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Aviation Product Liability in the European Union

Sidhant Sharma*

Abstract

This paper examines the current regime of product liability in the European Union, its application and importance for aviation. It will be considered in detail, whether the EU Directive introducing liability for defective products imposes a strict liability or not. In determining the strict nature of liability, particular emphasis will be given to the gravamen of the Directive, i.e. meaning of the word 'defect'. Secondly, this paper will also explore the very important relationship between the current aviation product liability regime and the 1999 Montreal Convention; in particular whether the significant provision under Article 29 of Montreal Convention, dealing with exclusivity of the Convention has a preemptive effect over claims under the Directive against producers in aviation sector. Lastly, in light of the analysis and conclusions made in the paper, further reforms in the Directive, particularly in relation to defect and damages will be considered.

Introduction

Product Liability is the liability of the producer for injury caused to the person or property of a buyer or third person caused by a product, which has been sold¹. Aviation Product Liability carries the same definition except, as the term suggests, is limited to products in aviation. The stated definition contains many terms, such as "producer", "injury caused" and "product" which will need further clarifications, an attempt of which will be made in this paper.

Before beginning the paper; however, it is important to point out that the scope of this paper is limited to considering aviation product liability in the European Union ("EU") through [Directive 85/774/EC](#) from the perspective of passengers. This does not mean that aviation product liability does not extend to other claims such as under tort or contract in national law or from other claimants like third parties on the ground or by air carriers².

Importance of Product Liability in Aviation

The importance of product liability in aviation is twofold. Firstly, which does not originate from within aviation, is the safety of the user i.e. that whosoever sits on an aircraft should be assured that he/she will not suffer harm because of the product being defective. Safety was the primary reason why courts across the globe started finding liability for the producers³.

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Secondly, this reason more aviation orientated is to give passengers an alternative to bring a claim for damages other than under Montreal Convention 1999, hereafter referred to as the MC1999. A passenger may look for an alternative to MC1999 for two primary reasons:

Under the product liability regime, there is an established line of case law in the USA, which allows albeit restrictively, recovery of psychiatric injury, without the existence of a “*bodily*” injury⁴. MC1999 only allows recovery of mental or psychiatric injury if it is accompanied by bodily injury⁵. The EU perspective on recovery of psychiatric injury will be considered in detail below.

There are better chances for the claimant to recover more damages from the producer than from the air carrier under MC1999. This is mainly due to better financial status that the manufacturers in aviation have over air carriers and also because of the limitations imposed in recovering damages against air carriers under Montreal Convention.

Aviation Product Liability in the EU

Council Directive 85/374/EEC, henceforth referred to as the Directive, governs product liability in the EU. Article 1 of the Directive introduces the concept of strict liability. The principle of strict liability⁶, for the purposes of the Directive, is based merely on showing damage and defect in the product. On a general reading, therefore, there is no need to show breach of a standard of care, as required in tort law under many major common law jurisdictions⁷.

A producer includes not just the manufacturer of a finished product, but also the manufacturer of a component part. Furthermore, an importer who imports for the purpose of sale, hire, leasing or any other form of distribution in the course of his business shall be deemed to be a producer. This wide definition thus covers not only the final manufacturer like Airbus but also engine manufacturer like Rolls Royce or cabin window manufacturer like GKN Aerospace. The significance to aviation of importers being producers will be dealt later in this paper.

A product includes “all movables, even though incorporated into another movable or into an immovable object.” The burden of proof lies on the claimant to prove that the defect in the product caused him/her the damage. “Damage” for the purposes of the Directive means damage caused by death, or by personal injuries or property damage with a minimum threshold of 500 ECU in context to property damage. Thus damage does not include pure economic loss even if the loss originates from a product defect. The appropriate claim for that would be contractual or under different principles of tort in national laws⁸.

The Directive provides six defences. The most relevant to aviation producers is under Article 7(b), which states:

‘It is probable that the defect which caused the damage did not exist at the time when the product was put into circulation, or that the defect came into being afterwards.’

This is the most relevant defence for aviation producers because its main application is in cases where it is claimed that the danger stems from lack of repair or servicing or from subsequent tampering of the product⁹. This can be foreseen as happening to aircrafts as the operators may fail to maintain or repair the aircraft in time.

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There have been questions on what may amount to “*put into circulation*” but the European Court of Justice, hereafter referred to as CJEU has now clarified that as “when the product leaves the production process operated by the producer and enters a marketing process.”¹⁰

The limitation period under the Directive is three years. It begins from the day on which the claimant became aware, or reasonably has become aware, of the damage, the defect and the identity of the producer.

Lastly, the Directive provides that a producer’s total liability for damage resulting from a death or personal injury caused by the same defect can be limited by Member States to not less than 70 million Euros.

Analysis of the EU Directive

Implementation of the Directive

Before making an in-depth analysis of the Directive from an aviation perspective, it is important to consider its implementation in the Member States. Directives are powerful source of law in the Member States; but do not share the same applicability rules as Regulations. Regulations are directly effective and applicable in each Member State as if they are national laws of that country¹¹, whereas Directives need to be transferred into the national law in the prescribed time limit imposed to be accessible for the potential claimants¹² and generally contain optional provisions, which Member States can implement according to their own needs. Thus, there is always a chance that Member States implement the Directive in a way that disturbs the overall harmonization of the Directive.

In a report published by Lovells for the EU Commission in 2003, hereafter referred to as the EU Report, over 70% producers concluded that the liability regime across Member States either differs only a little or not at all. Similarly, over 70% legal advisors and over 80% insurers agreed that the liability regime was the same across the Member States or only differed a little¹³. The Commission recognized that the main sources of differences lied, not in the implementation of the substantive law but in the optional provisions of the directive, such as Article 16(1), differing approaches to the assessment of damages¹⁴ and the interpretation of the provisions from the national courts.

Recognizing that the substantive law across EU is harmonized, it is essential to now consider that in detail and its applicability to aviation.

What amounts to a Defect?

Article 6 of the Directive states:

“A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including the presentation of the product, the use to which it could reasonably be expected that the product would be put, the time when the product was put into circulation.”

The test, thus, to judge the defect is one of expectation. In context to aviation, two things must be pointed out relating this test.

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1. Expectation is a highly subjective terminology. As the EU Report concluded, the term expectation is un-definable like other existing terms 'negligence' or 'intention.' Due to the subjective nature of the test, one cannot always answer affirmatively whether compliance with provisions of European Aviation Safety Authority or the U.S. Federal Aviation Administration in relation to design, manufacturing and assembly process¹⁵ is enough to "provide safety which a person is entitled to expect"¹⁶.

2. Member States, when considering the expectation test not only take into account the circumstances as stated under Article 6 but other factors like cost/benefit analysis¹⁷ and the nature of the defect¹⁸. But because of the arbitrary nature of the expectation test, it is not always clear whether the courts will consider these factors consistently in every product liability claim. For instance in France, the courts have held that it is sufficient that the product caused the harm and it is unnecessary to consider the nature of the defect¹⁹ i.e. the exact cause of it. In contrast, in UK, Portugal and Spain it has been held that it is not enough for the claimant to show that the product had failed; he also bore the burden to prove the nature of the defect that caused the harm²⁰.

For producers and claimants in potential aviation product liability case, this is problematic. Firstly, it is not clear what factors or circumstances the court will take into account in deciding the case. Secondly, if the court decides to take into account the nature of the defect, it would be very difficult for the claimant passenger to prove the exact cause of the defect. It is exemplified by *Uberlingen* air crash that it is not always clear what the nature of the defect in product is. Here, it was the failure of the TCAS to issue a reversal Resolution Advisory that led to the accident (as the Spanish Court ruled), which could be a design defect or failure to give adequate warning or both but it is difficult to determine the exact nature of the defect it carried²¹.

Lastly, it is essential to briefly discuss the "strict" nature of liability under the Directive. It was mentioned at the start of subsection 3 above of this paper that on a 'general reading' the directive imposes strict liability. However, after considering the meaning of 'defect' under the directive, it is unclear whether the liability is actually strict. Taking into account factors like the 'conduct of the defendant' or the 'cost/benefit analysis' suggests an imposition of a standard of care, one, which is often, used in negligence in common law jurisdictions like USA²². Furthermore, if in a future aviation product liability case, the court considers compliance with European Aviation Safety Authority conditions in relation to manufacturing and design as one of the criteria for expectation test, is that not a conclusive proof of applying a standard of care rather than imposing a no-fault based liability?²³ In past, UK courts have held that compliance with safety regulations can be evidence that the product is not defective for the purposes of product liability provisions of the Act implementing the Directive²⁴. Furthermore, even though the Directive 'superficially' suggests a uniform approach to injuries from manufacturing defects and design defects 'there is in reality an asymmetry of liability for design and manufacturing defects²⁵.' I.e. the courts take 'strict liability' approach in relation to manufacturing defects but not for design defects. Thus, not only is there incoherence in the general application of the strict liability principal but also in its specific application to different nature of defects²⁶.

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What amounts to Damage?

The Directive states that “damage” means death or personal injuries. It is not clear what may amount to personal injuries. The Directive makes no effort to further define the term. One may interpret the term narrowly and state that “personal injuries” includes only physical or bodily harm but there is nothing that restricts the opposing interpretation of including mental damage into the definition of personal injuries and hence opening doors for a primary victim i.e. where the claimant himself suffers Posttraumatic Stress Disorder (“PTSD”) because of the air crash he was involved in or for a secondary victim i.e. where a person suffered PTSD after seeing his child die or suffer serious physical injuries in an air crash.

Ireland, in implementing the directive defined personal injury as ‘including any disease and any impairment of a person’s physical or mental condition.’ The use of the word ‘or’ suggests that mental condition alone can suffice as damage and it does not need to be supported by a bodily injury, as is the case in MC1999. Apart from Ireland, no other Member State has defined personal injuries in their legislation thus relying on established case law in their respective jurisdictions to answer that question.

Lastly, even if one concludes that mental injuries fall into the interpretation of ‘personal injuries’ there is an additional issue of determining the damages to be paid to the claimant. The Directive leaves the matter of non-material damages in the discretion of Member States. This can lead to uncertainty as some claimants suffering the same mental injuries may get higher recovery in one country and some may get lower in another.

Exclusivity of Montreal Convention 1999

Article 29 of MC1999 states:

“In the carriage of passengers...any action for damages, however founded, whether under this Convention or in contract or tort or otherwise, can only be brought subject to the conditions and such limits of liability as set out in the Convention.”

In *Sidhu v British Airways*²⁷, the House of Lords held:

“The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all high contracting parties without reference to the rules of their own domestic law.”

Therefore, suggesting that anything related to carriage of passengers that does not comply with the limits and conditions set out in the Convention cannot be brought in any court as that would disturb the purpose of the ‘international code.’ The Supreme Court of the UK in *Stott v Thomas Cook Tour Operators Limited*²⁸ has recently supported this case.

To consider this from the perspective of aviation product liability, this potentially means a producer can argue that, before any action for damages can be made against them, a passenger must satisfy the conditions and limits of MC1999.

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From a truly literal reading of the text of Article 29, that defence is sound, but one should consider Article 30(1) of Vienna Convention on the Law of Treaties which provides that all international treaties ‘must be interpreted in good faith in accordance with the ordinary meaning given to the terms of treaty in their context and in light of the object and purpose²⁹.’

There are many reasons to conclude that the effect of Article 29 is limited to liability of the air carrier and is not extended to producers. Firstly, all the cases that have considered the exclusivity principle under Montreal Convention apply it only in the context to air carriers. *Sidhu* concluded with a remark:

“Convention was designed to ensure that in all questions relating to the carrier’s liability, it is the provisions of the Convention which apply and that the passenger does not have access to any other remedies³⁰.”

Similarly *Stott* makes no mention of any other type of potential parties other than air carriers when considering the scope of Article 29³¹. Secondly, even MC1999 includes Article 29 under the main heading of “The Liability of the Carrier.” Lastly, there is case law from France supporting the argument that Article 29 does not extend as far as to producers of the aircraft³². Whether the judgment from the French court is applied in other jurisdictions is unclear but personally I believe following the route taken by the French court would be ‘interpreting the treaty in good faith in accordance with its ordinary meaning.’

The problem arises where an air carrier falls under the EU Directive as a potential producer. This is possible and in my view, rightly pointed out in publications on aviation product liability. Article 3(2) of the Directive states that any person: ‘who imports into the Community a product for sale, hire, leasing...in the course of business shall be deemed to be a producer.’ It is possible for an air carrier to be an importer, thus a producer, where it imports an aircraft from a non-EU country and then leases hires or sells it to another air carrier immediately.

The relevant question here is, Will the national courts disapply the Directive to comply with Article 29 of MC1999?

In *Stott*, Lord Toulson concluded that ‘embarrassment and humiliation suffered by the claimant were exactly what the EC Regulation 1107/2006 and UK Disability Regulations 2007 were intended to prevent’ but that Article 29 of Montreal Convention precluded those damages. Thus, an EC Regulation was disapplied in order to comply with the provisions of MC1999 referred to above. Importantly, the judgment from the *Cour de Cassation* which stated that the exclusivity principle does not extend to producers because its effect is limited to air carriers may not be a defence here, since it is an air carrier to whom the liability relates. Following this approach, it is thus possible for a national court to uphold the exclusivity of Montreal Convention if it comes up against the EU Directive with an air carrier being a producer.

Need for Reform

As was pointed out in subsection 4 above, the EU Directive has been substantially implemented in accordance with its intention in Member States. That however does not mean that it is not open to further reforms.

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In particular, there is a need of reform in three places:

1. Definition of 'defect'
2. Meaning of 'damage' and coverage of 'non-material damages'
3. Interpretation from national courts

Defect

It was rightly pointed out in the EU Report that the term 'defect' needs a more clearer and refined definition.

The 3rd Restatement of Torts in Product Liability³³ hereafter referred to as the Restatement in USA provides a clearer version of what may amount to a 'defective product'³⁴. It defines defect under three categories being manufacturing defect, design defect and inadequate instructions or warnings³⁵. Furthermore, it adds that the concept of strict liability only exists in context to manufacturing defect³⁶. Liability for design defect and inadequate warnings is only found where the claimant is able to show that a reasonable alternative design/warning could have reduced or avoided the damage. Although there are similarities in the EU regime and the Restatement in that there is a concept of 'negligence' rather than strict liability in both, but the difference lies in the legal certainty that exists in the Restatement.

Firstly, the Restatement clearly defines the nature of defects that are covered in the liability regime and although there is an academic consensus that the same natures of defects also apply to the EU Directive, a clear definition needs to come from the legislators themselves. As has been stated above, courts in the EU are still not sure if nature of defect is a consideration to be always taken into account. Secondly, the emphasis of liability under the Restatement is limited to finding a 'reasonable alternative design/warning' rather than a wider 'expectation test' under the EU Directive. Such a limitation under the Restatement gives a sense of direction and clarity to the courts in applying the test. The use of the word 'reasonable' in the Restatement historically dictates that the courts will take into account factors like cost/benefit analysis or the conduct of the respondent; factors that courts in EU are also presently considering but the difference between the both is that the former, because of the use of wording, will almost always consider same or similar factors in reaching their conclusion, whereas as is presently the case in EU, its unsure if the same or similar factors will consistently be considered in deciding whether there is a defect³⁷. Accordingly, what needs to change under the Directive is not the entire concept of 'defect' but rather the language so that it enhances the legal certainty of the Directive.

Meaning of 'damage' and coverage of 'non-material damages'

In order to maximize coherence across the EU, it is essential that the meaning of the term 'damage' is the same across all courts. 'Personal injuries' are open to many different interpretations, hence resulting in inconsistency. It is thus essential to make it clear whether personal injuries are limited to physical injuries or include mental and psychiatric injuries too.

Coverage of non-material damages within the scope of Directive is controversial, but much in need.

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It is controversial because not all Member States will agree to include these damages in the Directive because their own national law either doesn't allow it or only allows it restrictively. On the contrary, it is needed because, otherwise it conflicts with the primary establishment of the EU: equality for all EU citizens claiming under the Directive³⁸. Whether the EU achieves the coverage of non-material damages by widely defining the term or by not defining it at all and only adding a minimum and maximum threshold amount on the recovery of non-material damages is unknown, but in order to protect the consumers under the Directive, it is known that the coverage of non-material damages is needed.

Interpretation from national courts

The EU Report suggests that in order to maintain harmonization across the EU, it is imperative that the interpretation of the provisions in the Directive is consistent. To enhance that, decisions of national courts should be made available to the national courts of other Member States. The Report recognized that decisions in one Member State are not binding in another but that these decisions can provide a valuable resource and useful guidance in achieving the overall objective of harmonization.

Conclusion

It is clear from the content of this paper that although the Directive has made an earnest effort in harmonizing the product liability regime in the EU, there remains a scope for further improvements, particularly in context to the gravamen of the Directive, being the meaning of defect.

Having said that, it is also evident that the product liability regime offers claimant passengers a chance to recover more damages due to the deeper pockets of the producers. Furthermore, there is a possibility of recovering mental or psychiatric illness alone. Likewise, there is also support of punitive damages in common law jurisdictions like the UK. Existence of these features distinguishes it from MC1999, however, one must note that the above-mentioned advantages are very exceptional and do not arise in every case. Importantly in the context to recoverability of damages, the claimant will only get damages for the harm he has actually suffered so practically it does not matter, albeit in exceptional cases, whether the defendant has deeper pockets or that the Member States have an unlimited liability regime for producers since the damage suffered would not to be so astronomical so as to require a defendant with handsome financial resources.

Thus, I believe that even though there is a possibility of recovering more damages in bringing a claim against a producer, the primary action logically rests under the MC1999 for the claimant passenger to sue the air carrier. It is logical not only because it is a claim of contractual relationship between the two parties involved i.e. passenger and air carrier, hence ease for the claimants, but also because if there is an aviation product defect because of which claimant passenger suffered damage, it is almost inevitable that it will fall into the definition of 'accident' in accordance with the MC1999. Therefore, unless, any of the above-stated exceptional situations exist, there is no reason to not initiate proceedings under MC1999 and treat the Directive for product liability only as an alternative.

¹R.D Hursh & H.J Bailey, *American Law of Products Liability* 2,3 (1974)

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- ² .H. Ph. Diederiks-Verschoor & P.M.J. Mendes de Leon, *An Introduction to Air Law* 282 (2012)
- ³See e.g. *Donoghue v Stevenson*, per Lord Atkin [1932] A.C. 562
- ⁴See e.g. *Shepard v Superior Court*, where parents successfully sued for emotional injuries after seeing their daughter get killed due to a defective locking mechanism, 76, Cal. App. 3d 16, 142 Cal. Rptr. 612 (1977)
- ⁵See e.g. *Morris v KLM*, where sexual assault on a 15-year-old girl leading to clinical depression was held to be outside the scope of Warsaw Convention as it was not a bodily injury, [2002] UKHL 7.
- ⁶Article 1 provides that “the producer shall be liable for the damage caused by a defect in his product.”
- ⁷See e.g. *Walton v British Leyland*, where the UK court considered cost/benefit analysis, a factor relevant to breach of standard of care, to reach their decision, *The Times*, 13 July 1991.
- ⁸See e.g. *ACG Acquisition XX LLC v Olympic Airlines*, where defect in the aircraft led to financial damage for the lessee [2012] EWHC 1070.
- ⁹C.J Miller, R.S Goldberg, *Product Liability Second Edition*, 486 (2004)
- ¹⁰Case C-127/04
- ¹¹Paul Craig, Grainne De Burca, *EU Law, Text Cases and Materials*, 107 (2015)
- ¹²De Burca, *supra* 24, at 109 (2015)
- ¹³See EU Report, at 11.
- ¹⁴Article 9 states that the Directive shall be ‘without prejudice to national provisions relating to non-material damages.’
- ¹⁵<http://www.airbus.com/company/aircraft-manufacture/quality-and-safety-first/>
- ¹⁶Hansard, HL (series 5) vol 483, col 804, where Lord Lucas of the UK House of Lords, in addressing the Committee for Consumer Protection Bill, expressed a similar thought that compliance with a safety regulation may amount to a defence, but that in some cases, it may not (19 January 1987).
- ¹⁷See e.g. *Sam Bogle and others v McDonald’s Restaurants Ltd*, where the court considered cost/benefit analysis as one of the relevant considerations [2002] EWHC (QB) 490.
- ¹⁸See e.g. *Richardson v LRC Products Ltd* [2000] 59 BMLR 185
- ¹⁹2nd October 2001, *Dalloz* 2001, IR p. 3092.
- ²⁰See e.g. *Foster v Biosil*, Central London County Court (2000).
- ²¹Final report of the mid-air collision accident on 1st July 2002 between Boeing B757-200 and Tupolev TU154M near Ueberlingen/Lake of Constance/Germany
- ²²Keneth W. Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 Loy. L.A. L. Rev. 1171 (2008)
- ²³CJEU in recent *Joined Cases C-503/13 and C-504/13, Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt- and Others*, could have clarified whether conduct of the defendants or compliance with standards are factors that should be considered in judging defect but failed to provide any information on that.
- ²⁴See C.J Miller, *supra* 18, at 380.
- ²⁵J. Stapleton, *Product Liability Reform- Real or Illusory*, 6 OJLS 392, 399 (1986).
- ²⁶This approach is similar to one that is adopted in USA. See Levine, D.I. & Stolker, C, J.J.M, *Aviation Products Liability for Manufacturing and Design Defects: Two Recent Developments*, *World Bulletin* (1998).
- ²⁷[1997] AC 430
- ²⁸[2014] UKSC 15
- ²⁹Alexander Uros Kosenina, *Aviation Product Liability: Could Air Carriers Face their ‘Life and Limb’ being Placed in Peril for the Exclusivity of the Montreal Convention?* 38 *Air and Space Law, Issue 3*, pp. 249-268 (2013).
- ³⁰Also see the leading case on the matter in the USA, *El Al Isarel Airlines v Tseng*, 525 U.S. 155 (1999) which applied Article 29 only in the context to air carriers.
- ³¹‘Convention’s preemptive effect on local law extended no further than the Convention’s own substantive scope.’ Lord Toulson in *Stott*, at 40.
- ³²Decision on Accident of Gulf Air Flight, 12 November 2009, Appeal No: 08-15269, *Cour de Cassation*

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³³*Restatement (Third) of Torts: Product Liability (March 13, 1995), henceforth referred as the Restatement.*

³⁴*Restatements are not binding as the legislations unless the courts follow them. An example of that is Second Restatement of Torts which was followed by American courts for over 30 years before the Third Restatement. See Levine, D.I. & Stolker, C, J.J.M, Aviation Products Liability for Manufacturing and Design Defects: Two Recent Developments, World Bulletin (1998).*

³⁵*Section 2 of the Restatement.*

³⁶*'A product contains a manufacturing defect when it departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.'*

³⁷*J Stapleton, supra 34, where the expectation test has been regarded as 'inadequate and misleading' in cases involving complex designs.*

³⁸*Case 106/83 Sermide SpA v Cassa Conguaglio Zucchero [1984] ECR 4209*

Today's Cabin Size Baggage: What's in a Name

Ridha Aditya Nugraha *

Abstract

This article explains cabin size baggage issues which have arisen along with the increased popularity of the low-cost carrier business model. The stringent cabin size baggage policies introduced by low-cost carriers have the potential of infringing on consumer rights. One of the main reasons is the confusion and conflicts caused by an absence of a harmonized definition of cabin size baggage dimensions. IATA has announced a recommended size, however it has only limited power within the current airline industry. The airline association, as the last resort, should seek to defend passengers' fundamental rights in this matter by creating an equilibrium between good moral and business principles, thus proactively defending their airlines from potential negative legal or political blowback and consequences.

Today's Airline Business: The Low-Cost Carrier Phenomenon

The history of the airline business was traditionally characterized by state intervention and interference¹. This remained true until the 1980's, when airlines were regarded as operating inefficiently and thus costing their owners, which was the state, a lot of money². However due to national pride, these airlines kept operating through (heavy) subsidies, since many states did not want to see their flag carriers disappear³.

Liberalization and privatization of national airlines, combined with foreign direct investment has opened a new chapter on how the aviation business operates today. One of the objectives of liberalization in the European Union (EU) and deregulation in the USA was to force airlines to operate more efficiently⁴. Taxpayers' money must be better allocated rather than paying for unprofitable business endeavors. In order to reach this objective, liberalization covers three main areas which are pricing, capacity and market access, and finally the application of competition law to the air transport sector⁵.

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The adoption of the EU's third package of air transport liberalization legislation has changed the face of the European airline industry, leading to the privatization of the traditional state-owned flag carriers and the emergence of the low-cost carriers⁶. The latter has become a phenomenon within the last decade, where it could be seen as a way to 'solve' inefficiency within airline business. Furthermore, 'efficient' has become the central philosophy to do business where airlines in the low-cost segment offer only their passengers essential needs, which are safe and reliable journeys.

Low-cost carriers introduce new business methods for ticket fare reductions, such as using secondary airports and providing less on-board service to its passengers⁷. There are no free snack or beverage service, no business class service, and no newspapers offered as by the traditional airlines⁸. Check-in baggage and cabin baggage are another issue where there has been stricter conditions, regarding its size and/or weight. Online check-in is encouraged since there will be additional cost for doing this at the airport desk with some airlines. Most low-cost carriers also are not using aerobridges for the boarding process⁹, with Schiphol Airport as the perfect example where there is a special gate designed without aerobridges for Easyjet and Ryanair. Perhaps low-cost carriers service could be described simply with one sentence: "you get what you pay for, and no more than that".

The situation above could be seen as characteristic of airlines doing business within low-cost segments. Low-cost carriers are also called low-cost airlines, or no-frills, discount, low-fares, budget or value-based airlines or carriers¹⁰. The International Civil Aviation Organization (ICAO) has developed a definition of a low-cost carrier as follows:

"an air carrier that has a relatively low-cost structure in comparison with other comparable carriers and offers low fares and rates. Such an airline may be independent, the division or subsidiary of a major network airline or, in some instances, the ex-charter arm of an airline group"¹¹.

Based on this ICAO definition, some of well-known low-cost carriers are given in the table below¹².

Airline	Established	Region	Country of AOC
kulula.com	2001	Africa	South Africa
Fastjet	2012	Africa	Tanzania
Jetstar	2003	Asia and Pacific	Australia
Virgin Australia	2000	Asia and Pacific	Australia
Spring Airlines	2004	Asia and Pacific	China
IndiGo	2006	Asia and Pacific	India
Citilink	2001	Asia and Pacific	Indonesia
Lion Air	2000	Asia and Pacific	Indonesia
AirAsia	1996	Asia and Pacific	Malaysia
AirAsia X	2007	Asia and Pacific	Malaysia
Tiger Airways	2003	Asia and Pacific	Singapore
Germanwings	2002	Europe	Germany
Transavia	1966	Europe	Netherlands

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Wizz Air	2003	Europe	Hungary
WOW Air	2012	Europe	Iceland
Ryanair	1985	Europe	Ireland
Vueling	2004	Europe	Spain
Easyjet	1995	Europe	United Kingdom
Flybe	1979	Europe	United Kingdom
flyDubai	2008	Middle East	UAE
GOL Linhas Aereas	2001	Latin America	Brazil
JetBlue Airways	1998	North America	United States
Southwest Airlines	1967	North America	United States

It is interesting to see how low-cost carriers respond to the current intense competition climate, where cooperation between low-cost carriers and full-service airlines has become a reality. Vueling and British Airways have entered into a partnership leading to code-shared flights for some intra-EU routes¹³. AirAsia X is another interesting case where a low-cost carrier even serves long-haul flights, such as Melbourne-Tokyo¹⁴ or Hong Kong-Perth¹⁵ routes which take more than six hours. Jetstar Airways also follows the AirAsia X path, serving long-haul flights in Asia and the Oceania region¹⁶. Considering increased competition within the airline business in the following years, no doubt such innovations will continue to appear.

This paper shall describe such innovations and their impact on passengers' rights.

What is Cabin Size Baggage?

At present the low-cost carrier model has become one of the main elements within the airline business. Its strong presence has meant many practices of low-cost carriers have become standard across the current airline business, with cabin size baggage restrictions being one important example. This sub-chapter shall describe further the cabin size baggage issue within the current competitive airline business in connection with the fundamental rights of airline passengers as consumers.

Low-Cost Carriers: Establishing New Perspective(s)

There was a time when airline passengers need not be worried regarding their cabin baggage. As long it seemed to fit in the cabin, then the ground crew or stewardess were unlikely to object or interfere with the passengers' cabin baggage. It could be said that the phrase "consumer is the king" was still valid in this regard at that time.

However, the appearance of low-cost carriers has changed how the airline business is done. Since low-cost carriers offer only basic services to 'strive for cost and time efficiency'¹⁷, it is not surprising they seek additional income for every extra service provided towards their passengers.

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Cabin baggage has become one of these extra services, that has become more limited and restricted than it used to be. This situation has influenced airlines' policies towards cabin baggage size and weight across the world, although with variations in different regions. Passengers' basic needs are decided to be sufficiently met by small cabin baggage with certain dimension and/or a hand bag which certainly must be smaller than the baggage. As a 'compensation', exceeding the dimension or restrictions means purchasing extra product. The purpose of this measure is to minimize costs through reducing fuel usage by limiting cargo weight; reducing ground handling service fees¹⁸; and also to keep boarding process efficient for on-time flight schedule¹⁹.

A definite new perspective towards cabin size luggage has been established in the mind of airline passengers by the restrictions of low cost carriers. Passengers accept that there is no free lunch within low-cost carrier flights. As long as passengers can reach the destination on-time along with their baggage, they tend to forgive the lack of service encountered when flying with low-cost carriers, as they value price relative to the benefits²⁰.

Furthermore this new concept of handling cabin size baggage has also been adopted by some full-fare airlines. British Airways is one example where a baggage gauge now to be found as well during boarding process²¹. This sort of restrictive practice is not what airlines' passengers traditionally expect when travelling with full-fare airlines²². Considering today's competitive market, it is not surprising though if even full-fare airlines they take this step to minimize every possible cost.

Determining Cabin Size Baggage and Price

All passengers in the world are paying more attention to each airline's baggage policy, both hold and cabin baggage, when travelling in order to avoid penalty fees. The International Air Transport Association (IATA) established a basis for a cabin size baggage definition when they acknowledge a limitation of 56 cm x 45 cm x 25 cm following the foiled terror plot of 10 August 2006²³. This size was deemed as a potential countermeasure which was developed in the context of improving security, namely to counter the potential threat posed by liquids, gels and aerosols²⁴.

The size has decreased into 55 cm x 35 cm x 20 cm under the IATA Proposed Cabin OK Size which at the moment has been paused, but not withdrawn, to reassess the initiative²⁵. This Cabin OK Size Baggage measure is aimed to be guaranteed on board even when the flight is full²⁶. However this invention is not aimed to establish an industry standard²⁷, thus leaving the ultimate choice to each member airline. So far IATA recognizes a 56 cm x 45 cm x 25 cm as the maximum dimension of a cabin size baggage²⁸.

Unfortunately IATA has no binding power towards its member airlines' policy on determining maximum and minimum dimensions of cabin size baggage, let alone towards non-member airlines. Thus harmonization of cabin size baggage still seems a distant concept.

The table below shows airlines' policies on cabin baggage size, whether a member of IATA or not.



IATA Proposed Cabin OK Size²⁹			
55 cm x 35 cm x 20 cm			
Airline	Type	Cabin Baggage Policy (in cm)	Oversize Cabin Baggage Penalty or Extra Fee
AirAsia ³⁰ <i>non-member</i>	LCC	56 x 36 x 23 + one handbag or laptop bag	no information regarding penalty fee at boarding gate
Citilink ³¹ <i>non-member</i>	LCC	56 x 36 x 23 + one handbag or laptop bag	no information regarding penalty fee at boarding gate
Easyjet ³² <i>non-member</i>	LCC	56 x 45 x 25	£ 45 at boarding gate as a cabin baggage £ 30 at bag drop counter as hold baggage
Ryanair ³³ <i>non-member</i>	LCC	55 x 40 x 20 + one small bag 35 x 20 x 20	£ 50 or € 50 at boarding gate (depends on airport location)
Transavia ³⁴ <i>non-member</i>	LCC	55 x 40 x 25 not guaranteed on busy flights or 45 x 40 x 25 guaranteed on board	no information regarding penalty fee at boarding gate prices vary depending on the itinerary
Vueling ³⁵ <i>IATA member</i>	LCC	55 x 40 x 20 + one smaller item	€ 35 at boarding gate

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Wizz Air ³⁶ <i>non-member</i>	LCC	42 x 32 x 25 or 56 x 45 x 25* (with extra fee)	€ 10-18 as the extra fee* via internet € 40 as the extra fee* at airport
British Air- ways ³⁷ <i>IATA member</i>	Full-fare	56 x 45 x 25 not guaranteed on busy flights or 55 x 40 x 20* + one extra item 40 x 30 x 15	prices vary depending on itinerary and airport loca- tion, starting from € 50 *€ 35 at boarding gate for code-shared flights operat- ed by Vueling (flight code: IB5XXX)
Iberia ³⁸ <i>IATA member</i>	Full-fare	56 x 45 x 25 or 55 x 40 x 20* + one extra item	*€ 35 at boarding gate for code-shared flights operat- ed by Vueling (flight code: IB5XXX)

Almost all well-known low-cost carriers' cabin baggage policy is bigger than the IATA proposed Cabin OK Size. At least the latter could be set as a *de facto* minimum dimension of a cabin size baggage, although not guaranteed of being brought on-board if the flight is full.

A strong market presence will lead to a power to determine the market. With its huge market capital, Ryanair successfully established its cabin baggage size when the airline and Samsonite, the world's biggest luggage provider, launched the "Ryanair's Cabin Baggage"³⁹. Thus Ryanair's standard (a 55 cm x 40 cm x 20 cm) could be considered as cabin size standard within the stores across Europe. Probably it could be more popular than the new IATA Proposed Cabin OK Size at some Ryanair destinations.

After the size, then comes the price. The latter means paying extra or a penalty fee which occurs when airline passengers do not meet airlines' cabin size baggage policy. This kind of fee varies between airlines, and of course depends on which airport one is departing from. No clear criteria for determining such prices has been found so far. This situation leads into question whether airlines make extraordinary profit from an excess of 1 cm or even 0.5 cm on a baggage gauge; or in other words are exploiting their passengers through this type of practice.

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Infringement of Consumer Rights

Research and analysis has demonstrated there is very little security benefit to restricting cabin baggage size and quantity⁴⁰. The effectiveness of restricting cabin baggage size as a security measure is doubtful since airport security staff at screening checkpoints shall make a comprehensive check, regardless of size⁴¹. However IATA and its member airlines have their own recommendations and policies regarding this matter, where most airlines have also taken into account commercial considerations⁴².

The ICAO has recommended IATA member airlines to establish policies on cabin baggage, especially regarding its size, based on IATA recommendations⁴³. This means ICAO primarily recognizes IATA member airlines' freedom towards their commercial policies on cabin baggage, even if it may have a negative impact towards the passengers. ICAO's position also means a harmonized global policy on cabin size baggage shall be quite difficult to achieve, since each region has its own market characteristics.

From a consumer perspective, this policy could have negative implications on passengers convenience, especially for those who normally prefer to carry their bags onboard with them⁴⁴. With more and more code-shared or connection flights, cabin size baggage could become a new issue for transit and transfer passengers, where they need to check-in their cabin baggage since it may be oversized by the regulations of the connecting airline. Additional money must be spent, or even worse, the transit and transfer passengers' cabin baggage could arrive one or two days later than the originally planned flight. Important issues will arise if the passenger brings his or her life-supporting medicine within the baggage and due to the chaotic situation during transit and transfer, could not bring it onboard potentially causing harm to the passenger. This situation is even more likely to happen on intercontinental flights which connect two or more un-harmonized airlines' cabin baggage policies.

For example, a passenger travelling Garuda Indonesia with student status from Jakarta to Amsterdam sometimes receives a waiver from Soekarno-Hatta International Airport's ground crew to bring up to three items into the cabin⁴⁵. When the student has a connecting flight to another destination from Amsterdam Schiphol with KLM, most likely the student will receive some trouble with the quantity of his or her carry-on items as well as with the dimensions. The un-harmonized airlines' cabin baggage policy, even though both airlines are members of the SkyTeam alliance, potentially could harm the student passenger who may not be aware of these differing policies across the continents.

The lack of awareness by consumers and their associations of how standards ensure consumer protection is one of the biggest obstacles⁴⁶. Within this context, a consumer is defined as a natural person who seeks or acquires goods, services, or money for personal, family, or household use⁴⁷. The consumer as special economic actor is the ultimate subject of consumer protection⁴⁸. In many countries, national consumer organizations work to influence their governments to protect consumers through a pro-consumer legal framework⁴⁹. One of the goals of consumer protection is to deliver a system that achieves as high as possible a level of consumer protection whilst also keeping costs to business to a minimum⁵⁰. Thus it means aiming for an equilibrium which will also not harm airlines' business.

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Consumer law is considered to be a more effective instrument when it prevents rather than provides a remedy for loss or damage of the customers⁵¹. Its existence is to compensate for the inequality between economic actors on the market and to restore consumer sovereignty⁵². The latter is defined as the state of affairs where the consumer has the power to define his or her own wants and the ability to satisfy these wants at a competitive or reasonable price⁵³.

However when it comes to the airline business which is unique, prestigious and sometimes loaded with national and political intrigue, the effectiveness of consumer law and national consumer organizations seem not as strong. The situation that the General Agreement on Tariffs and Trade (GATT) measure does not apply to the operation of air services has weakened national consumer organizations' efforts. It is not surprising if some international consumer organizations such as the Organization for Economic Co-operation and Development (OECD) or the International Marketing Supervision Network (IMSN) shall become increasingly vocal if consumers are being taken advantage of due to unscrupulous airline policies on cabin size baggage in the future.

Unethical business models should have been prohibited since they are against fair trade, especially if the practice injures consumers⁵⁴. Wizz Air's cabin size baggage policy, which is far lower than 'common sense' or IATA standards, has raised a question whether this kind of business innovation should be considered as an unethical business model. First time passengers travelling with the airline probably could fall into the 'trap' or punishment at the boarding gate as a result of not reading the condition of carriage: € 40. An extra fee must be paid during the booking process for bringing a normal cabin size baggage. No strong response towards this kind of business practice means it becomes accepted as legal and encourages more airlines to adopt this policy as well in the name of competitiveness.

A European Union Perspective

Within this regional initiative, the guidelines on the application of Article 81(3) of the European Community (EC) Treaty refer to enhancing consumer welfare standards within a competitive market⁵⁵. Even though the article refers to the economic interests of consumers, this criterion has not become a substantive right of consumers⁵⁶. Thus airline passengers' struggle for their rights still have a long way to go.

Article 153(1) of the EC Treaty has become the other main ground of consumer protection in the EU:

In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests.

Considering the urgency for consumer protection, it could trigger group actions⁵⁷, probably as the last resort, which are legal within some EU member states. The current actions in some member states are as follow:⁵⁸

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State	Situation
Austria	Civil procedural rules allow the victim to pass on his/her claim to a consumers' association.
Belgium	Plaintiffs with similar but separate claims can institute proceedings before the same court and then ask the court to handle their claims at the same hearing, without joining them.
Denmark	The rules on legal proceedings allow popular legal actions to be brought in all consumer-related areas.
Finland	The consumer ombudsman can assist individuals before the court. The trial costs can be entirely covered by a special budgetary fund.
France	Legislation exists which enables consumer associations to defend the civil interest of consumers. This does, however, not include actions for compensation for a group of injured persons.
Germany	In the event of a series of accidents, there is a 'trial action' which will subsequently form the basis of compensation between industry and the injured persons.
Ireland	The rules of court provide a procedure whereby one or more of persons having the same interest in a single claim may bring or defend the claim on the behalf of all those interested.
Italy	Consumers' associations can defend consumers' interest, but cannot act on behalf of injured persons.
Netherlands	Multi-party action is possible under the Group Actions Act.
Portugal	Popular legal action exists whereby the Public Prosecutor's Office and Consumers' organizations can intervene in cases of injury to private individuals.
Spain	Consumers' associations can bring a legal action on behalf of its members. An amendment of the rules on court proceedings will make it possible to bring joint actions.
United Kingdom	Multi-party action can be brought in the courts in England and Wales under a rule of civil procedure on group litigation. Under this procedure one or more individuals can act in a representative capacity and bring proceedings on behalf of others where they have the same interest.

There is a trend calling for (full) harmonization regarding consumer protection in the EU⁵⁹. The goal is to have a legal certainty within this kind of service. Consumers' confidence, in terms they are not sufficiently confident that they will be adequately protected when buying services⁶⁰, shall be improved. If harmonization regarding consumer protection in the EU will be enforced, together Regulation No. 2006/2004⁶¹ and Directive No. 2011/83⁶² could become the instrument. However the latter only deals with various information duties and the right of withdrawal, thus no changes have been made on consumer sales and unfair terms⁶³.

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Within the EU airline business, especially in respect of consumer protection, Regulation No. 261/2004⁶⁴ is one of the examples of a harmonized legal framework. It has successfully established a standard on compensation towards airline passengers. However from the airline perspective, the compensation amount which is considered high could destroy the airline business, either full-fare or low-cost carrier, within the competitive airline market. It must be kept in mind: what will the airline passengers' welfare be without (many choices of) airlines?

No doubt there is a conflict between consumer rights and (freedom of) airlines' cabin size baggage policy. Strong consumer protection comes from a strong political will. However if airlines tend to help smoothen EU integration and also develop the economy, it seems more difficult to enact a pro-consumer policy. The EU's motto "common rules for a common market" seems not to answer whether a harmonization of legal framework on cabin size baggage is needed, thus leaving it to one last main actor: IATA.

How Far Could IATA Help?

IATA's status as a trade association, not a regulatory body, means it has no binding power towards its member airlines. This situation has put IATA in a difficult position towards its (member) airlines cabin size baggage policy. Although IATA could not reach non-member airlines, especially most low-cost carriers, its strong position representing 83%⁶⁵ of total air traffic within the airline business could play a significant role to determine a worldwide cabin size baggage dimension. Low-cost carriers have adopted or transformed the dimension according to their own policy depending on market characteristics.

IATA's mission to represent, lead, and serve the airline industry means the association has a moral obligation to protect airline passengers. It is not only an issue whether the passengers could pay the penalty for cabin baggage size excess or not, but it goes further. Passengers must be seen as human beings, and not as mere objects within this commercial world. They are not dollar trees for making money through this behavior; and IATA has been called to make this issue clear towards the member airlines.

The association should be more creative to 'outwit' this stubborn situation by persuading their member airlines, especially those who implement cabin size baggage policy strictly, to provide all necessary information at the check-in counter before the security check. Considering it will be almost impossible for the ground crew to monitor the numbers of cabin baggage brought on the aircraft at the check-in counter⁶⁶, having a special and accessible spot within the airport to put all member airlines' baggage gauges seems the best option. No doubt IATA has a bargaining position to settle this issue with many of the larger airports. Additional costs for providing such an area is nothing compared to enhancing the reputation that IATA's member airlines respect their passengers' rights.

IATA's moral obligations must be translated into the association's efforts to establish a guideline on determining penalty fees. IATA should encourage its member airlines of instituting a reasonable, as opposed to extraordinary income, from these type of fees. This would not only protect the passengers, but also the member airlines as well. By having a clear standard for the penalty formula, it shall prevent member airlines from being sued or prosecuted on grounds of infringing consumer rights.

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It is better for IATA to take all necessary steps to proactively protect their member airlines from the possibility of group actions such as lawsuits in the future. Facing such actions is a nightmare for them since it will damage their image and negatively impact the business. It is only a matter of time if these practices continue.

There is an urgency for an assessment to balance commercial purpose and consumer rights encouraged by the IATA. This could be a starting point to restore the image of an airline industry that respects their consumer's rights. Growth within the airline industry will be limited if passengers are dissatisfied.

Concluding Remarks and the Way Forward

One of the purposes of liberalization was to fix inefficiency within the airline business in order to benefit the consumers. A new era of airline competition has come which encourages innovations. As today phenomenon, the low-cost carrier model is one whose growth has had a significant impact on airline competition and business practices.

Today as a significant actor within the airline business, low-cost carriers have left a definite impact. A strict cabin size baggage policy with resulting penalty fees is one of the main attributes of the low-cost carrier business model. IATA also has played a role in determining cabin size baggage dimensions with its recommendation. IATA's proposed Cabin Size OK, which is currently being reassessed, has the potential to determine a worldwide cabin size baggage standard in the future. Some full-service airlines seems to be following the low-cost carriers' path in order to minimize costs.

Increasingly stringent cabin size baggage regulations have called into question whether they infringe passengers' fundamental rights as a consumer. Every airline passenger has the right for pleasant travel, including feeling 'secure' from surprise penalties when bringing baggage into the cabin. Transit and transfer passengers' rights have a greater chance to be infringed since they are using two or more airlines with unharmonized policies on cabin baggage. Considering the rapid developments of this situation, IATA must choose a stand between a pro-consumer or airline approach. An equilibrium does not always mean 50-50. The restoration of an economic balance between consumer and airlines is the goal. However, since IATA does not have binding power, their ultimate efforts must be seen based on moral obligation.

It is better for IATA to proactively take all necessary steps to protect their member airlines from the possibility of group actions such as lawsuits towards (member) airlines in the future. A comprehensive assessment with detailed recommendations towards cabin size baggage and its associated penalties could become a starting point.

There will not be an IATA without airlines, and there will not be airlines without passengers.

¹ Magnus Schmauch, *EU Law on State Aid to Airlines: Law, Economics, and Policy*, (Berlin: Lexxion Publisher, 2012), page 14.

² *Ibid.*

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- ³*Ibid.*, page 13. See also Rita Sousa Uva, *European Community State Aid Policy for Public Airports: Reality versus Law?*, (Coimbra: G.C. Gráfica de Coimbra, 2008), page 22 and 39.
- ⁴*Supra* note 1, page 14.
- ⁵*Supra* note 1, page 27.
- ⁶John Balfour and Solange Leandro, "State Aid in the Airline Sector: A Change in Focus", *European State Aid Law Quarterly*, Volume II (2011), page 225.
- ⁷Sean D. Barrett, "The Sustainability of the Ryanair Model", *International Journal of Transport Management*, Volume II (2004), page 91.
- ⁸*Ibid.*, page 90.
- ⁹*Ibid.*
- ¹⁰International Civil Aviation Organization Working Paper on Definition and Identification of Low-Cost Carriers No. STA/10-WP/9 dated 13 October 2009, page 2.
- ¹¹*Ibid.*
- ¹²<http://www.icao.int/sustainability/Documents/LCC-List.pdf> as accessed on 5 December 2015.
- ¹³<http://www.vueling.com/en/vueling-services/british-airways> as accessed on 5 December 2015.
- ¹⁴<http://www.airasia.com/ot/en/home.page?cid=1> as accessed on 5 December 2015.
- ¹⁵<http://www.airasia.com/ot/en/home.page?cid=1> as accessed on 5 December 2015.
- ¹⁶Hongwei Jiang, "Service Quality of Low-Cost Long-Haul Airlines - The Case of Jetstar Airways and AirAsia X", *Journal of Air Transport Management*, Volume XXIV (2013), page 20.
- ¹⁷Jennifer Kim Lian Chan, "Understanding the Meaning of Low Airfare and Satisfaction Among Leisure Air Travellers Using Malaysian Low-Cost Airlines", *Journal of Vacation Marketing*, Volume XX No. 3 (2014), page 212.
- ¹⁸*Supra* note 7, page 94
- ¹⁹David C. Nyquist and Kathleen L. McFadden, "A Study of the Airline Boarding Problem", *Journal of Air Transport Management*, Volume XIV (2008), page 197.
- ²⁰Yeoh E. and Chan J.K.L, "Malaysian Low-Cost Airlines: Key Influencing Factors on Customers' Repeat Purchase Intention", *World Applied Sciences Journal*, Volume XII (2011), page 35-43.
- ²¹Based on the writer's personal assessment in Schiphol Airport when travelling to London Gatwick with British Airways (BA 2759) at 10:55 on 20 October 2015.
- ²²Based on the writer's personal assessment, the airline's ground crew never ask to put the cabin baggage into a baggage gauge when travelling with Iberia and KLM from Schiphol Airport between 2014-2015. Those airlines could be deemed as a perfect compbase on criteria i) member of IATA; ii) EU nationality; ,and iii) flight taken on intra-EU routes.
- ²³International Civil Aviation Organization Working Paper on Cabin Baggage Size and Quantity Restrictions No. AVSEC/PAX/BAG/TF/1-WP/05 dated 17 January 2008, page 1.
- ²⁴*Ibid.*
- ²⁵<https://www.iata.org/pressroom/pr/Pages/2015-06-17-01.aspx> as accessed on 14 December 2015
- ²⁶<https://www.iata.org/pressroom/pr/Pages/2015-06-12-01.aspx> as accessed on 14 December 2015
- ²⁷<https://www.iata.org/pressroom/pr/Pages/2015-06-12-01.aspx> as accessed on 14 December 2015
- ²⁸<http://www.iatatravelcentre.com/iata-travellers-faq.htm> as accessed on 14 December 2015
- ²⁹<https://www.iata.org/pressroom/pr/Pages/2015-06-17-01.aspx> as accessed on 14 December 2015. At the moment IATA pauses rollout of Cabin OK to reassess initiative
- ³⁰<http://www.airasia.com/ot/en/baggage-info/cabin-baggage.page> as accessed on 9 December 2015.
- ³¹<https://www.citilink.co.id/en/condition-of-carriage> as accessed on 9 December 2015.
- ³²<http://www.easyjet.com/en/help/preparing-to-fly/baggage> as accessed on 8 December 2015.
- ³³<http://legacy.ryanair.com/en/terms-and-conditions/regulations-cabinbaggage/as> accessed on 9 December 2015.

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- ³⁴<https://www.transavia.com/en-NL/service/hand-luggage/> as accessed on 9 December 2015.
- ³⁵<http://www.vueling.com/en/vueling-services/prepare-your-trip/luggage#contenedor> as accessed on 9 December 2015.
- ³⁶https://wizzair.com/en-GB/useful_information/baggage as accessed on 8 December 2015.
- ³⁷<http://www.britishairways.com/en-gb/information/baggage-essentials/hand-baggage-allowances> and <http://www.britishairways.com/en-gb/information/baggage-essentials/extra-overweight-baggage> as accessed on 9 December 2015.
- ³⁸<http://www.iberia.com/nl/luggage/hand-luggage/#excepciones> as accessed on 9 December 2015
- ³⁹Factiva, “Ryanair & Samsonite Launch Guaranteed Carry-On Bag”, as published on 25 July 2011. The article could also be accessed on the internet at <https://global.factiva.com/hp/printsavews.aspx?pp=Save&hc=Publication>.
- ⁴⁰Supra note 23, page 1.
- ⁴¹Supra note 23, page 2.
- ⁴²Supra note 23, page 2
- ⁴³Supra note 23, page 2.
- ⁴⁴Supra note 23, page 2.
- ⁴⁵Based on the writer’s personal assessment in Soekarno-Hatta International Airport when travelling to Schiphol Airport with Garuda Indonesia (GA 88) at 00:40 on 20 August 2014.
- ⁴⁶Cristina Poncibò, “Modernisation for European Consumer Law?” in James Devenney and Mel Kenny (eds.), *European Consumer Protection: Theory and Practice*, (Cambridge University Press, 2012), page 53.
- ⁴⁷William T. Vukowich, *Consumer Protection in the 21st Century: A Global Perspective*, (New York: Transnational Publishers, 2002), page 99.
- ⁴⁸Katalin Judit Cseres, *Competition Law and Consumer Protection*, (The Hague: Kluwer Law International, 2005), page 320.
- ⁴⁹Supra note 46, page 53.
- ⁵⁰Supra note 47, page 96.
- ⁵¹Supra note 48, page 156.
- ⁵²Supra note 48, page 157.
- ⁵³Supra note 47, page 91.
- ⁵⁴Supra note 47, page 174.
- ⁵⁵Supra note 48, page 253.
- ⁵⁶Supra note 48, page 256.
- ⁵⁷This term is also referred as “class actions” and defined as procedural device that permits one or more plaintiffs to file and prosecute a lawsuit on behalf of a larger group or class. See https://www.law.cornell.edu/wex/class_action as accessed on 16 December 2015.
- ⁵⁸Supra note 47, page 543-544.
- ⁵⁹Alexandre Duterque, “Do We Really Want a *Ius Commune* for EU Consumer Protection?”, *Dublin University Law Journal*, Volume XXXV (2012), page 76.
- ⁶⁰Christian Twigg-Flesner, “Good-Bye Harmonization by Directives, Hello, Cross-Border only Regulation? - A Way Forward for EU Consumer Contract Law”, *European Review of Contract Law*, Volume II (2011), page 240.
- ⁶¹Regulation (EC) No. 2006/2004 of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364/1.
- ⁶²Directive (EU) No. 2011/83 of the European Parliament and of the Council on Consumer Rights, OJ L 304/64.
- ⁶³Supra note 60, page 20.
- ⁶⁴Regulation (EC) No. 261/2004 of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights,

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⁶⁵<https://www.iata.org/about/Pages/index.aspx> as accessed on 15 December 2015.

⁶⁶International Civil Aviation Organization Working Paper on Cabin Baggage Size and Quantity Restrictions No. AVSEC/PAX/BAG/TF/1-WP/05 dated 17 January 2008, page 2-3.

From the Chicago Convention to regionalism in aviation. A comprehensive analysis of the evolving role of the International Civil Aviation Organization

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The present work is designed to provide a critical analysis on the role of the International Civil Aviation Organization. In doing so, a historical approach may give a comprehensive idea of the actual intention of the drafters of the Convention on International Civil Aviation (Chicago Convention). The examination of the provisions of such Convention would seem to define a 'formal' role for the Organization. As a result, ICAO is entrusted with legal functions, which de facto result in 'quasi' legislative and 'quasi' judicial powers. However, challenges arising from the development of aviation, such as security and environmental protection, have induced ICAO to reinterpret its role in order to carry out a multidimensional policy. On the other hand, from a practical perspective, the relevance of ICAO is being eroded by the emerging of a number of regional organizations. If apparently, hence, ICAO seems to have been overcome by regional bodies, this paper intensely aims for reaffirming the need of considering the progressive regionalisation as a form of integration, which implicitly calls for ICAO as an international and super-partes supervisor.

Introduction

The International Civil Aviation Organization (hereinafter 'the Organization') has performed a paramount role in the development of international civil aviation since 1947. The Chicago Convention (henceforth, 'the Convention'), which is to be deemed as the 'constitution' of the Organization, represents, as known, a clear framework for the development of international aviation on a worldwide scale.

In spite of the fact that the Organization, according to the wording of the Convention, was thought to be a centrepiece in the field of safety, an accurate analysis may show that ICAO plays, in reality, a relevant role even in other aspects of air law. If on the one hand, the positive law crystalized in the Convention, even without defining it, seems to foresee a 'formal' role for ICAO, on the other hand, it may be interesting to provide a comprehensive picture of the reality by looking at the practice, which has led ICAO to enlarge its legal activity.

Furthermore, if considering certain aspects of public international law, there is the need of taking into account the main two legal functions, which ICAO is appointed to exercise. A neutral assessment could suggest affirming that, whilst the legislative function of ICAO conveys its main role as a technical rule-maker, the judicial one, foreseen by article 84 of the Convention, describes the Organization as an independent and *super-partes* entity.

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Conclusively, several remarks may arise out of the analysis of the relations that ICAO maintains with other international and regional organization. Firstly, the multidimensional nature of aviation clearly calls for a strict cooperation between ICAO and the other specialised agencies of the United Nations. Secondly, with specific regard to aviation, the lack of effectiveness of the regulatory policy on an international level and the lack of enforcement powers may suggest looking at the establishment of regional organizations as a way to reach efficiency.

THE 'FORMAL' ROLE OF ICAO. THE OBJECTIVES EX ART. 44 OF THE CHICAGO CONVENTION

Trying to limit the role of ICAO to a single and unique aspect could not provide the precise extent of the relevance of such organization within the context of air law. A more truthful consideration may show its actual multifaceted essence, which results in fact in a number of prominent positions in different sectors related to aviation. An initial reference should be made, hence, to the provision ex art. 44 of the Chicago Convention, which provides a list of objectives that ICAO is appointed to pursue. The analysis of such norm recommends considering ICAO's role as that of a global guide role in implementing, insuring and promoting a safe development of aviation. Moreover, the preamble of the Chicago Convention underlines certain auspices of the drafters, which seem to be in line with this interpretation.

On the other hand, from a historical perspective, the Convention, signed at the end of the Second World War, was almost obliged to address safety related issues in order to channel the use of aircraft for peaceful purposes. As a result, "the objective of safety has clearly been recognized as the objective with the highest overall priority"². Such undisputed reflection seems to be confirmed by the ICAO's Assembly itself, which has explicitly affirmed: "the primary objective of the Organization continues to be that of ensuring the safety of international civil aviation worldwide"³. In addition to that, a part of the doctrine has authoritatively noted that, albeit legally qualified as a U.N. specialised agency, ICAO shows some relevant peculiarities in terms of organization and powers. In light of that, the Organization has shown a certain elasticity in dealing with new challenges, such as environmental issues, and in managing a progressive fragmentation characterised by the appearance of several regional organizations.

In a sense, the role of ICAO appears strictly related to the concept of uniformity. The high number of States that are parties to the Chicago Convention and the technical nature of most of the issues related to safety and air navigation suggested the drafters of the Convention entrusting ICAO with very broad powers. For instance, articles 54 and 55 of Chicago Convention spell out wide powers and duties for the Council, which, even being a political body, is vested with both quasi-legislative and quasi-judicial powers. Furthermore, as a closing clause, pursuant to article 49 (k), the Assembly is mandated to "deal with any matter within the sphere of action of the Organization not specifically assigned to the Council".

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THE 'TRADITIONAL' FUNCTIONS

The legislative function of ICAO

The principal legislative function performed by ICAO consists of the formulation and adoption of International Standards and Recommended Practices (SARPs). Such a power is foreseen by article 54 (l) of the Convention, which entrusts ICAO's Council to "adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices, for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken".

As shown by the nineteen Annexes adopted by ICAO up to this point, the nature of such rules is to be considered as essentially technical. Moreover, given the high degree of technicity and the potential binding essence they have, SARPs are adopted with a vote of two-thirds of the Council members. In preparing such instruments, the Council is practically assisted by a number of secondary technical bodies, amongst which, for instance, the Air Navigation Commission (ANC).

An interesting remark should be made on the nature of SARPs. First and foremost, an official distinction between International Standards and Recommended Practices has been adopted only by ICAO in its practical activity⁴. Such a distinction underlines that, whilst the adoption of International Standards appear as necessary, the one of Recommended Practices is seen as only desirable. However, despite ICAO does have a broad legislative power, it lacks of a concrete enforcement system through which obliges the member States to implement the above-mentioned SARPs. This consideration seems to be in line with a common opinion according to which ICAO's legislative function would be defined as 'quasi-legislative'. In fact, the text of article 38 of the Convention, which basically defines the *status* of SARPs, contains an 'opt-out' provision, which "makes the SARPs only 'soft-law'"⁵. In other words, the Chicago Convention envisages that in order for SARPs to be in force, they must be implemented and enforced by member States.

Such lack of implementation has led ICAO to adopt the USOAP 'Universal Safety Oversight Audit Programme' so that to exercise a sort of control on the concrete process of implementation carried out by the member States and in order to mitigate the lack of enforcement powers⁶.

Furthermore, international procedures have been laid down specifically for air navigation services (Procedures for Air Navigation Services [PANS]). Even though these rules are distinguished and published apart from SARPs, in practice PANS are treated on the same footing as standards.

International Conventions and Protocols

ICAO is actively involved in the preparation of international air law instruments. However, the legal status of such conventions is that of acts of the participating member States and not of organs of the Organization. The role of ICAO, therefore, is usually limited to the function of depositary of the respective legal instruments, which specifically entrust the Organization with this function. Accordingly, the signature and the ratification of a convention or a protocol by a State is to be deemed as the moment in which it starts being in force.

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On the other hand, from a practical perspective, ICAO has developed, with the assistance of the Legal Committee, a large number of international conventions both in the field of public air law and in that of private air law. In particular, a crucial role is performed by the Legal Committee, which essentially prepares the conventions and presents them to the Diplomatic Conference for the formal approval.

A further relevant aspect of ICAO's activity is set out in article 94 of the Chicago Convention, which entitles the Assembly to amend the Convention itself. In spite of the fact that most of the amendments to the Convention have dealt with institutional and organizational matters, the example of article 3-bis may show that ICAO has also approved substantial amendments in order to reflect relevant political decisions⁷.

Judicial and quasi-judicial function

Chapter XVIII of the Chicago Convention foresees a system for the settlement of the disputes, which may arise on the interpretation or application of the Convention. Article 84 as well as most of the multilateral and bilateral agreements confer to the ICAO Council judicial powers. The effective exercise of such a function is formally delimited by article 84 itself, which states that the dispute: (i) has to arise on the interpretation and application of the Convention and/or its Annexes; (ii) cannot be settled by negotiation (which basically means that an attempt of negotiation should be made); and (iii) has to be submitted to the Council by a contracting State "concerned in the disagreement".

On the other side, from a practical perspective, the effective extent of the judicial function of ICAO is mitigated by the provision of article 84 (2) pursuant to which the decision made by the Council may be appealed to: (i) an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute; or (ii) the International Court of Justice.

A clear paradox outlines out of the analysis. If considering the legal implications related to such function, indeed, it should be pointed out that, although the task of interpreting the provisions of the Chicago Convention is a legal one, this responsibility is conferred to the ICAO Council, which is essentially a political body⁸. Such view seems to be consistent with the provision of formal filters and of an appealing mechanism in article 84, which deprive Council's decisions of binding force.

Nonetheless, even if up to this moment the Council has dealt with five disputes in its judicial function⁹, it adopted in 1957 the *Rules for the Settlement of Differences*¹⁰. According to article 11 of the Rules, the Council may decide on the basis of written submissions of the parties (memorials and counter-memorials) and on the basis of oral hearings.

In addition to that, article 54 (n) entrusts the ICAO council with a so-called 'quasi-judicial' power. Despite the terminology used by most of the scholars, the function ex art. 54 (n) could be better defined as an 'advisory' function¹¹. In fact, from a strict legal perspective, the Council will hear such cases without the procedures and formalities foreseen in the *Rules for the Settlement of Differences* and, as a result of the discussion, it will express views, make statements, issue recommendations.

THE VERSATILE NATURE OF ICAO

Having analysed the role of ICAO in light of a comprehensive reading of the provisions of the Chicago Convention, especially focussing on the legal functions, which ICAO is entitled to exercise, it could be interesting to adopt a different approach. In doing so, the following chapters will be dedicated for the examination of the progressive and continuing evolution of ICAO's role. The Organization, indeed, has demonstrated over the years to succeed in reinterpreting its own role in order to face the new challenges of the global aviation industry. In this section, two main sectors will be taken into consideration so that to show how ICAO has embraced fields others than safety.

Security

The notion of security, which is implicitly included in the broader one of safety, could be defined as "protection from man-made criminal acts against the safety of civil aviation"¹². In other words, whilst safety is pertinent to internal and intrinsic risks, security could be seen in a sense as relating to 'external' threats.

Yet again, from a legal perspective, no mention of 'security' was made neither in the Paris Conference in 1919 nor in the Chicago Convention twenty-five years later. During the dawn of civil aviation, indeed, the number of criminal acts involving aircraft was almost insignificant and these criminal acts, as such, were mainly believed to fall under domestic criminal laws.

In such context, "ICAO has become the natural focal point for the development of aviation security programmes on an international level"¹³. Since the late sixties, in fact, ICAO has been involved in the adoption of several international instruments, the aim of which was that of preventing attacks on aviation and airport security¹⁴. This was implicitly suggested by the large increase of hijacking of civil airlines.

Moreover, dealing with security of civil aviation, in 1974, ICAO adopted Annex 17 to the Chicago Convention, showing hence the need of a technical regulation even in such field. Annex 17 confirmed what had been stated in the Tokyo, The Hague and Montreal Conventions and "required each member state to establish a governmental institution for regulating security and establishing a national civil aviation security program¹⁵". The relevance of Annex 17 cannot be underestimated. From a strict legal point of view, indeed, the SARPs contained in such Annex set out the basis for the ICAO programmes and activities in the field of security.

Nonetheless, it seems fair to describe ICAO's role in security as a reactive role more than a proactive one. Such affirmation is corroborated by the reactions adopted by ICAO after the tragic events of 11 September 2001, which *de facto* resulted in the adoption of the *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* (Beijing, 2010) and the *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* (Beijing, 2010).

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On the other hand, the events of 9/11 have led ICAO to act on a different tier. In 2002, therefore, the Organization adopted, under the recommendation of the High-Level, Ministerial Conference on Aviation Security, the so-called Aviation Security Plan of Action, including the *Universal Aviation Security Audit Programme* (hereinafter USAP). Such plan called for the “establishment of a comprehensive programme of regular, mandatory, systematic and harmonized aviation security audits to be carried out by ICAO in all contracting States”¹⁶. From a methodology perspective, USAP programme maintains a similar structure to that used for the USOAP, including a number of activities, such as audit visit and the drafting of a preliminary and of a final report. Conclusively, in its report to the thirty-sixth Assembly, the Council affirmed that the USAP “have validated a markedly increased level of implementation of ICAO security standards”¹⁷.

Environmental protection

The Environmental protection has not been directly foreseen by the Chicago Convention amongst the objectives that the Organization is appointed to pursue. However, in this days and age, such field is progressively increasing in terms of relevance. From a legal perspective, an interesting debate has emerged on the fact whether ICAO has been officially entrusted with a ‘mandate’ for dealing with environmental-related issues. This discussion is essentially based on the exegetical analysis of the art. 2(2) of the *Kyoto Protocol to the UN Framework Convention on Climate Change*¹⁸. Despite the legal interpretation of such norm has led to varied opinion, it could be extremely interesting to observe that, in the practice, ICAO has *de facto* included the environmental protection within its objectives. The Resolution A35-5, indeed, states three broad objectives for ICAO’s activity: (i) to limit or reduce the number of people affected by aircraft noise; (ii) to limit or reduce the impact of aviation emissions on local air quality; and (iii) to limit or reduce the impact of aviation greenhouse gas emissions on the global climate¹⁹. This interest has also been confirmed by ICAO during its 37th general Assembly held in 2010, adopting resolution A37-18 and 19, which constitute a ‘Consolidate Statement of continuing ICAO policies and practices related to environmental protection’. Resolution A37-18 sets out the general provisions on environmental protection and declares that ICAO ‘is conscious of and will continue to address the adverse environmental impacts that may be related to civil aviation activity in order to achieve maximum compatibility between the safe and orderly development of civil aviation and the quality of the environment.

ICAO AND REGIONAL INTEGRATION**The concept of co-operation both from an ‘external’ and ‘internal’ perspective**

The aviation industry is currently witnessing to a clear trend towards regional integration. The establishment of regional organizations, indeed, is showing a progressive fragmentation of competencies and a symmetric transfer of responsibilities. Despite the fact that such regional cooperation has been particularly successful with regard to safety, it would be at least improper to affirm that relevant achievements have been reached with exclusively reference to that field.

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Preliminarily, it should be borne in mind that although ICAO came into life in 1944, when neither the UN did not exist yet, it was clearly foreseen at that time that the new Organization would become part of a broader network of international bodies. The legal basis of such premise can be found in the provisions *ex* articles 64 and 65 of the Convention. As a result, ICAO, which became itself a UN specialised agency in 1947, maintains active working relationships with other agencies. It could be significant here, for instance, to mention the relations that ICAO maintains with the *World Meteorological Organization* (WMO) and the *World Health Organization* (WHO).

If, hence, on the one hand, ICAO cooperates on an ‘external’ level with other UN agencies in order to coordinate activities embracing multiple fields of law, on the other, with specific regard to aviation, the Organization does rely on an ‘internal’ cooperation with regional bodies. It is necessary, here, to specify that with the expression ‘regional bodies’ must be meant all those regional organization which cannot be considered neither as regional offices of ICAO nor entities completely independent from ICAO. The notion of ‘intermediate’ status elaborated by the doctrine, therefore, takes on topical relevance²⁰. Such concept essentially indicates that the regional bodies are autonomous in establishing their own work programmes and setting their own agendas, albeit maintaining in reality a close liaison with ICAO. The practical experience of the *European Civil Aviation Conference* (ECAC) fittingly confirms those theoretical remarks²¹. In practice, for instance, ECAC plays an important role in contributing to a broader application of EU commercial initiatives by recommending them for application in non-EU European states²². However, it should be noted that ECAC is only one of the four regional organizations, with an ‘intermediate’ status, which try to carry on a regional policy in accordance to the general guideline of ICAO. To be thorough, mention must be made to the other regional civil aviation bodies: (i) *African Civil Aviation Commission* (AFCAC), headquartered in Dakar, Senegal. Such organization has, amongst its primary aims, that of coordinating matters of civil aviation in Africa and cooperating with ICAO. Given the fact that most of the African member States of ICAO have not implemented their domestic legal system in accordance with SARPs, either for lack of financial possibilities or due to political decisions, AFCAC is actively involved even in fostering a uniform application of ICAO standards; (ii) *Latin Civil Aviation Commission* (LACAC), headquartered in Lima, Perú.

It has twenty-one member States and is open to any State in the American hemisphere. LACAC has performed a decisive role in promoting an orderly development of air transport in the region, in monitoring the implementation of SARPs through USOAP and in implementing a transport regulatory policy. However, underlining ICAO’s role, it must be said that the Organization provides continued assistance to LACAC; and (iii) *Arab Civil Aviation Commission* (ACAC), having fifteen member States plus Palestine and headquartered in Rabat, Morocco. ACAC has been actively involved in the field of traffic and transit rights, aviation training, routes and airports and harmonization of air law. Nonetheless, the relations between such body and ICAO are maintained on an *ad-hoc* basis.

The sectorial integration. ICAO as a *super-partes* organization

The Organization maintains working relations with regional organizations, which are primarily set up for dealing with specific fields of interest within the context of aviation. The analysis will mainly focus on two relevant fields, which have lived a progressive and sharp drive to an efficient regional regulation.

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On one hand, indeed, several organizations have been established on a regional level in order to provide air traffic and air navigation services. It may be emblematic, for instance, to mention the *European Organisation for the Safety of Air Navigation* (EUROCONTROL)²³, which currently counts thirty-four member States providing air navigation services in these countries. The working relations between EUROCONTROL and ICAO seem to be significantly intense in light of the high technicality relating to the coordination of ATC systems. In particular, EUROCONTROL operates a harmonized route charges system, under which the organization “sets, bills and collects route charges from aircraft operators for air navigation services rendered²⁴”. Nevertheless, the need and the willingness of harmoniously coordinating air navigation services has led to the establishment of other regional organizations such as the *Agency for the Safety of Aerial Navigation in Africa and Madagascar* (ASECNA) and the *Central American Corporation for Air Navigation Services* (COCESNA).

On the other hand, safety may be seen as the field where regional integration has reached its highest degree of development. This essentially for two orders of reasons. Firstly, as above examined, safety has had a central position in ICAO’s activity since its establishment in 1944. Secondly, the technical essence of standards implicitly calls for a progressive regionalisation, which may help to reach a uniform, even if only partial, implementation. Within this context, the instance provided by the relations between ICAO and the *European Aviation Safety Agency* (EASA)²⁵ represents an interesting example. From an operative perspective, ICAO and EASA work together for avoiding potential overlaps and duplication. Nevertheless, legally speaking, ICAO has formally recognized the role of EASA concluding with it a Memorandum in 2008, through which the Organization, basically, bestows on the European Agency the task of carrying out the audit programme in the EU²⁶.

In light of this, it could be said that ICAO seems, in practice, moving from a position of *super-partes* organization among the States to the one of *super-partes* entity among regional organizations²⁷.

Conclusion

The analysis arising out of the present work suggests considering ICAO’s role still as that of a primary global institution within the context of air law and aviation policy. Bearing in mind so, it may be interesting to draw two main conclusions.

On the one hand, despite the Chicago Convention would seem to address the attention on safety, conferring to ICAO broad legal authority in such field, the Organization has demonstrated a multidimensional and eclectic nature. This should be seen as a direct result of the continuing developments that have challenged the aviation industry. Yet, the relevance of article 44 of the Convention cannot be underestimated. The intention of the drafters could be deemed as that of enumerating a non-exhaustive list of objectives, which, given its extent, would have conferred a sort of ‘mandate’ to ICAO in order to deal with emerging legal categories.

On the other hand, the progressive regionalisation is showing that ICAO needs to reconsider its position within the network of aviation organizations. Whilst, after its establishment, ICAO could perform a comprehensive role, in this days and age, the regional organizations are demonstrating that they can more efficiently operate in regional areas. However, ICAO should continue in monitoring the activity of such organi-

zation, performing a role of international supervisor and promoter. To do so, entrusting ICAO with 'hard-law' powers, at least with regard to those standards whose implementation appears as necessary, may be seen as a desirable solution.

Conclusively, a remark should be made on the structure and experience of ICAO. Its stable operative structure, indeed, has been invoked as a main feature, by a part of the doctrine, for an active involving of the Organization in the regulation of outer space²⁸. Even though such affirmation seems to be a provocation rather than an actual proposal, a crucial role for such a debate in ICAO's future agenda cannot be *a priori* excluded.

¹Convention on Civil Aviation (Chicago 7 Dec. 1944). 15 U.N.T.S. 295. Entered into force 4 Apr. 1947 (hereinafter 'the Convention').

²L. WEBER, *International Civil Aviation Organization*, Kluwer Law International, Alphen aan den Rijn, 2012, at. 19. *The Safety of flight, indeed, is the basis, the conditio sine qua non, for all aviation activities, be they commercial, non-commercial, general aviation or other flying activities.* See also: M.MILDE, *International Air Law and ICAO*, second edition, Eleven International Publishing, The Hague, 2012 at. 219, and J.HUANG, *Aviation Safety and ICAO*, Kluwer Law International, Alphen aan den Rijn, 2009 at 15-17.

³Assembly Resolution A37-2 and A37-3, in the first Whereas clauses. http://www.icao.int/Meetings/AMC/Assembly37/Documents/ProvisionalEdition/a37_res_prov_en.pdf

⁴Such a distinction can be found for instance in the foreword to the Annex 1 of the Chicago Convention in which is stated that the expression 'international standards' means : "any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety of international air navigation and to which contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention", and that the expression 'recommended practices' refers to "any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation and to which contracting States will endeavour to conform in accordance with the Convention". Foreword to Annex 1 of the Convention.

⁵P.S.DEMPSEY, *Public International Air Law*, Institute and Centre for Research in Air & Space Law, McGill University, Montreal, 2008 at 76.

⁶On the point, see also G.GUILLAUME, *Icao at the Beginning of the 21st Century*, in *Air & Space Law XXXIII/4-5*, 2008 at 314. The issue of the responsibility of the member States to implement and enforce SARPs has been on ICAO's agenda for a long time. In the field of safety, for instance, ICAO established in 1998 a 'Universal Safety Oversight Audit Program' [USOAP]. As Guillaume analyses, "The scope of the audits has gradually been expanded and now examines the way in which States are implementing the safety provisions of all Annexes. Although the USOAP has been a success, serious deficiencies remain in around forty States because of a lack of resources or of political will".

⁷The adoption of article 3-bis can be seen as a consequence of the shooting down of the Korean Air Lines flight 007 by a fighter jet from Soviet Union while en route from New York to Seoul killing all 269 passengers and crew aboard. Then "the United Nations Security Council met in a special session and considered a draft resolution that included the statement that 'such use of armed force against international civil aviation is incompatible with the norms governing international behaviour'...[]... On May 10 of the following year, still reacting of the downing of the KAL 007, the members of the ICAO assembly unanimously adopted art. 3-bis". B.E.FOONT, *Shooting down civilian aircraft: is there an international law?*, in *Journal of Air Law and Commerce* 72, 2004, at 707.

⁸See the analysis made by J. BAE, *Review of the Dispute Settlement Mechanism Under the International Civil Aviation Organization: Contradiction of Political Body Adjudication*, in *Journal of International Dispute Settlement* vol. 4, n.1,2013 at 71-75. The author notes, indeed, that: "...absent in the ICAO Council is judicial competency, specifically the ability on the part of Council representatives, individual and collectively, to deliver a judgment through legally sound reasoning and deliberation. International Tribunals such as the ICJ, the International Tribunal for the Law of the Sea, and the International Center for Settlement of Investment Disputes (ICSID) require judges and arbitrators to be well-qualified with recognized competence in the relevant field of law. In contrast, the Chicago Convention does not prescribe any qualifications, not to mention judicial competency, for Council representatives. [...] In other words, the selection and tenure of the representatives is entirely subject to the whim of their own Governments".



⁹Here is provided a list of the disputes submitted to ICAO Council under article 84 of the Chicago Convention: (i) *India v. Pakistan*, 1952; (ii) *United Kingdom v. Spain*, 1967; (iii) *Pakistan v. India*, 1971; (iv) *Cuba v. United States*, 1996; (v) *United States v. 15 Member States of the European Union*, 2000.

¹⁰These rules, adopted in 1957 and revised in 1975, are contained in the Doc. 7782/2.

¹¹Part of the doctrine generally makes a distinction between 'judicial function' referring to the powers conferred to the Council under article 84 of the Convention and 'quasi-judicial' function referring to the ones foreseen in article 54(n). See for instance, amongst the others, WEBER, *International Civil Aviation Organization*, at 54-55.

¹²M. MILDE, *International Air Law and ICAO*, at. 219. The author also underlines a comparative discrepancy between the terms 'safety' and 'security'. "There is some terminology confusion since in French the word 'sécurité' is equivalent to English 'safety'; the English word 'security' in French is 'sûreté'. Spanish language uses the expression 'seguridad' both for 'safety' and 'security' and Russian also use a single word 'bezopasnost'. Id. at note 1.

¹³A. KOTAITE, *Security of International Civil Aviation - Role of ICAO*, in *Annals of Air and Space Law* 7, 1982 at. 95-96.

¹⁴The International Civil Aviation Organization developed, indeed: the *Convention on Offences and Certain other Acts Committed on Board Aircraft* (Tokyo Convention, 1963); the *Convention for the Suppression of Unlawful Seizure of Aircraft* (The Hague Convention, 1970); the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (Montreal Convention, 1971).

¹⁵DEMPSEY, *Aviation Security: The Role of Law in the War against Terrorism*, in *Columbia Journal of Transnational Law* 41, 2002-2003 at 659. See also P.S. DEMPSEY, *The Role of the International Civil Aviation Organization on Deregulation, Discrimination, and Dispute Resolution*, in *Journal of Air Law and Commerce* 52, 1987, at 529.

¹⁶Assembly Resolution A35-9, Appendix E, *The ICAO Universal Security Audit Programme, Operative Clause 1*. Looking at the content, the audit programme essentially comprises the following elements: (i) regular, mandatory, systematic and harmonized aviation security audits of all ICAO contracting States; (ii) audits conducted at both national and airports levels; (iii) evaluation of States' aviation security oversight capabilities; (iv) evaluation of the actual security measures in place at selected key airports; (v) audits to be carried out on the basis of bilateral Memorandum of Understanding (MOU) signed between each contracting State and ICAO; and (vi) coordination with security-related audit programmes at regional and sub-regional level. Assembly Resolution A35-9, Appendix E, Operative Clauses 1-4. See now A37-17, Appendix E.

¹⁷Assembly, 36th session, A36-WP/38 EX/9.

¹⁸"The parties included in Annex I shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively". Art. 2 of the Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC), adopted 11 Feb. 1997 2303 UNTS 148, entered into force on 16 Feb. 2005.

¹⁹ICAO Assembly Resolution A35-5, Appendix A, Operating Clause 1.

²⁰See MILDE, *International Civil Aviation and ICAO*, at 224-226. See also WEBER, *International Civil Aviation Organization*, at 129-131.

²¹The European Civil Aviation Conference (ECAC) has forty-two members up to this moment. A useful elucidation of the legal relationship between ECAC and ICAO can be found in article 3 of the ECAC Constitution, which states that: "The Conference shall maintain a close relationship with ICAO in order, through regional co-operation, to further the aims and objectives of the Convention on International Civil Aviation (the Chicago Convention). It shall establish such relations with other governmental and non-governmental international organizations as it considers necessary for the achievement of the objectives of the Conference". Article 3 of the ECAC Constitution, ECAC Doc. No. 20, 3rd edition. https://www.ecac-ceac.org/documents/10189/51566/DOC20-Constitution_7th_Edition-July_2015e.pdf/86680e36-7516-4c1a-adfc-17f4d9f0973e

²²P.P.C. HAANAPPEL, *The Law and Policy of Air Space and Outer Space: a comparative approach*, Kluwer Law International. Alphen aan den Rijn, 2003 at 36-37. See also, amongst the others, E.M.GIEMULLA, L.WEBER, *International and EU Aviation Law*, Kluwer Law International, Alphen aan den Rijn, 2011 at 317-319.

²³Revised Convention on EUROCONTROL, signed on 27th Jun. 1997.

²⁴L.WEBER, *The EUROCONTROL Route Charges Litigation before the Court of Justice of the European Communities*, in *Annals of Air and Space Law* III, 1978 at 358-359.

²⁵Regulation (EC) No. 1592/2002 of the European Parliament and the Council of 1 July 2002 on common rules in the field of civil aviation and Establishing a European Aviation Safety Agency (EASA), OJ L 240, 1-21 (7 Sep. 2002).

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²⁶Article 6.1 of the Memorandum explicitly foresees that “EASA will design a Continuous Monitoring Coordinator (CMC) who will perform the functions of the National Continuous Monitoring Coordinator as described in the USOAP Continuous Monitoring Manual for all USOAP activities related to the continuous monitoring of EASA”. <http://easa.europa.eu/system/files/dfu/WA%20on%20CMA%20signed.pdf>

²⁷Such affirmation is corroborated by the fact that, “for some regions, such as Africa, regional cooperation has emerged as an indispensable element of ICAO strategy for addressing aviation safety problems that they face”. M. RATAJCZYK, *Regional Aviation Safety Organisations*, at 19. See ICAO Assembly Resolution A38-7 ‘Comprehensive Regional Implementation Plan for Aviation Safety in Africa’, (38th ICAO Assembly, 2013).

²⁸See on this point, P.P.FITZGERALD, *Inner Space: ICAO’s New Frontier*, in *Journal of Air Law and Commerce* 79, 2014, 3-34.

Civil Procedure Issues in the Lawsuits of MH370 in China: Jurisdiction and Limitation of Action

To mark the 2nd anniversary of MH370's disappearance¹

Dejian Kong *
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Abstract

In order to help the families of passengers on board the missing MH370 get fair, prompt and adequate compensation, civil procedural issues in particular the jurisdiction and Limitation of Action should be clarified at the first time. Montreal Convention is the applicable law with priority in MH370 cases. As the major impact of MH370 cases, the courts above intermediate level where the destination of MH370 (Beijing Capital International Airport) located are competent for jurisdiction. After comprehensive consideration, China specified the jurisdiction of MH370 cases to Beijing Rail Transportation Court, which is not against the law. The Limitation of Action of MH370 cases is a period of two years, reckoned from the date on which the aircraft ought to have arrived, but the calculation including the suspension and discontinuance of that period should apply Chinese nation law. Even if the relatives of the missing passengers failed to institute an action before 8 March 2016, it does not always mean the Limitation of Action has expired.

Introduction

Malaysia Airlines Flight 370 (MH370) disappeared in the early morning of 8 March 2014, while flying from Kuala Lumpur International Airport, Malaysia to Beijing Capital International Airport, China. Except for a confirmed piece of wing from the aircraft of MH370, all other including the 239 passengers and crew on board are still missing. On 29 January 2015, Malaysia government officially declared the missing MH370 an accident and its passengers and crew presumed dead.

Until the second anniversary of missing MH370 (8 March 2016), 36 actions filed by the relatives of the missing passengers have been accepted by Beijing Rail Transportation Court (hereafter referred to as 'MH370 cases'), including one withdrawal of the action because the settlement was reached.

In order to commemorate the missing passengers of MH370, to help the relatives get fair, prompt and adequate compensation as soon as possible, two main civil procedural issues namely the Jurisdiction and Limitation of Action in MH370 cases are discussed in this paper, based on current facts released officially to the public.

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Jurisdiction of MH370 cases

When the court in China receives the application for case registration on civil compensation, the starting point in general would be to determine the jurisdiction according to Chinese national civil procedural laws including *Civil Procedure Law of the People's Republic of China* (hereafter referred as 'CPL'), which would have a significant impact on the choice of law, detailed procedure of court trial and litigation outcome. In addition, because foreign-related cases apply special provisions on civil procedure in China, the court has to identify the foreign-related elements in the case at the very beginning. As the actual carrier and one of defendants, the main business place and the locality of registration of Malaysia Airlines are outside of China, and that determines that MH370 cases are foreign-related cases according to Article 522 of *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China* (hereafter referred as 'Interpretation of CPL'). Therefore, in MH370 cases the court thereof should firstly determine whether Chinese court has the jurisdiction according to Chinese civil procedural laws in particular the special provisions on foreign-related civil procedures, and if so, the court in question should further determine the territorial jurisdiction and hierarchical jurisdiction so as to settle down the specific court. After the above process, if the court in question believes it is under competent jurisdiction over MH370 cases, it could continue the trial procedure, otherwise it shall transfer the case to the right court.

Territorial Jurisdiction

According to Article 260 of CPL, the international conventions concluded or acceded to by China shall prevail in their conflicts with CPL, except the reserve clauses. Both those specific bilateral and multilateral agreements on transnational civil jurisdictions, and the clauses on transnational civil jurisdictions in the text of certain treaties are included in aforementioned international conventions². China and Malaysia are the State Parties of two main air law conventions which refer to *Warsaw Convention* and certain related protocols (hereafter referred as WC instruments), and *Montreal Convention* (hereafter referred as 'MC'). However, MC is designed to supersede WC instruments, according to its Article 55. Immediately after the application of MC has been confirmed, it would be able to decide which court in which State has appropriate jurisdiction. Therefore, it can be concluded here that while determining the jurisdiction of MH370 cases, the court should apply the following legal documents in the following order: (i) MC; (ii) WC instruments; (iii) Chinese national legislations. If it exists dispute of jurisdictions between Chinese national laws, the choice of law should be settled down by the relevant provisions in *Legislation Law of the People's Republic of China*³.

MC (Article 33) keeps the four types of jurisdiction regulated by WC (Article 28), those are the courts located at (i) the domicile of the carrier; (ii) the carrier's principal place of business; (iii) the place of establishing or making the contract; or (iv) at the place of destination. What's more, for the convenience of passenger, MC introduces the fifth jurisdiction which is the the principal and permanent place of residence of the claimant in the case of personal injury or death. In the situation of multi-jurisdictions, the claimant has the right of choice, but it is limited to the territory of a State Party of MC. From the current information about MH370 cases released to the public, the jurisdiction has a distinct link with the jurisdiction of Chinese court in a strong way, that is the destination of MH370. However, the question whether the aforementioned 'destination' refers to 'China', 'Beijing' or 'Beijing Capital International Airport' needs to be clarified further.

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From the perspective of international public law, the parties of MC are 'States', and the purpose of MC is to coordinate the relationships between different 'States'. Therefore, the term 'destination' in MC refers to 'State' rather than a specific location. The above opinion could also be supported by the words in Section 4, Article 33 of MC: 'questions of procedure shall be governed by the law of the court seized of the case', which means that the lawsuit may be brought to the State of 'destination',⁴ and the specific jurisdiction, as one of procedural issues, should be determined by national law in that State⁵. The above theory will practically make a difference for the determination of jurisdiction of MH370 cases in Chinese national law, supposing that:

MH370 was finally crashed in Chinese territorial water of South China Sea, which is in the jurisdiction of, let us say, Sansha City, Hainan Province.

Based on the above opinion, if the term 'destination' in Article 33 of MC is interpreted as the State - China, the court of Sansha City, as the place where the tort occurs, or its superior has the jurisdiction of MH370-related cases according to the principle of *lex loci delicti as lex causae* regulated in Article 29 of CPL. However, if the term 'destination' is interpreted narrowly as 'Beijing Capital International Airport' rather than 'China', the court of Shunyi District, where the airport is located, and its superior have jurisdiction of MH370 related cases, which excludes the jurisdiction of any other Chinese courts.

The above shows that different theories result in different jurisdictions in the cases of MH370. Therefore, the term 'destination' has to be interpreted clearly by Chinese law so as to apply the right jurisdiction over MH370 cases.

In Chinese legal texts in particular the *Contract Law of the People's Republic of China*, *Tort Law of the People's Republic of China* and CPL, the terms such as 'the defendant's place of domicile', 'the place where the contract is performed', 'the place of domicile of the plaintiff' and 'the place of domicile of the plaintiff' are always interpreted narrowly. On the one hand, the specific places in those terms could never be interpreted as 'State', otherwise there is no way to determine the specific jurisdiction because all those places are usually inside the territory of China; on the other hand, those terms could not be explained as the 'province', 'city' or 'county' where actually has more than one courts.

Although Chinese national laws including *Constitution of the People's Republic of China* and *Law of the People's Republic of China on the Procedure of the Conclusion of Treaties* do not regulate the legal status of international convention in Chinese legal system, since the ratification from the *Standing Committee of the National People's Congress* the treaties have been integrated into Chinese legal system, which requests the legal interpretation of those treaties should also follow the general rules in Chinese legal practice. Meanwhile, the texts used in the provision (Article 3 of MC) of document of carriage are also 'the places of departure and destination', but almost all flight tickets in practice indicate the specific name or code of arrival airport instead of merely the name of arrival city, let alone arrival State. Therefore, in view of Chinese general rules of legal interpretation, which requests the same term used in the same legal instrument should have the same meaning, the term 'destination' in Article 33 of MC could only be interpreted as the arrival airport showed on the flight ticket,⁶ rather than the name of arrival city or State. So in MH370 cases, the court with appropriate jurisdiction in China is the court of Shunyi District or its superior where Beijing Capital International Airport is located.

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Hierarchical Jurisdiction

After the clarification of territorial jurisdiction, the next step in Chinese law is to decide which level of court should be applied on the basis of nature and impact of MH370 cases⁷. Air law treaties including MC do not cover the issue of hierarchical jurisdiction, so the hierarchical jurisdiction of MH370 cases should and could only apply the law of the forum, that is Chinese national law. Although Part Four of CPL contains special provisions on foreign-related civil procedures in China, it does not regulate hierarchical jurisdiction, so that the hierarchical jurisdiction should only be determined in accordance with general rules of CPL. Considering the different understanding of major impact of MH370 cases, the intermediate courts (Beijing Third Intermediate People's Court),⁸ the higher court (Higher People's Court of Beijing Municipality) or the supreme court (Supreme People's Court of The People's Republic of China) is competent for the jurisdiction over MH370 cases according to Article 18, Article 19 and Article 20 of CPL respectively.

Specified Jurisdiction

Specified jurisdiction in Chinese law refers to a court at a higher level specifies jurisdiction to a court at a lower level through a ruling. Article 36 and Article 37 of CPL regulate two situations of specified jurisdiction, where has dispute over jurisdiction between the courts and where exists special reasons such as collective disqualification of judges, but both of them are usually the specified jurisdiction between different territories. Article 38 of CPL regulates the specified jurisdiction between different levels of court including the specification from superior to lower level and the contrary situation. Although there is no any dispute on the territorial jurisdiction of MH370 cases as discussed above, it is unclear that whether the 'major impact' of MH370 cases is in the jurisdiction scope of the intermediate court, the higher court, or the supreme court. Bearing in mind of the huge number of missing passengers on board, the supreme court of China or higher court of Beijing shall have the right to claim for the jurisdiction of MH370 in addition to the intermediate court of Beijing, according to Article 20 and Article 19 of CPL respectively. However, the jurisdiction of MH370 was finally assigned to Beijing Rail Transportation Court (a court of basic level), and that is against the regulation on hierarchical jurisdiction of *Provisions of the Supreme People's Court on Some Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Elements* (Article 1), according to which a court of basic level is not competent for a foreign-related case.

It is apparently that the specified jurisdiction of MH370 cases complies with the case of 'the specification from superior to lower level' in the provision of Article 38 of CPL. In addition, Article 42 of *Interpretation of CPL* limits aforementioned specified jurisdiction into three categories, those are (i) a case concerning a debtor in the bankruptcy procedure; (ii) a case involving numerous parties who are inconvenient to institute actions; or (iii) a case of any other type as determined by the Supreme People's Court, which is a catch-all clause. On the one hand, MH370 applies to the second category, or could be viewed as the special case in the third category; on the other hand, Article 5 of *Several Provisions of the Supreme People's on the Jurisdiction of Railway Transport Courts over Cases* regulates that Beijing Rail Transportation Court is competent to deal with the case specified by higher court.

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It is important to note that the direct superior court of Beijing Rail Transportation Court is Beijing Intermediate Railway Transportation Court (Beijing Fourth Intermediate People's Court) rather than Beijing Third Intermediate People's Court which was concluded above. Therefore, it could be speculated that the superior which made the specification could only be the Higher People's Court of Beijing Municipality or the Supreme People's Court, which means the specification of MH370 cases' jurisdiction was downward skip-level. According to the texts of Article 38 of CPL, there is no indication to forbid the skip-level specification. Meanwhile, the specification of jurisdiction in civil procedure itself is the breakthrough of legal jurisdiction, and it does not have to obey the territorial and hierarchical jurisdiction in law. Therefore, after comprehensive consideration, it is not against its national law for China to specify the jurisdiction of MH370 cases to a basic level court - Beijing Rail Transportation Court. But the official reasons why that specification is necessary should be disclosed further, so as to protect the litigants' right to know.

Relationship with the jurisdiction in other States

If the claimants have filed lawsuits in China, does that mean other States have to give away their jurisdictions? This is actually the question of parallel proceedings, which refers to the litigations arising from the same set of facts are filed in different courts in the same State or different States by the same party or parties⁹. For the case which has been registered by one court in China, other Chinese courts carry out the principle of *ne bis in idem* strictly. However, for the foreign-related cases, Chinese courts could accept the case, which has been registered in foreign court, under the following two restricted conditions in Article 533 of *Interpretation of CPL*: (i) Chinese court has legal jurisdiction; and (ii) the judgment or ruling rendered by the foreign court has not been acknowledged by any of Chinese courts. But the above are just Chinese regulations, whether other States accept MH370 cases which have been registered in Chinese courts totally depends on the law in those States in question or the treaties between China and them, if any.

Considering that both the U.S., as the State of manufacturer of missing aircraft, and the United Kingdom, as the State of producer of engines of missing aircraft, are much possible to be involved in MH370 cases after the causes of accident are released step by step in the future, the above two States' attitudes over parallel proceedings should be addressed further in practice.

Limitation of Action of MH370 cases**The duration of Limitation of Action**

According to Article 7 of *Law of the People's Republic of China on Choice of Law for Foreign-related Civil Relationships*, the Limitation of Action shall apply the proper laws applicable to the relevant foreign-related civil relations. As mentioned above, MC in MH370 cases has priority in the choice of law, the applicable law for duration of Limitation of Action is MC. Article 35 of MC regulates that if the flight agrees on the arrival time, the Limitation of Action shall be a period of two years reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived; if there is no agreements on arrival time, the period of two year shall be reckoned from the date on which the carriage stopped.

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Apparently, considering the missing status of MH370, the Limitation of Action of MH370 cases is a period of two years reckoned from the date on which MH370 should have arrived at Beijing Capital International Airport, that is 8 March 2014.

As MC only unified certain rules of carrier liability excluding many other rules such as aviation product liability, the aforementioned two-years period from the scheduled arrival time could only apply to the case where the carrier is the defendant. In MH370 cases, if the claimants institute other lawsuits against the manufactures of defective aircraft or its components, the determination of Limitation of Action should apply the law which is decided by Chinese rules on conflict of laws, rather than MC.

Before the Limitation of Action was finally settled down, the last thing is to check whether the passenger and airline made any special agreement on the extension of Limitation of Action, although the likelihood of that is minimal. As MC does not indicate that the two-years period could not be changed, both international and Chinese scholars insist that the Limitation of Action could be changes by agreement as long as that period is still between the minimum period and maximum period requested by law¹⁰. However, According to Article 2 of *Provisions of the Supreme People's Court on Several Issues concerning the Application of Statute of limitations during the Trial of Civil Cases* (hereafter referred as 'Provisions of Limitations'), the court shall not support any agreement reached in violation of law between the parties on extending or shortening the statute of limitations or waiving any interest from the statute of limitations. Therefore, if there is no official interpretation of Article 35 of MC to allow the change of Limitation of Action, at least in Chinese national law, the duration of the Limitation of Action is fixed at two years in MH370 cases.

Calculation of Limitation of Action

As to the calculation of Limitation of Action, MC delegates the power to its State Parties by the law of the court seised of the case. Therefore, Chinese provisions on the suspension and discontinuance of Limitation of Action shall apply to MH370 cases.

The suspension of Limitation of Action

According to Article 139 of *General Principles of the Civil Law of the People's Republic of China* (hereafter referred as 'General Principles of the Civil Law'), the Limitation of Action shall be suspended during the last six months of that Limitation if the plaintiff cannot exercise his/her right of claim because of force majeure or other obstacles. The Limitation of Action shall resume on the day when the grounds for the suspension are eliminated. In MH370 cases, what is most likely to trigger the suspension of Action of Limitation is 'other obstacles', for example, suppose that the missing passenger is the sole legal representative until the last six months, the Limitation of Action is under suspension until the new legal representative is identified, according to Article 20 of *Provisions of Limitations*.

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Discontinuance of Limitation of Action

According to Article 140 of *General Principles of the Civil Law*, a Limitation of Action shall be discontinued if a suit is brought or if one party makes a claim for or agrees to fulfilment of obligations. A new Limitation shall be counted from the time of the discontinuance. As the claimants of MH370 cases filed the lawsuits before the last day of Limitation of Action (8 March 2016), that Limitation was re-counted after the day of submitting complaint¹¹. However, even though some relatives of the missing passengers failed to institute the lawsuits before 8 March 2016, it does not always mean that two-years Limitation has expired. Those relatives could argue, *inter alia*, as follows based on Chinese law:

(1) So far Malaya Airlines has made several statements and press conferences which request the relatives of the missing passengers start the procedure for claims. Those requests actually constitute aforementioned 'one party agrees to fulfilment of obligations' and then the Limitation of Action discontinued and is recalculated since the day of the last statement or press conference. Even after the termination of Limitation of MH370 cases, if Malaysia Airlines, regardless of publicly or secretly, agrees to carry out the obligations of compensation to right holders and to this end sign paper documents such as indemnity agreement or indemnity schedule, those paper documents could be viewed as the re-recognition of its responsibility for compensation, and the right of claimants based on those paper documents shall be protected by law according to Chinese legal practice.

(2) In Chinese law, the precondition to claim for compensation of death damages is the missing passengers have been recognized as 'death' before any general civil procedures was started. As no body of the missing passengers has already been found so far, if the relatives want to start the claim for compensation, the special procedure of death declaration in law has to be finished firstly. Before the death declaration, all the missing passengers are just 'missing' rather than 'death'. According to Article 137 of *General Principles of the Civil Law*, a Limitation of Action shall begin when the entitled person knows or should know that his/her rights of claim for compensation have been infringed upon. Therefore, it is reasonable to understand that before the death declaration of the missing passengers, those passengers are just 'missing', and the relatives are hoping and believing that those passengers have not been dead. So, the relatives could argue that they did not know that their rights for compensation resulting from 'dead' passengers have been infringed and therefore the Limitation of Action shall not begin before those passengers were declared as 'death' in law. Although on 29 January 2015, Malaysia government officially declared the missing MH370 an accident and its passengers and crew presumed dead, it has no legal effect in Chinese national law before that declaration is officially accepted by Chinese government. Taking a step back, even though that declaration is recognized by Chinese government on the same day, all the passenger on board MH370 were 'missing' rather than 'dead' before 29 January 2015.

For the above, some scholars or lawyers may worry that the relatives of the missing passengers may postpone the starting point of Limitation of Action again and again which may lead to legal uncertainty. In fact, the above worry is unnecessary, bearing in mind that:

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- As one of interested persons, Malaysia Airlines or other defendants could also start the special procedure of death declaration in the Chinese competent court, according to Chinese national law.
- the Maximum Limitation of Action regulated in Chinese nation law makes the court shall not protect the rights of claim for compensation if 20 years have passed since the infringement. In other words, the rights of the relatives of the missing passengers will be expired anyway after 8 March 2034.

Conclusion

It has been more than two years since the missing of MH370. Although there is still not enough confirmed information about the searching of MH370, the liable party or parties should provide fair, prompt and adequate compensation to the relatives of the missing passengers at the first time, so as to recover them a calm life as soon as possible. In order to start the civil procedure in an appropriate way, the first things to be cleared by the parties are, *inter alia*, the jurisdiction over MH370 cases and the Limitation of Action.

First of all, the fact that one of main defendants is Malaysia Airlines makes the foreign-related element in MH370 cases, and therefore the determination of jurisdiction over MH370 cases has to analyze whether China has the jurisdiction and then which is the competent court specifically according to Chinese rules on choice of procedural law. In MH370 cases, MC is the applicable law with priority, and that determines that the court with appropriate territorial jurisdiction in China is the court of Shunyi District or its superior where Beijing Capital International Airport is located. In addition, according to the provisions of CPL, Beijing Third Intermediate People's Court, the Higher People's Court of Beijing Municipality or the Supreme People's Court of The People's Republic of China has the hierarchical jurisdiction of MH370 cases depending on the different understandings of 'major impact' of MH370' disappearance in CPL. However, through comprehensive consideration, the jurisdiction of MH370 cases was finally specified to a basic level court - Beijing Rail Transportation Court, which is not against Chinese national procedural law.

Secondly, the Limitation of Action of MH370 cases is a period of two years reckoned from the date (8 March 2014) on which MH370 should have arrived at Beijing Capital International Airport. The calculation of that two-years period applies to Chinese national law on the suspension and discontinuance of Limitation of Action. However, according to Chinese national law, it does not always mean that the Limitation of Action has expired even after 8 March 2016.

At last, let us continue to pray for MH370...

¹The paper is only for academic research, without any official opinion of lawyers in MH370 cases.

²Yuanmin Zheng and others, *Private International Law* (CITIC Publishing House, 2002), at 89.

³Although Civil Aviation Law of the People's Republic of China is the special law in the aviation sector in China, it does not include any special provisions on the jurisdiction of air liability related cases.

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⁴See Charles E. Robbins, *Jurisdiction Under Article 28 of the Warsaw Convention*, 9 (4) *McGill Law Journal* 1963.

⁵This opinion is the result communicated with Mr. Pai Zheng, assistant researcher of the East China University of Political Science and Law.

⁶See Giemylla/Eshmid (editors), *Montreal Convntion: Comentary (Kluwer Law International, 2006)*, at Article 33-20; Malcolm A. Clarke, *Contracts of Carriage by Air (Lloyd's List, 2010)*, at 180; *Air France v. Liberator, CA, Paris 8.12.1973, (1974) 28 RFDA 287, affmd Cass 16.4.1975, (1975) 29 RFDA 293.*

⁷The sequence to determine territorial jurisdiction and hierarchical jurisdiction is not regulated in Chinese law, but it makes no difference to the final outcome of specific jurisdiction of MH370 cases.

⁸Shunyi District, where Beijing Capital International Airport is located, is under the leadership of Beijing Third Intermediate People's Court. Please visited the official website of Beijing courts, <http://www.bjcourt.gov.cn/fyzy/detail.htm?id=29>, accessed 10 March 2016.

⁹James McComish, *Stay of Parallel Proceedings and the Brussels I Regulation*, 73 (2) *The Cambridge Law Journal* 2014.

¹⁰Malcolm A. Clarke, *Contracts of Carriage by Air (Lloyd's List, 2010)*, at 182; Shengping Gao, *Certain Issues in the legislation of Limitation of Action*, (2) *Legal Forum* 2015.

¹¹Be noted that it is not the day of registration by the court. See SONG Xiaoming, LIU Zhumei and ZHANG Xuemei, *Understanding and application of Provisions of the Supreme People's Court on Several Issues concerning the Application of Statute of limitations during the Trial of Civil Cases*, (21) *People's Judicature* 2008.

Space Activities Today

Christina Giannoapapa*
Christopher Lehnert**

Introduction

Space activities have grown consistently, as many more countries and private companies engage in space. Governments remain the main driver for space activities, however private companies are increasingly entering space activities. New activities in the fields of applications, space tourism and security have been increasing in space programmes. Traditional actors such as the USA, Russia and Europe, remain engaged to the full spectrum of space activities. The international community has witnessed the rise of new space actors in Asia and Latin America. Countries like China and India continue to increase the spectrum of their activities. Overall, space activities are expected to continue increasing over the next years with more nations and more private actors.

Since 2006 the Space sector has remained vital and opened up to globalisation. Many of the new space strategies such as in the USA (2010), the UK(2012) or Germany (2011), emphasize commercialisation and social benefits of space, international cooperation and reflect an increased awareness of issues pertaining the sustainability of the Outer space.

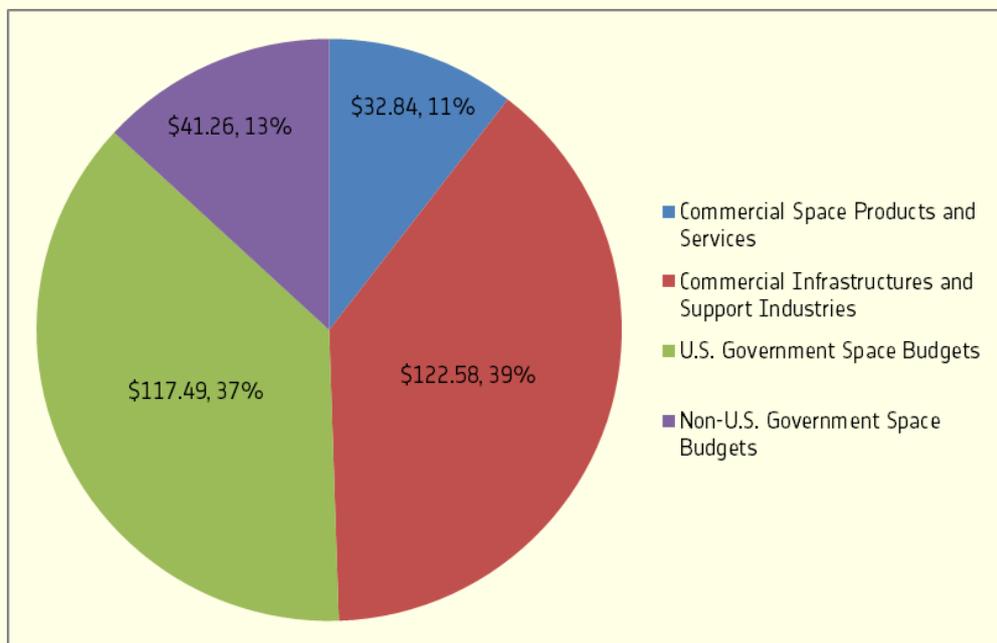


Figure 1 Global Space Activity 2013 (Source: Space Foundation 2014)¹

*European Space Agency

**European Space Agency

SPACE

Space activities remain in particular focus of the American and Russian programs, whereas Europe emphasizes meteorology, science, communication, exploration, the public service and security². In 2012, Germany has become ESA's biggest contributor and remained in this position in 2013. Also the European Union, has allocated significant funds to its flagship programs GALILEO and COPERNICUS. In Latin America, Brazil is the biggest actor in space, with a National space Plan for 2012-2021, with plans to develop Earth observation, science and telecommunication satellites, as well as a new series of launchers³. Governments also remain the largest customer for space systems, accounting for 70% of the total launch mass in 2013, of which 30% was solely devoted to human activity in space⁴. In Asia, China is vigorously pursues its space ambitions, constantly increasing its space budgets that include a large portion for human space activities⁵. Globally, In the mids 2000s, a new round for the development of launchers has started, which is led by Russia and USA, that account for over 50% of the expenditures on launchers in 2012. They were followed by the Asian countries (20%)

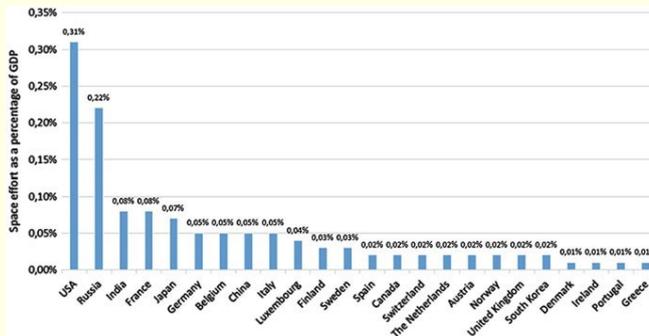


Figure 2: Public space budgets as a share of nominal GDP in 2011 (Source: Euroconsult /IMF)

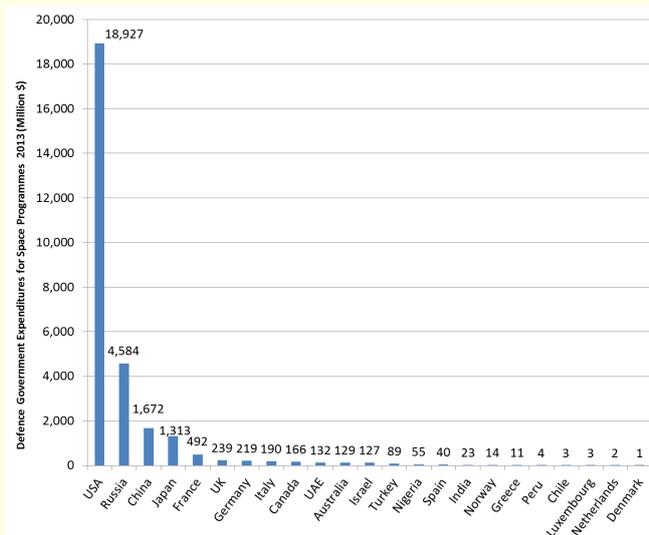


Figure 3: Defence government expenditures for space programmes in 2013 (Source: Euroconsult 2014)

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Launch Programmes

In the twentieth century launcher programs were closely related to classified military projects demonstrating intercontinental ballistic missile capabilities (ICBM). Over the years they have seen a gradual level out to commercial launches separated from the military activities. Today, besides the United States and Russia, the European Space Agency, Japan, China, India, Iran, and Israel have also gained capabilities to put satellites in orbit. Brazil is also close to acquire this capability. Most of these countries or agencies also offer services on a commercial basis, providing to many more countries around the world the possibility to put satellites to space through their launch vehicles.

Countries launch capabilities have continuously developed, which reflects many governments wish for autonomous access to space. Nevertheless, the capacity to put space systems into all possible orbits, is a privilege of the few - USA, Russia, Europe, China, Japan and India. (Figure 2)

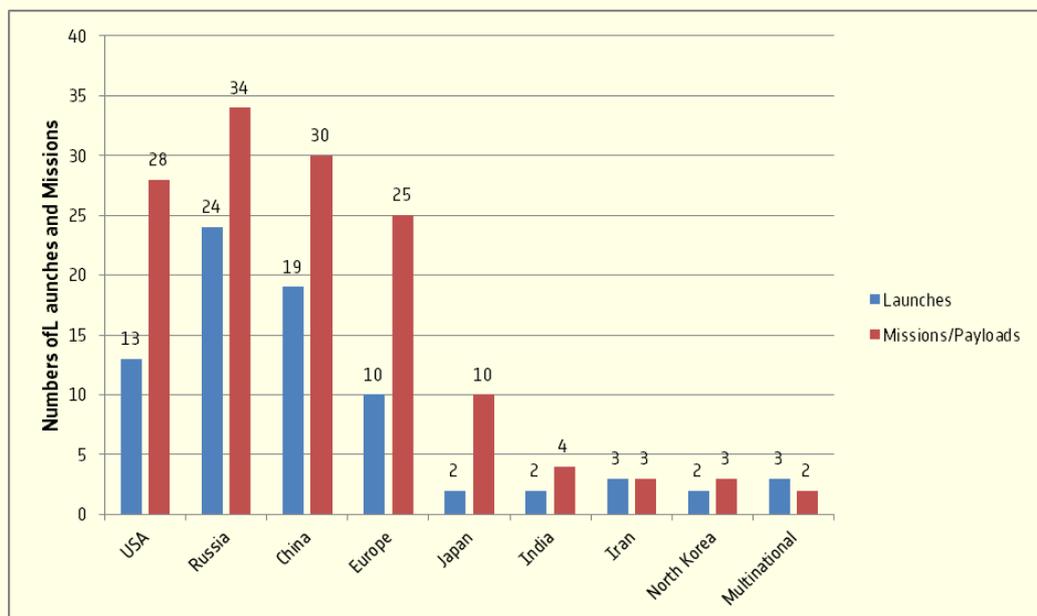


Figure 4: Space Power Activities in 2012 (FAA 2013)

By 2013, the overall attempted launches have thus slightly increased on the average launch attempts. Between 2009 and 2013 there were 81 attempted launches, of which 78 were successful. However, spacecrafts put into orbit increased continuously and peaked in 2013 from 139 to 213. (Figure 3). This high figure relates to the increasing number of cubesats being launched.

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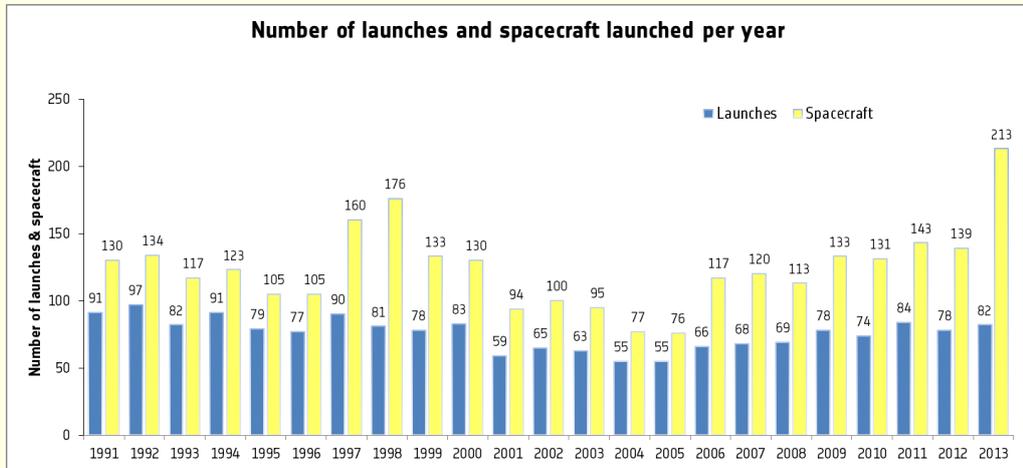


Figure 5: Number of launches and spacecraft launched per year (source: Eurospace⁶)

Russia again, has remained at the top of launching countries, followed by the USA and China, while no new country entered the launch market. The market, however, saw the introduction of smaller launch vehicles including the Chinese Kuaizhou, the European Vega and the Japanese Epsilon⁷.

These vehicles are mainly used for scientific instruments. Until 2012 the market was shared between four launcher families operated by four launch service providers: Ariane by Arianespace, Proton by International Launch Services, Long March by CASC, and Zenith by sea launch/Land launch. In 2013 Space X entered into the GEO segment.



Figure 6 Commercial Launch Demand Forecast (Space Foundation 2014)⁸

The United States launch program includes a number of launch options and over the years has increased its commercial side. The United States launch vehicles can place payloads in orbit from a few hundred kilograms to heavy payloads. In addition to orbital launch vehicles, the USA has a number of suborbital space launch systems, including vehicles under development for carrying people for tourism or research purposes. Despite of the success of the United States launch program, there is currently no orbital human space flight vehicle.

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Russia can be considered today as having the most complete launch program in the world. Russia currently operates four types of launch vehicles, the Rockot, Soyuz, Zenit, and Proton. The launch vehicles are operated from two main launch sites, Baikonur and Plesetsk, while the third one in Vostochny is currently under construction. Today, Russia and China are the only countries in the world with capabilities for human space flights in low Earth orbit, and Russia is the sole provider of human transportation to the International Space Station. Russia over the past two decades has been offering its launching capacities for international and commercial uses. Russian launchers are among the leaders in the global launch market due to their high quality, cost efficiency, and compliance with the customer requirements.

The European launch program is developed and implemented through the European Space Agency. It is based on the joint cooperation of the Agency's 22 member states, their national space agencies, industry, and Arianespace which is the company responsible for the operations and exploitation of Europe's launch capabilities. Arianespace for over 30 years has become the global point of reference for commercial missions. The European family of launchers includes the Ariane 5, Vega, and Soyuz that secure Europe's independent access to space and are launched through the Guiana Space Centre. The adapted European version of the most used and most reliable launcher in the world, the Soyuz, provides the potential for Europe with additional modifications should it decide to the possibility for human space flight. The evolution of the launchers program will be one of the subjects of discussion at the next ESA Ministerial Conference in 2016, after the decision to develop the next generation launcher Ariane 6 was taken at the ESA Ministerial Conference in 2014.

The Japanese launch program has progressed mainly for space science and space utilization. Its unique characteristic is that it has been promoted only for peaceful purposes. The key technologies of launchers are maintained and evolved by the government and Japan Aerospace Exploration Agency (JAXA) in cooperation with academia and industries. Japan has two types of launch vehicles. These are the liquid propulsion ones H-IIA and H-IIB launched from the Tanegashima Space Center and solid rocket Epsilon launched from the Uchinoura Space Center.

China has been sticking to the self-reliance and independent innovation path in its launch program. After 40 years of experience, China has developed a number of launch vehicles. The Long March is its primary expendable launch system family. There are three launch sites in China: Jiuquan, Taiyuan, and Xichang; currently there is fourth one under construction, the Wenchang Launch Center. China is continuously strengthening the construction of space transportation systems, further perfecting the completeness of LM launch vehicles, enhancing the ability of access to space, and developing a new generation of launch vehicles and upper stages. China puts the development of space industry as an important part of the country's overall development strategy.

The Indian launch program started with the vision to utilize the potential of space technology and its applications for national development in the 1960s. India has made significant progress in launch vehicle technology. Today India's efforts in launchers are undertaken by the Indian Space Research Organisation (ISRO). Over the years India has been developing the Satellite Launch Vehicle which retired in 1984; the Augmented Satellite Launch Vehicle; the Polar Satellite Launch Vehicle; and the Geosynchronous Launch Vehicle, and is making efforts for Reusable Launch Vehicles.

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ISRO has established launch complex at the Satish Dhawan Space Centre.

Brazil has started its first steps into the space arena in the early 1960s. Since then it has made significant progress and is close to acquire launch capabilities. Its launch program has evolved from sounding rockets to the development of the launch vehicles VLS (Veiculo Lancador de Satelites) and VLM (Veiculo Lancador de Microsatelites). The first flight for VLS is expected in 2015. Brazil's space port is Alcantara Launch Centre. Another important part of the Brazilian space launch program is its cooperation with Ukraine for building and launching Cyclone 4 from its space port.

Satellite Programmes

The first artificial satellite Sputnik 1 was put in space on 4 October 1957 by the Soviet Union's space program. Initial satellite programs were fulfilling science and military objectives. Today, there are more than 50 countries in all continents that have a satellite in orbit. Almost 1,000 operational satellites are now in orbit with diverse Earth observation, telecommunications, navigation, and positioning missions. In parallel to the growing importance of these down-to-earth applications, science and space exploration remain key missions of space agencies, invigorating international scientific cooperation. The United States leads with more than 350 satellites in orbit, followed by Russia. The new landscape of space-faring nations is the result of two trends: the ambition of many countries around the world to develop independent national space programs and the globalization of the aerospace and defense industry.

Satellite Activities have been growing steadily in the last years, and by 2015 there is a total population of 1265 satellites in orbit⁹. In 2013 alone, 213 satellite missions were launched by 29 countries¹⁰. Of those missions around 50% belonged to technology demonstrations and scientific research¹¹. Communication missions remained at the top of application mission, accounting for approximately 30% of the total satellite missions (Figure 5).

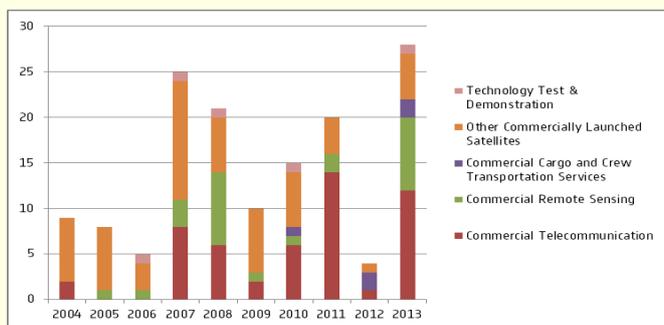


Figure 7 Historical Payloads (FAA 2014)¹²

2013 also witnessed that a large portion of the satellite missions were microsatellites, that weight less than 91 kilograms¹³. These satellites usually have a small life time, operate in LEO and are usually launched as piggy bags. In the communication sector, the traditional divide between fixed-satellite-services (FSS) and mobile satellite services (MSS), has become blurred in the recent years, as technological development and evolving market demands have changed¹⁴. In particular the demand for MSS has been decreasing because of expanding terrestrial provision, while FSS has been able to bring advance products to customers.

Overall, by 2013 the satellite market is as vivid as ever. The procurement, launch and operation of satellite systems is no longer restricted to a few companies or countries.

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Today, countries such as Belarus or Laos successfully operate domestic systems in Space¹⁵.

The satellite programs of the United States include civilian as well as military and intelligence developments. The civilian ones included the full spectrum of activities. The defence organizations provide services in telecommunications, surveillance, missile early warning, meteorology, positioning/timing, radio interception, nuclear detonation, and data relay. The United States has a unique capability of deploying military satellites of all types and on a global basis. Its military space program overshadows the military space programs of all other countries combined and that of civilian agency. This is expected to continue in the years to come.

Satellite programs in Europe can be divided to institutional, national, and multinational. The institutional satellite programs are developed by European supranational actors which are the European Space Agency with a number of satellite missions, EUMETSAT with meteorological missions and the European Union with the Galileo system for navigation and positioning, and the Copernicus (former GMES) system for environment and security. At the national level, a number of European countries have been developing their satellite programs caring different types of sensors through their own national programs. More than 30 European remote sensing satellites are currently operating or are planned for launch by individual countries or jointly with others. Some of these are civilian or commercial satellites, others are dedicated military satellites, others are dual use. Multilateral cooperation between European countries provides the possibility to develop high quality systems in a cost-effective way by pulling together needs and resources. This applies equally to the civilian as well as in defense and security domain.

Chinese satellite programs cover Earth observation, communication and broadcasting, navigation and positioning, and scientific and technological test satellites. Until the end of 2011, China had successfully developed and launched 144 satellites.

Human Activities and Space Tourism

Human spaceflight activities have been centred around deployment and use of the ISS for years. Although often controversially debated, it has received continuous support by all its users. First and foremost by the United States that have announced support after 2020, following their national space policy goals set in 2010¹⁶. Russia's commitment has also been confirmed up to 2024, although the Ukraine crisis is putting this to the test¹⁷. From European side, the future remains unclear as European nations are not ready to commit to operations after 2020, which was the decision of the Ministerial Council 2014. Other plans to build up a space station in LEO by China are still under discussion, while operations are scheduled for 2020¹⁸.

While the ISS's lifetime end is in sight, new human spaceflight missions are being developed. NASA is working on the Orion Multipurpose Crew Vehicle (MPCV), which is based on ATV-derived technology, Europe supports this effort by contributing the service module¹⁹. The first flight is scheduled for 2018. Europe's contribution is based on a larger German interest in Human Spaceflight and Robotics. While budget had been decreasing steadily since 2006 due to the completion of the ISS infrastructure, the work on NASA's Orion vehicle has given a new impetus to the field. Human spaceflight was a central topic between France and Germany during the 2012 ESA Ministerial council²⁰.

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While the institutional commitment to human spaceflight in general is stable, the commercial sector is also developing. Several companies emerged in the USA, where the FAA is counting nine firms that are engaged in commercial human spaceflight²¹. There are also efforts in Europe to offer suborbital flights e.g. by a Swiss company²². On both sides of the Atlantic the sector is viewed as economically important, which gives it institutional support. In the USA only recently a bill²³ was passed to stimulate this industrial sector. A central element is the prolongation of a testing period, where regulation on passenger safety remains low and risk taking has to be borne by participants. In Europe, the United Kingdom is eager to set up a spaceport and in Sweden the Kiruna Spaceport is hoping to offer Virgin Galactic space flights²⁴. Additionally, the United Arab Emirates have started to invest in human spaceflight, although the funding has decreased in 2013 after a peak in 2012. Private investors bought shares of Virgin Galactic and Bigelow Aerospace, and developed plans to build a spaceport in Abu Dhabi, which are still under discussion²⁵.

Overall, the human spaceflight and space tourism, is on the edge to make a big leap. However, technological issues and customer demand still lack the maturity to be certain of the a true breakthrough.

Space Situational Awareness

The increasing number of space activities and satellites in orbit increases concerns on how to protect space assets. Space situational awareness (SSA) is a key enabler for detecting and protecting against threats faced by space assets. SSA is a complex topic that is not always used in the same way. However, it can generally be defined as information about the space environment and activities in space that can be used to operate safely and efficiently; avoid physical and electromagnetic interference; detect, characterize, and protect against threats; and understand the evolution of the space environment. Currently SSA is one of the most important topics in space security. The United States operates the largest SSA program in the world and Russia the second largest. Individual countries in Europe have partial capabilities and ESA since 2009 has started to implement an SSA optional program with financial participation by 14 Member States.

Outlook

Space activities have grown consistently, as many more countries and private companies engage in space. Governments remain the main driver for space activities, however private companies are increasingly entering space activities. New activities in the fields of applications, space tourism and security have been increasing in space programmes. Traditional actors such as the USA, Russia and Europe, remain engaged to the full spectrum of space activities. The international community has witnessed the rise of new space actors in Asia and Latin America. Countries like China and India continue to increase the spectrum of their activities. Overall, space activities are expected to continue increasing over the next years with more nations and more private actors.

¹Space Foundation. *The Space Report 2014*. Space Foundation, Colorado Spring, 2014

²Euroconsult 2014. *Profiles of Government space programs analysis of over 80 countries and agencies*, p 5.

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³ Ibid. p 5.

⁴ ASD Eurospace. *Space Trends 2014 - Global Space Activity Overview*, p 5.

⁵ Euroconsult 2014. *Profiles of Government space programs analysis of over 80 countries and agencies*, p. 43

⁶ ASD-Eurospace (2014), “*Space Trends 2014. Global Space Activity Overview*”, 3rd Edition, June 2014.

⁷ Ibid.

⁸ Space Foundation. *The Space Report 2014*. Space Foundation, Colorado Spring, 2014

⁹ “Union of concerned Scientist Satellite Database,” http://www.ucsusa.org/nuclear_weapons_and_global_security/solutions/space-weapons/ucs-satellite-database.html#.VWXT9s-eDRY (accessed May 27, 2015).

¹⁰ SD-Eurospace (2014), “*Space Trends 2014. Global Space Activity Overview*”, 3rd Edition, June 2014.; Space Foundation. *The Space Report 2014*. Space Foundation, Colorado Spring, 2014, p.81.

¹¹ Ibid.

¹² Federal Aviation Administration. *The Annual Compendium of Commercial Space Transportation: 2014*. Federal Aviation Administration, 2015, p. 182.

¹³ Space Foundation. *The Space Report 2014*. Space Foundation, Colorado Spring, 2014, p.81.

¹⁴ Ibid. 81

¹⁵ Ibid. 82

¹⁶ US National Space Policy

¹⁷ Jeff Foust. “*Putin seeds confusion about Russia’s ISS commitment*”, *Space News*, April 17, 2015, <http://spacenews.com/putin-seeds-confusion-about-russias-iss-commitment/> (accesses May 26, 2015).

¹⁸ Frank Moring, Jr., *Chinese Plan Unmanned Space Docking*, Oct 7, 2011, *Aviation Week*, <http://aviationweek.com/awin/chinese-plan-unmanned-space-docking-next-month> (accessed May 26, 2015).

¹⁹ Euroconsult Report 2014. *Profiles of government space programs analysis of over 80 countries & agencies*, p. 18

²⁰ Ibid.

²¹ John Sloan. “*Updates from the FAA Office of Commercial Space Transportation*” March 2015. Presentation at the European Space Agency.

²² Debra Werner. “*Startup Spotlight | Swiss Space Systems (S3)*”, January 26 2015, <http://spacenews.com/startup-spotlight-swiss-space-systems-s3/>. (accesses May 28 2015)

²³ Jeff Foust. “*House approves commercial space bill*”. May 21 2015, <http://spacenews.com/house-approves-commercial-space-bill/> (accessed May 27 2015)

²⁴ Andrew Curry. “*Spaceport at the top of the world*” *Air&Space*. August 2011. <http://www.airspacemag.com/space/spaceport-at-the-top-of-the-world-27475249/?no-ist> (accessed August 2011).

²⁵ Euroconsult Report 2014. *Profiles of government space programs analysis of over 80 countries & agencies*, p. 34-35



Recent decision on bird strikes: operators' liability according to technical and legal issues.

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Abstract

This study is aimed at examining the key points of one of the rare judgments concerning bird strikes, with particular reference to the functions assigned to the party in charge of the Air Traffic Controllers and to the role of the regulatory provisions in identifying the violations resulting in a contractual and tortious liability for damages. Although bird strikes are very common and represent one of the most serious threats to air traffic safety, the jurisprudence on the matter is quite limited. This circumstance, together with an international legislation that does not indicate any unitary instrument for the identification of the parties to be held liable for damages caused by collisions between birds and aircrafts, makes this Court decision particularly remarkable.

The case under examination concerns an aircraft collision occurred during taking off at the coastal Genoa airport Cristoforo Colombo, when a cargo aircraft of large size collided with a flock of seagulls, coming from the near dump of Scarpino. At first instance and on appeal, it has been established that the controls put in place by the airport operator in order to prevent bird strikes (today, Wildlife Program Control) were all perfectly working and compliant with the rules in force at the time, that the crew behaved correctly even if the flight preparation proved to be inadequate, and that the Air Traffic Controllers behaved in compliance with their duties. The Genoa Court of appeal has then concluded that the damage was caused by unforeseeable circumstances. This article is a summary, as objective and aseptic as possible, of the most relevant elements of the mentioned judgment (which has recently become final). However, there is need to specify that the author of this article has been a member of the ENAV defense team during the appeal proceedings. The present article is then to be read considering this particular circumstance.

Key words: bird strike, tortious liability, contractual liability, strict liability, Air Traffic Service Provider, technical measures, technical rules, Aeronautical information service, obstruction, caso fortuito, fortuitous event

Reconstruction of the dynamics of the event

The first section of the Court of Appeal of Genoa - with the decision n. 1004 published on 4 August 2015 - has established that the liability for the damage is to be ascribed to fortuitous event ("*caso fortuito*"). This decision has completely disregarded the judgment of first instance, pronounced after a proceedings lasted several years and characterized by a thorough technical consultancy, with partisan experts but also experts in aviation and ornithology appointed by the Court. During first instance proceedings, the attention was drawn in particular on the reconstruction of the dynamics of the event, and on the implementation of the technical prevention equipment, in use when

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the accident occurred, as well as on the technical and “human” organization of the parties in order to assess their adequacy to prevent bird strikes.

As a matter of fact, during the proceedings of appeal, the technical advisors of the Court of Appeal of Genoa (a General of an Air Team of the military aviation and an aeronautics engineer) have confirmed the dynamics of the event, as already reconstructed by the technical consultants of the Court in first instance (even if during the appeal the matter has been further investigated with respect to the characteristics of the aircraft, indeed the Flight Guide was made available, which had not been considered in the first instance). But the appeal judge, unlike the first instance judge, took in great consideration the advice of his consultants, whose conclusions have been also reported in the final judgement.

The key elements are the following:

The bird strike in question took place on 19 June 1997 at about 6.45 a.m. (local time) and involved the four-engine jet AN 124-100 (one of the biggest in the world, conceived for military purposes and used today mainly for the transportation of bulky goods) owned by the Ukrainian company ANT O.K. Antonov. The reconstruction of the dynamics of the event made by the Court has established that the aircraft took off from Genoa airport and, two seconds after the wheels had detached from the runway, collided with a flock of hundreds of seagulls, which had suddenly crossed the strip, arriving, at a speed attested between 30 and 50 Km per hour, from the north part of the airport.

For the purpose of reconstructing the event, there is need to remind that the Genoa Cristoforo Colombo airport, opened to international air traffic, is placed by the sea, and the presence of an open dump of municipal solid waste at about one kilometer towards north-west hills (Scarpino) makes it particularly exposed to the presence of birds, especially seagulls.

The collision occurred at a height between 11 and 30 meters, causing damages to the Antonov internal right engine n. 3, that switched off immediately, and to its internal left engine n. 2, whose power was reduced in order to avoid vibrations soon after the taking off.

The above mentioned technical advisors of the Court have ascertained that *“the flock of seagulls became visible only in the last fifteen seconds and when the distance flock-aircraft was such to allow a sighting by the aircraft (more useful for any decision to be taken)”*. There is need to highlight that the air cabin, provided with large lateral glasses, is placed at 11 meters from the ground, so allowing pilots to have a very good view.

On that day, the weather forecasts on Genoa airport reported good visibility, it did not rain but the strip was wet. These elements, as we are going to see, play a key role in the reconstruction of the aetiology of the event. At 6.44 the aircraft took off and two minutes later, at 6.46, communicated to TWR of having hit “too many birds” and of having a blowout at engine n.°3. The controllers then asked the aircraft if it wanted to declare emergency, receiving a negative response.

Landing occurred at 6.54 and the controllers asked again to the pilots if the aircraft needed any assistance, receiving again a negative answer.

The bird strike in question, due to the incomprehensible decision of the crew of not declaring the emergency state, was defined at that time “a major aeronautic inconvenience” and not an aeronautic accident. Since the declaration of emergency was lacking, a formal technical investigation by the competent authorities could not be initiated on an ex officio basis, as provided for by art. 826 of the Italian code of navigation in fore at the time the event occurred. The initiation of such an investigation

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would have probably allowed obtaining significant and reliable evidence on the dynamics of the event, on the damages suffered by the aircraft, and especially, on the causes of, and liabilities for, the accident, as foreseen in the mentioned art. 826 of the Italian code of navigation in force at that time.

The bird strike prevention system, the procedures and the devices the airport operator should have applied according to national and international legislation were in use at the time the accident occurred, and met high standards of security. This circumstance clearly emerged since the beginning of the investigation carried out during the first instance proceedings, such that the Court of appeal did not deem necessary to reopen the technical investigation concerning the adequacy of the deterring systems in use at the airport, while it did on other points, which will be examined hereafter.

The weight was found to be higher than that foreseen for a rejected take off with wet strip, while the airplane center of gravity (CG) was not certified, since the loadsheet lacked of the pilot in command's signature.

According to the technical consultants, the flight preparation had been "at least, poorly accurate"¹.

The Court decision in first instance and the position of the air traffic controllers

Though recognizing the hard work carried out by the judge in first instance on such a complex and technical matter as the *bird strike*, scrolling down the 160 pages of the decision, the conclusion drawn is that the judge was conditioned by his same scruple, refusing, on many (too many) points to take into account the advices provided by his consultants and taking, from a certain point on of his analysis, a "third way", that led him to sanction the joint and several liability of four, out of five, of the defendants (ENAC was discharged because at the time was not constituted yet!), condemning them to compensate the damage claimed by the Ukrainian insurance company - the main defendant in first instance having substituted, according to art. 1916 of the Italian civil code, the aircraft owner into his rights - and by the aircraft operator, although in different percentages: 35% each, charged to Aeroporto di Genova S.p.a. and ENAV; 22,5% charged to the Ministry and 7,5% to Genoa Port Authority.

In particular, the Aeroporto di Genova S.p.a. was condemned as direct manager of the Genoa aerodrome, ENAV as entity "*in charge of flight safety*", the two governmental entities on account of a "*lack of supervision on the practical organization of the safety and prevention services by the final operators*".

The two Ukrainian companies have claimed the condemnation of the defendants for various reasons and in particular, for what concerns the airport operator and ENAV, an award of damages according to art.1218 of the Italian civil code (for contractual liability), art. 2043 of the Italian civil code (for tortious liability) and of art. 2050 of the Italian civil code (for tortious liability resulting from the exercise of a dangerous activity). For what concerns the Genoa Port Authority, the Ministry of Infrastructures and Transport, and ENAC, for tortious liability for omission of the appropriate controls on the work carried out by the airport operator and ENAV.

There is need to remind that the Court that has issued the judgment of first instance, had already decided on a bird strike case occurred in the same airport, 9 years before the contested judgment². Therefore, a serious doubt arises - but this is a personal opinion - on the fact that, issuing a cumulative condemnation, the Court's intention was that of admonishing all the entities involved in the activities of the Genoa airport, no one excluded, as an exhortation to diligence and in the - wrong, in the author's opinion - belief that to an extension of the competences corresponds an increase in safety.

But if this perceived need can be attributed to a human way of thinking, it cannot surely be accepted when dealing with the justice of the case, above all when the experts' conclusions have at once pointed out the existence of elements of interruption of the casual nexus, which must be the foundation of any attribution of liability, even when objective.

As mentioned above, the judgment of first instance had condemned the defendants, joint and severally and with different percentages according their liabilities, which were deemed to be different, for causing the damage, to the payment of over 2 million e 500 thousand US dollars (relating, in part, to the damages suffered by the engines and the aircraft, but also to the expenses borne for refit) .

This condemnation results from a technical-reconstructive activity carried out by the Court of first instance, that has identified the grounds of the conviction not in the violation of positive rules of prevention, but in the existence of a *“fault in the organization”*, identifying in the *“human patrol”* the cause of the event. In particular, the Court has deemed, essentially and for what concerns the Air Traffic Service provider, that the four controllers present in the tower have correctly meet the duties, but that ENAV was however responsible for the damage, on account of the fact that it had not foreseen a *“further control”* aimed at sighting, in due time, the seagull flock arriving from the northern part of the strip. The Court arrived to propose a technical alternative to the procedures in use, inspired to *“scalability and higher incisiveness criteria”*, that, for what concerns ENAV, should have brought to add a fifth man at the Control Tower, in charge of sighting the seagulls and, in general the potential threats looming from the north side of the strip.

ENAV has been then condemned, notwithstanding the Court having ascertained that the (four) controllers present in the tower could not have seen the flock approaching from the north in a useful time, such to prevent the event from occurring, since two of the controllers were necessarily watching traffic circuit (in Genoa's aerodrome, towards the south) and the other two had the visual precluded, due to the presence of radar screens towards which their attention was (mandatorily) turned. The technical solution suggested by the judge was that the entity in charge of the air traffic control should have foreseen an additional controller to cover the north side of the aerodrome, even if such a solution was not provided for by any law or regulation. For what concerns the liability of the airport operator, this was ascribed to *“a lack in foreseeing an additional appropriate supervision, i.e., armed staff with a radio device, to control the north side of the runway”*. Once again the judge has suggested a solution not provided for by any law or regulation, and irrespective of the fact that the judge himself had ascertained that there hadn't been *“any material non-compliance with the organization requirements for granting flight safety”*.

With respect to this third solution, identified independently from the conclusions of both the experts and the parties, and completely lacking of any valid reference to rules of technical nature indicating a violation of the controls devices foreseen by the legislator, the judge has excluded that the event can be ascribed to unforeseeable circumstances.

If the conclusions of the Court of first instance had been confirmed in the final judgment, the Air Traffic Controllers should have dealt with a new task, not provided for by any law or regulation and completely out of the functions foreseen for their position. Subsequently, they would have been required, according to a decision taken by a Court, to fulfill tasks for which they are not properly trained or organized.

The decision of the Genoa Court of Appeal

The judgment of appeal is in line with the conclusions of both the experts and the parties, identifying the cause of the event in “fortuitous event”, having verified that all the parties involved had diligently complied with all the requirements provided for by the legislation in force. The decision in question deserves a thorough analysis under different points of view, but the first thing to highlight is the importance attached, while assessing the appropriateness of the actions taken to avoid the damage, to the technical rules, contributing to reconcile these latter with the legal norms.

The Court did not further go into the details of the tasks provided for by the legislation and, as specified hereafter, did not identify the competences of the single air traffic operators. This was due to the fact that it deemed sufficient, for the purpose of deciding on the case in question, to ascertain the facts that proved that the causal nexus between the event and the damage had been cut. The judge deemed unhelpful to decide on whether ENAV had special tasks with respect to bird strikes, since, in the case in question, it had been ascertained that the TWR couldn't have sighted the flock in a useful time, such to avoid the event. Therefore, the discontinuity element between event and damage was identified in the objective impossibility for the controllers, for the BSU (Bird Strike Unit), and the pilot (whose liability was claimed by the defendants as a co-cause of the event, or as the exclusive cause of the event itself), to sight in a useful time (and then in a time compatible with a rejected take-off) the approaching flock. This point will be further examined hereafter.

However, with reference to the elements of the law relevant to this study, the Court has, *incidenter tantum*, agreed with the principle - not held in case-law, moreover when applied to the aeronautics industry - according to which the evidence by the operator of having precisely complied with “*the technical measures foreseen by laws or regulations*”, excludes the “*possibility to assess the appropriateness of these measures*” and with it the presumption of the liability of the party, also when it carries out a dangerous activity³. Therefore, once identified the legal and technical norms in force for bird strike prevention (all referring to the airport operator) and the air traffic controllers' duties provided for by technical law and regulation, for what concern taking off and landing, the evidence of having adopted these measures and having complied with all the procedures foreseen, excludes any strict liability and the judge cannot, and shall not, make any assessment on the appropriateness of these norms for the purpose of preventing the event. This principle is confirmed in various parts of the sentence, namely:

With reference to Air Traffic Controllers (page 53): “the TWR could not report to the pilot the presence of birds because this is not provided for by any norm or procedure (see attachment 17,⁴ tasks and duties of ATS services, with particular reference to TWR). If it had to intervene, it shouldn't have reported to the pilot the presence of the birds, but, according to the procedure in force (on this point see the provisions adopted by the Ministry of Infrastructures and Transport - General Directorate for civil aviation; Final Report by commanding officer Currado annexes from 23 to 32)⁵ it should have been warned by the competent airport operator staff on the runway un-serviceable due to the presence of birds, suspending the taking offs and *landings or revoking, but only if not yet initiated, the clearance to take-off; in this latter case, when the taking off has already initiated, the TWR should absolutely keep silent*” (author's note irrespective of the possibility of sighting, or of the actual sighting of the danger). With reference to airport operator: “In the case of the BSU, positioned at point Z of the map, we can agree that it should have, in first place, see the

seagulls (we remind the light condition at that moment), interpret their intentions (it is difficult believing that all the seagulls of the port cross the runway in that particular area), calculate their trajectory, and assess the risk, it should have then call the TWR to declare the runway unserviceable of the airport, and only then the controller, getting in contact with the pilot, should have suspended the taking off; as a matter of fact, the BSU does not have at disposal an aeronautical radio ground/on board/ground working on earth frequencies, but only a radio on terrestrial frequencies (and this is appropriate: see on the topic the provisions adopted by the Ministry of Transport - Directorate General of the civil aviation, attachments from n. 23 to n. 32 to the final report of 1° level of the commanding officer Currado), that is the only possibility at the unit's disposal, irrespective of the number of its members. Every other assumption gives rise to very confused scenarios, which are not compliant with flight safety standards."

The Court concludes as follows: *"Even if the seagulls had been seen in the moment they appeared, the very little time at disposal to develop the information (i.e. they are on a collision route), the position (and speed) of the aircraft, the risk of worsening the situation, have rationally precluded any action, that, as said, was not foreseen (on the contrary is excluded) by the ICAO regulation and that, however, even if hypothetically taken, wouldn't have led to any different conclusion"*.

Consequently, the exam of the previous paragraphs allows to state that the Court has transcended the dangerous principle (which is not new in the national legislation framework) established by the Cassazione with sentence n. 6828 / 2010, that had assigned to the airport controllers a role of "grantors", by imposing on them the obligation not only of complying with the ICAO regulation but also of integrating such regulation with "prudence, cautiousness and diligence". Therefore, the mere evidence of having complied with the procedures shouldn't have (and in the case of the accident of Monte dei Sette Fratelli, has not) allowed the controller of being held not liable.

The reconciliation between the technical and the legal norm - in favor of all the airport operators- seems to have been appropriately assessed by the first section of the Genoa Court of Appeal.

Although the relevant regulation under exam does not include, *ratione temporis*, the art. 733 bis of the Italian Navigation code, it is useful to remind that the legislator, in 2014, acknowledged the conflict - not only potential - between the technical and the legal norm, tracing back "the tasks, the functions and the operational procedures of the cabin crew, the military staff and other staff involved when providing air navigation services for the general traffic", to the provisions "of the EU legislation, as well as to the national technical rules adopted by the ENAC according to art. 687 I° co. and 690 I° and II° paragraphs, and to operational manuals of the service suppliers of the air navigation, military aeronautics and air operators".

In conclusion, with reference to this point, the appeal judgment, also on account of the authority of its rapporteur, becomes very relevant in the special jurisprudential framework; however, it is impossible not to consider that the Court did not seize (or did not want to seize) the opportunity to issue the final judgment establishing that Air Traffic Controllers are unrelated with the bird strike matter. And indeed, although the above reported paragraphs surely represent a useful element to define the limits of the responsibilities of the operator clarifying that, in some circumstances, neither the legislator, nor the Court can substitute an assessment on the appropriateness of the procedures that has already been made by the technical legislator. It would have been better if the Court had take a clear position on the lack of Enav's capacity to be sued.

It has instead opted for the application of the principle of the proceedings of the most liquid reason (“*ragione più liquida*”), that allows the judge to examine a motive of merit susceptible of granting a final judgment, also in presence of a preliminary question like that presented by ENAV with reference its own lack of the capacity to be sued. In a nutshell, the jurisprudence of legitimacy (reflected in the decision by the Court of Genoa) has stated on this matter that, if the case can be decided in the merits on account of a circumstance of fact that can be immediately ascertained, for reasons of procedural economy and speed, the judge can choose to follow this procedure omitting to adjudicate on non-functional preliminary issues.

Returning to the exam of the reasons of the decision, it is worth highlighting that the Court has affirmed that carrying out a dangerous activity leads to a presumption of liability (and not of fault) and then the aetiologic nexus between carrying out the activity and the damage shall exist and shall be demonstrated by the damaged party (page 44 of the sentence). The Court has established, that the presumption of liability works only when the operator has already adopted techniques *different* from those provided for by law or regulation. The Court continues, drawing from well consolidated principles, confirming that, in presence of an efficient cause that can, alone, make the event happen, the above mentioned nexus is cut, and the investigation on the omission of the required measures to be taken by the airport operator according to art. 2050 of the Italian civil code becomes irrelevant. The Court has deemed that, in the case under exam, there are several factors able to cut the casual nexus. Among these, without entering into details, for the sake of brevity, the reduced time for sighting by both the tower and the strip operators, and the weight of the aircraft at the moment of taking off (that, also if the pilots had seen the flock, wouldn’t have allowed a secure rejected take-off).

In the opinion of the author of this study, there is need to carefully consider the intention to classify the activities carried out by the main defendants (Airport controllers and Airport operator) among those regulated by art. 2050 of the Italian civil code, to demonstrate the impossibility to classify, *a priori*, among these activities the one carried out by the airport controllers.

And in fact, although the jurisprudence has left margin to different interpretations, there are several reasons that lead to reasonably exclude the applicability of the mentioned art. 2050 of the Italian civil code to the aviation activity in general and, all the more, to that of the Air Traffic Control. In particular, this statement is supported by a not recent pronouncement on this topic, that establishes as follows: “*The legislator does not consider air navigation as a dangerous activity, it cannot be deemed (for its nature, characteristics of the instruments used or its particular harmful potential) objectively dangerous, considering that it concerns a mean of transport widely diffused and considered, compared to others, with a low level of risk, in abstract and in general*”⁶. Therefore, in the opinion of the author of this study, the activity auxiliary to the effective navigation, such as Air Traffic Service, cannot, all the more, be considered dangerous, and this short but significant illustrative paragraph of an authoritative doctrine is certainly to be agreed with: “*not specifically for the intellectual and not directly practical character of the activity, but for the fact that it is a question of complying - with due diligence, cautiousness and prudence - with procedures broadly codified in detail and applied since long*”⁷.

There is need to highlight, indeed, that whether the nature of an activity is dangerous or not, is an assessment to be made *ex ante*, reflecting on the harmful potential, with reference to the likelihood (and not to the mere possibility) that the damage occurs, and not with reference to the extent and kind of consequences that can arise when the activity is *carried out negligently* (*ex multis*, Cass. n. 2220 del 28.2.2000).

The jurisprudence has clarified that the “air navigation” can be considered dangerous according to art. 2050 of the Italian civil code when it is carried out in conditions of “abnormality” with respect to some elements relating to its scheduling (*i.e.* “flight plans, security conditions, etc...”) (Cass. n. 10551/02). In the opinion of the writer, in a case like that herein examined, where every procedure has been held and there weren’t deviation (the renown of the bird strike phenomenon at the Genoa airport, the full compliance by the all operators involved, with the relevant technical rules, on both the use of the dissuasion instruments and the alarm procedures), the Court has not properly considered these elements so to exclude the applicability of art. 2050 of the Italian civil code. In substance, it is possible to state that the *bird strike* prevention program - operating since 1997 and today implemented - have strict procedures to be followed, which make neutral the potential danger that could arise from a classification of the nature of the activity of air navigation, and all the more, of Air Traffic Service.

Since the high standardization of the procedures is a key element of all the phases of the air navigation and, as far as this case is concerned, of the activity carried out by the flight controllers, the wish is that the jurisprudence takes into consideration this element to reshape the correct application of art. 2050 of the Italian civil code to the air navigation.

Focus on the competences of air traffic controllers on the topic of bird strike: nonexistence

The services provided by ENAV can be summarized as follows⁸:



The functions relevant to the present case shall be examined in detail: (a) “Air traffic services” e (b) “Aeronautical information services”.

Air traffic services

The services provided and better described in the rules hereafter reported, do not assign the provider the task of meeting any requirement of the aircrafts in flight, but they clearly and specifically define the competences of the air traffic controllers in order to create - also at international level, for consistency reasons - standard procedures which cannot, and must not, result in inconsistency or discretion.

In order to make them easier to consult, the relevant rules are fully reported:

>> L. 665/96 : “2. *The Entity is in charge, in particular, of the organization and provision of the following services: a) air traffic services, that is the service of control of the air circulation, the service of flight information, the advisory and alarm service*”.

>> Art. 691 bis Italian navigation code “*Provision of air navigation services: the air navigation services, as well as the preparation of the obstacle chart, are provided by ENAV S.p.A., a public company, for the air spaces and the airports under its competence. ENAV S.p.A., under the supervision of ENAC and acting in collaboration with the airport operator, regulates and controls, for the airports under its competence the movements of the aircrafts, of other means and of the staff on the maneuvering area and grants the orderly movement of the aircrafts on the aprons....*”

>> Art. 2.2 of the annex to ICAO 11⁹⁻¹⁰, named “Air traffic services” (ATS), identifies the tasks (“objectives”) of the air traffic controller¹¹:

1. Prevent collision between aircrafts;
2. Prevent collision between aircrafts on the maneuvering area and between aircrafts and obstructions on the same area;
3. Accelerate and maintain an expeditious flow of the air traffic;
4. Provide useful warnings and information for a safe and efficient flight conduct;
5. Make the competent authorities aware of the fact that an aircraft needs search and assistance, and support such authorities according to the needs.

The ICAO Doc. 9426 subordinates to the density of the air traffic the opportunity to establish or not a specific ATS service among those illustrated in the above mentioned art. 2.2 Annex ICAO 11. In particular, the Air Traffic control service, (objectives a) and b)), is established at the airports with a high number of aircraft movements, so to avoid that pilots hold the liability for separating the aircrafts in flight, both arriving and departing, and in the traffic¹², circuit, as well as to prevent the collision between the aircrafts and the obstructions present on the airport maneuvering area; liabilities and tasks that, therefore, when there is no ATS service, are assigned only to the pilot. When the Air traffic Control Service is provided, the ICAO regulation defines in detail the tasks assigned to the control tower:

>> ICAO Doc. 4444/Rac 501, Part. V “Aerodrome Control Service”:

Function of Aerodrome Control Tower:

General

Aerodrome control towers shall issue information and clearances to aircraft under their control to achieve a safe, orderly and expeditious flow of air traffic on and in the vicinity of an aerodrome with the object of preventing collision(s) between:

- a) *aircraft flying in the aerodrome traffic circuits around an aerodrome;*
- b) *aircraft operating on the maneuvering area;*
- c) *aircraft landing and taking off;*
- d) *aircraft and vehicles operating on the maneuvering area;*
- e) *aircraft on the maneuvering area and obstructions on that area.*

Examining the above mentioned rule, the following conclusions can be drawn:

When an Air Traffic Control Service is provided, the separation between the aircrafts in flight is under the competence of the “Aerodrome control tower”; where that service is not provided, that functions are assigned to the discretion of the pilots of the aircrafts;

The separation between aircrafts and birds or other obstructions (for example, clouds, kites, etc.) present during the flight is a task that is never assigned to the Italian air traffic service provider, or to its international equivalents;

The TWR or the AFIS units shall however provide the “Flight Information Service” integrated with the aerodrome information, which depend on what has already been published by the Aeronautical Information Service.

Any structure in charge of Air Traffic Control (in Italy, ENAV), in order to provide this service, shall carry out very precise activities, that are preliminary and required (Annex 11 art. 3.3). These are:

- a) Obtain the information concerning the movements foreseen for every aircraft (for example, flight plans) and their variations, the updated information on the development of every flight;
- b) Determine, from the information received, the positions of the known aircrafts, one with respect to the others;
- c) Issue authorizations and information aimed at preventing the collisions of the aircrafts under its control and accelerate and maintain an orderly traffic flow;
- d) Agree with the other units (author’s note: for example, other air traffic controllers) on the required authorizations.

The rules illustrated above clearly establish that ENAV (and, in general, all the operators, at international level, providing “Air Traffic Control Services”) is in charge of maintaining the separation of heights and routes between the known aircrafts (not all the aircrafts then, but only those which can communicate with the control tower, and that this latter knows on account of the coordination with another structure of air traffic control services) and between these latter and the obstructions present on the maneuvering area (the part of the airport used for taking-off, landing and the movements of the aircrafts on the grounds, aprons excluded)¹³.

Art. 2.2 Annex ICAO 11, already mentioned, specifies that the air traffic service has the objective of preventing collisions: (a) in flight, between aircrafts and, (b), on the maneuvering area (on ground) between aircrafts and between aircrafts and obstructions.

The air controller then:

- 1) Has the task of separating the aircraft from the obstructions only for what concerns the maneuvering area (on the ground), but not for all the air space under his competence.
- 2) Does not have the task of “sighting” the obstructions, since this task is assigned to other, clearly identified parties.

So, the air traffic controller has undoubtedly the task of preventing the collisions between the aircraft and the obstructions present on the maneuvering area, but this - in the writer’s opinion - does not mean that the air traffic controllers must sight these obstructions and proceed to make the organization adequate to this task. And indeed, the identification and following communication of any obstructions on the maneuvering area to the control tower - these obstructions could be, for example, a deer (likely visible from the tower) or a screw-driver (objectively impossible to sight for the control tower operators) - are in charge to the airport operator, who shall verify the accessibility of the runway (Annex 14, among others) and is liable for it, and to the pilot,

who must verify in person, and irrespective of the other parties, the accessibility and safety of the area he is going to run along.

The “*obstacles*” intended in the aeronautical sense, and above all “flight safety” purposes, which are under the responsibility of the provider according to art. 2.2 L. 665/96, are illustrated in art. 709 of the Italian code of navigation¹⁴. The annex ICAO 4 defines the obstacles as “*charting objects*”. Consistently with the mentioned art. 2.2. Annex ICAO 11, the art. 691 *bis*, III co., of the Italian code of navigation, also previously mentioned, by regulating the Air Traffic Service, foresees the control, operated by ENAV, of the “*aircrafts and other means, and of the staff present on the maneuvering areas*”

In claris non fit interpretatio! The tower operators must be “organized” in order to meet their obligations, among which keeping separate the aircrafts or the aircrafts and the obstructions if these latter are on the maneuvering area (and then on the ground and not in flight). The obligation of the separation is not equivalent to, nor presuppose, the sighting obligation, which is on the contrary in charge to other, well specified parties.

Aeronautical information service

The rule examined until this point, defines the limits of the competencies assigned to ENAV and, specifically, to the tower operators, excluding that they are entrusted with the obligation of the separation of the aircrafts from any obstacle, in the widest sense of this word, and not technical, and irrespective of its collocation into the space.

Furthermore, it seems appropriate, in this context, to provide a clarification on the type of information that the controllers must provide to the pilots.

Chapter 8 - par. 8.1 - of Doc. 4444-rac/501 details the “*essential information*” to be provided to the pilots, specifying - even before proving the list at point 2 - that these information relate only to “*the movement area or any facilities usually associated therewith*”, excluding thereby that the list of information is always, and in any case, comprised in the communications to be provided to the pilots. Therefore, the air traffic controller communicates to the pilot the information listed at point 2 only if recognized on the mentioned areas (runway, maneuvering area, taxi ways) and only if these areas are involved in that taking-off or landing, as provided for by the repeatedly mentioned art. 2.2.

(b) Annex ICAO 11, these rules shall be naturally coordinated with. Furthermore, art. 8.3 establishes that the above mentioned information shall not be provided when it is known that the aircraft already has received all or part of the information from other sources, above all when they are well established and as such are included, as specified in the following “*Note*”, in the so called “*Notam*” (“*Notice to Air Man*”) and in the permanent publications (AIP)¹⁵, that the pilots must mandatorily consult when planning the flight.

It is therefore important to highlight that the air traffic controllers must provide the *essential information* within the above mentioned limits, but they are not the originators of the information, but only the mean through which this information arrives to the pilots. And indeed, as already reported, with reference to the “obstructions”, the air traffic controllers are not entrusted with the task of detecting them (and so of becoming the source of such information), but have the duty of transmitting the information, they have received from other sources, concerning their presence on the maneuvering area, within the limits described above.

On this point the major regulating authority on the matter has issued a clear pronouncement, that is the ICAO, that at § 2.2.1.1 of Doc. 9426 states the following:

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“The fact that FIS has been entrusted to ATS, even though the information emanates or is generated by other ground services (airport operators, the MET and communications (COM services), is due to the fact that ATS is the ground service which is most frequently in communication with the pilot. From this it follows that, while ATS is responsible for the transmission of that information, the responsibility for its initiation, accuracy, verification and timely transmission to ATS must rest with its originators”,. In addition, there is need to consider that the originators of the information are the pilots themselves who are required to transmit directly to ATS the reports in flight (so called, AIREP and AIREP Special) about the situations and conditions (weather, presence of birds, etc..) that represent information to be transmitted to other aircrafts by FIS (Flight information service).

Art. 8 of the mentioned doc. 4444 went through an adjustment which it is worth to be reported. In particular, the text in force in 1985 provided, at (g) an incidental sentence, appropriately cancelled in the following version. On the information to be communicated to the pilots, this sentence established as follows: *“g) presence of birds, observed, or reported, on the ground or in flight on the airport area or in its vicinity”*. In the subsequent versions of this text, reference to an “observation” of an obstruction, have been eliminated.

Conclusion

Summarizing the notions examined in this document and applying them to the case under exam, what should have occurred according to the competencies assigned is the following: if the BSU, entrusted with this task by the airport operator, had sighted in time the forthcoming flock of birds arriving from Porto Petroli, and had assessed the relevance of the trajectory of the flock with respect to the air space in the airport vicinity, they should have timely state the runway or aerodrome unserviceable by the control tower. There is need to consider that the simple communication of the presence of a forthcoming flock shouldn't have had, alone, any significance, since the information is already known and permanently published in AIP. What is relevant instead is the consequence of the sighting in concrete, with respect to the accessibility and possibility to use or not the airport infrastructures and the near air space, which is a specific obligation of the airport operator. Whether the airport operator has sighted the flock, does not obviously affect the obligation of the pilot, whose task is to examine the air space and then sight the danger represented by the presence of groups of birds. The pilots should have then assessed their trajectory with respect to the intended maneuvering and take the relevant measures. The only task of the control tower was, in the first case, acknowledge the declaration of unserviceable by the airport operator and immediately suspend the operations; in the second case, acknowledge the communication by the pilots that they would have delayed the taking off maneuvering (if not initiated) or rejected taking off, if the run had already initiated and they had not reached the V1 yet. What has been said about the pilots is absolutely consistent with the fact that they daily carry out activities in thousands of airports, where, even in presence of a bird strike risk, the ATS is not provided.

It is worth to remind that the expert appointed by the Court has however specified that, in the situation actually occurred, the controllers, even if they had sighted the flock, should have remained silent (precise words) in any case, since this communication, when the taking off had already begun would have been unhelpful, if not harmful, resulting in a source of distraction for the pilot.



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In conclusion, the Air Traffic Controller (like any other operator) cannot be entrusted with competencies and duties not specifically foreseen, both for what concerns the active competencies (*i.e.*, bird sighting), and the passive ones (*i.e.*, communication of information).

The already mentioned ICAO deals with the importance of defining in detail the tasks of the air traffic controllers, and in doc. 9426 §1.2.3 reports the following: “ since ATS is normally the only ground service which is in direct contact with aircraft in flight, care must be taken in assigning additional responsibilities emanating from other national requirements to ATS (*i.e.* diplomatic authorization to operate over the territory of a State), operational supervision of flights, etc. (*i.e.* national security), so as not to dilute the service provisions of ATS to a point where it will become difficult for controllers to draw a clear line in distinguishing the different capacities in which they are expected to act. In general, experience seems to indicate that the less **additional responsibilities that are given to ATS the better it is able to meet its primary objectives**”; and yet: § 1.2.4 “ Similar considerations apply with respect to the provision of information by ATS to aircraft not directly derived from the activities of ATS (e.g. information on the status of other than ATS facilities and services, meteorological information, etc.). **Such information should be provided to ATS for onward transmission in a manner and form which requires the least amount of interpretation and/or responsibility for the accuracy and timeliness of the information in question**”.

In the ICAO rule, although it is very detailed, there is no mention to the obligation for the air traffic controllers to sight the birds while the same obligation is imposed (first of all) on the pilot and then on the airport operator. This because the regulator has evidently considered that, also in case of sighting of birds by the air traffic controller, the transformation of this factual element in an aeronautical information in the sense indicated by the rule, is substantially impossible to provide in order to “require the lowest possible level of interpretation” and the highest “accuracy and timeliness” ((see. docc. 9426 par. 1.2.3).

Finally, a simple consideration can clear up any doubt: taking offs and landings are carried out and authorized by the control towers (all over the world) also with no visibility (fog, darkness, etc.). Indeed, the air traffic controllers are able to adopt all the precautions, so that, during these phases, there are no collisions between aircrafts or between aircrafts and obstructions, according to the mentioned Annexes ICAO and the code of navigation.

The assessments included in this article represent the author’s personal opinion and cannot be in any case attributed to ENAV S.p.A. or to parties other than the author herself.

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¹In particular, on the flight plan, the technical consultants of the Court have noted that: 1) the aircraft has been authorized to the cargo flight for the transportation of two heavy Ansaldo turbines, in strict compliance with the Flight Manual; 2) the aircraft has been authorized to arrive with a crew of 8 people, while it left with even 20 people; 3) the loadsheet reported a weight at take-off of 370.125 kilos, while according to experts’ reports it was of 382.000 kilos; 4) the crew had not gone through the flight documentation, in particular of the AIP publication reporting on the permanent bird strike risk

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²Sentenza Tribunale di Genova del 23 agosto 2001 (TNT case)

³Cass. N. 3022 , 2 March 2001, mentioned in the judgment in exam

⁴The annex to the experts' report to which the Court refers, indicates legislation sources of technical nature relating to the tasks and the objectives of the air traffic services, and namely: Annex 11 ICAO (ATS); ICAO doc. 9426 (ATS Planning Manual); ICAO Doc. 4444 (Air Traffic Management procedures for ATS).

⁵ENAC and Ministry of Infrastructures and Transport aimed at regulating the airport service of bird scaring, and reports and orders of the same administrations from 16/7/1980 to 27/5/1997.

⁶Cass. n. 10551 del 19.7.2002; conf. Cass. 11234 del 13.11.1997; Cass. n. 6175 del 20.6.1990

⁷(Guido Camarda, "La responsabilità per l'esercizio di attività pericolose nel campo aeronautico", in Rivista di diritto dell'economia, dei trasporti e dell'ambiente, II/2004).

⁸From technical report by Dott. Michele Bufo (Enav's consultant in the proceeding of appeal)

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¹⁰International Civil Aviation Organization, whose members are almost all the countries of the world, established with the Chicago convention on 7 December 1944, (implemented in Italy with the legislative decree - D.lg. 6 March 1948, n.616 and in force since 8 June 1948) and modified with the subsequent Montreal Protocol of 10 May 1984 (implemented in Italy with the Law 29 January 1986). The ICAO norms establish the general Standards, which are actually unbreakable and the recommended practices.

¹¹Reported as indicated in the related ENAC regulation, "Air traffic services" which has implemented in Italy the provisions of the ICAO Annex 11.

¹²ICAO Doc. 9426 (ATS Planning Manual), §. 1.5.2; ICAO Doc. 4444/RAC 501, Part. V "AERODROME CONTROL SERVICE".

¹³Definition of "maneuvering area" present on ENAC website, glossary.

¹⁴Art. 709 cod. nav. : "Obstacles to air navigation are the buildings, the tree plantations, orographical reliefs and in general the works that, by virtue of their destination in use, interfere with surfaces related, as defined by ENAC in its own regulation. The constitution of fixed or mobile obstacles to air navigation is subordinated to the authorization by ENAC, with a previous coordination with the Ministry of Defense."

¹⁵Doc. 4444 par.7.5.3.: "the essential information on the conditions of the airport shall be provided to every aircraft except when these information can be deemed as already known, since received from other sources"; NOTE: the other sources are NOTAM, dispatch via ATIS, presence of proper warning signals."

Convention on International Interests in Mobile Equipment as applied to Aircraft Objects.

Note on Its Entry into Force in Spain

Luis Vega-Penichet*

The Convention on International Interests in Mobile Equipment as applied to aircraft objects (“CTC”) will enter into force in respect of The Kingdom of Spain on 1 March 2016¹.

In this respect, Spain has lodged a number of Declarations both under the Convention² and under the Protocol³. Part of the Declarations issued with respect to the Convention were made at the time of its accession to the Protocol⁴.

Considerations in respect of Spain’s declaration

The consequence of some of said declarations being subsequent declarations

According to the UNIDROIT web page⁵, declarations in respect of Articles 39.1 (a), 39.1 (b), 40 and 53 of the Convention constitute subsequent declarations and will thereby, enter into force on 1st June 2016⁶.

The Resolution from the General Directorate for Registries and Notaries, dated 29 February 2016, to which I would later on refer, confirms said nature of the declarations⁷.

The consequences of this seem clear, at least at the outset. Until they become enforceable⁸, the CTC will be applicable in Spain as if such declarations shall not have been made⁹. The Official Commentary to the Convention On International Interest In Mobile Equipment And Protocol Thereto On Matters Specific To Aircraft Equipment (hereinafter “OC”¹⁰) ratifies this conclusion in section 4.342¹¹ and in fact, said conclusion, which appears evident from a general point of view, is reinforced in respect of the declaration affecting Article 39.1 (a) by the contents of Article 39.3¹².

However, with respect to non-consensual rights or interests (Article 39.1 (a)), Article 39.4 of the Convention -which specifically allows non-consensual rights or interests to gain priority even over registered international interest- applies only when the Contracting State has made a declaration in such respect¹³.

The reason behind this is clearly explained by the OC, section 2.213:

2.213. Priority is given only if the non-consensual right or interest is covered by a declaration deposited prior to registration of the competing international interest (Article 39(3)). The purpose of this provision is to alert registrants of international

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interests and prospective international interests to the fact that, contrary to the normal priority rule in Article 29(1), such interests will be subordinate to non-consensual rights or interests covered by a Contracting State's declaration. However, under Article 39(4), a Contracting State may at the time of ratification, etc., declare that a non-contractual rights or interests covered by a declaration under Article 39(1)(a) is to have priority even over an international interest registered prior to the date of such ratification, etc. This provision was originally inserted to meet the concern of some States that, since they could not make a declaration under Article 39(1)(a) prior to ratification, non-consensual rights or interests declared upon ratification would be subordinate to international interests already on the register by virtue of earlier ratification by other Contracting states (i.e. States where the debtors were situated at the time of the agreement), and this prejudice to non-consensual rights or interests would become more acute for a State the later it ratified. Article 39(4) enables a Contracting State to ensure that its non-consensual rights or interests retain the priority they enjoyed under national law even vis-à-vis international interests already registered. A Contracting State's declaration may also be expressed to cover categories of non-consensual right or interest created after the deposit of the declaration (Article 39(2)).

This declaration lodged by The Kingdom of Spain pursuant to Article 39.1 (a) specifically provided that such non-consensual rights or interests shall have priority over registered international interest, whether they were registered before or after the accession of the Kingdom of Spain.

However, as the referred declaration is considered a subsequent declaration, it will only apply starting 1st June 2016.

Accordingly, from 1st March 2016 to 31 May 2016, the CTC will apply in Spain without taking into account such subsequent declaration. This issue is of relevance only for that limited time, but the consequences may be significant as during said period, non-consensual rights may not gain priority in respect of registered international interests¹⁴.

The referred consequences may also be limited by the fact that the priority of non-consensual rights and interests derives from national law and not from the Convention (OC section 2.212) and hence they are not entitled to recognition in another Contracting State, except to the extent so provided by the rules concerning conflict of law in that State.

In respect of the declaration pursuant to Article 39.1 (b) of the Convention -which will be commented in more detail further below-, the situation is similar.

However, as the arrest or detention of aircraft is an action to take effect within Spanish territory, application of internal law shall suffice to produce that same effect and, accordingly, the effects of the subsequent enforceability of the declaration, in that respect, would presumably cause minor consequences only (in theory, however, registered international interest will have priority during that period of time and a conflict may arise¹⁵).

In respect of the declaration pursuant to Article 40 of the Convention, the situation is

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more or less the same. Initially, such non-consensual rights or interest shall not be registrable until 1st June 2016, with the consequence that any other interest registered from 1st March 2016 to 31 May 2016 will gain priority over them, albeit such gained priority, shall not be limited to such period but will instead extend to the whole life of the registered interest.

In respect of non-registered international interests, priority will be determined according to Spanish law -OC section 4.282– and hence no difficulties would exist.

In respect of the declaration concerning Article 53 of the Convention, the commented effects would imply that during the referred period, there would be no competent Spanish court relevant for the purposes of Article 1 and Chapter XII of the Convention.

Declaration lodged in respect of article 39 (1) (b)

Under Spanish law, it is possible to detain and retain an aircraft, for a certain debt -it is not necessary that the debt correspond exclusively to public services--, but there is no right of realization of the asset (or any other preference different from the simple right of retention) to collect the credit. Since the period during which an aircraft is detained/retained may be prolonged, the owner may decide to pay the debt -if the debtor has not paid it– in order to recover the asset (thereby becoming the successor and new holder of the credit vis-à-vis the debtor).

Further, the creditor that shall have detained the aircraft may, through the corresponding proceedings, either as a precautionary measure or as enforcement of the judgment, arrest the aircraft and, in its case, with the intervention of the court, dispose of the aircraft to collect --with the proceedings-- the amount owed to it.

Under Spanish law, however, in my view, it is not possible to detain/retain/arrest an aircraft for debts that have nothing to do with the services rendered to the debtor, unless it is an aircraft (or any other asset) owned by the debtor and the creditor is able to arrest it through a court order (for debts due to it for whatever other concept).

Accordingly, in my view, the so-called “fleet lien” is not possible under Spanish Law¹⁶.

In this respect, it might look surprising that Spain has maintained the reference to “... another object ...” in the declaration. As mentioned in section 4.276 of the OC “... A Contracting State should be careful not to make a declaration under Article 39 (1) (b) covering services in relation to an object other than that detained unless the law of that State permits it.”

I believe, however, that the declaration made by Spain under Article 39.1 (b) pretends to cover those cases where an aircraft (owned by the debtor) may be arrested in Spain through a court order, to make it liable (as any other asset of that debtor, including other aircraft owned by said debtor) for unpaid debts of the owner/debtor, in which case, the declaration will be correct.

*MISCELLANEOUS MATERIAL OF INTEREST***Declaration lodged in respect of article XIX (1)**

This declaration designates the “Registro de Bienes Muebles” (the Moveable Property Registry¹⁷) as the Spanish entry point and seems to configure it as an “authorizing entry point”.

Former legislation, specifically, the Sixth Additional Provision to Royal Decree 384/2015 of 22 May¹⁸, approving the Regulation on matriculation of civil aircraft, already indicated that the said registry was to be the entry point in respect of CTC matters, but did not expressly indicate if it was an authorizing or a direct entry point (the provision - contrary to the declaration- seemed to have opted for a direct entry point more than for an authorising entry point, as it provided for the registrar to record, for example, the reservation of the international priority at the IR).

Said provision, is quite imprecise and certainly does not comply with CTC regulation. Although it is correct in the sense that it recognises the superiority of the international legislation from the outset, the procedure it foresees for registering international interests contains conditions that contravene the CTC system¹⁹. For example, for the recording of an international interest, it requires prior registration (or the notation) of the interest in the Moveable Property Registry²⁰.

Last 29 February 2016, the General Directorate for Registries and Notaries adopted a resolution approving the form to request the authorization code from the Moveable Property Registry (thereby definitively resolving the existing doubt as to the nature of the entry point²¹). The form is available through the Moveable Property Registry’s web page²².

Declaration lodged in respect of article XXX (1)

The Kingdom of Spain declares that it will apply Article XIII of the Protocol (Deregistration and export request authorization -IDERA--) and that the provision contained in the Spanish declaration under Article 54(2) of the Convention will not apply, that is, the IDERA could be exercised without leave of the court.

The form of IDERA was published as an Annex to the Instrument of accession to the Protocol (Spanish Official Gazette of 1st February 2016).

The referred resolution from the General Directorate for Registries and Notaries, dated last 29 February 2016, also approved the IDERA form, which is now also available through the Moveable Property Registry’s web page²³.

Declaration lodged in respect of article 54.2

Spain declares that all remedies available to the creditor under the provisions of the Convention, the exercise of which is not subordinated by virtue of such provisions to a petition to the court, may be exercised only with leave of the court.

The purpose of this is to maintain invariable the Spanish system as applied today (the novelty, in this respect, has been the possibility of enforcing the IDERA without leave of the court).

¹Spain adhered to the Convention on 28 June 2013 by virtue of an accession instrument executed on 20 June 2013 --the text of the Convention was published in the Spanish Official Gazette (BOE) of 4 October 2013, a correction of errors being published in the BOE dated 21 February and 31 July 2015-- and to the Protocol on 27 November 2015, by an accession instrument executed on 13 November 2015 --the text of the Protocol was published in the BOE of 1 February 2016--.

²The declarations lodged under the Convention consists of:

Declaration pursuant to Article 39.1 (a)

Pursuant to Article 39.1 (a) of the Convention, the Kingdom of Spain declares that all categories of non-consensual rights or interests which under Spanish law have and will in the future have priority over an interest in an object equivalent to that of the holder of a registered international interest shall to that extent have priority over a registered international interest, whether in or outside insolvency proceedings, and whether it was registered before or after the accession of the Kingdom of Spain.

Declaration pursuant to Article 39.1 (b) Pursuant to Article 39.1 (b) of the Convention, the Kingdom of Spain declares that nothing in the Convention shall affect its right or that of any entity thereof, any international organisation in which the Kingdom of Spain is a Party, or other private provider of public services in the Kingdom of Spain to arrest or detain an object under the Spanish law for payment of amounts owed to the Kingdom of Spain or any of the aforementioned entities, such organisation or provider directly relating to those services in respect of that object or another object.

Declaration pursuant to Article 40

The Kingdom of Spain declares that the following categories of non-consensual right or interest:

a) rights of a person obtaining court order permitting attachment of an aircraft object in partial or full satisfaction of a legal judgment, b) liens or other rights of a State entity relating to taxes or other unpaid charges shall be registrable under the Convention as regards any category of object as if the right or interest were an international interest and shall be regulated accordingly.

Declaration pursuant to Article 52

Spain indicated that in the event that the Convention were to be applied to Gibraltar, Spain wishes to make the following declaration: 1. Gibraltar is a non-autonomous territory for the international relations of which the United Kingdom is responsible and which is subject to a decolonisation process in accordance with the relevant decisions and resolutions of the General Assembly of the United Nations. 2. The authorities of Gibraltar are of a local nature and exercise exclusively internal competences which have their origin and their foundation in the distribution and attribution of competences performed by the United Kingdom, in compliance with its internal legislation, in its capacity as sovereign State on which the mentioned non-autonomous territory depends. 3. As a result, should the Gibraltarian authorities participate in the application of this Convention it will be understood as effected exclusively within the scope of the internal competences of Gibraltar, and it cannot be considered to produce any change whatsoever in relation with what was established in the two preceding paragraphs. 4. The procedure established by the regime relating to Gibraltar authorities in the context of certain international treaties agreed upon by Spain and the United Kingdom on 19 December 2007 is applicable to this agreement. 5. The application to Gibraltar of the present Convention cannot be interpreted as recognition of any rights or situations involving matters not included in Article 10 of the Treaty of Utrecht of 13 July 1713, signed by the crowns of Spain and Great Britain.

Declaration pursuant to Article 53

The Kingdom of Spain declares that all courts and competent authorities in accordance with the laws of the Kingdom of Spain will be the relevant courts for the purposes of Article 1 and Chapter XII of the Convention.

Declaration pursuant to Article 54.2

Spain declares that all remedies available to the creditor under the provisions of the Convention, the exercise of which is not subordinated by virtue of such provisions to a petition to the court, may be exercised only with leave of the court.

³The declarations lodged under the Protocol consist of:

Declaration pursuant to Article XIX (1) The 'registro de Bienes Muebles' will be the entry point which will authorize the transmission to the International Registry of the information required for registration in respect of airframes and helicopters registered in the Kingdom of Spain or in the process of registration, and may authorize the transmission of such information to the Register in respect of aircraft engines.

Declaration pursuant to Article XXIX Spain repeated in respect of the Protocol the declaration it made to the Convention in respect of Gibraltar (please refer to same for specific content).

Declaration pursuant to Article XXX(1)

The Kingdom of Spain declares that it will apply Article XIII of the Protocol, and in this case the provision contained in the Spanish declaration under Article 54.2 of the Convention will not apply.

⁴These refer to Articles 39.1 (a), 39.1 (b), 40 and 53.

⁵<http://www.unidroit.org/instruments/security-interests/cape-town-convention>

⁶UNIDROIT note reads: These declarations were notified to UNIDROIT by the Government of the Kingdom of Spain, as subsequent declarations pursuant to Article 57.1 of the Convention, on 27 November 2015, and in accordance with Article 57.2 of the Convention will take effect on 1 June 2016.

⁷The resolution states, in that respect "Both texts [the Convention and the Protocol] will enter into force in Spain on 1st March 2016, with the exception of the subsequent declarations to the conventional text lodged by our country in the instrument acceding to the Protocol, in respect of articles 39.1, 39.3, 40 and 53, which will only enter into force on 1st June 2016". (The reference to Article 39.3 is an error of the Resolution).

⁸Article 57.2 provides "Any such subsequent declaration shall take effect on the first day of the month following the expiration of six months after the date of receipt of the notification by the Depositary. Where a longer period for that declaration to take effect is specified in the notification, it shall take effect upon the expiration of such longer period after receipt of the notification by the Depositary."

⁹Article 57.3 provides: "Notwithstanding the previous paragraphs, this Convention shall continue to apply, as if no such subsequent declarations had been made, in respect of all rights and interests arising prior to the effective date of any such subsequent declaration."

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¹⁰Official Commentary, Third Edition by Professor Sir Roy Goode.

¹¹Section 4.342 of the OC expressly states the effect of such subsequent declaration, that replaces or modifies the earlier ones "... but no so as to affect rights and interests arising prior to the effective date of the subsequent declaration." The Official Commentary further recognises that "... This qualification is necessary to ensure the stability of acquired legal rights".

¹²Article 39.3 states "A non-consensual right or interest has priority over an international interest if and only if the former is of a category covered by a declaration deposited prior to the registration of the international interest."

¹³Article 39.4 reads: "Notwithstanding the preceding paragraph, a Contracting State may, at the time of ratification, acceptance, approval of, or accession to the Protocol, declare that a right or interest of a category covered by a declaration made under sub-paragraph (a) of paragraph 1 shall have priority over an international interest registered prior to the date of such ratification, acceptance, approval or accession."

¹⁴There is no doubt that since 1 June 2016 -when the declaration will be fully effective-- and onwards, non-consensual rights or interests will gain priority, even over prior registered interests (including any interest registered between 1 March and 31 May 2016).

¹⁵Section 2.9 of the OC refers to Article 27 of the 1969 Vienna Convention on the Law of treaties, that provides that a party may not invoke the provision of its internal law as justification for its failure to perform a treaty and provides the example of the authorities of a Contracting State that will not be able to assert against a registered international interest a lien or right of detention to secure import customs fees unless this is covered by a declaration under Article 39 or registered in the International Registry following a declaration under Article 40.

¹⁶The problematic in respect of the "fleet lien" is well explained in the Aviation Working Group web page (<http://www.awg.aero/inside/purpose/>):

"Certain air navigation and airport authorities have broad priority and detention rights against an aircraft for debts owing to that entity, including debts arising through use of other aircraft (the latter, so-called fleet lien).

The effect of such priority and detention rights is to penalise owners/lessors and financiers who neither contributed to the incurred debt nor have the practical ability to prevent that debt from accumulating. AWG believes that owners/lessors and financiers - innocent parties - should not by virtue of property rights in aircraft be made liable for navigation and airport charges incurred by operators.

The threshold question centers on the appropriate allocation of risk. AWG takes particular issue with the existence and exercise of rules that allocate risk to innocent parties, starting with but not limited to the fleet lien.

The fleet lien, including on behalf of debts owed to Eurocontrol, exists in the United Kingdom. It has recently been exercised, with litigation resulting. AWG submitted documents relating to the fleet lien in the related court proceedings. AWG was not a party to such proceedings. Fleet lien issues are also subject to litigation in Canada. An AWG - taking issue with fleet liens in general and as applied in Canada - was cited as authority by parties to that litigation.

To the extent that courts, interpreting statutory law, uphold fleet liens and similar rights, AWG believes that a legislative change to such law is required."

¹⁷As called at the International registry web page (<https://www.internationalregistry.aero/ir-web/>).

¹⁸Published in the BOE of 17 June 2015

¹⁹It could be interpreted that as long as the disposition contradicts the provision of the CTC it will not be applicable

²⁰For a detailed analysis of the said disposition, refer to the article by Teresa Rodríguez De Las Heras Ballell.

<http://www.millenniumdipr.com/ba-30-la-adhesion-de-espana-al-protocolo-aeronautico-del-convenio-de-judad-del-cabo-parte-ii>

²¹A copy of the Resolution is attached as annex 1

²²<https://www.rmercantilmadrid.com/rmm/documentosbienesmuebles.aspx>

²³Please refer to the previous footnote.

The new ICAO's CO₂ emissions standard: the first global agreement to oversee and limit the aircraft emissions.

Anna Masutti*
Najah Zeilah**

The EU Commission is glad to welcome the agreement reached in February 2016 within the International Civil Aviation Organisation (ICAO) on the first global standard to oversee aircraft CO₂ emissions, which will guide the certification of aircraft towards greater fuel-efficiency.

The new environmental measure was unanimously recommended by the 170 international experts on ICAO's Committee on Aviation Environmental Protection (CAEP), waiting for its ultimate adoption by the Governing Council.

Under the CAEP recommendation, the new CO₂ emissions standard would be applicable to new aircraft type designs as of 2020, and current in-production aircraft from 2023, with a cut-off date of 2028 for planes that do not content with the new standard.

According to ICAO estimates this programme will save up to 650 million tonnes of CO₂ in the period between 2020 and 2040.

The proposed global standard is especially stringent for larger aircraft, where it will have the greatest impact: operations of aircraft weighing more than 60 tonnes account for more than 90% of international aviation emissions. However, the standard also covers the full range of sizes and types of aircraft used today and therefore encompasses all technological feasibility, emissions reduction potential and cost considerations.

The agreement, voted unanimously after six years of international negotiations, now have to be approved by the ICAO General Assembly and officially adopted by the ICAO Council at the beginning of 2017, before entering into force.

Aviation account for around 2% of global greenhouse gas (GHG) emissions, but it had become necessary to provide to a global system to oversee or limit greenhouse gas emissions from this sector, which has a strong international character and requires a global approach to addressing emissions from international aviation.

For these reasons, in 2008 the EU tried to include the aviation sector within the EU emissions trading system (EU ETS) that represent the first - and the biggest - international system for trading greenhouse gas emission allowances, and covers more than 11,000 power stations and industrial plants in 31 countries. However, many non-EU countries opposed this, arguing it was a breach of sovereignty, and that they should not have to pay emission offsets to European governments. Finally, in November 2012 the EU agreed to stop the broader application of the EU ETS scheme to flights into or out of Europe, while the ICAO develops a global scheme.

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As mentioned, the ICAO Agreement will be brought before the 39th ICAO Assembly in September 2016 for political approval, and formally adopted by the ICAO Council in 2017.

The ICAO CO₂ standard it is based on the aircraft's performance during the "cruise" phase of flight, expressed in kilograms of fuel per kilometre of flight, which is then adjusted to account for the fuselage size. It also focuses on cruise flight performance because the cruise portion of a flight is typically when the most fuel is consumed and the majority of CO₂ is emitted.

For each aircraft type, depending on its size and weight, the ICAO scheme defines a maximum metric value (fuel burn/per flight kilometre) that may not be exceeded.

The European General Court annuls the European Commission's decision on air cargo case.

Zsófia Török*

The European Commission's decision on a price-fixing cartel (Case C.39258 - Airfreight), which was adopted on the 9th November 2010 imposing fines of 790 million Euros, was overturned by the EU General Court.

The Commission's Directorate-General for Competition held responsible 11 airlines for infringing Article 101 of the Treaty on the Functioning of the European Union, Article 53 of the EEA Agreement and Article 8 of the Agreement on air transport between the European Community and the Swiss Confederation. The investigation concerned the cargo operations only and not the passengers transport.

According to the Commission's decision, there was a single and continuous infringement on EU competition rules for a six years period. Initially, the cartel members contacted each other in order to introduce the fuel surcharge (FSC). Later, they cooperated to introduce a security surcharge (SSC) refusing to pay a commission on them. They ensured that surcharges did not become subject to competition by refusing to pay commission to their customers, i.e. freight forwarders.

Overall, 11 airlines were held responsible and the Commission imposed fines for approximately 800 million Euros. Under the Commission's leniency policy, which offers full or partial immunity to companies that provide information about a cartel in which they take part, the Deutsche Lufthansa AG and its subsidiaries did not pay any fines.

All air carriers, with the exception of Qantas, appealed the decision at the General Court, which has the competence to hear actions against the European Union institutions. The Court upheld the appellants' arguments and annulled the Commission's decision.

The Court argued that there is a contradiction between the grounds of the decision and its operational part. Furthermore, the Court held that the grounds of the Commission's decision themselves were inconsistent.

More precisely, the Court noted that according to the grounds of the appealed decision, there was a single and continuous infringement for which carriers were held responsible, whereas the operational part refers to four separate single and continuous infringements based on different routes, periods and carriers.

Furthermore, the Court argued that the national courts are bound by the decision adopted by the Commission, so the operational part of the decision must be explicit because national Courts have to understand the scope of that infringement in order to identify the liable parties and make decisions on damage claims. Therefore, the Court overturned the decision in its entirety.

The European Commission had the right to appeal against the decision of the Court of Justice until mid-February, but it gave up doing it. However, it can adopt a fully reasoned decision and re-impose fines on the air carriers, without any deadline.

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It is very important to highlight that the Court did not question the existence of the cartel and the decision was annulled solely on procedural grounds. The Court's ruling will affect actions brought in front of national courts on damage claims against the carriers that lodged the appeal. However, it has to be pointed out that the Commission's decision is still valid regarding Qantas, which cannot rely on the Court's decision since it is legally binding only for the air carriers that appealed the decision.

Decision of the European Court of Justice: Air Carriers are liable for damages suffered by employers in case of delay.

Alessandra Laconi*

Having examined the request for a preliminary ruling under Article 267 TFEU from the Supreme Court of Lithuania to explain the application of the Montreal Convention - and the related request of the Special Investigation Service of the Republic of Lithuania (STT) to award damages to be paid by the airline Air Baltic - the European Court of Justice (ECJ) has stated that the air carrier may be considered responsible for the additional costs incurred and suffered due to the delay of flight which was taken by the staff of the STT under the transport contract (case C-429/14, judgment of the 17th February 2016).

The dispute arose over the interpretation and application of Articles 19, 22 and 29 of the Montreal Convention. The panel of judges of the Supreme Court of Lithuania, which has examined the case, took a note of the fact that it was not explicitly clear whether the employer of the passengers who suffered the flight delay (STT) had the right to be refunded by the air carrier of the costs and damages suffered as a consequence of the over-14-hours delay.

Air Baltic argued that a legal person, such as the Investigation Service, may not invoke the liability of an air carrier as provided by Article 19 of the Montreal Convention. It stated, in a nutshell, that it may be held liable only in respect of the passengers themselves and not other persons, *a fortiori* when they are not natural persons and cannot therefore be considered consumers.

On the other side, according to STT's opinion, the liability of an air carrier provided for in Article 19 may be relied on by a person who (i) is party to a contract for the international carriage of passengers concluded with an air carrier and (ii) sustained damage occasioned by a delay.

By its first question, the referring Court specifically asked whether the Montreal Convention, in particular Articles 19, 22 and 29 thereof, must be interpreted as a meaning that an air carrier which has concluded a contract of international carriage with an employer of persons carried as passengers, such as the Investigation Service in the main proceedings, is liable to that employer for damage occasioned by a delay in flights on which its employees were passengers pursuant to the contract, on account of which the employer incurred additional expenditure.

As a preliminary step, the ECJ reminded that the Montreal Convention was signed by the European Community on the 9th December 1999 and approved on its behalf by the Council on the 5th April 2001, so that the examined international convention is binding in EU legal order since the date on which it entered into force (28th June 2004).

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As to the merits, applying Article 31 of the 1969 Vienna Convention on the Law of the Treaties¹, the ECJ underlined that under Article 29 of the Montreal Convention, in the carriage of passengers, baggage and cargo, any action for damages can only be brought subject to the conditions and such limits of liability as are set out therein, without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. It further provides that in any action damages are not recoverable.

In this scenario, the ECJ first ascertained whether the alleged damage comes within the scope of the Montreal Convention, recalling Article 19 of the analysed Convention, according to which carriers are bound by a general obligation to compensate for any “*damage occasioned by delay in the carriage by air of passengers, baggage or cargo*”. However, the same provision does not specify in any manner whatsoever who may have suffered that damage.

In this context, despite the described lack of specifications, the Court argued that Article 19 of the Montreal Convention lends itself to being interpreted as applying not only to damage caused to passengers themselves but also to damage suffered by an employer.

Then, in the light of the relevant case-law, the ECJ supported this interpretation referring to (a) the various language versions of Article 22 of the Montreal Convention (only the French one restricts the damage to that suffered by passengers), and to (b) Article 1, according to which the Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward.

The mentioned first provision of the Convention has been interpreted in the light of the third recital, which emphasises the importance of ensuring protection of the interests of consumers in international carriage by air. The ECJ explained that the concept of “*consumer*” for the purposes of the Montreal Convention should not be confused with the different concept of “*passenger*”, then it may include persons who are not themselves carried and are thus not passengers.

Therefore, persons who retain the services of an international air carrier for the purpose of carriage of their employees as passengers cannot be excluded from the scope of application of the Montreal Convention, and the damages suffered by those persons have to be refunded.

It follows from all the foregoing that Article 19 of the Montreal Convention must be interpreted as being applicable not only to the damage suffered by a passenger but also to the damage suffered by a person in its capacity as an employer having concluded a contract of international carriage with an air carrier for the purpose of carriage of passengers who are its employees.

The Court has hence stated the responsibility of Air Baltic for the delay of the flight, and then its liability for the damages incurred by the employer (client) who is the contracting party of the transport contract.

As to the limit of liability, the Court decided that the amount of (compensatory) damages which may be granted to the person at issue in the main proceedings cannot exceed the amount obtained by multiplying the limit laid down in Article 22 of the Montreal Convention by the number of passengers carried under the contract concluded by

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by that person and the air carrier.

The importance of this judgment for employers is clear: they should now consider whether to purchase air tickets for their travelling employees in their name or to allow the employees to directly purchase the travel documents. The consequence of such choice must be identified in relation to the active legal capacity to ask for the compensation for damages caused by delay: any person - natural or legal - who has concluded a contract of international carriage with an air carrier is enabled to claim for damage occasioned by a delay in flights on which that person or its employees were passengers pursuant to that contract.

¹As known, it states that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

FORTHCOMING EVENTS

Executive course

INTERNATIONAL CONTRACTS IN AEROSPACE INDUSTRY



AIAD in collaboration with: University Institute of European Studies, University of Bologna, LS Lexjus Sinacta Law Firm and International Training Centre of the ILO are presently offering an Executive Course on International Contracts in Aerospace and Aviation Industries.

Date: the course will take place from **27 June to 02 July 2016**, at Luigi Einaudi Campus, in Turin, Italy.

Additional information is available at: <http://icai.iuse.it>

The Executive Course offers a-week study program, targeting mainly Professionals and Managers from the aerospace and aviation industry. This course aims at reinforcing the participant's knowledge by giving a complete theoretical and practical analysis of the various sources and principles of law that govern international contracts in aerospace and aviation industries. During the course the participants will gain a comprehensive legal and business knowledge along with a practical understanding of key issues.

FORTHCOMING EVENTS

Main topics are:

- The European legal framework of the aerospace market; European aerospace industry and the latest EU strategy proposals.
- EU defense and security: the analysis of the procurement directive.
- ESA General Terms and Conditions and ESA tenders.
- Aerospace Contracts Law. Drafting and negotiating a contract in the aerospace sector: strategy and skills.
- General terms and conditions and battle of forms - Choice of law clauses - Transfer of risk and title.
- Limitation and exclusion of liability clauses - Penalties and liquidated damages clauses - Termination for convenience and for default.
- Systems of dispute resolution - Choice of forum and jurisdiction.
- Arbitration in aerospace - Mock case.
- Liability and insurance in aerospace. Aerospace product liability. Single European Sky-SESAR and the reallocation of risks and liabilities among the various operators. Cyber Risks.
- Physical damage and liability cover for manufacturers and suppliers. Case history.
- Economic and financial issues - Direct lending and bank financing.

The lecturers of the Executive Course are highly recognized academics with a long-standing reputation in Aerospace and Aviation Law. The expansion of global trade has resulted in an increasingly high degree specialization in international contract practices. The jurisdictional complexity of such contracts has led to a rapid growth in the role of alternative dispute settlement mechanisms. For this reason the course also focuses on arbitration and alternative dispute settlement mechanisms.

This course is recommended for:

- Professional and Managers of the industry;
- In house lawyers.

Registration form

<http://intranetp.itcilo.org/STF/A9510106/en>

Please do not hesitate to contact us for further information: icai@iuse.it



FORTHCOMING EVENTS

Workshop

New challenges in aerospace insurance

Date: 11th May 2016

Time: 9.00–13.20

Venue: Ania, via Aldo Rossi 4 (Zona Portello) Milan

Organized by: Ania and LS Lexjus Sinacta Law firm

For further information and registration please contact: eventiania@ania.it

09.00 - 09.30 Registration

09.30 - 09.40 Welcome and presentation - Cristina Castellini (ANIA)

Carrier Liability

Recent european trend and case law concerning the air carrier liability.

09.40 - 10.00 Stefania Guastatore, Senior Manager Transport & General Litigation, Alitalia

10.00 - 10.20 Franco Liverani, General Aviation Regional Practice Group Leader for Mediterranean area, Allianz Global Corporate

10.30 - 11.00 Coffee break

Responsability and insurance obligation for defective product and cyber risk

11.00-11.20 Roberto Bursi, Head of Commercial Airborne Platform Systems - ASSD, Finmeccanica

11.20-11.40 Marcello Maestri, Aviation Manager, AIG Europe

FORTHCOMING EVENTS

11.40 - 12.00 Anna Masutti, Professor at Bologna University and Senior Partner Ls Lexjus Sinacta—Italy

12.00 - 12.10 Q&A

UAV Unmanned aerial vehicles

Unmanned aircraft: Recent European and national regulatory measures for the regulation of UAV. Risks, liabilities and insurance obligations.

12.10 - 12.30 Riccardo Delise, Program Manager APR, ENAC

12.30 - 12.50 Andrea Lanzaro, Underwriting Aviation, Generali Global Corporate & Commercial Italy

12.50 - 13.10 Stefano Guazzone - CEO - SATEC e Alessandro Sabatini - Deputy Underwriter Aviation - SATEC

13.10 - 13.20 Q&A