

# Legal and Regulatory Issues of Aviation

Liability and Passenger Rights

Dr. Till Vogel

## Agenda for this Modul

### **Saturday, 2022/09/17**

- Institutions and Authorities
- Traffic Rights
- Access to Airports
- Compliance

### **Sunday, 2022/09/25**

- Safety & Security
- Liability & Consumer Protection
- Air Traffic Control - ATC
- Travel Agencies

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## Useful books

- *Diederiksen-Verschoor/Mendes de Leon*,  
An introduction to Air Law, 10<sup>th</sup> edition, 2017
- *Havel/Sanchez*,  
The Principles and Practice of International Aviation  
Law, 2014
- Paul Stephen Dempsey, Ram Jakhu  
Routledge Handbook of Public Aviation Law, 2017
- Milde, Michael,  
International Air Law and ICAO - Third edition - 2016
- *Schaefer, Christoph*,  
Recht des Luftverkehrs, 2017

# Part VI

## Liability and Passenger Rights

## Liability & Consumer Rights

- Since mankind is flying things go wrong!
- Therefor legal questions arise:
  - *Who pays for what kind of damages?*
  - *What can be claimed by the victims?*

## The Warsaw Convention

These question were internationally regulated in the

- Warsaw Convention, 1929
  - Protection of an “infant industry”
  - Rule:
    - Liability of the carrier regardless of negligence or fault
    - Liability for damages to passengers, luggage and cargo
  - But:
    - Exculpation of the carrier was possible
    - Limited amounts if no gross negligence by carrier
- Insurability



# The Montreal Convention

Today these questions are internationally regulated in the

- [Montreal Convention, 1999](#)
  - Effective date is November 2003
  - Ratified by about 130 countries including all EU member states
- Governs:
  - Liability of the carrier
    - Article 17 I: Death or injury of passengers
    - Article 17 II: Damage to baggage
    - Article 19: Delays
    - Articles 21, 22: Compensation of the passenger
- Sets forth limits for compensation with regard to delays
- Limits have been increased in 2009

## The Regulation (EC) 261 / 2004

- Effective date of [Regulation 261/2004](#) is February 2005
- Applies to:
  - Flights departing a member state
  - Flights arriving in a member state from a third country if the air carrier in question is licensed by a Member State

## Relationship of Applicable Law

Now: What is the relationship between the Montreal Convention and Regulation (EC) 261/2004?

The European Court of Justice (ECJ) had to clarify the relationship between the Montreal Convention and Regulation (EC) 261 /2004.

- [Case C-344/04](#) IATA et al vs. Department of Transportation  
(Sidenote 19 provides the background)
- [Question 1:](#) Is Regulation 261/2004 inconsistent to Article 29 of the Montreal Convention?
- [Question 2:](#) Do parts of Regulation 261/2004 infringe the principle of proportionality?

## Question 1:

Article 29 of the Montreal Convention reads:

*“Delay compensation can only be claimed in accordance with the provisions of the Montreal Convention.”*

### ECJ Judgment:

# 43: Every delay creates two types of damages

- General damages with the need for an immediate fix
- Individual damages to be determined case by case later

# 47: Remedies set forth under both sets of rules are not exclusive

# 48: Remedies that further improve the position of passengers vis-à-vis air carriers are not inconsistent with the Montreal Convention

## Question 2:

Principle of *Proportionality* is a fundamental principle in EU law

➤ Damage compensation must be in relation to the damage itself

Article 19 of the Montreal Convention allows for exculpation of air carriers in cases of delays

Article 6 of Regulation (EC) 261/2004 does not

ECJ Judgment:

# 86: Remedies in case of flight delays in accordance with Article 9 (Right to Care) meant to cater to passengers' immediate needs in the situation – regardless of the cause of the delay.

The carrier has a duty to care for its passengers.

# 92: For this reason, no infringement of the principle of proportionality

## Key Issues regarding Regulation 261/2004

- Protection of passenger rights is an important issue
- ECJ and the Commission have a tendency to view consumer protection above all
- However, Regulation (EC) 261/2004 leaves much uncertainty, e.g.
  - Definition of *extraordinary circumstances* (Art. 5 III)
  - Discontinuation of a flight after on-time departure
- Interests of air carriers need to be considered
- The future may see revisions to Regulation (EC) 261/2004
- European Court of Justice: Cases C-402/07 and C-432/07 (Sturgeon Case):
  - Despite the lack of monetary compensation for flight delays under Article 6, a passenger may be entitled to the remedies of Article 7 in case of significant delays.

## Key Issues regarding Regulation 261/2004

- The courts of the Member States and the ECJ will continue to clarify the application of the rights under Regulation 261/2004
- Examples:
  - The compensation payable to passengers in the event of cancellation or long delay of a connecting flight must be calculated according to the radial distance between the departure and arrival airports (ECJ Case [C-559/16](#))
  - Terms & Conditions of carriers that prohibit the assignment of the claims of the passenger to a third party are invalid (Court order of the regional court Nuernberg, 30.07.2018, [5 S 8340/17](#)).
- The [ECC-net](#) is a helpful resource for passengers.

## The Regulation (EC) 261 / 2004

- Effective date of [Regulation 261/2004](#) is February 2005
- Governs:
  - Article 4: Denied boarding (overbooking)
  - Article 5: Flight cancellations
  - Article 6: Flight delays
- Sets forth specific remedies with regard to Articles 4 – 6
  - Article 7: Right to compensation
  - Article 8: Right to reimbursement or re-routing
  - Article 9: Right to care



# The Regulation (EC) 261 / 2004

## Article 4: Denied boarding (overbooking)

- Volunteers that surrender their reservations in exchange for benefits shall be assisted with
  - Reimbursement
  - or re-routing (Art. 8)
- If boarding is denied to passengers against their will, the operating air carrier shall
  - immediately compensate (Art. 7) and
  - assist them in accordance with Art. 8 and 9.

# The Regulation (EC) 261 / 2004

## Article 5: Cancellation

- In case of cancellation of a flight, the passengers concerned shall:
  - be offered assistance in accordance with Article 8; and
  - be offered assistance in accordance with Article 9(1)(a) and 9(2), as well as, in event of rerouting when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and
  - have the right to compensation in accordance with Article 7, unless passengers have been informed correctly
    - Unless extraordinary circumstances

# The Regulation (EC) 261 / 2004

## Article 6: Delay

- When a flight is delayed beyond its scheduled time of departure:
  - a) for 2 hours or more in the case of flights of 1 500 km or less; or
  - b) for 3 hours or more in the case of
    - all intra-Community flights of > 1 500 km and
    - of all other flights between 1 500 and 3 500 km; or
  - c) for 4 hours or more in the case of all flights not falling under (a) or (b),
- passengers shall be offered:
  - (i) the assistance specified in Article 9(1)(a) and 9(2); and
  - (ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and
  - (iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).
- ECJ: Delay of more than 3 hours equals cancellation -> Art. 7 (C-402/07 Sturgeon)

# The Regulation (EC) 261 / 2004

## Article 7: Right to compensation

1. Where reference is made to this Article, passengers shall receive compensation amounting to:

- (a) EUR 250 for all flights of 1,500 km or less;
- (b) EUR 400 for all
  - intra-Community flights of more than 1,500 km, and
  - for all other flights between 1,500 and 3,500 km;
- (c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time.

## The Regulation (EC) 261 / 2004

### Article 8: Right to reimbursement or re-routing

- Passengers shall be offered the choice between:
  - reimbursement within seven days, of the full cost of the ticket,
  - a return flight to the first point of departure, at the earliest opportunity;
  - re-routing, at the earliest opportunity; or
  - re-routing, at a later date at the passenger's convenience, subject to availability of seats

# The Regulation (EC) 261 / 2004

## Article 9: Right to care

1. Passengers shall be offered free of charge:
  - (a) meals and refreshments in a reasonable relation to the waiting time;
  - (b) hotel accommodation in cases
    - where a stay of one or more nights becomes necessary, or
    - where a stay additional to that intended by the passenger becomes necessary;
  - (c) transport between the airport and place of accommodation (hotel or other).
2. In addition, passengers shall be offered free of charge
  - two telephone calls, telex or fax messages, or e-mails.

# International Approach

## Consumer Protection in the USA

- Denied boarding compensation if an airline requires a passenger to give up his seat on an overbooked flight and:
  - You have a confirmed reservation,
  - You checked-in to your flight on time,
  - You arrived at the departure gate on time, and
  - The airline cannot get pax to his destination within one hour of your flight's original arrival time.

# International Approach

## Domestic - Denied Boarding Compensation (DBC)

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Length of Delay	Compensation
0 to 1 hour arrival delay	No compensation
1 to 2 hour arrival delay	200% of one-way fare (but no more than \$675)
Over 2 hour arrival delay	400% of one-way fare (but no more than \$1,350)

## International - Denied Boarding Compensation (DBC)

International - Denied Boarding Compensation (DBC)

Length of Delay	Compensation
0 to 1 hour arrival delay	No compensation
1 to 4 hour arrival delay	200% of one-way fare (but no more than \$675)
Over 4 hour arrival delay	400% of one-way fare (but no more than \$1,350)



# International Approach

## Consumer Protection in the USA

- Tarmac delays (see CFR 259)
  - Mostly technical help
- Delayed flights
  - There are no federal laws requiring airlines to provide passengers with money or other compensation when their flights are delayed.
  - Each airline has its own policies about what it will do for delayed passengers.
- Lost baggage
  - Airlines are required to compensate for lost, delayed, or damaged bags.

## Case Study

Mark Smith holds a confirmed booking on Lufthansa flight LH1500 from Düsseldorf (DUS) to Palma de Mallorca (PMI) (1,335 kilometers) departing at 13:30 and arriving at 15:30.

Upon check-in at 10:30 on the day of the flight, Mark is informed by the carrier that the flight will be delayed until 16:45.

At 16:40 Lufthansa cancels flight 1500 altogether due to a technical issue with the aircraft and re-books Mr. Smith on flight 1502 departing Düsseldorf at 20:30 and arriving at 22:30.

Flight 1502 departs on time and arrives in Palma de Mallorca ten minutes ahead of schedule.

What are Mark's rights under Regulation (EC) 261/2004?

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## Case Study

- Applicability of Regulation (EC) 261/2004
  - Article 3 I (a) departing from an airport in a member state
  - Article 3 II (a) confirmed reservation timely check-in
- Delay
  - Article 6 I (a)
    - delay longer than 2 hours
    - distance less than 1500 kilometers
  - Article 6 I (i) refers to
    - Article 9 I (a) meals and refreshments
    - Article 9 II phone calls, etc.

## Case Study

### ➤ Cancellation

#### ➤ Applicability of Article 5 (Cancellation)

- Article 5 I (a) Remedies of Article 8 Re-routing ✓
- Article 5 I (b) Remedies of Article 6 Right to Care ✓
- Article 5 I (c) Remedies of Article 7 Compensation

#### ➤ Article 5 III ???

-> Does not apply

#### ➤ Article 7 I (a)

-> Compensation in the amount of Euro 250.00

#### ➤ Article 7 II ???

-> Does not apply