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CONTENTS

Aviation

The Spanish Approach to the Limitation Period or Condition Precedent in the Montreal Convention on International Air Carriage of 28th May 1999
Rodolfo A. González-Lebrero p.2

Compensation for Flight Delays: the English County Court's Approach to Regulation 261/2004
Arpad Szakal p.14

Space

Prison Is Not a Place for Scientists
Vanessa Leigh p.19

Miscellaneous material of interest

Conference on the Revision of EU Regulation 261/2004 p.23

Recent EU Initiatives Regarding Liquids Security Measures at Airports p.26

Recent Initiatives Regarding the Cooperation between the EU and Eurocontrol p.28

The New Italian Regional Tax Threatens the Quality of Airport Services p.29

Eu Commission to Propose New Guidelines for State Aid Rules for Airports and Airlines p.30

Forthcoming Events:
"The Aviation and Healthcare Perspectives on the Principle of Just Culture" Rome, 20th November 2013 p.31

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AVIATION

THE SPANISH APPROACH TO THE LIMITATION PERIOD OR CONDITION PRECEDENT IN THE MONTREAL CONVENTION ON INTERNATIONAL AIR CARRIAGE OF 28TH MAY 1999

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INTRODUCTION

The nature of the period of time indicated in Article 35 of the Montreal Convention 1999 is not yet a pacific subject in Spain, either in doctrine or in the courts of justice, as it happens with other States within the international community.

However, some Spanish courts are maintaining in rather recent decisions, that said period is not a time limit, but a condition precedent. The Madrid Court of Appeals, in its judgment of 13th May 2013, decided that it is a condition precedent ("*caducidad*" or "*decadenza*" or "*forclusion*"), confirming the previous decision of same court in its judgment of 26th June 2011.

1 LIMITATION PERIOD OR CONDITION PRECEDENT IN WARSAW AND MONTREAL

The first paragraph of Article 35 of the Montreal Convention 1999 (headed "Limitation of Actions"), which sort of repeats the rule provided in Article 29 of the Warsaw Convention 1929, provides that "*the right to damages shall be extinguished if an action is not brought within 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, or from the date on which the carriage stopped*".

In the Warsaw Convention, the first paragraph of Article 29 provides that "*the right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped*".

The second paragraph is almost identical in both conventions, and it is left to the law of the court hearing the case to decide on how that period is to be calculated.

The Montreal Convention 1999 has respected, in the same way as the Warsaw Convention 1929, the sovereignty of States with regard to their territorial competence, and particularly the rules of procedure that should regulate the development of the proceedings and the executive force of judicial decisions within the framework of contracting States. This policy of international legislation can be reproached with contradicting the trend towards unification of Aviation Law, inasmuch as it prevents, or at least hampers, the creation of a uniform aviation case-law, although the main problem lies in possible ambiguity of the international rule, inasmuch as it can influence the opinion of the courts, leading them to follow the most familiar and logical path of their national legislation.

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This rule of the Montreal Convention 1999 poses various problems, among them the legal nature of the term indicated, i.e., that of knowing whether it is a limitation period or a condition precedent, and this determination will obviously have major legal and practical consequences. As it has been said, it is certainly not an undisputed matter, and has not been so throughout the long years of life of the former international instrument.

At the same time, we must stress that the Montreal Convention 1999 was drafted in six languages (Spanish, Arabic, Chinese, French, English and Russian), and all versions are equally authentic, which does not mean that they are identical, because it is extremely difficult to achieve an equal wording among various languages, added to which is the difficulty resulting from conceptual differences in the diverse legal systems of the contracting States.

The French wording reads: "*L'action en responsabilité doit être intentée, sous peine de déchéance* ….. ", which can be literally translated into English as "action for liability shall be brought, under penalty of expiry ….", because the word "*déchéance*" means "decline" or "expiry" or the "loss of a right, either by way of sanction, or for failure to observe the conditions for its exercise". In French there is also the expression "*délai de forclusion*" which consists of decline ("*déchéance*") of the capability to act or to bring an appeal when, in the absence of a term in which to do so, the interested party fails to act on time, which can be translated as "expiry of instance" or "condition precedent". When drafting, or translating, the Convention, the word "extinguish" was not used, "*eteindre*" in French, because that word does not have the same meaning in French as, i.e. in Spanish, but rather that of "put out", "placate", "erase" and also that of "extinguish", but in the sense of "annihilate".

The Italian wording (unofficial) reads: "*a pena de decadenza*" ("under penalty of expiry"), because it was translated from French, but had this been done from English, it would have read "*si estingue*" ("is extinguished"). The Italian word "*decadenza*" means "decline" or "loss of a right". Strangely, the Act of the Republic of Italy that ratified the Montreal Convention 1999 ("*Legge*" n° 12, of 12 January 2004) adopted a different wording for Article 35, and referred to "limitation" ("*prescrizione*") instead of "condition precedent" ("*decadenza*").

This uncertainty has been superseeded with the reform of the Italian Navigation Code establishing at article 949-ter that "*The rights deriving from the contract of transportation of persons and baggage are subject to the provisions on the forfeiture of the international regulation as of article 941. The same rights are not subjected to the provisions with regulate the time-bar period*".
That provision has been introduced by Law Decree n. 151/2006 which aims at rendering the legislation perfectly consistent with article 35 of the Montreal Convention, thus, superseding any issue of difference of interpretation.

The English wording reads: "*the right to damages shall be extinguished if an action is not brought …*", in other words, practically the same as the Spanish text, as it was ratified by Spain on 4 June 2002.[1]

It can be said that there are some minor differences between the Spanish wordings of Articles 29 of the Warsaw Convention 1929 and 35 of the Montreal Convention 1999.

The first one reads: "*The right to damages shall be extinguished if an action is not*

brought within two years …" i.e., it refers to an "*action for damages*" to be brought "*under penalty of expiry*", whereas the second reads: "*The right to damages shall be extinguished if an action is not brought within a period of two years …*", and it therefore refers to a "right to damages" which will be extinguished "if an action is not brought".

In other words, "*penalty of expiry*" of the "*action*" for damages in one case and "*extinguishment*" of the "*right*" to damages in the other, and to avoid this it is necessary to bring an action within the term indicated.

There can be no doubt that, according to the Warsaw Convention 1929, this is a condition precedent given the clarity of the rule, the literality of which poses no doubts in Spain in agreement with article 3.1 of the Spanish Civil Code, which states that "*rules are to be construed in accordance with the proper meaning of their wording …*", and -according to scholars' opinion- given the length of the period (two years), which is usually one year for cargo, except in the United Nations Convention on the Carriage of Goods by Sea, done in Hamburg on 31 March 1978, and in the United Nations Convention on International Multimodal Transport of Goods, done in Geneva on 24 May 1980, which set a two-year period. However, in general, a condition precedent is a short period of time.

The theory of literality cannot be applied in respect of Article 35 of the Montreal Convention 1999, because this rule does not contain the word "condition precedent", which suppression might not "*be casual or irrelevant*", as pointed out by the Las Palmas Court of Appeal, in its judgment of 29th December 2009. This court, maintains that the two-year period is a limitation period and supports such contention in the slight change in the wording, reasoning that, in our opinion is weak and superficial.

During the preparatory works of the Warsaw Convention 1929, there was an exchange of opinions between Georges Ripert and Amedeo Giannini from which we can infer that this was a condition precedent, and this was to avoid concern by air carriers beyond the expiry date of the term. That was a logical reflection, because at that time an attempt was made to favour the development of airlines, particularly when aviation accidents were frequent. Nowadays that situation has changed significantly.

2 NATIONAL CASE-LAW AND THE OPINION OF SCHOLARS

In the United States of America, the rule given in Article 29 of the Warsaw Convention of 1929 was construed as a condition precedent and not as a limitation period.[2]

With regard to interpretation of Article 35 of the Montreal Convention 1999, the US courts maintain that this rule is the equivalent of Article 29 of the Warsaw Convention 1929, and they maintain that the former international instrument is the direct successor of the latter, accordingly, when interpreting the rules of the Montreal Convention 1999, they do so based on the voluminous body of case-law that led to the Warsaw Convention 1929.[3]

Accordingly, the notion of condition precedent continues to be upheld by case-law in the United States of America.[4]

In France, courts considered during sometime that this was a condition precedent[5],

until the Cour de Cassation decided, although according to Article 29 of the Warsaw Convention 1929 (and lately also to article 35 of the Montreal Convention 1999) that actions for damages should be brought ("*under penalty of expiry*" in the first one) within a term of two (2) years, that there was no express provision in either Convention according to which, in derogation of the principles of French domestic law, that term could not be interrupted or suspended.[6]

In Germany it is understood that this is a condition precedent[7], in the same way as in Israel[8], Switzerland[9], Belgium[10], Luxembourg[11], and Argentina[12], amongst many other countries.

In Italy, case-law makes a distinction between the right to compensation and judicial action to claim damages[13] and understands that the word "expiry" ("*decadenza*") refers exclusively to judicial action which, unless exercised at the courts within two years, will be definitively extinguished.

Spanish case-law shows no uniformity, having not yet adopted an uniform doctrine.

Curiously enough, the Zaragoza Court of Appeal, has stated that "*there is no consolidated theory that affirms that that term is a condition precedent and not a limitation period, but we must necessarily acknowledge that this is accepted by the majority*". Nevertheless, and inexplicably, that court considered "*that that two-year term is for limitation*" and affirmed that the expression "condition precedent" had been omitted in the Montreal Convention 1999, and the international legislator intentionally wished to interpret that term as a limitation period.[14]

Other courts have followed that same line[15] whereas others maintain the criterion of condition precedent: Santa Cruz de Tenerife Court of Appeal Judgment of 20th February 1998; Valencia Court of Appeal Judgment of 20th October 2004, Vizcaya Court of Appeal Judgment of 1st September 2005, *inter alia*.

It can be seen that Spanish courts follow, so far at least, different schools of thought but, sooner or later, the Supreme Court will adopt decisions in this regard, that will set up a clear cut doctrine, to be thereafter followed by lower courts. Case law will then be binding, and all courts will have to abide by such doctrine.

In some countries, one reason why limitation periods can be interrupted is minority.

In Spain, legal or full age is obtained when children are eighteen years old, being, until then, represented by their parents (Arts. 162 and 315, Spanish Civil Code). Minority is not a reason to interrupt limitation periods, being the duty of parents to protect their children's interests whenever necessary (Arts. 164 *et seq*, Spanish Civil Code) and, should the negligence of such representatives be at the root of any action been time barred, minors can claim against their parents (Art. 1932, *in fine*, Spanish Civil Code).

As far as the opinion of scholars is concerned, we can say that the majority focus on the notion of condition precedent, and not of limitation period[16].

3 THE MONTREAL CONVENTION 1999 AS EU LAW

Spain, as all EU Member States, ratified the Montreal Convention of 28 May 1999,

which came into force in the said Union on the 28 June 2004. This convention is also applicable to domestic air carriage via article 3.1 of Regulation (EC) nº 2027/97, of 9 de October 1997, of the Council, which came into force on the 17 October 1998 (art. 2.1. (b)), inasmuch its article 1 was amended by Regulation (EC) nº 889/2002, of 13 May 2002, of the Parliament and the Council. In fact, article 1.2 of same, amended article 1 of the 1997 Regulation in the sense that the former implements the relevant rules of the Montreal Convention of 1999, as far as the carriage of passengers and their baggage is concerned, thus extending the application of the international rules to the carriage by air within the Member States.

The foregoing means that the Montreal Convention of 1999 is part of the European Union law since the 28 June 2004, in agreement with Decision nº 2001/539, as it has been confirmed by the Court of Justice of the European Communities (Third Chamber) in its judgment of 6 May 2010, in the case "*Axel Walz contra Clickair, S.A.*" (TJCE/2010/135).

Furthermore, as it is mentioned in said judgment, "*since the rules of said Convention are part of the legal rules of the Union, the Court of Justice can retain jurisdiction to issue a pre-judicial opinion on its construction*". This decision is one of paramount importance, because it results from same that said court is, as far as the EU Member States are concerned, the final interpreter of the Montreal Convention 1999, and their decisions will, therefore, have to be followed by their national courts.

4 LEGAL NATURE OF THE PERIOD IN THE MONTREAL CONVENTION 1999

What is the legal nature of the term established in Article 35 of the Montreal Convention 1999?

Limitation period, or condition precedent?

What problems arise with regard to the limitation of action and the expiry of rights?

4.1. Basic notions on limitation periods and conditions precedent.

Based on the Roman aphorism *vigilantibus et non dormientibus iura succurrent*, in Spanish Law, as in other legal systems, failure to pursue rights and actions within the legally provided terms leads to their extinguishment. Indeed, the passage of time has an influence on legal relationships, for both contractual and extra-contractual obligations. These are **limitation periods**. Rights and actions are extinguished simultaneously as a consequence of having lapsed due to completion of the corresponding terms.

But neither rights nor legal actions are automatically extinguished by the mere passage of time, which is why the courts cannot *per se* declare that an action has lapsed, unless the interested party (debtor) has invoked that defence at the appropriate time.

Limitation periods are based on both private and public reasons. On the one hand, the creditor's negligence is penalised to the benefit of the debtor, while on the other, limitation periods grant legal certainty, and they ensure legal relationships above any other consideration.

Because it is not based on the principles of intrinsic justice, but on the idea of penalising conducts of abandonment, negligence and indifference in the exercise of one's rights, the institution of limitation must be construed in a restrictive manner.

For their part, **conditions precedent** run relentlessly and can only be interrupted by exercise of the pertinent action before their expiry.

Conditions precedent are those that are not expressly defined as limitation periods, peremptory terms whose holders must choose, from among them, whether to use their right or not. The expiration of rights takes place when a legal rule, or the wish of the parties, determine a fixed term for the duration of those rights so that, once that term has elapsed, such rights can no longer be exercised. In Spain, the Civil Code includes several cases of conditions precedent, as well as it does the Commercial Code.

In limitation we have a subjective right in respect of which a unilateral voluntary act by someone permits modification of an uncertain legal situation, whereas this does not occur with condition precedent, which can even be applied *ex officio* by a judge. Compared with limitation, and the possibility to interrupt or suspend the term, condition precedent offers some advantages, inasmuch as it obliges the parties to act more diligently in the search for and identification of facts and circumstances that caused the damages, and in the search for and collation of evidence, apart from offering the possibility to find fair and timely formulae for compensation more rapidly. Limitation is intended to extinguish a right based on the objective reason of its lack of exercise by its owner (avoiding legal uncertainty), whereas condition precedent only refers to the objective fact of its lack of exercise within the pre-determined term.

Limitation periods can be interrupted or suspended when the "*animus conservandi*" is irrefutably proven by the owner of the action, which is incompatible with the idea of their abandonment. If they are interrupted, a new and complete term will start to run as from the date of interruption, but if they are suspended, the same terms will continue to run once the time during which those terms were suspended has been exhausted.

In the event of joint and several liabilities for damages, interruption of the limitation period in respect of one of those parties will extend to the others.

With regard to the interruption of limitation periods, this can occur for the following reasons:

(a) presentation by a creditor of the pertinent claim before a competent court, either as a formal claim, or as an act of conciliation, or as the seizure of assets owned by the debtor;

(b) an act of the debtor whereby the debt is acknowledged, or his/her wish to acknowledge the debt to the creditor;

(c) an extra-judicial claim from the creditor to the debtor, by means of a notarial requirement or similar measure, or by means of what is called in Spain a "*burofax*" (a letter sent to the debtor via the Post Office which confirms safe reception of same by the addressee), and

(d) a recorded notification by the creditor to the debtor of the appointment of an arbitrator (when an arbitration clause exists), but only in civil matters. This cause does not exist in commercial matters and will not be acknowledged as valid, unless the debtor reacts by accepting the appointment of the arbitrator or designates an arbitrator by himself.

The suspension of limitation periods is not expressly regulated in Spanish Law, with the exception of Article 955 of the Spanish Commercial Code, which provides that the government may suspend the limitation periods established in that Code, with regard to commercial transactions, in the event of war, epidemics or revolution. In any event, the interested parties may agree to extend limitation periods at their expiry, but they cannot agree to an unlimited extension.

Conditions precedent cannot be either suspended or interrupted.

4.2. The two-year period as a condition precedent.

Article 35 of the Montreal Convention 1999 contains, with just a slightly different formulation, a rule taken from the old Warsaw Convention 1929. For such reason we have to ask ourselves whether it is also conceptually different, insofar as it makes no reference to the exercise of an action for damages under penalty of expiry, but to the extinguishment of the right to damages if that action is not brought within the term of two years. We can maintain that there is no conceptual difference between both rules.

All limitations will extinguish the action, but not the right, as occurs with conditions precedent, because the right that has lapsed remains in the hands of its owner, even though it cannot be exercised before the courts of justice.

Limitation periods cannot be admitted *ex officio* -unlike conditions precedent- which generates the loss of the right automatically attributed by law, given the mere passage of time established for its exercise. The purpose of limitation periods is the extinguishment of a right in the light of an objective reason for its lack of exercise by its owner, and to avoid legal uncertainty, whereas in conditions precedent only the objective fact of lack of its exercise within the predetermined term is addressed.

Article 35 of the Montreal Convention 1999 provides that "*the right to damages shall be extinguished if an action is not brought within a period of two years …*". Accordingly, there is a "*right to damages*" which will be extinguished "*if no action is brought*", with no mention being made to the notion of limitation. We are discussing a situation of inactivity *vis-à-vis* a specific conduct (bringing an action), that cannot be performed beyond a determined time (two years), and that omission precludes the exercise of the right to damages (extinctive efficacy), and it cannot be waived by the damaged party.

Evidently, we are facing a condition precedent that comes into play *ipso jure* depending on the *dies a quo* determined in the convention.

4.3. The *dies a quo*.

In the same Article 35 of the convention, it is established that the period of two-years will start running "*from the date of arrival* (of the aircraft) *at the destination,*

or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped".

We understand the word "*from*" implies that the two-year term must be reckoned from the day following that of arrival of the aircraft at its destination at the airport agreed, or the day following that on which it should have arrived at the airport agreed or the day following that on which carriage stopped.

In the hypothesis that it would be considered to be a limitation period –and unless legislation provides otherwise- the period of time at the end of which legal action lapses must start to run on the day following that on which the owner of the action could have brought that action.

4.4. Actions to which the term applies.

Apart from the problem of the nature of the two-year term indicated in Article 35 of the Montreal Convention 1999, there is the problem of determining the action to which that term applies.

Inasmuch as that rule is included in regulations on international air carriage, we must refer, obviously, to actions that result from the non-execution or the improper execution of any contract for the international air carriage of persons, baggage or cargo, covered by Articles 1 and 2 thereof.

With regard to passengers, the air carrier has the obligation to carry them safely and soundly to their destination within the time agreed, and they will therefore fail to comply with their obligations when those passengers lose their lives or suffer bodily injuries or do not reach the destination agreed or arrive late, and they must therefore respond for death, bodily injuries, non-execution and improper execution of the contract (delay, "*overbooking*", etc.).

With regard to baggage and cargo, air carriers will fail to fulfil their obligations when baggage and cargo fails to reach its destination, or only a part of this arrives, or arrives damaged or outside the time agreed, i.e., they will respond for losses (total and partial), breakdowns and delay.

Damages resulting from events or acts external to international air transportation, or that occur before or after the start of the carrier's obligations, or due to ticket changes or refunds thereof, or in situations of terrorism, before the trip has started or finished, are excluded.

Obviously, the two-year term does not apply when actions are exercised in respect of events not covered by the Montreal Convention 1999, such as, by way of example, the collecting of freight by the air carrier, or claims brought by the latter against the handling company, or in respect of actions between successive carriers, except insofar as their contractual carriage obligations are concerned.

4.5. Criminal proceedings and actions for damages based on the Montreal Convention 1999

Aviation accidents can cause death (or bodily injuries) to passengers, and total or partial destruction of cargo and baggage on board the damaged aircraft, which

triggers the criminal proceedings mechanism, addressed at establishing whether determined events or conducts represent crimes or offences and, as the case may be, whether they can be attributed to one or more persons, in agreement with the rules related to those proceedings.

In Spain, Article 100 of the Criminal Proceedings Act (CrimPA.) provides that "*all crimes and offences will give rise to criminal action to punish the perpetrator, and civil action can also arise for restitution of the object, reparation of the damage and indemnity for damages caused by the punishable event*". Accordingly, two types of action arise in criminal proceedings, each of which has a different nature, but one of which, the civil action, can be voluntarily abandoned by its owner, but provided that waiver is not contrary to public interest or public order and does not jeopardise third parties.

The human conduct typified as a crime or minor criminal offence leads to punishments and to safety measures, but civil liability, albeit deriving from crimes and minor criminal offences, does not arise from these but from the damage caused thereby. Therefore, civil actions *ex delicto* do not forfeit their specific civil character because they are exercised within the criminal jurisdiction, and the rules contained in the Spanish Civil Code on tort will apply. Article 116.1 of the Spanish Criminal Code (CrimCod) provides that "*whoever is criminally liable for a crime or offence shall also be civilly liable if damages derive from the event*", but Article 109.1. of the same Code clarifies that the obligation to make reparation does not arise directly from the crime or offence, but from the "*execution of an event described in the Act as a crime or offence*".

We can conclude that civil actions *ex delicto*, addressed at obtaining reparation for the damages sustained, have no direct bearing on the crime or offence, but on the unlawful acts or omissions that led to those damages, and have a legal nature identical to that of unlawful acts and omissions mentioned in Article 1089 of the Spanish Civil Code, as one of the sources of obligations. This rule distinguishes the unlawful criminal act from the unlawful civil act, and accordingly, a typical unlawful act inherent in Criminal Law is judged in criminal proceedings, whereas an unlawful civil act is judged in civil jurisdiction. In this jurisdiction, the significant components on conduct, attributability, culpability, seeking the third party liability required, have a completely different methodology from that of the other jurisdiction.

Article 111 of the Spanish CrimPA prohibits the exercise of civil actions that derive from a crime or offence while the criminal action is pending, and to use the French expression "*le pénal tient le civil en état*", that procedural rule determines in its Article 114 that, "*once a criminal trial has been commenced to investigate a crime or offence, no lawsuit can be heard on the same fact; and it shall be suspended if it is in progress, at the stage it may have reached, until a binding judgment has been issued in the criminal case*". However, this rule does not cover all civil actions possible but exclusively those related to the crime or offence which the criminal proceedings refer to.

Limitation of the civil action deriving "*from an event described in the Act as a crime or offence*" (art. 109.1, CrimCod), occurs based on the regime for criminal action if they are both exercised jointly, but if criminal action ends with no conviction and the alleged facts do not exist, then civil jurisdiction is opened up. In such event it may be subjected to the limitation of one year if the claim is based on extra–contractual

liability, and that term will be reckoned from the day on which it could have been exercised. This will be the day after the resolution that ended the procedure becomes binding, or it will be the term corresponding to limitation of the contract if the facts were perpetrated on the occasion of an obligation contracted, and on the performance of which the pretension is based.

We must point out that the preceding comments refer to the limitation of actions, and not to the expiry of rights.

Prosecution of the object of criminal proceedings does not imply, according to the Spanish Supreme Court in its judgment of 14th December 1999, "*that it will include all civil matters that may arise from the facts, acts and conducts comprised in the description of facts, in order to clarify civil-legal relations using judicial pronouncements on the validity and invalidity thereof, except insofar, and only insofar, as this may be necessary to judge criminal and civil liabilities that may derive from the crime*". Similarly: Spanish Supreme Court Judgments of 15 April 1992, of 29 January 1997, and of 21 March 1997, *inter alia*.

Article 1089 of the Spanish Civil Code provides that "*obligations arise from the law, from contracts and quasi-contracts, and from the unlawful acts and omissions or in which there is any type of fault or negligence involved*", and its antecedent can be found in Roman Law, and particularly the doctrine of Gaio, set forth in Book II of his work "*Rerum cottidianorum sive Aureorum*". And the same Code acknowledges the obligatory force of contracts between the contracting parties, "*who shall comply therewith accordingly*" (Art. 1091), a declaration based on an old Spanish Law[17], and acknowledged by Spanish case-law even before the enactment of that Code.

In the case of passengers and their baggage, and cargo handlers or forwarders, the basis of their possible claims is none other than the rules of the Montreal Convention 1999, and here, Article 29 is quite clear, when it provides that "*in the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention …*".

Accordingly, despite the existence of criminal proceedings (which have no direct relationship with the contract of carriage of passengers, baggage or cargo) "*the right to damages shall be extinguished if an action is not brought within 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, or from the date on which the carriage stopped*", and this term shall be determined by the law of the court hearing the case (art. 35, Montreal Convention 1999), although that right will end at the expiry of that term, and will not be protected by the aforementioned Article 114 of the Spanish CrimPA, apart from the irrelevance of its interruption or suspension given its nature.

In any event, cases of third-party liability "*ex delicto*" do not give rise to a true preliminary criminal issue in the sphere of civil proceedings, firstly because the legal qualification of the fact judged as a crime or offence contributes nothing from the perspective of its civil effects, and secondly because determination of the certainty of the fact disputed –which will be the same in civil and criminal proceedings- is not the object of a preliminary issue.

Accordingly, "*the maxim "le penal tient le civil en état", in the terms of arts. 111 and 114 LECrim, applies exclusively to third-party liability deriving from a criminally*

typified event"[18], but not if the claim for damages is based on contractual defaults regarding a contract for the air carriage of passengers or baggage or cargo.

Pursuant to Article 40.2 of the Spanish Civil Procedure Act (CivPA), this new procedural ruling includes the possibility not to order the suspension of proceedings in a civil suit vis-à-vis "*an event that gives the appearance of crime or offence that can be prosecuted ex officio*" that is evidenced in those civil proceedings (art. 40.1., CivPA) and that suspension should not occur, even more so, as we have said, when this is not a civil aspect of a crime or an offence, but of the non-execution or improper execution of a contract of carriage by air, subject to a special law.

CONCLUSIONS

As a consequence of all what has been said, we can draw the following conclusions:

(1) The wording of Article 35 of the Montreal Convention 1999 is not a limitation period but a condition precedent, as it was that of Article 29 of the Warsaw Convention 1929.

(2) Limitation periods can be suspended or interrupted, but conditions precedent cannot.

(3) Limitation cannot be admitted ex officio, unlike conditions precedent, which generates the decline of the right or authority automatically attributed by a legal rule, given the mere passage of time established for its exercise.

(4) The Montreal Convention of 1999 is part of the European Union law since the 28 June 2004.

(5) As far as the EU Member States is concerned, the final interpreter on the Montreal Convention 1999 is the Court of Justice of the European Communities.

(6) Actions to which the two-year term indicated in Article 35 of the Montreal Convention 1999 refers to, are those which result from the non-execution or the improper execution of any contract for the international air carriage of persons, baggage or cargo, covered by Articles 1 and 2 thereof.

(7) As a consequence of the condition precedent that results from Article 35 of the Montreal Convention 1999, the existence of criminal proceedings cannot interrupt or suspend the two-year term.

(8) Therefore, any action for damages, whether based on the convention, or on a contract or on an unlawful act, albeit in other proceedings, can only be brought in accordance with the conditions and up to the limits of liability set forth in that convention, i.e., within the two (2) years following the dies a quo indicated therein. Otherwise, the right to damages will have lapsed even if the criminal proceedings have not been concluded.

[1] Official State Gazette *[B.O.E.]* nº 122, of 20th May 2004.
[2] "Ricotta versus Iberia Líneas Aéreas de España", 482 F. Supp. 497 (C. D. New York, 1979); "Kahn versus Trans World Airlines", 82 A. D. 2nd 696, (443 New York S. 2nd 79, 87, 1981); "Fishman versus Delta

Airlines, Inc", 938 F Supp. 228, 231 (A. D. New York 1996); "Blake versus American Airlines", 90 F Supp. 2nd, 1265, 1266, 1267 (S. D. Florida 2000); "Marotte versus American Airlines", 159 F Supp. 2nd 1374, 1381 (South District Florida 2001), inter alia.

[3] *"Ugaz versus American Airlines, Inc." (South District Florida, 2008); "Baah versus Virgin Atlantic Airways, Ltd." (South District New York, 2007); "Kruger versus United Airlines, Inc.", (North District California, 2007), inter alia.*

[4] *"Chubb Insurance Company of Europe S.A. versus Menlo Worldwide Forwarding, Inc." (U.S. District Court, C.D. California, 2008); "Onyeruku, A. versus Northwest Airlines and KLM Royal Dutch Airlines", North District Illinois, 2007); "Jones, C. versus USA 3000 Airlines" (Eastern District* Missouri. E.D., 2009); "*Gustafson, M. versus American Airlines, Inc*." (D. Massachusetts, 2009, *inter alia*).

[5] Court of Grand Instance of Seine, of 14 April 1961 and 13 January 1967; Court Appeal of Paris, of 30 June 1965, 4 March 1967 and 4 March 1971; Court of Grand Instance of Chalons-sur-Saone, of 18 October 1966; Court of Appeal of Dijon, of 21 December 1967, Court of Appeal of Lyon, of 2 July 1970 and Court of Cassation, of 19 December 1966.

[6] Judgment of the Court of Cassation, of 14 January 1977 and two Judgments of Civil Chamber One, of 1 July 1977.

[7] Judgment of the "*Bundesgerichthof*" of 2 April 1974.

[8] Judgment of the Supreme Court, of 22 October 1984.

[9] Judgment of Federal Court, of 10 May 1982.

[10] Commercial Court of Brussels, of 20 December 1965; Judgment of Court of Appeal of Brussels, of 2 May 1984.

[11] Commercial Court of Luxembourg, of 20 December 1985.

[12] Judgment of Supreme Court of Justice, of 16 October 2002.

[13] Court of Appeal of Genoa, of 2 February 2006; Court of Appeal of Rome, of 24 September 1986 and 25 September 2003; Court of Cassation, of 29 January 1982, 23 February 1983, 20 November 1990, 4 May 1995, 21 June 1996, and 25 September 2001.

[14] Zaragoza Court of Appeal, 13 October 2009.

[15] Murcia Court of Appeal Judgment of 26 April 2007; Commercial Court nº 6 of Madrid, Judgment of 10 November 2009; Barcelona Court of Appeal Judgment of 20 July 1999.

[16] Lemoine, Maurice, "*Traité de Droit Aérien*", Paris, 1947, page 558; Rodière, René, "*Manuel des Transports Terrestres et Aériens*", Paris, 1965, page 233; Mercada, Barthélemy, "*Droit des Transports Terrestres et Aériens*", Paris, 1996, page 275; Videla Escalada, Federico, "*Derecho Aeronáutico*", Volume IV, A, Buenos Aires, 1976, page 532; Górriz López, Carlos, "*La Responsabilidad en el Contrato de Transporte de Mercancías*", Bolonia, 2001, page 895; Cosentino, Eduardo T., "*Regulación Jurídica del Transportador Aéreo*", Buenos Aires, 1986, page 270: Tapia Salinas, Luís, "*Derecho Aeronáutico*", Barcelona, 1993, page 632; Mapelli, Enrique, "*El Contrato de Transporte Aéreo Internacional*", Madrid, 1968, page 260; Guerrero Lebrón, María Jesús, "*La Responsabilidad Contractual del Porteador Aéreo en el Transporte de Pasajeros*", Valencia, 2005, page 341; de Paz Marti, Jesús, "*La Responsabilidad en el Transporte Aéreo Internacional*", Madrid, 2006, page 271.

[17] Act 1., Title 1, Book X of the "*Novísima Recopilación*".

[18] SANCHEZ, R. J., "*La responsabilidad civil en el proceso penal*", Madrid, 2004, pages 87 & 90.

AVIATION

COMPENSATION FOR FLIGHT DELAYS: THE ENGLISH COUNTY COURT'S APPROACH TO REGULATION 261/2004

Arpad Szakal*

Payment of compensation pursuant to EU Regulation 261/2004[1] is a legally controversial topic. To a large extent, the regulation improved the treatment of air passengers who suffer disruption to their flights; however, it has also imposed a disproportionately heavy burden on air carriers. The EU's passenger rights regime has had profound cost implications on air transport businesses and IATA estimates that compliance with the regulation will cost airlines EUR 4 billion annually[2].

In its ruling in joined cases *Nelson v Lufthansa and TUI, British Airways, Easy Jet and IATA v UK CAA*[3], the Court of Justice of the EU confirmed that the regulation is to be interpreted as entitling passengers, whose flights are delayed by 3 hours or more after the originally scheduled arrival time, to the same fixed levels of compensation as passengers whose flights are cancelled, unless the air carrier can prove that the delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. The CJEU's judgment has prompted a flood of claims by passengers in relation to flights delayed for 3 hours or more going back to 17 February 2005.

Bird & Bird LLP[4] has been successfully handling a large number of Regulation 261 related claims on behalf of one of the leading budget carriers in the UK. This update examines the outcome of some of those cases and will review the English County Court's approach to these matters. In particular, it will demonstrate that technical defects can, in many cases involving flight delays, constitute extraordinary circumstances.

The scope of extraordinary circumstances that airlines could rely on in defending claims arising out of cancellation of flights had already been significantly reduced as a result of the CJEU's decision in the case of Wallentin-Hermann[5]. The judgment prevented airlines to rely on technical problems which come to light during maintenance unless that problem stemmed from events which, by their nature or origin, are not inherent in the normal exercise of the airline's activity and beyond its control. With the aim of striking a balance between the interests of passengers and airlines, in the TUI and Nelson decision the CJEU extended the availability of the defence of extraordinary circumstances to delays of 3 hours or more.

Flight Delay Judgments - References

A recent case, handled by this firm, involved a Claimant who was a passenger on a flight, which was scheduled to depart Manchester International Airport at 08:05 hours (local time) on 20 June 2011 and arrive at Madeira Airport at 12:05 hours (local time) the same day. However, due to a fuel leak in the aircraft's wing tank access panels,

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The views expressed in this article are those of the author and may not in any circumstance be regarded as an official position of Bird & Bird LLP.

the arrival of the Claimant's flight in Madeira Airport was delayed by approximately 6 hours.

The leak was detected during a walk-round inspection of the aircraft. An investigation by engineers revealed that the leak was caused by a cracked dome nut. Because the dome nuts were integral to the panel itself, the only solution was for the entire panel to be replaced. As there was no spare part available at Manchester Airport, a replacement panel was purchased from another airline, and couriered from Luton Airport to Manchester.

By considering alternative options to perform the flight, including chartering another aircraft, the airline took all reasonable measures available to it to avoid or reduce the delay to the flight occasioned by the technical defect. Further, throughout the period of the delay, the Defendant provided passengers, including the Claimant, with information by way of two Customer Information Bulletins, which informed passengers about the cause of the delay and the estimated new departure time. Also, given that the delay was over 3 hours, refreshment vouchers were made available to each passenger so to provide them with the necessary care and assistance pursuant to the Regulation.

The district judge heard evidence that a fault of this type could not be identified until fuel actually began to leak. Thus, the Aircraft suffered a technical defect that was both unforeseeable and unexpected, being the compromise of one of the port wing fuel tank access panels due to a design flaw in the integral dome nuts, of which the airline was not previously aware.

The district judge found in favour of the Defendant holding that the technical problem the airline encountered on the day of the delay "*is something which properly can be described as extraordinary circumstances*" and as a result it does not fall to be compensated under Article 5 and 7 respectively. Accordingly, he did not find that the 400 Euros was payable to the claimant in these circumstances.

In another recent matter, the fault which caused the delay was a leak from the “A” hydraulic system, which may have affected the safe handling of the aircraft and rendered the autopilot inoperative. The defect was not identified during routine maintenance but during the aircraft's previous rotation. The defect rendered the aircraft unserviceable and as a result could not perform the Claimant's flight from Rome Fiumicino Airport to Leeds Bradford Airport.

The judge heard that permanent repairs could not be undertaken and that a replacement part was ordered. However due to the rarity of the fault, the part was not in stock, and had to be ordered from the USA. There were no aircraft in the operator’s fleet which could be deployed to perform the Claimant's flight and the only option available to the operator to transport the Claimant was to re-route him on a substitute aircraft, which it did at considerable extra cost. The judge was therefore satisfied that the circumstances were extraordinary in nature, and that the operator had taken all reasonable measures to avoid the delay. In addition, the Judge went on to state that airline did have an appropriate system in place relating to spare part availability which complied with the requirements of the Regulatory Authority and that the defect concerned was of such extraordinary nature that it could not have been detected by those procedures. The Claimant's claim was dismissed accordingly.

The issue of having spare parts at all of the airline's bases is an issue pleaded regularly by Claimants and, therefore, to obtain a judgment suggesting that to do this is unreasonable is particularly helpful for airlines having to tackle such arguments. Further, the matter also raised a question of denied boarding. The Claimant argued that he was denied boarding because the replacement aircraft, sub-chartered by the airline, could not accommodate all passengers. Therefore, the Claimant being one of the last to check-in, had a seat arranged on the next available scheduled service. The Judge agreed that this was not a denied boarding scenario.

The judgment in this case was particularly noteworthy as it notes that "*the ECJ has recognised that, with the adoption of the Regulation, the European Legislator was seeking to strike a balance between the interests of the passengers and those of the air carriers*". This inevitably lends some weight to the argument that each circumstance of extraordinary circumstances should be viewed on its own merit and to its own particular facts as opposed to the 'consumer view' that if a flight is delayed for more than three hours a passenger is automatically entitled to compensation.

Another recent case concerned a flight between Malaga Airport (AGP) and Manchester International Airport (MAN). In this case, the delay to the flight was caused by the random failure of the Aircraft's wiring to the fuel valve. Upon discovering the problem, the Defendant immediately arranged for the new wires as well as an engineer to be flown to AGP. Following arrival at AGP, the engineer removed the old wiring and installed new ones. However, the complex nature of the wiring system made it particularly difficult for the engineers to replace the defective part and the Aircraft incurred a total arrival delay of 27 hours and 3 minutes.

At trial, the judge accepted that that the nature of the wiring defect was such that resolving it was never going to be unproblematic. This was compounded by the fact that the engineer, after arriving from the UK, not only had to deal with a 10 to 12 feet length of wiring but also had to locate the relevant wires within the bundle of wires. The judge found as fact that the issue took the wiring engineer over 12 hours to resolve.

The judge accepted the Defendant's engineering evidence that there had been no prior record of any wiring failure. Further, she also accepted both that Boeing require only a two-yearly check of the wires and that this would merely be a visual check which would not identify any defects in the 30 or 40 wires in the bundle. Therefore, it was established that the defect did not arise out of failure to undertake maintenance on the Aircraft and the evidence was that the airline had followed Boeing's requirements.

The judge explicitly accepted the test in *McDonagh v Ryanair*[6], namely that 'extraordinary circumstances' are exactly that – something more than ordinary. It was accepted that there are circumstances which are beyond the control of the carrier, regardless of their nature or gravity. She also accepted that paragraph [25] of *Wallentin-Hermann* set out the key distinction, namely that the carrier cannot rely on technical defects arising during maintenance or from a failure to conduct maintenance. The judge was on the opinion that, if the carrier has prior knowledge of a technical fault or has not been carrying out its maintenance obligations, it cannot hide behind the extraordinary circumstances defence. Paragraph [26] of Wallentin-Hermann showed in this case that the Claimant's distinction (that all technical faults are incapable of being extraordinary circumstances) was wrong.

This was a case where the evidence was that the airline had no prior knowledge of the defect and did conduct the maintenance obligations as required. Further, the defect was such which, short of stripping the plane entirely, could not have been found. Therefore the technical defect was one which can be classified as an extraordinary circumstance. The Judge could not see what more the airline could have done – even if it had checked the wiring every day. Effectively, this was a latent defect which impacted on the safety of the Aircraft.

On reasonable measures, the judge accepted that the question was whether a delay of three hours could have been avoided by reasonable measures, and not whether some or all of the further 24 hour delay could have been avoided by reasonable measures. The judge concluded that even though the airline took all reasonable measures to avoid a delay to the flight, due to the complex nature of the technical defect the flight was always going to have a delay of over three hours and nothing could have been done to avoid this.

Although the judge expressly said that she had sympathy with the Claimant because of the length of the delay, this was sufficient to give rise to a right to compensation under Article 7 of the Regulation. Therefore, it was concluded that there was no basis for the claim.

Conclusion

The case examples discussed in this paper demonstrate that, although English County Courts apply a strict interpretation of the term "extraordinary circumstance", technical defects can, in many cases involving flight delays, constitute extraordinary circumstances if they are caused by events that are not manageable by the operating carrier or affect the safety of the flight and make the continuation of the flight impossible. It is, at times, burdensome for air carrier to successfully invoke the "extraordinary circumstance" defence especially where delays are caused by technical problems; however, many delays are caused by reasons clearly outside the carrier's control, such as weather, air traffic control and airport problems so the defence is available in a significant number of cases.

On 23 July 2013, the European Commission published new guidelines which have been developed by national enforcement bodies (NEBs) across the EU. The guidelines aim to clarify when a delay or cancellation should be considered to not be an airline's fault ('extraordinary circumstances'). The publication of the NEB list is of crucial importance as, until now, there has not been agreement as to which circumstances are considered extraordinary and which are considered to be within an airline's control. The guidelines will hopefully provide airlines and air passengers (as well as the Courts) with a better idea if the disruption they face could lead to compensation. It is also hoped that the guidelines will also speed up the process of assessing claims.

[1] Regulation (EC) No 261/2004 of the European Parliament and of the Council 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, and repealing Regulation (EEC) No 295/91, OJ L46/1 of 17-2-2004.
[2] IATA Position Paper on Passenger Rights: http://www.iata.org/policy/Documents/pax-rights.pdf
[3] Joined Cases C581/10 *Nelson v Lufthansa and C629/10 TUI, British Airways, esyJet and IATA v* UK CAA.
[4] Bird & Bird LLP is a limited liability partnership registered in England and Wales.
[5] Case C-549/07 Frederike Wallentin -Hermann v Alitalia – Linee Aeree Italiane SpA - ECJ's judgment of 22

December 2008.

[6] Case C-12/11 Denise McDonagh v Ryanair, the ECJ's decision of 31 January, 2013 http://curia.europa.eu/juris/document/document.jsf?text=&docid=133245&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2214461. In this case the operating air carrier argued that large-scale airspace closure should not fall into the category of 'extraordinary circumstances' which may exempt airlines from compliance with parts of the Regulation. Instead, the introduction of an additional category of 'super-extraordinary circumstances' was contended for in the hope of releasing air carriers from all obligations under the Regulation.

PRISON IS NOT A PLACE FOR SCIENTISTS

Vanessa Leigh*

In early 2009, seismic tremors were recorded in the L'Aquila region of Italy and the public was becoming concerned. One scientist predicted that there would be a major earthquake in Italy, and this was widely reported in the press.

What does this mean for the scientific community?

Six scientists discussed the data at a meeting that took place in L'Aquila. Dr Bernardinis, a local civil defence official, reported to the press that the scientific community has said that there was no danger.

However, shortly afterwards, in April 2009, a major earthquake destroyed L' Aquila and much of its mediaeval treasure. 297 people died in the town and the surrounding area, 1500 were injured and 65,000 were made homeless.

The scientists, members of the Italian National Commission for Forecasting and Prevention of Major Risks, were charged with presenting to the public inexact, incomplete and contradictory information of the danger of an earthquake, as a result of which it was said, some people were denied the opportunity to take measures that would have prevented their deaths.

It was widely reported that they were convicted for failing to predict the earthquake, although this was inaccurate.

The scientists and Dr Bernadinis were sent to prison for six years and banned from holding public office in the future. They also had to pay damages and costs exceeding USD ten million. The case is under appeal.

Prison is not a place for scientists and yet what we see here is just that. If you provide information to the public, who rely on it to their cost, you may be criminally liable for that information if something bad happens.

Is this so different for scientists working in the space industries? It is not. It is exactly the same. As we have discussed yesterday, space industries are now critical infrastructure. But what happens when the systems are threatened by forces beyond any individual's control, such as solar storms? We've seen the pioneering work undertaken by the scientific community to understand the behaviour of the sun and its effects. My understanding from our discussions yesterday is that at the moment we have no models that can predict with accuracy when a solar storm will occur: such models as are used, are at an early stage of development and are for research purposes only.

Scientists can observe certain events which could impact earth or satellites such as

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CMEs and give some hours' warning. In the future, further research may mean that solar events can be predicted.

Is it the role of scientists to keep quiet about the risk of these events happening, or to give reasonable warning of the risk? Obviously, it is the latter. But in communicating an analysis to the public of that risk, scientists may find themselves in the situation of the Aquila Seven.

So let us consider what may happen. The situation is this: scientists have been called upon to advise on the risk of power outages and disruption to navigation systems from solar activity. Under pressure to give clear warning yet not to alarm the public unnecessarily, the scientists work to interpret complex and contradictory data. They give the all clear, and as events turn out, they were wrong and people die. What happens next?

We can get a clear idea of what happens elsewhere in the aerospace industry when catastrophic events lead to death.

In 2005 a Helios Airways flight crashed near Athens with the loss of all 121 on board following incapacitation of the flight crew due to hypoxia. Criminal prosecutions were brought in both Greece and Cyprus against directors of the company, the training captain who had performed the last simulator check for the captain of the accident flight and a flight engineer. The Greek Courts recently sentenced some of the defendants to 10 years in prison, which they avoided only by paying eye-watering fines. The case is subject to appeal at present.

In 2006 two American pilots collected a brand new Legacy business jet from the Embraer factory in Brazil. Due to air traffic control errors they were cleared to the same level as a GOL 737 aircraft with the result that the aircraft collided in mid-air. Miraculously, the Embraer crew managed to land their damaged aircraft, but the GOL aircraft crashed with the loss of all 154 passengers and crew. Criminal prosecutions were brought against the air traffic controllers and the two Legacy pilots who were convicted and sentenced to four years jail.

I advised on the liability claims arising out of both of these accidents and this is what I found.

Criminalisation is becoming common in aerospace accidents. There is no reason to believe criminal charges would not be brought if there were a space industry event causing death.

A criminal investigation/prosecution will profoundly affect everyone involved. Let me outline the consequences for the various parties:

- The individuals under investigation,
- the operator,
- the insurer.

The individuals under investigation will understandably be seriously shocked, shaken and distressed. Even if the accusations are groundless, a multiple death case takes an unimaginable toll of guilt. They and their families may come under siege from a hostile media. It's likely that they will have to bear heavy legal costs to defend

themselves at a time when their livelihood is on the line.

Any operator suffers after a major loss, but criminal prosecution will increase that to the extent the company may struggle to survive.

And, insurers too, will find that their civil claims defence strategy will be affected by a criminal prosecution. Criminal defence lawyers may advise their clients not to give evidence in a civil case because that could prejudice a criminal trial.

Let me also indicate some of the complexity that makes these events particularly difficult to deal with:

- For a start, local law and procedure. You may find yourself having to rapidly react to criminal actions brought in an unfamiliar jurisdiction. Whilst the country might provide some legal assistance to criminal defendants, the technical complexity is likely to require more senior and specialist counsel than would ordinarily be provided by a public defender more used to dealing with everyday criminal behaviour. You may be dealing in a foreign language, where the translation provided by the court may be inadequate.
- In some countries, prosecutors are elected and consequently, readily swayed by public pressure. And even in countries where prosecutors are not elected, do not underestimate the effect of political pressure.

- Then we have the issue communication with the public and the media. The rapidity of the media response with the rise of social media means that a fast, accurate and appropriate response is vital. However, complex technical and scientific subjects are challenging to communicate effectively to non-experts.

So you have a choice, whether you be an insurer, an operator or individual potentially at risk: you can do nothing and take the risk that, if a catastrophe should occur, the consequences will not come home to you, or you can plan and consider taking some simple and relatively inexpensive steps now so that if the worst should happen, the most serious consequences can be mitigated or perhaps avoided.

If you are an operator, you can check whether or not you have insurance for defence costs. Although you may have Directors and Officers cover, it may not cover criminal defence costs and is unlikely to cover more junior staff members, who would often be targeted by a prosecutor.

You can also analyse as to the likely criminal regimes you are exposed to and research suitable criminal lawyers in that jurisdiction. You can put in place supportive HR procedures to ensure your staff receive appropriate support if the worst should happen.

Develop and document a robust safety culture within the organisation. Safety culture is inherent in the aerospace industry – but is not always documented. If you are asked to provide information in an advisory role, make sure that the scope of that advice and the extent to which others can rely on it is properly documented.

If you're an insurer, you can work with your insured customer to ensure they have adequate planning.

SPACE

Never underestimate the effect of a criminal investigation or prosecution of an organisation.

But above all else, the space community should to lobby against criminalisation now. We have seen that this is pioneering science requiring the research resources of the whole community. The liabilities in this area are potentially huge. Criminal prosecutions are often an emotive issue, and political exigency can result in the search for a scapegoat. Scientists must to be free to pursue cutting edge research without the fear of a criminal prosecution hanging over them.

Because prison is not a place for scientists.

MISCELLANEOUS MATERIAL OF INTEREST

CONFERENCE ON THE REVISION OF EU REGULATION 261/2004

Arpad Szakal

On 13 March 2013 the European Commission published its proposal to amend Regulation 261/2004[1] on air passenger rights. The Regulation has been in force since February 2005 and it intends to provide clearer passenger rights in the event of significant delays, cancellation of flights and denied boarding.

Prof. Mia Wouters of the European Aviation Club and Prof. Pablo Mendes de Leon of the International Institute of Air & Space Law at Leiden University have jointly organised a conference[2], which took place on 17 October 2013, with the aim of providing a forum to discuss the Commission's proposal to revise the Regulation. The conference commenced with a review of the European Commission's proposal to amend the Regulation. Mr Jean-Louis Colson, Head of Passenger Rights Unit outlined the contents of the proposal made by the Commission and stressed that the aim was to achieve a balanced approach that combines enhanced passenger rights with a realistic economic framework.

The European Commission's proposal updates Regulation 261/2004 in four key areas:

Firstly, the proposal aims to clarify some of the grey areas with respect to rights to information on delayed or cancelled flights; extraordinary circumstances; rights in relation to long delays and tarmac delays; contingency planning; rights to re-routing and rights on connecting flights.

Secondly, it introduces new rights in case of rescheduling and misspelt names. Further, it also introduces rights with regard to mishandled baggage and transparency requirements for cabin and checked luggage.

Thirdly, the Commission's proposal also introduces new enforcement, complaint-procedures as well as a new sanctioning system by strengthening oversight of air carriers by national and European authorities (monitoring and joint investigations); as well as for complaint handling and enforcing individual rights (including a requirement on airlines to reply to complaints within two months).

Lastly, the proposal also aims to reduce the disproportionate financial burden on airline by introducing limits to assistance.

We have heard reactions from the different stakeholders, such as the airlines (IATA/ AEA) as well as the consumers, on the EC's proposal and the amendments made by the European Parliament. The consensus was that the revision provides a number of improvements for both airlines and consumers alike. The capping of care costs in the case of 'extraordinary circumstances' and applying more sensible temporal thresholds to compensation for flight delay are positive developments for the airlines. The reinforcement of the right to timely and comprehensive passenger information as well as greater clarity for passengers on submitting claims are viewed positively by consumer organisations such as the European Consumer Centre (ECC) in Ireland.

However, it was also highlighted by IATA/AEA that the notion of defining a delay when arriving at final destination and therefore applying delay provisions to missed connections on multi-sector journeys is misguided and it places the onerous financial compensation liability on the first airline, which may be a regional feeder and which may have experienced only a short delay not actionable under the Regulation in other respects.

Further, as the Montreal Convention 1999 (MC99) already sets out specific rules on the allocation of liability between carriers, in certain circumstances what the European Commission proposes would actually amount to a breach of the Convention. Standard interline agreements under which airlines enter into commercial cooperation, already include robust operational practices, consistent with MC99, for missed connections. And the provision will be impossible to enforce for some journeys with connecting points outside EU territory as it contravenes the territorial sovereignty of those third countries, potentially even interfering with their own consumer protection regimes.

It was agreed that a number of important questions remain unanswered, and the true proportionality of the proposal's measures remains dubious. The practical application and enforcement of many of the proposal's provisions, including as to re-routing and connecting flights, also remains unclear.

The afternoon sessions focused on the implementation and enforcement of Regulation 261/2004 in various EU Member States. We have learned about the different solutions proposed by the EU Commission to improve and limit divergent interpretation and enforcement across Europe, such as the proposition to split the two functions of the National Enforcement Bodies (NEBs) into one individual complaint handling entity. The proposal's reinforcement of monitoring and harmonisation of the application of the Regulation by the NEBs is viewed favourably by all stakeholders. The enforcement of the Regulation in the UK was explained by Mr Chris Smith of Kennedys who also highlighted the sharp increase in the number of claims/complaints handled by both his firm as well as the UK CAA.

A number of European airlines as well as travel agents are now committed to develop a transparent ADR mechanism with a view of providing some relief to the NEBs and to allow for disputes to be settled efficiently and cost effectively without the need of going to Court. Stakeholders also hope that effective ADR will help to avoid multiplication of cases brought before the Courts and will offer both businesses and consumers with a win-win situation in that consumers will have easy access to redress and businesses will avoid the cost of going to Court. The development of an ADR mechanism would also help to tackle the problem presented by enterprises making profit from Regulation 261/2004.

The afternoon session was concluded with a heated discussion of the non-exhaustive and non-binding list of extraordinary circumstances which was published on the EU Commission's website on 22 July 2013.

The Founder of EU Claim, Mr Hendrik Noorderhaven, appealed for the list to be removed from the Commission's website as the document is not legally binding. As a response, Dutch carrier Transavia highlighted the fact that most documents published on the Commission’s website are not legally binding but still feature on the website as guidance material. The general opinion of all stakeholders was that the list

provides transparency for passengers and the industry alike and assists NEBs in the consistent and uniform implementation and enforcement of the Regulation. Some even suggested that the list should feature as an "Annex" in the amended Regulation.

The new Regulation is currently expected to come into force in early 2015. The Transport Committee will vote on EP Rapporteur Georges Bach's report on air passengers' rights[3] on 14 November 2013 and the Parliament hopes to reach an agreement with the Council for the following Plenary Session.

However, the legislative timetable will be subject to further change depending on the degree of agreement that can be reached at European Parliament and Council level. In its current form, however, the proposed revision of the Regulation would be disastrous for regional carriers. It is expected to cause considerable confusion for travellers who take a connecting flight to the point of their long-haul departure and it might potentially harm regional and domestic travellers too by forcing smaller carriers to opt out of services into major hubs.

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[1] Regulation (EC) No 261/2004 of the European Parliament and of the Council 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, and repealing Regulation (EEC) No 295/91, OJ L46/1 of 17-2-2004.

[2] All papers and presentations from the conference are available on the European Aviation Club's website: http://www.europeanaviationclub.com/eac_events.cfm

[3] EP Rapporteur Georges Bach's Report on air passenger rights is available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-510.868%2b02%2bDOC%2bPDF%2bV0%2f%2fEN

RECENT EU INITIATIVES REGARDING LIQUIDS SECURITY MEASURES AT AIRPORTS

Doriano Ricciutelli

During its meeting of the 4th of February 2013[1], the EU's General Affairs Council decided not to veto the adoption by the Commission of measures abolishing from the 29th of April 2013 the requirement to screen every type of liquid, gel or aerosol, the so-called LAG's, at Community airports.

However, the restrictions which apply to such products remain in place for the time being, in that the rule still holds that liquids can only be introduced in security-restricted areas after screening, or if they are exempt from screening.

According to the Commission, imposing a general requirement regarding controls as from the above-mentioned date, would have caused operational problems at the Community's airports. The Commission also deems that the best way to ensure both a high level of protection as well as smooth passenger flows, is a gradual lifting of restrictions on LAG's.

So, in order to reach this objective, the Commission published on the 19th of March 2013 Regulation (EU) 245/2013[2] amending the Annex to Regulation (EC) 272/2009 as well as Regulation 246/2013[3] amending Regulation (EU) 185/2010[4] laying down detailed measures for the implementation of the common basic standards on aviation security.

In particular with the latter Regulation the Commission envisages a complete abolition of restrictions on LAG's, in the light of experiences gained after the introduction of screening (from February 2014 onwards), which will be assessed, together with the stakeholders, before the end of 2014. The aim would be to reach the final objective in 2016, i.e. two years after the introduction of the first phase.

The novelty is that the so-called LEDS, the Liquid Explosive Detection Systems, for which two standards have been established, should at the same time be able to detect multiple threats, e.g. liquid and solid explosives, which would facilitate control procedures.

As far as the first phase is concerned, Regulation 246 lays down that from the 31st of July 2014 at Community airports (as well as airports in Norway, Iceland and Switzerland), the following products will be screened:

1. LAG's purchased at an airport or on board and sealed in a security tamper-evident bag (STEB), which would reveal any interference, and containing sufficient proof that the purchase was made at the airport's airside, or on board.

2. LAG's destined for use during the trip for medicinal or dietary purposes, including infant formulae.

In Italy, ENAC, with a view to monitor the impact on passenger flows at check points, organized a pilot project for the controls of the articles sub point 2, between the 6th

of May and the 2nd of June 2013 at Bergamo's Orio al Serio airport.

Moreover, it is worth referring to the document which the Commission published on the 26th of April 2013, '20 Years of the Single Market Achievements in Transport'[5]. In it, the Commission sums up its initiatives in the field of security, referring to 'checks relevant to the threat' and 'the use of the latest scanners and liquid explosive detection technologies'.

Finally, we would like to point out the relevance of the discussion on the control of LAG's which takes place during the 38th ICAO Session (from the 24th of September to the 4th of October 2013), in the context of the review of the consolidated statement on the continuing ICAO policies related to the safeguarding of international civil aviation against acts of unlawful interference.

In fact, among the amendments proposed to the above-mentioned statement[6] is the one regarding the need to address the continued threat posed by LAG explosives, as mentioned by the way in the HLCAS outcome[7].

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[1] Council of the European Union, Doc. 5877/13.
[2] OJ, I 77/5 of 20 March 2013.
[3] OJ, L 77/8 of 20 March 2013.
[4] OJ, L 55/1 of 5 March 2010.
[5] Mobility and Transport DG, Page 22, 'Quick and effective airports'; See also: "Report from the Commission to the European Parliament and the Council", COM (2013) 523 final of 9/7/2013.
[6] See: A38-WP/14, EX/9, 31/5/13, Agenda item 13 (Executive Committee).
[7] The High-level Conference on Aviation Security in September 2012.

MISCELLANEOUS MATERIAL OF INTEREST

RECENT INITIATIVES REGARDING THE COOPERATION BETWEEN THE EU AND EUROCONTROL

Doriano Ricciutelli

The Council of the European Union authorised during its meeting of the 9th of July 2013[1], held under the Lithuanian Presidency, the conclusion of an agreement which lays down a new framework to enhance the cooperation between the European Union and Eurocontrol, the European Organization for the Safety of Air Navigation.

The Decision authorising the conclusion of the agreement on behalf of the Union, is contained in the Council document of the 12th of February 2013[2] which provides for Common Guidelines and in the document adopted on the 27th of June 2013[3], which notes that the European Parliament gave its consent on the 21st of May 2013.

The agreement stipulates and defines the areas, forms and mechanisms of the cooperation between both organizations and confirms Eurocontrol as the technical-operational instrument of the EU in the development and implementation of the Single Sky Programme (SES).
The agreement lays down above all the civil and military coordination of air traffic management (ATM) for a pan-European coordination beyond the European borders.

It is also aimed at bringing about the necessary synergies and avoiding duplication and redundancies in the work of the European Aviation Safety Agency (EASA) as far as air traffic management and delicate environmental questions are concerned.

The scope of the agreement contains matters such as the 'Functional Airspace Blocks', 'International Coordination', in particular with the ICAO and States other than Member States of the Parties, 'Air Transport – related data and statistics', 'Airport Policy', 'Unmanned Aircraft Systems (UAS)', etc.[4].

As far as the application of the agreement is concerned, various forms of cooperation are envisaged, amongst others the provision of mutual support, mechanisms for enhanced cooperation, liaison mechanisms and offices, the coordination of studies and programmes and joint activities, mechanisms for the collection and mutual exchange of information, data and statistics, and, where appropriate, the coordination of cooperation on technical matters at working level in the context of the ICAO.

It's noteworthy that the agreement, apart from the above-mentioned forms of cooperation, allows also for the exchange and secondment of staff between the Parties, subject to their respective internal legislations.

[1] Economic and Financial Affairs, 3252nd Council meeting (11849/13).
[2] See Aviation 10, OC 38 (5822/13).
[3] Aviation 89, Relex 573 (11495/13).
[4] See Aviation 137, OC 493 of 1st of October 2012 (13792/12).

MISCELLANEOUS MATERIAL OF INTEREST

THE NEW ITALIAN REGIONAL TAX THREATENS THE QUALITY OF AIRPORT SERVICES

Francesca Grassi

New law n. 342/2000 has established a new domestic tax on aircraft acoustic pollution in order to provide for monitoring and anti-pollution systems and to indemnify citizens who suffer from acoustic noise. The amount of the tax depends on the weight and the pollution class of each aircraft. The tax is due by the air carrier for each aircraft take-off and landing.

The domestic tax became a regional tax in 2011, however the regional legislative inefficacy was attacked by the National Association of Air Transport Carriers and Operators (ASSAEREO) and the Italian Airports Managers Association (ASSAEREOPORTI) with respect to the implications that the collection of the tax might have on the air transportation market.

In particular, major concern burst out after the "Unifying Conference of the Regions and Autonomous Provinces" took place last December releasing a document on the practical modalities to implement the tax on aircraft noise pollution.

Specifically, ASSAEROPORTI issued a note addressed to all regions arguing that such document is still insufficient in order to ensure an equal (thus, uniform) applicability of the tax provision throughout the country.

To put it shortly, the association believes that the document fails to address the purposes of the tax with respect to the diversity of the environment and of the population of the regions, besides omitting to provide for the actual destination of the revenues collected. Moreover, the association pleaded that the airports managers are left out of the picture as they are not involved in the responsibility to determine parameters and calculating the tax. Moreover, they are given no power to cover for wrong calculus or lack of payment and no power to enforce payments due. Also, the note highlights the negative impact on the right to mobility for the Italian citizens because of the increase of the costs of flying within the country borders.

For this reason, the improper application of the tax could adversely affect competition between the airports operating on the territory based on the fact that somewhere the tax could be more favorable than somewhere else.

In conclusion, the association clarifies that the tax provision necessitates better coordination between national and regional level authorities because these are the only ones capable of generating correct modalities of tax implementation, thus cutting down on regional inequalities that could threaten the quality of services provided on the market.

EU COMMISSION TO PROPOSE NEW GUIDELINES FOR STATE AID RULES FOR AIRPORTS AND AIRLINES

Francesca Grassi

The EU Commission lately released a draft containing revised state aid rules for the public funding of airports and start-up aid to airlines in order to update previous Aviation Guidelines of 1994 and 2005.

The EU initiative is dictated from the need of keeping up with the boosting economic grow characterizing the aviation industry today. It is noteworthy that the air transportation market means great deal to the European economy provided that it counts today for more than 140 billion Euros to the EU's Gross Domestic product. Subsequently, the purpose of the legislative proposal is that of ultimately pointing at further market expansion in respect of the fair competition principle and the right to free circulation of people, goods, services and capitals.

For this reason, the EU Commission has now started consultations aimed at receiving comments on the new draft which make up for the new guidelines starting to be effective from 2014.

In fact, the Commission Vice-President in charge of the competition policy, Joaquìn Almunia, publicly clarified that: "*Our aim is to ensure that taxpayers' money is well-spent and goes where it is truly needed. The next state aid guidelines will be a key ingredient for a successful and competitive European aviation industry, preserving fair competition regardless of the business model - from flag carriers to low-cost airlines and from regional airports to major hubs*".

The first public consultation was held in 2011 and based on the outcome of the comments; the EU Commission proposal is threefold.

Firstly, it addresses state aid for investment in airport infrastructure allowing it if it comes of genuine transportation need and public aid is necessary to provide access to that specific territory or region.

Secondly, as long as operating aid to airports is concerned, it now proposes to allow it for a transitional period of 10 years but under certain conditions only. It is provided that operating aid will decrease during that period in dependence on the situation of each airport in question.

Finally, the proposal introduced start-up aid to airlines to launch a new air route only upon condition that it remains restricted to certain time limitations.

MISCELLANEOUS MATERIAL OF INTEREST

FORTHCOMING EVENTS

The Aviation and Healthcare Perspectives on the Principle of the Just Culture

The successful cooperation between ANACNA, the University of Bologna, the Centre of Studies for Military Aviation-CESMA and the Italian Higher School of Magistracy, led to organize a day of professional enhancement on legal issues pertaining to both aviation and healthcare environment.

The conference is focused on the comparison between the approach of two different professional worlds to the principle of the Just Culture which has been recently subject to a few legislative changes by the European Union with respect to its applicability to those sectors.

The meeting will deal with the issue of the fault responsibility under the specific perspectives of the aviation and healthcare sectors because they are both strongly characterized by professional performances which imply high levels of responsibility.

ANACNA believes that this meeting will be an excellent starting point in order to provide for further expansion and development of the Just Culture in the next future.

The conference is scheduled on next 20th November and it will take place in Rome, Piazza della Rovere 83.

For more information see
http://anacna.it/modules.php?name=News&file=article&sid=263.