CLYDE&CO

Aviation Bulletin

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Contents

Diary dates

Clyde & Co Americas Airline Seminar

14-15 March 2013
The Penn Club, New York

Our inaugural Americas Airline Seminar program will cover topics such as:

- Handling common passenger claims
- DOT regulatory developments
- Recent issues arising under the Montreal and Tokyo Conventions
- Preemption and carrier liability for child abductions
- E-Discovery and document retention considerations for air carriers and their insurers
- Emergency response

For further information or registration details please email events.aviation@clydeco.com or contact the following Clyde US Aviation partners:

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We are pleased to be sponsoring the following industry events:

IATA Legal Symposium

17-19 February 2012
Radisson Blu Hotel, Berlin, Germany
Alan Meneghetti will be a Moderator at the Breakout Session: Airline Intelligence Data Products: Increased Efficiencies and Consumer Welfare v Too Much Transparency?

RAAKS - Russian Association of Aviation Insurers

Fourth International Aviation Conference
"Aviation Insurance in Russia"
26 February 2013
Swissotel Krasnye Holmy, Moscow
Maria Wood, Speaker

Malakut Brokers Conference

"Aviation in Russia: The Future is in the Clouds"
27-28 February 2013
Swissotel Krasnye Holmy, Moscow
Philip Bass will be participating in a Panel discussion

Willis, IATA, AAPA Asia Pacific Aviation Insurance Conference

5-8 March 2013
Hotel Mulia, Senayan, Jakarta, Indonesia

EU/UK merger control - Court of Appeal decision in *Ryanair v Competition Commission and Aer Lingus*

John Milligan

On 13 December the English Court of Appeal handed down a judgment which concluded that it would not contravene the obligation of 'sincere cooperation' between the EU and member states for the UK Competition Commission (CC) to proceed with its investigation into Ryanair's 29.82% stake in Aer Lingus. The European Commission is currently conducting a second phase investigation of Ryanair's current notified bid for the entirety of Aer Lingus' capital and this is due to be completed in January 2013. As a result of the ruling, the CC is under no obligation to stay its investigation. The CC has a statutory timescale of 24 weeks (extendable by up to eight weeks), and its investigation would be expected to be concluded after the EU Commission's decision.

EU proceedings

The facts of the case are unusual and have generated long running litigation on the interaction of the EU Commission's exclusive 'one stop shop' jurisdiction under the EU merger regulation 139/2004 with national merger control regimes, in this case the Enterprise Act 2002. Ryanair had first notified its bid for the acquisition of the whole of Aer Lingus (having already acquired a minority stake) to the European Commission in 2007. This was prohibited as incompatible with the competition rules, the Commission emphasising differences from previous airline mergers in that this was a merger of the two main airlines in a single country, operating from the same home airport (Dublin), both low-cost airlines, operating on a point-to-point basis and with a greater number of overlapping routes than in previous airline cases.

Aer Lingus had requested the EU Commission to order that Ryanair divest the shares it had already acquired, but the EU Commission refused to do so on the basis it had no such power. The EU merger regulation confers jurisdiction on the EU Commission over mergers in which, as a minimum, the acquirer has the possibility of exercising a decisive influence over the activity of the undertaking being acquired. Ryanair's stake fell short of this level. The Court of Appeal decision reports that, while the EU Commission concluded that it had no such power itself, the EU Commission suggested that the UK competition authorities might.

The Office of Fair Trading (OFT) initially indicated that that the EU merger regulation, which prohibits member states applying their own legislation to a concentration caught by the regulation, precluded it from investigating. Action by Aer Lingus before the EU Commission and the General Court seeking divestment and interim measures to prevent the exercise by Ryanair of voting rights were not successful; nor was Ryanair's appeal against the EU Commission's prohibition (Joined cases T-342/07 and T-411/07, 6 July 2010). Proceedings in the EU came to an end at this point.

OFT investigation

In September 2010 the OFT requested information from Ryanair under the Enterprise Act 2002 merger control provisions to enable it to decide whether its minority shareholding gave it a material influence over the behaviour and policy of Aer Lingus, as a result of which it would have jurisdiction to investigate. 'Material influence' is a lower level of control than the 'decisive influence' test used by the European Commission under the EU merger regulation.

The OFT has four months in which to refer a merger to the CC, time running from the date of completion, or the date the merger was made public if later, though there is an exception whereby the time is suspended where there are EU proceedings under way. Ryanair objected that this limit had expired in 2007.

The OFT in January 2011 decided that the time limit for reaching a decision on the minority acquisition did not begin to run until the expiry of the time for appealing the EU General Court's judgment. The Competition Appeal Tribunal (CAT) upheld the OFT, stating that, had the domestic merger rules been applied before Aer Lingus's appeal had been finally resolved, there would have been a risk of the OFT infringing Article 21(3) of the EU merger regulation (which provides that no Member State shall apply its national legislation on competition to any concentration falling within the scope of the EU merger regulation). That risk was such as to trigger the duty of sincere co-operation under Article 4 of the EU Treaty, meaning that the OFT was obliged to avoid that risk.

OFT referral to CC

The OFT subsequently referred Ryanair's minority shareholding to the CC on 15 June 2012. On 19 June Ryanair announced its public bid, invited the CC to stay its investigation and subsequently notified the EU Commission. The CC informed the parties that it had decided to continue its investigation and required the production of documents by Ryanair and responses to a merger enquiry questionnaire. This refusal to stay was the subject of the appeal to the CAT that the investigation should be stayed pending the EU Commission's investigation into the public bid on the basis of the exclusive jurisdiction of the EU Commission. The CAT held that Ryanair's minority holding did not constitute a 'concentration' under the EU merger regulation and that the CC's jurisdiction over the minority stake was distinct from the EU Commission's jurisdiction over the public bid and was, therefore, unaffected by the prohibition on applying national law to any concentration having a Community dimension.

The Court of Appeal upheld the CAT, adding that a cautious approach must be followed by the national authorities but generally stating that even if there was a theoretical possibility that the CC's decision on the minority shareholding could be relevant to that of the EU Commission on the public bid, or vice versa, the EU Commission's decision would be delivered first. In any event, even if the CC finished its investigation first, it could defer the implementation of any remedial action until the conclusion of the EU Commission's investigation.

EU "stops the clock" on the ETS

Mark Bisset

On 12 November 2012, the EU Climate Commissioner Connie Hedergaard announced that the Commission planned to "stop the clock" and suspend application of the EU Emissions Trading Aviation Directive 2008/1001 as regards flights to and from third countries on both EU and non-EU airlines. This means that the Directive will not be enforced and payment will not be required by EU regulatory authorities in respect of extra-EU flights by airlines which exceed their emissions limit and are unable to buy additional allowances.

Application of the Directive has been suspended until an ICAO Council meeting next autumn to allow a global market based initiative, which appears to have been gathering momentum, and which creates a chance to develop a global solution. The Directive has been widely criticised by non-EU airlines and governments and was subject to a challenge by the Air Transport Association of America (now Airlines for America) before the English High Court which was referred to the Court of Justice of the European Union (CJEU). In December 2011 the CJEU Grand Chamber held that the Directive was not contrary to the Chicago Convention and general principles of international law.

The Commission states that it is taking this step to allow ICAO a chance to put a global ETS solution in place but if this comes to nothing by next autumn the Directive will be reactivated.

Further details are expected from the Commission on how this "stop the clock" procedure will be implemented, but we set out in this brief note the answers to some of the main questions that have been raised since the announcement was made, so far as information is currently available.

Which flights are impacted?

The suspension applies to all "international" flights whether operated by EU carriers or non-EU carriers. An "international" flight is any flight to and from the EU, which includes for this purpose Croatia (being an accession state), the EEA states (Norway, Iceland and Liechtenstein) and (from 2014) Switzerland. The Directive continues to apply to all intra-EU flights whether operated by EU carriers or non-EU carriers.

How will this be implemented?

In the press announcement on 12 November 2012, Ms Hedergaard explained that whilst she has had regular consultations with the Member States prior to making the announcement, there would need to be a formal proposal which the European Council, the European Parliament and Member States would all have to endorse. However, she also stated that she would not have made the press announcement if she was not confident of their support.

The principle is that the Aviation Directive will remain fully in force but will be supplemented by a derogation that covers international flights. This will be done by way of adding a paragraph to Article 16 of the Directive so that action will not be taken against aircraft operators which do not meet the Directive's reporting and compliance obligations arising before the ICAO Assembly in respect of international flights. The only condition for this is that they have not received, or have returned, free allowances received in 2012 for such flights. Compliance sanctions will not be taken in case of the non-reporting of such emissions.

This derogation will need to follow the EU's co-decision procedure, and the Directorate-General for Climate Action (DG CLIMA) is hopeful that it will be ready by April 2013. There remains, however, the possibility that the European Council or, more likely, the European Parliament, may raise objections. Further, as the scheme is implemented through national legislation in each Member State, the derogation will have to be implemented nationally as well, so potentially there could be delay at the local level.

There is also, of course, the possibility of legal challenge to the validity of the derogation, in many respects relying on the mirror image of some of the arguments deployed by non-EU airlines first time round.

How does this impact the auctioning of allowances?

The percentage of auctioning remains at 15%. Consequently, a proportionately lower quantity of aviation allowances will be auctioned for 2012.

What about allowances that have been issued for compliance in April 2013?

According to their first calculations, the Commission expects to withdraw about two-thirds of the allowances that they had initially allocated to the 2012 period. The details will be published in the coming weeks by the Member States, and operators will be notified individually by their supervising authority.

What about small emitters?

A small emitter is a non-commercial air transport operator whose flights in aggregate emit less than 10,000 tonnes of CO2 per annum, or which operates fewer than 243 flights per period for three consecutive four-month periods. A small emitter can take advantage of a simplified procedure to monitor its emissions of CO2 from its flight activity. We understand that small emitters will still be bound to comply with the EU ETS despite the derogation, but will only need to pay for emissions in Europe. More detail is awaited.

What does the Commission expect from the 2013 ICAO Assembly?

No alternative scheme has yet been agreed by ICAO and no alternative scheme is going to be in place for a few years yet, so what does the Commission expect from the 2013 ICAO Assembly? The Commission expects that the Assembly should agree on a global market-based measure (MBM) with a realistic timetable and road map for it to apply, alongside endorsing an ICAO framework for facilitating states' application of MBMs pending application of the global measure. There should also be "progress" on the development, submission and review of State action plans.

What if the 2013 ICAO Assembly fails to reach a satisfactory agreement?

In the initial press briefings the impression was given that the compliance obligations are being deferred and not waived (the deferral was described as "temporary"). It appeared that should the meeting not produce the desired outcome, the deferred obligations would be applied "automatically".

However, according to the latest Commission briefing (10 December 2012), it is stated that "the derogation for flights operated to and from 3rd counties in 2012 will be permanent".

Automatic re-activation of obligations would have raised a number of questions. How is an operator to meet its 2012 obligations? How is an operator to retrospectively monitor its emissions unless it has already captured the relevant data in compliance with the scheme? (We would note here that airlines would be well advised to continue their monitoring and reporting). Does the deferral mean that the 2012 obligations must be met by surrendering the necessary quantity of allowances by the next compliance deadline, i.e. by 30th April 2014 (for 2013)? If so, what types of allowances may be used? May Phase 2 (2012) allowances be used to meet a Phase 3 (2013 – 2020) obligation, notwithstanding that the EU Directive states that units issued for Phase 2 may only be used in that period? Phase 2 EUAs are expected to be cancelled and replaced by Phase 3 allowances by July 2013, will this proceed? As always, the devil is in the detail and further legislation (following the co-decision procedure) may well be required if ETS obligations are re-activated; in the meantime, operators are left to face a lengthy period of uncertainty until it is absolutely certain that the 2012 derogation is to be permanent (we await the actual proposal).

What about the US ETS Prohibition Act? (the "Thune" legislation)

On 3 December 2012 President Obama signed into law the bill banning US airlines from compliance with the ETS. This Act empowers the US Department of Transport to enact the necessary secondary legislation, but DG CLIMA believes that the DoT will not do it, at least not until October 2013, which is the date of the ICAO General Assembly. It should be noted that the Act does not preclude US carriers from respecting their ETS obligations for intra-European flights.

In a rehearsal of the arguments made in the ATA case, DG CLIMA believes that the Act is in breach of the EU – US Open Skies Agreement of March 2010.

Is the "stop the clock" decision discriminatory?

The "stop the clock" measure seems to defeat one of the key principles underpinning the validity of the original inclusion of aviation in the EU ETS, that of non-discrimination in the treatment of operators. We may recall with a touch of irony the words of Advocate General Kokott in rejecting the ATA's legal challenge to the extra-territorial features of the ETS: "*If the EU legislature had excluded airlines holding the nationality of a third country from the EU emissions trading scheme those airlines would have obtained an unjustified competitive advantage over their European competitors…Such favourable treatment would have been unjustified in view of the objective of Directive 2008/101 and such a course of action would not have been compatible with the principle of fair and equal opportunity laid down in Article 2 of the Open Skies Agreement*".

Arguably hub and spoke international airlines based in the EU will be the biggest losers as a result of this interim measure. For example, a passenger flying from Brussels to New York via Heathrow will face an EU ETS charge on his or her flight to London. However, a passenger flying to New York direct from Brussels will face no emissions charges at all.

Conclusion

This is a dramatic U-turn by the Commission and may well have arisen due to political pressure which has been brought to bear by many third country carriers and their governments, for example from the US, China, Russia and India. The decision will in many ways be welcome to airlines but its economically discriminatory effect will be troubling to EU airlines and it raises some very difficult questions of detail to which the answers are not presently clear. It is to be hoped that the further details to be given in forthcoming EU technical briefings will provide sufficient clarification.

French judgment on application of Regulation 261/2004 to return flights by non-Community carriers

Benjamin Potier

The *Cour de Cassation*, French Supreme court, rendered a decision on 21 November 2012 clarifying the notion of place of departure under EU Regulation 261/2004 when the passenger travels with a round-trip ticket.

Regulation 261/2004 provides for automatic compensation of passengers in the event of cancellation of flights and denied boarding. This regulation applies (a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies; and (b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies (…) if the operating air carrier of the flight concerned is a Community carrier.

In this case, the passenger had bought from Air Algérie a round-trip ticket from Paris (Roissy-Charles de Gaulle) airport to Annaba (Algeria). The delay occurred in the return from Annaba to Paris. Although the judgment of the first instance tribunal is not available, it is assumed that the claimant deemed compensation for flight delay to be payable on the basis of the Sturgeon judgment. As Air Algérie is not a Community carrier, the Regulation could apply only based on (a) above, and therefore the question was whether the place of departure as defined by the regulation was Paris or Annaba.

The first instance tribunal (*Juge de proximité*, who has jurisdiction for claims below 4,000€) ruled that the place of departure was Paris because it was the place where the passenger started his journey to Annaba. The Cour de Cassation overruled this decision, deciding that the place of departure was Annaba.

Interestingly, the *Cour de Cassation* cited the judgment of the European Court of Justice dated 10 July 2008 (Emirates Airlines – C173-07), which rendered a similar ruling. It is not common that the *Cour de Cassation* cites a decision of the European Court of Justice, thus showing an unexpected deference to this Court.

Even more interesting is the fact that the Cour de Cassation declared that the Warsaw Convention applies to this matter. This can be seen as the mere result of the non-application of Regulation 261/2004. However, one could argue that the Montreal Convention should apply because the place of destination was Paris (Roissy-Charles de Gaulle). The Warsaw Convention would apply only if the place of destination was Annaba in Algeria because Algeria is not a party to the Montreal Convention but only to the Warsaw Convention. Although there is no clear precedent of French courts on this point, it is commonly understood that the place of destination within the meaning of both conventions (Montreal and Warsaw) in a round-trip journey is the place of original departure as it is also the final destination of the passenger.

Therefore this decision can be interpreted in two ways:

- Either the *Cour de Cassation* did not see that the Montreal Convention, not the Warsaw Convention, should apply. Indeed, in principle the Cour de Cassation only rules on the arguments (*moyens*) raised by the parties; the only dispute was whether Regulation 261/2004 applied to this matter; Air Algérie claimed that the Warsaw Convention should apply in spite of Regulation 261/2004, but this does not seem to have been disputed by the claimant; therefore the *Cour de Cassation* had no reason to apply the Montreal Convention rather than the Warsaw Convention
- Or the *Cour de Cassation* intended to apply the Warsaw Convention and not the Montreal Convention to this matter, which means that the *Cour de Cassation* took the view that the place of destination with the meaning of the Conventions is not the place of departure of a round-trip ticket

The facts that (1) the question raised by the parties was not that of the applicability of either the Warsaw Convention or the Montreal Convention and (2) this decision is not meant to be published ("non publiée au bulletin") makes it inadvisable to place too much significance on this aspect of the judgment, and suggests that the *Cour de Cassation* did not intend to make a decision on such an important issue as the place of destination under the Conventions. The principle importance of the judgment therefore lies in the *Cour de Cassation's* confirmation of the approach of the European Court of Justice – ie, that, for the purposes of Regulation 261/2004, the place of departure of the return flight in a round-trip journey is to be considered to be the intermediate point in the journey, and hence that the EU-bound leg of a round-trip journey by a non-Community carrier is not subject to the Regulation.

European Commission updates the banned list

Alan Meneghetti
Rebecca Chant

The European Commission has recently adopted the twentieth update of the list of airlines and air operators who are subject to restrictions on operating within the EU due to safety deficiencies (the Banned List).

Background

Regulation 2111/2005 was a response by the EU to a number of highly publicised aircraft crashes involving non-EU operators and EU citizens, including the Birgenair Flight 301 crash in 1996, which resulted in the death of 167 German nationals and, in 2004, the accident off Sharm-el-Sheikh involving Flash Airways which caused the death of a large number of French nationals. One of the objectives of the Regulation is to provide more transparency to air passengers in respect of air carriers that do not meet relevant EU safety standards. This objective is accomplished through the publication of the Banned List, which lists all carriers which are banned from operating in European airspace or which are otherwise subject to traffic restrictions for safety reasons.

Carriers that transport passengers and cargo for commercial purposes are included on the Banned List (irrespective of their nationality) on the basis of the following criteria:

- Evidence of serious safety deficiencies on the part of a carrier
- A lack of ability (or willingness) on the part of the carrier to address safety deficiencies (including a lack of transparency or insufficient action)
- A lack of ability (or willingness) on the part of the authorities responsible for overseeing a carrier to address safety deficiencies (including a lack of co-operation, insufficient ability etc)

Every three months the Commission must assess whether the Banned List needs to be updated to add or remove certain carriers. This assessment is made by the Air Safety Committee, which is composed of representatives from EASA, the 27 Member States of the EU, Croatia, Norway, Iceland and Switzerland.

The Banned List

The Banned List is presented in two parts: Annex A lists those carriers which are subject to a complete operating ban within European airspace, whereas Annex B lists those carriers which are subject to operational restrictions (and what those restrictions are). It is worth noting that carriers listed in Annex A will still be permitted to use aircraft in the EU that are wet-leased from carriers not contained on the Banned List and, indeed, this way is often used by carriers which are on the Banned List in order to get around the restrictions.

The Banned List includes blanket bans on all carriers subject to oversight from an aviation authority that is unable or unwilling to rectify safety-related shortcomings. This may be evidenced by:

- A lack of cooperation with the aviation authority of a Member State with regard to safety concerns about a carrier licensed or certified by that authority
- An inability to enforce relevant safety standards, such as corrective plans drawn up by the ICAO following inspections under the Universal Safety Oversight Audit Programme

In the current version of the Banned List, all but three of the entries relate to blanket bans for aircraft licensed or certified by specific national aviation authorities.

November 2012 update

There were no surprise additions or deletions from the Banned List in its most recent update, which resulted in two hundred and eighty-seven airlines from 20 non-European countries being on the Banned List. The most notable addition are all carriers from Eritrea and the most notable removals are of Jordan Aviation and of all carriers from Mauritania.

Right of appeal

If an airline considers that it should be taken off the Banned List because it complies with the relevant safety standards, it can address a request to the Commission or a Member State, either directly or through its civil aviation authority. Only the Commission or a Member Sate may make a request for the Banned List to be updated. The Air Safety Committee will then assess the evidence presented to substantiate the request for removal from the Banned List and formulate an opinion to the Commission.

Conclusions

Although there were no unexpected additions or deletions from the Banned List in the most recent November update it is of some concern that there are still numerous civil aviation authorities and, to a lesser extent, airlines, which appear to fail to meet the safety standard requirements of the EU.

The Banned List does, however, continue to divide opinion and raise questions as to whether it is the most effective way of addressing perceived safety deficiencies and shortcomings. Although some of the most recent amendments to the Banned List were due to a meaningful improvement of safety standards by the relevant civil aviation authority and/or airline, there is still debate as to whether or not a more collaborative approach (along the lines of that taken by the US) to remedy the deficiencies and shortcomings might produce results which are of greater long-term benefit to the global aviation industry.

Aviation noise: the EU regulatory regime

Alan Meneghetti
Rebecca Chant

According to the European Commission, the European aviation sector is one of the best performing and most dynamic parts of the European economy. Almost 800 million passengers (one third of the world market) travel each year by air from, to and within the EU. Whilst the importance of the aviation industry to the European economy is recognised, there is concern to regulate aviation noise. This article explores the current European regulatory regime on aviation noise and proposed new European measures.

Why regulate aviation noise?

The potential health consequences of elevated sound levels are well documented. These include hearing impairment, hypertension, sleep disturbance, stress and anti-social behaviour.

A statistical analysis of the health effects of aviation noise on over one million residents around Cologne airport concluded that aviation noise significantly impairs health, increasing the risk of coronary heart disease and heart attacks.

The current law

The current European regime on aviation noise largely derives from Directive 2002/30, which applies to EEA airports with more than 50,000 civil aircraft flights per year.

'Balanced approach'

The Directive obliges Member States to take a 'balanced approach' to aviation noise management. This is an approach which attempts to limit noise through:

- Reduction of aircraft noise at source
- Land-use planning and management measures
- Noise abatement operational procedures
- Local operating restrictions

This is based on the balanced approach suggested in Resolution A35-5 of the International Civil Aviation Organization.

The Directive provides that Member States should consider the costs and benefits of proposed measures and airport-specific characteristics, and, importantly, should ensure that measures are not more than necessary.

The Directive prescribes factors that must be taken into account when operating restrictions are considered. These include an inventory of current measures, a forecast of the levels of noise if the measures were not to be implemented and an assessment of the impact of the new measures.

Member States must ensure that no restrictions are introduced without prior consultation of interested parties, which can include airport and airline operators, pressure groups and residents' associations.

'Marginally compliant' aircraft

The main method by which the Directive seeks to manage aviation noise is by the withdrawal of 'marginally compliant' aircraft. These are aircraft for which the difference between the certified noise level and the maximum permitted noise level, as described in the Convention on International Civil Aviation, is not more than 5EPNdB (Effective Perceived Noise in Decibels). The Directive allows for the introduction of operating restrictions which aim to facilitate the withdrawal of marginally compliant aircraft, first by prohibiting increases in their movements as compared to the previous year, and then by requiring operators to reduce their movements by 20% per year.

Reaction to the Directive

Positive points

A European Commission report found that stakeholders appreciated the introduction of a framework in which all relevant interests were taken into account when assessing new noise control measures. Some airports have indicated that the Directive provides a useful checklist of potential measures and has raised awareness of possible actions and good practice among small and medium-sized airports.

Focus on marginally compliant aircraft

However, the Directive's focus on marginally compliant aircraft has attracted criticism. This aspect of the Directive is considered to be largely irrelevant to many operators' businesses, as economic pressures and natural replacement cycles have led to an almost entirely compliant fleet. Less than 12% of aircraft in the EEA and Switzerland and less than 20% of aircraft worldwide are marginally compliant.

Inconsistent implementation

EU directives contain general principles which Member States must then implement by way of their local law, providing Member States with an element of discretion. The separate implementation of the Directive by each Member State has led to a wide variation in the regulatory regime across Europe.

Scope

Many have questioned the need for, and purpose of, the Directive, as it has only been used in respect of a limited number of airports. Stakeholders are frequently of the opinion that the Directive is not sufficiently clear and, in many cases, adds little or nothing to existing national legislation. In the UK, for example, the Civil Aviation Act 1982 already empowers the Secretary of State to prescribe measures relating to aviation noise.

The proposed new law

The new law

In December 2011 the European Commission launched its 'Better Airports Package' of suggested measures to address capacity shortages at European airports and improve the quality of services offered to passengers. The package contained legislative proposals on slot allocation, ground handling and aviation noise.

It was proposed to replace the Directive with a new EU regulation. As a regulation rather than a directive, the Regulation would be directly applicable in each Member State: it would not require implementation under local law. Aviation noise regulation would therefore be harmonised across Europe.

In June 2012 the European Transport, Telecommunications and Energy Council agreed on a draft of the Regulation, amending several of the European Commission's proposals. There are further legislative stages to be completed before the Regulation becomes law.

Balanced approach

The European Commission has stressed that the Regulation is not about setting noise targets or noise budgets (although many states, including the UK, retain the ability to do so under national legislation), but instead focuses on the decision-making process.

The Regulation will apply the balanced approach to aviation noise management consistently across the EEA. Disparities between Member States will be removed and this will ensure that certain processes are adhered to where measures are taken to mitigate aviation noise.

The Regulation goes further than the Directive in stipulating a process that Member States must follow. They must:

- Asses the noise situation at individual airports
- Define the environmental objective
- Identify available measures
- Evaluate the cost-effectiveness of the measures
- Select the measures
- Consult with stakeholders in a transparent way
- Decide on measures and provide sufficient notification
- Implement the measures
- Provide for dispute resolution

Regular assessments

The Regulation proposes regular assessments of the noise situation at airports and that, where the assessment reveals that new measures are necessary, a forum for cooperation is established between airport operators, aircraft operators and air navigation service providers. This forum will consult regularly with local residents or their representatives, giving them at least three months to provide responses on proposed measures.

Although the Regulation requires consultation with local residents, it does not appear that any specific weight should be given to their grievances or that they should be able to block proposed measures.

Marginally compliant aircraft

The Regulation will allow national authorities to phase out the noisiest aircraft more effectively. A stricter threshold will be applied for the definition of marginally compliant aircraft to reflect the modernisation of fleets and to expedite the phasing out of older aircraft.

Next steps

The draft Regulation was examined and debated by the Transport and Tourism Committee on 21 November 2012, and the debate was reported in the Official Journal at OJ 11/12/2012-34. Concerns had been voiced by the German Bundesrat, Austrian Bundesrat, French Senate and Dutch First Chamber, over the parts of the Regulation which would allow the EU Commission to veto noise-abatement measures, particularly as these are often decided on as a result of long negotiations between stakeholders. In the revised draft, the Committee has stressed that the EU Commission's oversight of national measures should obey the subsidiarity principle, and has removed the EU Commission's power to override measures approved and decided on by Member States.

Further amendments have been made to introduce considerations relating to the health and quality of life of residents into the matrix of 'cost effectiveness'. These measures go some way to diluting the position taken in the original draft, which would have focused heavily on purely economic considerations.

A debate was held in the European Parliament on 11 December 2012, and the following day the European Parliament voted to approve the draft Regulation 501 votes to 155 with eight abstentions. We now have to wait for the Council's first reading position in respect of the draft Regulation.

New Russian rules on compensation in disability and personal injury cases

David Willcox
Maria Wood

Another attempt to provide guidance and clarity in connection with the level of compensation payable in personal injury cases has been undertaken by the Russian Government.

The 2010 Rules

"The Rules on Obligatory Insurance of Carrier's Liability to Passengers" were approved by the Russian Government in 2008 and came into force on 1 January 2010 as an integral part of Section 133 of the Russian Air Code 1997.

The 2010 Rules provided obligatory minimum payments in personal injury cases, depending on the nature of the injury. Referring to "obligatory insurance" and laying down a compulsory minimum, the 2010 Rules appeared rather to provide for a personal accident type of payment, as opposed to an assessment of compensation on a legal liability basis.

The 2010 Rules applied to injuries sustained by passengers during Russian domestic carriage by air, and introduced three bands of compensation depending on the seriousness of the injury. A schedule of injury types was set out under each of the three bands. Thus, assessment of compensation seemed likely to be a very straightforward exercise, but this has not proved to be the case.

A problem faced by defence lawyers was that the purportedly exhaustive list of injuries for which compensation could be awarded under the 2010 Rules was rather lacking in precision. There was also a significant difference between the three levels of compensation for each band: RUR 300,000 (USD 9,700) for minor injuries; RUR 600,000 (USD 19,420) for more serious injuries; and RUR 1,000,000 (USD 32,500) for the most serious injuries. Lawyers were supposed to be able to match the specific injury to one of the three categories but, of course, injuries are never the same and often multiple injuries may be sustained, some major, some minor, so this proved a difficult exercise. There was a potential risk of under, or over, compensating victims.

If a passenger sustained injuries crossing two different compensation bands, a practice developed whereby compensation was awarded on the basis of the more severe injury. Insurers began to demand that medical reports specify precisely the injury sustained so as to establish precisely which band an injury fell into and, thus, the proper level of compensation. That caused additional aggravation for claimants and associated difficulties for settlement.

Problems also arose if the injury was so small that it fell in no category at all. Further, there were concerns that, as to claims under the international Warsaw/Hague regime, the Russian courts would use these Rules (where compensation is seen as "fixed" and "automatic") as a benchmark for awards of compensation, even though strictly speaking the Rules apply only to domestic contracts of carriage.

The 2013 Rules

On 15 November 2012, the Russian Government adopted new Rules on "Determining Insurance Compensation Level in Personal Injury". The Rules come into force on 1 January 2013.

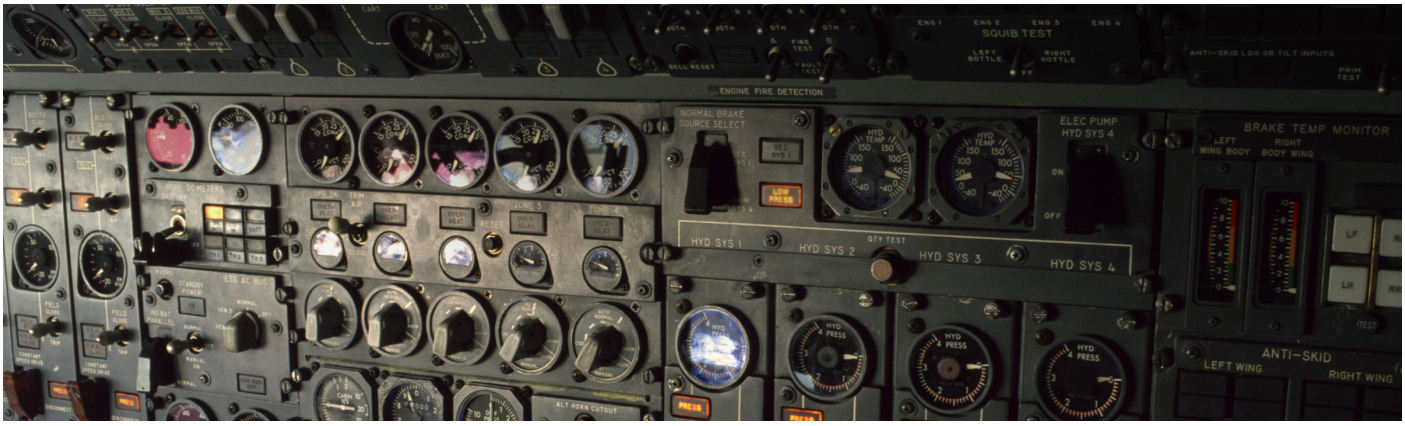
The 2013 Rules provide a much more extensive list of injury types and a new methodology for calculation, theoretically to allow an individual assessment of each specific injury. It is no doubt hoped that this will avoid defendants – and claimants – having to try to pigeonhole each injury into the one of three bands provided in the 2010 Rules. Clearly, this should be an improvement.

The 2013 Rules also provide for a fixed amount of compensation for injuries which qualify for first, second and third degrees of (permanent or partially permanent) disability, in the amounts of RUR 2,000,000 (USD 65,000); RUR 1,400,000 (USD 45,000) and RUR 1,000,000 (USD 32,000) respectively. Children sustaining disability will be awarded USD 2,000,000 (USD 65,000).

As to personal injuries not equating to disability, the 2013 Rules provide for assessment of damages by reference to a specific percentage "multiplier" (or scale) to be applied depending on the nature and extent of the injury. The percentage will then be applied to the baseline figures set out in the three compensation bands, provided by the 2010 Rules. Since 2010, many policies provide specifically for coverage for the payment obligations set out in the 2010 Rules.

While the more extensive listing of the injuries will be helpful, application of the 2013 Rules may still be problematic. For example, if a claimant sustains a fractured jaw, the 2013 Rules require a multiplier of "10%", but 10% of what? The Rules suggest the percentage could be applied to any of the three set bands for compensation. Insurers will in many cases have to decide how they wish to apply the Rules, and the courts are likely to be called in to decide where there is a difference of views.

It therefore remains to be seen whether new rules prove to be more efficient and productive and how they will work in practice.



Increasing holiday pay for airline pilots?

Peter Roser

In a decision delivered in October 2012, in *British Airways v Williams and others*, the Supreme Court considered whether a pilot's holiday pay should take into account certain contractual supplementary payments. It confirmed that holiday pay should be calculated on the basis of normal remuneration, which will include remuneration intrinsically linked to the performance of contractual tasks. Holiday pay should not, however, extend to remuneration that is intended to cover ancillary expenses and costs.

Background to Supreme Court's decision

Under collective agreements incorporated into their contracts, BA pilots were entitled to basic pay plus two supplementary payments (a "flying pay supplement" and a "time away from base allowance"). However, in periods of statutory annual leave the pilots were only paid basic pay. The pilots claimed that the two supplements should have been included in their holiday pay calculation and brought claims in the Employment Tribunal. Ms Williams acted as lead claimant for some 2,750 claimants employed by BA.

An Employment Tribunal and Employment Appeal Tribunal found in the pilots' favour; however, the Court of Appeal overturned the decision and found that there was no breach where BA paid the pilots basic pay only during periods of leave.

The pilots appealed to the Supreme Court, which concluded that the requirements of the Working Time Directive and the Aviation Directive (which governed the calculations of payments for leave and have been incorporated into UK domestic law via the Working Time Regulations 1998 and the Civil Aviation (Working Time) Regulations 2004 respectively) were unclear. Accordingly, the Supreme Court referred a number of questions to the Court of Justice of the EU (CJEU) seeking clarification on the meaning of the two Directives.

Last year the CJEU responded by stating that, in line with the annual leave provisions of the Working Time Directive, the Aviation Directive requires that airline pilots are entitled not only to basic salary but to "normal remuneration" during statutory annual leave. Its reasoning was as follows:

- "Paid annual leave" under the Working Time Directive meant that workers on holiday should receive their normal remuneration. The purpose of holiday payment is to put workers in a position which is comparable to the position they are in during periods of work.
- Remuneration linked intrinsically to the performance of tasks which a worker is contractually required to perform (in the case of airline pilots, payments in respect of time spent flying) must be taken into account when calculating holiday pay.
- In contrast, however, components of remuneration which are intended exclusively to cover ancillary costs (e.g. travel and subsistence) arising at the time of the performance of contractual duties need not be taken into account when calculating holiday pay.

The case was then returned to the UK Supreme Court to determine whether various components comprising the pilots' total remuneration met the criteria to be included in the holiday pay calculation.

Supreme Court

The Supreme Court concluded that the claims should be remitted to the Employment Tribunal for further consideration of the appropriate payments to be made to the pilots in respect of the periods of leave. Their reasoning was as follows:

- Holiday pay should include remuneration intrinsically linked to the performance of contractual tasks. It is therefore expected that the Employment Tribunal will find that the "flying pay supplement" (which is a guaranteed payment a pilot receives when flying) should be included for the purposes of calculating holiday pay.
- As to the "time away from base allowance", the Employment Tribunal must decide whether the parties genuinely intended that such payments would exclusively cover costs for time spent away from home, in which case they should not be included.

What this decision means for employers

This case must now go back to the Employment Tribunal to decide whether or not the disputed payments should be included in the calculation of holiday pay. Employers in the aviation industry should therefore watch out for the Tribunal's decision which, if decided in favour of the claimant pilots, will be highly significant, potentially resulting in increasing employers' costs.

Compensation for flight delays: the European court abandons the rule of law

John Balfour

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", because 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 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.

Some carriers have taken the view that the prescription period under the Montreal Conention should apply, there extinguishing the right to bring proceedings after two years. However, the CJEU has recently ruled in the *Joan Cuadrench Moré v KLM* case that it a national law, and not the Convention, which will dictate the relevant limitation period. This is consistent with the CJEU's previous view that Regulation 261 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.

For further information, please contact Alan Meneghetti, Thomas van der Wijngaart, Peter Macara or John Balfour.

English Court of Appeal holds no right to damages for breach of EU Regulation 261/2004

Nick Medniuk

Payment of compensation under the EU Regulation 261/2004 is a legally controversial topic. Unlike, the much-awaited ruling of the CJEU in the joined *TUI* and *Nelson* cases (discussed above), the English Court of Appeal decision in *Graham v Thomas Cook Airlines UK Limited* has been rather unfairly overlooked. Perhaps this is because, with so much controversy surrounding Regulation 261/2004, there is not much print room left for a sensible domestic decision. Much more slowly than the ash cloud, upon which the claim is based, reached UK airspace, proceedings went through two appeals to the Court of Appeal. Amid a number disappointing decisions here is a respectable decision that should not be ignored in the debate about the scope of the Regulation. With GBP 50 million potentially at stake, this cancellation claim was optimistic but yet not one which Thomas Cook could take lightly.

Background to the Court of Appeal decision

On 14 April 2010, the spread of the ash cloud from the Icelandic volcano Eyjafjallajökull had the effect of closing UK airspace from 15-20 April 2010. One consequence was the cancellation of Thomas Cook's flight from Manchester to Jamaica, scheduled for 18 April 2010. At the time, there was no clarity about when the UK airspace would re-open. One of the many affected passengers, Miss Najite Graham, obtained a full reimbursement of her ticket price through her travel agent upon request by her father.

Subsequently, and despite the refund, he asserted that he had been provided with misinformation and required his daughter's flight to be rescheduled under Regulation 261/2004 "for the earliest possible date in June". Initially, this request was refused, prompting Miss Graham to commence County Court proceedings. Complimentary tickets were later issued for both father and daughter, and they flew to Jamaica on 14 June 2010.

Notwithstanding that the tickets were intended as a goodwill gesture, the Claimants continued proceedings, seeking:

- General damages for distress caused by the cancellation
- A sum for wasted expenditure incurred by a third party
- Punitive or exemplary damages of up to GBP 50 million

Both parties applied for summary judgment. While Thomas Cook was held to be in breach of Article 8 of the Regulation, the claim was ultimately dismissed because it was held to be governed exclusively by Article 19 of the Montreal Convention, where cancellation "incurs delay". The remedies under the Convention did not allow for Miss Graham's claim for damages, especially in view of the fact that punitive/exemplary damages are excluded by Article 29 of the Convention. Further, Mr Graham's claim was struck out as he had no cause of action as a stranger to the contract of carriage nor did he have any passenger rights under the Regulation.

Claim dismissed – why appeal?

Upon an application for summary judgment, the District Judge must have been satisfied that the claim had no real prospect of success and that there was no compelling reason for a trial. However, as noted above, this Regulation has been under constant review at the European level throughout the period of this litigation, and the judge did not rule on whether the Regulation gave rise to a separate cause of action in damages.

The claimant's first appeal, to the High Court, was dismissed, with the Court holding that the Regulation did not provide for a private law cause of action for damages and agreeing with the District Judge that the Montreal Convention exclusively governed the claim and did not support any claim for damages.

However, permission was rather cautiously given for a further appeal to the Court of Appeal on the basis that the Convention might not apply to cancellation (as distinct from a delay or an incident that occurred before boarding). The caution related to other issues that could still preclude recovery under general law.

The appeal – no right to damages under Regulation 261/2004

Ironically, the Court of Appeal dismissed the appeal without deciding upon the applicability of the Montreal Convention but noted that, since it is a complicated matter of law, it would not be appropriate to grant a summary judgment on this issue.

The issues focussed on whether Miss Graham could sustain a claim for damages, either under the contract of carriage or otherwise. The judges concluded that she could not.

Since the claim was mainly based on Thomas Cook's (unappealed) failure to offer a choice of reimbursement or rerouting to the final destination, as required by Article 8 of the Regulation, the basic problem for the Court was deciding whether:

- A breach of Article 8 of Regulation 261/2004 provides for a civil action for damages
- If so, were the damages claimed legally sustainable?

In upholding the High Court's view that Article 8 rights do not include a right to damages, the Court noted that remedies for breach of the Regulation in the UK were dealt with by the enabling statutory instrument, which makes breaches a criminal offence (enforceable by the CAA).

The claimant then advanced an argument that Article 12 of the Regulation, which provides that the Regulation "shall apply without prejudice to a passenger's rights for further compensation", allows for a claim outwith the scope of the Regulation. This point was comprehensively dealt with by application of the CJEU's decision in *Sousa Rodriguez v Air France* in 2012, deciding that additional losses caused by a breach of Article 8 may not be claimed. The term 'further compensation' was held to show that the remedies provided for under Article 8 are not exhaustive and so allows a court to award compensation either under the Montreal Convention or for breach of contract under domestic law.

Other matters of interest – breach of contract and damages for distress at common law

The flight cancellation was not the breach about which the claimants complained, rather it was the failure to comply with contractual obligations post-cancellation. Where such a claim falls outside the Convention, one has to look at the terms of the contract and to general law. Significantly, for Thomas Cook, the contract was for carriage only, rather than a contract for a holiday with a tour operator.

The cancellation of a flight will, almost inherently, cause some distress and anxiety to affected passengers. The claim for damages for distress, however, failed not only because of the application of the Convention but also because damages for distress are permitted only rarely in actions for breach of contract; whereas breach of contract for a holiday is one such case, breach of a simple contract for carriage is not. This gives the curious result that two passengers with identical itineraries and both similarly affected by a flight cancellation will have different rights based simply on the nature of their arrangements.

The claim for the third party's wasted expenditure (relating to an apparent obligation on Miss Graham to make it good) was dismissed as being too remote.

Conclusion

Not least because of the audacious demand for GBP 50 million in punitive/exemplary damages, this case carries much of interest. Notably, it is significant as the first high level English authority on whether the Regulation provides for a right to damages. Counsel in this case pointed out that, in holding that no such damages are available, the Court of Appeal is consistent with a decision of the German Supreme Court. Such decisions will be likely to have some persuasive authority should this point arise in other jurisdictions.

The case exposes the tension between the Regulation and the Montreal Convention. By holding that there was no right to damages, the Court of Appeal preserved the distinction between the two developed by the CJEU in its decision in *IATA v Dept of Transport* in 2006. Whereas the Regulation provides for standardised and immediate compensation, it was held not to conflict with Montreal Convention claims, which are assessed individually (on merit) and may require legal proceedings to pursue damages. Short of challenging the IATA distinction, it may be argued that the Court of Appeal had no choice but to avoid finding a right to damages.

It is academically disappointing that the Court did not take the opportunity to provide its opinion on what amounts to 'delay' for the purposes of Article 19 of the Convention. The term is not defined in the text of the Convention and there is no English authority on point. It is understood that there will be no further appeal to the Supreme Court so, for now, this is the end of the matter.

Additions to and changes in the aviation team

Finance

Aviation finance specialist Emma Pond has joined the firm in London. Previously a partner with Dewey & LeBoeuf, Emma advises international clients on a wide range of finance structures with a focus on borrowers (commercial and business jets) and lessors. She has particular regional expertise in the US, Middle East and Russia. Emma is recognised for her asset finance and leasing work in the latest edition of the UK Legal 500.

Regulatory

Aviation partner Peter Macara has recently relocated from the Clyde & Co London office to work with Beaumont & Son in Rio de Janeiro giving greater focus to airlines based in and operating to and from Latin America. Peter was previously based in Rio between 2001 and 2005. Peter's practice encompasses both contentious and non-contentious aviation matters, with a particular focus on regulatory matters arising out of airline alliances. Peter also acts for airlines and their insurers in the defence of claims relating to aviation losses including handling large airline accounts and multi-jurisdictional disputes.

Alan Meneghetti has joined our regulatory and commercial aviation team in London complementing his general commercial practice. On the commercial side, the aviation team advises airlines, airports and suppliers to the aviation and aerospace industry on all types of commercial contracts and arrangements including procurement, distribution and supply, IT, IP, outsourcing, data protection and privacy. Our aviation regulatory team advises clients in relation to state aid rules, competition law, particular issues such as alliances, mergers and acquisitions, CRSs, handling, and EU legislation and regulation generally.

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