum of 5 hours after the time originally scheduled, the application of temporal and monetary limits for care obligations imposed on airlines in case of delays and cancellations arising out of "extraordinary circumstances", the express definition of what should be considered "exceptional circumstances" within the meaning of the regulations and their publication in a non-exhaustive list contained in a new annex. There are also proposals for re-routing, such as the provision of the right of passengers whose flight does not arrive at their destination within twelve hours after the scheduled time, of being accommodated via a different carrier or an alternative mode of transport, or proposals providing a fair balance of the liability of carriers in the case of flights operated in coincidence with each other. The proposal also foresees a partial ban on airlines to deny boarding to passengers on the return flight on the basis that they failed to use the outbound leg.

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[1] For consideration of the Regulation see N. CARNIMEO, *La tutela del passeggero nell'era dei vettori low cost. Annotato con la giurisprudenza*, Bari, 2012. M. DEIANA, *Responsabilità del vettore per negato imbarco e ritardo in Aeroporto e reponsabilità*. Atti del Convegno, Cagliari, 2005, 113-132.

[2] On this point see Cass. Civ. Sez. III 27-10-2004, n. 20787, in N.CARNIMEO, *La tutela del passeggero, cit.*, 40.

[3] Initially, reference was made to "Act of God" which was then substituted by "exceptional cirtumstances".

[4] European Court of Justice, 4th Section, Judgement of 22 December 2008, case C-549/07.

[5] European Court of Justice, 3rd Section, Judgement of 12 May 2011, case C- 294/10.

[6] For commentary on the judgement, see A. MASUTTI—M. STANEV *The European Court*

of Justice upholds a broad interpretation of the Concept of "denied boarding", in n. 3/2012, 35 ss.

[7] For a reflective overview, see P. GIRARDI, *Recenti sviluppi della regolamentazione dell'overbooking ed applicazione degli schermi di indennizzo per mancato imbarco,* in *Dir. Trasp.*, 1992, 413 ss; S. BUSTI, *La responsabilità del vettore aereo per overbooking,* in *Dir. Trasp.*, 1993, 313; M. COMENALE PINTO, *Considerazioni in tema di sovraprenotazione nei servizi di trasporto aereo,* in *Studi in memoria di Luisa Corbino,* Milano 1999.

[8] V. SILINGARDI, *Attività di trasporto aereo e controlli pubblici,* Padova, 1984, 218 ss.

[9] On passenger protection in case of delay, cfr. G.D. CARABBA - G. DI GIANDOMENICO, *Brevi cenni su una tutela concreta del passeggero alla luce del nuovo regolamento comunitario n. 216/2004,* in *Studi su negato imbarco, cancellazione del volo e ritardo nel trasporto aereo,* 2005, 263-268.

[10] European Court of Justice, 4th Section, judgement of 19 November 2009, cases C-402/07 and C-432/07.

[11] European Court of Justice, Grand Chamber, judgement of 23 October 2012, C–581/10 and C-629/10.

[12] European Court of Justice, Third Section, judgement of 22 November 2012, C-139/11.

[13] European Court of Justice, First Section, judgement of 10 March 2005, case C-336/03.

[14] Article 23 of EC Regulation 1008/2008 of 24 September 2008.

[15] Meeting of 28 April 2001. Source: www.agcm.it

[16] Tar-Lazio-Roma, Sez I, judgement of 15 February 2012, n. 1521.

[17] On the topic see Thomas van der Winjgaart, John Balfour and Peter Macar *Air Passenger Rights Revisited—European Commission publishes proposal for amendment of Regulation 261/2004*, on Mondaq, 21 March 2013.

SPACE DEBRIS: WHO WILL PAY?

Neil Stevens*

SPACE HAS NEVER BEEN MORE ACCESSIBLE, BUT ARE WE ABOUT TO PAY THE PRICE FOR NOT CLEARING UP THE MESS THAT WE HAVE CREATED THROUGH ITS EXPLOITATION?

1 INSURANCE PERSPECTIVE

Ask most space insurance underwriters whether they have a concern about space debris and without doubt every single one will declare that it represents an escalating risk for the sector. Ask the same group of space insurers whether they factor the increasing risk into their pricing models for assessing space risks and the answer from most would be they would not give it much consideration. It would seem that although we recognise the risk, we apparently take no proactive steps to protect ourselves by rating accordingly. States who engage in space activity appear to have a similar attitude to the potential hazards.

Insurance is based on the principle that 'the many' pay for 'the few' or put another way, many people pay insurance premiums and hopefully there are relatively few losses which are paid from the income from those premiums. Pricing follows the frequency and quantum of losses so that over time a steady premium rate is achieved which equates to the level of risk. The underwriter obviously needs to earn a profit margin, but generally speaking quantum and frequency of losses form the basis for premium rating. However, in the case of space debris, despite the fact that we recognise the risk, it is unlikely to become a rating factor until the incidents of casualties begin to mount. It would appear that the same is true for states engaging in space activity, i.e. they are aware of the problems but choose to turn a blind eye to the increasing amount of debris being created. Insurance is reactive rather than proactive, but there is no reason why states engaging in space activity should be the same.

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Space insurance is underwritten in 2 separate classes: first party property insurance covers the spacecraft and launch vehicle costs (amongst other financial costs) and is usually taken out by satellite operators; third party insurance covers claims brought by third parties. Again it is usually taken out by satellite operators, although it may be purchased by governments or launch service providers to cover the specific risks associated with launching a satellite. Property insurance covers the straight forward commercial risk which private commercial entities seek to mitigate. If you are a satellite operator and your main means of earning revenue is damaged your business will falter. The damaged property must be repaired or replaced. Since spacecraft are to all intents and purposes 'inaccessible', the latter applies. In general, governments do not buy property insurance. They regard it as a waste of taxpayers' money. Third party liability insurance frequently provides cover for private commercial entities but also governments (at their request or through imposition of licensing requirements). The direct risk to governments arises under international law virtue of the 'Space Conventions'.[1]

Governments licence the activity of commercial entities and will usually make the grant of a license dependent upon the respective party purchasing third party liability insurance (typically provided as part of the launch service cost). The third party insurance frequently identifies the licensing state and any other launching states[2] as insured parties. This provides a first tier of protection for the licensing state and any other associated governments regarded as a launching state. The level of cover provided by the various launch service providers differs (around the USD100m level for launch and 1 year). Beyond this limit the respective government may choose to limit its liability to a prescribed level or accept the liabilities themselves. Various schemes have existed. Until recently, the United Kingdom was the only government which imposed an unlimited liability regime on its' licensees[3] (commercial operators bear the risk). Other governments have used risk sharing schemes. The USA, for example, provides indemnity for an upper layer of exposure, with liability reverting back to the licensee above the governmental layer (commercial/governmental risk). The French Government provides a financial guarantee to compensate damages to people, property or the environment. This sits above the insurance cover that Arianespace provides under its launch service agreements (virtual governmental risk). Amongst all of these, virtual governmental risk is the most likely to foster greater commercial activity.

2 DEBRIS CREATION

Debris in low earth orbit is an increasing concern, but to date there have been relatively few collisions. The only notable one was between the USA registered Iridium 33 and Russian military Cosmos 2251 spacecraft which collided in low earth orbit. The concern is that the resulting fragments from collisions will send uncontrollable items of debris into the path of otherwise unimpaired spacecraft. Liability for collisions in space is fault based[4].

As between Iridium 33 and Cosmos 2251, the former was controllable but the latter was defunct and uncontrollable. Iridium was warned of the possibility of collision but opted to take no measures to avoid the potential hazard. There are two factors that come into play here. First, Iridium received frequent advices about the possibility of collision. The company, which owns a large network of satellites, was not in the habit of acting on every warning that they received. They had also never suffered a collision. Secondly, the accuracy of position reporting given in warnings is far from pin-point. If Iridium had taken action to avoid the convergent trajectory, they may in fact have been taking action that would put their spacecraft into the path of the convergent spacecraft. In this scenario Iridium may well have been 'at fault' because they would be moving into the path of an uncontrollable object. On the other hand taking no action may be considered negligent or even reckless when a clear warning is given. In either case, the Liability Convention gives no guidance.

Another area lacking in legislative guidance concerns debris removal. Every launch creates debris which pollutes low earth orbit. The size and quantity of the respective pieces created vary. At one end of the scale there are large uncontrollable items like launch vehicle upper stages. At the other end of the scale there are smaller pieces like flecks of paint. These objects travel at high velocity. When they collide they are capable of causing substantial damage. They also increase the amount of debris in low earth orbit as a result of fragmentation. From a legal perspective there is significant risk.

If a launching state is responsible for the objects that it launches into space, i.e. the launch vehicle or satellite, it follows that the launching state is also responsible for the component parts that fall off or break free from those objects (fragments). As such, all of the pieces of debris (which can be tracked) that emanate from a single launch are objects that could create potential liability for the associated

launching state or states. Consider a piece of debris the size of a football. It is travelling at approximately 28,000 kilometres/hour (in low earth orbit). It is effectively an unguided missile of the launching state. If it hits something, the chances are that that object will be destroyed. If we assume that the launching state is found to be at fault, the fragments emanating from the collision are likely to be imputed to the same launching state from a liability perspective[5]. In effect one missile creates more missiles. Liability presumably extends to any subsequent loss from the new missiles. Carried to its conclusion, if one impact triggered the feted "Kessler Effect"[6], the result would not simply be catastrophic for the satellite community; it could lead to a catastrophic level of liability for the original launching state(s) that put the chain of events in motion.

3 COLLISION AVOIDANCE

There are substantial similarities between the provisions of the UN Convention on the Laws of the Sea and the corpus of space conventions. A set of adaptable regulations to deal with matters like collision avoidance, in much the same way that the International Regulations for Preventing Collisions at Sea relate to the provisions of the United Nations Convention on the Law of the Sea, could provide a means for addressing collision avoidance as between orbiting spacecraft.

The Iridium/Cosmos collision highlights the legal uncertainty that exists with respect to collisions in space. Collision avoidance in the space environment could be reduced by introducing a set of regulations similar to those used by the international maritime sector. This could become a body of rules and norms that would help maintain international legal order as between states and their operators for the purposes of collision avoidance. It may also be useful for the purpose of establishing liability in the event of a collision. At present liability under the Liability Convention relies on establishing fault. In the absence of clear guidance on who has what obligation, this is likely to promote extensive and expensive legal arguments.

Whilst the introduction of collision avoidance regulations may assist in the unnecessary creation of further clouds of debris, they will not go to the heart of the problem which is how to clear up what is already up there. Some of the debris re-enters the Earth's atmosphere and burns up, but there is a cumulative effect which means that the amount of debris surrounding the Earth is increasing. Satellite operators do collaborate on collision mitigation and interference risks and UN

guidelines on de-orbiting have been driven by best practice rather than through regulation. Organisations like the Space Data Association[7] also play a valuable role in promoting responsible activity in the space environment. Unfortunately membership of the SDA is voluntary, which dilutes the obvious benefits which could otherwise be achieved through compulsory compliance data sharing.

4 DEBRIS REMOVAL

Various technical solutions to remove debris have been mooted. Whilst there are obvious merits in doing so, the major stumbling block is who is going to pay for it? A typical communications satellite costs about USD200m to build and launch. With a life of about 15 years, the satellite is likely to earn revenue of something like 4 to 6 times this amount. The cost to build and launch a debris removal spacecraft would likely be similar. It will not generate revenue (per se) and would probably have limited capability/capacity for what it could actually remove. Large items (which are a greater threat) require more energy to remove them from their orbits and a debris removal spacecraft is only likely to be able to capture a couple of large pieces. The assumption is that the items captured would then be de-orbited along with the debris removal spacecraft.

The development of a market for debris removal under the existing legal climate is implausible. It is not economic and there is nothing within the current legal framework which creates a clear obligation on the parties involved in launching a satellite to remove the debris attributable to the launch. It would be extremely difficult to impose an obligation on each party involved in the launch to clear up every piece of debris without making access to space completely unaffordable, so the best on offer is to attribute liability to the launching states. Whilst good or best practice may be to remove those items which pose the greatest threats, cost will still be a factor likely to prevent debris removal. A straight forward third party liability insurance will be charged at a rate of about 0.1% (capacity is generally available for cover up to USD500m). Compare this to the cost to build and launch a debris removal spacecraft (USD200m noted above) with the annual insurance premium of USD500,000 to insure against third party liabilities. The third party liability cover for the debris removal itself would carry the same charge. The insurance option is far cheaper, which begs the question, why would a commercial operator even contemplate paying for debris removal unless forced to do so?

Article IX of The Outer Space Treaty states that "State Parties to the Treaty shall pursue studies of outer space, including the Moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination," but does not define what constitutes harmful contamination[8]. It seems almost implausible to consider space debris as anything other than matter which contaminates the space environment because space debris is essentially junk. Is it harmful? Well it prevents access to and interferes with operational activity in certain orbits, serves no useful purpose and causes losses to operational spacecraft when it collides with them. On balance, it is difficult to reach any other conclusion. To this extent there is an obligation on State parties to "pursue studies" and "conduct exploration" so as to avoid harmful contamination. Article IX also recognises the obligation on States to avoid "adverse changes in the environment of the Earth resulting from introduction of extraterrestrial matter" and indicates that "where necessary [States] shall adopt appropriate measures for this purpose." The implication here is that State parties really should be looking at ways to clear up the mess made by the launch activities they licence. This in part provides the basis for addressing the major stumbling block identified above, concerning who is going to pay for it.

Whilst it is doubtful whether a state could be compelled to take action to remove debris, because there is no positive duty to do so, the way forward does appear to be through collective voluntary action from the signatories. Many ideas have been suggested, including the imposition of a debris tax on satellite operators. Whilst this may seem to be a proportionate and reasonable solution, taxes require domestic legislative action in the first instance. Conventions are state to state agreements. Collecting a tax from satellite operators would be cumbersome and problematic. Raising a tax would also be an unfair imposition on those operating in the present day rather than those who may have created the problem in the past. Finding a proportionate solution at a commercial level does appear to be a problem.

A new convention is not required and would be a poor solution. It is suggested that what is required is action on the part of state signatories to the existing conventions to agree an amendment. Key points to address would be to introduce:

- Collision avoidance rules
- Debris removal obligations on states
- A proportionate mechanism for collectively financing debris removal

How states choose to recoup the expense of debris removal should be their own affair. Obviously they can impose heavy taxation on their own commercial entities, although the flip side to this is that they may well impair their own interests as this will discourage space related activity within the state. Without action on the part of the state signatories the price that we may end up paying is that access to space just becomes too risky or too dangerous and that "the province of all mankind"[9] may be lost for generations to come.

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[1] The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967 (the "Outer Space Treaty") and The Convention of the International Liability for Damage Caused by Space Objects, 1972 (the "Liability Convention").

[2] As defined under the Liability Convention, Article 1(c) and the Convention on Registration of Objects launched into Outer Space, 1975, Article 1(a) - the words are identical.

[3] Outer Space Act 1986, s. 10.

[4] Liability Convention, Article IV (b).

[5] Fragments above approximately 2 cm^2 are capable of being tracked and therefore.

[6] The Kessler syndrome (also called the Kessler effect, collision cascading or ablation cascade), proposed by NASA scientist Donald J. Kessler in 1978, is a scenario in which the density of objects in low Earth orbit (LEO) is high enough that collisions between objects could cause a cascade—each collision generating space debris which increases the likelihood of further collisions. One implication is that the distribution of debris in orbit could render space exploration and even the use of satellites, unfeasible for many generations.

[7] The Space Data Association (SDA) is a formal, non profit association of satellite operators that supports the controlled, reliable and efficient sharing of data that is critical to the safety and integrity of satellite operations. The SDA's charter is to seek and facilitate improvements in the safety and integrity of satellite operations through wider and improved coordination among satellite operators and to facilitate improved management of the shared resources of the space environment and the RF spectrum. The SDA was formed in 2009 by Inmarsat, Intelsat and SES to share data.

[8] For an excellent analysis of Article IX and the impact of the anti-satellite missile testing in China, the United States and the Soviet Union, see Michael C. Mineiro, FY1C and USA-193 ASAT Intercepts: An Assessment of Legal Obligations Under Article IX of the Outer Space Treaty, Journal of Space Law, Vol 34, p. 321.

[9] The Outer Space Treaty, Article I.

THE ILA—MODEL LAW FOR NATIONAL SPACE REGISTRATION

Stephan Hobe*

1 INTRODUCTION

Article VI S. 2 of the Outer Space Treaty introduced in case of an ("allowed") private space activity the need for the "appropriate" State to introduce adequate national legislation. With this provision, the fundamental code of international space legislation highlights, that private activities are allowed and these activities have to be continuously been checked upon. International law is thereby not very outspoken: It just asks for "authorization and continuous supervision by the appropriate State party". So what States need to enact in their national space legislation is left relatively open. The minimum requirements are, as can be clearly understood, such as the need for a licensing system (of authorization) and the "continuous supervision" of the space object by the launching State (appropriate party). This, and a couple of other requirements have been developed in the current codifications of States. By now, appropriately 20 States do have their own space legislation[1].

The International Law Association (ILA), a non-governmental international organization of approximately 13.000 members worldwide, founded in 1837 has adopted at its 52nd bi-annual international conference in 2012 in Sofia, Bulgaria, a "Model Law for National Space Legislation". This Model Law was elaborated in its Space Law Committee, chaired by Prof. Maureen Williams from Argentina and with Rapporteur Prof. Stephan Hobe, Cologne. The Model Law was elaborated over three bi-annual conferences, namely such in Toronto 2006, in Rio de Janeiro 2008, and in The Hague 2010, before in 2012 in Sofia the last refinements were made. The Model Law is based on State practice, assembled by the Rapporteur through the distribution of several questionnaires among the approximately 35 members of the Committee, representing 22 member States. It is thus reflective of current State practice in numerous countries. In the following, the Model Law will be presented in order to become better known among

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interested State parties. It is a non-binding legal instrument, just recommendatory in character, and serving as a model for domestic legislators. A full description of the Model Law and more of its facets concerning the motives behind the Law as well as a thorough description of this drafting process by the Rapporteur can be red in another article by this author.[2]

ILA Model Law on National Space Legislation

Article 1- Scope of application

The present law applies to space activities carried out by citizens of XY or legal persons incorporated in XY and space activities carried out within the territory of XY or on ships or aircrafts registered in XY.

Article 2 – Definitions – Use of Terms

The following definitions will apply for the purposes of this law:

Space activity

The term 'space activity' includes the launch, operation, guidance, and re-entry of space objects into, in and from outer space and other activities essential for the launch, operation, guidance and re-entry of space objects into, in and from outer space.

Commercial space activity
A space activity for the purpose of generating revenue or profit whether conducted by a governmental or by a non-governmental entity.

Space object
The term 'space object' refers to any object launched or intended to be launched into outer space including its component parts as well as its launch vehicle and parts thereof.

Operator

The term "operator" refers to a natural or legal person carrying out

space activities.

Authorization
License delivered in written form.

Supervision
Continuous observation and tracking of a space activity.

Article 3 – Authorization
All space activities are subject to authorization. Authorization shall be granted by the minister of … (= the competent minister).

Article 4 – Conditions for authorization
(1) Authorization shall be granted if the following conditions are met:

(a) The operator is in a financial position to undertake space activities,
(b) The operator has proven to be reliable and to have the required technical knowledge,
(c) The space activity does not cause environmental damage to the Earth and outer space in accordance with Article 7,
(d) The space activity mitigates space debris in accordante with Article 8,
(e) The space activity is compliant with public safety standards,
(f) The space activity does not run counter National security interests,
(g) The space activity does not run counter International obligations and foreign policy interests of XY,
(h) The operator has complied with ITU Regulations with renard to frequency allocations and orbital positions,
(i) The operator complies with insurance requirements as determined in Article 12.

(2) In order to prove fulfillment of the conditions mentioned in paragraph (1), the operator must submit appropriate documentation and evidence (as specified in an implementing decree/regulation).

(3) The authorization may contain conditions and requirements.

Article 5 – Supervision

All space activities are subject to continuous supervision by the minister. Details of this supervision shall be laid down in an implementing decree/regulation.

Article 6 – Withdrawal, Suspension or Amendment of Authorization

The minister may withdraw, suspend or amend the authorization, if the conditions of Article 4 para. 1 or the specific conditions for requirements of Article 4 para. 3 are not complied with.

Article 7– Protection of the Environment

(1) Space activities shall not cause environmental damage to the Earth and outer space or parts of it, directly or indirectly.

(2) An environmental impact assessment is required before the beginning of a space activity.

(3) Details of the environmental impact assessment shall be laid down in an implementing decree/regulation.

Article 8 – Mitigation of Space Debris

(1) Any space activity shall avoid the production of space debris.

(2) The obligation of para. 1 includes the obligation to limit debris released during normal operations, to minimise the potential for on-orbit break-ups, to prepare for post mission disposal and to prevent on-orbit collisions in accordance with international space debris mitigation standards.

Article 9 - Transfer of space activity

The transfer of a space activity to another operator is subjected to prior authorization by the minister. Authorization will be granted under

the conditions of Articles 4.

Article 10 – Registration

(1) A national register is hereby established for the registration of space objects. The minister of … (= competent minister, preferably the same as in Article 3) keeps the national space register.

(2) All space objects for which XY is the launching State according to Article 1 of the International Convention on the Registration of Objects Launched into Outer Space of 1974 shall be registered in the national register.

(3) If there are two or more launching States in respect of any such space object, the agreement among them according to Article II para. 2 of the International Convention on the Registration of Objects Launched into Outer Space shall be determinative of the registration in XY.

(4) The following information has to be entered into the national register:

- Name of the launching State or States (name of a private launching entity: natural or legal person),
- Registration number of the space object,
- Date and territory or location of the launch,
- Basic orbital parameters including nodal period, inclination, apogee, perigee,
- General function of the space object.

(5) Additional information and information in accordance with the Registration Convention and/or the UN Registration Practice Resolution as specified in an implementing decree/regulation shall also be included in the national register.

(6) The information contained in para. 1 shall be made available to the Secretary-General of the United Nations as soon as possible.

(7) Any relevant change with regard to the information mentioned in para. 1 must be registered in the national register. The Secretary-General of the United Nations shall be informed accordingly.

Article 11 – Liability and Recourse

(1) When XY has paid compensation to third parties for damage caused by a space activity in fulfillment of its international obligations, the government is entitled to have recourse against the operator.

(2) The recourse of the government against the operator may be limited to a certain amount.

Article 12 – Insurance

(1) The operator of a space activity has to take out an insurance covering damage caused to third parties up to the amount of… (TBD by national law).

(2) The obligation of para. 1 does not apply if the government itself carries out the space activity.

(3) The minister may waive the obligation to insure if

a) the operator has sufficient equity capital to cover the amount of his/her liability;

a) the space activity is not a commercial space activity and is in the public interest.

(4) The details of the content and conditions of the insurance shall be laid down in an implementing decree/regulation.

Article 13 – Procedure

(1) The rules of procedure follow the general rules of (administrative)

procedure law. This includes time limits for the decision of the minister and the right to impose conditions and sanctions.

(2) Appropriate costs and tariffs for the procedure are laid down by the minister in the implementing decree/regulation.

(3) Any dispute arising from the interpretation and/or application of the present law shall be solved in the national court system.

Article 14 - Sanctions

A violation of the obligations set out by the present law is punishable by a fine of ##.####. The carrying out of space activities and the transfer of space activities without authorization by the minister according to Articles 3 and 9 is punishable at least by an amount of #.###.

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[1] Such countries are, inter alia, the United States of America, Russia, Kasachstan, The Netherlands, The United Kingdom, Japan, South Africa, Belgium, Austria, etc. See Böckstiegel/Benkö/Hobe (eds.), Space Law—Basic Legal Documents, Vol. 5, Loseleaf, The Hague, status June 2012. See further on the problem Michael Gerhard, Article OST VI in: Hobe/Schmidt-Tedd/Scrogl (eds.), in Cologne Commentary on Space Law, Vol. 1, passim.

[2] See Stephan Hobe, The ILA Model Law on National Space Legislation, in: Zeitschrift für Luft-und Weltraumrecht (German Journal of Air and Space Law), 2013, pp. 81 et seq.

CASE LAW COMMENTARY

9-11: UNITED AIRLINE'S MOTION FOR SUMMARY JUDGMENT
Rule or exception?

Valeria A. Grella*

1 INTRODUCTION

Almost twelve years have passed since the destruction of the World Trade Center complex on September 11th, 2001. This act of terrorism and the associated ripples of change it caused geopolitically and throughout various legal frameworks around the world are still being felt today. Aviation law was no exception, as legal cases were brought and decided, impacting broad ranges of areas such insurance, security, and even the definition of an aircraft itself.

Perhaps one of the most interesting cases to be considered over this period of time was decided last November, in a ruling that was issued by Judge Alvin K. Hellerstein (United States District Court Southern District of New York) in *World Trade Center Properties LLC*[1], stating what all the media communication summarized as: *"…United Airlines bears no responsibility for the collapse of a third World Trade Center building on September 11, 2001, stemming from suspected airport security lapses that allowed hijackers to crash an American Airlines plane into the complex, a federal judge ruled on Wednesday…"*

The District Court reached fascinating conclusions about the facts of the terrible hijacking of American 'Flight 11' and also laid out a remarkable analysis in respect of potential liability and duty of care from an aviation law standpoint. The reader will find below not only a legal review of the foundations of the court case but also a report of the particular chain of events that led to the tragedy on that fateful day, that for many of us were unknown.

2 BACKGROUND FACTS, JURISDICTION AND LEGAL PRECEDENTS

World Trade Company Ltd ("**WTC**"), Tower 7's lessee, sued United Airlines, American Airlines and others, alleging that the destruction of Tower 7 was a direct result of the defendant's negligence. Original and

* Aviation Lawyer

exclusive jurisdiction in respect to this action was granted to the United States District Court for the Southern District of New York, as outlined in the Air Transportation Safety and System Stabilization Act ("**ATSSSA**") of September 22, 2001.[2]

Summary Judgment was sought by both United Continental Holdings and United Airlines (together "United"), and ultimately granted by Judge Alvin Hellerstein. United's case was determined to be a "matter of law" , and therefore the Judge decided that there were no disputes of "material" fact requiring a trial to resolve, and in applying the law to the undisputed facts, one party is clearly entitled to judgment[3]. Moreover, it was clarified that a genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"[4]. This decision was open to appeal and review by the US Court of Appeals 2nd Circuit.

It is worth highlighting the fact that, while this motion for summary judgment was granted, a separate motion filed by American Airlines for summary judgment on the basis that 7WTCo had already been fully compensated by insurance recovery in respect to any tort liability, was denied only a week later. Therefore, the critical question to consider is: what was the key to United's success? United's particular motion brought into focus two important and ultimately critical considerations for Judge Hellerstein: a) Responsibility related to Flight 11 itself and b) Responsibility regarding the actual hijacking. These considerations and ultimate findings of fact provided the supporting reasoning to determine: 'Did United owe a legally recognized duty of care to the plaintiff?'

To answer the questions above it is important to review some of the relevant facts:
Two of the hijackers boarded a previous flight before taking Flight 11. The connecting flight was Flight 5930 from Colgan Air at Portland International Jetport bound for Boston's Airport. To board the mentioned flight both passengers received their tickets from U.S Air-ways, and were then required to pass through one security screening checkpoint that was the custodial responsibility of Delta Airlines, which was also the only checkpoint in the airport. This checkpoint was Delta's responsibility based on the "Shared Responsibility Agreement" signed by several Air Carriers in 2001, including United. Pursuant to this Agreement, Delta Airlines assumed responsibility for the overall operation of the checkpoint, as well as to allocate the administrative and financial responsibility for any civil penalties levied by the Federal

Aviation Administration in addition to any alleged non specific violation of the Air Carrier Standard Security Program. Furthermore, Delta Airlines was not only responsible for the checkpoint but also was liable for any nonspecific violation at Portland's Airport. United was not directly responsible for either of these, nor for the ticketing, boarding, check in, or the operation of Flight 5930.

Next, the Court proceeded to analyze events at Boston's Airport (Logan International Airport) where the hijackers ultimately boarded Flight 11. The Security checkpoint at Terminal B where the hijackers passed through was operated by Globe Aviation Service under contract to American Airlines, the company that also issued the boarding passes for Flight 11.

As a result of the facts previously noted, the Court concluded that United had no direct relationship or influence over the operational safety or passenger screening in respect to flight 5930 or Flight 11. Additionally, the aforementioned agreement between the aviation companies also had no terms to indicate United had any implied duty of security. The ultimate determination of a duty of care, or lack thereof, was critical because it "*..is thus a sine qua non of a negligence claim: the absence of a duty, as a matter of law, no liability can ensue*".[5]

To further explore the possible duty United may have owed to WTC, the case of "Stanford vs Kuwait Airways" was considered as a matter of precedent, partly because WTC placed reliance of this case as the keystone to its argument regarding United (and the associated defendants). In Stanford, Hezbollah terrorists ultimately successfully hijacked Kuwait Airways flight 221 after transiting from Middle East Airlines (MEA), leading to the death of two American diplomats. The estates of these deceased diplomats were successful, on appeal, to hold the initial negligence of MEA was not 'so far removed' as to be entitled to summary judgment. However, the Court notes that the facts of this case were in fact quite different: there was a clear connection that was 'direct and significant'. MEA was responsible for ticketing, baggage screening, and examining visas. In Stanford, tickets were purchased involving a circuitous routing, no return ticket, and a cash payment. MEA was also fully aware of growing security concerns at the time of the hijacking. Given that the finding in MEA was a "close call", the Court found that the facts of United's motion did not in any way rise to the level of those in Stanford.

After noting the above, the Court in United's case then considered the general hesitation in "…extending liability to defendants for their failure to control the conduct of others… The key in each is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm. The risk reasonably to be perceived defines the duty to be obeyed, and risks imports relation, it is risk to another or to others within the range of apprehension"[6]. The 'range of apprehension' was ultimately the deciding factor in respect of a duty of care, which while reached in the MEA case was deemed to have not been established in the United motion because "It was not within the United's range of apprehension that terrorists would slip through the Portland security screening checkpoint, fly to Logan, proceed through another air carrier's security screening and board that air carrier's flight and crash it into 1 World Trade Center, let alone that 1 World Trade Center would therefore collapse and cause Tower 7 to collapse".

3 CONCLUSION

After reviewing the facts and the legal reasoning applied by the Court, it is clear that it was a thorough analysis of United's responsibility.

In addition to the information in the case, it is a relevant fact that security screening checkpoints, after January 5, 1976, based on a Federal Aviation Administration regulation, had involved all airlines in the screening of passengers and their carry-on baggage. The airline that had operational control of the departure concourse controlled by a given checkpoint would hold that contract. Although an airline would control the operation of a checkpoint, oversight authority was held by the FAA. It is important to note that, C.F.R[7]. Title 14 restrictions did not permit a relevant airport authority to exercise any oversight over checkpoint operations.

The above detailed "security proceeding" informed the development of company's agreements for determining and appointing responsible parties for security points and their operation. The legal relationships created between the companies resulted in a level of complexity that required analysis to determine responsibility.

Furthermore, the legal reasoning applied by the Court regarding the relation between negligence and the existence of a duty in order to determine if there is any liability, in addition to the consequence of holding someone responsible for actions that are beyond the area of

apprehension, provided a firm foundation for the ruling. It is the indirect, distant and not relevant relationship regarding United and the hijacking itself that as a matter of course led to summary judgment.

Judge Hellerstein's decision also reinforced the importance of considering the impact on society as a whole, if a judicial decision such as this one was to extend responsibility for events that occurred beyond United's area of apprehension.

The importance of this additional consideration not only appears in Common Law cases like this one, as echoed in the sociological jurisprudence as expounded by Judge Cardozo: "*Law ought to be guided by consideration of the effects [it will have] on social welfare*." And the utilitarian philosophy of Bentham that "*it is the greatest happiness of the greatest number that is the measure of right and wrong" but also in cases from Civil Law*". These cases, such as that of "Rodriguez vs Embotelladora[8]" where an Argentinean Court stated: "*This Court can't omit these circumstances because as it was repeatedly judged "… A ruling can't be issued without taking into account what would happen as a matter of course because this test is one of the safest guidelines used in order to verify the reasonability of the interpretation and the congruence with the legal system in which the regulation is inserted (Judicial Precedent Nr. 302:1284)…""*, this in short reflects a jurisprudential approach of juxtaposing consequences for the parties in question but also society, i.e. that *"…the decision to rule in certain way will also include the necessity to evaluate the possible consequences of deciding in one or the other way…."*[9].

Last but not least, it is worth noting that the legal implications of 9/11 are still being felt to this day. As mentioned, the legal responsibilities over the security screening checkpoints were an important part of the Court analysis in order to grant United's motion, but post 9/11, as a result of the Aviation and Transportation Security Act, the operational responsibility of the security screening check points changed. Since November 19, 2002 passenger screening has been conducted by Federal employees. As a result, passenger and baggage screening is now provided by the Transportation Security Administration (TSA), which is part of the Department of Homeland Security. Accordingly, the Government should be the responsible party for duty of care in similar cases.

As a final comment, I have concluded that Unted's case is not an

exception, but rather in compliance with legal regulations and is the result of a conscientious analysis of fact made by the Court. 9/11 will always remain in the memory of the world and of future generations as one of the most tragic events in history, causing a deep impact and even improvements in several areas such as technology, immigration, commerce, security, aviation developments and operations, company's agreements and even in the law itself. These modifications take us to a new era. As John F. Kennedy said: *"…for time and the world do not stand still. Change is the law of life. And those who look only to the past or the present are certain to miss the future"*[10].

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[1] *World Trade Center Properties LLC et al v. American Airlines Inc. et al, U.S. District Court, Southern Districts of New York, No. 08-03722.*

[2] The ATSSSA grants: "United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001".

[3] Schwarzer, William W.; Barrans, Alan Hirsch David J.: "The Analysis and Decision of Summary Judgement Motions": Rule 56 for the "Federal Rules for the Civil Proceedings": "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

[4] "Anderson v Liberty Lobby" 477 U.S. 242,248 (1986).

[5] "Alfaro c/WalMart Stores Inc", 210 F3d 111, 114 (2d Cir 2000).

[6] "Hamilton v Baretta U.S.A. Corp.", N.Y.C.A. 96 N.Y. 2d 222,232-33 (2001).

[7] U.S. Code of Federal Regulations.

[8] Argentine Supreme Court: "Rodríguez, Juan R. c/Compañía Embotelladora Argentina S.A. y otro", April 15th—1993.

[9] Mario Ruiz Saenz: "Rational Argumentation and consequences in the judicial decisions" (dialnet.unirioja.es/descarga/articulo/17693.pdf).

[10] 266—Address in the Assembly Hall at the Paulskirche in Frankfurt, June 25, 1963.

CASE LAW COMMENTARY

COMPENSATION FOR DENIED BOARDING APPLIES ALSO TO CASES RELATING TO OPERATIONAL PROBLEMS (European Court of Justice, case C-321/11, Judgement of the 4th October 2012)

Alessandra Laconi

Regulation 261/2004 recognizes precise rights to air passengers departing from or flying to an airport located in a Member State. With the exception of the cases where there are grounds for a carrier to deny boarding, passengers are entitled to be immediately compensated , be reimbursed their tickets or be re-routed to their final destination and cared for while awaiting a later flight.

In the analyzed case, the applicants Mr Rodríguez Cachafeiro and Ms Martínez-Reboredo Varela-Villamor bought tickets from Iberia from Coruna (Spain) to Santo Domingo. The journey was composed of a first flight Coruna –Madrid and of a second flight Madrid – Santo Domingo. At the Iberia check-in counter at Coruna airport, they directly checked—in their their luggage to their final destination, and were given two boarding cards for the two successive flights. The flight Coruna – Madrid was delayed of 1 hour and 25 minutes, thus the applicants missed their connection and Iberia cancelled their boarding cards to Santo Domingo, allocating their seats to other passengers. The refused passengers reached Santo Domingo 27 hours late.

For this reason, they brought an action before the Spanish Court seeking a decision ordering Iberia to pay them the sum of EUR 600 each as a compensation provided by the Regulation in respect of extra-Community flights of more than 3.500 kilometres.

Iberia asserted that the situation in question was not denied boarding but missed connection, considering that the decision to deny the boarding was not due to overbooking, but to the delay to the earlier flight. According to the airline's opinion, the event of a missed connection did not give rise to compensation.

In this scenario, the Spanish Court asked to the ECJ whether the concept of denied boarding refers exclusively to situations in which flights have been overbooked or whether that concept may be extended to cover other situations.

In the examined reference for a preliminary ruling, the ECJ clarified that the concept of denied boarding refers not only to cases of overbooking but also to those concerning different grounds like operational reasons. The Court pointed out that limiting the scope of denied boarding exclusively to cases of overbooking would have the practical effect of substantially reducing the protection afforded to passengers, denying them the due protection in similar situations where they are not responsible.

In addition, the ECJ considered that the denial of boarding attributable to the carrier may not be intended as a reason of health, safety or security and thus could not justify the deny according to the Regulation.

It can be affirmed that the rendered interpretation is consistent with both the wording of the Regulation and the objective of ensuring a high level of protection for air passengers, whose rights would potentially be harmed by an arbitrary difference of treatment in case of missed connection for operational reasons.

AIR CARRIER OBLIGATIONS TO PROVIDE ASSISTANCE IN THE EVENT OF FLIGHT CANCELLATION DUE TO AIRSPACE CLOSURE (European Court of Justice, Judgement in Case C. 12/11)

Isabella Colucci

1 THE FACTS

The European Court of Justice's pronouncement of January 31, 2013 is the latest in an increasingly frequent sequence of references for preliminary rulings concerning the interpretation and application of Regulation 261/2004 which establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights.

The said dispute arose from the closure of the majority of European airspace between 15 and 22 April 2010, following the eruption of Iceland's Eyjafjallajökull volcano.

The claimant, Ms McDonagh, was one of the passengers on the Faro to Dublin flight scheduled for 17 April 2010 which was cancelled following the volcanic eruption. Flights between continental Europe and Ireland did not resume until 22 April 2010 and Ms McDonagh could not reach Dublin until 24 April 2010. During that period, Ryanair failed to comply with its obligations to provide care pursuant to Article 9 of the Regulation. According to that provision, passengers have to be provided, free of charge, with meals, refreshments, hotel accommodation, local transport and basic communication services for the delay period.

After the events, Ms McDonagh brought an action against Ryanair before the Dublin District Court for compensation in the amount of EUR 1,129.41, corresponding to the costs she incurred during the waiting days.

2 THE PRELIMINARY RULING

The questions referred by the Dublin Metropolitan District Court (Ireland) can be summarised in the following categories: the court, first, inquired the Court of Justice whether the airspace closure as a

result of a volcanic eruption comes under the notion of "extraordinary circumstances", and, if so, whether that means that liability for breach of the airline's duty to provide care under Articles 5 and 9 is excluded. Second, if the Court classifieds such circumstances as a "extraordinary circumstances", it is also asked to rule on the question whether, in such a situation, the obligation to provide care must be subject to a temporal and/or a monetary limitation.

The European Court of Justice first turned to the meaning of extraordinary circumstances, noting that these are not exhaustively defined in the Regulation, even though Recitals 14 and 15 of its preamble provide several examples, including notably air traffic management decisions and meteorological conditions incompatible with the operation of the flight concerned.
In accordance with everyday language, the term "extraordinary circumstances" literally refers to circumstances which are "out of the ordinary". In the context of air transport, it refers to an event which is not inherent in the normal exercise of the activity of the carrier concerned and is beyond the actual control of that carrier on account of its nature or origin (Case C-549/07 Wallentin-Hermann v Alitalia paragraph 23).

Following the Advocate General's analysis of the relevant travaux préparatoires, who suggested that the Legislature intended to bracket together under this term the entire range of possible events, the Court noted that 'extraordinary circumstances' served as an all-encompassing category, "whatever (the event's) gravity". It refused to recognise a separate category of 'particularly extraordinary' events as against both the ordinary meaning of the notion and the underlying consumer-protective objectives of the Regulation. For said reason the Court replied that circumstances such as the closure of part of European airspace as a result of a volcanic eruption constitutes "extraordinary circumstances" which do not release air carriers from their obligation to provide care.

Second, the Court stated that the regulation does not provide for any limitation, either temporal or monetary, of the obligation to provide care to passengers whose flight is cancelled due to extraordinary circumstances. The Court pointed out that the that provision is particularly important in the case of extraordinary circumstances which persist over a long time and this obligation must remain compelling, whatever the event which resulted in the cancellation and whether or not the air carrier was responsible for the event. It is in situations

where the waiting period is particularly lengthy that it is necessary to ensure that an air passenger has access to essential goods and services throughout that period.

Finally, the fact that the obligation defined in Article 9 of Regulation No 261/2004 to provide care entails, as Ryanair claims, undoubted financial consequences for air carriers is not such as to invalidate that finding, since those consequences cannot be considered disproportionated to the aim of ensuring a high level of passengers protection.

RECENT EU AVIATION SECURITY INITIATIVES

Doriano Ricciutelli

During the second half of 2012, under the Cyprus Presidency, the EU Council took a number of interesting initiatives aimed at further increasing aviation security.

On the 6th December 2012, the JHA Council adopted 'Council conclusions on aviation security against terrorist threats'[1], thereby confirming the EU's resolve to safeguard human lives. The conclusions highlight that only through an integrated approach aimed at harmonising existing security measures[2], information exchange and the development of international standards, will it be possible to guarantee an adequate level of civil aviation protection.

The conclusions refer to the recent increase in air traffic, to the implementation of the 'EU Action Plan on strengthening air cargo security', and to a continuous assessment at European level of the threats posed by LAG's, with a view to adapting the related legislation.

The Council, in formulating its conclusions, has taken into account the legal framework laid down in the 'EU Internal Strategy in Action'[3], which should result in a coherent risk management policy by 2014, as well as the tragic events which took place at Burgas airport (Bulgaria) in July 2012, i.e. the most serious terrorist attack on air transport in Europe since 9/11.

In this context the Council also refers to its 'Conclusions on the protection of soft targets' of 25th October 2012[4], urging Member States to enhance existing cooperation in order to establish, develop and exchange good practices.

Mention is also made of a conference which was organized recently at Nicosia by the Cyprus Presidency. Its aim was to bring together all those involved in air transport, and to promote cooperation between the public and private sector.

The conclusions highlight the role of the competent EU bodies in their cooperation with partner countries, stakeholders and private operators and with the ICAO. In particular the latter has succeeded in devising a

well-performing tool benefiting aviation security by gathering passenger identity data upstream of the flight[5].

What stands out in these Council Conclusions, is that the Commission, the High Representative and the Member States are asked to extend the risk analysis which they use to formulate their risk-based policy making to other areas mentioned in Regulation 300/08, i.e. extend beyond cargo and LAG's.

In addition to the above-mentioned, the actors concerned are invited, to the extent possible, to exchange information and best practices with international organizations and third countries, and to assist the latter by means of appropriate teaching and training programmes.

It is obvious that the Council is all too aware of the extreme complexity of the measures which are required to face up to as delicate an issue as aviation security in the third millennium.
It is clear, therefore, that in order to protect air transport, what is required, apart from the measures laid down in the aforementioned Regulation and various implementation provisions on ground and in-flight rules, is a global, proactive approach common to all actors. It must consist of an exchange of information, experience and best practices, and of the latest technological innovation and know-how between intelligence services and civil aviation authorities[6].

As far as the mere soft targets are concerned, we think there is ample room for manoeuvre to extend the activities based on risk assessments. In particular, measures regarding an enhanced protection of facilities and infrastructures (almost entirely missing from Regulation 300/08), and, in general, anything to do with protecting landside areas, is deserving of more attention in Community legislation (see note 2).

Moreover, Regulation 300/08 states in Recital 3 that the most effective means of offering assistance needs to be found following terrorist acts with major impact in the transport field. This too needs to be translated into concrete provisions.

And last but not least, there's room to improve on the more stringent measures (Article 6) which can be applied in this context.

At international level, ICAO approved during the 37th Session of its Assembly on the 8th of October 2010 a "Comprehensive Aviation Security Strategy (ICASS)", in order to allow the organization to allocate

allocate resources more efficiently to critical security objectives.
One of the key activities, and a priority in the period until 2016, is that of addressing new and existing threats. The ICAO's Secretariat is developing a new risk assessment tool, known as the Global Risk Context Statement, which will supply states with the necessary information. And ICAO's Working Group on Threat and Risk has identified threat scenarios of attacks taking place also outside of security-restricted areas[7]. The ICAO's High Level Conference on Aviation Security of the 12th-14th September 2012[8] has taken note of the work, and has invited the Organization to study emerging issues, such as the protection of facilities and landside security.

To complete the picture, we can say that, at national level, it will be important to follow the implementation of the national security programme. The, hopefully imminent, update of fiche 7[9], will offer the possibility of having another, broader look at the protection of Italy's airport infrastructure.

Finally, we would like to point out the importance at a national level, of organising drills and exercises in the context of the national contingency plans, as well as awareness-raising campaigns among the general public, aimed at prevention and response as indicated by the Council (see note 4).

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[1] 17008/Enfopol 396, Aviation 185, JAI 85512 of 4/12/2012.
[2] For all Regulation (CE)300/08 and Regulation (EU) 185/10.
[3] 16797/10, KAI 990.
[4] 14591, Enfopol 316.
[5] See: ICAO HLCAS of 12-14th September 2012 (Conclusions & Recommendations).
[6] See: Joint Statement of the Regional Conference on Aviation Security in Europe (Moscow) of 22nd November 2011.
[7] See: DGCA-MID/1-IOP/ 15 of 6th March 2011, agenda item 6.
[8] HLCAS-WP/10 of 4th July 2012
[9] ENAC prot. 0000022/DG of 25th May 2012.
See also: the ENAC Circ. (SEC5) of 20th December 2012 on training, entered into force on 19th January 2013.

MISCELLANEOUS MATERIAL OF INTEREST

EUROPEAN COMMISSION PROHIBITS RYANAIR'S TAKEOVER OF AER LINGUS

Alessandra Laconi

The European Commission has prohibited the proposed takeover of Aer Lingus by Ryanair. According to the EU Merger Regulation, the operation would have harmed consumers by creating a monopoly or a dominant position on 46 routes where Aer Lingus and Ryanair compete vibrantly against each other. Such an acquisition would have reduced choice and led to price increases for consumers travelling on these routes.

It was the third time that the proposed acquisition of Aer Lingus by Ryanair was notified to the Commission. In 2007 the Commission prohibited Ryanair's first attempt to acquire Aer Lingus and such a decision was upheld by the EU General Court; in 2009, the second notification by Ryanair was withdrawn.

The Commission's new investigation confirmed that the proposed merger would have entailed the existence of strong barriers for new carriers potentially interested in the Irish aviation market. In other terms, Ryanair's takeover of Aer Lingus would have likely represented a detriment for consumers because of the reduction of travelling options and of the fares increase.

During the proceedings, Ryanair submitted four different sets of remedies. It originally proposed slot divestitures on a limited number of routes and block space agreements on the remaining overlap routes. The first set of commitments was not market tested given that it was clear that they were not sufficient to remove the serious competition concerns identified by the Commission.

The second, third and fourth commitment packages proposed by Ryanair have all been market tested. Ryanair was informed of both the results of the market tests and of the Commission's concerns following a preliminary assessment of the successive commitment packages on the occasion of the so-called state of play meetings between Ryanair and the Commission, organised following each of the market tests.

The final remedy package offered by Ryanair was not adequate neither in order to solve the arisen competition problems nor to ensure that

consumers' rights would not be jeopardized, considering that the market position of the two involved Irish airlines have become stronger since 2007.

The final package of commitments proposed by Ryanair comprised both a divestment to Flybe with respect to operations on 43 routes from and to Ireland and various destinations in Europe, and slot divestments to IAG/British Airways with respect to operations on three routes connecting Ireland to London.

Irish Transport Minister Varadkar welcomed the decision to prohibit Ryanair's takeover of Aer Lingus, considering that the merger would have had a significant detrimental effect on competition, connectivity and employment in the Irish market.

LAYING DOWN TECHNICAL REQUIREMENTS AND ADMINISTRATIVE PROCEDURES RELATED TO AIR OPERATIONS PURSUANT TO REGULATION (EC) No 216/2008: COMMISSION REGULATION 965/2012/EC

Isabella Colucci

On 5 October 2012 the Commission published the long awaited new European rules for air operations.

The aim of Regulation No 965/2012 (EC) is to create harmonised requirements at the European level for commercial air transport operations applicable to airplanes and helicopters, including ramp inspections under the safety oversight of another State when landed at aerodromes located in the territory subject to the provisions of the Treaty.

To achieve these aims, the Regulation provides for a simple risk-based process of certification and oversight. New rules reflect the scientific and technological state of the art in the field of air operations, based on evidence worldwide and they introduce proportionality with regard to the scale and complexity of operations (for example by distinguishing between different types of operations relating to local or international flights). Furthermore, air carriers will not need to request recertification every year and for smaller companies lighter administrative processes are provided.

Finally the regulation introduces the first EU-wide rules for helicopters to replace the different national ones existing today.

The Regulation entered into force three days following its publication but Member States have the flexibility to delay the applicability of its rules for up to a maximum of two years.

THE ITALIAN PENALTIES PURSUANT TO ARTICLE 23 OF THE EU REGULATION No. 996/2010

Adeliana Carpineta

On 26th February 2013, the Italian Official Journal published the Legislative Decree no. 18 of 14 January 2013, in order to give effect to the provisions indicated to the Article 23 of the EU Regulation no. 996/2010.

Regulation no. 996/2010 - Article 23 (Penalties):
"Member States shall lay down the rules on penalties applicable to infringements of this Regulation. The penalties provided for shall be effective, proportionate and dissuasive".

In brief, the Legislative Decree provides a system of penalties for violation of the Regulation's provisions. The punishable subjects are included in the definition of "*person involved*" pursuant to Article 2 of EU Regulation no. 996/2010.

Regulation no. 996/2010 - Article 2 (Definitions):
"'person involved' means the owner, a member of the crew, the operator of the aircraft involved in an accident or serious incident; any person involved in the maintenance, design, manufacture of that aircraft or in the training of its crew; any person involved in the provision of air traffic control, flight information or aerodrome services, who have provided services for the aircraft; staff of the national civil aviation authority; or staff of EASA"

The penalties provided are administrative pecuniary sanctions, unless the act constitutes a crime, and the National Agency for the Safety of Flight (ANSV) is the responsible for the application of these penalties.

The amounts of the penalties are updated every two years and the proceeds of sanctions shall be paid directly to the State budget (pursuant to Article 6 of Legislative Decree), and not to ANSV.