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## CONTENTS

### Aviation

No compensation in the case of connecting flight cancellation under Regulation No. 261/2004

By Anna Konert

p.2

Wet Lease: Convenience Comes at a Cost  
Synopsis of the Relevant Rules in the European Union

By Jacomo Restellini

p.9

### Space

International Space Law and Turkey

By Serap Zuvin and Onur Can Ucarer

p.22

### Miscellaneous Material of Interest

The Jurisdiction Clause and the Consumers's Protection in the Event of Cancellation of a Flight

By Daniele D'Antonio and Carla Bonacci

p.34

## No compensation in the case of connecting flight cancellation under Regulation No. 261/2004

Anna Konert\*

### Abstract

*This article refers to the question whether under the provisions of the Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No. 295/91<sup>1</sup>, a passenger of a cancelled flight should receive compensation due to a change that concerned another section of their journey, which takes place pursuant to a separate contract made with a different carrier and is not related to the contract for that part of their journey with respect to which the first flight was cancelled.*

### Introduction

If a flight delay leads to a passenger missing a connecting flight, and their delay at the final destination is 3 hours or more, then that passenger has a valid claim for compensation. However, their flight plans need to have been made under one booking for this to apply. If a passenger has booked all legs of their journey with one single booking, then an airline must offer alternative transportation as soon as possible. But what happens when a passenger has booked their flights separately with different airlines and part of their journey is delayed or cancelled?

Should the passenger of a cancelled flight receive compensation due to a change that concerned another section of their journey, which takes place pursuant to a separate contract made with a different carrier and is not in any way related to the contract for another part of their journey?

The goal of this article is to analyze a decision made by the Polish Supreme Court on February 24 2014, the provisions of Regulation No. 261/2004 and national law in light of the abovementioned issue.

### Main Heading

On February 24 2014, Poland's Supreme Court published its reasoning in the case *W.C. vs. LOT Polish Airlines*<sup>2</sup>. The court held that passengers were not entitled to compensation under art. 12 of EU Regulation No. 261/2004 if said passengers incurred costs resulting from a change in the time of their flight, with the change concerning another section of their journey which takes place pursuant to a separate contract made with a different carrier, and is not related to the contract for that part of the journey with respect to which the first flight was cancelled. The goal of this article is to analyze this judgment, the provisions of Regulation No. 261/2004 and the Polish Civil Code in light of the abovementioned issue.

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## AVIATION

The facts of the case were as follows - the claimant was to fly from Warsaw to Detroit based on two separate flight contracts, one made with PLL LOT S.A. for a flight from Warsaw to Chicago, and the other one with UNITED Airlines for a flight from Chicago to Detroit. The Warsaw-Chicago flight was cancelled on 13 April 2013. The claimant had their ticket booked for this flight for a long time, and was informed about the cancellation of the flight on 21 March 2013. Her next flight from Chicago was purchased separately from an American airline, and she had to change her booking after LOT had cancelled its flight, meaning that she had to pay extra.

The Regional Court in Warsaw (later referred to as W.), having heard the appeal filed by the defendant, Polskie Linie Lotnicze LOT S.A. in W. against the judgment of the District Court in W. dated 25 February 2014, amended that judgment by way of the judgment of the Regional Court dated 23 September 2014, in that the Court dismissed W.C.'s claim for compensation for the difference paid between the price originally paid by the claimant, before the change in the date of flight with the American airline, and the final price, caused by the cancellation of the flight by the defendant.

The claim was dismissed as the second instance court recognized that as the provisions of Regulation (EC) No. 261/2004 apply, the passenger is not entitled to compensation if they were informed about the cancellation of a flight at least two weeks prior to its planned departure time (art. 5(1)(c)(i)). The Regional Court did not agree with the position of the court of first instance on art. 12 of the Regulation, which paves the way for claiming further compensation, as the Regional Court believes that this provision first and foremost supplements the compensation over what the passenger is eligible for in line with the Regulation's tariff.

According to art. 5 para. 1 lit. c i of EU Regulation No. 261/2004, in case of cancellation of a flight, the passengers concerned shall have the right to compensation by the operating air carrier amounting to EUR 250, 400 or 600 unless they are informed of the cancellation at least two weeks before the scheduled time of departure.<sup>3</sup>

Art. 12, entitled "Further compensation", states that the Regulation shall apply without prejudice to a passenger's rights to further compensation. The compensation granted under this Regulation may be deducted from such compensation.

The Supreme Court, in the matter lodged by way of a complaint by W.C. to confirm the non-compliance with the law of the legally binding and enforceable judgment of the Regional Court in W. dated 23 September 2014 and filed by W.C. against Polskie Linie Lotnicze LOT S.A. in W. for payment, having considered the matter at an in camera session at the Civil Chamber on 24 February 2016, decided to dismiss the complaint.

As the carrier informed the passenger about the flight's cancellation three weeks before the planned flight date, no obligations mentioned in EU Regulation No. 261/2004 were incurred by the carrier, including the obligation to pay so-called flat-rate compensation for a cancelled flight. In this context, the Supreme Court noted that so-called further compensation under art. 12 was not applicable.

*AVIATION*

The Supreme Court was correct to state that contracts made at different dates by the claimant were confirmed by separate tickets, and therefore constituted two separate journeys, and the defendant was not liable for the proper course of the second journey. Despite this, the claimant believed that she should be compensated the price difference as reimbursement for costs that she had to incur by changing the flight date to another date, doing so due to the fact that the original flight from W. to Chicago was cancelled.

As noted by the Supreme Court, this provision may be understood as the entitlement to compensation that exceeds the value specified as a flat-rate in art. 7 of the Regulation; therefore, it may only be applied if the passenger is eligible for primary compensation, whose amount may be deducted from such compensation (art. 12 (1), second sentence of the Regulation), or it might mean the ability to enforce claims pursuant to art. 471 et seq. of the Polish Civil Code, which waives this position.

The Supreme Court relied on two earlier judgments passed by the European Court of Justice (ECJ): in the case C-63/09 from 6 May 2010 and the case C- 83/10 from 13 October 2011, claiming that the reasoning in these judgments shows a link between further compensation and liability prescribed in the Regulation. The second judgment indeed refers to the issue of “further compensation”.

A literal interpretation of art. 12 of Regulation No. 261/2004 indicates that the word “further” must be interpreted as “exceeding the legal framework of Regulation No. 261/2004”. This provision satisfies the principle of full restitution for loss, which is present in the majority of legal systems, and, as the Court notes, serves to supplement solutions provided for in Regulation No. 261/2004 in a way that passengers receive compensation for all losses incurred by them as a result of an air carrier infringing on their contractual obligations. The word “further” is an indication that the passengers may claim supplementary compensation pursuant to provisions of law separate from the provisions arising out of Regulation No. 261/2004. However, it is difficult to see a connection between the ECJ judgement of 06 May 2010 C-63/09 and the subject matter - the judgement does not mention the issue of compensation under Regulation No. 261/2004 at all, it only concerns the notion of damage within the meaning of the Montreal Convention of 1999.

Recently, the Voivodship Administrative Court in Warsaw (judgment of 29 October 2015<sup>4</sup>) held that passengers are entitled to compensation if they missed their connecting flight as a consequence of a delay in their first flight. However, the situation is different in that firstly, the contract was actually performed (though delayed), and secondly, both flights were treated as a single contract made with one air carrier.

Had the passenger booked both flights at the same time and with the same carrier or under code-share, and should both flights be treated as one contract for a journey with subsequent means of transportation, consideration could be given to determine whether the passenger is entitled to compensation. A standard causal link would take place, then. We would treat this situation as cancelling part of a flight (a section of the journey) only. When cancelling one section of a journey, the carrier should be aware of the fact that the passenger could miss another section of their journey. And vice versa. As the Supreme Court holds, there is no standard causal link between flights performed by different air carriers based on separate contracts. The carrier had no knowledge of any other journeys that the passenger had planned.

## AVIATION

In the proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No. 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air<sup>5</sup>, we find a partial solution to this problem. Namely, the proposal confirms that passengers that miss a flight connection because their previous flight was delayed have the right to care (to be provided by the operating air carrier of the missed flight which is best positioned to provide this care) and, under certain circumstances, the right to compensation (to be provided by the air carrier operating the delayed flight as it was at the origin of the total delay).<sup>6</sup> However, such rights would only apply where the connecting flights are part of a single contract of carriage as in the case that the air carriers concerned have committed to and are aware of the intended connection between the flights. The air carriers retain the right to agree on distributing costs between themselves (art. 1 (6) of the proposal - art. 6a of the amended Regulation (EC) No. 261/2004). The article refers to missed connection flights, but one could assume that a *maiori ad minus* this rule could also apply to cancellations.

The other argument for the Polish Supreme Court's reasoning could lie in the interpretation of the term "flight". According to the ECJ and Federal Court of Justice in Germany, the concept of "flight" within the meaning of the Regulation must be essentially interpreted as an air transport operation, a unit of such transport performed by an air carrier which fixes its itinerary. It follows that an outward and return journey cannot be regarded as a single flight. The fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision (see *Emirates v Schenkel*).<sup>7</sup>

In the matter considered by the Polish Supreme Court, the contract was not performed. It could be adopted that informing the passenger about the cancellation of a flight two weeks in advance should be treated as the air carrier's withdrawal from said contract. The contract is treated as if it had not been made, and whatever performances the parties may have rendered to one another should be returned.

It must be considered whether withdrawal from a contract within the meaning of Regulation No. 261/2004 in Poland should be governed by regulations on the withdrawal from a mutual agreement regulated in the country's Civil Code. According to art. 494 (1) of the Civil Code, the party that withdraws from a mutual agreement is obliged to return to the other party everything that the given party gained under that agreement, and the other party is obliged to accept it. The party that withdraws from the agreement may not only demand the reimbursement of the performances rendered, but they may also demand that the loss incurred due to such failure to perform an obligation be remedied, on general terms. Therefore, even if we assumed that it is not possible to claim so-called further compensation under art. 471 of the Civil Code read together with art. 12 of Regulation No. 261/2004, would the passenger be able to claim reimbursement for the costs of changing her journey plan with another carrier on the general terms governing the remedying of a loss incurred due to the failure to perform an obligation, read together with art. 494 (1) of the Civil Code?

On one hand, the argument for such an interpretation could be the very objective of Regulation No. 261/2004 itself, i.e. strengthening the protection of passengers' rights.

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On the other hand, according to the statement of grounds to a decision of the Supreme Court dated 21 August 2014 III CZP 44/14, the provisions of national law should be applied with care regarding air travel contracts, especially due to the fact that they are regulated in separate provisions. Therefore, it seems that the consequences of withdrawing from a carriage contract should only arise from the provisions of the Regulation itself. Moreover, the notion of withdrawal from an agreement varies in each EU Member State. Therefore, if we were to use the interpretation of a withdrawal from an agreement arising out of individual national laws, it could be interpreted as an infringement of the rule of legal certainty, and as being contrary to legislator's intentions since the very core for creating provisions on the protection of air passengers rights is the overall standardization of these provisions.

**Conclusions**

The application of EU passenger rights rules has improved since their entry into force, however, we have reached a point where a revision of the legislation itself is necessary to ensure that passenger rights are protected in practice.<sup>8</sup> As already noted, the proposal for a Regulation amending Regulation (EC) No. 261/2004 foresees a solution in the event of a missed flight connection due to a delay in the previous flight under which the passenger has the right to care and, under certain circumstances, the right to compensation. However, there is no clear solution for a situation where a passenger incurs costs due to changing the time of their flight, which concerns another section of their journey and takes place pursuant to a separate contract made with a different carrier, and is not related to the contract for that part of their journey with respect to which the first flight has been cancelled. According to Polish Supreme Court, the passenger does not have the right to compensation in such a case. The determining factor here should be the presence of a normal causal link. The rulings of the Supreme Court are binding only if the appellate court asks a question of law on the issue that raises doubts. Then, the legal view expressed in the resolution of the Supreme Court is binding on the court in this specific case. Other judgments of the Supreme Court are not formally binding for the lower courts. However, in practice, a lower courts always apply Supreme Court judgments in similar cases - unless they are very strong arguments to the contrary. As one can see, the trend is still the same in Poland - jurisprudence's position has not changed since this decision in 2014.

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<sup>1</sup>See more about the Regulation: M. Bobek, J. Prassl, *Air Passenger Rights. Ten Years On*, Bloomsbury, 2016

<sup>2</sup>Case file no. I CNP 7/15.

<sup>3</sup>Arnold K., *EU Air Passenger Rights: Assessment of the Proposal of the European Commission for the Amendment of Regulation (EC) 261/2004 and of Regulation (EC) 2027/97* (2013) 38 *Air and Space Law*, Issue 6; Arnold K., *Application of Regulation (EC) No. 261/2004 on Denied Boarding, Cancellation and Long Delay of Flights*, *Air and Space Law* (2007): 93 ; Balfour J., *Airline Liability for Delays: The Court of Justice of the EU Rewrites EC Regulation 261/2004* (2010) 35 *Air and Space Law*, Issue 1.

<sup>4</sup>Case file no. VII SA/Wa 64/15

<sup>5</sup>COM(2013) 130 final 2013/0072 (COD)

<sup>6</sup>See more M. Bobek, J. Prassl, *Air Passenger Rights. Ten Years On*, Bloomsbury, 2016 , pp. 276 .

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## Wet Lease: Convenience Comes at a Cost Synopsis of the Relevant Rules in the European Union

Jacomo Restellini\*

### Abstract

*Wet lease offers many advantages and, therefore, attracts more and more airlines around the world. However, this model also involves significant drawbacks. Beside its high price, it does not go without creating concerns in terms of safety, job security and competition. From a safety perspective, some airlines are tempted to rent aircraft from 'trash airlines', often much cheaper, thus creating a safety risk for passengers. From a social perspective, the use of the lessor's cabin crews runs the risk of salary dumping in the country in which the aircraft operates. Also, in specific circumstances, wet leasing may be viewed as a creation of a dominant position by the lessee, leading to a distortion of the competition market. This paper starts by defining the model of wet lease; analyzing its main characteristics. It then goes over the legal framework in place to mitigate the above-mentioned concerns.*

### Introduction

The acquisition of an aircraft requires substantial capital investment, in particular because of the significant cost of most airplanes. Therefore, direct ownership is often unattractive for airlines who prefer to use other forms of acquisition such as 'leasing'. In addition to offering greater flexibility for airlines, leasing requires low-capital investment.<sup>1</sup>

Leasing mainly takes two forms: 'financial leasing' and 'operational leasing'. *Financial leasing* is characterized by the fact that the lessor remains the legal owner of the aircraft, even though the economic risks associated with the aircraft are transferred to the lessee for the duration of the contract. As a consequence, the lessee can include the depreciation of the aircraft in its balance sheet. At the end of the contract, the lessee directly becomes the owner of the aircraft or can exercise a purchase option. *Operational leasing*, on the other hand, is marked by a shorter term and the fact that the lessor retains the economic risk associated with the aircraft, including its depreciation value. The aircraft is not included in the lessee's balance sheet and is returned to the lessor at the end of the contract.<sup>2</sup>

Operational leasing can be divided into two main sub-categories: 'dry lease' and 'wet lease'. The former consists of the simple provision of an aircraft without crew and insurance. The later consists of a turnkey contract including the aircraft, crew, maintenance and insurance.<sup>3</sup>

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**AVIATION**

In 2005, the European Commission estimated that of the total EU fleet of 5,081 aircraft, 60% were under operational lease; with 6.6% under wet lease.<sup>4</sup> Since then, wet leasing has been attracting more and more European airlines, not only for short term rentals, but also for long term rentals, which is a new trend. The wet lease market is expected to grow by around 10% between now and 2022.<sup>5</sup>

The growing interest of airlines for wet leasing deserves a special attention. This article starts by presenting the main characteristics of wet leases; analyzing some typical provisions of such contracts. Then, it sketches the contours of the European legal framework governing wet leases, in particular with regard to safety issues. Finally, the article briefly addresses the issue of competition law, since recent decisions from European national competition authorities suggest that wet lease could, under certain circumstances, raise competition concerns.

**THE WET LEASE MODEL****Characteristics of a Wet Lease**

A wet lease is a contract between two airlines that typically runs for a short period; not more than six months to a year. Under a wet lease, the lessor provides the lessee with an aircraft and its crew, as well as technical maintenance and insurance coverage. This against payment of a rent by the lessee. Wet lease is often referred to as 'ACMI', for "Aircraft, Crew, Maintenance and Insurance".<sup>6</sup> When the crew is not made available to the lessee, the contract is referred to as 'damp lease' or 'AMI' for "Aircraft, Maintenance, and Insurance".<sup>7</sup>

Airlines generally use wet lease contracts in specific circumstances, such as making up for the lack of an aircraft in technical maintenance, coping with a seasonal increase in passengers, assessing the potential of a new flight route or obtaining an interim lift prior to taking delivery of new fleet aircraft.<sup>8</sup>

In a wet lease contract, the aircraft is operated under the 'AOC' (Air Operator Certificate) of the lessor which must also hold an 'operating licence' inherent to its status of air carrier.<sup>9</sup> This means that the lessor has the 'operational control' of the aircraft *i.e.* the authority to assess whether safety conditions are met to start a flight and determine the assignment of its cabin crew. The pilot has total discretion over the control of the aircraft as well as the cabin crew and passengers that the lessee must accept.<sup>10</sup> The lessee, for its part, has the 'commercial control' of the aircraft and decides on its use. As such, the lessee sells the aircraft's seats on its own account, provides the flight number and holds the traffic rights.<sup>11</sup>

It is usually the lessor's responsibility to position the aircraft at the right time and at the agreed location. The lessor must also provide parts for maintenance, prove the lessee that all the necessary insurances have been subscribed and ensure that the crew members will follow the lessee's instructions.<sup>12</sup> On the other hand, the lessee ensures the payment of the costs of fuel, landing, parking and storage of the aircraft. The lessee is also responsible for the costs of accommodation, meals and visas for the crew as well as insurance for passengers, baggage and freight.<sup>13</sup>

*AVIATION***Differences with Dry Leasing**

Dry leasing is a simpler form of operational leasing which is generally used for longer periods of time. Under a dry lease contract, only the aircraft is made available to the lessee, with the crew being provided by the lessee itself.<sup>14</sup> Similarly, both commercial control and operational control belong to the lessee. The leased aircraft is therefore operated through the lessee's AOC, that is, operational control, and the lessee decides on the use of the aircraft, that is, commercial control.<sup>15</sup>

**Difference with Charter Contract**

In a charter contract, a 'charterer operator' makes an aircraft and crew available to a lessee, under the instructions of the lessee, for one or more operations.<sup>16</sup> A charter contract is therefore similar to a wet lease contract, with the difference that the lessee is not an airline, but rather a tour operator, and the lessee does not hold its own operating licenses and permits. The aircraft is operated under the licenses and permits of the charter operator.<sup>17</sup>

**Advantages and Disadvantages of a Wet Lease**

Wet leasing can be advantageous in certain circumstances. For the lessee, it allows a temporary increase in capacity without increasing the fleet and crew. Furthermore, given its quick implementation, a wet lease can also make it possible to anticipate the access of competitors to new routes. For the lessor, wet leasing guarantees additional activity during off-peak periods and expands indirectly the presence into new markets without incurring commercial costs.<sup>18</sup>

Nonetheless, wet lease can pose a number of problems in practice, in particular for the lessee. There may be circumstances where:

- the aircraft is delivered with a delay, obliging the lessee to cancel flights;
- the lessor runs out of spare parts at the place of operation, constraining the aircraft to remain on the ground;
- the lessor's crew carries an excessive number of luggage items causing inconvenience for the passengers;
- the aircraft is used by the lessor for other airlines notwithstanding the contractual exclusivity; or
- the lessor purchases fuel and other supplies at non-competitive prices and re-invoices them to the lessee.

When such litigious situations occur, the forum elected in the contract, most of the time abroad, makes it difficult for the lessee to bring legal proceedings.<sup>19</sup>

From a safety perspective, the State of registry often encounters difficulties in ensuring supervision of the leased aircraft since the aircraft usually operates in remote airspace over which it does not have jurisdiction.<sup>20</sup> Indeed, Article 83*bis* of the 1944 Chicago Convention offers the possibility for the State of registry to delegate its safety supervision obligations to the State in which the lessor has its principal place of business or, if it has no such place of business, its permanent residence. However, this provision finds its limits in case of a wet lease.

## AVIATION

First, because there is in principle a coincidence between the State where the lessor has its principal place of business and the State of registry of the aircraft, which makes the application of Article 83*bis* of the Chicago Convention useless.<sup>21</sup> Second, because in the rare situations where there is a discrepancy between the State of registry and the State where the lessor has its principal place of business, Article 83*bis* is not adapted to the short term wet lease situation given the substantial time required to set up the transfer, that is, long negotiations between the States concerned.<sup>22</sup>

### Additional Elements

In a wet lease, the lessee must be an airline with its own operating licence.<sup>23</sup> In order to obtain such a licence, an EU based airline must demonstrate, *inter alia*, that it has one or more aircraft at its disposal through ownership or a dry lease agreement (Article 4 let. c) Reg. 1008/2008). Therefore, an airline cannot rely exclusively on a wet lease model at the risk of losing its operating licence and no longer being allowed to carry passengers for remuneration.

When a wet lease is in place, passengers booking a flight with airline 'X' finally find themselves transported by an aircraft of airline 'Y'. In order to avoid confusion and to allow passengers to make their choices in full knowledge of the facts, Article 11 of Regulation n° 2111/2005 requires passengers to be informed of the identity of the "operating air carrier" *i.e.* the lessee must inform passengers of the identity of the lessor.<sup>24</sup>

### Concluding Remarks

The wet lease model appears to be a favorable short-term solution for an airline, in particular because of its quick implementation and the flexibility it offers. That being said, given the complexity of the contractual structure of a wet lease contract, the parties should endeavor to precisely define the tasks incumbent on each of them in order to avoid dispute in the performance of the contract. The following chapter will give some examples of typical provisions in a wet lease agreement, specifying which obligations fall upon the lessor and the lessee.

## TYPICAL PROVISIONS OF A WET LEASE AGREEMENT

### Rent

In a wet lease agreement, the rent is usually calculated on the basis of guaranteed minimum monthly hours called "block hours", which must be paid in advance by the lessee, *e.g.* 200 block hours per month. Each block hour corresponds to a fixed amount, *e.g.* 2,000 Euros per block hour.<sup>25</sup> The more the lessee commits to a long-term contract, the lower the hourly rate of a block is. Hours of use in excess of the guaranteed minimum monthly hours are paid as overtime, usually at a lower hourly rate. Most of the time, a compensation system is set up so that if the lessee exceeds the guaranteed minimum monthly hours, overtime can be compensated by unused block hours from previous months.<sup>26</sup>

*"The actual Block Hours performed by the Lessee will be averaged on a [quarterly] basis and the Basic Rent and Extra Block Hour Rent paid with respect to such period shall be reconciled and adjusted accordingly"* (emphasis added).<sup>27</sup>

## AVIATION

**Maintenance**

A wet lease agreement usually provides that maintenance is carried out directly by the lessor. Indeed, the lessor undertakes to provide an aircraft that is properly maintained in an airworthy condition and to operate it in accordance with all applicable rules.<sup>28</sup>

In the EU, Regulation 1321/2014 provides that in the case of commercial air transport, the operator is responsible for the continuing airworthiness of the aircraft.<sup>29</sup> For long-term wet leases or when the distance between the parties is significant, maintenance is sometimes carried out directly by the lessee or one of its sub-contractors. In such cases, the lessor remains ultimately responsible for the maintenance.<sup>30</sup>

*“[Lessor’s name], pursuant to its statutory and regulatory obligations as the certificate holder, shall have complete and exclusive responsibility for the operation, maintenance and safety of the Aircraft, and for compliance with all applicable Legal Requirements of any Governmental Authority having jurisdiction over the ownership, operation and maintenance of the Aircraft and the ACMI Services to be provided hereunder” (emphasis added).*<sup>31</sup>

**Liability**

According to Articles 40 and 45 of the 1999 Montreal Convention (MC), the ‘contracting carrier’ and the ‘actual carrier’ are jointly and severally liable for damages for which compensation may be claimed under the MC. Towards third parties, an action for damages may be brought, at the discretion of the plaintiff, against the actual carrier or the contracting carrier, or against both together or separately. It being specified that in a wet lease, the lessor is deemed to be the ‘actual carrier’ and the lessee the ‘contracting carrier’.<sup>31</sup>

Notwithstanding the legal principle of joint and several liability, some lease agreements provide that the lessee contractually waive any recourse action against the lessor and guarantee the lessor against any claim for compensation. According to CHassot, this contractual transfer of the transport risk to the contracting carrier reflects the strong position of the lessor’s vis-à-vis lessees who are often in a hurry to quickly remedy operational contingencies.<sup>33</sup>

*“Notwithstanding the foregoing, [Lessor’s name] indemnification obligations herein (...) are limited to the kinds and amounts of insurance [Lessor’s name] agrees to provide herein, unless such insurance coverage is unavailable through the fault of [Lessor’s name], and except to the extent such obligations arise from the gross negligence or willful misconduct of [Lessor’s name] or its agents or employees” (emphasis added).*<sup>34</sup>

**Insurance**

A wet lease agreement provides for the obligation of each party to take out insurance to cover the risks it is responsible for. The lessor generally insures the aircraft body and liability toward third parties on the surface. The lessee often insures the damage suffered by passengers, their baggage or goods.<sup>35</sup> A certificate of insurance coverage must be provided by each party indicating that the insurances are in force. Said certificates specify policy numbers, expiry dates and limits of liability.



## AVIATION

*“The Party procuring the insurance hereunder shall provide to the other Party here-to prior to the commencement of operations a certificate from the insurers that such insurance is in effect. These certificates shall state policy numbers, dates of expiration, and limits of liability thereunder” (emphasis added).<sup>36</sup>*

### Concluding Remarks

Unlike the sale of aircraft, there is no standard wet lease contract offered by IATA or other organizations.<sup>37</sup> The provisions of a wet lease agreement are unique and mainly depend on the will of the parties and the nature of the services they wish to implement. In any case, the parties will have to attach particular importance to the dispute resolution provision. Indeed, a forum elected in a foreign country with failing or complacent state courts may, for instance, make it difficult for the lessee to bring legal proceedings. In this context, the establishment of an independent arbitration court based in a third country and composed of arbitrators specialized in aviation law may be an appropriate solution to ensure greater speed of process and competence than a state court.

### APPROVAL OF THE AUTHORITIES UNDER EUROPEAN LAW

#### EU Legal Regime

European law contains specific rules applicable to wet lease contracts; the purpose of which is essentially to control the safety aspect of aircraft leasing. Two Regulations are mainly applicable to wet leases: Regulation n° 1008/2008 and Regulation n° 859/2008.

#### Between Two EU Airlines

When two European airlines wish to conclude a wet lease contract, the principle of freedom of operation applies, subject to the observance of safety rules.<sup>38</sup> Indeed, according to Regulation n° 1008/2008, “Community air carriers may freely operate wet-leased aircraft registered within the Community except where this would lead to endangering safety” (Article 13 § 1). In this context, the lessee, and only the lessee, is responsible for obtaining a prior safety approval “in accordance with applicable Community or national law on aviation safety”.<sup>39</sup>

Said approval is issued by the competent authority of the State in which the lessee's principal place of business is situated.<sup>40</sup> The competent authority approves the wet lease agreement after ensuring that the lessor meets continuing airworthiness requirements and air operations in accordance with applicable European rules.<sup>41</sup>

#### Between an EU airline and a non-EU airline

##### Potential Situations

When one of the two airlines do not fall under European jurisdiction but is an extra-European airline, two situations must be distinguished. Those are discussed in sub sections below.



## AVIATION

### *EU lessor and non-EU lessee*

The first situation is where the lessor is a European airline and the lessee is not from the European Union. In such a situation, European law does not require any approval and control of the operation is left to foreign national law.<sup>42</sup>

### *Non-EU lessor and EU lessee*

The second situation is where the lessor is a non-European airline and the lessee is a European airline. In this situation, European law is applicable and introduces a protectionist approach. Indeed, in addition to the prior safety approval provided for in Article 13 § 2, the lessee must apply for a “prior approval for the operation from the competent licensing authority”.<sup>43</sup> For such approval to be granted, the operation must not only meet safety criteria, but also restrictive economic expediency.<sup>44</sup>

From a safety perspective, the lessee shall demonstrate that:

- the non-EU airline holds a valid AOC issued in accordance with ICAO Annex 6;
- the non-EU airline safety standards are equivalent to those imposed by EU law; and
- the aircraft has a standard Certificate of Airworthiness (CofA) issued in accordance with ICAO Annex 8 of the Chicago Convention.<sup>45</sup>

From an economic expediency perspective, the lessee shall demonstrate that one of the following needs exists:

- an exceptional need such as a special oversized cargo or a need for additional capacity for the prospection of new markets. If so, the lease is granted for a maximum of 7 months and may be extended once for a new period of 7 months maximum.<sup>46</sup>
- a seasonal capacity need which cannot be met by wet leasing an aircraft in the European Union (EU). Such situations may occur when there is no suitable aircraft on the EU market. If so, the approval is granted for one or more seasons and may be renewed.<sup>47</sup>
- a need to overcome operational difficulties and it is not possible or reasonable to lease an aircraft registered within the EU. This will be the case, for example, in the event of a breakdown or mechanical incident bringing the aircraft to a standstill. In such a case, the approval is granted for the time necessary to overcome the operating difficulty.<sup>48</sup>

Even if the above conditions are met, the competent authority may refuse to grant its approval if there is no reciprocity as regards wet leasing between the Member State concerned and the third country where the wet-leased aircraft is registered (Article 14 § 4 of Regulation n° 1008/2008).

### **Concluding Remarks**

The regulatory system set up by the European Union puts EU and non-EU airline on an equal footing when it comes to safety. The requirement for non-EU airlines to meet European safety standards certainly increases passenger safety by preventing these airlines from flying on aircraft that do not comply with European safety standards.



## AVIATION

From an economic perspective, the exhaustive list of situations in which EU airlines can call on non-EU airlines and the principle of reciprocity reflect the protectionist nature of European law on wet leasing with third countries. Although this practice certainly prevents the expansion of a free market for wet leasing, it nevertheless protects European aircraft personnel from certain abuses such as salary dumping.

## COMPETITION LAW ISSUES

### General Context

At first glance, competition law has little to do with wet lease. However, two recent decisions of European national competition authorities, in Germany and England respectively, suggest that in certain wet leases, the contracting parties would be well advised to seek the approval of the competition authorities (in addition to the safety approval).

In these two decisions, the national competition authorities have considered whether, by means of the wet lease, the lessee took over the lessor's market position and thereby acquired a dominant position.

### Germany: Lufthansa/Air Berlin Case

In 2016, Lufthansa and Air Berlin entered into a wet lease agreement for the rental of 38 aircraft (Airbus A319 and A320) over a period of 6 years, including a renewal option. The 38 aircraft were all dry leased by Air Berlin from third parties. Prior to the wet lease, the transaction provided that Lufthansa would dry lease 10 aircraft and sub-lease them to Air Berlin and acquire 15 aircraft to dry lease them to Air Berlin. The remaining 13 aircraft would continue to be dry leased by Air Berlin from third parties. The transaction neither involved the transfer of slots nor the transfer of contractual relationships of Air Berlin's customers. Also, the transaction did not cover the transfer of specific routes previously operated by Air Berlin.

In a nutshell, the German "*Bundeskartellamt*" decided that the transaction could potentially create a dominant position of Lufthansa on the market in so far as (i) the wet lease could be considered as an acquisition of part of Air Berlin by Lufthansa (ii) a 6-year lease period was exceptionally long and (iii) the lease of 38 aircraft represented a significant part of Air Berlin's fleet - almost a quarter - thus strengthening Lufthansa's position on the market for flights to and from Germany.

In the case at hand, however, the "*Bundeskartellamt*" considered that Lufthansa did not take over Air Berlin's market position and thereby acquired a dominant position, in particular because no transfer of slots, routes and customers between Air Berlin and Lufthansa was part of the transaction.<sup>49</sup>

### England: Aer Lingus/CityJet Case

At the beginning of 2018, CityJet decided to cease its flight operations and focus solely on wet leasing. In this context, Aer Lingus and CityJet entered into a framework agreement providing for (i) the wet lease of several CityJet aircraft, (ii) the loan to Aer Lingus of CityJet slots (between LCY and DUB), for the duration of the



*AVIATION*

contract, and (iii) the automatic transfer to Aer Lingus of customers who had already booked a CityJet flight from LCY to DUB.<sup>50</sup>

The British Competition and Markets Authority (CMA) considered that the transaction had to be treated as a merger.<sup>51</sup> In essence, the CMA argued that the combination of a wet lease agreement with a transfer of slots and customers on a particular route amounted to Aer Lingus taking over the market position of CityJet, referring to the principle of economic continuity. Through this operation, Aer Lingus acquired the ability to control price, quality of service and timing of operations, which were previously controlled by CityJet. The CMA considered that the transaction was likely to have an impact on the competitive structure of the air market between London and Dublin. After the operation, Aer Lingus became the only airline to operate on this route.

In this case, the CMA nevertheless accepted the transaction considering that (i) if no merger had taken place, CityJet would have ceased to provide scheduled flights between LCY and DUB in any case; CityJet had indeed decided to cease its flight operations, (ii) no other airline would have had the ability or strategic intent to enter into an agreement with CityJet and provide scheduled passenger services on the LCY-DUB route, and (iii) the transaction did not create a more anti-competitive result than if CityJet had simply withdrawn from the LCY-DUB route.<sup>52</sup>

**Concluding Remarks**

A short-term wet lease of a limited number of aircraft is unlikely to be considered a prohibited concentration in most European jurisdictions. That being said, Burnside AND De Backer consider that the contracting parties must be particularly vigilant when the wet lease (i) covers all or a large part of an airline's fleet (e.g. a quarter), (ii) is of long duration, (iii) includes the transfer of slots to the lessee, even temporarily, and (iv) involves the transfer of contracts or customer files to the lessee.

In such cases, the transaction should be reported to the national competition authority, which could, as the case may be, prohibit the transaction. In this context, the parties may decide to provide for the approval of the competent competition authority as a condition precedent to the entry into force of the wet lease.<sup>53</sup>

**CONCLUSIONS AND RECOMMENDATIONS**

On July 2014, the McDonnell Douglas MD-83 of the Spanish airline Swiftair, wet leased to Air Algérie, crashed between Ouagadougou and Alger killing all 116 passengers and crew on board. On May 2018, the Boeing 737 of the Mexican company Global Air wet leased to Cubana de Aviación, which had been forced to ground its fleet of Antonov An-158s due to a lack of spare parts, crashed shortly after take-off from Havana, killing 112 of the 113 occupants of the aircraft.<sup>54</sup> Although these disasters were essentially due to human error, they potentially suggest that the wet lease model consists in the lease of 'trash planes' by unscrupulous airlines, which has probably not helped the reputation of this business model in the aviation industry.



## AVIATION

However, after this brief overview of the applicable rules, it appears that European legislation has made it possible to alleviate safety risks by imposing safety approvals. Furthermore, whilst the protectionist system put in place for wet leases involving non-EU countries certainly prevents the expansion of a free market for wet leasing, it remains a good option to avoid salary dumping on the European leasing market. As for the system of joint and several liability provided for in the Montreal Convention between the lessor and the lessee, the provision offers appreciable security for passengers since these have the possibility to bring action against either the lessor or the actual carrier, that is, the lessor, or the contracting carrier, that is, the lessee, or against both together or separately.

At the EU level, there is no precedent in which the European Commission's Directorate General for Competition has considered a wet lease to fall within its merger control.<sup>55</sup> That being said, a new trend towards long-term wet leases, taking into account competition law concerns, seems to be taking hold in some European countries. As a consequence, airlines will have to be increasingly vigilant since long duration of a wet lease contract may lead competition authorities to consider the agreement as a prohibited concentration.

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## AVIATION

<sup>1</sup>Endrizalova E., Novak M., Nemeč V., Hyrslova J. & Mrazek P. (2018). Operating lease as a specific form of airlines outsourcing. *Business Logistics in Modern Management*, 18, p. 642; Schubert, F. (2017). *Le droit aérien*, Schulthess Verlag, Zürich. p. 76.

<sup>2</sup>Leon, P. (2017). *Introduction to air law* (10th ed.), p. 470-471; Hanley, D. (2011). Aircraft operating leasing: A legal and practical analysis in the context of public and private international air law. S.I.: s.n. p. 155.

<sup>3</sup>Bournonville, D. & Grigorieff, C. (2017), *Panorama de la diversité contractuelle*, in *Le droit du financement des aéronefs*, Bruylant, Bruxelles. pp. 29 ff. Airlines also opt for long-term wet leasing to increase their operating capacity. Some companies are even specialized in long term wet leasing: See <https://www.easa.europa.eu/sites/default/files/dfu/Practical%20Guide%20New%20Business%20Models%20Hazards%20Mgt.pdf>.

<sup>4</sup>Morrell, P. (2016). *Airline finance* (4th ed.), p. 242.

<sup>5</sup>The grounding of the Boeing 737 MAX is not without incidence. Indeed, many companies had to quickly find alternatives to provide flights, whose tickets were already sold, but whose aircraft were no longer authorized to fly. See also: <https://aviationvoice.com/wet-lease-to-grow-10-by-2022-2-201803011042/>.

<sup>6</sup>Bournonville & Grigorieff (2017), p. 32.

<sup>7</sup>Panchal, R. (2017). Technical aspects of aircraft leasing (part I of II). *Court Uncourt*, 4(7), p. 11.

<sup>8</sup>Castellanos Ruiz, M. (2016). *Contratos internacionales de leasing de grandes aeronaves civiles - International leasing contracts for large civil aircrafts*. *Cuadernos De Derecho Transnacional*, 8(2), pp. 139-140; Bunker, D. H. (2005), *International aircraft financing. Vol. 1: General Principles*. Montreal [etc.] : IATA. p. 229.

<sup>9</sup>Castellanos Ruiz, M. (2012). *Los contratos internacionales de utilización de aeronaves: a modo de síntesis*. *Cuadernos De Derecho Transnacional*, 4(1), p. 156; Chassot, L. (2017). *Le contrat de location d'aéronef avec équipage - Le wet lease in Le droit du financement des aéronefs*, Bruylant, Bruxelles. p. 93. See also Article 2 § 10 and 25 Regulation n° 1008/2008, Article 3 Regulation n° 1008/2008 and Regulation n° 859/2008 EU-OPS 1.165 a) 2).

<sup>10</sup>Castellanos Ruiz (2016), p. 140.

<sup>11</sup>Castellanos Ruiz (2012), pp. 155-156; Bournonville & Grigorieff (2017), p. 32.

<sup>12</sup>Bunker, D. H. (2000). Aircraft wet leasing: The perils and the benefits. *Annals of Air and Space Law*, 25, pp. 68-69.

<sup>13</sup>Bellandi, F. (2018), Aircraft wet leases: Accounting dissonance with competitive strategy and travelers' perspectives. *International Journal of Business and Management*, 13(11), p. 217.

<sup>14</sup>Frühling, P. & Golinvaux, S. (2017). *Le contrat de location coque nue - Le dry lease in Le droit du financement des aéronefs*, Bruylant, Bruxelles, p. 40.

<sup>15</sup>Castellanos Ruiz (2012), pp. 155-156. See also Article 2 § 24 Regulation n° 1008/2008 and Regulation n° 859/2008 EU-OPS 1.165 a) 1).

<sup>16</sup>Castellanos Ruiz (2016), p. 140.

<sup>17</sup>Hanley (2011), p. 8.

<sup>18</sup>Bellandi (2018), p. 217.

<sup>19</sup>Bunker (2000), pp.78-81: very comprehensive list of issues associated with wet lease.

<sup>20</sup>Schubert (2017), p. 69; Reuleaux, M., Hans Jakobsen, M. L. & Sand P. (2019). Aircraft repossession under leasing arrangements pursuant to Article 83bis Chicago Convention. *Air and Space Law*, 44(6), p. 547.

<sup>21</sup>Chassot (2017), p. 94.



## AVIATION

- <sup>22</sup>Bunker (2000), p. 74.
- <sup>23</sup>Bunker vol. 1 (2005), p. 229.
- <sup>24</sup>Castellanos Ruiz (2012), p. 156.
- <sup>25</sup>In our example, the lessee would pay each month in advance a fixed amount of EUR 400,000 (200x2000).
- <sup>26</sup>Bunker (2000), p. 71; Castellanos Ruiz (2016), p. 141. See also Article X ACMI Service Agreement available at <https://www.sec.gov/Archives/edgar/data/3000/000095016803001198/dex101.htm>.
- <sup>27</sup>Bunker, d. H. (2005). International aircraft financing. Vol. 2: Specific documents. Montreal [etc.]: IATA. p. 265.
- <sup>28</sup>Chassot (2017), pp. 106-107.
- <sup>29</sup>Regulation n° 1321/2014, Annex I, M.A.201, let. h). In a case of a wet lease, the lessor is the operator of the aircraft and exercises operational control: Castellanos Ruiz (2016), p. 140.
- <sup>30</sup>Bunker (2000), p. 74.
- <sup>31</sup>Article II, Section 2.4 (a) ACMI Service Agreement (see note 26).
- <sup>32</sup>Kosenina, A. (2014). Liability of aircraft lessors is the residual amount of protective coating sufficient to shield lessors from growing into an alternative source for plaintiff's damage recovery. *Zeitschrift für Luft- und Weltraumrecht German Journal of Air and Space Law*, 63(2), p. 273; Chassot (2017), p. 102.
- <sup>33</sup>Chassot (2017), p. 110.
- <sup>34</sup>Article VIII, Section 8.1 ACMI Service Agreement (see note 26).
- <sup>35</sup>Chassot (2017), pp. 111-112.
- <sup>36</sup>Article VIII, Section 8.5 ACMI Service Agreement (see note 26).
- <sup>37</sup>Chassot (2017), p. 105.
- <sup>38</sup>Grellière, V. (2019). Droit aérien et spatial available at : [http://publications.ut-capitole.fr/32897/1/TRAITÉ\\_DROIT\\_AERIEN\\_SPATIAL\\_Grelliere.pdf](http://publications.ut-capitole.fr/32897/1/TRAITÉ_DROIT_AERIEN_SPATIAL_Grelliere.pdf), p. 252.
- <sup>39</sup>Article 13 § 2 of Regulation n° 1008/2008 and Regulation n° 965/2012 ORO.AOC.110 a).
- <sup>40</sup>Article 3 of Regulation n° 965/2012 and ORO.GEN.105.
- <sup>41</sup>Regulation n° 965/2012 ORO.AOC.110 a), 4); Chassot (2017), p. 97.
- <sup>42</sup>Grellière (2019), p. 253.
- <sup>43</sup>Article 13 § 3 of Regulation n° 1008/2008. The authority may or may not coincide with the authority issuing the safety approval provided for in Article 13 § 2. See also Chassot (2017), p. 98.
- <sup>44</sup>See note 42.
- <sup>45</sup>Article 13 § 3 let. a) of Regulation n° 1008/2008; Regulation n° 965/2012 ORO.AOC.110 c) 1-3). This approval overlaps with the safety requirements laid down in Article 13 § 2: See Chassot (2017), pp. 98-99.
- <sup>46</sup>Article 13 § 3 let. b) i) Regulation n° 1008/2008. See also Guidance for leasing and code sharing (2015), available at: [https://www.samgongustofa.is/media/flug/flugrekstur/GM009\\_Leasing\\_codeshare.pdf](https://www.samgongustofa.is/media/flug/flugrekstur/GM009_Leasing_codeshare.pdf), p.8.
- <sup>47</sup>*Ibidem*, let. ii) Regulation n° 1008/2008. See also Chassot (2017), p. 99.
- <sup>48</sup>*Ibidem*, let. iii) Regulation n° 1008/2008. See also Grellière (2019), p. 254.



## AVIATION

<sup>49</sup>Decision of the German competition authority (30 January 2017), B9-190/16 - Lufthansa darf Flugzeuge von Air Berlin leasen, available at <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Fallberichte/Fusionskontrolle/2017/B9-190-16.html> (2017), pp. 1-2 and 8.

<sup>50</sup>Decision of the Competition and Markets Authority (CMA) (21 December 2018), ME/6782/18 - Aer Lingus Limited and Cityjet Designated Activity Company, available at [https://assets.publishing.service.gov.uk/media/5c46de96ed915d38a2f5e262/AerLingus\\_CityJet\\_Full\\_Text\\_Decision.pdf](https://assets.publishing.service.gov.uk/media/5c46de96ed915d38a2f5e262/AerLingus_CityJet_Full_Text_Decision.pdf), pp. 3-4.

<sup>51</sup>Under UK competition rules, a merger occurs, in particular, when two companies cease to be distinct. See Enterprise Act 2002, s. 23: <https://www.legislation.gov.uk/ukpga/2002/40/contents>.

<sup>52</sup>See note 50, pp. 7, 11-12, 14-20.

<sup>53</sup>Burnside A. & De Backer M. (2019). Wet lease agreements and competition law. *Air and Space Law*, 44 (3), pp. 313-315.

<sup>54</sup>CEAIAC final report (2016) available at [https://reports.aviation-safety.net/2014/20140724-0\\_MD83\\_EC-LTV.pdf](https://reports.aviation-safety.net/2014/20140724-0_MD83_EC-LTV.pdf) and Cuban CEIAA final report (2020) available at [https://reports.aviation-safety.net/2018/20180518-0\\_B732\\_XA-UHZ.pdf](https://reports.aviation-safety.net/2018/20180518-0_B732_XA-UHZ.pdf).

<sup>55</sup>Burnside & De Backer (2019), p. 306. The authors also put forward a few hypotheses explaining the potential incompetence of the European Commission's Directorate General for Competition with regard to wet leasing, these are (i) the aircraft and crew remain under the control of the lessor (operational control), (ii) the duration of a wet lease is generally limited and (iii) the assets, even in combination, can be mere inputs and not amount to a business to which a market presence can be attributed.

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## International Space Law and Turkey

Serap Zuvin\*  
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## Origins

When giving advice about law, the first thing a lawyer keeps in mind should be the jurisdiction in which that certain act is taking place. All the legislation, rules, procedures or customs have jurisdictional boundaries. So, in a world where every new technologic innovation is exceeding the boundaries of humankind, which rules govern the outer world? What are the rights and obligations of the States on Earth regarding exploring or possibly even colonizing outer world? And how does a developing country such as Turkey find its place in this dynamic environment?

Although some of the aspects of possible rules governing the outer world were discussed in the early 20th century<sup>1</sup>, this issue became much more relevant after 1950s when humans became able to travel to space and reach to the moon or even planets. Therefore, the then newly established United Nations (UN) started to gather and regulate the States' rights and obligations in their actions affecting or taking place in outer world. The foundational stones of the international space law were built then, as *corpus juris spatialis*, the fundamental law governing space activities, through the initiatives taken by the UN. The basis of international space law consists of five international treaties which are ratified by more than 100 countries around the world and five principles preceding them.

## International Principles of Space Law

With the growing interest in space activities in the 1950s, the first action by the international community to establish basic rules regarding the conduct in space was set forth by adopting principles. These principles relating to functioning of the international outer space law were adopted by the General Assembly of the UN. The UN's initial purpose in such enactment was to guide the Member States with certain principles in their space explorations. Although these principles were not international treaties, they were confirmed in the UN General Assembly with an overwhelming majority of the Member States, and they have been embedded in the international treaties that were written in 1960s and 1970. Therefore, some scholars argue that they have the status of customary international law.<sup>2</sup>

1) The "**Declaration of Legal Principles**": the Declaration of Legal Principles<sup>3</sup> is adopted by the UN General Assembly in 1963 and it underscores the fact that exploration of the outer space must be carried out only for the benefit of all humankind on an equitable basis among all states in a peaceful manner. It is further stated that the outer space and celestial bodies are not subject to national appropriation by claim of sovereignty or occupation.

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## SPACE

2) The **"Broadcasting Principles"**: these principles<sup>4</sup> encompass acts of the states' conducts regarding the use of satellites for international television broadcasting. It is stated that "principle of non-intervention" is important and each State must respect each other's' right to seek, receive and impart information.

3) The **"Remote Sensing Principles"**: this UN General Assembly Resolution<sup>5</sup> establishes fifteen rules regarding the use of remote sensors to analyze earth's surface from space via the use of electromagnetic waves. These principles mainly outline that the remote sensing activities shall be carried out for the benefit of all countries based on equality. For this reason, states must cooperate with each other in order to enhance the benefits from such activities.

4) The **"Nuclear Power Sources" Principles**: these principles<sup>6</sup> mainly recognize the use of nuclear power sources in outer space vehicles and their applications, provided that their safety have been assured.

5) The **"Benefits Declaration"**: this declaration<sup>7</sup> underlines the importance of international cooperation in the use of outer space on an equitable and mutually acceptable basis.

### Fundamental International Treaties (the Rights and Obligations of the States)

The UN Committee on the Peaceful Uses of Outer Space ("UNCOPUOS") was established in 1958, one year after the launch of Sputnik, as an ad hoc committee of the UN with the purpose of reviewing the scope of international cooperation in peaceful uses of outer space, oversee the implementation of the international treaties regarding space, disseminate information on outer space matters and research legal issues that arises from the exploration of outer space.<sup>8</sup> One year later, it was given a permanent status under UN resolution 1472 (XIV).<sup>9</sup> When it was first established, it had 18 Member States; yet with the rise of space industry and the general interest in space, currently the committee has 95 Member States.<sup>10</sup> The committee played a pivotal role in drafting the five fundamental treaties that govern the activities of countries in outer space and currently it has the duty to oversee the implementation of these treaties by States Parties.

#### 1) Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (the "Outer Space Treaty"):

- Introduction

The Outer Space Treaty is the main pillar for setting up the rules regarding the States' activities in outer space. It entered into force on 10 October 1967 with three depositary states: United States, United Kingdom and Soviet Union (now Russian Federation). Currently, there are 110 Parties to the Outer Space Treaty.<sup>11</sup>

*SPACE*

- States' Rights and Obligations

Firstly, the Outer Space Treaty makes it clear that the exploration and use of outer space shall be carried out only for peaceful purposes and for the benefit and interests of all countries on Earth.<sup>12</sup> It sets forth that neither the outer space nor the celestial bodies in space can be claimed by any Party as their own territory; with a prohibition on claims of sovereignty or occupation.<sup>13</sup> Underlining the obligation for the peaceful exploration of space, it forbids the Parties from placing any object carrying nuclear weapons or any other kinds of weapons of mass destruction. Furthermore, it prohibits the establishment of military bases and fortifications in outer space.<sup>14</sup> The Treaty requires the Parties to provide assistance in case an astronaut is in distress. In addition, it sets forth the international responsibility of the Parties for their national activities carried out in outer space regardless of the entity being governmental or private.<sup>15</sup> The Treaty states that each Party that launches an object into outer space is internationally liable in case such an activity causes damage to natural or legal persons that are a national of another Party. Lastly, this Treaty obligates the Parties to be guided by the principle of cooperation and mutual assistance while carrying out activities that falls within the scope of this Treaty, and that the Parties must pay due regard to the corresponding interests of all other Parties.

- Current Developments

With a growing interest in the space activities in the last decade, there have been several actions by Parties such as the establishment of space forces of military or the possibility of mining the resources from other celestial bodies such as moon or asteroids. These acts are controversial in international space law and may be in conflict with States' obligations under the Outer Space Treaty.

As opposed to 1950s, the space industry nowadays has a number of private companies such as SpaceX that are conducting outer space activities and private companies are aiming for certain commercial interest out of their acts. An important commercial opportunity is extraterrestrial mining. NASA estimates that the elements found within the asteroids may be valued at around \$700 quintillion.<sup>16</sup> There are differing opinions in the legal doctrine on whether the mining of the elements found in the Moon, other planets or asteroids would infringe the Outer Space Treaty. The Treaty states that outer space is "the province of all mankind" and that it is the "common heritage of all mankind". Furthermore, although the Treaty does not refer to mining, as elaborated above, Article II states that outer space and other celestial bodies are "not subject to national appropriation by claim of sovereignty". From these provisions, some scholars argue that mining of celestial bodies would violate the Treaty since it would constitute the appropriation of celestial objects for commercial purposes, as an extension of their national sovereignty.<sup>17</sup> On the other hand, other scholars state that the Treaty is insufficient and ambiguous in terms of providing clear rules on mining activities, and in the lack of a clear provision banning mining in celestial bodies, it shall be allowed.<sup>18</sup>



*SPACE*

Another highly debated topic concerns the establishment of space forces in the military branches of States Parties. As mentioned above, the Outer Space Treaty prohibits the use and installation of nuclear weapons and weapons of mass destruction in outer space and on celestial bodies. Furthermore, Article IV of the Treaty states that the moon and other celestial bodies can only be used for peaceful purposes only. It further prohibits the establishment of military installations, fortifications and the testing of any type of weapons and the conduct of military maneuvers on celestial bodies. While some Parties argue that the establishment of military space forces is not prohibited and that these forces can be of use for peaceful purposes, others state that such an establishment goes against the rationale that the whole Treaty is based on: international cooperation for peaceful purposes.<sup>19</sup>

## **2) The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (the “Rescue Agreement”)**

- Introduction

In the years preceding this Agreement, States’ activities in space were increasing rapidly and astronauts were being sent to outer space regularly by the United States and the Soviet Union. Although a reasonable amount of these activities were being conducted without any problems, in certain occasions, the missions were encountering problems. Therefore, the UN drafted the Rescue Agreement in case everything does not go accordingly to the plan during the States’ outer space activities. The Agreement entered into force on 3 December 1968 and currently has 98 States Parties.<sup>20</sup>

- States’ Rights and Obligations

Article I of the Rescue Agreement provides that in case a Party receives information or discovers that the personnel of a spacecraft is in distress or have suffered an accident; or that a spacecraft conducts an emergency landing in their territory, the Party shall notify the launching authority and the Secretary-General of the UN. Furthermore, Article II states that if a Party notices spacecraft personnel within their territory after an accident or due to distress, the Party shall immediately take all possible steps necessary to rescue them. The Agreement further requires the Parties to take all the necessary action for the return of the spacecraft personnel to the representatives of the launching authority. Article V of the Agreement states that States Parties are under the obligation to provide assistance for the return of the space objects to the launching authority. Lastly, the Agreement has provisions regarding the return of space objects that have accidentally landed in the territory of a State Party.



## SPACE

- Current Developments

The Rescue Agreement is instrumental in providing guidance regarding how the States Parties must act in case a spacecraft personnel or a space object lands in their territory due to unforeseen reasons. However, this Agreement is criticized for lacking clarity on the definitions of the subjects which are entitled for rescue. While it regulates how States Parties shall give assistance in searching, locating and returning the spacecraft personnel, it does not define the term 'spacecraft personnel'. This provision is ambiguous in today's world, since it is not clear whether the space tourists in a spacecraft (such as the planned space trips of Virgin Galactica) would be entitled for the guidance it would provide to astronauts.

### 3) The Convention on International Liability for Damage Caused by Space Objects (the "Liability Convention")

- Introduction

As the number of the objects that are sent to outer space grew in the second half of 20th century, the number of accidents of space objects also rose. Therefore, the international community found it necessary to provide a legal avenue for compensating the damages that are caused by space objects in the territory of States Parties. The Liability Convention entered into force on 1 September 1972 and it currently has 98 States Parties.<sup>21</sup>

- States' Rights and Obligations

Article II of this Convention provides that the launching State is "absolutely liable" to pay compensation for damage caused during the flight or on the surface of the earth by a space object that is either launched from their territory. The Convention further regulated the diplomatic and legal avenues that are required to ensure that the compensation has been made to the damaged Party. It also provides rules regarding different scenarios where there are multiple states responsible for the launch of a spacecraft. It is important to underline that only States can claim compensation from another State under this Convention. So, if a damage is incurred by private persons within the territory of a State Party, they must arrange for their country to make a claim under the Convention against the State that launched the space object. The only claim that is made via this Convention was caused by the crash of Soviet satellite Kosmos 954 in Canadian territory in 1978.

### 4) The Convention on Registration of Objects Launched into Outer Space (the "Registration Convention")

- Introduction

With the growing number of objects being launched to space, the international community saw it necessary to establish a central registry on which the registration of all space objects that are being launched into outer space would be mandatory. Therefore, the Registration Convention was drafted by the UN and entered into force on 15 September 1976. Currently, there are 69 States Parties to the Convent-

## SPACE

Therefore, the Registration Convention was drafted by the UN and entered into force on 15 September 1976. Currently, there are 69 States Parties to the Convention.<sup>22</sup>

- States' Rights and Obligations

According to Article II of this Convention, the States Parties are required to register the space objects that are launched by them through an entry in the registry kept by the Secretary-General of the UN. The registry aims at being able to identify the space objects and enable the States Parties to figure out which space object has caused damage to it or to any of its natural or legal persons. The Convention further details the information that is required to be entered into the registry and the duties of the Secretary-General of the UN with regard to keeping this registry.

### 5) The Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (the "Moon Agreement")

- Introduction

The main aim of developing the Moon Agreement was to ensure the developing countries and non-space powers that they would not be excluded from benefiting the resources in the celestial bodies in outer space.<sup>23</sup> It was the first international treaty in which the usage of resources in outer world was being regulated.<sup>24</sup> After more than a decade-long drafting process, the Moon Agreement entered into force on 11 July 1984. Yet, the States Parties to this Agreement is very low with only 18 countries.<sup>25</sup> None of the states which have engaged in self-launched spaceflight have signed or ratified this agreement.

- States' Rights and Obligations

Under the Moon Agreement, Article I declares that the moon should be used to the benefit of all states of the international community and underlines that the resources found in the moon are not subject to national appropriation. It seeks to establish a framework of laws or an international regime to govern the exploitation of the natural resources of the moon. It requires the States Parties to inform the public and the Secretary-General of the UN in case they have discovered any natural resources on the moon. Furthermore, Article XI states that the placement of a vehicle on the surface of the moon does not entitle the launching State a right of ownership on that area.

This Agreement has introduced two new concepts to the international space law: firstly, it designated the moon as a "common heritage of mankind"; and secondly, it provided a procedure for the designation of rules for using the natural resources found in moon. However, the countries which conduct most of the space activity have objections regarding this Agreement since they have the understanding that the resources they obtain from space during their outer space activities become the property of the State that obtains the material.<sup>26</sup> Therefore, with the lack of major space powers as signatory to this Agreement, it does not have considerable influence on the conduct of the States regarding their activities on the moon.

## SPACE

**The Convention on International Interests in Mobile Equipment (the “Cape Town Convention”) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Space Assets (the “Space Protocol”)**

With the rising capital of private companies, there are now a number of large international companies that are willing to use space for commercial purposes such as space travelling, exploration or mining in celestial bodies. Therefore, while the international rules that we have mentioned up until now contain public international law characteristic, with the modernization and the increase in privatization of spacecraft and space missions, need for establishing legislative pieces to regulate the private law part of space law became inevitable. At this point, Cape Town Convention became prominent.

The Cape Town Convention<sup>27</sup> is designed to regulate and facilitate the cross-border financings of the mobile assets such as aircraft and railway rolling stock. It creates an optional private international law regime that facilitates financing of a mobile equipment by qualifying the equipment as an international interest, establish default remedies for the creditors, create an international registry of international interests for the financiers which is transparent and easy to access by electronic means, meet the needs of the industry and increase the investment confidence of potential investors. All these facts ultimately lower the cost of financings.<sup>28</sup>

Compared with international maritime commerce and international air commerce, outer space commerce is at an earlier stage of development. Unlike other movable assets such a ships and airplanes, spacecraft do not have nationality<sup>29</sup>. However, nationality for spacecraft would resolve the confusion which now prevails regarding jurisdiction over space objects.

Moreover, the Space Protocol is the first private international law treaty on outer space activities which was first published in 2012 with only 4 states as signatories and is not ratified by neither of them. A clear example regarding the purpose of the Space Protocol was given in Paul B. Larsen’s article on Berlin Space Protocol<sup>30</sup>. According to Paul B. Larsen, *“A satellite operator may borrow money from a financier, enter into contract with Boeing to build a satellite, contract with Arianespace to launch that satellite from French Guyana, and finally may engage in the business of remote sensing from outer space. Subsequently the operator may become insolvent and may default on the security agreement by failure to make payments to the financier, or the satellite may be sold to another operator of a different nationality in violation of the security agreement. The satellite operator may also seek surreptitiously to use that satellite as security for other loans, thus raising the issue of priorities of security interests. The treaty establishes a unique international law governing security interests in space assets based on the principle of asset-based financing.”*

## SPACE

After processing the purpose of the Space Protocol, the question comes into mind whether it is possible for creditors to exercise their remedies under the Space Protocol. The Space Protocol takes into account the physical impossibility of repossession in two ways<sup>31</sup>:

- Assignability of debtor's rights: The Space Protocol recognizes the importance of revenue streams in relation to the space asset for the creditor, and it contains detailed provisions on the assignment of debtor's rights such as "rights to payment or other performance due or to become due to a debtor by any person with respect to a space asset".
- Tracking, Telemetry and Control Enforcement mechanism: Moreover, the remedies section of the Space Protocol contains a provision on the tracking, telemetry and control ("TT&C") of space assets, which can be found within the command codes associated with the space asset. Article XIX of the Space Protocol allows parties to specifically agree to the placement of TT&C and related data and materials with a third party so that the creditor may establish control over or operate the space asset upon debtor's default.

Once the articles of the Space Protocol are examined closely, it is undeniable that there are countless benefits of the Space Protocol to space financing. For example, the Space Protocol, by facilitating asset-based financings, allows actors within the space industry to create a lower level risk for financiers. It creates a uniformed regulatory regime for the recognition and protection of security interests in space assets. The benefit of asset-based financing is that, in the case where the debtor cannot pay its debt to the creditor, the asset itself, or interests in the asset, may transfer to the creditor, be it the ownership or the control of the asset. Not only facilitating the transaction process but the Space Protocol also ensure secured finance. It provides that by creating an international registry where interests in space assets can be recorded. The fact that the Space Protocol additionally introduces a strong set of remedies in the case of a default, may allow creditors from across the world to invest capital in space assets.

Prior to the Space Protocol, there were no international legal framework providing for asset-based financing within the space industry. In order to have some contribution in the development of the space industry, an efficient international regime should be developed. The Space Protocol provides a stable and secure legal environment for transactions in space assets based on asset financing.

However, according to the UNIDROIT's records<sup>32</sup>, today the Space Protocol to the Cape Town Convention is not in force. Thus, there are only four states which have signed the Space Protocol, namely Burkina Faso, Saudi Arabia, Zimbabwe, and Germany<sup>33</sup>. Since conditions regulated under Article XXXVIII of the Space Protocol, which carries the title *entry into force*, are not met yet, the Space Protocol is not in force. The reason why the Space Protocol is not in force is that, it is unlikely to be welcomed by the industry, and it is opposed by space industry organizations such as the Satellite Industry Association ("SIA")<sup>34</sup>. The general opinion of industry is that the existing models and practice of space assets finance are sufficient and the Space Protocol has added an unnecessary supra-national layer of law to the financing industry<sup>35</sup>. As it is stated in the foregoing, our position on this issue is to provide harmonization and development between the states on space asset related matters.

## SPACE

**Turkey's Role**

Turkey has signed and ratified all of the foregoing international agreements that are considered as the fundamental international space laws, except for the Space Protocol of the Cape Town Convention.<sup>36</sup> When all those international agreements are scrutinized, it is clear that satellites, as space assets, constitutes the most important in all legislative pieces we have examined. Satellites are basically foundational components of today's society. They carry out communication, global positioning, space studies and other activities. Satellites can be used for observation purposes such as remote sensing satellites are used to study the Earth, including weather forecast, ecological trends and ocean temperatures. According to the Union of Concerned Scientists ("UCS"), which maintains a database of active satellites in orbit, as of 1 April 2020, there were a total of 2,666 satellites in Space<sup>37</sup>, of which 1,918 were in low Earth orbit. They also can be used for solar system and deep space studies which is essential for physicists to understand our universe.

As of September 2020, Turkey has six active satellites in the space, orbiting the Earth. While three of them (the Turksat satellites) are used for communication purposes, the other three are used for observational purposes.<sup>38</sup> Turksat 3A, 4A and 4B satellites were launched in the first half of 2010s and their main function is to emit television signals. Turkey's oldest actively working observation satellite is named Rasat, which has been orbiting the Earth since 2011 and it has conducted more than 2,716 missions during the last decade, picturing an area of nearly 15 million square kilometers. Göktürk-2 is the second satellite that is being used for observational purposes. It was launched into the space in 2012 and is mainly used for environmental, urban, agricultural and forestry observational needs of Turkey. Lastly, Göktürk-1 was sent to the space in 2016 and since then, it is mainly used for providing high-resolution images and intelligence to the Turkish military for their operations.

In the coming years, Turkey is planning to launch four more satellites to the space. Three of them are going to be communication satellites. The launch of Turksat 5A is expected on 30 December 2020 by Elon Musk's company, Space X. In addition to this, Turksat 5B and 6A are expected to launch in 2021.<sup>39</sup> Lastly, the fourth satellite, named IMECE, is being planned to be used for high-resolution image capturing and observational purposes.

Besides launching satellites, Turkey wants to be a more active player in the space industry. For that reason, the Turkish Space Agency ("TSA") was established with the Presidential Decree<sup>40</sup> in 2018. The duties of the TSA are enumerated in Article 4 of the Decree<sup>41</sup>: Its main aims and duties are to prepare a National Space Program and prepare long-term strategic plans in order to develop a competitive space and aviation industry. The TSA is also authorized to decide on the use of national sovereignty rights of Turkey regarding spacecraft and space systems.

In August 2019, TSA organized a conference to prepare the National Space Program. The program is expected to cover a long-term plan of ten (10) years regarding Turkey's future space endeavors. According to the Director of TSA, the program includes important emphasis on access to space within Turkey through exploration of possible spacecraft launch sites. Furthermore, TSA is in cooperation with relevant authorities and companies to produce and launch Turksat 6A and IMECE satellites to space by 2021.



## *SPACE*

### **Conclusion**

In today's world, where the number of actors that engage in space activities increases every day, it is of the utmost importance to ensure that all actors comply with the requirements of international space law in developing international and regional space cooperation. For that reason, we must examine all international and domestic legislative pieces, along with following up to date developments in the industry. As it is stated in the foregoing, our position on this issue is to provide harmonization and development between the states on space asset related matters.

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## SPACE

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<sup>1</sup>Stephen E. Doyle, Concise History of Space Law, A, 53 Proc. Int'l Inst. Space L. 3 (2010). At page 3.

<sup>2</sup>Jakhu, Ram S. and Freeland, Steven, The Relationship Between the Outer Space Treaty and Customary International Law (2016). Available at SSRN: <https://ssrn.com/abstract=3397145> or <http://dx.doi.org/10.2139/ssrn.3397145>

<sup>3</sup>The Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, RES 1962 (XVIII), General Assembly 18<sup>th</sup> session, December 13, 1963, is one of the most important texts concerning the Space Law.

<sup>4</sup>General Assembly of the United Nations Office for Outer Space Affairs adopted a resolution numbered 36/35 dated 18 November 1981 in which it decided to consider at its thirty-seventh session the adoption of a draft set of principles governing the use by States of artificial Earth satellites for international direct television broadcasting.

<sup>5</sup>General Assembly of the United Nations Office for Outer Space Affairs adopted a resolution numbered 41/65 on Principles Relating to Remote Sensing of the Earth from Outer Space.

<sup>6</sup>General Assembly of the United Nations Office for Outer Space Affairs adopted the Principles Relevant to the Use of Nuclear Power Sources in Outer Space (NPS Principle) on the work of its thirty-fifth session with the Resolution numbered 47/68 dated 14 December 1992.

<sup>7</sup>The Benefits Declaration is adopted by the General Assembly of the United Nations Office for Outer Space Affairs with its Resolution numbered 51/122 dated 1996.

<sup>8</sup><https://www.unoosa.org/oosa/en/timeline/index.html>

<sup>9</sup>[https://www.unoosa.org/oosa/oosadoc/data/resolutions/1959/general\\_assembly\\_14th\\_session/res\\_1472\\_xiv.html](https://www.unoosa.org/oosa/oosadoc/data/resolutions/1959/general_assembly_14th_session/res_1472_xiv.html)

<sup>10</sup><https://www.unoosa.org/oosa/en/ourwork/copuos/members/evolution.html>

<sup>11</sup><https://www.unoosa.org/documents/pdf/spacelaw/treatystatus/TreatiesStatus-2020E.pdf>

<sup>12</sup>Articles I and III of the Outer Space Treaty.

<sup>13</sup>Article II of the Outer Space Treaty.

<sup>14</sup>Article IV of the Outer Space Treaty.

<sup>15</sup>Article VI of the Outer Space Treaty.

<sup>16</sup><http://www.digitaljournal.com/tech-and-science/technology/the-race-for-space-is-on-think-asteroid-mining-worth-trillions/article/524405>

<sup>17</sup>[https://www.orfonline.org/research/if-space-is-the-province-of-mankind-who-owns-its-resources-47561/#\\_edn52](https://www.orfonline.org/research/if-space-is-the-province-of-mankind-who-owns-its-resources-47561/#_edn52)

<sup>18</sup><https://www.inverse.com/article/34935-luxembourg-s-asteroid-mining-is-legal-says-space-law-expert>

<sup>19</sup><http://opiniojuris.org/2018/09/13/the-legality-of-a-u-s-space-force/>

<sup>20</sup><https://www.unoosa.org/documents/pdf/spacelaw/treatystatus/TreatiesStatus-2020E.pdf>

<sup>21</sup>ibid.

<sup>22</sup>[https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIV-1&chapter=24&Temp=mtdsg3&clang=en](https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIV-1&chapter=24&Temp=mtdsg3&clang=en)

<sup>23</sup>James R. Wilson, Regulation of the Outer Space Environment Through International Accord: The 1979 Moon Treaty. At page 175. (<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1325&context=elr>)





## SPACE

<sup>24</sup>ibid.

<sup>25</sup><https://www.unoosa.org/documents/pdf/spacelaw/treatystatus/TreatiesStatus-2020E.pdf>

<sup>26</sup>Supra 23.

<sup>27</sup>The Cape Town Convention on International Interests in Mobile Equipment is entered into force in April 2004. Turkey became party to the Cape Town Convention on International Interests in Mobile Equipment with Law No. 6192 dated 10 March 2011 and published in the Official Gazette numbered 27899 dated 29 March 2011.

<sup>28</sup>Roy Goode, Convention on International Interests in Mobile Equipment and Protocol Thereto on Matters Specific to Space Assets, Official Commentary, para. 2.6.

<sup>29</sup>Bin Cheng, Studies in International Law, Chapter 17, Nationality for Spacecraft, at page 491.

<sup>30</sup>Berlin Space Protocol: Update, Paul B. Larsen, 2015, page 365.

<sup>31</sup>Hamza Hameed from UNIDROIT, Conference on Harmonized system of secured transactions law for space assets: The Space Protocol of the Cape Town Convention, 2019

<sup>32</sup><https://www.unidroit.org/status-2012-space>

<sup>33</sup>UNIDROIT, STATUS - UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Space Assets (Berlin, 2012)

<sup>34</sup><https://sia.org/>

<sup>35</sup>Mark J. Sunahl, The Cape Town Convention: Its Application to Space Assets and Relation to the Law of Outer Space (2013), page 35

<sup>36</sup>Ratification of the Outer Space Treaty was published in the Official Gazette dated 24 July 1967 numbered 12655. Ratification of the Rescue Agreement was published in the Official Gazette dated 7 May 2004 numbered 25455. Ratification of the Liability Convention and Registration Convention was published in the Official Gazette dated 4 May 2004 numbered 25452. Ratification of the Moon Treaty was published in the Official Gazette dated 11 June 2011 numbered 27961.

<sup>37</sup><https://www.ucusa.org/resources/satellite-database#:~:text=In%2Ddepth%20details%20on%20the,purpose%2C%20and%20other%20operational%20details.>

<sup>38</sup><https://www.aa.com.tr/tr/bilim-teknoloji/turkiyenin-uzaydaki-gozleri/1448858>

<sup>39</sup><https://spacewatch.global/2020/01/turkey-to-unveil-national-space-programme-soon-launch-several-satellites-over-next-two-years/>

<sup>40</sup>Presidential Decree numbered 23 dated 12 December 2018.

<sup>41</sup><https://spacewatch.global/2020/01/turkey-to-unveil-national-space-programme-soon-launch-several-satellites-over-next-two-years/>



## The jurisdiction clause and the consumer's protection in the event of cancellation of a flight

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### Abstract

On the 18th of November 2020, the Court of Justice of European Union issued a judgment which specified the applicability of the consumers' protection and of the jurisdiction clause included in the general terms and conditions of a contract.

### Overview

The limitations to the possibility to travel during the peak of the Covid-19 pandemic led to mass cancellations of flights. Since the EU Commission stated that the measures to contain the pandemic shall be considered extraordinary circumstances<sup>2</sup> - as referred to in Article 5(3) of Regulation (EC) No 261/2004<sup>3</sup> - passengers' difficulties to get their compensations for cancelled flights notably increased.

With regard to the compensation for cancellation of a flight it is worth highlighting a recent CJEU judgment, which specified the applicability of the consumers' protection and of the jurisdiction clause included in the general terms and conditions of a contract. This judgment has been issued in Case C-519/19<sup>4</sup>, *Ryanair v. DelayFix*, concerning the interpretation of Article 25(1) of Regulation (EU) No 1215/2012<sup>5</sup> and of Directive 93/13/EEC<sup>6</sup>.

Parties to the proceedings were Passenger Rights (now DelayFix), a company specialised in the recovery of claims and to which a passenger assigned his rights, and the airline Ryanair. The dispute concerned the payment of a compensation for the cancellation of a flight on the basis of Article 7(1) of Regulation (EC) No 261/2004.

Specifically, Passenger Rights requested the District Court for the Capital City of Warsaw to order Ryanair to pay a sum of 250 euro for the cancellation of a flight between Milan and Warsaw to a passenger of that flight.

Since Section 2.4 of Ryanair general terms and conditions of carriage - to which the passenger agreed when he purchased his ticket online- provides that any subsequent proceedings between the parties is subject to the jurisdiction of the Irish Courts, Ryanair asserted that Polish Courts did not have jurisdiction in the case. According to Ryanair, Passenger Rights, as the assignee of that passenger's claim, was bound by that clause too.

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*MISCELLANEOUS MATERIAL OF INTEREST*

By means of a decision of 15 February 2019, the District Court for the Capital City of Warsaw rejected Ryanair's plea of lack of jurisdiction. The Polish Court alleged that the jurisdiction clause encompassed in the contract between the passenger and the airline was unfair within the meaning of Directive 93/13 and that Passenger Rights, as the assignee of the passenger's claim for the cancellation of the flight, could not be bound by such a clause.

Subsequently, Ryanair brought an appeal before the Regional Court of Warsaw asserting that as Passenger Rights was not a consumer it could not benefit from the jurisdictional protection provided for consumer contracts. The Regional Court of Warsaw noted that *"the unfairness of a term of a contract could be established in the context of the assessment of a claim for damages brought against a liable person by a professional party who has acquired the claim of a consumer"*<sup>7</sup>. However, the Regional Court of Warsaw asked CJEU whether, under Articles 3(1) and 6(1) of Directive 93/13, the assignee of a consumer's claim may also be considered as a consumer.

More specifically, the Regional Court of Warsaw asked whether the assignment to a professional party of the consumer's claim takes over the consumer's rights, allowing the professional party to rely on the EU regime of consumer protection which arises from that Directive. The Court also asked for clarification about the application of Regulation (EU) No 1215/2012 and about the regime of the jurisdiction clauses laid down in Article 25 and in Section 4 of Chapter II.

Firstly, CJEU stated that the concept of a jurisdiction clause must be interpreted as an independent concept of EU law to give full effect to the principle of freedom of choice on which Article 25(1) of Regulation (EU) No 1215/2012 relies<sup>8</sup>. In particular, according to CJEU, the fact that the contract between Ryanair and the passenger was concluded online did not invalidate that principle.

Furthermore, Article 25(1) of Regulation (EU) No 1215/2012 does not specify whether a jurisdiction clause may bound - beyond the circle of the parties to a contract - a third subject who is party to a subsequent contract and who is successor to the rights and obligations of one of the parties to the initial contract.

In this case, the jurisdiction clause was not enforced against one of the parties to the original contract in which it appears but against a third party (i.e. Passenger Rights). However, CJEU noticed that while neither Passenger Rights agreed to be bound to Ryanair by a jurisdiction clause, neither Ryanair consented to be bound to that collection agency.

Based on this, CJEU specified that in order to challenge the jurisdiction of a Court to hear an action for compensation on the basis of Regulation (EC) No 261/2004 brought against an airline, a jurisdiction clause incorporated in the contract of carriage between a passenger and that airline cannot be enforced by the latter against a collection agency to which the passenger has assigned the claim. Only if the third party had succeeded to an original contracting party's rights and obligations, that third party could be bound by a jurisdiction clause to which it had not agreed.

Regarding the relationship between Directive 93/13 and the rights of air passengers such as those deriving from Regulation (EC) No 261/2004, CJEU stated that this Directive provides a general consumer protection that shall be applied in all sectors of economic activity, including air transport sector.



## MISCELLANEOUS MATERIAL OF INTEREST

According to Articles 1(1) and 3(1), the Directive applies to the terms which have not been individually negotiated and which are incorporated in contracts concluded between a seller or a supplier and a consumer.

CJEU held that a jurisdiction clause incorporated in a contract between a consumer and a seller or supplier, which was not subject to an individual negotiation and which confers exclusive jurisdiction to the Courts in whose territory that seller or supplier is based, shall be considered unfair under Article 3(1) of Directive 93/13 if, contrary to requirement of good faith and in damage of the consumer, it causes significant imbalance in the parties' rights and obligations arising under the contract<sup>9</sup>.

In conclusion, the CJEU judgment clarifies that the jurisdiction clause incorporated in the contract of carriage between a passenger and an airline cannot be enforced by the latter against a collection agency to which the passenger has assigned the claim, in order to challenge the jurisdiction of a Court to hear an action for compensation brought against the airline and based on Regulation (EC) No 261/2004.

This, unless the third party had succeeded to an original contracting party's rights and obligations in accordance with national law. In any case, a jurisdiction clause, which was not subject to individual negotiation and which confers exclusive jurisdiction to the Courts in whose territory that seller/supplier is based, must be considered unfair if it causes imbalance in the parties' rights and obligations.

Even if it does not arise precisely from a case of cancellation of flight due to the Covid-19 restrictions, this judgment could be considered useful to understand how the jurisdiction clause can be enforced in the actions for the compensation to an air passenger for the cancellation of a flight and how a professional party can act against an airline if the passenger decides to assign his claim, in consideration of the difficulties that passengers are still facing in order to obtain compensations for their cancelled flights.

