International Transportation Committee

Editor’s Introduction to Issue № 2

Welcome to the second issue of ITC News, the official newsletter of the International Transportation Committee of the American Bar Association’s Section of International Law. This newsletter is published periodically throughout the year to keep Committee members up-to-date on current international transportation issues, Committee activities and general American Bar Association events relevant to international transportation law. ITC News also provides a forum for Committee members to discuss international transportation ideas and opinions. If you are interested in contributing an article regarding aspects of international transportation law or have relevant news that you would like to share with fellow Committee members, please contact Committee Co-Chairs Catherine Pawluch or Mark J. Andrews via email. Their contact information appears on the last page of this newsletter. Copies of all Committee newsletters, including this issue, may be retrieved from the Committee’s Internet site accessible at http://abanet.org/.

Upcoming Events and Opportunities for Participation

Committee 2009-2010 Program Year

The International Transportation Committee welcomes its members to the Committee's 2009-2010 season and to all of the activities the Committee has planned for the current program year. To date, the Committee has organized and executed several successful events, including the following:

✦ Presentation of a “Showcase” program on maritime piracy on 28 October 2009, at the Section’s fall meeting in Miami Beach, with co-sponsorship by the Section’s Law of the Sea Committee. Kudos to Prof. Steven Snell, a past Co-Chair of the Committee, for spearheading this very well-attended program.

✦ Co-sponsorship of a brown-bag lunch on “Export Controls and Sanctions - Responsibilities of Freight Forwarders,” held in Washington, D.C., on 7 October 2009. The program was organized by the Section’s Export Controls and Economic Sanctions Committee.

✦ Compilation and preparation of the Committee’s contribution to the forthcoming Year-in-Review 2009 edition of The International Lawyer, the Section’s law review.

(continued on page 8)
About five years ago, Regulation (EC) No 261/2004 (the “Regulation”) entered into force and established common European rules on compensation and assistance to air transport passengers in the event of denied boarding and of cancellation or long delay of flights. The Regulation provides passengers – depending on the circumstances – with a right to care (meals, hotel accommodation, etc), to monetary compensation, and to reimbursement or re-routing if confronted with any of those events.

In this contribution, the author wishes to clarify the mechanism of the Regulation (Part I) and to discuss the case law that has so far come down from the Court of Justice (Part II). Specific attention will be given to a recent judgment – of 19 November 2009 – in which the Court of Justice appears to have extended the scope of protection of the Regulation.

**NEWSLETTER TOPIC Nº 1**

**AIRLINE PASSENGER RIGHTS IN THE EUROPEAN UNION**

**EC Regulation No 261/2004 and Guidance from the European Court of Justice**

By

Leendert C.T. Creyf

About five years ago, Regulation (EC) No 261/2004 (the “Regulation”) entered into force and established common European rules on compensation and assistance to air transport passengers in the event of denied boarding and of cancellation or long delay of flights. The Regulation provides passengers – depending on the circumstances – with a right to care (meals, hotel accommodation, etc), to monetary compensation, and to reimbursement or re-routing if confronted with any of those events.

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**Part I**

EC Regulation No 261/2004 – What Rights does it Provide?

The Regulation establishes minimum rights for passengers when either (i) they are denied boarding against their will, (ii) their flight is cancelled, or (iii) their flight is delayed.

In each of the three envisaged situations, the passengers are entitled to care, which means that the airline must offer, free of charge, meals and refreshments, hotel accommodation if necessary and two free telephone calls or other means of communication.

Whether passengers are further entitled to monetary compensation, reimbursement or re-routing depends on the specific situation. In this respect, the Regulation can be summarised as follows:

<table>
<thead>
<tr>
<th>Event</th>
<th>Monetary Compensation</th>
<th>Re-routing / Re-imbursement</th>
</tr>
</thead>
<tbody>
<tr>
<td>Delay &lt; 5 h</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Delay &gt; 5 h</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Denied Boarding</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Cancellation</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>

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2. OJ 46, 17.02.2004, p. 1
The right to monetary compensation means that the passenger, depending on the distance that is to be flown, shall receive an amount of 250 EUR (£1,500 km), 400 EUR (£1,500 – 3,500 km) or 600 EUR (£ > 3,500 km). These amounts may be reduced by 50% if the passenger is offered re-routing to its final destination and the final arrival time so achieved is within certain limits of the arrival time originally booked.

However, should the right to monetary compensation be triggered by a cancellation of a flight, the operating carrier shall be excused from paying compensation if it can prove that the cancellation “is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken” (article 5(3)).

The right to re-routing is self-evident: the airline offers the passenger the possibility to go to the final destination via an alternative route. The passenger may opt to take the first available flight(s) or flight(s) at a later date.

Lastly, the right to reimbursement means that the passenger is reimbursed for fares incurred, including possibly fares for flight segments already flown if those flight segments no longer serve any purpose in relation to the passenger’s original flight plan. In those cases, the reimbursement of the cost of the ticket may include providing the passenger with a return flight to the first point of departure.

EC Regulation No 261/2004 – Scope?

A distinction must be made between flights departing from within the European Union and flights departing from countries outside of the European Union.

All flights departing from an airport located in the territory of a Member State of the European Union are covered by the Regulation (irrespective of the destination). There is no further distinction made, and therefore, it is of no importance whether the air carrier involved is a Community carrier (having its Air Operator’s Certificate issued by an EU Member State) or by any other third country. A flight from Paris to New York on a US carrier is covered by the Regulation.

Passengers departing from airports outside the European Union on flights bound for airports located within the European Union may also enjoy the benefits of the Regulation if the operating carrier is a Community carrier, unless those passengers “received benefits or compensation and were given assistance in that third country” (article 3(1)).

A flight from New York to Paris on a US carrier is therefore not covered by the Regulation.

Part II
The Validity of the Regulation

Shortly after the adoption of the Regulation, on 11 February 2004, two airline associations challenged the Regulation arguing inter alia that it was invalid because of inconsistency with the Convention for Unification of Certain Rules for International Carriage by Air of 28 May 1999 (the “Montreal Convention”).

The argument was that articles 19, 22 and 29 of the Montreal Convention exclusively, unconditionally and precisely determine an air carrier’s liability in case of delay. Hence, since the Montreal Convention prevails over secondary Community legislation (e.g., a directive or a regulation), the Regulation would be inconsistent with the Montreal Convention and therefore invalid.

In its judgment of 10 January 2006, the Court of Justice rejected this argument. It noted that in fact two types of damage result from delayed flights: first, damage which is quasi identical for every passenger and which can be redressed by standardised and immediate assistance or care for everybody concerned. Second, individual damage, redress for which requires a case-by-case assessment.

The Court of Justice found that the Regulation addresses the first type of damage and that the Montreal Convention addresses the second. Therefore, the Montreal Convention and the Regulation could co-exist.

Extraordinary circumstances

As noted, an operating carrier need not pay compensation to a passenger if it can prove that a cancellation of a flight “is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken” (article 5(3)).

Preambles 14 and 15 to the Regulation provide some guidance by listing a series of events that may produce extraordinary circumstances: political instability, meteorological conditions, security risks, unexpected safety shortcomings, strikes or air traffic management decisions.

On 22 December 2008, the Court of Justice rendered a decision in a matter where Alitalia had rejected a passenger’s request for compensation, stating that the flight cancellation was due to a complex engine defect, which it considered to be an extraordinary circumstance.

In its decision, the Court set the bar very high for air carriers wishing to invoke extraordinary circumstances. It stated that air carriers are confronted with technical problems as a matter of course in the performance of their operations. Therefore, technical problems cannot – in themselves – constitute extraordinary circumstances. It is required that the technical problems stem from events which are not inherent in normal operations of the carrier and are beyond its actual control. Moreover,


the Court did not accept the contention that an airline’s compliance with (minimum) rules on maintenance of aircraft in itself evidences that the carrier took “all reasonable measures” to avoid those circumstances.

Needless to say, this judgment caused controversy and led some to state that it gives passengers’ rights a higher priority than passenger safety.5

Monetary compensation for delay?

Air carriers suffered a second blow on 19 November 2009 when the Court of Justice rendered its judgment in the joined cases of Sturgeon & Böck.6

Under the terms of the Regulation, passengers whose flight has been cancelled or who suffer a long delay are treated differently: the first are entitled to monetary compensation while the latter are not. In Sturgeon & Böck, this difference in treatment—which flows from the Regulation itself—was put to the test.

Both cases involve flights where the passengers arrived more than 20 hours late at their destinations. The air carriers argued that the flights were delayed. Claimants however launched claims for compensation due to cancellation of their flight. These claims were dismissed by their respective national courts. Claimants appealed, which led to a series of questions on the interpretation of the Regulation being put to the Court of Justice.

In reaching a conclusion, the Court first stated that even a long delay cannot be regarded as a cancelled flight where that flight is operated in accordance with the carrier’s original planning. Thus, there is no automatic roll-over from delay to cancellation.

Nonetheless, the damage sustained by passengers in cases of cancellation or long delay is comparable so that—in the eyes of the Court—these passengers cannot be treated differently without the principle of equal treatment being infringed upon. This, taken together with the purpose of the Regulation—to protect all and not some passengers—leads the Court to hold that for the purposes of the right to compensation, passengers whose flights are delayed may rely on the right to compensation where they suffer a loss of time equal to or in excess of three hours.

This judgment has considerable implications for the airline industry. Under the umbrella of “interpretation” of the Regulation, the Court of Justice has exposed air carriers to possibly having to pay monetary compensation of up to 600 EUR per passenger in case of a flight delay exceeding three hours while such compensation was not foreseen by the Regulation.

Concluding remark

Passenger rights are here to stay. The European legislator over the past decade has adopted several measures in this regard, including the above Regulation as well as measures for the protection of passengers with reduced mobility, measures regarding publication of fares, etc. Passenger rights are considered the ‘quid pro quo’ for the liberalisation of the airline industry.

However, the most recent development with the Sturgeon & Böck cases can be questioned, and, without a doubt, air carriers will seek to challenge the outcome of this judgment.

A branch offices in locations that were not operators were not permitted to set up examples, under the Agreement, US vessel on the ability of Chinese or US vessel Agreement included certain limitations United States of America. However, the transportation between China and the intended to encourage maritime "Agreements". The Agreement was bilateral maritime agreement (the States of America entered into their first handle its customers' needs. or operate their own ships. Rather, an Operating Common Carriers has been handled by Non-Vessel Operating Common Carriers ("NVOCCs"). NVOCCs assume the responsibility of a carrier, but do not own or operate their own ships. Rather, an NVOCC purchases space on a ship to handle its customers' needs.

In 1980, China and the United States of America entered into their first bilateral maritime agreement (the "Agreement"). The Agreement was intended to encourage maritime transportation between China and the United States of America. However, the Agreement included certain limitations on the ability of Chinese or US vessel operators to access fully the maritime transportation markets of the other. For example, under the Agreement, US vessel operators were not permitted to set up branch offices in locations that were not transport cities. Therefore, US vessel operators were not able to issue bills of lading for carriage originating in or destined for inland ports in China. In addition, US vessel operators were prohibited from offering logistics services or from engaging in maritime agent activities. Therefore, the US carriers could not handle the inland transportation directly or hire a carrier to do it for them.

In 2001, China joined the World Trade Organization ("WTO"). In order to fulfill its WTO accession commitments for maritime transportation, on 1 January 2002, China promulgated new regulations on international maritime transportation (the "2002 Regulations"). The 2002 Regulations allowed US vessel operators to open branch offices anywhere in mainland China. They also allowed foreign investors to invest directly in maritime logistics operations.

Although the 2002 Regulations created opportunities for foreign NVOCCs, they also imposed some burdens. Foreign NVOCCs doing business in China are required to deposit RMB800,000 in a Chinese bank as proof of financial responsibility (the "Deposit"). The Deposit is intended to serve as a guaranty that the NVOCCs will meet their financial commitments to shippers and their compliance obligations to the Chinese government. The Deposit can be applied directly to an arbitration award, a court judgment, or fines and penalties that may be assessed against the NVOCCs.

Although the Deposit requirement may be understandable, it can be unduly burdensome to foreign NVOCCs. This is particularly true if the NVOCC's home country has a similar requirement. In response to the concerns about the Deposit requirement, on 20 January 2003 China's Ministry of Communication ("MOC") promulgated another set of implementing rules and regulations ("2003 Regulations"). The 2003 Regulations revised the Deposit requirement to the extent of waiving it if the foreign NVOCC had already obtained an NVOCC license in its home country and had already met its financial requirements in its home country. However, the waiver applies only if the home country of the foreign NVOCC enters into an agreement with MOC that will assure MOC that the foreign NVOCC would fulfill its financial obligations in China as if the Deposit had remained in effect.

The United States Department of Transportation ("DOT") has been interested in alleviating the financial burdens that otherwise are applicable to US NVOCCs operating in China. After several rounds of discussions between DOT and MOC, on 31 July 2003, China and the US entered into a Memorandum of Consultation (the "Memorandum"). In the Memorandum, China agreed to waive the Deposit requirement for US NVOCCs so long as the US NVOCC applying for operating rights in China (i) is a legal person in good standing under the laws of one of the United States, (ii) has an NVOCC license from the US Federal Maritime Commission, and (iii) provides evidence of financial responsibility (bond, letter of credit) up to 800,000 RMB.

The Memorandum led directly to a new US-China Bilateral Maritime Agreement that came into force on 21 April 2004 (the "2004 Agreement"). In addition to resolving the Deposit requirement as described above, the 2004 Agreement allows shipping companies from China and from the United States of America to establish and maintain any number of branch offices anywhere within the other country.

**Procedures for Obtaining Foreign NVOCC License**

Under the 2002 Regulations, a foreign NVOCC is required to have a Chinese NVOCC license from MOC to operate to or from a Chinese port. To

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obtain a license, the foreign NVOCC is required to submit the following documents (“Application Documents”):

(i) a letter of application;

(ii) a feasibility study;

(iii) business registration of the applicant (e.g., Certificate of Incorporation) authenticated by the Chinese Embassy or Consulate;

(iv) sample bill of lading including terms and conditions;

(v) proof of compliance with the applicable Deposit or financial responsibility requirement (the latter being applicable if the foreign NVOCC is licensed in the U.S.); and

(vi) power of attorney to appoint a “Liaison Office” (i.e., agent for service of process) in China.

The application process can be completed relatively quickly. As can be seen, the burdensome requirements of the U.S. Federal Maritime Commission relating to “qualifying individuals” are entirely absent in the Chinese maritime regulations. The Application Documents should be submitted to MOF at the provincial level. Within seven days of the filing, the provincial MOF will forward the Application Documents, with comments, to MOF. MOF will approve or reject the application within fifteen days. If the application is rejected, MOF will notify the applicant of its reasons.

**Enforcement of the Regulations**

When the 2002 Regulations were adopted, it became obvious to Chinese and foreign NVOCCs that enforcement was not a priority for MOF. As a result, it was reasonably common for a foreign NVOCC to operate at Chinese ports without registering with MOF. However, in June 2007, MOF announced that it would begin enforcing the laws related to maritime operations.

It is clear that MOF’s announcement was not an idle threat. The requirements are not being totally ignored and some enforcement is taking place. For example, as of December 2009, 3500 NVOCCs have paid the Deposit. Two foreign NVOCCs lost their licenses for failure to replenish the Deposit after the Deposit was applied to pay a judgment in a Chinese court. Approximately 136 foreign NVOCCs have registered bills of lading with MOF. Several foreign NVOCCs have lost their licenses for failure to register their bill of lading as required.

Notwithstanding the above, many foreign NVOCCs continue to doubt the effectiveness of MOF’s enforcement efforts. This may be in part because an unregistered NVOCC is still permitted to use a Chinese court to enforce its bill of lading.

Foreign NVOCC’s need to consider their options carefully before deciding to conduct business without registering or posting the Deposit or bond. Under the applicable regulations, an unregistered NVOCC can be prohibited from doing business in a Chinese port. In addition, the income generated from the unauthorized NVOCC activities may be confiscated. If the income generated from the illegal operations is more than RMB100,000, a fine of RMB50,000-200,000 may be imposed. If the unregistered foreign NVOCC signs a contract with a vessel operator to handle illegal freight, the liner operator may be subject to a fine of RMB20,000-100,000.

Based on the above, we advise our clients to complete the NVOCC registration process and to post the bond. In addition, we advise vessel operating carriers that before signing an agreement with a NVOCC, they should check the list of registered NVOCCs maintained by MOF and published in its Web site.

**AN UPDATE ON GROWTH OF AIR TRANSPORT IN BRAZIL**

By

Maria Regina M.A. Lynch
Ana Luisa C.C. Derenusson
Ruth P. e C. Lunardelli Costa1

In the previous issue of this newsletter, the authors wrote about the rapid increase in domestic passenger travel within Brazil. The Brazilian National Agency of Civil Aviation (“ANAC”) has recently published updated information on air transportation in Brazil. According to ANAC, the internal demand for air transportation services has increased 17.65% in 2009, which according to the Advanced Compared Data of the agency, represents the best growth rate since 2005. The month of December had year-on-year growth of 37.70%, confirming the substantial development of the Brazilian market during the second half of 2009.

With regard to market shares of the Brazilian airlines, we are beginning to see a clear reduction of concentration. In December, smaller companies such as Webjet, Azul, OceanAir and Trip had a share of almost 15%, while TAM and Gol/Varig had a share of 85%. During the whole year these two companies accumulated 86.40% of the internal market share.

According to the President of ANAC, Solange Paiva Vieira, “the end of the restriction on use of Santos Dumont Airport in Rio de Janeiro, ordered by ANAC in March 2009, allowed the

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growth of smaller companies and this factor was fundamental for the deconcentration of the market. The increase in competition is beneficial for passengers, as they have more choices based on schedules, price, services or other factors”. She adds that this trend “is expected to continue throughout 2010 with other companies having access to Congonhas Airport in São Paulo by means of the redistribution of slots that will take place on February 1st”.

Seat occupancy on domestic flights reached a level of 73.70% in December 2009, a much better rate when compared to the 66.86% registered in the same period of 2008. As a whole, 2009 occupancy was 66.75% against 65.49% in 2008.

Brazilian carriers also have begun seeing an increase in the demand for international air transportation services, as shown by year-on-year growth of 13.37% in December 2009, with occupancy of 74.66%. For the entire year 2009 there had been a slight decrease of demand (0.59%) compared to 2008.

Charts containing the information published in the Advanced Compared Data are prepared by ANAC based on the information provided by air carriers, and can be found on the Internet at anac.gov.br/dadosComparativos/DadosComparativos.asp.
For the coming months, the Committee has scheduled additional Committee meetings and programs that are relevant to today’s practice involving international transportation. These meetings and programs include a Webcast to be held and made available for download in 2010 to address the pending Convention on Contracts for the International Transportation of Goods Wholly or Partly by Sea (the “Rotterdam Rules”). The Committee will also be co-sponsoring a program at the Section’s spring meeting, as described below.

**Section Spring Meeting in New York**

**Committee Co-Sponsoring Spring Meeting Program**

At the Section’s spring meeting in New York City, to be held from April 13 to April 17, the Committee will be co-sponsoring a program entitled “A Debate on Stolt-Nielsen Class Arbitration and International Parties.” The program will take place on Thursday, 15 April 2010 between 2:30 p.m. and 4:00 p.m. (ET) and will address the issues arising from the recent U.S. Supreme Court decision in Stolt-Nielsen, S.A. v. AnimalFeeds International Corp. Speakers from academia, private practice and the ICC International Court of Arbitration will debate the propriety of class arbitration where the governing agreement is silent or ambiguous as to class treatment, and will consider the international implications of the Court’s decision. The program is particularly relevant to the practice of transportation law because domestic and international carriers of all modes are facing rampant class actions on fuel surcharges and other issues, while foreign arbitration clauses are a common feature of ocean bills of lading. Audience participation at the April 15 program will be encouraged.

**Important Spring Meeting Dates**

Please note these important spring meeting registration deadlines and hotel arrangements:

- Early Bird Registration Deadline is 8 March 2010
- Grand Hyatt New York hotel room block Deadline is 23 March 2010
- Pre-Registration Final Deadline is 31 March 2010

The Section has arranged for a special nightly room rate of $229, plus taxes. Early booking is recommended to make sure this special rate remains available. More information concerning registration and hotel arrangements is available at [http://abanet.org/intlaw/spring2010/](http://abanet.org/intlaw/spring2010/).