

Regulations and Contracts

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OVERVIEW

- I. Regulations & their impact on Contracts
- II. Consumer Protection
- III. Safety
- IV. Liability

I. Regulations and their Impact on Contracts



- **What?**
 - Will of the Government
- **Diverse forms:**
 - Legislation
 - Regulation
 - Administrative orders
- **Issued centrally**
 - Requires local compliance
 - Requires knowledge
 - Ignorance no excuse



- **Sources:**

- ICAO
- ICAO Annexes
- EASA
- Eurocontrol
- Turkish CAA
- Turkish Government more generally
- Local Governments
- Planning laws
- Destination Governments



II. Consumer Protection



- **Obligation**
 - Rules addressing imbalance of bargaining power
 - Consumer-facing contract should reflect it
 - Although imposed on carriers regardless of contract:
 - Provisions in carriers' contract of carriage are void if conflicting with federal regulations
- **Means of consumer protection**
 - Legislation
 - Regulation
 - Air Carrier Contracts of Carriage
 - Common Law / Judicial decisions

- **Case study: Conditions of Carriage**
 - Consumer groups argued against a number of the terms from IATA's Recommended Practice 1724 and advocated additional passenger protections
 - Delay?
 - Denied boarding?
 - Compensation and assistance to pax?
 - Would never happen with airlines...
 - Recent United example

EU Reg 261/2004 on Air Pax Rights

- Why?
 - Rights to compensation for delay and cancellation
 - Definition of reasonable delay
 - Further interpreted by the European Court of Justice
- What about other states?
 - Similar protections through different means
 - Eg. US: the US Department of Transportation (USDOT) is directly concerned with consumer protection, eg:
 - 14 C.F.R. Part: 250, “*Oversales*;”
 - 14 C.F.R. Part 253, “*Notice of terms of contract of carriage*;”
 - 14 C.F.R. Part 374, “*Implementation of the Consumer Credit Protection Act with respect to air carriers and foreign air carriers*;” ...

EC 261/2004 vs. Warsaw System including Montreal 99'

- EC 261 as additional consumer protection above and beyond Warsaw System

EU Court of Justice:

- Reads down what might constitute an 'extraordinary measure'
- Eg. Delay arising from mechanical issue is NOT extraordinary, as maintaining the aircraft is part of what an AL is expected to do

Conflict of EC Reg. 261 with Warsaw & Montreal Conventions

- **Warsaw Convention:**
 - **Art. 19:** Remedies for delay
 - **Art. 20:** Exonerates the carrier from liability where he took “*all necessary measures to avoid the damage or that it was impossible . . . to take such measures.*”
 - **Art. 22:** Sets liability limits of 125,000 francs.
 - **Art. 24:** in cases covered by Article 19, “*any action for damages, however founded*” can only be brought subject to the conditions and limits set out in this Convention.”

- **Montreal Convention**

- **Art. 19:** Remedies for delay & exoneration from liability where the carrier took “*all measures that could reasonably be required to avoid the damage or that it was impossible ... to take such measures.*”
- **Art. 22:** Limits carrier liability for delay to 4,150 SDRs, unless the carrier engaged in willful misconduct.
- **Art. 29:** “*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 Punitive, exemplary or any other non-compensatory damages shall not be recoverable.*”

Compensation for long delays

- Joined Cases C-402/07 and C-432/07 (**Sturgeon**)
<http://curia.europa.eu/juris/document/document.jsf?docid=73703&doclang=EN>
- A **long delay** entitles pax to the **same compensation** as in the case of a **flight cancellation**:
 - Pax entitled to compensation if reaches his/her final destination with a delay of 3h or more
 - Such a delay does not, however, entitle pax to compensation if the air carrier can prove that the long delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier

Compatibility of delay compensation with international law

- Joined Cases C-581/10 and C-629/10 (**Nelson**)

<http://curia.europa.eu/juris/document/document.jsf?docid=128861&doclang=EN>

- Requirement to compensate pax whose flights are delayed is compatible with the Montreal Convention
 - Loss of time inherent in a flight delay constitutes an inconvenience rather than "damage" which is not governed by the Montreal Convention
 - Consequently, the obligation to compensate pax whose flights are delayed falls outside the scope of that convention, but remains additional to the system for damages laid down by it

Compensation for missed connecting flights

- Case C-11/11 (**Folkerts**):

<http://curia.europa.eu/juris/document/document.jsf?docid=134201&doclang=en>

- The compensation for long delays is also owed to pax of directly connecting flights reaching their final destination with a delay of at least 3 h
 - The delay to be taken into account is the delay at arrival, including in case of flight connections
 - It does not matter whether the delay occurred at the departure airport, at the connecting airport(s) or at any stage of the journey, only the delay at the final destination of the journey is relevant for the right to compensation

Compensation in case of technical defects

- Case C-549/07 (**Wallentin-Hermann**):

<http://curia.europa.eu/juris/document/document.jsf?docid=73223&doclang=en>

- Airline can be exempted compensation in case of a long delay or a cancellation if it can prove extraordinary circumstances
 - Technical problem which comes to light during aircraft maintenance or is caused by failure to maintain an aircraft cannot be regarded as “**extraordinary circumstances**”
 - Moreover, the fact that an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken all reasonable measures to relieve that air carrier of its obligation to pay compensation

Care in extraordinary circumstances

- Case C-12/11 (**McDonagh**):

<http://curia.europa.eu/juris/document/document.jsf?docid=133245&doclang=EN>

- In the event of cancellation of a flight, the **air carrier** is **obliged to provide care to pax** as well as to provide compensation
 - Obligation to provide care: Air carrier must provide free of charge (in light of the waiting time) refreshments, meals & where appropriate, hotel accommodation & transport between airport and accommodation, as well as means of communication with 3rd parties
 - Even when the cancellation of the flight due to extraordinary circumstances – which could not have been avoided even if all reasonable measures had been taken
 - Exemption to provide compensation: if carrier can prove that the cancellation of the flight was caused by such circumstances

Time of arrival

- Case C-452/13 (**Germanwings**):

<http://curia.europa.eu/juris/document/document.jsf?docid=157348&doclang=EN>

- The ‘**arrival time**’, which is used to determine the length of the delay to which passengers on a flight have been subject, corresponds to the **time at which at least one of the doors of the aircraft is opened**, the assumption being that, at that moment, pax are permitted to leave the aircraft

Denied boarding

- Cases C-22/11 (**Finnair**) and C-321/11 (**Rodríguez Cachafeiro and Martínez-Reboredo Varela-Villamor**):
 - <http://curia.europa.eu/juris/document/document.jsf?docid=121722&doclang=en>
 - <http://curia.europa.eu/juris/document/document.jsf?text=&docid=128002&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=118809>
- **‘Denied boarding’** relates **not only** to cases of overbooking **but also** to those where boarding is denied on other grounds, such as operational reasons
 - Airlines cannot validly justify a denied boarding and be exempted from paying compensation to pax by invoking extraordinary circumstances or by assuming that passengers would not arrive on time for their connecting flight

"Reasonable measures" to be taken by the air carrier

- Case C-294/10 (**Eglitis-Ratnieks**):

<http://curia.europa.eu/juris/document/document.jsf?docid=82052&doclang=en>

- **Art. 5(3) of Reg (EC) No 261/2004 must be interpreted that:** an air carrier, since it is obliged to implement all **reasonable measures** to avoid extraordinary circumstances, must **reasonably**, at the stage of organising the flight, take account of the risk of delay connected to the possible occurrence of such circumstances
 - It must thus provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end
 - However, the required reserve time should not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time

Flight that returns to the airport of departure

- Case C-83/10 (**Sousa Rodríguez**):

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=111221&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=122758>

- The concept of "**cancellation**" **also** covers the case in which the aircraft took off but, for whatever reason, was subsequently forced to return to the airport of departure where the pax of the said aircraft were transferred to other flights

Time limits for bringing action under Regulation 261/2004

- Case C-139/11 (**Cuadrench Moré**):

<http://curia.europa.eu/juris/document/document.jsf?docid=130243&doclang=en>

- **The time-limits for bringing actions for compensation for flight cancellation under EU law are determined in accordance with the rules of each Member State on the limitation of actions**
 - Provisions of the Warsaw and Montreal Conventions are not relevant, because the compensation measure laid down by Regulation 261/2004 falls outside their scope, while remaining additional to the system for damages laid down by them

Package Travel Directive – 2015/2302/EU (25 Nov 2015)

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2015.326.01.0001.01.ENG&toc=OJ:L:2015:326:TOC

- **Scope:** Traditional package holidays organized by tour operators; AND Bookings through other forums of combined travel (eg. Flight + hotel or car through a website):
 - Protected as package where:
 - Travel services advertised as package, **or**
 - Booked within the same booking process, **or**
 - Offered or charged at total or inclusive price
 - Applicable in 3 sorts of travel combinations:
 - Pre-arranged packages
 - Customised packages
 - Linked travel arrangements

- **Benefits for Consumers**
 - New information requirements for travelers
 - More predictable prices
 - Stronger cancellation rights
 - Clear identification of the liable party
 - Clear liability for booking errors
 - Clarification on essential consumer rights
 - Money-back guarantee and repatriation

- **Benefits for Business**

- A level playing field (same rules will apply for businesses across the EU selling competing travel products → easier cross-border transactions)
- Mutual recognition of insolvency protection
- Business trips arranged by business travel management companies will no longer be included under the rules
- Modernised information requirements no longer based exclusively on travel brochures
 - Overall less administrative burden, easier cross-border transactions and increased legal certainty will at the same time benefit businesses

CRS codes of conduct (Reg EC No 80/2009)

<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Atr0025>

- Harmonised Code of Conduct on the use of Computerised Reservation Systems (CRS) to ensure fair competition and protection of consumers' rights
- **Airline Compensation Funds**
- **Consumer protection rules generally**
 - Mis-description of goods or services
 - Eg. Nader v. Allegheny Airlines 426 U.S. 290 (1976)

Nader v. Allegheny Airlines 426 U.S. 290 (1976)

- Facts:
 - Consumer activist Ralph Nader booked a confirmed reservation on an Allegheny Airlines
 - Allegheny overbooked the flight → Nader denied boarding
 - Nader refused compensation offered & brought a common law suit for **fraudulent misrepresentation**
- The Court of Appeals dismissed Nader's claim for punitive damages on grounds that Nader was an informed consumer, and therefore not misled
- The US Supreme Court held that a common law action may proceed irrespective of the Civil Aeronautics Board's views as to whether deliberate overbooking violated the statute's prohibition against unfair and deceptive practices

III. Safety



- **Particular body of law and practice in aviation**
- **Obligations arising from:**
 - Chicago Convention
 - Annexes
 - SARPs
 - EASA
 - CAA
- **Overrides all other considerations**
 - Contracts
 - Employment contracts etc



Chicago Convention

PREAMBLE

WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

- **Role of the Captain**
 - Impacts labour contracts
 - Ticket terms and conditions
 - Ground Handling agreements

- **Operation of the aircraft**
 - Impacts labour contracts
 - Ticket terms
 - Arrangements with airports/ANSPs
 - Outsourcing agreements etc

IV. Liability



- **Terms on a ticket**
 - Clear provisions on liability on the ticket or at least incorporated by reference
- **No ability to rewrite?**
 - Claims for baggage value
 - Airway Bills
- **International rules, impacted locally**
 - Montreal as impacted by Reg (EC) 2027/1997

Carrier Liability for lost & damaged baggage

- On domestic US flights:
 - Maximum carrier liability = \$3,300/person
- For international flights:
 - **Warsaw** Convention: Maximum = \$20/kilogram of checked baggage (\$9.07/pound), with a maximum of \$634.90/bag
 - Under **Montreal** Convention 1999: liability raised to 1,000 Special Drawing Rights [SDRs], adjusted for inflation (mix of currency values established by IMF)
 - Excess valuation coverage may be purchased from the airline

Conflicting interpretation of **Montreal Convention 99**

- Art. 22(2) Montreal 99: In case of destruction, loss, damage or delay of baggage, an airline’s liability will be limited to 1,131 SDR “for **each pax** unless the pax has made, at the time when the checked baggage was handled over to the carrier, a special declaration of interest in delivery”
- **ECJ** in Sanchez v. Iberia Airlines (2012)
 - ECJ concluded that “**each pax**” meant each pax whose items packed in a bag
 - Airline liable for loss of baggage to multiple pax who had packed items in the same bag (thus not only to pax who checked the bag)
- **Canadian courts** – Eg. Holden v. Ace Aviation (2008)
 - Ontario court concluded that only pax who checked the bag was eligible for compensation

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