

IBAR WORKSHOP

March 2017

REGULATORY FRAMEWORK OVERVIEW

- **Regulation No. 261/04/CE** of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, flight cancellation, long delays, downgrading.
- **Montreal Convention of 1999** for the Unification of Certain Rules for International Carriage by Air.
- **Warsaw Convention of 1929** for the Unification of Certain Rules Relating to International Carriage by Air.



Regulation No. 261/04/CE

A law which was already restrictive when it came into force in 2005 by imposing high amounts of compensation, regardless to the price of the ticket and to having the passenger suffered or not a damage.

Such Regulation became a further burden for carriers following to decisions by European Court of Justice which

- extended the area of application of the same extending to delays by more than 3 hours the compensation due in case of flight cancellation.
- reduced the possibility for the carriers to successfully defend with regard to events that can be considered as force majeure.



Regulation No. 261/04/CE

The Regulation is being reformed by the EU Commission.

Among the main points taken into consideration with the reform project the following have a deep impact:

Time limitations on the provision of care and assistance in extraordinary circumstances beyond the control of the airline

➤ Hotel accommodation to be paid for a maximum of 3 nights.

The introduction of “*trigger times*” for delay compensation that vary by flight length.

➤ 5 hours on intra-EU flights;

➤ 9 hours for flights of less than 6,000 km;

➤ and 12 hours for longer distances, and a general cap on the provision of airport assistance.

A listing of extraordinary circumstances, by means of a non-exhaustive list (set out in Annex 1 includes natural disasters, security risks, ATC restrictions and labour disputes) and the specification that carriers can only invoke the defence in so far as the extraordinary circumstances affect the flight concerned or the previous flight operated by the same aircraft.



Regulation No. 261/04/CE - The EU Commission Guidelines

- Only the operating air carrier is always responsible for the obligations under the Regulation.
- Although a flight may generally tend to be considered as cancelled when its flight number changes, this might not always be a determinant criterion.
- A diverted flight is to be treated in the same way as a cancellation. Unless the airport of arrival and the airport of the original final destination serve the same town, city or region.
- The operating air carrier should register the time of arrival on the basis of, for instance, a signed declaration by the flight crew or handling agent.
- A the text of a notice on passenger's rights must be displayed at check-in in a manner clearly visible to passengers, also on kiosks at the airport and on-line.
- An operating air carrier denying boarding or cancelling a flight must provide each passenger affected with a written notice setting out the rules for compensation and assistance. This also in case of delay by more than 2 hours.
- If the passenger has made his own assistance or re-routing arrangements even if carrier offered assistance, then the air carrier is not responsible for any additional costs.
- If a passenger rejects the air carrier's reasonable care and makes his or her own arrangements, the carrier is not obliged to reimburse the expenses incurred by the passenger.



Regulation No. 261/04/CE - The EU Commission Guidelines

- Passengers do not have the right to be compensated for damages suffered because of a lack of care if they have not incurred expenses.
- Care may be limited or declined if its provision would cause further delay.
- In case of two separate tickets for two consecutive flights, when delay of the first flight determines misconnection with the following flight, the carrier is not obliged to pay compensation.
- Significant delays at security checks do not give entitlement to compensation.
- When the delay at arrival is less than four hours for a journey of more than 3500 km involving an airport located outside the EU, the compensation can be reduced by 50 %;
- To be exempted from the payment of compensation the carrier must simultaneously prove:
 - the existence and the link between the extraordinary circumstances and the delay or the cancellation, and ^[L]_[SEP]
 - the fact that this delay or cancellation could not have been avoided although it took all reasonable measures. ^[L]_[SEP]



Regulation No. 261/04/CE - The EU Commission Guidelines

- The carriers may provide as proof of extraordinary circumstances extracts from log books or incident reports and / or external documents and statements.
- Passengers' complaints to a national enforcement body should be made only when they have first complained to the air carrier and disagree with the air carrier's answer or in the absence of any satisfactory reply from the air carrier.
- The air carrier should reply within two months from request sent by passenger.
- The Regulation does not establish time limits for bringing actions in the national courts. This issue is subject to the national legislation of each Member State on the limitation of actions.
- The two-year limitation of action under the Montreal Convention is not relevant.



Warsaw and Montreal Conventions

These are at present the main multilateral treaties ruling the liability of air carriers with regard to passenger, baggage and cargo claims.

They rule the liability of carriers *vis a vis* passengers with regard to:

- Flight delay;
- Injury or death of passenger;
- Late delivery of baggage;
- Loss or damage to baggage.

Do these rules conflict with EU Regulation No. 261/04, at least with regard to cases of delay in arriving at destination?

- The Court of Justice affirmed that the rules are compatible since the assistance and taking care of passengers envisaged by the Regulation in the event of a long delay to a flight constitute a standardized and immediate compensatory measures. And that therefore regards a right to compensation not regulated by the Convention.

Case law

European Union Case law

- A journey involving outward and return flights cannot be regarded as a single flight (Case C-173/07, Emirates Airlines).
- Denied boarding does not cover a situation where there are reasonable grounds for refusing to carry passengers on a flight even though they presented themselves on time for the flight, such as for reasons of health, safety or security, or inadequate travel documentation (Case C-22/11, Finnair).
- It cannot be concluded that there is a flight delay or cancellation based on a 'delay' or a 'cancellation' being shown on the airport departures board or announced by the air carrier's staff (Joined cases C-402/07 and C-432/07, Sturgeon e.a.).
- A delay at arrival of at least three hours gives the same rights in terms of compensation as a cancellation (Joined cases C-402/07 and C-432/07, Sturgeon e.a.; Joined Cases C-581/10 and C-629/10, Nelson e.a.; Case C-413/11, Germanwings).
- The concept of "time of arrival" corresponds to the time at which at least one of the doors of the aircraft is opened (Case C-413/11, Germanwings).
- If assistance is not offered passengers can obtain reimbursement of the expenses incurred, provided they were necessary, reasonable and appropriate (Case C-12/11, McDonagh). And that evidence of the expenses incurred is provided.

Case law

European Union Case law

- The air carrier is obliged to fulfil the obligation of care even when the cancellation of a flight is caused by extraordinary circumstances (Case C-12/11, McDonagh).
- The 'final destination' is the destination on the ticket used for the check-in or, in the case of directly connecting flights, the destination of the last flight. And the distance which determines the compensation should be based on the 'great circle' distance between the place of departure and the final destination i.e. the 'journey' and not by adding the 'great circle' distances between the different relevant connecting flights composing the 'journey' (Case C-11/11, Folkerts).
- In case of technical problems extraordinary circumstances must relate to an event which meets two cumulative conditions:
 - it is not inherent in the normal exercise of the activity of the air carrier concerned;
 - it is beyond the actual control of that carrier on account of its nature or origin (Case C-549/07, Wallentin-Hermann).
- A technical problem which comes to light during aircraft maintenance or is caused by failure to maintain an aircraft cannot be regarded as 'extraordinary circumstances'.

Case law

European Union Case law

What is inherent in the normal exercise of the activity of the air carrier?

- A breakdown caused by the premature malfunction of certain components of an aircraft does not constitute an unexpected event. Being this event inherent in the normal exercise of the air carrier's activity, which is based on complex machines (Case C-549/07, Wallentin-Hermann).
- The collision of mobile boarding stairs with an aircraft cannot be considered as 'extraordinary circumstances'. Being mobile stairs or gangways indispensable to air passenger transport. And, therefore, air carriers are regularly faced with situations arising from the use of such equipment (Case C-257/14, van der Lans).
- Extraordinary circumstances apply, for example, when damage to the aircraft is due to an act external to the airport's normal services, such as an act of terrorism or sabotage (Case C-257/14, van der Lans).
- The requirements to provide compensation for delay at arrival and assistance in the event of delay at departure are compatible with the Montreal Convention (Case C-344/04, IATA and ELFAA).
- Article 22(2) of the Montreal Convention, which sets the limit of an air carrier's liability for the damage resulting, inter alia, from the loss of baggage, includes both material and non-material damage (Case C-63/09, Axel Walz).

Case law

Italian Case law

- EU Regulation and Montreal Convention are based on different principle. EU Regulation is based on fixed indemnities which are granted to the passengers regardless to having the same suffered a damage or not, Montreal Convention is based on compensation and requires the passenger to specify and provide evidence of the damage he alleges (Tribunal of Oristano, Pinna and others vs Thai, 2016).
- A long delay or a cancellation of a flight does not imply moral damages even if the carrier did not provide assistance to the passenger (Court of Cassation, Decision No. 12088 of 2015).
- A baggage delay or loss, even if occurred during honeymoon and even if it implied not having the passenger participated to events, does not determine moral damages (Court of Cassation, Decision No. 14667of 2015).
- The carrier is responsible only for transportation, regardless to the reasons for travelling (Tribunal of Rome, Br.Me. e altri c. Iberia, 2010; Tribunal of Genova, 2011).
- EU Regulation is not applicable outside the EU and if the carrier is not a EU carrier. There are no assistance obligations according to Montreal Convention (Tribunal of Busto Arsizio, Colombo vs American Airlines, 2015).
- A baggage delay occurring on return flight cannot imply first necessity expenses (Justice of Peace of Busto Arsizio, 2016);

Case law

Italian Case law

- EU Regulation does not apply to non EU Carriers when flight is departing from an airport located outside the EU (Tribunal of Busto Arsizio, *Colombo vs American Airlines*, 2015; Tribunal of Torre Annunziata, *Doto vs American Airlines*, 2015; Tribunal of Oristano, *Pinna vs Thai*, 2016; etc.).
- A technical problem can be considered as force majeure when it occurred notwithstanding the regular maintenance of the aircraft. And the Air Operator Certificate is enough to demonstrate the maintenance (Tribunal of Rome, *Bonini + 27 vs Turkish Airlines*, 2016).

How are these rules applied by Italian Courts

3 judicial levels:

- A first instance court, which can be the Justice of Peace or the Tribunal, depending on the value of the case.
- A second instance court, in front of which decisions can be appealed, which can be the Tribunal, if the appeal is against decisions of the Justice of Peace or the Court of Appeal if the appeal is filed against decision of the Tribunal.
- A third instance court, the Supreme Court of Cassation which decides on questions regarding the interpretation of law, with the aim of granting uniform interpretation of law.

How are these rules applied by Italian Courts

Most cases are filed in front of the Justice of Peace. And this is a problem.

Why?

- The Justice of Peace are not professional Judges. And therefore very often are not prepared to decide on complex questions.
- The Justice of Peace earn based on the number of decisions they make (regardless to the quality of the decisions). This creates a “judicial market” favored by their decisions.
- Very often, the Justice of Peace, when rejecting the claim, do not condemn the claimant to legal expenses.

Therefore it is important to challenge the decisions

Defensive strategies when receiving a claim

- The first important step is to collect all possible information and documents pertaining to the case.
- It is also important, as far as possible, to obtain documents from third parties. Since the value as evidence of documents not coming from third parties is challenged with success by counterparty lawyers.
- Such documents may consist in weather reports, METAR, maintenance records, baggage delay records, receipts of assistance provided, communications sent to the passengers about cancellations and re-protection offers, or compensation offers, evidence showing that the rerouting was performed on the first available flight, articles published on newspapers regarding meteo, strikes, logbooks, release forms signed by PAX when receiving vouchers, compensation or assistance, etc.
- Once all info and documents are collected it will be possible to evaluate the case and outline a possible defense.

Defensive strategies when receiving a claim

Are legal expenses due when a passenger asks for compensation through a lawyer, eventually directly in front of court without previously making an out of court request?

In my opinion no.

- EU Regulation does not impose to the carrier to immediately pay the compensation. This is provided only in the case of denied boarding.
- The carrier does not need to proactively offer the compensation to the passenger in case of cancellation or delay. But the passenger must file such request to the carrier.
- If the passenger decides to ask assistance to a lawyer, the cost of this decision cannot be bared by the carrier, unless the same previously denied the compensation or did not answer within a reasonable time frame.
- The EU Commission affirmed the above in its 2016 Guidelines. Specifying that the reasonable time for an answer is two months.

Defensive strategies when receiving a claim

Other possible defense arguments regard the

- Lack of Jurisdiction
- Lack of the capacity to sue of the claimant
- Lack of capacity to be sued of the air carrier
- Statute of limitation
- Force majeure
- Liability limitation
- Lack of the right to the EU Compensation provided by Regulation No. 261/04/CE.

But, obviously, further arguments depend on a case by case exam

The emergence of new actors and new types of claims

Claims filed by companies as Airhelp, Flightright etc. on behalf of passengers

- I will mention the two more important companies at this time: Flightright which was founded in 2010 and AirHelp which was founded in January 2013.
- They both provide services to airline passengers who have experienced a flight cancelation, delay or overbooking.
- They allow passengers to easily verify online or through their smartphone their flight eligibility at no cost. After determining eligibility, the passenger can choose to enlist them to handle their claim against the airline.
- Both companies base their services on a success fee, for a medium amount of 25% of the compensation + applicable taxes.
- This is very attractive for passengers, since they do not have to make themselves the request or go to a lawyer and spend money.

The emergence of new actors and new types of claims

But is it possible to defend against these claims?

- As with any claim regarding air transport, it is possible to defend when force majeure or other circumstances excluding carrier's liability occur.
- Furthermore, it is possible to affirm that EU compensation must be considered as an indemnity for moral distress. Since the same is automatic and does not need evidence of the damage and of its amount. And that, therefore, the right to compensation is personal and not transferable.
- Furthermore, should a case start in front of Court, it is possible to challenge the validity of the proxy given for the out of court stage. As a matter of fact, the proxy given to Airhelp or Flightright for the out of court procedure is not valid with regard to the court procedure.
- However, the outcome of such defensive strategies is uncertain, especially considering that most court cases are brought in front of a Justice of Peace.
- In any case it is important that carriers verify that all necessary documents are attached to the claims. Such as ID cards, tickets, boarding cards, signed proxies.

The emergence of new actors and new types of claims

Claims filed through an injunction to pay

- Recently, some lawyers have started filing claims not through a traditional summons, but by requesting to court an injunction to pay which is then notified to the carrier, giving to the same 40 days' time to oppose the injunction.

Debate and discussion