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# THE AVIATION LAW REVIEW

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SECOND EDITION

EDITOR  
SEAN GATES

LAW BUSINESS RESEARCH

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The Aviation Law Review

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# THE AVIATION LAW REVIEW

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Second Edition

Editor  
SEAN GATES

LAW BUSINESS RESEARCH LTD

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# EDITOR'S PREFACE

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The first edition of *The Aviation Law Review* has been enthusiastically received around the world. Not only is aviation law global in its reach, but it is also in many respects unique, even in the field of transport, as this edition demonstrates. The second edition of *The Aviation Law Review* includes chapters from contributors to the first edition alongside a number of chapters from lawyers in additional jurisdictions, making this an even more vital tool for students, practitioners and in-house counsel.

Clients continue to demand a 'one-stop shop' approach from their lawyers in this field given the issues they face and the special nature of the subject. All the customary disciplines of a commercial practice come into play, but all must then be overlaid with an aviation perspective. This further emphasises the essential nature of specialisation in the industry and maintains the exclusivity of the practice of aviation law.

This year again, regulatory matters have been to the fore with more and more countries seeking to feather-bed consumers with protection from the vicissitudes of life, and at the expense of the industry. The global tendency towards the nanny state piles costs on operators, which can only be recovered from ticket prices, and therefore consumers, but since the link between regulation and cost is indirect, regulators can boast of their concern for consumers without having to deal with the backlash of increasing cost, or finding a budget for their extravagance. Among others the US consumer protection laws represent a further imposition, though perhaps EC carriers will find comfort in the company of their peers!

Unmanned aerial vehicles are coming into the regulatory focus as aspirational operators look to adopt the technology for cost saving and additional services. BP has won the first licence from the FAA for use of UAVs to monitor the Alaskan pipeline. Amazon's intentions in this area have been widely published and the plans of Jeff Bezos should not be dismissed lightly. Many jurisdictions are consulting on the shape of the regulatory framework, on whether UAV operators will fall to be regulated similarly to commercial operators and what airspace they will be permitted to occupy.

Last year I railed against the failure of the EC to institute a truly first-class accident investigation body within Europe. This year practitioners' eyes should be

focused on a recent decision of the UK Court of Appeal in *Rogers v. Hoyle*, which has permitted the use of accident reports in civil liability trials contrary to the prohibition on this practice recommended by the draftsmen of the Chicago Convention 1944 in the accident investigation annex and by the draftsmen of the EU Regulation on accident investigations. The prospects for the EC revisiting the topic are remote, but perhaps the right approach in any event would be for a truly global accident investigation board to be established; the potential for cost saving would be significant, while providing the opportunity to eliminate those unable to attain a sufficiently high standard. Sadly the prospects of movement in the International Civil Aviation Organization (ICAO) within the next two decades seem remote, though in the past the Air Navigation Commission has acted as an investigatory appellate body!

Before closing, one must welcome the Montreal Protocol to the Tokyo Convention following the Diplomatic Conference at the ICAO in Montreal this year. This has been focused on the activities of disruptive passengers and the regulation of in-flight security officers. The Protocol, by extending jurisdiction to the state of next landing in relation to criminal offences committed on board aircraft make it much more probable that those offences will be prosecuted and that disruptive passengers will be brought to book. Sadly, states declined to take the short step of extending immunity to the commander of the aircraft beyond that extant in the original Convention. The actions of the commander and flight and cabin crew remain susceptible to examination by courts, which can review their actions with the full benefit of hindsight and a test of reasonableness the interpretation of which will vary widely from one country to another. Industry recommended that deference be given to the actions of the flight crew in situations where the safety of the aircraft could be jeopardised, but this was not taken up by the delegates. Nevertheless the Protocol is to be commended for what it does achieve more than criticised for that which delegates passed on, and hopefully it will be ratified without too much delay.

I would like to extend my thanks to the contributors to this volume, both those who contributed before and those who have joined the group. Their efforts are highly appreciated and represent a substantial contribution to the global aviation law library.

**Sean Gates**

Gates Aviation Ltd

London

July 2014

## Chapter 13

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# ITALY

*Anna Masutti*<sup>1</sup>

### I INTRODUCTION

The administration of Italy's air navigation sector is guaranteed by the Italian Civil Aviation Authority (ENAC), the National Agency for the Safety of Flight (ANSV) and by the Aero Club of Italy (AeCI). The management of air navigation in its operational profiles has been referred to ENAC.

ENAC is the primary agency entrusted with the responsibility of regulating aviation in Italy, as provided by Article 687 of the Italian Navigation Code (INC) and Legislative Decree No. 250/97. ENAC is the competent authority for supervision and regulation of air carriers and has power to impose fines for breach of regulations. In particular, ENAC is responsible for imposing fines on airlines that are in breach of Regulation 261/2004. Moreover, the Passenger's Charter and the Charter of Airport Standard Services have been promulgated by ENAC. The Passenger's Charter is practically a *vade mecum* of national, European and international regulation on air passenger protection, detailing the claims and compensation procedures available to passengers in case of non-compliance with the above regulation. The Charter of Airport Standard Services sets out the minimum quality standards airport operators are bound to comply with in providing their services.

In addition, Legislative Decree No. 201/2011 (the *Salva Italia* Decree), subsequently amended by Legislative Decree No. 1/2012 (the liberalisation decree), established the Regulatory Transport Authority (the Authority). The Authority carries out important functions in regulation, promotion and ensuring fair competition in the transport sector. Included among these functions is the Authority's responsibility for ensuring fair conditions of access and non-discriminatory access to airports, and movement of passengers and goods at national level. The Authority performs supervisory functions regarding airport charges. Another of the Authority's roles is to

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<sup>1</sup> Anna Masutti is a senior partner at LS Lexjus Sinacta.

verify that tender notices do not contain discriminatory conditions or obstruct other market competitors. The first board of the Authority was appointed by Presidential Decree dated 9 August 2013, published partially in the Italian Official Journal (dated 16 September 2013). The Authority has established its main offices in Turin.

Another agency that comes into play in the aviation sector's regulatory domain is the Italian Antitrust Authority. An independent authority established by Law No. 287/1990, it is tasked with clamping down on unfair commercial practices and misleading advertisements, and is empowered to levy fines, if necessary. The Authority has already fined several Italian air carriers for unfair commercial practices relating to underpricing or mispricing of tariffs and other reimbursable elements of cost, which tends to prejudice the passenger's interests, in case of flight cancellation. The Authority also considers unfair the practice of acceptance of insurance policies by passengers, given that this service is normally preselected during the carrier's online booking process. As a consequence, consumers who are not interested in purchasing the service would be forced to opt out. More recently, in a historic decision, the Italian Antitrust Authority awarded seven slots that were previously held by the former Italian flag carrier to a low-cost European air carrier, thus effectively enabling it to consolidate its position in the Italian market.

The Italian administrative courts of jurisdiction are the Regional Administrative Court and the Supreme Administrative Court. The Regional Administrative Court has jurisdiction over ENAC's and the Italian Antitrust Authority's decisions. The judgments issued by the Regional Administrative Court can be challenged before the Supreme Administrative Court.

## **II LEGAL FRAMEWORK FOR LIABILITY**

Liability of the air carriers for death or injury to passengers, for loss of or damage to goods or baggage, and for delay in international transport is governed by the Montreal Convention of 28 May 1999 on International Air Transport, which came into force in Italy on 28 June 2004, following its simultaneous ratification by 13 Member States of the European Community (now the European Union), the Community itself and Norway. It replaced both the Warsaw Convention of 1929 and subsequent protocols, and the Guadalajara Convention of 1961.

With its entry into force, the Convention applied Regulation (EC) No. 889/2002 of 13 May 2002, which amended Regulation (EC) No. 2027/97 of 9 October 1997. This Regulation broadens the extent and scope of the provisions of the Montreal Convention on carriage of passengers, baggage and cargo, as well as carriage by air within a single Member State by the air carriers of the Community countries, including Italy.

Following this, the Italian regulation stands in compliance with the Community rules. Some international arrangements for protecting the interests of passengers have been effected through the modification of the most important internal source of regulation – the INC. Section II of the INC is entirely dedicated to matters related to aviation, while Section I is devoted to matters related to maritime. In 2005 and 2006 numerous amendments were introduced to the INC's articles governing the aeronautical sector, through Law Decrees No. 96/2005 and No. 151/2006, with a view to creating internal

discipline that matches international and Community standards, and in particular, with regard to the transport of passengers (and the consequent liability of the carrier and the protection of passengers' rights).

By adding the amendments of 2005 and 2006 to its domestic legislation, Italy has extended the enforceability of the Montreal Convention to every area of commercial aviation, which includes the ferrying of air passengers, baggage, as well as areas left out by the extension induced by Regulation 2027/97, as amended by Regulation 889/2002.

The areas left out earlier included the transport services carried out by non-Community air carriers, as well as those performed by unlicensed carriers. (In this regard, it must be considered that, to date, the former are not permitted as per the cabotage rights enshrined in the Chicago Convention.) Unlicensed operators include, for example, carriers operating with light aircraft, as well as those involved in transport services with points of departure and arrival at the same airport.

Article 941 of the INC concerning air carriage of passengers and baggage, and Article 951 on the transport of goods, extend the applicability of the Convention to all air transport, to which the domestic laws – Law Decrees No. 96/2005 and No. 151/2006 – become applicable.

In addition, Italy has extended the applicability of the rules of the Montreal Convention on air carrier liability to psychological damage as well. Indeed, Article 941, Paragraph 1 of the INC had already extended the applicability of the Convention to personal injury caused to passengers, although according to the prevailing interpretation, the Convention applies only to bodily injuries and not psychological injuries.

However, it is important to keep in mind that this extension is not applicable to areas of transport to which the Convention applies in its own right, or as a result of the Community rules, because for them, the Convention applies irrespective of the INC. So the Convention rules would prevail in cases to which domestic legislation would have applied.

The damage caused by failure to perform transport services is not governed by the Montreal Convention, which does not apply for this sort of damage.

Article 949-bis of the INC applies to the liability of the carrier for the failure to perform services, which is the same liability system established for delay, as regulated by Article 19 of the Montreal Convention.

Again, Article 949-ter of the INC establishes a limitation of actions to the right to damages in relation to the transport of passengers and baggage. The article establishes that the right to damages shall be extinguished in accordance with the international and community law rules in force in the Italian Republic, which is therefore the regulation introduced by the Montreal Convention. Consequently, Article 35 of the Montreal Convention on the limitation of actions is applicable in Italy if an action is not brought within a period of two years, reckoned from the date of arrival at destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped. Article 949, Paragraph 2 specifies that the above-mentioned rights are no longer subject to the regulation-established time bar that was applicable before the new amendments to the INC were carried out in March 2006.

With regard to carrier liability, the INC provides for a compulsory insurance system (Article 942). Since Regulation (EC) No. 785/2004 on insurance requirements for air carriers and aircraft operators does not establish a complete regulatory framework



on insurance, the civil liability insurance rule contained in the Italian Civil Code applies, as well as the provision contained in Article 942, Paragraph 2 of the INC, which provides that the passenger has the right to take direct action against the insurer of the carrier for any damage suffered or incurred.

Article 942, Paragraph 3 states, however, that the insurer cannot rely on the passenger acting directly against his or her objections arising from the insurance contract concluded by the carrier, or clauses that provide for a contribution from the carrier to indemnify for damage.

As for the transport of passengers and goods by air, the Italian legislature, in 2006, found that the regulation on liability for damage caused to third parties on the surface was adequate and comparable to the international regulations in force. Indeed, Article 965 of the INC extends the regulation of the Rome Convention 1952 also to damage caused on Italian territory by aircraft registered in Italy, as well as damage caused by state aircraft.

In this manner, the rules of the Rome Convention apply to cases for which it does not apply in Italy under its own rights (Article 26).

The Italian legislator introduced some changes to the rules on liability for collision between aircraft. These are in line with the amendments made to the regulation of liability of the operator for damage caused to third parties on the surface. Article 972 of the INC states that all rules governing the limitation of compensation and its implementation in the event of liability for damage caused to third parties on the surface (Rome Convention 1952) shall also apply to liability for damage due to collision between two aircraft in flight, or between an aircraft in flight and a moving ship (in which case, the responsibility for the damage falls on the aircraft). Article 971 of INC modifies the extent of the limits laid down in the Rome Convention (which vary according to the weight of the aircraft – Article 11 of the Convention) and fix it in accordance with the minimum amount of insurance required as per Article 7 of Regulation No. 785/2004. Indeed, the minimum coverage is determined by the maximum take-off mass (MTOM) of the aircraft and ranges from 0.75 million to 700 million special drawing rights.

#### **i International carriage**

As mentioned above, the air carrier's liability for loss or damage to goods transported, and loss due to delay in international transport is governed by the Montreal Convention of 28 May 1999. Article 951, Paragraph 1 of the INC applies to all air transport liability rules contained in the Convention. The Montreal Convention relating to the transport of persons does not apply to damages for non-performance of the carriage. Even in this case, Article 952 of the INC, which has a provision identical to Article 949-bis on the transport of persons, extends the conventional regulation governing this failure of the air carrier, the only difference being that in the carriage of goods, the carrier's liability is limited.

#### **ii Internal and other non-convention carriage**

The main source of Italian law in domestic aviation matters is the INC. Section II of the INC is entirely dedicated to matters relating to aviation, while Section I is devoted to maritime matters.

As mentioned above, Article 951, Paragraph 1(i) of the INC makes the liability rules set out in the Montreal Convention of 1999 applicable to all air transport of goods. (To understand the significance of this extension or the scope of application of the Montreal Convention, see Section II, *supra*.)

The gaps in the Montreal Convention regulations in respect of carriage of goods have been filled by the INC; this was done by referring to the rules contained in the INC for the regulation of maritime transport, and adding some rules as to the responsibility of the carrier for non-performance of the carriage, on return of things and the time-bar. In particular, the provision on non-performance of the transport services contained in Article 952, as was the case for the transport of persons, is subject to the same liability regime that the Convention rules for the delay, but with an added compensation limit, also corresponding to what the Convention provides for the delay.

### iii General aviation regulation

The law that governs the liability of the operator in of general aviation activities is established by the INC and other domestic laws (see the Decree of the President of the Republic on 9 July 2010, No. 133).

Article 743, Paragraph 1 of the INC contains a broad definition of aircraft, describing it as a machine used for transporting passengers and goods by air. Consequently, the activities performed by aircraft are subject to the rules of the INC, which govern these liabilities (see subsection ii, *supra*), including the liability of the carrier and the operator of small aircraft.

On the other hand, with regard to aircraft used for leisure and microlight aircraft, the Italian legislator has introduced a special regulation for insurance obligations; however, this special regulation refers to both the Community guidelines on insurance obligations, as well as to the principles established by the INC for such obligations (which we have discussed in subsection ii, *supra*).

Indeed, Decree No. 133/2010 of 9 July 2010 introduces specific insurance requirements for single and double microlights without motor (two-seaters weighing up to 100 kilograms), for powered aircraft (weight not exceeding 330 kilograms for fixed-wing aircraft used for leisure flights, and not more than 450 kilograms for helicopters) and for the two-seater powered aircraft (weighing not more than 450 kilograms, and not more than 495 kilograms on devices with fixed wings used for recreational flying and helicopters). This Decree has amended Law No. 106 of 25 March 1985, in light of developments in technology and the safety needs of leisure aviation.

Article 20 of Decree 133/2010 establishes a compulsory insurance for civil liability of the operator for damage caused to third parties on the surface as a result of impact or collision in flight.

Article 21 introduces the requirements of the insurance coverage and requires that the insurance contract be concluded in compliance with Regulation 785/2004, and also foresees the extension of insurance coverage to the damage caused by gross negligence. It also provides for the obligation of the insurer to directly indemnify the injured third party, within the limits of the maximum insured. The insurer cannot deny it because of any contract or clause that provides for the contribution of the insured towards damage

compensation. However, this does not preclude the possibility of recourse by the insurer against the insured, to the extent and circumstances provided for in the contract.

#### **iv Passenger rights**

ENAC has issued the Passenger's Charter, which contains the rights conferred on passengers by Regulation 261/2004. It is a practical guide in which ENAC has summed up with useful information for those travelling by air.

The Passenger's Charter was drawn up for the first time in 2001 and distributed at all Italian airports. As mentioned earlier, a new version (the fifth) was introduced in 2005, in conjunction with the entry into force of new rules governing delay and cancellation of flights, with a view to report, in particular, the increase in the amount of compensation payable by carriers in the event of denied boarding due to overbooking, introduction of forms of compensation and assistance in the event of flight cancellations or long delays, as well as the extension of such protection to passengers on charter flights.

In March 2009, ENAC approved a newer edition of the Passenger's Charter, implementing therein the European provisions on the rights of disabled passengers and regulations regarding security and surveillance on operators. It also allows for the implementation of regulations on carrying liquids on board aircraft, and published a list of items that add up to the final cost of an airline ticket, to allow transparency in pricing determination.

Recently, ENAC has incorporated the principles established in the judgment of the European Court of Justice in November 2009 on compensating passengers in the event of a long delay. The judgment upheld the rights of passengers to be compensated in the event of reaching their destinations over three hours later than the published arrival time.

In addition, the Italian legislator introduced into the INC certain provisions aimed at ensuring special protection for passenger rights. Special mention must be made of Article 943, which provides for a specific obligation to provide information. If the transport is being carried out by an air carrier other than the carrier indicated on the ticket, the passenger must be adequately informed of such prior to the issuance of the ticket.

For ticket reservations, the above information must be given at the time of booking confirmation. In the event of lack of information, a passenger may request the termination of the contract, reimbursement of the cost of the ticket and the payment of damages. Article 943 also establishes that carriers cannot operate from Italian territory if they do not fulfil their obligations to provide information referred to in Article 6 of Regulation No. 2027/97 (as amended by Regulation No. 889/2002). In addition, Article 948 introduces rules for passenger waiting lists. The carrier is obliged to communicate to the passenger its respective waiting list numbers while putting up a waiting list for a certain flight. Moreover, it must be posted in a location that is accessible and visible to the travelling public. Passengers whose names have been entered on the waiting list have the right to access transport according to the waiting list number assigned to each.

Finally, Article 783 of the INC obligates air carriers to make an annual check on the quality of services offered to passengers, according to the indications given by ENAC, which checks compliance with promised quality, and in the event of non-compliance, enforces measures laid down in its rules that can even lead to the revocation of the operator's licence (Article 783 of the INC).

### **III LICENSING OF OPERATIONS**

#### **i Licensed activities**

Within the EU, international and domestic air services are governed by Regulation No. 1008/2008, which provides market access to all carriers who have obtained, in advance, an operating licence, as well as an air operator's certificate.

This principle was also adopted by the Italian legislature in 2005 and 2006 as it modified the rules of the INC, stipulating services that are allowed to be performed by air carriers. These include air transport services to passengers and carrying of mail and cargo on scheduled and non-scheduled flights on intra-Community routes by carriers who have obtained an operating licence, and previously, a certificate (AOC), according to the provisions laid down in the INC and in EU legislation.

ENAC is the body responsible for issuing the AOC. The certificate affirms that the operator has the professional ability and organisation necessary to ensure the exercise of its aircraft in a safe condition for the aviation activities specified therein (Article 777 of the INC). ENAC establishes, through its own internal rules, the content, limitations and procedures for the issuance, renewal, and changes, if any, to the AOC. The regulation governing ENAC's issuance of a national AOC for air transport undertakings is also applicable to air carriers that have helicopter operations.

ENAC releases the air carrier licence to undertakings established in Italy, in accordance with Regulation 1008/2008. The conditions for issuance, the formalities, and validity of the licence shall be subject to the possession of a valid AOC specifying the activities covered by this licence.

To issue the licence, ENAC requires the operator to submit evidence for the administrative, financial and insurance requirements referred to in Regulation (EC) No. 1008/2008 and Regulation (EC) No. 785/2004, proof of availability of one or more aircraft, or on the basis of a property deed, or under a contract for the use of the aircraft previously approved by ENAC according to their own regulations.

Supervision of the activities of the air carrier and verification of its ability to meet the requirements on an ongoing basis comes under the authority of ENAC and is a condition for the issuance of the operating licence. A year after its issuance, and every two years thereafter, ENAC has to verify that the requirements for the issuance of licence are being met on an ongoing basis.

ENAC may, at any time, suspend the licence if the carrier is unable to ensure compliance with the licensing requirements, and has the authority to revoke it if it appears that the carrier is no longer able to meet its commitments.

**ii Ownership rules**

ENAC issues the air carrier's licence in accordance with Regulation (EC) No. 1008/2008 (Article 778 INC). The licence is granted to undertakings established in Italy whose effective control, through a shareholding majority, is owned directly or through majority ownership by a Member State or nationals of EU Member States and whose main activity is air transport in isolation or in combination with any other commercial operations of aircraft or the repair or maintenance of aircraft. Moreover, air carriers must own a valid certificate of airworthiness issued by ENAC and one or more aircraft being its property or leased (dry lease) as provided by Article 2.2 of the Circular No. EAL-16 on 27 February 2008. Air carriers must provide satisfactory evidence of administrative, financial and insurance requirements, as provided by Regulation 1008/2008.

**iii Foreign carriers**

Access to European routes is guaranteed to all air carriers (Italian and European) with the AOC and the operating licence granted by ENAC (Article 776 of the INC).

The services of scheduled air transport of passengers, mail or cargo that are conducted, in whole or in part, outside the European Union are governed by bilateral agreements.

Article 784 of the INC, regarding non-EU scheduled air transport services, states that it is an essential condition that the civil aviation authorities of the country parties have a regulatory system for certification and surveillance for air transport services; this is required to ensure a level of safety as provided by the Chicago Convention standards. The air transport services are performed for the Italian part by one or more designated air carriers, established on national territory, with a valid operating licence granted by ENAC or by a Member State of the European Union, provided with financial and technical capacity and insurance sufficient to ensure the smooth running of air services in conditions of safety and to safeguard their right to mobility of citizens (Article 784 INC).

ENAC chooses carriers on the basis of criteria set out and made public through transparent and non-discriminatory procedures. ENAC is the only authority that can prepare an agreement that regulates relations with the chosen air carriers. Designated carriers cannot give to other air carriers the service hired without the prior written consent of ENAC, under penalty of exclusion from the hired service (Article 785 INC).

Italy allows air carriers holding a licence and the carriers of the state with which there is the air transport service the exercise of non-EU non-scheduled services, on condition of reciprocity.

ENAC requires non-EU carriers technical requirements and administrative provisions, including those relating to the prevention of attacks against civil aviation (Article 787 of the INC). ENAC is responsible for regulating the carrying out the services of non-scheduled air transport.

In the event that the carrier does not meet the requirements mentioned, ENAC may prohibit a non-EU carrier to enter Italian airspace.

## **IV SAFETY**

Safety in the aviation field is guaranteed by the maintenance of the airworthiness of aircraft and parts and spares; it requires the certification of management organisations and products, as well as the qualification of technical and operating staff working in the field. Safety technical regulation is established and implemented by ENAC, which issues airworthiness certificates, air operator certificates and approves maintenance programmes in accordance with the international and European rules issued by the International Civil Aviation Organization and by the European Aviation Safety Agency (see Regulation (EC) No. 216/2008 of 20 February on common rules in the field of civil aviation).

The Italian safety regulation for air operations that do not constitute commercial transport is represented by Circular No. 71-B issued by ENAC on 31 October 2011 on continuing airworthiness management (CAMO) of aircraft not used in commercial activities with a weight of more than 5,700 kilograms and multi-engine helicopters (large aircraft).

In Italy the accident reporting system is guaranteed by the captain of the aircraft, who has the duty to record the accident or incident in the flight book immediately after landing and to report it to ENAC. Articles 826 to 832 of the INC regulate air accidents, establishing several duties for airport management, the Italian air navigation services provider (ENAV SpA) and for the ANSV. Pursuant to Article 826 of the INC, the technical investigation of air accidents and incidents is conducted by the ANSV.

## **V INSURANCE**

The amendments to the INC, made in 2005 and 2006 (by Decree No. 96 of 9 May 2005 and Decree No. 151 of 15 March 2006), which adapted its provisions to the international and Community standards in force in Italy, also have had an impact on aviation insurance regulation.

The previous regulations on compulsory insurance by air carriers and aircraft operators have been replaced by the current obligations to ensure their civil liability for damage caused to passengers, baggage, cargo and third parties established at European level. Indeed, the current rules oblige air carriers and aircraft operators to ensure their liability for damage caused to passengers, baggage, cargo in accordance with Community legislation (Regulation No. 785/2004). In this way Italy applies the same regulation established at EU level, with one specific provision established in favour of passengers. With particular regard to the insurance of passengers, Article 942 of the INC allows the passenger to exercise direct action against the insurer for compensation for the damage caused by the air carrier, which is not allowed under Regulation 785/2004.

As a result of this provision, an injured person may claim compensation either against the carrier or against its insurer. With regard to legal action against the insurer, Article 1020 of the INC provides for a limitation period of one year. Since the passenger has at his or her disposal a period of two years to bring an action against the air carrier (Article 35 of the Montreal Convention), it is generally believed that if the same passenger intends to act directly against the insurer, he or she needs to have the same two-year term for the action.

## **VI COMPETITION**

The Italian system does not provide specific regulation for the aviation sector. The Italian Law No. 287 of 10 October 1990, which introduced in the Italian system's general rules on competition law, is also applicable to the aviation sector.

## **VII ESTABLISHING LIABILITY AND SETTLEMENT**

### **i Procedure**

There is no sector-specific regulation on which fora and mechanisms are used to settle claims, or on the timelines for settlement and limitations for bringing claims. The general Italian Civil Procedure rules (established in the Italian Civil Procedure Code) are applicable.

Similarly, on the matter of which parties may be joined in actions for compensation (carriers, owners, pilots, manufacturers, etc.), the general Italian Civil Procedure rules (established in the Italian Civil Procedure Code) are applicable. The Italian Code of Civil Procedure provides the possibility for one party to involve one or more parties in a dispute, provided that the party who promotes the action holds an interest in bringing proceedings against other parties (Article 100).

Liability is allocated among the defendants according to the respective negligence in causing the accident or incident (if fault is established).

### **ii Carriers' liability towards passengers and third parties**

See Section II, *supra*.

### **iii Product liability**

There are no sector-specific rules governing manufacturers' and owners' liability to passengers and operators; the Italian regulations on product liability are applicable.

### **iv Compensation**

There are no sector-specific rules. The Italian regulations on product liability are applicable.

## **VIII THE YEAR IN REVIEW**

A new scenario is taking shape in the airline industry with the rapid expansion of Emirates, the Persian Gulf-based airline, which in a recent development has begun offering services between the European Union and the United States through direct flights as well as under special partnerships with other airlines. Emirates requested slots and traffic rights to be granted the right to extend one of its three daily flights from Dubai to Milan Malpensa onwards to New York's John F Kennedy International Airport. After an analysis of the relevant traffic flows, Emirates affirmed the identification of a strong demand for both direct connections as well the Emirates brand name, which is considered to stand out from the rest, being the only carrier in the region to offer a first-class cabin.

On 5 March 2013, ENAC authorised the proposed services on an extra-bilateral basis, thus granting the fast-growing UAE carrier the right to land in Italian territory and board passengers travelling on to a third state, the United States, where the passengers disembark (also known as ‘beyond rights’). This long-haul route, which allows Emirates to operate scheduled flights to pick up passengers in Italy and take them to the United States can be defined as an expression of the ‘fifth freedom’ provided by the Chicago Convention of 1944, which initially aimed at preparing a framework for the development of civil air transport. The route is thus enabled by the ‘open skies’ agreement between the United States and the EU, along with special authorisation by Italian aviation regulators. Rules that govern such routes allow an airline to fly paying customers between two foreign cities, as long as the flight continues to or from its home country. In this case, the Emirates Milan–New York route will continue to and from its main hub, Dubai.

However, from an EU perspective, Emirates’ foray into the EU–United States air transport market could represent a concern in terms of loss of traffic for its European competitors because transatlantic routes are considered to be among the biggest profit centres for many European carriers. In response to the aforementioned scenario, the European Parliament resolution of 2 July 2013 on the EU’s External Aviation Policy – Addressing future challenges (2012/2299(INI)) focused on the consolidation of the EU’s aviation industry in the global market. In particular, the European Parliament acknowledged that the global position of non-EU carriers has been reinforced through massive new investments in aircraft and infrastructure that have already been undertaken in various parts of the Middle East. The competitiveness of EU carriers has been further affected by factors such as state aid provided to their competitors, which are not subject to EU competition laws, varying rates of taxes, airport congestion and high ATM and airport charges. Taking all these into consideration, the Parliament stressed the relevance of fair and open competition, hoping for inclusion of standard fair-competition clauses in bilateral air service agreements, and called on the Commission to define a minimum set of standard requirements to be included therein. Strategically speaking, the EU needs to preserve a competitive aviation industry, which must also be developed in external markets.

In addition, towards the end of 2013, Alitalia CAI SpA brought an action against the Italian Civil Aviation Authority challenging the fifth freedom rights given to Emirates and on the 10 April 2014, the Administrative Court of First Instance accepted the action and declared null and void the authorisation previously granted by ENAC to Emirates to fly on the Milan Malpensa–New York route for a period of 18 months.

The decision of the Administrative Court of Lazio preventing Emirates from performing flights on this route was appealed before the Council of State. The appellant also requested (as established by Italian law) the ‘cautionary suspension of the first instance judgment’ before the issuance of the final decision on the merits. Such a suspension is an interim or cautionary measure usually granted by Italian Courts if the claim brought is at first glance well-grounded (*fumus boni iuris*) and the applicant proves that it is exposed to damage beyond repair during the course of the ordinary proceedings (*periculum in mora*).

At the hearing on 6 May 2014 the Council of State granted the cautionary suspension of the first instance judgment with the consequence that Emirates can now continue to perform the above flights. The Council of State stated that: ‘Given that, within the limits of the brief examination of the cautionary stage, the prejudice claimed



by Emirate Airlines can be favourably evaluated, moreover impacting on public interests which are upheld by several government agencies (Transport and Infrastructure Ministry, ENAC, SEA SpA, the Milan City Council and the Region of Lombardia) and also impacting on consumer associations. The above prejudice is not balanced by a sufficient interest of the appealing parties.<sup>2</sup> This interim decision or cautionary decision is not appealable. It is clear, however, that the Council of State will issue the final decision on the merits of the case.

Also new in the past year was the publication of the Italian Ministry of Transport's new national airport plan, with the aim of designing a balanced development of Italian airports, offering a new governance system, identifying the structural priorities and optimising the global transport offer. The plan in question also intends to avoid competition conflicts between airports located in the same region, favouring the creation of airport systems with a unique governing body. The Italian airport plan has been drafted according to the EU principles that have also been included in the EU Commission Communication on the draft EU Guidelines on state aid to airports and airlines; these state that: 'except in duly justified and limited cases, airports should be able to cover their operating costs and public investment should be used to finance the construction of viable airports; distortions of competition between airports and between airlines, as well as duplication of non-viable airports should be avoided. This balanced approach should be transparent, easily understood and straightforward to apply.' The plan identifies 10 traffic basins; each basin has one strategic airport with the sole exception of the Centre–North basin, where Bologna and Pisa–Florence operate, provided that Pisa and Florence airports become totally integrated. The 10 strategic airports are: Milan Malpensa (North West), Venice (North East), Bologna and Pisa–Florence (Centre–North), Rome Fiumicino (Centre), Naples (Campania), Bari (Mediterranean–Adriatic), Lamezia (Calabria), Catania (East Sicily), Palermo (West Sicily) and Cagliari (Sardinia). Other airports of national interest can be identified, provided that they can actually play an effective role in one basin, and that they can achieve at least a break-even point in their annual accounts. The plan also envisages the strengthening of airport infrastructure, the development of inter-modality, the creation of a cargo network and facilitation for general aviation.

Another development concerns the new Regulation on Remotely Piloted Air Vehicles, which has been set up in accordance with Article 743 of the INC, stating that remotely piloted aircraft are 'aircraft', as defined by special laws or by ENAC and, for military remotely piloted aircraft, as defined by the Ministry of Defence. The regulation provides separately for 'remotely piloted aircraft systems' (RPAS) and recreation model aircraft, establishing the safety rules for flight operations for each category. Sections II and III of the regulation define the prerequisites for obtaining the relevant authorisation to operate in the airspace and the airworthiness certificate, when applicable, the permitted operations and the terms for special operations. These prerequisites are separately indicated for RPAS of MTOM below 25 kilograms and for RPAS of MTOM over 25 kilograms up to 150 kilograms. RPAS below 25 kilograms do not require an airworthiness

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2      Quote from the cautionary decision of the Council of State.

certificate and operations are permitted under an ENAC authorisation available on request by the operator, and auto certification. This authorisation can be released for special operations in segregated and non-controlled airspace or for experimental activity in segregated airspace. These operations are permitted within visual line of sight only, at a maximum altitude of 70m, at a minimum distance of 8km from an airport, far from congested areas, in daylight and VFR/VMC conditions. Special operations can be authorised only after a successful completion of experimental activities. The operator must declare that such special operations can be conducted safely and that an adequate insurance policy has been stipulated. The authorisation has a validity of 12 months. As with RPAS between 25 kilograms and 150 kilograms, they must be registered with ENAC, which also releases a 'permit to fly', equivalent to an airworthiness certificate. Besides various requirements specified in Article 13 of the Regulation, both the operator and the pilot must be certified by ENAC. Operations are permitted up to an altitude of 150m, complying with the Rules of the Air in force.

## **IX OUTLOOK**

As previously mentioned, the Italian Regulatory Transport Authority's role is to define the criteria for setting the tariffs according to the competition circumstances actually available on any single market related to local and national transportation services including airports. In accordance with this function, and to provide greater understanding in the matter, the authority is currently preparing its own guidelines on the application of the recently adopted (20 February 2014) EU Guidelines on state aid to airports and airlines (the Guidelines). Indeed, this EU legal framework contains provisions, in line with EU state aid rules, that are binding for all EU Member States. The guidelines are aimed at ensuring good connections between regions, as well as the mobility of European citizens, while minimising distortions of competition in the single market. They are part of the Commission's State Aid Modernisation strategy, which aims at encouraging more effective aid measures and focusing on cases with the biggest impact on competition. According to the Guidelines, there are several conditions that must be satisfied before investment aid can be granted.

The financing by public authorities of the construction of airport infrastructure for the provision of airport services to airlines and other airport clients constitutes state aid only if it meets the 'market economy operator' test. Therefore, if the test reveals that the sums are put at the disposal of the airport operator under conditions that would be acceptable to a private market investor (i.e., if the investor could reasonably expect an adequate economic consideration from that investment, taking into account the degree of risk involved), then no state aid issue arises. Instead, if the test highlights that those same conditions would not be acceptable to a private investor, then the public financing for the airport constitutes state aid for the purposes of Article 107 (1) TFEU.

Moreover, the public entity wishing to give aid to the airport must provide a plan identifying an objective of common interest (e.g., increasing mobility of European citizens, combating air traffic congestion at major hubs or facilitating regional developments) and clarifying how the aid would help to reach the target. Small airports, therefore, located near airports with greater capacity will not be likely to receive any state aid if the bigger

airport, located within a radius of 100km, is not operating at 100 per cent capacity. This would occur because under those circumstances there could be a duplication of unprofitable airports, which the EU does not consider an objective of common interest. The financed airport infrastructure should have good prospects of being used in the medium term. Therefore, duplication of unprofitable or underused airports does not contribute to any objective of common interest and the EU has doubts about the compatibility of investment aid in favour of an airport located in the same catchment area as an airport with spare capacity. In fact, the duplication of unprofitable airports, or incentivising their creation, would cause an unjustified distortion of competition.

Furthermore, the public entity providing aid must prove that there is a need for the targeted airport to receive investment. Subsequently, the bigger the airport, the less need there should be for public intervention. In fact, the highest level of aid (75 per cent of investment costs) is considered appropriate for airports catering for fewer than one million passengers, whereas airports catering for more than five million passengers are not entitled to any investment aid, save in exceptional circumstances, (e.g., in the event of relocating an existing airport to a new site).

Financial aid shall be proportionate to each airport's investment plan, and subject to the financial analysis for a given project. If this proves that the project can be carried out with less than the maximum level of aid allowed for that airport size, then the aid will be limited to the lower amount.

Therefore, in future the Italian Regulatory Transport Authority should take into consideration the main aspects of the aforementioned EU Guidelines.

## Appendix 1

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# ABOUT THE AUTHORS

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*LS Lexjus Sinacta*

Anna Masutti's practice covers the main areas of air and space law. Anna advises on litigation, insurance claims, airline liability, leasing and other commercial transactions involving aircraft, and a wide variety of regulatory matters concerning airlines and airports.

She has wide experience in drawing up contracts for the aviation sector, in particular for aircraft purchases or sales and relevant financing and guarantee systems, in the area of insurance and reinsurance (hull, goods and liability) and in aviation litigation and alternative dispute resolution. She regularly assists clients applying for air operator certificates, operating licences and other types of authorisation or permission from the Italian Civil Aviation Authority. National and European Union competition law is another field in which Anna is an expert. She is the author of various books on air law, including a widely used university textbook. Anna is tenured professor of air law at the University of Bologna, where she lectures on air law and company law. She also coordinates the School of Aviation Management at the University of Bologna. She is the editor of *The Aviation and Space Journal* of the University of Bologna and committee member of the European Air Law Association.

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