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Update

Compensation for flight delays: The European Court abandons the rule of law

In its much-awaited ruling in Joined Cases C581/10 Nelson v Lufthansa and C629/10 TUI, British Airways, easyJet and IATA v UK CAA, delivered on 23 October 2012, the Grand Chamber of the Court of Justice of the EU declined the opportunity presented by these two references to revise the controversial ruling issued by the Court in November 2009 in the Sturgeon case.

The Court confirmed that EU Regulation 261/2004 is to be interpreted as entitling passengers to compensation where, on account of a delayed flight, they arrive at their final destination three hours or more after the originally scheduled time, unless the carrier can prove that the delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. In doing so it has arrogated to itself legislative powers contrary to the principle of separation of powers and paid scant regard to the principle of legal certainty, which are fundamental principles required by the rule of law.

The Court expressed the view that such an interpretation was necessitated by the principle of equal treatment, and that it was not incompatible with:- the Montreal Convention; its previous ruling in the IATA/ELFAA case; the legislative intent; the principle of legal certainty; or the principle of proportionality. It also confirmed that this interpretation was to be applied from the entry into force of the Regulation (on 17 February 2005).

The Court's reasoning and analysis

The principle of equal treatment. The Court found that the principle of equal treatment requires such an interpretation because passengers whose flights are delayed for three hours or more suffer a loss of time similar to that suffered by passengers whose flights are cancelled. The reason for the three hour threshold is that a carrier does not have to pay compensation to a passenger whose flight is cancelled if it offers the passenger re-routing bringing departure forward by no more than one hour and deferring arrival by no more than two hours.

The Court did not discuss the possible alternative approach (raised by Sharpston AG in the original Sturgeon case, and by the referring court in the TUI reference) of declaring void the supposedly unequal provisions on compensation for cancellation, even though this would have been more consistent with its approach to the effect of the principle in other cases.

Montreal Convention. The Court followed the reasoning applied in its IATA/ELFAA ruling, and took the view that fixed levels of compensation for delay constitute standardised and immediate redress for the inconvenience suffered by way of loss of time, and that such inconvenience does not constitute "damage occasioned by delay" within the meaning of Article 19 of the Convention and hence falls outside the scope of Article 29. Article 29 provides that "In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention…In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable".

The Court further reasoned that Article 19 implies that there is a causal link between the delay and the damage and that the damage is individual to the passenger, whereas: - "a loss of time is not damage arising as a result of a delay, but is an inconvenience"; a delayed flight causes the same loss of time for all passengers on the flight, for which standardised and immediate assistance may be given; and there is not necessarily a causal link between the delay and the loss of time giving rise to compensation, as the compensation is payable once a delay of three hours has been reached and does not increase if the delay extends beyond this period. Furthermore, the obligation to pay compensation under the Regulation is additional to the carrier's liability under the Montreal Convention, as it operates at an earlier stage, and does not prevent passengers from receiving further damages, under the Convention, in respect of their individual losses.

The argument that a loss of time caused by a delay is an "inconvenience" but not damage clearly strains credibility. Moreover, the Court itself deals it a fatal blow when it says (in paragraph 46 of its ruling): "In paragraph 45 of IATA and ELFAA, the Court held that it does not follow from Articles 19, 22 or 29 of the Montreal Convention, or from any other provisions thereof, that the authors of that convention intended to shield air carriers from any form of intervention other than those laid down by those provisions, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, **the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes** [emphasis added], without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts".

The Court also failed to raise and answer the obvious question - what would the position be if a carrier did not pay compensation and the passenger brought an action against the carrier in respect of this failure. Surely that would constitute an action for damages within the scope of Article 29, and hence its prohibition of non-compensatory damages (as clearly the Regulation's standardised amounts of compensation are) would come into play?

The fundamental problem with the Court's approach is that the distinction drawn by the Court between the scope of the Convention and the scope of the Regulation, originally in the IATA/ELFAA case and repeated here, is based on a fatal fallacy, because the measures envisaged by the Regulation are not all "standardised and immediate measures", as they include the obligation to reimburse to the passenger the cost of the ticket for the part(s) of the journey not made and for any parts already made if the flight is no longer serving any purpose for the passenger, which is a far from standardised and immediate matter.

The IATA/ELFAA ruling. The Court found no tension between its ruling in the IATA/ELFAA case and its ruling in the Sturgeon case, for the reasons set out in paragraphs 46 - 48 of its present ruling - ie, because in the former the Court held that standardised and immediate redress for the inconvenience caused by delay fell outside the scope of the Montreal Convention and, though it did not in that case consider the question of compensation, it did not exclude it, and in the latter ruling the Court held that inconvenience caused by delay must also be redressed by compensation.

However, this does not satisfactorily dispose of the question of the tension between the two rulings, given the arguments of the parties on the issue, which pointed to the fact that the Court in the IATA/ELFAA case found that the provisions of the Regulation dealing with cancellation and delay were "entirely unambiguous".

Legislative intent. The Court found that it followed from paragraphs 30 - 39 of its ruling that its interpretation was not inconsistent with the EU legislature's intentions. However, these paragraphs deal principally with the question of equal treatment, and all they say about legislative intent is to argue that recital 3 ("…the number of passengers denied boarding against their will remains too high, as does that affected by cancellations without prior warning and that affected by long delays") suggests that the legislature considered that the inconvenience suffered by the latter two groups of passengers was equivalent, and to refer in general terms to the Regulation's aim of increasing protection for all passengers.

Not only does recital 3 not justify such a desperate leap of reasoning, but the Court gave no consideration whatsoever to the travaux preparatoires, which give a better indication of legislative intent (as recognised by the Court in other cases), and which were put before the Court in the

arguments of the parties.

Legal certainty. The Court confirmed that the well-established principle of legal certainty requires that individuals should be able to ascertain unequivocally what their rights and obligations are and to take steps accordingly, but all it says in response to the arguments of the parties on this crucial point is "Having regard to the requirements arising from the principle of equal treatment, air carriers cannot rely on the principle of legal certainty and claim that the obligation imposed on them by Regulation No 261/2004 to compensate passengers, in the event of delay to a flight, up to the amounts laid down therein infringes the latter principle", and to state that passengers and carriers were able to be perfectly clear about their rights and obligations with regard to compensation for delay once the Sturgeon ruling was delivered.

In other words, according to the Court the principle of equal treatment is superior to that of legal certainty - an astonishing contention, and one inconsistent with the rule of law and common sense, particularly given that the "principle" of equal treatment is much less well-defined and more fluid, and open to interpretative differences. And it is patently self-serving and offensive to claim that once that Court had effectively re-written the Regulation in its Sturgeon ruling the law was perfectly clear.

Proportionality. The Court rejected arguments based on proportionality on the grounds that: - the aim of the Regulation is to ensure a high level of protection for passengers regardless of whether they suffer denied boarding, cancellation or delay; the entitlement to fixed compensation ensures a high level of protection, in accordance with this aim; this is "particularly appropriate...given that the loss of time suffered is irreversible, objective and easily quantifiable"; the financial consequences for air carriers are not disproportionate to the aim, because the obligation only arises in the case of long delays, a defence of extraordinary circumstances is available and air carriers may seek recovery from third parties who caused the delay; the case law shows that the importance of consumer protection may justify negative economic consequences for certain economic operators; data provided to the Court shows that only less than 0.15% of flights give rise to the obligation to pay compensation; and no evidence was presented showing that it would lead to an increase in fares or reduction in services.

Arguments based on proportionality, rightly, have to surmount considerable hurdles, and are rarely sufficient on their own, and it is not surprising that they did not succeed in this case. However, there may be some scope for debate about the number of flights affected and/or the degree of the financial burden on airlines and hence the likelihood that the additional expense will be passed on to passengers by way of higher fares.

Temporal effects. Finally, the Court dealt with the question of the temporal effects of the ruling. It confirmed the general rule that when the Court interprets a rule of EU law, that interpretation applies from the time of its entry into force, unless exceptionally, in the context of the actual judgment in question, the Court considers that derogation from this principle is justified. It pointed out that, as the Court in its original Sturgeon ruling considered whether derogation would be justified and concluded that it was not, that was the end of the matter.

There can be little doubt that this is the correct approach, as an interpretation of a legislative provision by a court simply clarifies the meaning of the provision, which it has had since it came into force, even though that meaning may not have been previously clear. The problem lies not in retroactivity of the interpretation but in the incorrectness of the interpretation.

What to do now?

The CJEU has made its view very clear, after having been given the opportunity to reconsider its earlier ruling, and this interpretation of the law is final: there is no possibility of any further reconsideration or appeal. So on first sight it would seem that airlines have no option but to pay the required compensation levels in the case of properly substantiated claims for delay. However, several comments may be made:

Defence of extraordinary circumstances. As the Court confirmed, a carrier will be excused from the obligation if it can show that the delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, within the meaning of Article 5(3) of the Regulation. Following the strict approach taken by the Court to the scope of this defence in its Wallentin-Hermann ruling, it will generally be difficult for carriers successfully to invoke this defence where delays are caused by technical problems. However, many delays are caused by reasons clearly outside the carrier's control, such as weather, ATC and airport problems - indeed to a greater extent than is the case with cancellations - so that the defence should be available in a significant number of cases.

Time bar. Given the Court's finding that its interpretation of the Regulation applies as from its entry into force on 17 February 2005, an important practical question for airlines will be when backdated claims for compensation for delay may be refused on the basis that they are time barred. At present, the applicable law on this is not clear. One possibility is that courts may apply the Montreal Convention's 2 year limitation period, although this is hardly consistent with the CJEU's view that the matter falls entirely outside the scope of the Convention. Otherwise, in the UK at any rate a possibility is that courts would apply the six year limitation period applicable to claims for breach of statutory duty.

Recovery from third parties. This is not the first occasion on which the Court has emphasised that the burden on carriers is reduced by their ability to recover from third parties responsible for causing the delay. However, while this possibility exists in theory, the Court does not seem to appreciate that in reality it is likely to be of little assistance, as the third parties involved in many cases (eg, ATC providers, airports) will be able to invoke the protection of immunity and/or exclusion clauses.

Direct effect? An important question which arises is whether a passenger may bring a successful action against an air carrier which refuses to pay compensation for delay in circumstances where it is required in accordance with the Court's ruling. In view of clear EU jurisprudence on the direct effect of EU regulations (ie, that they may be invoked by private parties for their benefit in national courts), one would have thought that the answer to this question was clear. However, in 2011 an English County Court (in Hendy v Iberia) held that Regulation 261/2004 had no such direct effect, and although this is clearly a decision of a lower level court without precedential value, it is not impossible that other courts might take a similar view, particularly given that the right to compensation for delay arises not from the clear wording of the Regulation but from judicial interpretation of it.

Montreal Convention. Although the Court held that the obligation under the Regulation to pay compensation for delay falls outside the scope of the Montreal Convention, the fact that it did not address the question of what would happen if a passenger brought an action in respect of an airline's non-payment could possibly leave it open for a national court, without actually contradicting the CJEU, to hold that such an action fell within Article 29 and to dismiss the claim on the basis that it was for non-compensatory damages for delay, not permitted by Article 29.

Non-EU States party to the Montreal Convention might also wish to consider the possibility of commencing proceedings before the International Court of Justice against EU Member States for contravening their obligations under the Montreal Convention by adopting legislation inconsistent with Article 29, or at least making complaints through diplomatic channels about this infringement of their Convention obligations and the apparent disregard for the rule of law in the EU.

Prosecution and criminal aspects. Non-compliance by a carrier would raise the further question whether it could be successfully prosecuted - in the UK under the 2005 implementing Regulations, which make it an offence for a carrier not to comply with certain specified provisions of Regulation 261. The fundamental principle in criminal law (at least in the UK, and presumably a similar principle applies in other countries) that a person may only be subjected to criminal penalty on clear law, and the fact that it is by no means clear from the face of the law as written (as opposed to judicial interpretation of it) that non-payment of compensation for delay is an offence, may give some scope for a successful defence to any attempted prosecution.

Revision of the Regulation. This assumption of legislative powers by the Court makes the current review of the Regulation by the Commission and its shortly expected proposals for revision all the more important.

Further information

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