WATSON FARLEY
&
WILLIAMS

BRIEFING

THE DENIED BOARDING REGULATION (EC) NO 261/2004: DELAY COMPENSATION UPDATE

JULY 2017

- DOES A BIRD STRIKE CONSTITUTE 'EXTRAORDINARY CIRCUMSTANCES' IN RESPECT OF DELAY CLAIMS?
- *GAHAN V EMIRATES*: IS A FLIGHT THAT CONNECTS THROUGH A NON-MEMBER STATE AIRPORT A SINGLE FLIGHT?
- DOES THE PASSENGER'S REPRESENTATIVE HAVE AUTHORITY TO HANDLE THE CLAIM?
- TIPS AND SUGGESTIONS FOR DEALING MORE EFFECTIVELY WITH RECOVERIES AGENCIES AND CLAIMANT LAWYERS.

Reducing the number of claims for delays is always a priority for airlines, especially as third parties such as claims agencies are now pursuing claims more and more aggressively. Establishing in what circumstances liability arises and how claims should be handled is not always straightforward. This briefing reviews recent developments under EC 261/2004 and offers practical tips on dealing more effectively with passenger delay claims and with recoveries agencies and claimant lawyers acting for passengers.

Does a bird strike constitute 'extraordinary circumstances'?

Where a delay is caused by 'extraordinary circumstances', carriers are not liable to pay EC 261/2004 compensation to affected passengers.

However, what constitutes 'extraordinary circumstances' is not clearly defined and is the subject of a considerable number of claims and proceedings, with inconsistent outcomes.

In England, the position accepted by some courts was that a bird strike did not constitute 'extraordinary circumstances'. Taking the view that frequency could not determine whether bird strikes were extraordinary, the courts compared bird strikes to accidents between cars, between cars and bicycles, and between cars and pedestrians. There is some support for the position that it is the impact of the bird strike rather than its frequency that has made this a bigger issue for airlines.

The decision of the Court of Justice of the European Union (the "CJEU") in *Pešková and Peška v Travel Services A.S.* C-315/15 has now provided airlines with more certainty on this issue, and may reduce the number of claims they face. Although the airline was ultimately held liable for compensation for delay on other grounds, the decision is nevertheless significant.

"IT IS IMPORTANT TO NOTE THAT THE FOCUS IS ON THE STEPS AN AIRLINE HAS AND COULD HAVE TAKEN TO AVOID OR REDUCE DELAY."

The CJEU ruled on the following four issues:

QUESTION	CJEU DECISION
Is bird strike an 'extraordinary circumstance' as defined either by the Denied Boarding Regulation or pursuant to the guidelines set out in the relevant case law?	A bird strike constitutes 'extraordinary circumstances' for the purpose of EC 261/2004, provided it was not intrinsically linked to the operating systems of the aircraft and, as a result, not by its nature or origin inherent to the normal exercise of the activity of the air carrier and is outside that air carrier's control. The significance is the determination that a bird strike is outside the control of a carrier.
If bird strike does constitute an 'extraordinary circumstance', will the technical and administrative measures implemented by an air carrier following a bird strike, even where no damage was inflicted, also constitute extraordinary circumstances?	The key issue in whether these measures also constitute 'extraordinary circumstances' appears to be whether the measures were necessary and appropriate. The CJEU decision indicates that carriers must not prioritise minimising delays over safety. On this basis, steps taken by an airline after a bird strike that contribute to or cause a delay may constitute 'extraordinary circumstances' where they appear necessary and appropriate to ensure the safe operation of the aircraft. Whether the collision caused damage to the aircraft appears immaterial. It is important to note that the focus is on the steps an airline has and could have taken to avoid or reduce delay. The airline does not appear responsible for steps taken or that could have been taken by other parties, such as Air Traffic Control, to reduce or minimise delays and that are outside its control.
If bird strike does constitute 'extraordinary circumstances', may preventive measures used around airports be considered within reasonable measures	The focus is on the steps and preventive measures an air carrier, whether at a technical and administrative level, was able to make, directly or indirectly, to reduce or prevent collision with birds. Steps taken by parties outside the control of an airline, such as an airport or local government, will not be relevant to consideration of whether an air

taken by the air carrier to avoid bird strike?	carrier has taken reasonable measures to prevent or reduce bird strikes. This analysis should apply to other circumstances of delay and assessing whether an air carrier has taken reasonable measures.
How must compensation be assessed where the technical and administrative measures implemented do not deal exclusively with the bird strike and include time attributed to a technical problem unconnected to the bird strike?	Where the total length of delay is attributable to two or more causes and not all of those causes constitute 'extraordinary circumstances', the total delay duration must be reduced by the length of delay caused by extraordinary circumstances. The resulting aggregate delay must be used to assess whether EC 261/2004 delay compensation is payable. For example, if a flight over a distance of 3,500KM or more is delayed by five hours and only two hours of the delay are attributable to an extraordinary circumstance, the air carrier will still be liable for EC 261/2004 delay compensation. If three or more hours of that five hour delay are attributable to 'extraordinary circumstances', the air carrier will not be liable for EC 261/2004 delay compensation.

"THE FOCUS IS ON THE STEPS AND PREVENTIVE MEASURES AN AIR CARRIER, WHETHER AT A TECHNICAL AND ADMINISTRATIVE LEVEL, WAS ABLE TO MAKE, DIRECTLY OR INDIRECTLY, TO REDUCE OR PREVENT COLLISION WITH BIRDS."

What should an airline do?

- ensure there are sufficient and appropriate resources available to deal with a bird strike and that these are deployed as quickly and as fully as possible;

Keep a log of the delay, including:

- records of the technical and administrative steps taken by the air carrier and the time required to complete these steps;
- records of the steps outside the control of the air carrier and the impact of these on the delay;
- if the delay had more than one cause, keep a record of the total delay and the amount of time attributable to each cause;
- identify personnel who can explain why these steps were necessary and appropriate as a result of the bird strike; and
- ideally, take short contemporaneous statements from each of these personnel.

Where an air carrier has outsourced its ground-handling operations to one or more third parties, implementing these recommendations may be more challenging.

Air carriers should also ensure that they refer to this decision and apply it as quickly and consistently as possible.

Implications of the appeal in *Gahan v Emirates* (unreported, 5 May 2016)

The English Court of Appeal is likely to hear an appeal from the decision of the County Court in *Gahan v Emirates* this month.

"THIS IS A CRITICAL ISSUE WHERE THE CONNECTING SECOND FLIGHT IS DELAYED OR THE PASSENGER MISSES THE CONNECTING FLIGHT BECAUSE OF A SMALL DELAY ON THE OUTBOUND FIRST FLIGHT, RESULTING IN THE PASSENGER ARRIVING AT THEIR FINAL DESTINATION WITH A DELAY THAT WOULD ENTITLE THEM TO COMPENSATION UNDER EC 261/2004."

The key issue is whether, for the purposes of EC 261/2004, a flight departing from an EU Member State to a destination in a non-EU Member State, connecting through a non-EU Member State airport, should be categorised as one single flight or as two separate flights making up an overall journey.

This is a critical issue where the connecting second flight is delayed or the passenger misses the connecting flight because of a small delay on the outbound first flight, resulting in the passenger arriving at their final destination with a delay that would entitle them to compensation under EC 261/2004.

The position in England is unclear and, in denying liability for delay, carriers rely on two decisions that hold that EC 261/2004 applies only to flights departing EU Member State airports and not to flights between airports in non-EU Member States. This appears to focus on each sector being separate and distinct, despite the likelihood that the passenger's baggage has been checked through to the final destination and the two sectors were sold as a single journey.

However, this approach has not been consistently applied.

In addition, the position differs from that taken in the courts of other EU Member States and the CJEU, which is that a multiple sector flight should be considered as a single unit of air travel. This takes into account the likelihood that the multiple sector journey was marketed and sold as a single unit of air travel rather than as separate tickets and that the passenger and their baggage were checked-in at the airport of departure for all sectors of the multiple sector journey.

"THE COURT OF APPEAL WILL NEED TO CONSIDER THE CONFLICTING INTERPRETATION OF THE REQUIREMENTS BY THE HIGH COURT AND BY THE CJEU."

Why is this decision potentially significant?

- The Court of Appeal will need to consider the conflicting interpretation of the requirements by the High Court and by the CJEU.
- The impending departure of the UK from the EU may also have an influence on the outcome.
- Regardless of the outcome, the judgment of the Court of Appeal should provide a clear determination of whether EC 261/2004 applies to sectors of a journey between two non-EU Member States.
- This should allow air carriers dealing with claims by English-based passengers more certainty in claims handling.
- A further issue to be addressed is understood to be whether EC 261/2004 is incompatible with the provisions of the Montreal Convention and thereby does not apply to non-Community Carriers. This will require the Court of Appeal to consider an existing decision of the CJEU on this issue, which found that EC 261/2004 was not incompatible with the Montreal Convention. However, that decision was in relation to an EU Member State air carrier, which was bound by the Montreal Regulations. Non-Community Carriers (such as Emirates, the defendant in *Gahan v Emirates*) are not bound by the Montreal Regulations.

Does the passenger's representative have proper authority to handle the claim?

Passenger claims are increasingly being handled by claims agencies, recovery agents and law firms.

Many of the claims are handled online with limited direct contact between the passenger claimants and the claims agencies, recoveries agent or law firm.

It is not unusual for an airline to receive a *pro forma* letter demanding compensation for delay with minimal details of the passenger and instructions for the payment to be made to the claims agency, recoveries agent or law firm.

"WHERE A PASSENGER ELECTS TO HAVE ANOTHER PERSON OR PARTY REPRESENT THEM, THE AIR CARRIER IS ENTITLED TO REQUEST EVIDENCE OF THIS AUTHORITY AND THE NOTICE STIPULATES THAT THIS SHOULD BE A SIGNED POWER OF ATTORNEY, TOGETHER WITH A COPY OF THE PASSENGER'S ID OR PASSPORT ID PAGE."

In many cases, the claims agency, recoveries agent or law firm will resist calls to have the passenger claimant execute a release and indemnity or receipt. While there are circumstances where a release is not required by law, any settlement where a payment is made to a third party raises issues in relation to the true authority of that third party to handle and settle the claim(s). Further, settlement of claims in the absence of proper authority raises issues of fraud, duplicated claims and increases the number of claims that are presented to airlines.

To address these issues and provide some guidance to all parties, the EC issued an Information Notice on 9 March 2017. This specifically addresses the role of recoveries agents and law firms and expressly states the right of each passenger to decide if they wish to be represented by another person or party.

Where a passenger elects to have another person or party represent them, the air carrier is entitled to request evidence of this authority and the Notice stipulates that this should be a signed power of attorney, together with a copy of the passenger's ID or passport ID page.

What should airlines do?

On receipt of claims from claims agencies, recoveries agents, law firms or any person or party claiming to act on behalf of another passenger, an airline should request evidence of the authority of the third party, including claims agencies, recoveries agent or law firm, to act on behalf of the passenger.

In any discussions on payment of compensation, it should be made clear in the correspondence that any payment will be made only on receipt of a properly executed power of attorney, together with a certified copy of the passenger's ID or passport ID page.

If the right to this evidence of authority is disputed, the agent should be referred to the terms of the Information Notice.

"THE EASIER IT IS FOR A PASSENGER TO PRESENT THEIR CLAIMS DIRECTLY TO AN AIRLINE, THE GREATER THE LIKELIHOOD THAT THE CLAIM CAN BE RESOLVED WITHOUT THE INVOLVEMENT OF CLAIMS AGENCIES, RECOVERIES AGENTS AND LAW FIRMS."

Delay claims: cutting out the middleman

The increasing role of claims agencies, recoveries agents and law firms in relation to delay claims has resulted in claims being pursued more aggressively than is often the case with claimants in person. This is particularly so where any fees earned by the claims agencies, recoveries agents and law firms are derived from compensation payments made by air carriers.

From our experience in dealing with claims presented by passengers, claims agencies, recoveries agents and law firms, we have set out below some recommendations to enhance the management and handling of EC 261/2004 claims:

Dealing with passenger claimants:

- Provide a simple and convenient claim form accessible via the airline's website to provide a mechanism for passengers to submit claims for delay. This should be as easy to use and straightforward as those used by claims agencies and recoveries agents and should allow for a claim to be resolved without the need for further documentation.
- The airline's website should make it clear that the use of a claims agency, recoveries agent or law firm is unlikely to result in any offer of compensation in excess of the limits in EC 261/2004.
- The easier it is for a passenger to present their claims directly to an airline, the greater the likelihood that the claim can be resolved without the involvement of a third party, including claims agencies, recoveries agents and law firms.
- This may also present an airline with a means of achieving a more amicable and cost-effective outcome.
- Records of payments and settlements should be kept and should be as clear and reliable as possible.
- In the event that the claim is not resolved at this stage and escalates to a formal claim, the chain of correspondence may be useful in defending the conduct of the airline, particularly if there are any disputes over costs.

Documents and records:

"PASSENGER MANIFESTS SHOULD BE MAINTAINED AND BE READILY AVAILABLE TO CONFIRM THAT THE CLAIM IS GENUINE."

- Passenger manifests should be maintained and be readily available to confirm that the claim is genuine. These should be kept for the applicable national limitation period, which ranges from one year in Belgium to 10 years in Luxembourg from the date of the flight. The limitation period for claims in England and Wales is six years from the date of the flight.
- This can expedite claims processing and resolution and avoid disputes and issues where an airline cannot verify a passenger's claim.
- For delayed flights, flight records, cabin and/or crew voyage reports, records of rebooked passengers, the services and compensation offered and any communication with delayed passengers should be collated and retained by a single team or department to ensure that they are readily accessible if claims are subsequently presented by delayed passengers.

Dealing with claims agencies, recoveries agents and law firms:

- Ensure that the recoveries agent or law firm has the required authority to act.
- Ensure that the passenger can demonstrate that they had a confirmed reservation and presented themselves for check-in within the prescribed time.
- As far as possible, ensure that all communication is in writing.
- As claims agencies, recoveries agents and law firms tend to handle a large number of claims, there are concerns about the confidentiality of settlements reached in respect of individual passengers on the same flight or carried by the same airline. It is thus vital that settlements reached emphasise and/or record that the claims agencies, recoveries agents and law firms keep settlement terms confidential between their respective clients.
- The starting position for any out of court settlement should be that it be subject to the execution of a release or receipt in terms acceptable to the carrier. This should include undertakings as to confidentiality and a full release of all claims by the passenger against the carrier.

FOR MORE INFORMATION

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