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Preparing Regulation on Tarmac Delays for Indonesia's Post-Covid Aviation World

By Rio Christiawan * and Ridha Aditya Nugraha **

Abstract

Before the Covid-19 pandemic, the Indonesian aviation market had been growing rapidly from time to time, and domestic flights even reached its peak. As travel restrictions due to the pandemic are being reduced one by one, efforts are currently undertaken to maximize and speed up the recovery of Indonesia's aviation industry. An issue that needs to be addressed in post-pandemic Indonesia is passenger protection. Tarmac delay is one of the relevant topics - similar to the situation brought about in the United States a decade earlier, but without as much development. In the end, this article provides legal and policy recommendations to find equilibrium between the Indonesian aviation industry and passengers protection during the domestic market recovery phase.

Overview

The beginning of this century raises tarmac delay as one of the issues related to passenger protection. In the United States, tarmac delay caught the global attention when thousands of Northwest Airlines passengers were stranded in a storm-crippled Detroit Metro Airport for almost 10 hours in December 1999.¹ There was no way to disembark the passengers as the blizzard continued, worsened by the fact that neither food nor water was available on board, and the lavatory did not work. At that time, Northwest Airlines was operating while other major airlines shut their operations down. The event highlighted the lack of proper disaster management and poor mitigations efforts.²

In January 2001, the airline agreed to pay USD 7.1 million settlement to the 7,000 passengers that were stranded in the blizzard.³ The 2001 Northwest Airlines settlement was preceded by United Airlines' compensation for 168 passengers that were stuck aground for six hours on a Christmas Eve flight. United Airlines granted USD500 and an airline voucher of the same amount to each passenger.⁴

In December 2006, American Airlines diverted 130 aircraft to other airports due to a storm in Fort Worth International Airport, Dallas, and one-third of the passengers ended up being trapped in the tarmac for more than four hours.⁵ In February 2007, twenty-one JetBlue Airways' aircraft experienced tarmac delay for more than four hours at New York's John F. Kennedy International Airport; affecting more than 1,000 passengers.⁶ On one hand, these consecutive tarmac delay situations highlighted the United States airline industry's perceived inability to address customers' needs during long delays - in this context, tarmac delay;⁷ and on the other hand, gradually raising passenger protection awareness in other parts of the world.

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The inability of American airlines to handle tarmac delays in a customer-friendly way resulted in attempts by various states as well as the U.S. Congress to address tarmac delays issues in the beginning of 2007.⁸ The Congress proposed drafts on tarmac delay regulation several times, all of which were unfortunately rejected due to Airline Deregulation Act of 1978⁹ which prohibited States from enacting or enforcing laws relating to “price, route, or service”.¹⁰ However, the year 2009 finally marked a new era of passenger protection when the U.S. Department of Transport (DoT) enacted its enhancing airline passenger protections rule which also included tarmac delay matters.¹¹

The DoT rule was amended in 2011. Furthermore, the U.S. has set up certain passenger protection standards related to tarmac delay that influenced many countries around the globe.

Incidents of Tarmac Delay in Indonesia

The Indonesian aviation market before Covid-19 was similar to the United States market, in the context that both countries had a dominant domestic market. In Indonesia, there was an average of 90 million domestic passengers between 2017-2019, and approximately a comparison of 3:1 with its international counterparts.¹² Pro-liberalisation regulations combined with the presence of low-cost carriers paved the way for the rapid growth of passengers.¹³

When analysed from the perspective of delays (including tarmac delays), passenger protection in Indonesia was - and is still - at its ebb. Lion Air’s massive delays between 18 - 20 February 2015 affected around one hundred flights and is considered as one of the worst examples of poor management.¹⁴ Thousands of passengers in seven major airports were affected and the incident crippled the domestic air transportation industry. There is no precise information on the number of passengers trapped in the tarmac; but for those in Jakarta’s Soekarno-Hatta airport, the average tarmac delay was estimated to be around one hour.

As an equatorial state, hot weather, and by extension overheating in certain months, should be an expected risk for airlines operating in Indonesia. In 2013, Lion Air JT-755 enroute Manado-Jakarta with 198 passengers onboard experienced tarmac delay for around one hour, and the cabin air conditioner did not work well.¹⁵ The passengers - including the babies on board - had trouble breathing and had to forcibly escape through the emergency due to thin oxygen levels and high heat. Fact finding showed that prior to the accident, the Manado Sam Ratulangi airport had warned the airline regarding the air conditioner issues, but the airline chose to ignore it.¹⁶

There were similar tarmac delays involving the same airline that lasted less than one hour, namely the Lion Air JT 033 (2018) and Lion Air JT 605 (2019) incidents.¹⁷ While the period of delay was insignificant, passengers still reported to have experienced trouble breathing due to the lack of proper air conditioning. The repeat of similar incident could definitely endanger passengers’ safety itself. Other tarmac delays also occurred in 2015 and 2016 for two hours each, highlighting the lack of commitment to take the passengers’ safety seriously.¹⁸

Learning from the previous incidents, there is an urgency to enact regulations regarding tarmac delays to face post-pandemic flights. This is because the successful recovery of the aviation industry will lead to higher number of passengers and aircraft movements. This article shall discuss tarmac delay for the interests of domestic flight in Indonesia.

*AVIATION***The Absence of Provisions on Tarmac Delay within the Indonesian Legal Framework: Is it Time for Amendment?**

There are two national regulations dealing with passenger protection in Indonesia, namely the Indonesian Minister of Transportation Regulation No. 77/2011¹⁹ (the “**MoT Regulation No. 77/2011**”) and the Indonesian Minister of Transportation Regulation No. 89/2015²⁰ (the “**MoT Regulation No. 89/2015**”), and up until today, February 2022, both have never been amended. The former deals with liability for loss of life, bodily injury, and third-party damage; while the latter regulates liability for delays.

Neither regulations clearly mention their scope of applicability, whether they only apply for domestic carriages or international carriages as well. The Indonesian Aviation Law of 2009, as the legal basis of both ministerial regulations, states that it applies to every carrier, either Indonesian nationals or foreigners, flying from or to Indonesia.²¹ Potential legal uncertainty happens within the passenger protection legal framework, particularly on international carriages.

The MoT Regulation No. 89/2015 defines a delay as “time difference between the scheduled departure or arrival time with its actual realization”.²² If a delay of at least five hours is the airline’s fault, an amount of IDR300,000 (approximately 18 SDR or USD25) must be compensated to the passengers. For international flights departing from an Indonesian airport, the presence of international conventions - the Montreal Convention of 1999 and the Warsaw Convention of 1929 - means there is more than one legal framework regulating delays.²³ The latter is not included within the scope of this article.

The MoT Regulation No. 89/2015 offers direct compensation and does not rely on a court decision to grant compensation. The latter is more similar to an international convention’s scope which precludes consumer protection measures because of its exclusivity clause.²⁴

Another situation to be highlighted is the lack of global consensus regarding the definition of a flight delay. International conventions do not provide clear guidance about it either noticing neither the Warsaw Convention nor the Montreal Convention defines delay, as it was the drafters’ intention not to do so.²⁵

There is an absence of tarmac delay provisions in both MoT Regulation No. 89/2015 and MoT Regulation No. 77/2011. Additionally, MoT Regulation No. 77/2011 does not expand the definition and scope of flight delay further than Articles 2(e) and 9 (1). When enacted four years later, MoT Regulation No. 89/2015 also does not regulate tarmac delay. Six delay categories are stipulated without mentioning tarmac delay. This situation leads to the need to define tarmac delay in Indonesia.

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Delay Categories	Condition	Compensation
First	30 up to 60 minutes delay	Providing refreshing drinks.
Second	61 up to 120 minutes delay	Providing a snack box set. The passenger can be assigned to the next flight or his/her ticket is refunded.
Third	121 up to 180 minutes delay	Providing a heavy meal. The passenger can be assigned to the next flight or his/her ticket is refunded.
Fourth	181 up to 240 minutes delay	Providing a snack box set and heavy meal. The passenger can be assigned to the next flight or his/her ticket is refunded.
Fifth	more than 240 minutes delay	IDR300,000 (approximately USD25) in the form of cash, redeemable voucher, or bank account transfer. It must be processed by no later than 3 x 24 hours after the occurrence of the delay. Airlines must provide accommodation (if necessary) for a delay of more than 6 (six) hours. The passenger can be assigned to the next flight or his/her ticket is refunded. It shall be in the form of cash (if the ticket is purchased by cash) or transferred to the passenger's credit card account within 30 (thirty) calendar days.
Sixth	flight cancellation	Either being assigned to the next flight or a refunded ticket. In the case of refunded ticket, it shall be in form of cash (if the ticket is purchased by cash) or transferred to the passenger's credit card account within 30 (thirty) calendar days.

Table 1 - Six Delay Categories pursuant to the Indonesian Ministry of Transportation Regulation No. 89/2015²⁶

As reference, the U.S. sets up a comprehensive regulation on tarmac delay consisting of technical obligations to report tarmac delay data to authority (Code of Federal Regulations or CFR Section 14 Part 244); and enhancement of protection for airline passengers which includes tarmac delay (Part 259). A clear tarmac delay definition is set as below,

“the holding of an aircraft on the ground either before taking off or after landing with no opportunity for its passengers to deplane”.²⁷

In other words, tarmac delay is linked to when the aircraft doors are being closed and opened. The scope of U.S. tarmac delay covers all airlines that operate flights to or from U.S. soil with the capacity of 30 seats or more. There are exceptions solely for charter flights without any new passenger embarkment in U.S. territory.²⁸

Furthermore, airlines are obliged to provide the following services to ensure proper passenger protection:²⁹

1. adequate food and water in no later than two hours, unless the pilot-in-command considered such treat threatened flight safety or security;
2. assurance of operable lavatory facilities;
3. adequate medical attention, if needed;
4. notification on the flight status every 30 minutes starting from the scheduled departure or arrival time, if known;

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5. clear information on alternative gate or disembarkation area.

The U.S. best practice could become a reference in preparing the Indonesian passenger protection regulations pertaining to tarmac delay. It should encourage the right to care rather than merely the right to compensation to establish an equilibrium between the interests of airline and passenger protection. Furthermore, the Indonesian Ministry of Transportation should consider whether tarmac delay covers only scheduled flight; or applicable to non-scheduled or chartered flight as well. Considering how the national aviation industry is still struggling and needs extra efforts to recover post-pandemic, expanding the applicability of tarmac delay regulations to charter flight seems unrealistic.

The right to care shall make the tarmac delay regulations applicable for both domestic and international flights departing or arriving in Indonesian jurisdiction. Aside from the best practice in the U.S. as mentioned above, the provision of free communication facilities (such as wi-fi connections) should be considered. Promoting the right to care for passengers whose flight is disrupted could enhance the airline's reputation.

Challenges will come to Indonesian low-fare airlines (low cost-carrier or LCC) should they are unable to provide sufficient water or food for the passengers if tarmac delay occurs. Maintaining the cabin's temperature is also essential due to Indonesia's hot weather as equatorial state; because airlines try to maximize fuel efficiency amidst the overcapacity in some Indonesian airports. Commercial considerations are a factor in fulfilling passengers' essential needs.

In the end, the time has come to amend MoT Regulation No. 89/2015 by adding more provisions based on the right to care, specifically regarding tarmac delay. Supposedly, airlines should not always be suspected and blamed for every delay which end up with compensation. Equilibrium is the key to recover Indonesian aviation industry.

Concluding Remarks and the Way Forward

In both the national and regional scenes, there has been numerous regulations on flight delay. However, this does not apply to tarmac delay situations. The U.S. case shows that the absence of an explicit provision on tarmac delay means a disadvantage for not only passengers, but also for airlines.

Indonesia needs to redefine its current passenger protection legal framework on air transportation. Promoting the right to care when enacting tarmac delay provisions shall avoid further problems compared to rigidly forcing the implementation of right to compensation. Pro-passenger regulations must also consider airline's interests to safeguard domestic aviation market recovery.

¹ <https://www.chicagotribune.com/news/ct-xpm-2001-01-10-0101100173-story.html> accessed 7 January 2022.

² Ibid.

³ Ibid.

⁴ Ibid.

⁵ <https://www.nytimes.com/2007/11/15/business/15airlines.html> accessed 8 January 2022.

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⁶ Ibid.

⁷ Daniel Friedenzohn (2013), "Delayed Flights and Delayed Action: The U.S. Department of Transportation's Tarmac Delay Regulations and Their Impact on Air Travel", *Issues in Aviation Law and Policy* Vol. 13(1), 178.

⁸ Ibid., 179.

⁹ United States of America, Airline Deregulation Act, 49 U.S.C. § 41713(b) (1978).

¹⁰ Daniel Friedenzohn (2013), "Delayed Flights and Delayed Action: The U.S. Department of Transportation's Tarmac Delay Regulations and Their Impact on Air Travel", *Issues in Aviation Law and Policy* Vol. 13(1), 179.

¹¹ United States of America, Enhancing Airline Passenger Protections, 14 C.F.R. § 259.2 (2012). The rule went into effect in April 2010.

¹² Ridha Aditya Nugraha, "Reviewing Ownership and Control of the Indonesian Airlines", ASEAN Aviation Integration Platform (AAIP) Policy Paper No. 2 Year 2019, accessed via https://www.ukm.my/aaip/wp-content/uploads/2019/03/AAIP-Policy-Paper-No.-2_2019-Reviewing-Ownership-and-Control-of-the-Indonesian-Airlines-12.pdf on 11 January 2022. See also Indonesia National Air Carriers Association, INACA Annual Report 2019, 7. For the United States domestic market, see <https://www.transtats.bts.gov/> accessed 9 January 2022.

¹³ Ridha Aditya Nugraha, "The Indonesian Aviation Sector in the Realm of Liberalisation: The Long and Winding Road" in Jae Woon Lee (ed), *Aviation Law and Policy in Asia: Smart Regulation in Liberalised Market* (Brill, Asian Law Series Volume 10, 2020), 253-254.

¹⁴ <https://bisnis.tempo.co/read/644184/8-fakta-tentang-delay-lion-air/full&view=ok> accessed 9 January 2022.

¹⁵ <https://nasional.tempo.co/read/517905/pesawat-lion-sempat-rusak-pra-insiden-dobrak-pintu/full&view=ok> accessed 10 January 2022.

¹⁶ <https://news.detik.com/berita/d-2373968/demi-pengiriman-rp-11-juta-lion-air-malah-rugi-ratusan-ribu-dolar> accessed 9 January 2022.

¹⁷ <https://www.tribunnews.com/regional/2015/11/17/kepanasan-penumpang-lion-air-memilih-turun-dari-pesawat> and <https://www.cnnindonesia.com/hiburan/20181029194359-234-342441/cerita-presenter-tv-soal-kondisi-panas-lion-air-di-bali> both accessed 9 January 2022.

¹⁸ <https://news.detik.com/berita/d-2993071/penumpang-lion-terkurung-2-jam-di-dalam-pesawat-sebelum-dialihkan> and <https://news.detik.com/berita/d-3220297/penumpang--2-jam-ngendon-di-dalam-pesawat-lion-air-lalu-disuruh-turun-lagi> both accessed 11 January 2022.

¹⁹ Indonesia, Minister of Transportation Regulation No. 77 Year 2011 on Airline Liability.

²⁰ Indonesia, Minister of Transportation Regulation No. 89 Year 2015 on Delay Management on Scheduled Commercial Airline in Indonesia.

²¹ Indonesia, Law No. 1 Year 2009 on Aviation, art. 4.

²² Indonesia, Minister of Transportation Regulation No. 89 Year 2015, art. 1(6).

²³ Ridha Aditya Nugraha and Lalin Kovudhikulrungsri, "Aviation Legal Issues in Indonesia and Thailand: Towards Better Passengers' Rights in ASEAN", *Indonesia Law Review*, Vol. 7(1), 30.

²⁴ Paul Stephen Dempsey and Svante O. Johansson, "Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage", *Air and Space Law*, Vol. 35(3), 219-220.

²⁵ Jae Woon Lee and Joseph Charles Wheeler, "Air Carrier Liability for Delay: A Plea to Return to International Uniformity", *Journal of Air Law and Commerce*, Vol. 77, 50.

²⁶ Indonesia, Minister of Transportation Regulation No. 89 Year 2015, arts. 3 and 9(1). Tabel retrieved from Ridha Aditya Nugraha and Lalin Kovudhikulrungsri, "Aviation Legal Issues in Indonesia and Thailand: Towards Better Passengers' Rights in ASEAN", *Indonesia Law Review*, Vol. 7(1), 29.

²⁷ United States of America, 14 CFR 259.3 [Title 14 Aeronautics and Space; Chapter II Office of the Secretary, Department of Transportation (Aviation Proceedings); Subchapter A Economic Regulations; Part 259 Enhanced Protections for Airline Passengers (Effective 29 April 2010). See also <http://definitions.uslegal.com/t/tarmac-delay-aeronautics-and-space/> accessed 31 January 2022.

²⁸ United States of America, 14 C.F.R. § 244.2.

²⁹ United States of America, 14 C.F.R. § 383.2(a).

Operating Air Carrier, Confirmed Reservation and Scheduled Arrival Time: Latest Ruling by CJEU

By Ottavia Carla Bonacci *

On 21 December 2021, the Court of Justice of the European Union (CJEU) ruled¹ on the definitions of operating air carrier, confirmed reservation and scheduled arrival time and on the interpretation of several Articles of Regulation (EC) No 261/2004.²

1. The Cases

- In Case C-146/20, the claim was filed by passengers who had booked through a travel agency an all-inclusive trip to Antalya operated by Corendon Airlines, which confirmed the flight's departure from Düsseldorf. The airline had subsequently anticipated the flight of one hour and forty minutes. Having been unable to board the anticipated flight, the passengers brought an action against Corendon before the Düsseldorf District Court. The Düsseldorf District Court ruled that the anticipation of one hour and forty minutes did not constitute a cancellation of the flight that it was negligible. The passengers appealed the decision before the Düsseldorf Regional Court, which decided to refer two questions to the CJEU.
- In Case C-188/20, after booking a package holiday, several passengers received from the travel agency a document named "*travel registration*" mentioning 2 flights (outward and return) operated by Azurair. Later on, since the outward flight was delayed by more than 3 hours and the return flight was cancelled, the passengers brought an action before the Düsseldorf District Court against Azurair. The Düsseldorf District Court dismissed the claim on the ground that the "*travel registration*" from the travel agency did not constitute a booking confirmation from the airline. Hence, the passengers appealed to the Düsseldorf Regional Court which decided to refer seven questions to the CJEU.
- In Case C-196/20, after booking through an agency a package holiday, two passengers had received from the tour operator ITS a "*travel registration*" according to which the outward flight would have been operated by Eurowings with a departure at 7:30 and arrival at 10:05. Due to a long delay, the passengers had reached their destination at 21:08 and decided to bring an action before the Düsseldorf District Court which upheld it, ruling that the "*travel registration*" issued by ITS constituted a booking confirmation from the airline. In that case, Eurowings appealed to the Düsseldorf Regional Court which decided to refer three questions to the CJEU.
- In Case C-270/20, three passengers booked a flight with Austrian Airlines, which, on the day of departure, cancelled the flight and offered a flight that would take them to their destination 12 hours earlier than originally scheduled.

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The passengers brought an action before the Schwechat District Court, claiming that 1) the early arrival had caused them damage equivalent to a long delay and that 2) they had accepted Austrian's offer because otherwise they would have lost two days of their holiday. After the Court rejected the claim, the passengers appealed to the Korneuburg Regional Court which decided to refer one question to the CJEU.

2. Questions and ruling of the CJEU

- i. With the first question in both Cases C-188/20 and C-196/20, the Düsseldorf Regional Court asked whether Article 3 par. 2 lett. a) of Reg. No 261/2004 shall be interpreted as that a passenger has received a “*confirmed reservation*” when the tour operator transmits to the passenger “*other proof*”³ of their reservation,⁴ even though the tour operator has not received from the air carrier the confirmation of the departure and arrival times of the flight.

The CJEU pointed out that several rules of Reg. No 261/2004, including the Article 3 par. 2 lett. a), do not distinguish between the tour operator and the air carrier for the purposes of their application. Hence, the Court ruled that the “*travel registration*” may consist in “*other proof*” attesting that the reservation has been accepted and registered by the air carrier or by the tour operator. Subsequently, a reservation accepted and registered by the tour operator has the same value as the one accepted and registered by the air carrier.

The Court specified that flight reservations are often confirmed just by the tour operator and placing on the passenger the burden of verifying the information provided by the tour operator would be against the objective of the Regulation.⁵ Accordingly, even though the tour operator has not received confirmation of the flight’s departure and arrival times from the air carrier, the “*travel registration*” sent by the tour operator to the passengers constitute “*other proof*” of the registration (i.e. an accepted and registered reservation within the meaning of Article 2 lett. g) of Reg. No 261/2004).

- ii. With the second questions in both Cases C-188/20 and C-196/20, the Düsseldorf Regional Court asked whether Article 2 lett. b) of Reg. No 261/2004 shall be interpreted as that an airline is the “*operating air carrier*” when the passenger has concluded the contract with a tour operator for a specific flight operated by the air carrier, even though the tour operator has not confirmed the flight timetable nor the reservation for the passenger with that specific air carrier.

The CJEU recalled that Article 2 lett. b) of Reg. No 261/2004 lays down two cumulative conditions for an air carrier to be considered “*operating*”: 1) the actual operation of the flight and 2) the existence of a contract between the air carrier and the passenger. Accordingly, the air carrier is the operating one when, in offering transport to passengers, decides to operate a certain flight, fixes its itinerary and assumes the liability for its performance.

In the present cases, the change in the travel registration made by the air carrier concerned the flights schedule. Therefore, the fact that the passengers’ booking with the tour operator⁶ contained a flight schedule not confirmed by the carrier is not sufficient to meet the requirements of Article 2 lett. b) of Reg. No 261/2004. Nevertheless, for the CJEU, an air carrier making an offer of transport correspondent to the one made by a tour operator shall be regarded as the operating air carrier within the meaning of Article 2 lett. b) of Reg. No 261/2004, even though there may be changes to its offer.

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- III. With the third questions, in Cases C-188/20 and C-196/20, the Düsseldorf Regional Court asked whether Articles 2 lett. h), 5 par. 1 lett. c) and the second sentence of Article 7 par. 1 and 2 of Reg. No 261/2004 shall be interpreted as meaning that the scheduled arrival time - for the purpose of compensation - may derive from “*other proof*” transmitted to the passenger by the tour operator, or if the scheduled arrival time shall appear on a “*ticket*” within the meaning of Article 2 lett. f) of the Reg. No 261/2004. According to the CJEU, in the present cases the passengers received just one document (the “*travel registration*” and not a ticket) as reservation indicating flight times. Hence, in absence of further communications, they had legitimately considered the times reported in the “*travel registration*” as the scheduled departure and arrival times of the flights.
- IV. With the fourth question in Case C-188/20 and the first question in Case C-146/20, the Düsseldorf Regional Court asked whether Article 2 lett. l) and Article 5 par. 1 of Reg. No 261/2004 mean that a flight could be considered “*cancelled*” if the operating air carrier anticipate it by several hours. According to the CJEU, a significant flight anticipation may cause as much inconvenience as delay since it prevents passengers from freely disposing of their time. Hence, since Reg. No 261/2004 allows compensation for various types of damage and inconveniences, the concept of “*flight cancellation*” can include a significant flight anticipation. Nevertheless, the CJEU stated that an anticipation of one hour or less is the benchmark for determining whether the anticipation is significant or negligible for the purposes of compensation under Reg. No 261/2004.
- V. With the fifth question in Case C-188/20 and the sole question in Case C-270/20, the Düsseldorf Regional Court and the Korneuburg Regional Court asked whether Article 7 par. 2 of Reg. No 261/2004 is applicable to a situation in which the arrival time of an earlier flight falls within the time limits laid down in the rule. According to the Court, the right to reduce the amount of compensation relates to the situation in which the operating air carrier offers an alternative flight:⁸ even though the EU legislation considers the offer of an alternative flight for both anticipation and delay⁹ it doesn’t consider that an alternative flight offered by the operating air carrier could give rise to a reduction in the amount of compensation.
- VI. With the sixth question in Case C-188/20 and the second question in Case C-146/20, the Düsseldorf Regional Court asked whether Article 5 par. 1 lett. a) and Article 8 par. 1 lett. b) of Reg. No 261/2004 shall be interpreted as meaning that information relating to the anticipation of a flight, communicated to the passenger before the start of the journey, may constitute a “*re-routing offer*” within the meaning of the latter rule. In the Court’s view, an earlier flight may constitute a re-routing “*under comparable transport conditions*” within the meaning of Article 8 par. 1 lett. b) of Reg. No 261/2004, since the change only regards the flight time. Hence, an offer proposing a flight with a departure scheduled earlier than the cancelled one may constitute a re-routing allowing passenger to reach his/her destination “*as soon as possible*”. Consequently, to enable the passenger to exercise his/her rights in the event of cancellation, it is up to the operating air carrier to provide him with all the information concerning his rights under Article 8 par. 1 of Reg. No 261/2004.

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- VII. Lastly, with the seventh question in Case C-188/20, the Düsseldorf Regional Court asked whether Article 14 par. 2 of Reg. No 261/2004 shall be interpreted as requiring the operating air carrier to inform the passenger:
- 1) of the exact name and address of the company from which the passenger may claim compensation
 - 2) of the exact amount of that compensation that can be demanded and
 - 3) where appropriate, of the documents that he shall enclose with his claim for compensation
- According to the CJEU, the exercise of the rights deriving from Reg. No 261/2004 requires the air carrier to communicate i) the name and address of the company to which the claim should be addressed, ii) the procedure to exercise his rights iii) where appropriate, the documents to be enclosed within the claim for compensation. Nevertheless, the operating air carrier is not obliged to inform the passenger of the exact amount of compensation that may be obtained.

3. Conclusions

In the light of the above, with this ruling the CJEU concluded that:

1. Article 3 par. 2 lett. a) of Reg. No 261/2004 must be interpreted as meaning that the passenger has a “confirmed reservation” where the tour operator submits to that passenger (with whom it has a contract) “other proof”, within the meaning of Article 2 let.g) of that Reg., by which he or she is assured transport on a particular flight, even in cases where that tour operator has not received confirmation from the air carrier as to the times of departure and arrival of that flight.
2. Article 2 lett. b) of Reg. No 261/2004 must be interpreted as meaning that an air carrier is the “operating air carrier” in respect of a passenger if the latter has concluded a contract with a tour operator for a particular flight performed by the air carrier, without that air carrier having confirmed the hours of the flight or without that tour operator having made a booking for that passenger with that air carrier.
3. Article 2 lett. h), Article 5 par. 1 lett. c) and the second sentence of Article 7 par. 1 and 2 of Reg. No 261/2004 must be interpreted as meaning that the scheduled time of arrival of a flight can be determined, for the purposes of the compensation under Article 7 of that Reg., from “other proof” within the meaning of Article 2 lett. g), issued to the passenger by the tour operator.
4. Article 2 lett. l) and Article 5 par. 1) of Reg. No 261/2004 must be interpreted as meaning that a flight shall be considered “cancelled” if the operating air carrier anticipates it by more than one hour.
5. Article 7 par. 2 of Reg. No 261/2004 is not applicable to a situation in which the amount of time by which the arrival of a flight has been brought forward is within the limits referred to in that provision.
6. Article 5 par. 1, lett. a) and Article 8 par. 1, lett. b) of Reg. No 261/2004 must be interpreted as meaning that informing a passenger, before the beginning of the journey, that the flight has been anticipated may constitute an “offer of re-routing” within the meaning of that latter provision.
7. Article 14 par. 2 of Reg. No 261/2004 require the operating air carrier to inform the passenger in form of the precise name and address of the undertaking from which that passenger may claim compensation under Article 7 of that Regulation and, where appropriate, to specify the documents which must be attached to the claim, without requiring the carrier to inform the passenger of the exact amount of compensation which the latter may potentially obtain under Article 7 of the Regulation.



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¹ Joined cases C-146/20, C-188/20, C-196/20 and C-270/20.

² In particular, on Article 2 lett. b), f) to h) and (l), Article 3 par. 2) let. a), Article 5 par. 1, Article 7 par. 1 and 2, Article 8 par. 1, let. b) and 14 par. 2) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 29 April 2004 on a community code of conduct for air carriers.

³ As referred to in Article 2 lett. g) of Reg. No 261/2004.

⁴ Offering the transport on a specific flight identified by the places and times of departure and arrival and by the flight number.

⁵ I.e. ensuring high-level protection for air passengers.

⁶ In the context of the contractual relationship between the tour operator and the passenger.

⁷ Within the meaning of Article 2 lett. g) of the Reg.

⁸ It does not relate to the situation in which, due to an earlier flight, the passenger arrives at destination before the time originally scheduled.

⁹ Article 5 par. 1, let. c) of Reg. No 261/2004.

UN Resolution on Norms of Responsible Behaviours in Space: a Step Forward to Preserve Stability in Space?

By Lina Pohl *

The UN First Committee's resolution on norms of responsible behaviours

On November 1st 2021, the United Nations General Assembly's First Committee on Disarmament and International Security, adopted five resolutions related to outer space: 'Prevention of an arms race in outer space (PAROS) (L.3)', 'No first Placement of weapons in outer space (L.50)', 'Reducing space threats through norms, rules and principles of responsible behaviours (L.52)', 'Further practical measures for the prevention of an arms race in outer space (PAROS) (L.53)' and 'Transparency and confidence-building measures (TCBMs) in outer space activities (L.60)'.²

Among those, resolution L.52 represents a potential game-changer in the modus operandi that has thus far prevailed in tackling space security issues within the UN. Specifically, the resolution supported a shift in approach to consider and value behaviours - instead of technological hardware and capabilities - as the basis for international norm-setting. The resolution states *"the need for all states to work together to reduce threats to space systems through the further development and implementation of norms, rules and principles of responsible behaviours [...] which might [...] contribute to further consideration of legally binding instruments"*.³ As a concrete measure, the resolution decided to convene an Open-Ended Working Group (OEWG), meeting twice in 2022 and 2023 and working on the basis of consensus, to take stock of existing international legal and normative frameworks concerning threats arising from states' behaviours that could be considered irresponsible, and to make recommendations on possible norms of responsible behaviours. With 163 votes in favour, 8 against and 9 abstentions, the L.52 resolution received strong support.

A western-led controversial process ...

The new UN resolution builds on the process initiated in 2020 by the UK, which sponsored a resolution on reducing space threats through norms, rules and principles of responsible behaviours. Submitted to the UNGA at its 75th session and adopted in December 2020 (A/RES/75/36) the resolution called for a behaviour-based approach, defining 3 goals: first, to look at current treaties and agreements that relate to how to interact in space in order to highlight the gaps: second, to have an open dialogue around current and future threats and security risks as well as to make a clear distinction between intended state actions threatening or raising tensions and dual use technologies; and third, to directly address what norms could provide solutions to these threats and risks.⁴ The promotion of responsible behaviour was also mentioned in the recently published new UK Space Strategy (goal 2), which highlights UK's resolve to *"run a further resolution to set up a UN Working Group to discuss the building blocks and details of responsible space behaviours"*.⁵

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The UK-led L.52 process⁶ notably received a strong support from the U.S., which is similarly pushing for the establishment of norms for responsible behaviour. Notably, in July 2021, the U.S. Defence Secretary Lloyd Austin signed an unclassified, formal memo incl. 5 tenets of responsible behaviours in space⁷ - the first published memo of this kind which was welcomed by many experts, arguing that it is a good first step and that stating these tenets would allow the U.S. to lead by example. These attempts are in line with the U.S. DoD's 2020 defence Space Strategy and the current U.S. Space Force Planning Guidance which are stating that the U.S. seek to ensure space stability by promoting standards and norms of behaviours in space. On a similar vein, several European states have been working on Principles for Responsible Behaviour in Outer Space (PORBOS) and have unanimously supported the L.52 resolution. Overall, while the resolution obtained the overwhelming majority of votes, it also received non-negligible objections by some important space powers, notably China and Russia. Together with Iran, Cuba, Nicaragua, Syria, Venezuela and DPRK, China and Russia casted votes against L.52, arguing that the OEWG was not sufficiently legal in its approach and detached from the treaty-based disarmament agenda, although this was exactly the point of the new initiative. It was also contested that norms of responsible behaviour could be used as a political tool for certain countries to shirk their own responsibility, pin the blame on others and to create pressure for certain types of behaviour in space, which can in turn increase existing tensions. On a similar stance, the objections and concerns expressed by other non-western states, including India, which, despite abstaining from the final voting, expressed concerns over the subjective nature of concepts such as "responsible behaviour" and "perception of threats".

... reaching a compromise with the potential to deliver results.

Despite many states might prefer a new legally binding instrument to address space security issues and the looming weaponization of outer space, most seem now willing to accept the development of norms of behaviours - as a first step. Norms of responsible behaviours can be a good step to build trust and can be further developed into a legally binding framework, which is not a new approach: historically, norms have provided flexible solutions in cases when diplomatic-political hurdles made the development of legal frameworks impractical. As also stated by the EU during the UN First Committee, *"without excluding the possibility of a legally binding instrument in the future, the EU and its Member States believe that voluntary measures constitute a pragmatic way forward at the moment, starting with norms, rules and principles of responsible behaviours, through an incremental and inclusive process"* (EU Statement UN 1st Committee October 11th, 2021).⁸

In addition to focusing on norms of responsible behaviours, the new resolution explicitly acknowledges the importance of legally binding measures and verification mechanisms, thus meeting to some extent the preferences of China and Russia. As such, the outcome of the First Committee's vote could be an important compromise: the U.S. have now accepted the possibility that the OEWG might recommend legally codified norms of behaviour, while China and Russia, despite voting against the OEWG's formation, have now refrained from pushing a competing UN venue for discussions based on their long-proposed PPWT-treaty. Actually, there have even been indications that unlike UNGA resolution 75/36, this year both China and Russia would have abstained from voting against the resolution, should the consensus on L.52 not have been broken - which actually did Iran. Although Russia voted against the creation of the OEWG, it indicated that it *"supports the OEWG to discuss the most pertinent issues related to the disarmament agenda"* and *"welcomes any ideas"* to maintain outer space free from weapons.⁹

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Taking Russia's Anti-Satellite Test conducted on November 15th into account, on the one hand this incident marks a serious backlash and overshadows the hope of having found a compromise - as a good step towards finding international agreement on norms of responsible behaviours. Especially the U.S. and the EU criticised Russia's behaviour and valued it as irresponsible. On the other hand, Russia's ASAT test highlights the urgency to continue efforts and makes the work of the OEWG increasingly crucial. Nevertheless, the voting on the UK's resolution L.52 approved by the First Committee and the implicitly underlying compromise, can be valued as a step forward, and it is likely that the resolution will be approved in the upcoming UNGA session in December.

¹ Source: ESPI "ESPI Briefs" No. 54, November 2021. All rights reserved. Link: <https://espi.or.at/news/un-resolution-on-norms-of-responsible-behaviours-in-space-a-step-forward-to-preserve-stability-in-space>

² Reaching Critical Will: "Draft Resolutions, Voting Results, and Explanations of Vote from First Committee 2021", November 2021, link: <https://reachingcriticalwill.org/disarmament-fora/unga/2021/resolutions>

³ UNGA: Reducing space threats through norms, rules and principles of responsible behaviours: draft resolution, 76th UNGA session, October 14th 2021, link: <https://digitallibrary.un.org/record/3944822?ln=en>

⁴ UNGA: Reducing space threats through norms, rules and principles of responsible behaviours: resolution, 75th session, 2020/21, adopted by the UNGA, link: <https://digitallibrary.un.org/record/3895440?ln=en>

⁵ UK Government: UK National Space Strategy, September 2021: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034313/national-space-strategy.pdf

⁶ Breaking Defense: Exclusive: UK Pushes New UN Accord On Military Space Norms - The US intends to support the British effort, September 2021, link: <https://breakingdefense.com/2021/09/exclusive-uk-pushes-new-un-accord-on-military-space-norms/>

⁷ Breaking Defense: Exclusive: In A First, SecDef Pledges DoD To Space Norms, July 2021, link: <https://breakingdefense.com/2021/07/exclusive-in-a-first-secdef-pledges-dod-to-space-norms/>

Comparison of Aviation and Space Insurance: who Covers Suborbital Flights?

Reza Mazinani *

Abstract

In order to take out the appropriate liability insurance coverage, one should foresee the legal liability established by international Conventions or national legislation. Hence, this paper analyses and compares the air and space operators' legal liabilities towards passengers and third parties under international law. Additionally, this paper discusses the current mandatory insurance requirements concerning aviation and spaceflights.

Furthermore, this paper examines suborbital flights (mainly operated by Virgin Galactic and Blue Origin) and legal liabilities associated with such flights. Suborbital flights do not fall directly under aviation activity or spaceflight. Therefore, it is not straightforward to identify the applicable legal framework governing such flights. Hence, this paper will analyse and compare air and space law to identify suitable legal regimes.

This paper also suggests that air law regimes may be sufficient to govern the current suborbital flights subject to minor amendments, including modifying aircraft's definition. Finally, this work recommends that insurers and suborbital operators cooperate in developing a new tailor-made insurance policy to cover liabilities and risks associated with suborbital flights.

Introduction

With the advancement of aerospace technology, private entities such as Blue Origin and Virgin Galactic are going to take tourists around the earth's orbit, which could also be the future of passengers' transportation.

However, such missions are exposed to significant risks, including but not limited to loss of or damage to properties (e.g. spacecraft or third parties) or injury or loss of life of the persons onboard the vehicle. Subsequently, the flight operators seek to transfer the risks to insurance companies as a risk management method or even a legal obligation.

Insurers undertake to indemnify the insured, for specific occurrences, in exchange for a consideration called "premium".¹ By doing so, insurers have assisted various industries to develop, including the aviation and space sector. For example, the first aviation insurance policy was issued in 1908,² just five years after the Wright brothers' flight. In the same vein, the first space insurance policy was taken out in 1965 for COMSAT's Early Bird satellite, seven years after the first satellite launched into orbit.³

Recently, suborbital flights emerged in the world of air and space. Nonetheless, these flights are attached to many legal concerns and ambiguities. For example, should they be considered as an aviation or a space activity? Or both? Should aviation or space insurance policies cover suborbital flights?

This paper analyses the legal liability to passengers and third parties arising from air

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and space activities. Additionally, this work examines the legal liabilities related to suborbital flights (with emphasis on Virgin Galactic and Blue Origin flights) and relevant insurance coverages.

The term 'Air law' refers to Warsaw and Montreal Conventions throughout this work.

1 Types of insurances

Principally, aviation and space insurance can be divided into two sections:

1. Property insurance
2. Liability insurance

1.1 Property insurance

This type of insurance provides coverage for loss or damage to the insured's property (first-party), for example, damage to the aircraft⁴ or spacecraft. Nevertheless, property insurance does not cover every eventuality and comes with some exclusions, namely wear and tear and war perils.⁵

Generally speaking, aviation and space property insurances are not compulsory under many jurisdictions since the insured's responsibility is to protect his assets.

1.2 Liability insurance

This type of policy covers the liabilities of the insured arising from a legal statute or a contractual provision. There are various types of liability insurance, including the liability to passengers, cargo, crew and third parties.

2 Liabilities and insurance requirements under aviation law

Aviation insurers generally cover aircraft operators' legal liability arising from national legislation or international Conventions. However, nothing prevents operators and carriers from taking out a higher coverage limit than stated in the mentioned Conventions. The main legal liabilities of air operators are established in the following Conventions and legislations.

1. Liability to passengers, cargo, baggage and mail under international Conventions:
 - a) the Warsaw Convention⁶
 - b) the Montreal Convention⁷
2. Liability to passengers and their baggage under the European Union (EU) law; the EU has enacted EC Regulation 2027/97 as amended by EC Regulation.889/2002 to accommodate air carriers' liability in the event of accidents.
3. Liability for death/injury to persons and damage to property on the surface

Liabilities to third parties on the surface, resulting from aircraft in flight, is governed under the Rome Convention.⁸

2.1 International Conventions

2.1.1 Warsaw Convention 1929 (Warsaw Convention)

The Warsaw Convention applies to all international carriage of persons, luggage or goods performed by aircraft for reward.⁹ In Spite Of the wide ratification, it is criticised for establishing low limits of liability since it intended to protect the infant aviation industry.¹⁰ Despite the discussion over insurance requirements at the time of drafting, mandatory insurance was omitted from Warsaw Convention.¹¹ Hence, the Convention does not impose compulsory insurance on State parties. However, air carriers usually take out insurance voluntarily to cover the legal

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liabilities stated in the Warsaw Convention. The Warsaw Convention was amended by the Hague Protocol in 1958 and modified by a series of protocols before being replaced by Montreal Convention 1999.

2.1.2 Montreal Convention 1999 (Montreal Convention)

Montreal Convention was established to replace the Warsaw system and increase liability limits according to the principle of restitution.¹² Similar to its predecessor, Montreal Convention applies to all international carriage of persons, baggage or cargo performed by aircraft.¹³

However, article 50 of the Montreal Convention stipulates that “the state parties shall require their carriers to maintain adequate insurance covering their liability under this Convention.”¹⁴

Nonetheless, the Convention does not explicitly address how the member states are supposed to implement this obligation. It is understood that member states are expected to incorporate the insurance requirement into their national legislation or even licensing requirements. In addition, the term “their carrier” is not defined clearly. While some may think of state carriers, most practitioners believe it is referred to the air carrier established and registered in that state.¹⁵

While some airlines recognise article 50 of the Montreal Convention as a compulsory insurance requirement, the article does not directly refer to air carriers, and it does not provide any penalties in case of non-compliance.

Furthermore, the Montreal Convention only requires adequate insurance, which does not guide the states and carriers on how much coverage should be purchased, especially with the two-ties liability system.

2.2 Regulation(EC) 2027/97¹⁶ and Regulation (EC) 785/2004¹⁷

Regulation (EC) 2027/97 (as amended by Regulation (EC) 889/2002) regulates¹⁸ Community air carrier liabilities to passengers and their baggage in case of accidents.¹⁹ Moreover, article 3(1)(b) of the Regulation (EC) 2027/97 requires the Community air carrier to be insured for the limits stipulated under the same Regulation.

Following the catastrophe of 11th September 2001, the European Union (EU) decided to enact Regulation (EC) 785/2004 to impose a minimum insurance requirement on all air carriers (and aircraft operators) while flying within, out of, into or over the territory of member states.²⁰

Apart from established liabilities under Montreal Convention, the Regulation also requires the air carriers to take out insurance coverage regarding third parties, based on the maximum take-off mass of the aircraft (MTOM).²¹

In contrast to the Montreal Convention, the Regulation addresses restrictions in case of non-compliance of the air carrier. For example, failure to comply with the insurance requirement provisions may lead to “loss of aircraft operating licence for Community carriers”²² or “refusal of the right to land or take-off for non-community carriers in member states’ territory.”²³

2.3 Liability to Third Parties

In addition to the passengers, crew and cargo onboard the aircraft, third parties are also exposed to significant risks in case of an accident. The issue was recognised in 1927, but no concrete agreement was achieved until 1952²⁴ when the Rome Convention 1952 was established. The Rome Convention governs the liability of air

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operators for damage to persons and property on the surface caused by an aircraft or person or thing falling from.²⁵ Moreover, the Rome Convention compels member states to require aircraft operators to purchase insurance coverage according to liabilities stipulated under article 11(1) of the Convention.^{26 27} Nevertheless, it has not been widely ratified²⁸ due to the low limits of liabilities it offers and overlapping with existing national legislation.²⁸ Another drawback of the Convention is that it does not address the liability of air operators in case of damage to third parties in the air (e.g. resulting from air collision).

3 Liabilities and insurance requirements under space law

Space activities are exposed to certain significant risks. For example, the launching vehicle may explode during lift-off²⁹ or the spacecraft may collide with other space objects (or aircraft), resulting in loss of life of persons on board or damaging property or persons elsewhere.³³

The third-party liabilities arising from launching objects were primarily addressed in 1967 the Outer Space Treaty (OST)³⁰ and the 1972 Liability Convention.³¹ Article VII of the OST stipulates that “the launching state is internationally liable for any damage to other state parties’ natural and juridical persons that occurred in the air or outer space or on earth.”

Furthermore, the Liability Convention elaborates on article VII of the OST by classifying the liability into absolute (for the damage on the surface of earth or aircraft in-flight)³² and fault-based liability (for the damage caused elsewhere).³⁴

However, none of the international space treaties imposes compulsory insurance in order to cover the liabilities in place. Having said that, article 7 of the National Space Legislation Resolution³³ only recommends states “to impose insurance requirements in their national legislation in order to recourse the damages from operators or owners of the spacecraft.”³⁴

4 Comparing the liabilities under air law and space law

While air law imposes liabilities on the carrier or the aircraft operator, space law recognises the states as the liable party, in particular the launching states.³⁵

Furthermore, as opposed to air law Conventions, the OST and Liability Convention do not determine any limits of liability in case of accidents. The Liability Convention only refers to international law and the principles of justice and equity or compensating as if no damage occurred.³⁶

Moreover, the OST and the Liability Convention address the liability of the launching states for damage to third parties in the air, whereas the air law Conventions do not cover this area. On the other hand, the space treaties do not determine any liabilities for loss of life or injury to the persons onboard the spacecraft. Mainly because at the time of drafting, most space activities were conducted by states, indicating that they were responsible for their missions and the persons on board of spacecraft.

Having said that, there is one Convention that deals with persons onboard the spacecraft in case of accidents or emergencies is the Astronauts Rescue and Return Agreement (ARRA).³⁷ However, it should be noted that astronauts are not considered as passengers under the space legal framework. Instead, they are referred to as personnel of the spacecraft³⁸ or envoys of mankind.³⁹

Last but not least, under air law, passengers or third parties are entitled to bring a

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claim directly against the air carrier, whereas, under the space law, only states are entitled to do so.⁴⁰

5 Suborbital flight liability and liability insurance

The concept of suborbital flights is not something new.⁴¹ However, taking individuals (as tourists) around the earth's orbit or carrying passengers via these routes is novel. Two leading companies are developing the technology to take individuals around the Karman line⁴²; (a) Virgin Galactic and (b) Blue Origin.⁴³

5.1 Virgin Galactic

The company plans to take persons to an altitude of around 80 KM above the earth for several minutes. A custom-built carrier aircraft (the WhiteKnightTwo) carries a reusable hybrid rocket motor spacecraft (the SpaceShipTwo) to reach that altitude.⁴⁴

The WhiteKnightTwo takes off from an airport's runway in Mojave (California) and releases the SpaceShipTwo at an altitude of 15,000 KM.⁴⁵ Within seconds, the rocket motor is fired, and the SpaceShip's nose pitched to a near-vertical climb. Finally, after experiencing a few minutes of weightlessness, the SpaceShipTwo descends for the re-entry phase and lands in spaceport America.⁴⁸

5.2 Blue Origin

Blue Origin will also use a reusable suborbital rocket system called the New Shepard, named after Mercury astronaut Alan Shepard, the first American to go to space.⁴⁶ Six people will be seated in a capsule on top of a 60-foot-tall rocket. It will vertically climb through the atmosphere, and then the capsule separates before the Karman line⁵⁰ but continues to fly just above it. The whole journey will take around 11 minutes before the capsule's parachutes deploy for a gentle landing in the West Texas desert in the USA.⁴⁷

5.3 Does Montreal Convention apply to Suborbital flights (Virgin Galactic and Blue Origin)?

Article 1(1) of the Montreal Convention states that the Convention only applies to "international carriage" by aircraft for reward. Moreover, article 1(2) defines international carriage as when the place of departure and destination are situated in two different state parties or within the territory of a single state party but with an agreed stopping place outside that territory.

First of all, the WhiteKnightTwo takes off and lands in the USA. Therefore, the flights cannot be considered international, as elaborated in the Montreal Convention. However, suppose the flight takes off from the USA and lands in any other Montreal Convention's state parties. In that case, it can be argued that the flight is international, and Montreal Convention would be applicable.

Additionally, the same article of the Montreal Convention requires the flight to be performed by aircraft. The Montreal Convention does not provide any definition for aircraft. However, Annex 7 of the Chicago Convention⁴⁸ defines the aircraft as "a machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface."⁴⁹

Consequently, an aircraft should have three main characteristics:

- a. it should derive support in the atmosphere
 - b. secondly, that support should be from the air reaction
 - c. the machine should not fly as a result of the reaction of the air against the earth's surface (which excludes the air-cushion-type vehicle, such as Hovercraft).⁵⁴
- Regarding the first element, the earth's atmosphere extends to almost 480 km

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above the surface.¹ Hence both the WhiteKniTeTwo and the SpaceShipTwo will be flying in the atmosphere.

But can they derive support from the reaction of the air?

The word ‘*can*’ indicates that the machine only needs to be capable of deriving support in the atmosphere from the reactions of the air without actually being obliged to use that capability.

Nonetheless, the WhiteKniTeTwo has four turbofan jet engines and can take off and land in airport runways. Therefore it is most likely to be classified as an aircraft. Moreover, the SpaceShipTwo forms part of the aircraft while attached to the WhiteKniTeTwo. Although a rocket engine powers SpaceShipTwo, it derives support from the reaction of the air at some stages of the flight, specifically when gliding back to land.⁵¹ Consequently, both WhiteKniTeTwo and SpaceShipTwo can qualify as aircraft, meaning the Virgin Galactic flights could be governed by the Montreal Convention if performed as an international flight within the meaning of the Convention.

On the other hand, Blue Origin uses a rocket and an attached capsule that crosses the Karman line. According to spatialist schools of thought, it is considered as spaceflight, which means that air law Conventions would not apply to it. Nonetheless, in the course of landing, the capsule deploys its parachutes and derives support by the air reaction. Hence, it may fall under aircraft classification for the landing period. Having said that, it is unclear how courts would respond to related disputes due to the lack of precedent.

5.4 Suborbital flight liability and liability insurance

Suppose if the Montreal Convention governs the Virgin Galactic flights, then the insurance requirements under article 50 of the Montreal Convention should be met. However, insurance companies have the option to accept or reject the risk or even cover part of it. One reason for the insurer to reject such risk is the lack of statistics that indicate the accident possibilities.

Insurers cover risks based on their technical and legal knowledge. One aspect of technical knowledge is based on statistical information, which, in this case, is based on the number of flights. It should be noted that Virgin Galactic and Blue Origin have not started their commercial flights yet. Therefore insurers may not be able to evaluate the risks due to a lack of statistics.

In the case of Virgin Galactic, insurers may divide the operation into two separate phases and conditions. For example, the first phase may be covered from the WhiteKniTeTwo’s take off until the separation of SpaceShipTwo and the second phase, from the moment of separation until the SpaceShipTwo landed. However, insurers may charge a higher premium for the second phase due to the novelty of suborbital flights and the rocket propulsion of SpaceShipTwo.

Conversely, the national laws would apply if the Virgin Galactic flight does not fall under the Montreal Convention. Therefore, the suborbital flight operator may take out insurance coverage according to the national legislation.

Due to its similar space activity, Blue Origin’s flights will hardly fall under the current air law regime. Therefore, the operator may purchase insurance according to the national legislation.

*SPACE***5.5 Does Rome Convention 1952 or Liability Convention 1972 apply to Suborbital flights?**

According to the Rome Convention 1952, any person who suffers damage caused by an aircraft in flight or by any person or thing falling therefrom can bring claims against the air operator.⁵²

On the other hand, Article II of the Liability Convention recognises the launching state as the absolutely liable party for the damage caused by its space object on the earth's surface or to aircraft in flight.

The above aforementioned raises the question of whether the injured persons claim under the Rome Convention or the Liability Convention? with the assumption that the relevant states are parties to the Rome and Liability Conventions.

According to the Rome Convention, the injured person can bring an action against the aircraft operator (e.g. airlines or registered owner). Whereas, under the Liability Convention, the claim shall be brought by the state, which its natural or juridical persons suffered the damage, against the launching state.⁵³

Without a clear definition of spacecraft (and even aircraft in the Rome Convention), it will not be easy to determine which caused the damage. The aircraft or the spacecraft?

Regarding the Virgin Galactic, if the damage is caused before the separation, it is more likely that the Rome Convention would apply. However, nothing prevents the damaged party from claiming the damage caused by the SpaceShipTwo while landing(under Rome Convention) as it could qualify as aircraft.

With Blue Origin, the launch phase does not qualify to be an aviation activity due to the definition of the aircraft. However, the landing phase may do. Hence, if the capsule causes damage in the course of landing, the damaged party may be able to claim under the Rome Convention.

Nevertheless, courts may also refer to the registration type of the suborbital vehicle to determine the liability. For example, if the vehicle has been registered with the United Nations Office for Outer Space Affairs (UNOOSA), it will possibly be considered a spacecraft. However, at the time of writing, none of the New Shepard nor the SpaceShipTwo has been registered with UNOOSA,⁵⁴ which could be due to the Article II of the Registration Convention,⁵⁵ which only requires the space objects launched into the earth's orbit or beyond to be registered.

Nonetheless, it is much easier for the damaged party to claim under the Rome Convention. He can bring an action directly against the aircraft operator as opposed to the state-to-state system of the Liability Convention. However, the limit of liability is capped (according to MTOM of the aircraft) under the Rome Convention, while there is no limit under the Liability Convention.

5.6 Liability Insurance for third parties in suborbital flights

As iterated above, insurers usually reimburse the insureds when they become legally liable. Hence, in case of damage to third parties during suborbital flights, the insurer may have to pay out claims under the Rome or Liability Convention or even national legislation. Therefore, prudent insurers may limit their liability by a specific amount and to a specific Convention only. For instance, insurers may pay out the claims arising under Rome Convention and up to specific limits.

However, due to the unique characteristics of suborbital flights, insurers may draft

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and manuscript a new coverage with the cooperation of the operators.

6 Conclusion

Suborbital flights may be the future of passengers transportation, and the need to regulate the operator's liabilities is imminent. However, drafting a new international Convention could take years or decades. Therefore, it may be more logical to allocate the suborbital liabilities under air law since a significant part of these flights are within the airspace. In order to do so, ICAO could expand the definition of aircraft to encompass suborbital vehicles. Having said that, ICAO had once amended the definition of aircraft in order to exclude Hovercraft by adding the following phrase "other than the reactions of the air against the earth's surface" in 1967.⁵⁶

However, to expand the aircraft definition in order to encompass suborbital vehicles, ICAO can adopt the following definition; a machine that can derive support in the atmosphere from the reactions of the air or any other reactions, other than the reactions of the air against the earth's surface.

It should be taken into account that the aerospace industry is developing sharply, meaning that sooner or later, new generations of aircraft or transportation methods with more outstanding capabilities will emerge. Therefore, the aircraft definition should be more comprehensive and compatible with those developments.

Nevertheless, insurers and the operators do not need to wait until a new regime is introduced or the definition of aircraft is expanded. An insurance contract is a separate contract in which parties can agree upon risks and premiums based on freedom of contract. Moreover, the term 'aircraft' or duration of coverage could be expanded (or even limited) without complying with international Conventions.

Insurers can develop a tailor-made policy to cover suborbital flights with the cooperation of current suborbital operators. Insurance companies have already created AVN1D,⁵⁷ a policy covering aircraft hull and operators' liabilities combined, which is used for domestic and international flights. Hence, the same approach to cover suborbital flights could be beneficial for both insurers and suborbital operators.

This article only expresses the author's view

¹ Katherine Posner, Philip Chrystal & Tim Marland, *Margo on Aviation Insurance* (Lexis Nexis, 4th edn, 2014) 11 ² Ibid 1.

² Pablo Mendes de Leon, *An Introduction to Air Law* (10th edn, Wolters Kluwer 2017).¹

³ Katarzyna Malinowska, *Space Insurance: International Legal Aspects* (Wolters Kluwer 2017).⁵⁵

⁴ loss of damage to the aircraft is covered under Hull insurance, the term "Hull" derived from Marine Insurance terminology as the first policies were written by marine insurer.

⁵ Peter J.C Viccars, *Aviation Insurance; A planeMan's guide* (1st edn, Witherby 2001).²

⁶ Convention for the Unification of certain rules relating to international carriage by air, Signed 12 October 1929 in Warsaw (Warsaw Convention).

⁷ Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, May 28, 1999, entered into force on 4 November 2003 (Montreal Convention).

⁸ Rome Convention on damage caused by aircraft to third parties on the surface, 310 UNTS 181 (1952) (Rome Convention).

⁹ Warsaw Convention, art 1.

¹⁰ Mendes de Leon (n 3) 149.

¹¹ Posner (n 1) 19.



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- ¹² Montreal Convention, the preamble.
- ¹³ Montreal Convention, art 1(1).
- ¹⁴ Ibid art 50.
- ¹⁵ Posner (n 1)23.
- ¹⁶ Council Regulation (EC) No 2027/97 of 9th October 1997 on air carrier liability in the event of accidents (OJ L 285, 17.10.1997, p.1) [1997].
- ¹⁷ Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators (OJ L 138, 30.4.2004, p. 1). Amended by Regulation (EC) No 1137/2008 of the European Parliament and of the Council of 22 October 2008 (OJ L 311, 21.11.2008, p. 1).
- ¹⁸ Amends Regulation (EC) No 2027/97 and applies the rules of the Montreal Convention to all flights, whether domestic or international, operated by EU air carriers.
- ¹⁹ Regulation (EC) 2027/97 , art 1.
- ²⁰ Regulation (EC)785/2004, art 2(1).
- ²¹ Regulation (ec) no 785/2004 , art 7.
- ²² Regulation (ec) no 785/2004 , art 8 (5).
- ²³ Ibid, art 8(6).
- ²⁴ Mendes de Leon (n 3)383.
- ²⁵ Ibid art 1 (1).
- ²⁶ Ibid art 15(1).
- ²⁷ states according to <ICAO.INT> accessed 08/05/2021.
- ²⁸ Mendes de Leon (n 3)383.
- ²⁹ the physical separation of the launch vehicle from the launch pad, Posner (n 1)414.
- ³⁰ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies 610 UNTS 205 (1967).
- ³¹ Convention on International Liability for Damage Caused by Space Objects, 29 March 1972, 961 UNTS 187.(Liability Convention 1972).
- ³² Liability convention 1972, art II.
- ³⁴ Liability convention 1972, art III.
- ³³ Recommendations on national legislation relevant to the peaceful exploration and use of outer space, UNGA Resolution 68/74 (11 September 2013) A/RES/68/74 [2013].
- ³⁴ Ibid , art 7.
- ³⁵ According to article I of the Liability Convention; State which launches or procures the launching of a space object or the state from whose territory or facility a space object is launched.
- ³⁶ Liability Convention, art XII.
- ³⁷ Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space 1968 672 UNTS 119 (adopted 19 December 1967, entered into force 3 December 1968).
- ³⁸ Ibid art 1- art 4.
- ³⁹ OST, art V.
- ⁴⁰ Tanja Masson-Zwaan, 'Liability and insurance for suborbital flights' (2011).
- ⁴¹ Tanja Masson-Zwaan, *An Introduction to Space Law* (4th edn, Wolters Kluwer 2019) 85.
- ⁴² km above the sea level.
- ⁴³ Masson-Zwaan (n 50) 86.



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⁴⁴ < <https://www.virgingalactic.com/learn/> > accessed 01/05/2021.

⁴⁵ Ibid.

⁴⁸ Ibid.

⁴⁶ Suborbital spaceflight <<https://www.blueorigin.com/new-shepard/>> accessed 02/05/2021.

⁴⁷ Ibid.

⁴⁸ Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994) 15 U.N.T.S. 295.

⁴⁹ Convention on Civil Aviation ("Chicago Convention"), 7 December 1944, (1994) 15 U.N.T.S. 295, Annex 7 ⁵⁴ Paul Stephen Dempsey and Maria Manoli, 'Suborbital flights and the delimitation of air space vis-à-vis outer space: functionalism, spatialism and state sovereignty' (Legal Subcommittee of Committee on the Peaceful Uses of Outer Space, A/AC.105/C.2/2018/CRP.9, 28/03/2018)13.

⁵⁰ Tim sharp, 'Earth's Atmosphere: Composition, Climate & Weather' < <https://www.space.com/17683-earthatmosphere.html> > accessed 27/05/2021.

⁵¹ ICAO, "Commercial Space Flights", Working Paper, Legal Committee - 36th Session, LC/36-WP/3-2, 03/12/15, 3.

⁵² Rome Convention, art 1(1).

⁵³ Liability Convention, art VIII.

⁵⁴ <<https://www.unoosa.org/oosa/en/spaceobjectregister/submissions/usa.html>> accessed 5/5/2021.

⁵⁵ Convention on Registration of Objects Launched into Outer Space 1975 (Registration Convention) art II (1).

⁵⁶ ICAO, "Commercial Space Flights", Working Paper, Legal Committee - 36th Session, LC/36-WP/3-2, 03/12/15,13.

⁵⁷ London standard aircraft policy, drafted by Aviation Insurance Clauses Group (AICG).

The COVID-19 Pandemic and the Conversion of Passengers' Flights for Air Cargo Transportation

By Seyma Aslan *

Due to the COVID-19 outbreak many economic activities in global trade have declined. The harshest effects of the pandemic had been observed in the aviation sector¹ where several restrictions to air transport have been imposed to protect the international community from the effects of the contagions. As known, these measures included the closing of borders and the suspension of flight operations, inducing a cutback in revenues and severe financial losses in the aviation industry.²

According to results of latest ICAO world total passenger traffic analysis:³

- The COVID-19 impact on world scheduled passenger traffic for year 2020 caused 1) the reduction of 50% of seats offered by airlines, 2) the reduction of 2,703 million passengers (-60%) and 3) approximatively USD 372 billion loss of gross passenger operating revenues for airlines.
- The COVID-19 impact on world scheduled passenger traffic for year 2021 caused 1) the overall reduction of 40% of seats offered by airlines, 2) the reduction of 2,201 million passengers (-49%) and 3) approximatively USD 324 billion loss of gross passenger operating revenues for airlines.

Besides the severe economic repercussions of the pandemic, it should be considered that in recent years globalised production and mass industrialisation have led to the development of increasingly sophisticated transport technologies, allowing

- goods, materials and freights to be transported to and from all parts of the World and
- production to be organised and maintained on a global scale.

Nevertheless, as seen from the above, the pandemic has had many repercussions the aviation industry. Hence, two years after the COVID-19 outbreak, the balance between passenger and air cargo transportation has drastically changed and many aircrafts have been used simultaneously to transport both passengers and cargo.⁴

To explain the phenomenon, it could be appropriate to highlight the main differences between air passengers and air cargo transportation:⁵

1. With regard to routes configuration, air passengers' transportation includes both outward and return flights, while cargo transportation usually requires a flight from an origin to a destination point without the need of a scheduled return flight, ending the travel with the consignment of the freight.
2. From a marketing point of view, while the category of air passengers is homogeneous, air cargo transportation comprises a heterogeneous variety of products, which differ for measures, characteristics, weight or volume.
3. Air passengers and air cargo market differs in term of market competition: for passengers' transportation, long-haul routes have an extremely high demand, since for these flights almost all passengers have same transportation

*RP Legal & Tax.



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- preferences. Unlike air cargo transportation (especially for the freight which has time delivery flexibility), air passengers transportation faces high competition from other transport modes which offer lower price.
4. While air passengers move in the airports within their responsibilities during boarding and landing, cargo transportation is passive since freights are physically transported, loaded and unloaded into the aircraft.

As it appears from the reported data, the COVID-19 outbreak caused i) huge economic losses in the aviation industry and ii) the decrease in the demand of passengers' air travel, which caused many passengers aircraft to be idle for a long time.

This explains why due to the severe crisis experienced - despite the mentioned differences between air transportation of passengers and cargo - in the past two years many airlines had to:

1. diversify their income streams and
2. ensure that, when profits deriving from passengers' transportation were drastically reduced by the pandemic, the profits from the air cargo transportation remained unaffected and grew.

Although the air transport of passengers is usually the most profitable component of airlines' business model, in 2020 and 2021 air cargo transportation has become a useful "dual" income generation tool. Indeed, aircraft already had cargo storage space in the belly of the airframe, part of which has always been used to transport passenger baggage.

Consequently, the measures restricting passengers free of movement occurred during the peak of pandemic allowed the use of all available space in the belly of the airframe to transport freight. Moreover, the conversion of passengers' flights in cargo ones has been implemented also by removing the seats of passengers' planes, enabling airlines to gain additional cargo capacity without capital expenditure on new wide-body aircraft.

From the industry perspective, the conversion of passenger planes to cargo ones was considered a sustainable choice by assessing, for example:

1. the likelihood of future critical events
2. other limitations in passengers' free of movement and
3. the adjustments of flights to specific needs, such as the vaccine distribution.

Nevertheless, from a technical point of view, the decks in passengers' aircraft present limitations in floor structure and weight and converting passengers' planes in cargo one could result in increased costs in long terms. Hence, several airlines worked on solutions to containerised passengers' plane decks, allowing more cargo storage while requiring less labour.⁶

Although in 2020 and 2021 airlines have found in the conversion of passenger flights to cargo ones a solution to the dramatic decrease in the number of passengers, the conditions posed by the pandemic are currently very different.

Many restrictions for air passengers have been relaxed while maintaining additional measures, e.g. the use of protection devices, the exhibition of vaccination certificates or negative pre-departure tests, etc. For airlines, this led to the gradual reintroduction of various routes and to the full operativity on travel corridors previously blocked. On one hand, for those airlines that chose not to structurally



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modify their aircraft, the conversion of their aircraft back for passengers' flights has been straightforward, following refurbishing procedures to make the aircraft suitable for passenger transport again. On the other hand, those airlines who maximized their cargo revenue with structural modification of their planes have had more difficulties in the conversion of their aircraft back for passengers' flights.⁷

In light of above, it is clear that the "hybrid" model of aircraft used for both cargo and passengers' transportation could be implemented through further innovations in both passengers' and cargo aircraft. Certainly, the hybrid model will benefit airlines by encouraging, for example, the use of unsold seats on passenger flights to carry cargo, in order to maximize profitability on routes with a lower passenger load factor. A possibility that seems appealing to both low-cost carriers and traditional airlines that wish to diversify their revenue streams and minimize future losses.

¹ See A. Masutti, Covid-19 implications: the EU initiatives in support of the aviation sector, in <https://www.ibanet.org/article/24E95F6A-7839-40D9-8B71-98AF8BFC8028>.

² See ICAO, Economic Impacts of COVID-19 on Civil Aviation, <https://www.icao.int/sustainability/Pages/Economic-Impacts-of-COVID-19.aspx>.

³ See ICAO, Effects of Novel Coronavirus (COVID-19) on Civil Aviation: Economic Impact Analysis, 8 March 2022, https://www.icao.int/sustainability/Documents/COVID-19/ICAO_Coronavirus_Econ_Impact.pdf.

⁴ See ICAO, Repurposing Aircraft Passenger Cabins for Transport of Cargo, <https://www.icao.int/safety/OPS/OPS-Normal/Pages/Airworthiness%20TCPC.aspx>.

⁵ For more information, see <https://maktubaat.wordpress.com/2013/07/04/differences-between-the-air-passenger-and-air-freight-markets/>.

⁶ See <https://co.kuehne-nagel.com/en/-/knowledge/market-insights/aerospace/freighters-preighters>.

⁷ See <https://www.reedsmith.com/en/perspectives/global-air-freight/2022/01/carrying-the-load-use-of-passenger-aircraft-to-haul-cargo-during-covid19>.

EVENTS

The Future of Mobility Between Innovation and Sustainability

28 April 2022 – 13:45

Palazzo Rospigliosi - Conference Centre
Rome, Via Ventiquattro Maggio, 43

13:45 Registration & Welcome Coffee

14:30 Welcome address & Launching Video

14:40 Keynote Address Sergio Colella, *President SITA Europe*

14:50 Air Transport and Sustainability: Relaunching the Sector Protecting Health and Environment

Moderator Anna Masutti, *Chairperson RFI (Italian Railway Network), University of Bologna*

Speakers Fabio Lazzerini, *CEO, ITA S.p.A.*

Ivan Bassato, *Chief Aviation Officer, Aeroporti di Roma*

Peter Gerber, *CEO Brussels Airlines, CR European Affairs Lufthansa G. President BDL*

Conclusion Olivier Jankovec, *DG, ACI Europe Milano*

16:00 Challenges and Opportunities in the Future National Airport Plan

Moderator Stefano Paleari, *Bergamo University*

Speakers Monica Scarpa, *CEO, SAVE Aeroporto di Venezia*

Emilio Bellingardi, *DG, SACBO Aeroporto di Bergamo*

Nazareno Ventola, *CEO & DG, A. Marconi Aeroporto di Bologna*

Giovanni Battista Scalia, *CEO, GESAP Aeroporto di Palermo*

Conclusion Pierluigi Di Palma, *President, ENAC*

17:20 Transport Infrastructures, Connectivity & Intermodality: the Green Revolution and Social Sustainability

Moderator Laura Bettini, *Radio24 - Gruppo Sole 24 Ore*

Speakers Vera Fiorani, *CEO, RFI (Italian Railway Network)*

Stefania Pezzetti, *VP Ground Operations Southern Europe FedEx Express and AD FedEx/TNT Italy*

Nazzarena Franco, *CEO, DHL Express Italy*

18:20 Conclusions

Enrico Giovannini, *Minister of Infrastructure and Sustainable Mobility*

Aperitif

Registration

Seats are limited up to the maximum capacity of the conference room and access is allowed only to people owing green pass certification.
Registration is required by writing to the following email: elisabetta.pozzati@rplt.it.



EVENTS

Past and Future Events

Air & Space Law Lectures, University of Bologna

Alma Mater Studiorum Università di Bologna
Master in Legal Studies
Prof. Anna Masutti invites

16 March 2022 - 17:00/19:00

Giorgio Saccoccia

President at A.S.I. Agenzia Spaziale Italiana

30 March 2022 - 17:00/19:00

Ugo Celestino

Policy Officer for Space Research,
Innovation and Start-ups at DG Defence Industry &
Space (European Commission)

7 April 2022 - 15:00/17:00

Lorenzo Ferrario

CTO at D-Orbit

8 April 2022 - 17:00/19:00

Rodrigo Da Costa

Executive Director of the European Agency
for the Space Programme (EUSPA) and

Ezio Villa

Head of Legal and Procurement Department of EUSPA

13 April 2022 - 17:00/19:00

Morena Bernardini

Vice President Strategy at ArianeGroup

20 April 2022 - 17:00/19:00

Armando Brunini

CEO at SEA S.p.A. (Milan Airports)

21 April 2022 - 15:00/17:00

Kai-Uwe Schrogl

President of the International
Institute of Space Law (IISL)

22 April 2022 - 17:00/19:00

Alessandro Perrone

Legal & Compliance Counsel at Lufthansa Group and

Mark Wiesner

Legal Counsel at Deutsche Lufthansa AG

28 April 2022 - 15:00/17:00

Lorenzo Lagorio

Country Manager Italy at EasyJet

Click [here](#) to join the meeting