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The Slot Auction Sharing Mechanisms of the Airport and the Air Traffic Control - The Chinese case

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Introduction

Recently, the author published the article 'The Core Mechanism for the Continuous Implementation of Slot Auction', where it mainly discussed why primary slot trading could not be constantly implemented in both China and US. The problem was attributed to revenue distribution regime of slot auction and thus a new method was proposed. In the author's view, the revenue of slot auction shall be jointly owned and shared among the domestic airlines, rather than States.[1]

As for the above-mentioned opinions, some experts and scholars maintain that the airport and the air traffic control (ATC) are also supposed to share the revenue of slot auction. This point of view is not unusual in the US where some argue that the ATC and the airport shall be entitled to share the slot auction revenue. It is particularly worth mentioning, that it is from the perspective of the direct distribution that slot auction revenue shall be jointly owned by airlines excluding the airport and the ATC. On the other hand, it would be a better way to adopt the method of indirect distribution, for the purpose of incorporating the airport and the ATC into the sharing mechanism of slot auction revenue.

This article would mainly create and analyse two mechanisms, namely direct and indirect sharing of slot auction revenue by the airport and the ATC.

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Direct Sharing Mechanism

- **Sharing method**

Under the direct sharing mechanism, the airport and the ATC share the slot auction revenue at certain ratios. This could be illustrated by the formula as below:
Slot auction revenue share = Total revenue × percentage of sharing
For instance, the slot auction revenue of certain flights at an airport in the next few years is 100 million yuan. The airport shares the auction revenue at a rate of 15%, and the amount is 15 million yuan. The ATC involved in this airport follows 5% of the share of auction revenue, the amount is 5 million yuan. Then the rest of 80 million yuan of the auction revenue is owned by all airlines within the country according to certain rules.

- **Effect analysis**

In economic life, the market entities are generally pursuing optimisation of their interests. Respective entities involving in sharing the slot auction revenue are with no exception, who all pursue the slot auction share as much as possible.

For the airport and the ATC, how much they would gain from the slot auction revenue is determined by two elements: one is proportion, while the other is total revenue. The proportion will be concluded based on games of different 'players'. With a fixed total revenue, a higher sharing percentage means the higher shared revenue from slot auction. Therefore, the airport and the ATC would try their best to obtain a higher sharing percentage. With a fixed sharing percentage, the higher total revenue of slot auction means more shared revenue by the airport and the ATC respectively.

- **Airports and ATCs' measures to increase total auction revenue**

The total revenue of slot auction is determined by the bid price offered by bidder airlines. Therefore, are there any measures for the airport and the ATC to exert their influences so as to increase the total revenue of slot auction?

In order to increase the total slot auction revenue, the airport and the ATC could use the scarcity effect to enhance the value of these slots. Within a certain scope, the airport and the ATC could adopt some measures to create the scarcity. The determinants of slot capacities (frequencies of take-off and landing) are not only deemed to be the infrastructure including runways, terminals, navigation providers and instruction facilities, but also the level of the airport management and the ATC. In other words, it would make a great difference in slot capacities if the airport and the ATC adopt an optimised method of management, incorporating more capable and highly-motivated employees coupled with an effective incentive mechanism. As a result, higher slot capacities could be well expected.

The method of increasing the slot auction revenue is based on the increase of slots' scarcity, which is realized by the means of reducing take-off and landing per hour. Theoretically speaking, therefore, the airports and ATCs are supposed to lower their levels of management and provide less slots, in order to achieve less supplies in terms of time and space capacities. As a consequence, the facilities and resources of the airport and the ATC would not be fully utilised, as well as the talents. Efficiency of utilisation of the airspace would also see a decrease.
To conclude, the direct sharing mechanism for the airport and the ATC would lead to a negative incentive mechanism, where they are encouraged to reduce airport operations and then waste social resources. This is against the social welfare and the need for social and economic progress.

- **Airport and ATC' s measures for maximising their margins**

The airports, as corporations, are inherently pursing the maximisation of their margins. Currently, the main slot-constrained airports are Beijing Capital International Airport, Shanghai Pudong International Airport, Guangzhou Baiyun International Airport, Shenzhen Bao'an International Airport, whose management institutions are publicly listed companies, hence in their pursuit of margin-maximizing.

Currently, the airport revenue related to slots derives from charges imposed on the take-off and landing based on a certain standard. At present, the state implements a government-guided price for aeronautical service charge such as take-off and landing fees, in accordance with the 'Notice on Publishing the Scheme of Adjusting Civil Airport Charge Standards' (Civil Aviation [2018] No. 18) issued by the Civil Aviation Administration of China (CAAC). The state requires that the charge is consulted and determined by airports and the airlines within a range of no more than 10% of the base charge. Therefore, the revenue of airport charge on take-off and landing is relevant to the frequencies of take-off and landing. More airplanes take off and land, more revenue the airports will obtain.

Under the direct sharing mechanism, the airport revenue related to take-off and landing frequencies consist of two parts: take-off and landing fee, as well as the slot auction revenue. Take-off and landing fee refer to the total amount of take-off and landing multiplying the price thereof. The slot auction revenue equals to the total amount of auction revenue multiplying the sharing percentage. This could be illustrated by the formula here below:

The airport revenue related to take-off and landing = the total amount of take-off and landing × price of a unit of taking-off or landing + the total amount of slot auction revenue × sharing percentage.

In practice, the price of take-off and landing and the sharing percentage of slot auction is fixed periodically. To maximise the margins, airports need as much as revenue related to take-off and landing by means of generating more frequencies of take-off and landing as well as slot auction revenue. However, increasing the slots (frequencies of take-off and landing) is the opposite measure of generating more slot auction revenues. As the former argumentation indicates, to generate more slot auction revenues relies on increasing the scarcity of slots and hence reducing the slots supply.

As a consequence, the airport management is facing a dilemma on which measures they should adopt: to increase the level of management to generate more slots and then obtain more slot charge, or to lower the level of management to reduce the slots, and then obtain more revenue from the slot auction. To put it in another way, is it a better decision to fully utilize the resources and create more social welfare by means of improving the management, or to waste the resources and create less social welfare by lowering the management.

The above-mentioned dilemma should be attributed to the direct sharing mechanism of slot auction revenue. Only if airports choose to reduce their level of management they could achieve the maximization of margins. And this would further lead to a negative incentive mechanism, which constitutes a major disadvantage of the direct sharing mechanism.

The analysis on the behavior of the airport above would also be applied to the ATC.

Indirect Sharing Mechanism

Sharing Method

- **The overall scheme**

The indirect way for the airport and the ATC to share the revenue of slot auction is to add an extra fee linked with efficiency to current setting of the airport and the ATC charge. This method could encourage the airport and the ATC to provide more efficient service and obtain higher revenue at the same time.

- **Indirect Sharing Mechanism of airports**

The most updated basis for airport charge in China is ‘Notice of issuing the scheme on adjusting the setting of civil airport charges’, issued by Civil Aviation Administration of China (CAAC) (Civil Aviation [2018] No. 18) and the Implementation of the Reform of the Civil Airport Charge issued by the National Development and Reform Commission and the CAAC. (Civil Aviation [2007] No. 159).

Accordingly, the principle of airport charge in China is: 'cost recovery, transparency, non-discrimination, consultation'. Cost recovery pricing is the fundamental principle of airport charge on the air service. Cost recovery pricing principle is to involve relevant factors, including reasonable cost generated by airport management coupled with infrastructure and service, as well as the affordability of customers, into setting up the price. Therefore, the setting of air service charge, is in alignment with government-guiding price, determined by the CAAC and , based on reasonable cost generated by the airport management, the infrastructure and service, as well as the affordability of customers.

Table 1 Setting of the base charge for take-off and landing by mainland airlines

Title / Standard / Airport Classification	Take-off and landing charge（Yuan/per aircraft/per time）				
	T：The maximum takeoff weight of the aircraft				
	Under 25 T	26－50 T	51－100 T	101－200 T	More than 201T
Primary Airport, class 1	240	650	1200+24x（T－50）	2400+25×（T－100）	5000+32x（T－200）

Type of Airport	Airports
Primary Airport, class 1	3 airports: Bejing Captital, Shanghai Pudong, Guangzhou
Primary Airport, class 2	3 airports: Shenzhen, Chengdu, Shanghai Hongqiao
Secondary Airport	20 airports: Kunming, Chongqing, Xi'an, Hangzhou, Xiamen, Nanjing, Zhengzhou, Wuhan, Qingdao, Wulumuqi, Changsha, Haikou, Sanya, Tianjin, Dalian, Harbin, Guiyang, Shenyang, Fuzhou, Nanning
Tertiary Airport	All airports except the above primary and secondary airports

Table 2 Airport classifications

Type of Airport	Airports
Primary Airport, class 1	3 airports: Bejing Captital, Shanghai Pudong, Guangzhou
Primary Airport, class 2	3 airports: Shenzhen, Chengdu, Shanghai Hongqiao
Secondary Airport	20 airports: Kunming, Chongqing, Xi'an, Hangzhou, Xiamen, Nanjing, Zhengzhou, Wuhan, Qingdao, Wulumuqi, Changsha, Haikou, Sanya, Tianjin, Dalian, Harbin, Guiyang, Shenyang, Fuzhou, Nanning
Tertiary Airport	All airports except the above primary and secondary airports

The above two tables are the airport classification catalogue in Civil Aviation [2018] No. 18 and the base charge of the mainland aeronautical service by mainland airlines. These two tables indicate that, the setting of primary airport charges is lower than the secondary airport charge'. Moreover, the secondary airport charge is lower than tertiary airport charge. The rationale is that, though primary airports have always seen more investment, the flight frequency of them has resulted in a big number at the same time. Even if a lower charge is implemented on them, those primary airports could still recover their cost. On the other hand, there is less investment in tertiary airports but flights there are less frequent, which may even see quite a few flights per day. Even if a higher charge is implemented on them, tertiary airports might still not recover their cost. For instance, during the first half of 2017, the net margin of Shanghai Pudong International Airport, as a primary airport, was 1.777 billion yuan, which every passenger contributed a net margin of 52 yuan on average. During the same period, many tertiary airports suffered loss. Cost recovery pricing is on the contrary to market-based pricing. Under the principle of market-based pricing, the price is set by supply and demand. Since supply of primary airport slots always falls short of supply, the airport charge should rise. In the meantime, tertiary airport slots always sustain the surplus, so the airport charge would be relatively low.

Therefore, it is because the setting of airport charge on the air service is implementing the cost recovery pricing principle, that efficiency-based pricing could be added to the charge, in order to indirectly distribute the slot auction revenue to the airport.

As for the above-mentioned base charge, without considering the increase charge for the peak hour, the taking-off and landing fee would be the same per flight. Nevertheless, within the taking-off and landing service, the airports are required to provide, not only the infrastructure and facilities, but also management and instruction. Compared to those airports with less frequent taking-off and landing, airports with highly frequent flights always have higher requirements to meet. The employees of the airports commit themselves into a highly intense work and bear a higher level of stress. Under current single pricing mechanism, the value of the work done by employees in an airport with highly frequent flights has been underestimated. It fails to recognize the labour value of the airports employees and fails to further motivate the airports to maximise their increase of flight frequency, which is the slot capacity.

According to the designed indirect sharing mechanism of slot auction revenue, a differential rate should be implemented on taking-off and landing charges based on the flight frequency of the airport. For those flights who exceed certain frequencies, a higher charge should be imposed on them. It is specified as below:

Suggested setting of taking-off and landing charge for primary and secondary airports

Number of runways	Flight frequency	Setting of taking-off and landing charge (Yuan/per flight)
One runway	Q≤x11	Base charge rate
	x11<Q≤x12	Base charge rate ×N1
	x12<Q≤x13	Base charge rate ×N2
	x13<Q≤x14	Base charge rate ×N3
Two runways	Q≤x21	Base charge rate
	x21<Q≤x22	Base charge rate ×N1
	x22<Q≤x23	Base charge rate ×N2
	x23<Q≤x24	Base charge rate ×N3
Three runways	Q≤x31	Base charge rate
	x31<Q≤x32	Base charge rate ×N1
	x32<Q≤x33	Base charge rate ×N2
	x33<Q≤x34	Base charge rate ×N3
Four runways	Q≤x41	Base charge rate
	x41<Q≤x42	Base charge rate ×N1
	x42<Q≤x43	Base charge rate ×N2
	x43<Q≤x44	Base charge rate ×N3

Note: The number of runways refer to the number of runways actually being used; frequency of taking-off and landing refers to the frequency of actually operated flights. N1, N2, N3 refer to integers and decimals more than 1.

According to the above setting of taking-off and landing charge, if airports increase their flight frequency, they would obtain not only base charge but an extra charge at a differential rate. This measure will incentivise airports to adopt corresponding measures to enlarge their slot capacity in order to provide more taking-off and landing service.

- **Sharing mechanism of ATCs**

The ATCs provide near-airport navigation service to airlines for taking-off and landing with navigation charge. The updated basis for near-airport navigation charge is 'notice of adjusting near-airport navigation charge and flight route charge in civil aviation'. The chart below shows the standard setting of near-airport navigation charge imposed on mainly flights by mainland airlines.

The standard of near-airport navigation charge for mainland flights by mainland airlines

The chart illustrates that the near-airport navigation charge for mainland flights by mainland airlines has adopted an efficiency-based differential rate. Compared to tertiary airports, primary airports see higher flight frequencies and hence the employees of ATC have done their work with a higher quantity and quality results. Accordingly, a higher near-airport navigation charge is implemented. However, the above-mentioned efficiency-based differential rate is still not thoroughly enough. Even for the primary and secondary airports, the flight frequency of taking-off and landing differentiates from period to period during day and night. Taking-off and landing at a different frequency results in different requirements of commanding techniques and quality of the ATC service.

The maximum takeoff weight of the aircraft	Standard Charge（Yuan / T）		
（T）	Primary Airport	Secondary Airport	Tertiary Airport
0-25	2.46	2.42	2.2
26-50	3.22	3.17	2.88
51-100	3.64	3.58	3.25
101-200	5.1	5.01	4.55
More than 200	6.27	6.16	5,60

Taking-off and landing at a high frequency inherently requires air traffic controllers to have more flight control capabilities and more intense concentration. Under the single pricing within the same type of airport, the value of the ATC service during the peak time has been underestimated, which is not conducive to motivating ATC to provide more frequent near-airport navigation service. Therefore, a suggested setting of near-airport navigation charge is designed as follow:

Suggested setting of near-airport navigation charge on primary and secondary

Flight frequency of taking-off and landing	Setting of near-airport commanding charge (yuan/per flight)
Q≤x11	Base charge rate
x11＜Q≤x12	Base charge rate ×N1
x12＜Q≤x13	Base charge rate ×N2
x13＜Q≤x14	Base charge rate ×N3
…	….

According to the above setting of near-airport navigation charge, if the ATC increase its flight frequency of taking-off and landing, they would obtain not only base charge but an extra charge at a differential rate. This measure will incentivise ATCs to adopt corresponding measures to enlarge their slot capacity and provide more near-airport navigation service of higher quality.

- **A specific scheme of efficiency-based pricing**

Currently, cost recovery pricing has been implemented in airport charges on air service and the ATC near-airport navigation charges. Under the cost recovery pricing principle, cost including facilities, labour cost and management is included into the charges. Both primary and secondary airports could recover their cost. The efficiency -based differential pricing of airport and ATC charges could create great incentives to employees thereof, who are encouraged to improve their efficiency from different phases and functions. It could enable more taking-off and landing, served by the airport and the ATC.

Accordingly, to specify the setting of charges, the base charge could be designed to recover the cost related to infrastructure investment and average labour cost of the airport and the ATC. The revenue exceeding the base charge could be completely or partially considered as salary or bonus for employees, which could be specified in relevant documents related to management. By introducing a little part of efficiency -based charge, a big incentive could be created. This measure could be regarded by analogy with efficiency-based salary in the field of human resource management, which has been proved as effective.

Compared with single pricing, it would indeed be more complicated to implement an efficiency-based charge. For instance, to decide which particular setting of charge would be applied to a particular flight has to be based on the period of time and flight frequency. Though it requires much more work, the information announcement and modern information technology could be applied to facilitate it very well.

- **Effect Analysis**

The slot capacity of airports is increased

With higher efficient work, airports and ATCs are able to provide more taking-off and landing service, and slot capacities. It would contribute to the growth of revenue and profits. And it is not a linear growth but an exponential growth. In other words, the revenue and margins would grow by a higher rate with the increase of the flight frequency. Under the system of the efficiency-based differential charge, airports and ATCs could also adopt the efficiency-based piecework mechanism applied to front-line staff, to further create the incentives. Since extra revenue from the efficiency-based pricing would be used for paying the salary and bonus to staff, they would obtain a sense of achievement and thus improve their efficiency.

Compared with large-scale civil airports in developed countries, there has been a room for progress so far, for large-scale civil airports in China, to increase the flight frequency during peak time. It is by the way of reforming the airport and ATC charges as well as internal distribution system that potential motivation of employees would be triggered and airports are expected to achieve the growth of slot capacity.

- **The Airport and the ATC indirectly share the slot auction revenue**

Under this mechanism, the airport and the ATC have more revenue by providing more taking-off and landing service, which seems irrelevant to slot auction revenue. From another perspective to analyse the effects, the airport and the ATC indirectly share the slot auction revenue.

The rationale is that slot auction pricing is determined by the scarcity of slots. The less supply of slots there is, the scarcer the slots would be, and thus a higher price of slot auction could be reached. On the other hand, increasing the slot supply could lower the scarcity of slots and thus see the decrease of the slot auction price. Under the indirect sharing system,on the basis of efficiency-based charge, airports and ATCs would be encouraged to increase their level of management and thus result in more available slots, which reduces the slot auction price as well as the revenue.

A case analysis is made as follow:

For the airports and ATCs implementing single pricing, ten newly added slots would contribute 500 million yuan of revenue by means of slot auction.

For airports and ATCs implementing efficiency-based differential pricing, the newly added slots could be up to 13, as a result of higher incentives, which will also be distributed by auction. Since more slots lead to the decrease of scarcity, and thus would result in lower auction revenue at 400 million yuan. The airport and the ATC have increased the income by 50 million yuan by implementing the efficiency-based pricing and increasing the number of flights.

The comparison of the above two mechanisms demonstrates that, due to the efficiency-based pricing, both the level of incentives and slot capacity are increased, while the auction revenue decreases by 100 million yuan. The airport and ATC therefore get the increased income by 50 million yuan, which is equivalent to indirectly sharing the slot auction revenue of 50 million yuan. The public has also benefited from the increase in the slots at the airport under the new system, which has eased the slot-constrained situations at the airport, thereby reducing the price of air tickets.

As can be seen from the above example, by implementing the efficiency-based charge in the airport and the ATC, the supply of slots is increased, while the slot auction revenue is reduced. However, airports and ATCs increase their total revenue and reduce the slot auction revenue. From the perspective of the essence of economic effects, it is equivalent to the indirect sharing of slot auction revenue by airports and ATCs.

- **It meets the requirements of airport charge reforms.**

'The Implementation Plan Civil Airport Charge Reform' (Civil Aviation [2007] No. 159) provides that: 'All surcharges caused by take-off and landing related to night flights, peak hours, snow removal, high altitude airport (above the altitude of 2560 meters) and Class II operation airports, should be based on the cost of providing facilities and services, and can be raised on the basis of the prescribed base charge for take-off and landing. The maximum surcharge should not exceed 10% of the base charge in total.' This provision reflects the concept of differential pricing in accordance with the content and quality of the airport service. Compared with take-off and landing services in general airports, the service provided by night flights, peak hours, snow removal, high altitude airport (above the altitude of 2560 meters) and Class II operation airports, is required by more complex and demanding management and commanding service. Thus, these services can be levied on a base charge basis. The efficiency-based differential pricing we designed, is based on the difference in level of management, labour capacity and strength between the airport take-off and landing commanding services. And efficiency-based surcharges would be imposed for the take-off and landing commanding services provided by high-intensity airports based on the base charge. It is consistent with the spirit of 'Civil Aviation [2007] No. 159' and meets the requirements of airport charge reforms.

- **It meets the requirements of in-depth reforms of the Air Traffic Control.**

In December of 2016, the CAAC issued the "Implementation Opinions on Promoting the Deepened Reforms of Civil Aviation Management" (hereinafter "Opinions"). The "Opinions" put forward a number of reform measures. Among them, deepening the reform of the civil aviation management system and mechanism is the key and core issue of this round of reform. We must firmly collect the leading role of the three systems in the reforms: employment, fixed-term staff, and salary system. On the issue of the reforming the distribution system, the "Opinions" requires that we must adhere to slanting towards the front line, the grassroots, and the technology. In this way, the responsibility of first-line controllers would be highlighted, and it would enhance the sense of achievement of the grassroots employees from the reforms, thereby maximizing the potential development of ATCs.

After implementing the efficiency-based charge on near-airport navigation service, the ATC can increase revenue by improving navigation efficiency. In addition, it can implement differential piecework salary system or other relevant systems for front-line employees, thereby putting the stress of revenue distribution on them. It could truly realise the principle of "distribution in accordance with work", so that front-line employees have the perception of getting more money. It could attract and retain excellent employees. Through the incentives for employees, work efficiency can be greatly improved. Therefore, the indirect sharing mechanism of slot revenue can adapt to the requirements of in-depth reform of ATCs, promoting the implementation of reforms.

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- **It optimises the resource allocation and increases the social welfare.**

Increasing the slot capacity of the airport could allow more flights to take off and land at the same airport, so that airspace resources, airport resources and air traffic management resources can be utilised more efficiently. Increasing the number of flights from the airport can generate more supply of transportation, reduce the contradiction between supply and demand in the market and reduce the price of air tickets, which ultimately increases social welfare.

- **It is necessary to strengthen security management.**

Increasing the flight frequency at the airports will inevitably place higher demands on safety management. Some may think that the flight frequency growth by airports and ATCs will threaten the flight safety. Therefore, they are skeptical about the implementation of efficiency-based differential charging. The worries are not necessary. In fact, many industries in the national economy are faced with potential contradictions between safety and efficiency, such as aviation, railways, mining and other industries. In the civil aviation industry, airlines also face conflicts between safety and efficiency. The rate of aircraft utilisation is an important efficiency indicator. Increasing the rate aircraft utilisation will bring more risks of safety. And reducing aircraft utilization will increase safety margins. Since the independent operation of China's airlines began in the early 1990s, the utilization rate of aircraft has boosted through the efforts of airline staff. The annual utilisation rate of aircrafts has increased from 7.80 hours[20] per day in 1997 to 9.91 hours per day in 2015. At the same time, the level of safety has also been greatly promoted. Now, some airlines have been using aircrafts for more than 11 hours per day in a month, and they still guarantee the safe operation. From the data of the airlines, it can be seen that by strengthening management, it is achievable to improve efficiency on the basis of ensuring safety. At present, China's civil aviation industry generally adheres to the principle of 'safety first'. As long as the airport and the ATC continue to adhere to the principle of 'safety first', it is also feasible to enhance efficiency by ensuring safety while strengthening safety management.

- **There is a wider scope of application.**

It is from the perspective of adopting slot auction as the method of slot primary trading that the airport and the ATC implement efficiency-based differential charging to indirectly share the slot auction revenue. In fact, there is a wider scope of application for the airport and the ATC to implement efficiency-based differential charges. Even if the primary trading of slots does not adopt the auction system, it can still be implemented alone or in conjunction with other systems. For example, by drawing lots for primary allocation of slots, secondary trading auctions or other paid transactions for slots, the airport and the ATC can still indirectly share slot auction or transaction revenue by implementing efficiency-based differential pricing mechanism. Even if the primary allocation of slots still adopts the administrative allocation model, the efficiency-based differential charge mechanism still has the effect of creating the incentives, which can optimise the resource allocation of the airports, the ATCs and airspace.

Concluding remark

Based on the above analysis, it is found that the indirect distribution mechanism could have a better effect in optimising resource allocation, improving efficiency, and having a wider scope of application than direct sharing mechanism.

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[1]Guo Caisen, "The Core Mechanism for the Continuous Implementation of Slot Auctions (Part 2)", China Civil Aviation, No. 1, 2018, p. 22.

[2]See the Policy and Regulation Department of the Civil Aviation Administration of China and the Civil Aviation University of China. The Theory and Practice of Civil Aviation Flight Time Management: A Study on the Application of Scarce Resources, China Civil Aviation Press, 2009, pp. 124-125.

[3]Luo Zhiyu: 'Shanghai Airport semi-annual report release: a substantial increase in net profit', http://news.carnoc.com/list/416/416521.html

Liability of Airport Operator for Damage in International Carriage of Cargo - Representation Issue

*Berin Riđanovic**

Introduction

Unlike the contract on international carriage of passengers which is of two-way character by the nature of things, the agreement on international air carriage of cargo defines unidirectional carriage. Consequently, when establishing the applicable international instrument for damage sustained in international air carriage of cargo it is necessary to find out which international instrument was ratified by the state of a cargo consigner and which one by the state of cargo consignee.
Legal issues resulting from a loss of cargo in international air transport include active and passive legitimation, establishment of applicable instrument of liability (multilateral instrument – convention or implementation of conflict-of-law norms of international civil law or implementation of the national legislation of Bosnia and Herzegovina, as well as consequential issue of limited or non-limited liability for damage.

Legal issues to be addressed are as follows:

1. Who is an actively legitimized subject / passively legitimized subject?
2. Was the damage sustained during international air transport and which instrument is applicable for the particular damage?
3. Does the airport operator represent air carrier in terms of provisions of the Warsaw system or Montreal convention?

Actively and passively legitimized subjects

Contract on international carriage of cargo is concluded between consignor and air carrier. Contrary to international transport of passengers, a contract on international carriage of cargo is concluded in favour of a third physical or legal entity. Since provisions of the Warsaw system and Montreal convention do not define rights of cargo owner and whether he is an actively legitimized subject, it means that legal requirements in terms of obligations from contract on international transport of cargo may be set to a consignor, air carrier and consignee, but not the cargo owner. Consequently, the question arises on who is/are actively/passively legitimized subject (s).
Active legitimation of a cargo consignee in case of cargo loss results from Article 13 paragraph 3 of the Warsaw convention, which is adopted in Article 13 paragraph 3 of the Montreal protocol number 4 and Article 13 paragraph 3 of the Montreal convention. The condition for application of a consignee's right is that air carrier has admitted a loss of rights and that cargo has not arrived to destination in seven days after the date it ought to have arrived.

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Provisions of Warsaw system and Montreal convention have not stipulated in which way an air carrier can admit loss of cargo. In other words, air carrier may admit the loss of cargo in any form, i.e. in written or verbally. If air waybill says that cargo is to be delivered to a consignee's business or private address, in that case the consignee resumes the right to require cargo to be delivered to the consignee's business or private address.

In case of loss of cargo, consignee will require compensation for damage according to provisions of the Warsaw system or Montreal convention. If cargo is destroyed or damaged, consignee may require compensation for damage in accordance with national legislation whose implementation is indicated by conflict-of-law norms of a court having international jurisdiction. The question arises whether consignor and consignee of cargo may independently of one another file charges for damage compensation, or the consignor's right blocks out the consignee's right. Language interpretation of Warsaw convention and Montreal convention clearly indicates that right conferred on the consignor ceases at the moment when that of the consignee begins. Preparation materials from the Warsaw convention also indicate that states representatives accepted the interpretation according to which a cargo consigner loses his right when consignee's right commences[1]. According to Article 13 of the Warsaw convention and now Article 13 paragraph 3 of Montreal convention, cargo consignor loses his right on arrival of the cargo at the place of destination, i.e. at the moment when aircraft land to destination airport. Nevertheless, if the consignee declines to accept the air waybill or the cargo, or cannot be communicated with, the consignor resumes its right of disposition. The place of destination means the airport written in the air waybill as destination airport.

Answer to the question about legitimized subjects partially depends on whether the damage happened during international air transport. Namely, in case the damage happened during the international air carriage, the carrier would be passively legitimized subject. Otherwise, the carrier is not passively legitimized subject.
Furthermore, it is beyond dispute that airport operator is passively legitimized subject if the damage was sustained at the airport while handling the cargo. However, legal issue is whether the airport operator as an exclusive provider of ground handling services is a representative of air carrier in terms of Article 25 of Warsaw convention or Article 30 of Montreal convention, or if liability of airport operator for damage is to be established through implementation of national legislation. If applicable instruments are provisions of the Warsaw system or Montreal convention, liability of airport operator will be limited, while in case that applicable instrument is national legislation, its liability will be unlimited.

Scope of liability of carrier and airport operator in international air carriage of cargo

Carrier is responsible for the damage sustained or loss of cargo only if the event that had caused damage or loss happened during air transport. Consequently, carrier's servant or agent is also liable for the damage according to provisions of the Warsaw system or Montreal convention if the damage was sustained during carriage by air. Warsaw convention explicitly established air carrier's liability for damage on cargo under the condition the carrier takes care of the cargo on board the aircraft, at the airport or elsewhere, in case of landing out of the airport.

Montreal convention implicitly defined that the time of air carriage means the time while cargo is at airport. In other words, if the damage in international carriage of cargo was sustained at the airport, provisions of the Warsaw system or Montreal convention will apply.

Consequently, if the damage saw sustained out of the airport area, applicable instrument will be provisions of the national legislation. The rule on exclusive implementation of the Warsaw system and/or Montreal convention in the airport area is not absolute. First exemption includes whether the Warsaw system or Montreal convention are applicable if the damage happened during loading, delivery of reloading; it is presumed that any damage resulted from an event that happened during air transport, if not otherwise proved.

Conditio sine qua non for applying the Warsaw system or Montreal convention in such a case is that the loading, delivery or reloading were performed in order to realize the contracton international air carriage of cargo, as well as that the cargo could not have been transported the other way but by land. If cargo could have been transported by scheduled air carriage, in that case it will not be considered that loading, delivery or reloading of cargo were done during international air transport of cargo[2]. Second exception related to implementation of Montreal convention is when air carrier unilaterally, without consignor's consent, replaces air transport with transport by land. In that case, provisions of Montreal convention will apply. Warsaw convention and Montreal protocol No. 4 did not include such a solution. The following question arises: if air carrier is obliged, according to the contract on international air transport, to deliver cargo to consignee's main office or its other location (door to door), which provisions will be applied – of the Warsaw system or those of Montreal convention. The answer is positive only in case the provisions of the Warsaw system or Montreal convention are not contrary to provisions of the instrument related transport by land. Court practice in the United States of America took the view that in case the contract on cargo carriage includes door-to-door delivery, then the cargo is under control and in custody of air carrier, and, consequently, provisions of the Warsaw system[3]are applied. The same pertains to Montreal convention.

Provisions of the Warsaw system and Montreal convention do not define what is meant under the notion of „airport“. The notion of airport has been defined in Annex 14 of Chicago convention – Airports, as a certain area on land or water (including all buildings, installations and equipment), designed, entirely or partially, for manuvering, take-off, landing and parking of aircraft. Definition from Annex 14 of Chicago convention is technical and includes all the buildings designed for air traffic operations, regardless of the fact whether they make a separate unity or they are scattered in a wider geographical zone. On the other hand, a functional definition includes all the buildings, installations and equipment within the perimeter fence.

The Warsaw convention, more extensively and precisely, defines the international carriage by air as the time spent either at the airport, on board the plane or at any place in case of landing out of airport. Provisions of the Warsaw system and Montreal convention will indisputably be applied if the buildings, installations and equipment make a separate unity placed within the perimeter protective fence. However, if the buildings, installations and equipment do not make an entirety and are placed out of the perimeter fence, the question arises whether to apply provisions of the Warsaw system or Montreal convention. Preparation materials from the Montreal conference do not offer answer to the question.

Montreal convention does not define what the international air carriage precisely means and thus leaves space for interpretation that the international transport by air includes the period that does not cover the period of international air transport of cargo between two airports. Contrary to Warsaw convention and Montreal protocol number 4 that include dominantly location criterion which explains what is understood under surveillance over cargo, Montreal convention does not include location criteria except the notion of airport.

Limited and unlimited liability for damage in international carriage of cargo by air

Warsaw convention, altered by the Hague protocol, introduces limited liability for damage in international carriage of cargo of 250 francs per kilogram, what is 20 US$ per kilogram, i.e. approximately 29,80 KM per kilogram. Carrier's liability for damage in international transport of cargo may be exceeded if a consignor paid an additional statement on depositing the delivery at its destination and also paid an extra fee. Shortcomings regarding obligatory contents in air waybill in accordance with Warsaw convention, altered by the Hague protocol, do not affect validity of the contract on international air transport of cargo but do make a legal basis for exceeding of liability. Also, carrier will not be able to exempt or limit its liability for damage in international transport of cargo, applying provisions of Warsaw convention, altered by the Hague protocol, if the damage was caused deliberately or due to negligence[4] . Warsaw convention, altered by the Hague protocol, set up subjective liability of carrier and the carrier's agent for the damage in international transport of cargo. In other words, consigner and consignee have to prove in court or off-court proceedings that the carrier did not delivered cargo to a consignor while the air carrier or its agent have to prove they are not guilty for non-delivered cargo.

Montreal protocol number 4 and Montreal convention set up a limited liability for damage in international cargo carriage in the amount of 17 SDR per kilogram. In case that applicable instrument means Montreal protocol number 4 from 1975 and Montreal convention, shortcomings regarding documentation (content of air waybill) are not a legal basis for exceeding the liability for damage in the international transport of cargo. After the revision of limited liability made by ICAO in 2009, air carrier's liability in the international transport for damage on cargo equals 19 SDR per kilogram.

Montreal protocol 4 and Montreal convention introduced objective liability for damage in international carriage of cargo and starting from 1975 and Montreal protocol No 4 legal prerequisites for launching an electronic air waybill were created. By applying Montreal protocol number 4 and Montreal convention liability of carrier for damage in air transport of cargo cannot be exceeded even if the damage was sustained by extreme negligence or deliberately. Legal basis for exceeding of air carrier's liability for damage in the international transport of cargo is submission of a statement on having interest on delivery of the cargo to its destination and payment of extra fees, but that is rarely done in practical implementation of Montreal convention.

Due to introduction of limited liability without possibility to exceed the liability for damage, court proceedings in international cargo carriage happen infrequently when applying Montreal protocol number 4 or Montreal convention.

Limitation of Actions

Warsaw convention and Montreal convention set up the deadline of two years for bringing a legal action[5].In addition, the limitation of actions for a regress action that could be brought by third persons, for example insurance companies, against air carrier or carrier's agent is twoyears[6].
Deadlines set up in provisions of the Warsaw or Montreal convention are preclusive rather than prescribed. In other words, as courts pay attention to limitation of actions ex officio, there is no need for a party to raise an objection because of expiry of deadline in order to bring a legal action.

Court practice holds a view not to implement preclusive deadlines from provisions of Warsaw system or Montreal convention in case of bringing a regress action by actual or contracted air carrier against Ground Handling services provider for damage on cargo or the damage paid by actual air carrier[7]. Regress actions in practical implementation mean an off-court settlement, as well as bringing a regress action by mainly third legal persons against air carrier – insurance or reinsurance companies. As court proceedings are long-lasting, it is unlikely to have a regress action brought after a final judgement. The deadlines defined by provisions of the Warsaw system or Montreal convention cannot be extended or shortened by provisions from a contract on carriage or provisions of the national legislation. However, a start of implementation of preclusive deadlines from Article 29 of Warsaw convention or Article 35 of Montreal convention is established by national law of a relevant court being in charge of court proceedings. In case that provisions of the Warsaw system or Montreal convention are the applicable instrument, preclusive deadline of 2 (two) years cannot be extended and set up a new deadline even if the damage resulted from criminal act[8]. According to national legislation of Bosnia and Herzegovina, prescribed deadline for bringing a court procedure is 5 (five) years from the moment the damage was sustained[9], and in case the damage resulted from a criminal act[10], a claim for damages may be submitted in the deadline defined for statute of limitation on prosecution for criminal offence[10].

Representation in terms of the Warsaw system and Montreal convention

- **Evolution of liability of air carrier's servants and agents**

Representation means Principal's empowering of an agent to represent him in contacts with third legal and physical persons.

Authors of the Warsaw convention regulated not only the carrier's liability for damage in international air carriage of passengers, baggage and cargo, but also the carrier's liability for the damage caused by his agent, and sustained by a consignor (Articles 16 and 20 of the Warsaw convention), as well as the carrier's liability for the damage caused by his agent and sustained by passengers (death or injuries), or the damage sustained by lost, destroyed and damaged baggage and cargo, like in Articles 20 and 25 of the Warsaw convention[11] .The Warsaw convention does not establish explicitly passive legitimation of an agent[12] for damage, what resulted in non-uniform implementation of the Warsaw convention. Courts in the Republic of France, as well as the court of appeals in Singapore, due to a lack of provisions in the Warsaw convention, did not limit liability of air carrier's servants and agents, too.[13]

As the original text of the Warsaw convention was prepared in French language only[14], it is necessary to define meaning of the word „préposé“ in order to define meaning of agent. In terms of semantics, the notion „ prepose “ includes exclusively air carrier's employees. As a possibility of bringing action against air carrier's agent has not been explicitly defined by Warsaw convention, it would be right to conclude that the notion „agent“ includes carrier's employees, and that the authors of the Warsaw convention did not intend to include legal persons as air carrier's agents. In other words, the notion „agent“ in the Warsaw convention corresponds to the notion „prepose“ (servant).

Imprecision was corrected by Article 14 of the Hague protocol, which established carrier's agent's liability for damage sustained by passengers, baggage and cargo in international transport under the same conditions as for the carrier. In other words, the Hague protocol explicitly set us passive legitimation of air carrier's servants and agents, as well as the implementation of limited liability for the damage in international transport of passengers, baggage and cargo. The Hague protocol for the first time introduces the notion of a servant who is a carrier's employee, and the notion of an agent, which includes legal persons that act in accordance with air carrier's orders.

Article III of Guadalajara convention extends the field of implementation and agent's liability from contracted air carrier to an agent and servant of the actual carrier, and consequently, the limited liability of both actual and contracted air carriers’ agents for damage in the international air transport of passengers, baggage and cargo[15]. Article X of Montreal protocol 4 brings a revolutionary change in the international carriage of cargo by introducing the objective liability of air carrier for cargo damage, without a possibility of exceeded liability even in case the damage was inflicted deliberately or due to extreme negligence. In this way a degree of air carrier’s guilt for damage in international transport of cargo becomes irrelevant. Furthermore, long-lasting court proceedings are avoided because they often had to define a degree of guilt.

Article 30 of Montreal convention and all solutions from the Warsaw system (liability, limited liability of both actual and contracted air carriers’ servants and agents for damage in international air transport of passengers, baggage and cargo) have been unified in one instrument and under the same conditions as for the air carrier for damage in the international transport of passengers, luggage and cargo[16]. Notions of carrier’s “servants” and “agents” are included in Article 16, 21 paragraph 2 Indented line1) and 43 of Montreal convention.

Legal theory and court practice established criteria for delimitation of the notions of air carrier’s “servant” and “agent” from other legal persons participating in a chain of the international air transport of cargo:

- Basic criterion is that the damage was sustained during the international air transport of cargo.
- Servant and agent were performing their duties in order to realize the contract on air carriage of cargo.
- Carrier's servant or agent performed their jobs in accordance with the work contract or agency contract[17].
- Carrier's agent does not have a monopoly at the market.

Provisions of the Warsaw system and Montreal convention do not include a definition of an carrier and carrier's agent. The Warsaw convention and changed Hague protocol established that agency means work of agent within his authority[18]. Article 30 of Montreal convention explicitly jobsestablished that the notion of „servant“ or „agent“ is unbreakably related to performance of within the authority. Obligation to prove working within the authority is on carrier's servant or agent. If a servant or agent proves he was working within the authority, he will be able to use limited liability.

The question arises how to treat the employees of ground handling provider who were not supposed to work during the damage occurrence but were present during the occurrence and performed their duties within their scope of work. Court practice is divided regarding this issue. In my opinion if an employee, who according to his work contract has access to cargo and, abusing his authorities, commits robbery and theft, it should be deemed that he was working within authority of his working post regardless of the fact the damage occurred out of the employee's working hours[19].

The notion of representation in terms of provisions of the Warsaw system and Montreal convention is related to realization of a contract on international carriage of passengers, baggage and cargo. Manufacturers of aircraft and lessees of aircraft are not considered the carrier's servants or agents, since they do not perform tasks aimed at realization of the contract on international air transport.

Servants and agents of air carrier are its employees, like flight attendants, ground crews and administrative staff .Aircraft crew that operated temporarily in accordance with an agreement on exchange of crew among airlines is treated as air carrier's agent. Carrier's subcontracting party that took a flight may be considered the carrier's servant and/or agent.

Servants and agents of air carrier include all persons being necessary for execution of air transport contract even if they are not air carrier's employees if they perform the duties assigned by the carrier.

- **Carrier's agents**

Burden of proving the provisions to the benefit of air carrier's agent or servant is on a defendant, i.e. legal persons that believe that they may use limitations stipulated in the provisions of the Warsaw system or Montreal convention[26]. The provision on a possibility of limited liability for the damage sustained in the international air carriage of passengers, baggage and cargo goes to the benefit of the legal or physical person that claims to be air carrier's servant or agent. Consequently, the burden of proving is on such physical or legal person.

Economic dependence is not crucial in interpretation of the words „servant“ and „agent“ but the relation of subordination[25]. According to linguistic interpretation of the notion „prepose“, servants and agents exclusively pertains air carrier's employees to whom the carrier is entitled to issue orders regarding methods and way of performance of their duties. Historical and systemic interpretation leads to the conclusion that any physical or legal person in legal connection with carrier may be considered his servant or agent.

The most controversial issue of the notion „agent“ in terms of provisions of the Warsaw system and Montreal convention is whether the notion „agent“ covers a monopolistic status at the market of the legal person that concluded a contract with air carrier. Preparation materials of the Warsaw convention, the Hague protocol, Guadalajara convention, Montreal protocol number 4 and Montreal convention do not offer the answer to this question , i.e. the representation issue obviously did not attract sufficient attention of delegations. Consequently, historical, language related and systemic interpretation of the notion „agency“ cannot help in interpretation of the „agent“, and they do not establish a legal foothold for the conclusion that due to monopolistic status of a legal person providing its services to air carrier, it cannot be considered the carrier's agent.

Monopolistic status at the market can be of legal or market character. Monopolistic position of a legal person that performs tasks in accordance with a contract concluded with air carrier is not a legal probelm because the carrier has a possibility to chose a legal person to conclude a contract with. Legal monopoly, on the other hand, does not offer such a possibility, and thus carrier cannot conclude a contract with a legal person that would perform jobs on behalf of the carrier, nor on its own behalf.

Consequently, judicial practice took a view that legal persons having a legal monopoly cannot be understood as carrier's agents; thus the Air traffic control centre, meteo service providers, flight controllers, Customs officers or Directorate of Civil Aviation are not considered servants or agents of air carriers in terms of provisions of the Warsawsystem and Montreal convention.[26]

Liberalization of air traffic market for air carriers resulted in liberalization of the ground services market. Until 1996 and adoption of the EU Directive **on access to the groundhandling market at Community airports**, there was a monopoly of airport operators on the ground services market. Regarding that the Supreme court in Italy pronounced three consistent verdicts (No. 9357/1990, 85317/1992 and 9810/1997), from which it can be concluded that in case of air transport of cargo, the phases before and after the air carriage, are not considered to be a part of the carrier's liability, based on air waybill[27].The Supreme court in Italy set up two principles as follows:

- Warsaw convention is not applied to ground services and cargo custody. These services cannot be integrated in a contract on air carriage but are provided in accordance with a separate agreement on cargo custody according to the national legislation. Such approach means that the ground service provider is a depositary, acting on behalf of a third party, i.e. consignee. Legal ratio of the supreme court of Italy lies in the fact that the ground service provider is a monopolist and that air carrier is obliged to use the airport operator's services,
- According to the mentioned agreement (air carrier and airport operator are contracting parties, while the consignee is a user) the consignee is exclusively authorized to bring legal action against the airport operator, under the condition that the damage or loss of cargo happened on the ground.

Consequence of the mentioned points of view is that courts were restraining a notion of air carrier's supervision to immediate possession in case that airport operator, as a ground service provider, has a monopoly at the market. In that way, the location as a criterion of damage occurrence is made irrelevant, in spite of the fact that the damage was sustained in the airport area. Court rulings that narrowed down the implementation of the Warsaw system to immediate possession are wrong. If the criterion according to which the existence of a legal monopoly does not offer a legal basis that airport operator is air carrier's agent is accepted, it does not mean that the air carrier does not control the cargo if the location criterion is applied. In other words, in case of damages on cargo that occurred within the airport parameter, provisions of the Warsaw system or Montreal conventions should be applied to air carriers, regardless of the fact that the airport operator has or does not have a legal monopoly at the market. Standard Ground Handling Agreement (hereinafter referred to as: SGHA), starting from edition 2008, in the Main agreement recognizes ground handling provider as the air carrier's agent, whether or not the provider is the airport operator or it is a third legal person specialized for provision of ground handling services through defining that limited liability is to be applied to ground handling provider for the damage in the international air transport of cargo.[28]

Provisions on limited liability for damage were taken from SGHA from 2013[29] and 2018[30] . However, as the provisions of the Warsaw system or Montreal convention are of imperative nature, in item 8.1 of the Main agreement of SGHA from 2004, 2008, 2013 and 2018, representatives of air carriers and ground handling providers correctly assert that a court may define that the provisions on limited liability for damage in the international air trnsport are not applied to ground handling providers. Legal foothold of the provision lies in Article 23 of the Warsaw convention and/or Article 26 of Montreal convention.

It is obvious from mentioned facts that the contractual provision on limited liability of ground handling provider is of a principle nature, while courts have a final word whether a ground handling provider may restrict its liability for damage. Signed agreements on provision of ground handling services - SGHA do not protect providers of ground handling services. In case of exemption and limitation of liability, legal position of ground handling provider would not change if the damage was sustained due to intention or gross negligence. However, Standard Ground Handling Agreement clearly indicates that air carriers and ground handling providers undoubtedly hold that the notion of ground handling provider may be understood as the notion of the carrier's agent. Having that in mind, the question arises if P.C. „SARAJEVO“ International Airport LLC Sarajevo, as an exclusive ground handling provider, is the air carrier's agent.The question also arises whether, in case of bringing a legal action against the airport operator, the applicable instrument would be the existing Montreal convention, or in 2007 the Warsaw convention modified by the Hague protocol.In Bosnia and Herzegovina in 2007 airport operators had a legal monopoly to provide ground handling services. Cargo is handled within realization of a contract on international air transport of cargo. At that time the Standard Ground Handling Agreement from 2004 did not include a possibilityof limited liability for damage in the international air transport of cargo. Having in mind that P.C. „SARAJEVO“ International Airport LLC Sarajevo has a legal monopoly to provide ground handling services, and consequently implementing the criteria set up in court practice and legal theory of that time, P.C. „SARAJEVO“ International Airport LLC could not be understood as an agent in terms of the Warsaw system and/or Montreal convention, and there would exist unlimited liability of the Airport operator for damage. However, the national courts should establish whether airport operators may be interpreted as carriers' agents in terms of Article 25 A of Warsaw convention modified by the Hague protocol and Article 30 of Montreal convention.
Preparation materials do not indicate that airport operator cannot be covered by the notion of an agent. In addition, as it can be considered that provisions of the Warsaw system and Montreal convention established, among others, airport location as one of the criteria, and that the carrier does not lose control over the cargo which is handled at the airport within execution of the contract on the international air transport, it is quite justified to assert that the damage was sustained during the international air transport of cargo and that the airport operator is the carrier's agent. Due to liberalization of ground handling services market by adoption of the Directive 96/67 on access to ground handling services, it is possible to provide ground handling services independently and act at the market of third ground handling providers; in addition, a legal dilemma regarding application of Article 25 A of the Warsaw convention modified by the Hague protocol or Article 30 of Montreal convention was eliminated.

Conclusion

The agreement on international air carriage of cargo defines unidirectional carriage. Consequently, when establishing the applicable international instrument for damage sustained in international air carriage of cargo it is necessary to find out which international instrument was ratified by the state of a cargo consigner and which one by the state of cargo consignee. Montreal protocol number 4 and Montreal convention set up a limited liability for damage in international cargo carriage. Montreal convention does not define what the international air carriage precisely means and thus leaves space for interpretation that the international transport by air includes the period that does not cover the period of international air transport of cargo between two airports.

In terms of semantics, the notion „prepose“ includes exclusively air carrier's employees. Legal theory and court practice established criteria for delimitation of the notions of air carrier’s “servant” and “agent” from other legal persons participating in a chain of the international air transport of cargo:

- Basic criterion is that the damage was sustained during the international air transport of cargo.
- Servant and agent were performing their duties in order to realize the contract on air carriage of cargo.
- Carrier's servant or agent performed their jobs in accordance with the work contract or agency contract.
- Carrier's agent does not have a monopoly at the market.

The most controversial issue of the notion „agent“ in terms of provisions of the Warsaw system and Montreal convention is whether the notion „agent“ covers a monopolistic status at the market of the legal person that concluded a contract with air carrier. Historical, language related and systemic interpretation of the notion „agency“ cannot help in interpretation of the „agent“, and they do not establish a legal foothold for the conclusion that due to monopolistic status of a legal person providing its services to air carrier, it cannot be considered the carrier's agent. Judicial practice took a view that legal persons having a legal monopoly cannot be understood as carrier's agents; thus the Air traffic control centre, meteo service providers, flight controllers, Customs officers or Directorate of Civil Aviation are not considered servants or agents of air carriers in terms of provisions of the Warsaw system and Montreal convention.

[1] Montreal Convention, Annotated by Elmar Giemulla, Ronald Scmid, Wolf Muller – Rostin, Regula Dettling Ott, Rod Margo, article 18-50, Kluwer Law International

[2] Montreal Convention, Annotated by Elmar Giemulla, Ronald Scmid, Wolf Muller – Rostin, Regula Dettling – Ott, Rod Margo, article 18-35- supplement 6 (January 2010)

[3] Jayces Patou Inc v. Pier Air International, Ltd. 714 F. Supp 81 (S.D.N.Y 1989). Pick v. Lufhthansa German Airlines, 265 N.Y.S. 2d 63 (Civ Ct N.Y. 1965).

[4] Article 25 of Warsawconventionand Article 14 of the Hague protocol

[5] Article 29 of Warsaw convention and Article 35 of Montreal convention

[6] American Home Assurance Co. v. Kuehne & Nagel, 32 Avi 16,16,185 (S.D.N.Y. 2008), Data General Corporation v. Air Express International Co. 676 F. Supp 538,540 (S.D.N.Y. 1988)

[7] Sabena Belgian World Airlines v. United Airlines, Inc, 773 F. Supp 117 (N.D.III. 1991)

[8] Onyekuru v. Nortwest Airlines, Inc., 32 Avi ¸5.551 (N.D. 1II.2007)

[9] Article 376 paragraph 2 of the Law on obligations FBiH ("Official Gezette RBiH", No. 2/92,13/93 and 29/03)

[10] Article 390 of the Law on obligationsFBiH („Official Gazette RBiH", No. 2/92,13/93 and 29/03)

[11] This right will also be denied if the damage was cause by one of his agents, acting on his behalf, under the same conditions

[12] Yusen Air & Sea Service v. Changi International Airport Services, 1999-4 SLR 135, at 45 (Singapore Ct. of App., 1999

[13] The Refinement of the Warsaw System: Why the 1999 Montreal Convention Represents the Best Hope for Uniformity, Jennifer McKay, Issue 1, Volume 34, Case Western Reserve Journal of International Law, p. 86, 2002.

[14] Article 38 of Warsaw convention

[15] Article V of Guadalajara convention

[16] Montreal convention applies to agents of both contracted air carrier and actual carrier, i.e. in this particular case it applies to the provider of GH services to the actual air carrier. - American Home Assurance co. v. Kuehne & Nagel, 32 Avi 16,185 S.D.N.Y.

[17]Contract between carrier and third legal person is not obligatorily named the contract on representation

[18]Article 25 of Warsaw convention and Article 25A of the Hague protocol. The Hague protocol introduces the notion of servant

[19]Carrier's employee in charge of keeping the baggage and cargo who committed theft out of his working hours is the carrier's servant in terms of the provisions of Warsaw system. In such a case air carrier will be liable for sustained damage because its employee had access to committ the theft, regardless of the fact that the occurrence happended ouf the employee's working hours. - RGZ 101,348. In certain court proceedings the verdict were quite the opposite, i.e. carrier cannot be liable for the damage caused by theft of baggage or cargo during provision of ground handling services, which was committed by the air carrier's employee out of his working hours, or out of his scope of work. - Pymanovski v. Pan Am – NY Supreme Court, 1979 USAvR and 15 Avi 17,698, Eve Boutique v. Seaboard World – NY City Civil Court, 1968, USAvR 33

[20] LG Hanover, Vers 1990.282, AASL 1983,29

[21] Air Guadelope v. Divers – Cour d Appel de Basse – Tierre, RFDA 1984, 317

[22] Handler v. ALM and KLM – US Distrcit Court, EDNY, 1976, 14 Avi 17,414 and Al 1976,230

[23] OLG Dusseldorf, VersR 1978,968, LG Frankfurt, ZLW 1986,154/157 and TranspR 1985,432/434

[24] BGH ZLW 1989,252 and TranspR 1989,275

[25] Montreal Convention, Annotated by Elmar Giemulla, Ronald Scmid, Wolf Muller – Rostin, Regula Dettling – Ott, Rod Margo, article 19-24- Supplement 6 (January 2010)

[26] LG Hanover, Vers 1990.282, AASL 1983,29

[27] Though execution of these phases contributes to performance of air carrier's main obligation like air transport of cargo, the phases still constitute a separate obligation to be executed by airport operator.
The mentioned activities are not considered to be executed by the airport operator as the carrier's agent. Delivering a judgement that defines that services of airport operator were organized and provided beyond air carrier's control, the court limited the notion of an „agent“ to employees, i.e. servants of air carrier. The cargo being kept and stored by airport operator before and after the air transport is a reason for the carrier's liability in case of the cargo lost or damaged on the ground. Accordingly, in a civil lawsuit a litigation claim will be successful whenever the cargo was under exclusive control of an airport operator. The intention of the Supreme Court in Italy was to clearly set up principles that will be applied in such cases. It is obvious from the way the Supreme Court made a detailed analysis and a review on prevailing understanding of air carrier's obligation.
Holding that after delivering the cargo to airport operator the carrier fulfilled its obligation to a consignor, the court indirectly instructed a plaintiff to bring legal action against the airport operator regarding the cargo lost or damaged on the ground. The court holds that the airport operator took the obligation to take care of the cargo by a separate contract being independent on a contract on air carriage. Such a contract cannot be legitimately considered as a consequential contract of the contract on carriage. Accordingly, this contract is not legally covered by the Warsaw convention but by a national legislation instead, especially in respect of the expired debts and unlimited liability. The court noticed that air carrier is free from any control over the cargo whenever the airport operator has an exclusive right to provide ground handling services, and, as a result, is not obliged to be in its possession.

[28]Standard ground handling agreement is a result of a compromise between airlines' representative and ground service provider, and is revised once in five years. Standard ground handling agreement consists of the Main agreement as an obligatory part of the Agreement whose parts contracting parties may exclude, and Annex A which includes a list of all the services that can be provided either by ground service providers or airport operators. The services from Annex A agreed upon by the parties make Annex B of SGHA. In other words, the Standard Ground Handling Agreement consists of the Main agreement and Annex B.

[29]Item 8.6. of Main agreement SGHA from 2013

[30]Item 8.6. of Main agreement SGHA from 2018

Application of the Cape Town Convention and the Aircraft Protocol

*by Neda Şentürk**

Abstract

The Cape Town Convention and the Aircraft Protocol together, primarily aiming the establishment of a uniform regime governing the rules and principles of aircraft financing and acquisition, provide the creditors with a number of rights and remedies which provide them the confidence they need whilst granting credit or leasing the aicraft, where relevant. The purpose of this paper is to introduce the applicability of the Cape Town Convention and the Aircraft Protocol and the remedies provided thereunder. In that respect, particular attention will also be drawn to possible obstacles that may be faced during the exercise of such remedies.

General Introduction

- **Background: An Urgent Need for a Uniform Regime**

One cannot deny the fact that, in today's world which is gradually becoming more and more globalized, air carriage is one of the most preferred methods of transport to cross the borders due to its speedy nature. This huge demand for air travel leads to the necessity of a larger number of aircraft to be in operation and with more effectiveness, clarity and predictability with regards to the legal framework regulating the rules and principles of aircraft financing.

As it is difficult to meet this requirement by implementing domestic laws for aircraft sale and financing transactions involving various components situated in different jurisdictions without creating a unique and international regime and since the then principal *Convention on the International Recognition of Rights* of 1948 remained insufficient in building such regime[1], a diplomatic conference was held in Cape Town in 2001 which was concluded with the adoption of the *Convention on International Interests in Mobile Equipment*, henceforth referred to as the *Cape Town Convention*, and its associated *Protocol on Matters Specific to Aircraft Equipment*, henceforth referred to as the *Aircraft Protocol*. Throughout this paper, the Cape Town Convention and the Aircraft Protocol will collectively be referred to as the Treaty.

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- **Has the Treaty achieved its goal completely?**

Although it is undeniable that the Treaty has notably facilitated the financing, lease and acquisition of aircraft by extensively harmonizing the governing rules, establishing an International Registry[2] and providing *sui generis* remedies to creditors, there is still distance to be covered to meet the required level of stability in the interpretation and implementation of the principles free from national laws.

The importance of the Treaty, in terms of facilitating the financing of aircraft objects and establishing a predictable and uniform regime for creditors, is implicit in accurate and effective practice of rights and remedies provided thereunder. The parties to a transaction and their counsels shall ask the question of whether the Treaty is applicable to that particular transaction prior to inquiring whether the remedies are exercisable. I, therefore, do believe it is important to understand the Treaty's scope of and the Contracting States' approach to terms of the Treaty which will be introduced under Section 2 and Section 3 respectively.

This paper is not intended either to provide a general comparison of Contracting States' applications or to examine thoroughly every single remedy under the Treaty but rather purposes to draw attention to possible obstacles that may be faced while applying the Treaty and to elaborate on two specific remedies, namely the relief pending final determination and deregistration and export of the aircraft. This examination will take place under Section 4 of the present paper.

Sphere of Application: When Does the Treaty Apply to a Particular Transaction?

As mentioned under Section 1 above, the Treaty governs the rules and principles of aircraft financing to a large extent and provides a number of remedies available to creditors against debtors. Therewith, this question comes in view: To what extent and in which circumstances the Treaty will apply to what?
There are some preconditions that must be met in order for the Treaty to be applicable to a particular transaction.

- **An Agreement Creating an International Interest**

First, there must exist an agreement creating or providing for an international interest in or sale of an aircraft object. Pursuant to Article 1 (a) of the Cape Town Convention, this agreement is considered to mean a security agreement, a title reservation agreement which is often known as a conditional sale agreement or a leasing agreement and its validity is subject to certain formal requirements[3].

That being said, the determination of whether such agreement to be characterized as, for instance, a lease agreement or a title reservation agreement is left to the *lex fori*. This gains importance with regards to the remedies to be applied. The rules governing the agreement as stipulated in each national law will be applicable to that particular agreement regardless of how it is characterized under the Treaty. I find it confusing for parties to an agreement where, on one hand, the Treaty does determine whether an agreement falls within the scope of the Treaty, on the other hand,

the *lex fori* does characterize the agreement with regards to applicable remedies. Coming across different remedies than they expect might lead to unpleasant surprises and unsatisfactory outcomes for creditors.

- **Uniquely Identifiable Aircraft Object**[4]

Furthermore, this agreement must be related to a uniquely identifiable aircraft object. Pursuant to Article VII of the Aircraft Protocol the uniqueness of an aircraft object is apparent from its manufacturer's serial number, the name of the manufacturer and its model designation.

- **Debtor Situating in a Contracting State**

The debtor shall be situated in a Contracting State at the time of the conclusion of one of the agreements mentioned above. In order for the situation of debtor not to narrow the sphere of application of the Treaty[5], the Cape Town Convention have provided six separate scenarios in which the debtor will be considered to be in a Contracting State[6].

These three prerequisites have been set forth by the Cape Town Convention and are related to all aircraft objects. In order for the Cape Town Convention to apply to an aircraft object, particularly to engines, the three criteria addressed above shall be met.

- **An Alternative Precondition for Airframes and Helicopters**

Article IV of the Aircraft Protocol, nevertheless, provides one alternative to the precondition provided under Section 2.3. and this alternative is applicable only to airframes and helicopters. Accordingly, should the airframe or helicopter is either registered in a Contracting State or subject to an agreement to be registered in a national aircraft registry of a Contracting State at the time of conclusion of such agreement, then the Treaty will apply regardless of the situation of the debtor. The reason why this Article excludes engines is that the engines are not registered for nationality purposes.

This alternative may lead to the Treaty being applicable only to airframe but not the engines mounted thereon in cases where the debtor is not situated in a Contracting State whereas the airframe is registered in a Contracting State.

After listing all these criteria, one might question the situation of national laws against the Treaty. Do Contracting States have any options to shape the applicability of the Treaty within their own territories?

The Position of National Laws Against the Treaty

Following the entry into force of the Treaty within a particular Contracting State, that State may give primacy to the Treaty over their national laws in the event of any conflict in between the two, as is the case in Turkey[7]. Not only the ratification of the Treaty by the Contracting States will make difference in terms of establishing an international uniformity, but also adopting it in national laws is essential.[8]

The Treaty, however, gives some freedoms to the Contracting States whilst applying its provisions.

Each Contracting State has been set free to opt-in to or opt-out of certain sections of the Treaty by use of declarations which are required to be deposited with UNIDROIT. Contracting States, in other words, may choose what to apply and what not to apply within their own jurisdictions and announce their relevant preferences through declarations which are published on UNIDROIT's website[9].

This "declaration practice" enables each Contracting State to get involved in the legal framework established by the Treaty to the extent they deem appropriate and therefore is criticized for decreasing the uniformity of rules[10] which what the Treaty primarily aims to provide with. Not giving any breathing-space, however, would result in states abstaining from adopting the Treaty at all and this would ultimately lead the community astray from the ultimate goal of uniformity. Furthermore, it is observed that there is a consistency in the declarations made by Contracting States stemming from their will to benefit from the discounted export credit agency financing[11]. The parties to a transaction may also obtain an updated Contracting State Search Certificate for each transaction demonstrating all declarations that the Contracting States have made to that date.[12]

Contracting States, subject to a declaration to be made under Article XXX (1) of the Aircraft Protocol, may render the parties to an agreement free to agree on the domestic law which is to govern their contractual rights and remedies. Likewise, parties to a transaction may choose courts of a specific Contracting State[13]. Here, the concurrent jurisdiction provided for the relief pending final determination shall come to fore. In addition to the forum chosen by the parties, the courts of the State where the aircraft object is situated will also have jurisdiction to grant relief provided that this particular State has not opted out of applying such *sui generis* remedy created by the Cape Town Convention[14].

As seen so far, the provisions, rights and remedies established by the Treaty will be applied to a particular transaction within a Contracting State subject to the Contracting State's declarations and provided that the criteria discussed under Section 2 are met.

The Treaty will be useful for creditors and reach its goal in terms of creating uniformity to the extent that the rights and remedies provided thereunder are applied correctly by Contracting States.

Remedies under The Treaty

- **General Overview**

The remedies provided under both the Cape Town Convention and the Aircraft Protocol are vital for creditors to utilize promptly, efficiently and in a commercially reasonable manner[15] when faced with a party in default.

The agreements, for the most part, if not all, include a list of events which will be considered as "default" under such agreement. For instance, lessee's non-payment of lease or final payment, failure to comply with insurance requirements, failure to obtain a required authorization and misrepresentation are generally considered as "default" under a lease agreement. If there is no such agreement between the debtor and the creditor, then the definition of "default" given under Article 11 of the Cape Town Convention will be used[16].

With reference to the Treaty's mechanism, there are (i) default remedies of chargee[17], (ii) default remedies of conditional seller or lessor[18], (iii) remedies on insolvency[19], (iv) relief pending final determination, (v) deregistration and export of the aircraft and (vi) additional remedies[20].

For the purposes of this paper, I will only examine (i) the deregistration and export of aircraft and (ii) relief pending final determination due to the diffulties that I have personally come across in my own practice of the said remedies in Turkey.

- **A *Sui Generis* Remedy: Relief Pending Final Determination**

Overview

Article 13 of the Cape Town Convention establishing relief pending final determination, henceforth referred to as advance relief, creates the concept of "speedy relief" which should not be confused with the national forms of "interim relief". Article X (2) of the Aircraft Protocol leaves the specification for the term "speedy" to the declarations made by Contracting States. Leaving the determination of the number of days required to satisfy the term "speedy" to Contracting States is rightfully criticized for creating uncertainty.[21] Besides in my view this may also lead in nonuniformity in case Contracting States set significantly different definitions of the term "speedy".

This advance relief is available for creditors who adduce an evidence of default by the debtor provided that the debtor has at any time so agreed and that the Contracting State has not excluded this remedy by making a declaration under Article 55 of the Cape Town Convention. The creditor, for instance, can rely on default notices served upon the debtor or a bank statement showing that there is no any cash inflow from the debtor as an evidence of default.

- **Analysis and Remarks**

Based on my own experience in Turkey, in order for this advance relief to be applicable in accordance with its *sui generis* feature and not to be treated as a national law interim relief, the Contracting States should practice the utmost care in translating and adopting the original Treaty. Since the Article 13 of the Cape Town Convention was translated as "interim relief" into Turkish and as there is no much case law reported to AWG that could shed light to Turkish practitioners, the Turkish courts have treated this advance relief as if it is an interim relief under Turkish Civil Procedure Code.

In my opinion, if the lessor wants the aircraft back and there is no possibility to agree with the lessee at least in the near future, then applying the IDERA Route[22] makes more sense due to the fact that the national courts, particularly those who do not have sufficient expertise on aviation matters as is in Turkey, may refrain from making a desired a ruling.

- **Deregistration and Export of the Aircraft**

Overview

As befits the name, this remedy set forth under Article XIII of the Aircraft Protocol gives the creditor or its certified designee the authorisation to deregister and export the aircraft provided that certain conditions are met. A first inference that I have drawn from this article is that, this remedy is only applicable to airframes and helicopters and not to engines due to the reference to de-registration. As mentioned under Section 2.4. engines are not registered for nationality purposes and therefore deregistration is not relevant for them.

The deregistration and export of aircraft can be procured through two different ways. First one is the court route which I do not find as useful as the second one which is often referred as the IDERA route.

With reference to Article IX (1) of the Aircraft Protocol, either route is applicable to the extent that the debtor has at any time so agreed. Article IX (2) of the Aircraft Protocol, furthermore, states that these remedies cannot be exercised without prior written consent of the holder of any registered interest ranking in priortiy, if any.

The Court Route

A declaration in respect of Article X of the Aircraft Protocol shall be made by the Contracting State in order for this route to be applicable.

The Article X (6) of the Aircraft Protocol does not specify where the creditor shall apply to ensure the deregistration and export of the aircraft. Although the article itself refers to "relief", the determination of such relief has not been made obvious. After examining the AWG's earlier draft and the spirit of this article together[23], it becomes clearer that granting relief under this article indicates relief pending final determination which is established by Article 13 of the Cape Town Convention.

This specific route gives the creditor two phased procedure which in my opinion extends the process and makes it much more complicated. First, the creditor must obtain a court order for advance relief under Article 13 (1) of the Cape Town Convention from a court of the State of Registry[24] which by itself might be challenging and everlasting as indicated under Section 4.2.2. Should this advance relief order is obtained from an equivalent foreign court, then it must be recognized by the courts of the State of Registry which is bound to extend the process. If the required court order is obtained, then the creditor has to notify the registry. The authority shall make the remedies available in five working days starting from the date of the creditor's notification. Instead of this time-consuming process, the deregistration and export of the aircraft could be procured based solely on a document called IDERA.

The IDERA Route

This route is only applicable should the Contracting State has made an opt-in declaration in respect of Article XIII of the Aircraft Protocol.

IDERA is a fixed form created by and annexed to Aircraft Protocol[25].This form becomes effective, binding and irrevocable once it is (i) duly executed by the debtor in favour of the creditor or its certified designee, i.e. the authorized party subject to any possible domestic formal requirements[26] and (ii) registered with the registry authority unless the creditor agrees to revoke it[27].

Analysis and Remarks

I find the court route less practical than the IDERA route as it directs the creditors to the court which in fact they abstain from. The court route, furthermore, is linked to the order to be obtained under Article 13 (1) of the Cape Town Convention[28] and therefore the creditor may encounter the relevant drawbacks discussed under Section 4.2.2. The IDERA route, however, is much easier to apply since, among other things, the addressee of IDERA will be the registration authority which is generally more familiar with aviation related issues than a national court.

That being said, IDERA route gives the authorized party only the deregistration and export authorization of the aicraft and therefore does not secure the aircraft records and manuals evidencing the aircraft's maintenance history. These records and manuals are of extreme commercial importance and replacing them is costly. Should the lessee refuse to return these documents to the lessor, then the lessor may consider bringing a claim against the lessee.

The second obstacle which I see whilst exercising the IDERA in Turkey is that the lessee may fly the aircraft and act in breach until the registration authority issues the deregistration letter and the export certificate. In this case, the creditor may again require to have an interim relief order for the purpose of stopping the lessee from operating the aircraft in the interim.

Conclusion and Final Remarks

The Treaty, by providing interests recognized internationally, specifying remedies and establishing an International Registry that the international interests may be registered with, creates the uniformity and predictability in rules, rights and remedies governing aircraft financing transactions.

The butterfly effect of the facilities presented under the Treaty is incontrovertible. The financiers are awarded with remedies enabling them, including but not limited to, to take possession and control of the aircraft and have it deregistered and exported. Since the financiers, thanks to these remedies, will feel more confident while granting loans, the financing costs are likely to decrease resulting in the growth of the aircraft manufacturing sector.

The interests of lessees, namely the airlines, are also protected by the Treaty. Due to the reduced financing costs and discounted credit agency facilities, they will be able to operate more aircraft which will lead to a larger fleet, increased number of flights and decreased ticket prices which will eventually be for the benefit of passengers.

The full, accurate and effective implementation of the Treaty is of extreme importance in order for all above-mentioned facilities to materialize. The assistance of the authorities and courts of Contracting States in providing parties with a clear unobstructed path in the swift exercise of their remedies is imperative. The parties and their counsels, on the other hand, should take extra care, particularly on declarations made by Contracting States whilst negotiating and drafting transaction documents.

LIST OF ABBREVIATIONS

AWG Aviation Working Group
CAA Civil Aviation Authority
IDERA Irrevocable Deregistration and Export Request Authorisation
UNIDROIT International Institute for the Unification of Private Law

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1 P. M. de Leon, Introduction to Air Law 437, 10th ed (2017)

2 *See*, art. 16 of the Cape Town Convention

3 *See*, art. 7 of the Cape Town Convention

4 The term "aircraft object" is defined in Art. I(2)(c) of the Aircraft Protocol and contains airframes, aircraft engines and helicopters.

[5] R. Goode, Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment 27, 3rd ed. (2013)

[6] *See*, art. 4 of the Aircraft Protocol. A further discussion on the situtation of debtor falls outside the scope of this paper

[7] Art. 68/A of the Turkish Civil Aviation Code states that in the event of any conflict between the Treaty and Turkish laws, the Treaty will prevail.

[8] This remark is inspired from one of the lectures given by Prof. Pablo Mendes de Leon at Leiden University.

[9] www.unidroit.org, accessed on 24.10.2017

[10] P. M. de Leon, Introduction to Air Law 453, 10th ed (2017)

[11] Legal Advisory Panel of the Aviation Working Group, Practitioners' Guide to the Cape Town Convention and the Aircraft Protocol 48 (2015)

[12] https://www.internationalregistry.aero/ir-web/, accessed on 24.10.2017

[13] *See*, Art. 42 of the Cape Town Convention

[14] A further examination on this remedy will take place under Section 4.2.

15 *See*, arts. 8 (3) of the Cape Town Convention and IX (3) of the Aircraft Protocol

16 Article 11 (2) of the Cape Town Convention defines "default" as a default which substantially deprives the creditor of what it entitled to expect under the agreement.

[17] *See*, arts. 8 and 9 of the Cape Town Convention

[18] *See*, art. 10 of the Cape Town Convention

[19] *See*, art. XI of the Aircraft Protocol

[20] *See*, art. 12 of the Cape Town Convention

[21] A. Veneziano, Advance Relief Under the Cape Town Convention and its Aircraft Protocol: A Comment on Gilles Cuniberti's Interpretative Proposal, 2 Cape Town Convention J. 188 (2013)

[22] *See*, Section 4.3.1.2.

[23] R. Goode, Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment 185, 3rd ed. (2013)

[24] R. Goode, Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment 184, 3rd ed. (2013)

[25] P. M. De Leon, Introduction to Air Law 459, 10th ed (2017)

[26] In Turkey, for instance, pursuant to the Administrative Directive on IDERA the IDERA shall be executed before a Turkish Notary Public both in English and Turkish languages.

[27] In Turkey, for instance, the revocation is being made through an IDERA cancellation letter which is to be executed and submitted to the Turkish CAA by the creditor.

[28] R. Goode, Official Commentary on the Convention on International Interests in Mobile Equipment and the Protocol thereto on Matters Specific to Aircraft Equipment 184, 3rd ed. (2013)

SPACE

European Union: the proposed regulation for space policy beyond 2020 and for the establishment of a EU Space Agency

*by Alfredo Roma**

Last June, the European Commission made an ambitious proposal to boost the EU's space leadership beyond 2020 through a regulation establishing the space programme of the Union and to establish the EU Space Agency. The Commission also proposed a budget allocation of 16bn Euros for the post-2020 EU space programme that has been welcomed by the European space industries as this policy may increase the competitiveness of the European space sector in a difficult geopolitical scenario. The EU Space Agency could be formed by renaming the European Global Navigation Satellite Systems Agency (GSA) to the EU Space Agency.

To the proposed regulation the European Space Agency (ESA) has reacted on July 2018 issuing a proposal of the Director General (revised on February 2019) suggesting a considerable number of amendments. ESA is an international intergovernmental organisation legally protected and equivalent to that of a State. Its members include most of the EU member States but also Switzerland and Norway. ESA is a well-known brand all over the world having cooperation projects with NASA and various national space agencies, including the Chinese space agency.

Till now ESA has developed and realised the major European space projects, like Galileo and Copernicus. In 2008, the EU gave ESA the role of contractor for the tenders for Galileo satellites. ESA has played a key role in many missions to celestial bodies, coordinating the activities of the European space agencies and industries. This is to highlight the importance of ESA in the world space scenario.

ESA document clearly asserts autonomy vis-à-vis the EU and expresses its freedom to cooperate with non-EU member States. ESA fears that in the future the Commission will assign more and more tasks to the GSA (transformed in the EU Space Agency) by excluding it from many roles it has had in the past. Actually, the proposed regulation would exclude third countries and international organisations from SST (Space Surveillance and Tracking which can prevent collisions by navigating space debris) activities, including ESA that stresses in its document that SST should be open to any third party. ESA points out what should be its role in the European space programmes, recalling that Copernicus was realised thanks to the cooperation between the Union, ESA and the member States. The document suggests that the European Space Agency be the preferred institutional partner of the EU for implementing the space programme, with which appropriate relations should be established, as required under Article 189.3 TFEU. Finally, in order to achieve the highest possible levels of efficiency, ESA should have the largest possible autonomy, accompanied by the appropriate accountability for carrying out its tasks in accordance with the budget allocations.

It should be said that the relationship between ESA and EU have never been easy and many people of the European space sector believe that the EU since a long time has had the hidden intention to "absorb" ESA, especially after the Lisbon Treaty which attributed to the European Parliament the powers on space policy matters.

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At the Commission some executives believe that:

- ESA's role should not be to deal with systems that have been started and that have reached a certain maturity. The model that should be applied is that of EUMETSAT, where an agency manages a complex system of satellites and provides services to European meteo centres and other customers. This does not prevent having a cooperation agreement with ESA for the development of technologies or the creation of space infrastructures. It is not a question of the GSA that incorporates ESA or vice versa. They have different roles.
- GSA (or the EU Space Agency) should be a regulatory agency, being de facto an operational arm of the Commission since 95% of its budget comes from the Commission.
- The Commission should not be involved in the management of complex industrial programs such as Galileo or Copernicus. The Commission is a policy maker body and should decide the industrial policy for the European space projects.
- At present a negotiation between the commission, the European Parliament, and the Council of the EU is in progress aiming at establishing clarity about the different roles of the different bodies involved in the European space activities.

On 6th March 2019, the major European space industries have sent a "Joint Statement" to the European Parliament recalling the last year project to support the EU space leadership, allocating a substantial budget. The European Space manufacturers appreciate the EU effort but point out that a clear legal framework is needed and recommend "to move forward and make sure all conditions are met to secure the adoption of this regulation - with its associated budget – as promptly as possible". No comment is expressed by the European industries regarding the EU Space Agency.

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Regulation (EC) No 261/2004 and its recent case law developments

by Amedeo Zmarandoiu*

The right to compensation

- **Compensation for long delays**

In the analysis of Regulation (EC) no. 261 of 2004, with regard to the right to compensation, it can be observed that the occurrence of a prolonged delay authorizes passengers to the same compensation as in the case of a cancellation of the flight: the passenger has the right to compensation if he reaches the final destination with a delay of three hours or more. However, such a delay may not entitle passengers to compensation if the air carrier can prove that the delay was caused by "extraordinary circumstances". In other words, these are circumstances outside the actual control of the air carrier that could not have been avoided even by taking all the reasonable measures. [1]

- **Compensation for connecting flights**

Compensation for long delays is also due to passengers on connecting flights who reach their final destination with a delay of at least three hours. The delay to be taken into account is the delay at the arrival, even in the case of more than one coincidence. It does not matter, therefore, whether the delay occurred at the airport of departure or at the connecting airports or at any stage of the journey; only the delay in the final destination of the journey is relevant for the right to compensation.[2]

- **Compensation for delay and the Montreal Convention**

Moreover, the compensation for the delay is not in conflict with international law, as established in the decision C-581/10 - Nelson *et alia*[()],where the Court confirms its previous judgment (Sturgeon *et alia* v. Condor) in regard to the compensation due for long delays. The Court notes that the obligation to compensate passengers whose flights are delayed is in line with the principles of the Montreal Convention.

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- **On the determination of the amount of compensation**

The right to compensation under Regulation (EC) No 261/2004, as already mentioned, makes no distinction between passengers who reach their final destination by a direct flight or by one or more connecting flights. In both cases, passengers must also be treated equally with regard to the calculation of the amount of compensation. Consequently, when determining the amount of in the case of connecting flights, only the radial distance between the airport of departure and the airport of arrival shall be taken into account. [4]

Whether or not extraordinary circumstances have occurred

- **The technical defect does not constitute an extraordinary circumstance**

An airline may be exempted from the payment of compensation in the event of a long delay or cancellation if it can prove the existence of “extraordinary circumstances”. The Court also clarified that a technical problem which is detected during aircraft maintenance or caused by the lack of maintenance of an aircraft cannot be considered as “extraordinary circumstances”. The Court of Justice has clarified that even a technical problem which occurs unexpectedly, and is therefore not attributable to poor maintenance and is not detected during routine maintenance checks, does not fall within the definition of “extraordinary circumstances” when it is inherent in the normal exercise of the activity of the air carrier. For example, a failure caused by premature malfunction of some aircraft components can certainly be an unforeseen event. Nevertheless, this failure remains intrinsically linked to the very complex operating system of the aircraft. Therefore, the unforeseen event must be considered to be inherent in the normal exercise of the air carrier's activity. The Court recalled on this point that, of course, the carrier may claim against the manufacturer of the aircraft where the non-use of the aircraft results from a manufacturing defect.

However, a manufacturing defect subsequently revealed by the aircraft manufacturer or a competent authority, as well as damage to the aircraft caused by acts of sabotage or terrorism, may constitute "extraordinary circumstances ".[5]

- **The impact of a mobile boarding ladder does not constitute an extraordinary circumstance**

The Court clarifies that the collision of the mobile boarding ladders with the aircraft cannot be considered as part of the extraordinary circumstances exempting the air carrier from the compensation obligation. Mobile ladders or walkways can be considered indispensable for the carriage of passengers by air and, therefore, air carriers are regularly confronted with situations arising from the use of such equipment. A collision between an aircraft and a series of escalators is, therefore, an event inherent in the normal exercise of the activity of the air carrier. Therefore, the recognition of the right to compensation is also mandatory in this case. [6]

- **The bird strike is not always an extraordinary circumstance**

With regard to the bird strike , i.e. the collision of the aircraft with birds, the Court concluded that a collision between an aircraft and one or more birds is an extraordinary circumstance which may relieve the air carrier of the obligation to pay compensation if a flight is significantly delayed. However, if an authorised expert finds, following the collision, that the aircraft in question is fit to fly, the carrier cannot justify the delay by invoking the need to carry out a second check. The Court also confirmed that, in the case of a cumulative delay, any delay caused by an extraordinary circumstance must be deducted from the total delay, calculated at the time of arrival, in order to assess whether or not compensation should be paid in the specific case. [7]

- **The wildcat strike does not constitute an extraordinary circumstance**

The Court held that a strike by flight staff following the surprise announcement of a restructuring of the company does not constitute an “extraordinary circumstance” and therefore does not relieve the airline of its obligation to pay compensation in the event of cancellation or long delay of the flight. The Court notes that the Regulation lays down two cumulative conditions for the classification of an event as an extraordinary circumstance: (1) it must not, by its nature or origin, be inherent in the normal exercise of the airline's activity, and (2) it must be beyond its effective control. The mere fact that a recital of the Regulation [()] mentions that such circumstances may arise, in particular in the case of a strike, does not mean that a strike is necessarily and automatically a cause for exemption from the obligation to pay compensation. On the contrary, it is necessary to assess, on a case-by-case basis, whether the two conditions mentioned above are met.[9]

Obligation to provide assistance even in the presence of extraordinary circumstance

- **Obligation to provide assistance even in the presence of extraordinary circumstances**

With regard to the obligation to provide assistance, the air carrier must provide free of charge, on the basis of the waiting time, refreshments, meals and, where appropriate, hotel accommodation and transport between the airport and the place of accommodation, as well as the means of communication. The air carrier is also obliged to fulfil this obligation where the cancellation of the flight is caused by “extraordinary circumstances”, i.e. circumstances which could not have been avoided even if all reasonable measures had been taken. [10]Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that, since an air carrier is obliged to take all reasonable measures to avoid extraordinary circumstances, it must reasonably, at the stage of the organisation of the flight, take account of the risk of delay associated with the possible occurrence of such circumstances. It must, therefore, provide for a certain amount of reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end. However, the required fall-back time should not be such that the airline is induced to make sacrifices which, in the light of its business capacity, are intolerable. [()]

Denied boarding and cancellation

The concept of "denied boarding" covers not only cases of overbooking, but also those where boarding is denied for other reasons, such as operational reasons. Airlines cannot validly justify denied boarding and be exempted from paying. The concept of "denied boarding" covers not only cases of overbooking, but also those where boarding is denied for other reasons, such as operational reasons. Airlines cannot validly justify denied boarding and be exempted from paying compensation to passengers by extraordinary circumstances or by assuming that passengers would not arrive in time for their connecting flight. [12] With regard to the concept of “cancellation”, it also covers the case where the aircraft has taken off yet, for whatever reason, is subsequently forced to return to the airport of departure where the passengers of that aircraft are transferred to other flights.

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[8] Recital n. 14: "As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier."

[9] Judgment of the Court (Third Chamber) of the 17 April 2018 Helga Krüsemann e a. v. TUIfly GmbH, Joint Cases C-195/17, C-197/17 – C-203/17, C-226/17, C-228/17, C-254/17, C-274/17, C-275/17, from C-278/17 to C-286/17 and from C-290/17 to C-292/17. *http://curia.europa.eu/juris/document/document.jsf?text=&docid=201149&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12644038*

[10] Judgment of the Court (Third Chamber) of the 31 January 2013, Denise McDonagh v. Ryanair Ltd. Case C-12/11; *http://curia.europa.eu/juris/document/document.jsf?text=&docid=134659&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12647159*

[11] Judgment of the Court (Third Chamber) of the 12 May 2011. Andrejs Eglītis e Edvards Ratnieks v. Latvijas Republikas Ekonomikas ministrija. Case C-294/10. *http://curia.europa.eu/juris/document/document.jsf?text=&docid=82052&pageIndex=0&doclang=IT&mode=lst&dir=&occ=first&part=1&cid=12648367*

[12] Judgment of the Court (Third Chamber) of the 4 October 2012, Finnair Oyj v. Timy Lassooy. Case C-22/11 *http://curia.europa.eu/juris/document/document.jsf?text=&docid=129525&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12653023;* Judgment of the Court (Third Chamber) of the 4 October 2012 Germán Rodríguez Cachafeiro, María de los Reyes Martínez-Reboredo Varela-Villamor v. Iberia, Líneas Aéreas de España SA, Case C-321/11, http://curia.europa.eu/juris/document/document.jsf?text=&docid=129554&pageIndex=0&doclang=IT&mode=req&dir=&occ=first&part=1&cid=12653330

Forthcoming Events

Workshop programme
- EGNSS Innovation procurement opportunities within Horizon 2020 and Horizon Europe -

Prof.ssa Anna Masutti as a speaker in the following workshop

When? 11th of April 2019, from 10:30 to 16.30

Where? Prague, European GNSS agency, Janovského 438/2, Prague

Objectives of the workshop

Attending the workshop will give you the possibility to:

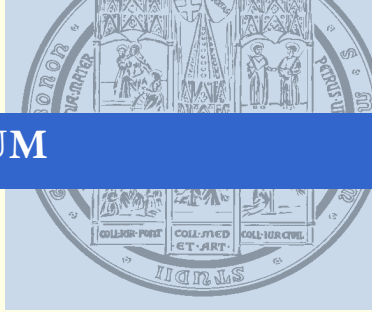
- **Learn about innovation procurement instruments** (pre-commercial procurement and public procurement of innovative solutions) **and their benefits**
- **Express your views** and interest related to **EGNSS R&D, in particular in the Public Safety and Maritime sectors**
- **Share views and ideas on the envisaged pilot pre-commercial procurement call** for EGNSS, which is planned to **open in October 2019**
- Learn about rules and conditions for participation in **European Commission funded projects to solve public challenges**

Topic Introduction

Innovation procurement can deliver solutions to challenges of public interest and digital technologies, and may be an interesting new instrument for European GNSS:

- **Pre-Commercial Procurement (PCP)** can be used when there are **no near-to-the-market solutions yet and new R&D is needed**. PCP can then compare the pros and cons of alternative competing solutions approaches, enabling to de-risk the most promising innovations step-by-step via solution design, prototyping, development and first product testing.
- **Public Procurement of Innovative solutions (PPI)** is used when challenges can be addressed by innovative solutions that are nearly or already in **small quantity in the market and don't need new R&D**.

The **workshop** will focus on the value added of both instruments; the benefits, challenges and lessons learnt by previous PCP and PPI projects in some Member States and the opportunities for PCPs and PPIs projects to support the **development of innovative EGNSS applications**. It will also provide the opportunity to discuss the most promising application areas for the pilot, along with administrative information and details.



Draft workshop agenda

10:30-11:00: Welcoming coffee

11:00-11:10: Welcome from the GSA (Fiammetta Diani, Head of Market Development, GSA)

11:10-11:30: Introduction from the European Commission – What is PCP/PPI, what are the benefits, and what i.3)s the EGNSS interest in these instruments (Tina Mede, European Commission, DG GROW

11:30-12:00: Presentation of main results of the PCP/PPI analysis on EGNSS - Which EGNSS application areas can benefit most from the introduction of PCP/PPI? Recommendations for the use of innovation procurement in EGNSS downstream (Marco Bolchi, VVA, Principal Consultant)

12:00-12:45: Rules and conditions – What are the participation rules ? How do things work in practice ? What are the challenges and lessons learned? (Vasileios Tsanidis, European Commission, DG CNECT ; Anna Masutti, ls lexjus Sinacta

12:45-13:45: Networking lunch

Experience sharing

13:45-14.00: PCP experience in security research (Paolo Salieri, European Commission)

14:00-14:45: Experience from previous PCP projects

MARINE-EO (Alkis Astyakopoulos, Researcher in Greek National Center for Scientific Research “Demokritos” - Greece)
Smart@Fire: (Francis Deprez, Member of the Evaluation Committee, Flanders Innovation & Entrepreneurship – Belgium)

14:45-16:15: Two parallel Focus groups:

Discussion on Public Safety (PS) use cases for PCP
Discussion on Maritime use cases for PCP

16:15-16:30: Closing remarks (Marta Krywanis, H2020 Call coordinator GSA).