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## CONTENTS

### Aviation

An evaluation of Airport Operation Safety: a case of Nnamdi Azikiwe International Airport (NAIA)

O.R. Nwaogbe, A.Pius, L. O. Nubu, H. W.Yakubu

p. 2

“Vumbaca v Terminal One Group Association LP” Extension of the Airport Operator's Civil Liability in Montreal Convention, 1999

Diego R. Gonzalez

p.21

### Space

The Impact of Non-Governmental Organizations in Developing Space Law and Policy

Sidbant Sharma

p.34

### Miscellaneous material of interest

Limitation Period For Claims Arising from Regulation 261/2004 - Polish Supreme Court Resolution of 21 February 2017-III CZP 111/16

Piotr Kasprzyk, Anna Konert

p.45

Air traffic and Aircraft Noise Pollution in the ECHR's case law

Laura-Cristiana SPĂTARU-NEGURĂ

p.47

Legal effects and Review of Regulation 1107/2006 (disabled persons and persons with reduced mobility when travelling by air)

Berin Ridanović

p.53

State aid Measures and the New Draft Commission Regulation for Regional Airports

Anna Masutti, Basima Kachni

p.82

### Forthcoming Events

Executive Course International Contracts in Aerospace Industry

5-7 JULY2017 ROME—ITALY

p.85

## An Evaluation Of Airport Operation Safety: A Case Of Nnamdi Azikiwe International Airport (NAIA)

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### Abstract

This paper attempts to assess safety measures and efficiency at the Nnamdi Azikiwe International Airport, Abuja (NAIA). Opinions were sought from the experts (B) and non-experts (A) in the aviation industry. Two hundred (200) questionnaires were administered to both groups, but one hundred sixty-one (161) questionnaires were retrieved and analysed. A range of statistic instruments such as chi-squared test, relative important index, and Kendall's determination coefficient were used for the analysis. The results reveal that there is a positive relationship between these two groups, but they are independent of each other. The findings confirm that some of the safety measures are more effective than the other. On the top of list, was the improvement of communication network at the airside and landside. The least variable observed was a systematic reduction of airfield workload. Therefore, it is suggested air safety measures on the terminals should be reviewed and improved to more attract private-sector involvement. It guarantees long-term industry advancement and economic benefits emanated from sustain investment. Air system lighting and signage will reduce flight delays, incidents, and accidents, especially during bad weather and night time.

**Key words:** airport system, airside system, landside system, and airport safety

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## AVIATION

## INTRODUCTION

Airport is one of the critical national infrastructures, fundamental to nations' socio-economic development and technological upgrading. Besides airport provides landing strips and taxiways for the airlines, including shopping areas, business centres, long and short term car parks, with storages for different users (Pius et al., 2017). Recently, pressure has been mounting on the airports' management world-wide, for them to become financially self-reliant, by depending less on the government funding and grants. In response to this directive some countries, have decided to start by prioritising terminal safety, creating a new regulatory body to oversee management of terminal safety. This policy has served as a cornerstone and incentive for the airport managers to become more business oriented, through effective management. Whilst, striving to meet service users' needs and expectations, which guarantees customer loyalty, repeat patronages, and long-term business sustainability. Oxford Economics (2014) aviation sector stands in the vanguard of nations' socio economic activities for sustain development, especially in the emerging countries. As noted by Nwaogbe et al., (2017) Nigerian aviation industry has witnessed a sustain sector growth during recent years, especially, in passengers' traffic and cargo demand, with private-sector involvement. Increasingly, passengers are very excited to travel by air in the developing countries. This rapid increase causes delay and overcrowding terminals, which constitute a threat passengers' safety. According to Lang (2012) and Lu et al., (2011) safety is an indispensable element in air transport operation. A safe air transport system simply means that effective standards and measures are established to prevent avoidable incidents/accidents at the terminal.

## Study Background

Aviation safety has gradually evolved over time from a reactive to a proactive and predictive model in the developed countries, although, some of the developing nations are still struggling to react effectively with terminal incidents. In Europe<sup>1</sup> in 1982 and later in the U.S. Safety Management System (SMS) was introduced as a scientific approach to tackle the safety challenges in industry and in the aviation sector. A proactive and predictive safety program is to identify and deal with hazard before its happens. Reactive safety, i.e. investigations after accidents, is the task of an Accident Investigation Body<sup>2</sup>, independent of the NCAA and from the service providers, following the principle of 'separation' first established in Europe in 1997<sup>3</sup>. NCAA is vested with the statutory obligation to regulate and oversee aviation safety and security<sup>4</sup>. Conversely, management and operations are entrusted to two major government agencies: The Federal Airports Authority of Nigeria (FAAN) which manages and operates aerodromes and the Nigerian Airspace Management Authority (NAMA), which is the Air-Traffic Management (ATM) service provider. NAMA is charged with managing air traffic on the runways and taxiways' areas (maneuvering area), while FAAN ensures safety of operations on the ramps and apron gates' areas, including the terminal building. In recent years, the sector has witnessed several accidents and incidents across the country.

The causes cannot be pinned to one specific factor. There are several factors, which can influence airport safety measures, for instance, bad weather, terminal congestion, obsolete equipment's, lack of trained personnel and poor communication system.

## AVIATION

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### Study Rationale

This research is among the very few to consider NAIA airfield safety management in Nigeria. Although, airport safety and efficiency have been considered extensively by the transport management scholars, but focusing on the established airports. Indeed, some of these studies come with wide range of concepts, fads and methods. As these ideas and models ripple through the sector at different speed and impact (TRS, 2004). Any new knowledge and approach should enhance and update available information and align with the current realities in the sector. Moreover, assessing safety measure and efficiency is an indispensable exercise for risk identification and prevention, for a better service user experience and sector continuity. Whilst, complying with the national regulations and International Civil Aviation Organisation (ICAO) safety standards.

### Statement of Problem

This paper seeks to address the lack of empirical studies into airport safety and efficiency at the NAIA. Thus, numerous cross-disciplinary studies suggested that rapid growth in air travel is outstripping the capacity of the airports and air-traffic control system. This has contributed towards the increase in airport congestion and delays (Kendarp et al., 2013 & Ludwig et al., 2007). As a result many aviation accidents have occurred, with loss of lives and properties; given that fact that safety measures are reactive and unplanned at this airport. This is known as “fly-crash-fix-fly” approach. Fly-crash-fix-fly simply means that safety procedures are introduced post incident or accident. Using Tomasello’s pyramid; reactive safety measure is second to the bottom, known as the independent investigators (AIBs).

Source: Tomasello’s Pyramid (2012)





## AVIATION

Generally, minor aviation incidents<sup>5</sup>, have the potential to cause inconveniences for passengers and damage to the industry reputation. Nevertheless, the rapid growth of air transport demand is causing the operational movements at the NAIA to approach maximum capacity. Nwaogbe et al., (2015) & Kendarp et al., (2013) noted that there are wide-ranging factors that can influence the activities and performance of airport operations, for instance, human, technology, environment, and organisation structure. Therefore, multiple-approach is essential, to identify and mitigate safety risk, as noted by Lee (2006) to gain a better understanding on how to manage inherent and unpredictable risks associated with the industry, especially in the developing countries, where this study focused.

### Study Aim and Objectives

The purpose of this paper is to evaluate airfield safety and efficiency at the NAIA, from two identifiable groups of respondents. The specific objectives of the paper are as follows:

- To examine the effectiveness of safety measures at the airfield.
- To assess safety measures from the aviation experts and non-experts.
- To rank safety measures based on their effectiveness at the air system.

### Study Hypothesis

H<sub>0</sub>: There is no significance difference between the two groups that rank safety measures, based on the effectiveness.

H<sub>1</sub>: There is significance difference between the two groups that rank safety measures, based on the effectiveness.

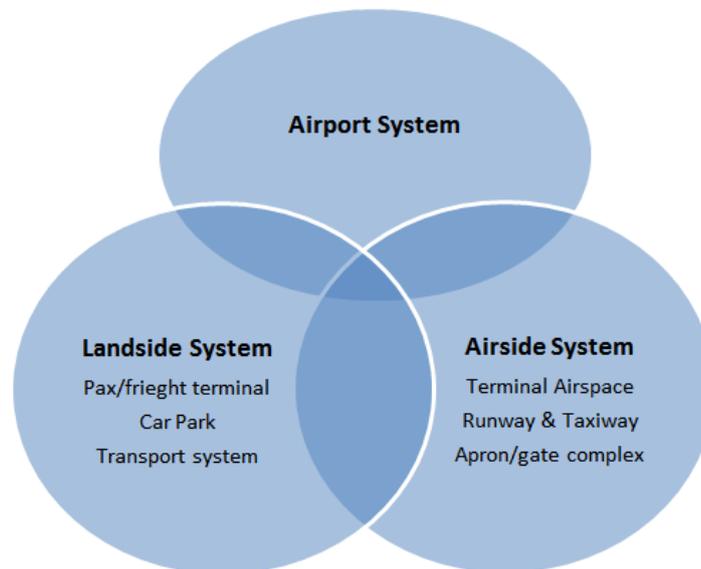
### Study Limitations

The department and airport safety manager were reluctant and slow to release record of accidents/incidents initially. The aviation experts and non-experts' views were limited to only one air system.

## LITERATURE REVIEW

Aviation industry has witnessed a steady improvement, through the scrupulous use of contemporary technologies and personnel capability building over the years. Barros & Weber (2009) aviation stakeholders and policy makers are ever more interested in airports' safety and efficiency, especially in the industrialised nations where airports are advised to depend less on the government grant. Major studies on airport safety and efficiency can be traced back to Oum et al., (2003) where international aviators and policy makers observed differences in the operational productivity and activity patterns in some airports. This section presents the theoretical framework for airport system. Previous studies were reviewed, and major concepts such as airport system, landside system, airside system, airport safety and productivity were defined.

Figure 2



Source: [Senguttuvan \(2006\)](#)

### Airport System

The air transport services are carried out by designated flights maintained over permanent air routes as recognised by the country civil aviation authority and depending on the navigational rules. ETSC (1999) posit that major element of air-route network is an airport, and the terminals are used for different purposes such as transporting passengers' and goods across domestic and national boundaries. The civil aviation authority is responsible for airlines needs and provides different facilities for tasks like handling of baggage, freight, and passenger's management (DOT, 2002). A standard airport consists of the buildings, runways, taxiways, aircraft parking areas, terminal buildings, and hangars, etc. One of the airport major function is to serve as a terminal on the airlines' network where the movement of passenger or freight stop for "value-adding" activity (transfer, storage, retrieval, repackaging, documentation) can be performed (ACI, 2004).

### Landside System

Ashford et al., (1997) suggest that landside consists of surface access network that links airports to the travelers, and cargo terminals, which are the main catchment areas of airport business. The surface access system in the airport includes cars' park, taxis station, light rail link, and road transport networks system that link the airport to different parts of the metropolis. As noted by Oduwole (2014) these amenities are provided for passengers, airport staffs and tourists to be able to move free from point A to B at any time of the day. There are two major components within the airport landside system; a devoted passenger terminals and freight terminals, which facilitate the movement of people and goods across the airport surface network and airplane (Oduwole, 2014).



## AVIATION

### Airside System

According to ICAO Annex 17, airside includes everything beyond security checks for passengers, which are still inside terminal building. Hall et Al., (2008) airside system includes the airspace surrounding the airport known as (Terminal or Airport Zone) including runways, taxiways, apron, and the gate complex, without considering the terminal building. The airside offer space for both departing and arriving aircraft from the airport, while runways provide ground space for aircraft unlimited landing and taking off at any time of the day. Taxiways connect runway and the apron/gate complex, to ease the aircraft movement across two areas as quick as possible. Whilst, the apron and gate complex are used ground handling services by the aircraft (ATRS, 2004). The landside system provides passengers with shops, business pavilion, restaurant, and bars at the gate complex.

### Airport Safety

ETSC (1999) argues that approximately 82 percent of the world's aircraft accident happened during landing and take-off process, these accidents have claimed 58 percent of all onboard passengers and crew. Mearns et al., (2003) opined that the assessment of safety management practices must complement weather assessment. Safety climate is a function of safety management, i.e. weathers influence the effectiveness of safety management. It is imperative that these two factors are considered side by side, including contemporary metrological equipment. Kjellen (1994) postulates that some types of deviations are associated with increased risk of accidents in any airport systems, which include defective equipment, production disturbances, irregular workload and tools used for unusual purposes. Stolzer (2008) stated that hazards were identified and recorded through a systematic process, which allows for traceability and further analysis. Lang (2012) argues that airport safety issues in Africa are as follows;

- Train and retrain airport inspectors.
- Train and retrain operations staff.
- Improve airport facilities and infrastructures.
- Improve regulatory oversight.
- Effective airport certification programs.

Some accidents are preventable, because most accidents are caused by the humans at the front-lines, i.e, pilots or air traffic controllers. Hall et al., (2008) stated that studies related to calculating risk in the aviation field are divided into two areas: (1) those related to operational risk, such as collision risk during an aircraft's landing; (2) those related deviations of design standard in airport infrastructures.

Wong et al., (2009) conducted a study into airport risk assessment focusing on the risks related to aircraft accidents at and near airports and managing airport safety areas as a risk mitigation measure. The approach is more quantitative, risk-sensitive, flexible, and transparent than standard risk assessment approaches. The first part to the study presents the methodological advances made to the development of accident incidence models, while second part presents the analysis of accident locations, including the plotting of Complementary Cumulative Probability Distributions for the relevant accident types.

## AVIATION

### Airport Efficiency

Airport operational efficiency can be determined by sustains infrastructure development over a period. CCSF (2003) & Caves et al., (1984) contends that capacity can be conceptualised based on the main area during the study. TRB (2003) believes that airport capacity is the ability to manage air traffic demand effectively, in a specific timeframe repeatedly. Operational capacity is the volume of demands, which airport can handle in each timeframe and conditions (Ashford et al., 1997). The following tools can be used to measure airport capacity; Maximum Throughput Rate (MTR) and Service Level (SL). MTR can be defined as “average number and outgoing cargo process.” Capacity is the total volume of performance under different circumstances, this could be used in locations or the network. Washington Avation System Plan suggested five forms of airport capacity can be recognised;

- Airfiled capacity - is the capability of an airport to provide functioning runways that can accommodate all types of aircraft to take-offs and land at any time without any issues.
- Airline passenger - is the capability of an airport terminal to provide enough space for airline’s passenger, including safety, security and ticket purchase.
- Air cargo - is the capability of an airport to provide specific terminal for cargo processing and vetting.
- Aircraft storage and Parking - is the capability of an airport to provide packing for fleeting aircrafts in tie-downs and hangers.
- Airspace system - airport ability to provide a safe airspace for transiting airplane between airports.

GAO (2007) highlighted the fact that efforts to improve ramp safety in the airports are delayed by insufficient incident data, and established standards for ground work handling. This data could assist aviation professionals in solving the issue and understanding what actions that need to be taken to reduce airside accidents (Lu et al., 2011).

### RESEARCH METHODOLOGY

The ontological position for this paper is positivist and will therefore, by necessity to adopt a deductive method using a quantitative technique. After an extensive analysis and consideration of different methods, the chosen approach was found to be appropriate, since it would permit the researchers to maintain objectivity and neutrality throughout the study.

### Study Population

In 2015, NAIA received approximately 2.26 million passengers and 35,728 airplane movement in six months. Breakdown of passenger statistics indicated that domestic flights had 1.7 million passengers, with 855,388 passengers arriving and 821,547 passengers departing from the airport. It is one of the newest, biggest, and busiest in terms of passenger’s traffic throughout the country. Thus, with a single runway and two terminals. This airport was chosen because of the strategical location and its significance to the nation capital.

*AVIATION***Sampling Method**

Sampling was divided into two groups (A & B), convenience sampling was used for the non-experts (group A), those with no formal educational background in air transport, because of availability and accessibility of data. While, purposive sampling was chosen for the experts (group B) participants, the selection was based upon their knowledge and experience, with a minimum of five years, and formal education in the air transport industry. To achieve this objective NAIA human resources department provided researchers with the practitioners' names that met specified requirements.

**Data Collection**

Self-administered questionnaire was used for gathering data, at the NAIA domestic and international terminals, focusing on two groups of respondents with formal and non-formal educational background in the sector. The researchers administered two hundred (200) questionnaires to the staffs, working on the airside system and non-aviators that are working within the airport environment. Thus, a total of one hundred sixty-one (161) responses were retrieved from both groups (A & B). The data collection timetable was scheduled as follows; Date: 15<sup>th</sup> to 31<sup>st</sup> August, 2016. Time: 8am to 8pm. Both groups were surveyed simultaneously, over two weeks' period.

**DATA ANALYSIS AND PRESENTATION**

A wide range of statistical instruments were used in data analysis such as Kendall's coefficient of concordance determination, Relative important indices (RII) and Chi-square and Relative Important Index (RII). Safety measures ranked by the groups were divided into four components. Below is the formula used in determining the relative important index;

**Relative important indices**

$$(RII) = \left\{ \frac{4n_4 + 3n_3 + 2n_2 + 1n_1}{4(n_1 + n_2 + n_3 + n_4)} \right\} \times 100$$

Where RII = Relative Important Index

n1= Number of respondent who answered "extremely effective"

n2= Number of respondent who answered "effective"

n3= Number of respondent who answered "not effective"

n4= Number of respondent who answered, "don't know"



## AVIATION

### Kendall's Concordance Co-efficient and Observed Chi-Square Value

The Kendall's concordance co-efficient measures the degree of agreement among sets of ranking. The formula below will be used to calculate the degree of agreement between variables:

$$W = \frac{S}{\frac{1}{12}K^2(n^3 - n)}$$

And must be between 0 and 1,  
Where:

$$S = \sum(SR_i^2) - n(\overline{SR})^2$$

$k$  = Groups (columns) with  $n$  items in each = 2  
 $n$  = number of variables = 8

$$SR_i = \text{sum of rank for each row}$$

$$\text{mean of } SR_i\text{'s} = \overline{SR} = \frac{(n+1)k}{2}$$

$$\text{observed chi-square calculation} = x^{2(n-1)} = k(n-1)W$$

Table 4.1: Education Background

Qualifications	Frequency	Percentage
School Leaving Certificate(SC)	0	0
O level Certificate (OL)	0	0
Ordinal Dip(ND) / Professional Dip (P Dip)	8	5
Higher Dip(HD) / 1 <sup>st</sup> Degrees (BSc)	104	65.6
Postgraduate Degrees (MSc/PhD)	49	30.4
Total	161	100

Source: Field Survey, 2016



## AVIATION

The table above shows that there is no single school certification (SC) holder and ordinary certificate holder (OL) among participants sampled. Those with ordinary diploma (OD) / professional dip (P Dip) were 5% of the total respondents (8). While 65.6% of the respondents possessed higher dip (HD) /BSc holders, representing the frequency of (104). While those who possessed MSc/PhD qualifications are 30.4% of the total respondents sampled. This shows that majority of the regulatory agencies staffs sampled in this study and other airport tenants' staffs have either higher dip or BSc qualifications.

**Table 4.2: Air Transport Education and Experience**

Air Transport Education and Experience	Frequency	Percentage
YES	90	55.9
NO	71	44.1
Total	161	100

Source: Field Survey, 2016

The table above shows that 55.9% of the respondents (90) have some formal education and experience in air transport industry, while 44.1% of the respondents (71) have none from the industry. Majority of the respondents (NCAA, FAAA, NAMA) are well-informed and qualified experts in the sector; thus, the difference is 11%, representing 19 of the total participants.

### Relative Important Index (RII)

The safety measure ranked by the aviators served as the variables, forming four (4) components factors. The following formula will be used to determine the relative important index:

$$RII = \left\{ \frac{4n_4 + 3n_3 + 2n_2 + 1n_1}{4(n_1 + n_2 + n_3 + n_4)} \right\} \times 100$$

RII will be presented as follow; Where RII = Relative Important Index.

n1= Number of respondent who answered "extremely effective"

n2= Number of respondent who answered "effective"

n3= Number of respondent who answered "not effective"

n4= Number of respondent who answered "don't know"

V24 represents 'improving the airfield markings/sign'

V25 represents 'adopting safety management system'

V26 represents 'improving airfield lighting'

V27 represents 'conducting airfield training'

V28 represents 'constant airfield inspection'

V29 represents 'Promote safety culture'

V30 represents 'Reduce airfield operators/controllers' workload'

V31 represents 'Improve communication of runway condition and weather flight crew'



## AVIATION

**Table 4.3: Respondents with no Formal Education in Air Transport Industry.**

s/ n	Variable	(n4)	(n3)	(n2)	(n1)
24	V24	41	21	0	1
25	V25	42	21	0	0
26	V26	29	34	0	0
27	V27	8	49	6	0
28	V28	21	41	1	0
29	V29	42	20	1	0
30	V30	6	56	1	0
31	V31	56	7	0	0

Source: Field Survey, 2016

The above table shows the ranking frequency of airfield safety measures by respondents that have no formal Air Transport education background in the sector.

**Table 4.5: Response Percentage, Relative Important Index, and Ranking of Air-field Safety Measures by Respondents with no Formal Air Transport Education.**

s/ n	Variable	(n4)	(n3)	(n2)	(n1)	RII	rank- ing
2 4	V24	65.1	33.3	0	1.6	90.475	4 <sup>th</sup>
2 5	V25	66.7	33.3	0	0	91.675	2 <sup>nd</sup>
2 6	V26	46	54	0	0	86.5	5 <sup>th</sup>
2 7	V27	12.7	77.8	9.5	0	75.8	8 <sup>th</sup>
2 8	V28	33.3	65.1	1.6	0	82.925	6 <sup>th</sup>
2 9	V29	66.7	31.7	1.6	0	91.275	3 <sup>rd</sup>
3 0	V30	9.5	88.9	1.6	0	76.975	7 <sup>th</sup>
3 1	V31	88.9	11.1	0	0	97.225	1 <sup>st</sup>

Source: Field Survey, 2016



## AVIATION

The above table represents response percentage, response relative important index and response ranking of airfield safety measures by the respondents with no formal Air Transport Education background. The ranking shows that the last variable V31 (improve communication) is the most effective among other safety actions, followed by V25 (adopting Safety Management System), while the least effective is the V27 (conducting airfield training). Variable V31 confirmed the importance of effective communication in airside system, especially in airport safety.

**Table 4.6: Respondents with Formal Air Transport Education Background**

s/n	Variables	(n4)	(n3)	(n2)	(n1)
24	V24	40	43	14	1
25	V25	35	42	15	6
26	V26	42	55	0	1
27	V27	8	49	35	6
28	V28	21	49	28	0
29	V29	28	28	28	14
30	V30	8	43	35	12
31	V31	41	43	14	0

Source: Field Survey, 2016

The above table shows the ranking frequency of airfield safety measures/actions by respondents that have formal Air Transport Education Background.

## AVIATION

**Table 4.7: Response Percentage, Relative Important Index, and Ranking of Airfield Safety Measures by Respondents with Formal Air Transport Educational Background.**

s / n	Variables	(n4)	(n3)	(n2)	(n1)	RII	Ranking
24	V24	40.8	43.9	14.3	1.0	81.125	3 <sup>rd</sup>
25	V25	35.7	42.9	15.3	6.1	77.05	4 <sup>th</sup>
26	V26	42.9	56.1	0	1.0	85.225	1 <sup>st</sup>
27	V27	8.2	50	35.7	6.1	65.075	7 <sup>th</sup>
28	V28	21.4	50	28.6	0	73.2	5 <sup>th</sup>
29	V29	28.6	28.6	28.6	14.2	67.9	6 <sup>th</sup>
30	V30	8.2	43.9	35.7	12.2	62.025	8 <sup>th</sup>
31	V31	41.8	43.9	14.3	0	81.875	2 <sup>nd</sup>

Source: Field Survey, 2016

The above table shows the response percentage, the response relative important index and response ranking of airfield safety measures by respondents with no Air Transport Education. The table 4.25 shows that V26 variable (improving airfield lighting) is the most effective, followed by V31 (improving communication), while the least effective V30 (reducing airfield operators' workload). Variable V26 improving airfield lighting was ranked 1<sup>st</sup>, with RII (85.225) and is the most popular constant with the respondents that have formal education in air transport, while constant V30 was ranked 8<sup>th</sup> the least popular.

Table 4.8: Ranking Responses from the Two Groups

RANK				
Variables	Respondents with no air transport education	Respondents that have air transport education	Sum of ranking (SR <sub>i</sub> )	Square of ranking (SR <sub>i</sub> ) <sup>2</sup>
V24	4	3	7	49
V25	2	4	6	36
V26	5	1	6	36
V27	8	7	15	225
V28	6	5	11	121
V29	3	6	9	81
V30	7	8	15	225
V31	1	2	3	9
				∑(SR <sub>i</sub> ) <sup>2</sup> =782

Source: Field Survey, 2016

**Kendall's Concordance Co-efficient and Observed Chi-Square Value**

The Kendall's concordance co-efficient measures the degree of agreement among sets of ranking. The formula below will be used as follows:

$$W = \frac{S}{\frac{1}{12}K^2(n^3 - n)}$$

And must be between 0 and 1,

Where:

$$S = \sum(SR^2) - n(\overline{SR})^2$$

$k$  = Groups (columns) with  $n$  items in each=2

$n$ = number of variables=8

$SR_i$  = sum of rank for each row

$$mean\ of\ SR_i\ s = \overline{SR} = \frac{(n + 1)k}{2}$$



## AVIATION

$$\text{observedchi} - \text{squarecalculation} = x^{2(n-1)} = k(n-1)W$$

$$\overline{SR} = \frac{(n+1)k}{2} = \frac{(8+1)2}{2} = \frac{18}{2} = 9$$

Let's find the value of  $SR_s$  =

$$S = \sum(SR^2) - n(\overline{SR})^2 = 782 - 8(9)^2 = 782 - (8 \times 81) = 782 - 648 = 134$$

S=134.

$$W = \frac{S}{\frac{1}{12}K^2(n^3 - n)} = \frac{134}{\frac{1}{12}2^2(8^3 - 8)} = \frac{134}{\frac{1}{12}4(512 - 8)} = \frac{134}{\frac{1}{3}(504)} = \frac{134}{168} = 0.797619047 = 0.8$$

The value 0.8 shows that the rate of response among the respondent is highly independent, and the level of agreement is very high. It also means that there is high relationship between the two groups of respondents, for example, the responses are related. Testing the significance of W at the = 0.05 (5%) is the level of significance for the hypothesis.

A significance level of 0.05;  $\alpha = 0.0$

$$\text{observedchi} - \text{squarecalculation} = X^2 = k(n-1)W = 2(8-1)0.80 = 2(7)0.80 = 11.2$$

The table value is as follows:

$$\text{from } X^2 \text{ distribution table} = X_{\alpha}^{2(n-1)} = X_{\alpha}^{2(8-1)} = X_{0.05}^{2(7)} = 14.07$$

Degree of freedom is 7, while the alpha is 0.05.

Since  $X_{tab}^2 > X_{cal}^2$  we accept null hypothesis and reject the alternative hypothesis concluding that the two (2) groups of unique respondents sampled in this study, agreed on the effectiveness of the eight (8) air safety measures tested in this study will improve air transport safety.

## CONCLUSION AND RECOMMENDATIONS

Quantifiable variables were used to assess airfield safety and efficiency. In the empirical survey, the groups (A&B) sampled agreed with the need for effective safety measures on the air system. The result shows that the experts and non-experts settled on the effectiveness of the safety measures tested for this study. Kendall's Concordance Co-efficient confirm that the safety measures are effective, and the most effective among the measures is the improvement of communication on the runway (Airside System), came first on the ranking of group (A) respondents. Whilst, improve airfield lighting was ranked first by group (B) respondents, using Relative Important Index (RII). The least effective at the safety variables tested is 'conducting airfield training and reduction of airfield workload for group (A & B). Kendall's Concordance Co-efficient and Observed Chi-Square Value determination result further reveals that there is a positive and significant relationship between the groups, and they are related, but independent of each other.



## AVIATION

Subsequently, it is recommended that;

- Air safety measures on the terminals should be reviewed and improved to more attract private-sector involvement, by taking full advantage of low accident rate. It guarantees long-term industry advancement and economic benefits emanated from sector-specific investment as suggested by Pius et al., (2017).
- Airside lighting should be improved to reduce incidents and accidents, especially during bad weather and night time, to reduce airplanes queuing on the runways unnecessarily.
- The government and airport management should develop an inclusive safety oriented-policy and practice that encourage effective service delivery, in-line with the industry and international best practices.

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### “Vumbaca v Terminal One Group Association LP” Extension of the Airport Operator's Civil Liability in Montreal Convention, 1999

Diego R. Gonzalez \*

#### Introduction

*An airport terminal operator is an "Agent of the air carrier" under the terms of Article 30.1 of the Montreal Convention for the purposes of establishing the liability for damages to the passenger, as the airport terminal operator's behavior promotes and is in furtherance of the fulfillment of the contract of carriage between the carrier and the passenger.*

With this statement, the judge presiding the case “Vumbaca v Terminal One Group Association LP”<sup>1</sup>, Jack B. Weinstein<sup>2</sup>, rejected the complaint filed against the operator of terminal one of JFK airport, New York, and extended the subjective scope of application of the civil liability system of the Montreal Convention.

For the New York District Court that system is not only applicable to the air carrier but also to the airport terminal operator being sued, as agent of the air carrier, based on a direct identification between the airport service - delivered by the airport terminal operator - and the contract of carriage - entered into between the air carrier and the passenger.

To rebuild the airport legal relationship between all subjects (airport operator, air carrier and passenger), the consolidation of the airport service concept and the identification of the applicable legal framework are some of the challenges of airport law.

Within the scope of this last challenge - the identification of an applicable legal framework for airport services - the airport operator's civil liability is one of the most important issues, which is pending treatment and regulation, precisely because the carrier's liability system was built based on the specialty of the carriage by air activity and its juridical nature.

International aeronautical legislation, doctrine and case law have historically outlined a scope of application for the carrier's civil liability system, enshrined in the International Conventions of Warsaw, The Hague, Montreal, 1999.

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## AVIATION

Beyond the different visions and discussions pertaining this system, certain elements are clear:

- It is applied based on a contract of air carriage
- It is applied when damages occur.
- Those damages are caused during carriage by air (passenger, cargo or mail) by a carrier or its servants or agents.

The same consensus is extended to the fact that the airport operator is excluded from the liability system for damages under the Conventions.

Now, the *Vumbaca* case assimilates them. It presents, from a factual and legal standpoint, a very broad range of circumstances, which will not be analyzed in depth in this paper.

In this paper we will deal with the most remarkable aspects and focus on the airport operator-carrier relationship, on the position adopted by Judge Weinstein on the legal condition of the airport operator as agent of the air carrier within the scope of Article 30.1 of the Montreal Convention and the possible alternatives arising from the application of Articles 17 and 19.

### The case

- **The parties**

The plaintiff is passenger Vivian Vumbaca, Italian citizen with permanent residence in the United States, who entered into a contract of air carriage with Alitalia between Rome and New York City airport, JFK Terminal 1.

The defendant is Terminal One Group Association LP, a North American company that administers and operates Passenger Terminal One of JFK airport. This terminal has 11 international boarding gates and is managed by the defendant by virtue of a contract entered into with the New York and New Jersey Port Authority for such purposes.

The terminal operator is a consortium of companies composed of, on the one hand Terminal One Management Inc. and on the other hand four airlines: Air France, Japan Airlines, Korean Airlines and Lufthansa German Airlines. It handles around 1,000,000 passengers a year. The airport ownership and operation model is an example of the regulatory phenomenon of the vertical integration in civil aviation<sup>3</sup>.

- **The facts**

Alitalia is a permissionnaire of Terminal One Group Association, has spaces and offices allocated in Terminal One, where it operates flights to and from New York City.

On December 26th, 2010 and until the following day, in the midst of the holiday season, the New York metropolitan area was hit by a huge snow storm which caused the closure of JFK airport during the peak of the storm.

## AVIATION

When the airport was reopened, there were still operative problems and arriving passengers had long periods of wait once landed before being allowed to disembark.

The most serious operative problems affected international flight terminals.

Alitalia passenger Viviam Vumbaca had taken off from Rome and arrived at JFK during the storm. Her flight, like many others, was subject to the operative circumstances affecting the normal and regular operation of the Terminal managed by the defendant. These circumstances forced her to stay 7 hours on the plane, with cramped legs, feeling uncomfortable, in a foul-smelling environment, hungry and with no water or sanitary services.

On the other hand, Terminal One Group Association, as airport operator and by virtue of the contract signed with the Port Authority, had the exclusive responsibility to guarantee the services of the embarking and disembarking gates used by passengers to move between the terminal and the aircraft, to repair and keep that airport resources in ordinary and extraordinary circumstances and carry out all necessary acts for the due performance of the services, including the removal of snow and ice from aircraft.

Likewise, as the responsible party for the selection of the handling provider for the purposes of moving the aircraft from and to each of the terminal gates, it had hired the company Aircraft Service International Group (ASIG). This company had to assist Alitalia and coordinate with Terminal One Group Association the execution of the applicable Snow Removal Plan.

We shall not go into the factual/operative details of the day of the storm, which caused the delay in the disembarking of the passengers. Within this framework of obligations and responsibilities of the airport operator, the handling agent and the air carrier. We will simply mention that, in the face of such snow storm, the operative impact was huge, required extraordinary services.

There were flight consolidations, delays and cancellations and the interruption of operations and the amount of snow on the aircraft located at the gates caused the collapse of the terminal and handling services for all flights operated by all carriers. That collapse also affected Mrs. Vumbaca, who had to stay on board the aircraft for 7 hours.

In this context, the plaintiff accuses the defendant of negligence in the operation of Terminal One of JFK airport as a direct cause for the invoked damages.

- **Legal foundations of the case. Primacy of the international system**

Originally, the case was filed against the Terminal One operator, -however not against Alitalia as contractual and actual carrier-, with the intention to apply the local legal system of the State of New York, claiming compensation for the emotional damages caused by the negligent performance of the airport operator's obligations and for the intentional infliction of emotional distress caused by hunger, thirst, foul smell and lack of sanitary services.

The basis for the claim for compensation for damages caused was the lack of permission to disembark within three hours of the flight landing.



## AVIATION

In that respect it is important to mention the recent national legislation approved in the US<sup>4</sup> - as a consequence of said effects of the airport capacity limitation and the delays to operations - which prohibits airlines to keep an aircraft at the airport apron for more than four hours without allowing the passengers to disembark.

The Court rejected the claim by Vumbaca because the local regulation became effective after the day the facts occurred and because it was not applicable against airport operators, only against airlines.

Therefore the District Court had to decide on the applicability and effect of the Montreal Convention, specifically on whether the defendant was an *agent of the air carrier*.

The Court held that the Montreal Convention was applicable and that the airport terminal operator was considered an agent of the air carrier under the terms of Article 30.1 of the Convention<sup>5</sup>.

Once this application and the primacy of the international regulations had been established, the plaintiff tried to extend her claim to also include - besides the originally claimed *emotional damages* - economic damages caused by the delay in the carriage by air and delivery of her in baggage.

The extension of her claim, however, was denied due to process reasons and thus only her claim for the emotional distress suffered by the plaintiff was admitted.

Later, the judge rejected the plaintiff's claim for emotional distress by applying the Convention's mechanism, that is to say:

- Article 17 of the Convention (the claimed damaged occurred during disembarking), the air carrier or the agent thereof do not have the obligation to indemnify the damaged party provided that said party has not suffered any physical injuries, which was the case with the plaintiff<sup>6</sup>.
- Article 19<sup>7</sup> only allows for the recovery of economic damages - plaintiff filed a claim for these damages out of time - and not emotional distress.

Should the District Court have decided that the defendant was not an agent under the terms of the Convention, the liability and compensation regime provided for on the local law of New York State would have been applicable.

- **Airport operator's civil liability. A matter of local law**

One of the differentiating features of airport law as compared to aeronautical or aviation law is the local nature of the legal system regulating the airport service, even when it relates to international carriage by air.

One of the features of aeronautical law is its internationality and uniformity provided by international treaties, and the international system regulating the carrier's liability appears as one of the legal institutions included in both legal frameworks (aeronautical and airport law).

This is one of the reasons why, in our opinion, the Montreal Convention is not applicable to the airport operator.

## AVIATION

Then, the point is to acknowledge and delimit the new phenomenon that emerged in civil aviation at the end of the eighties: airport service.

To do so, it is necessary to take into account the local condition of the phenomenon, a circumstance that governs the analysis of the complexity thereof and includes both, the airport operator figure, its composition as legal entity and the diversity of services and activities that each government or competent authority regulates and/or includes in a contract in each airport (or airport system).

Thus, New York's Port Authority established for JFK airport a special and specific manner of providing the services.

It was divided in different terminal airport operators, with a special and specific legal framework of application for each one.

In Vumbaca case, the JFK Terminal 1, the terminal service provision was given to a company that has foreign carriers among its shareholders, who render services to themselves. That is to say, Alitalia, Korean Airlines and Air France.

Likewise, New York's Port Authority and Terminal One Group agreed, in the terminal operation and administration contract, upon a set of activities and services to be delivered by the Airport Operator, including *handling* services, which covered, in this case and for the purposes of this discussion, activities such as the aircraft movement from and to the gates and the removal of snow from aircraft.

We can see how the rights and obligations framework of the Airport Operator, in this case and in all cases as a whole, is clearly an identifying element of the special and local nature of the airport legal system, which is impossible to unify in advance under universal rules for each airport, a circumstance that even affects the solution provided for the present Vumbaca case.

With this, we opine that the case solution can have, in all events, legal sense and rationality taking into account the surrounding facts and circumstances, that given the diversity of circumstances present in the delivery of airport services in each airport in the world, it can be risky to consider the Vumbaca case as a universal rule of reference for the aeronautical legal world.

- **The legislator's intention in the Montreal Convention**

Did the international legislator aim at giving the same treatment to the carrier and the airport operator and making them subject to the same civil liability system?

The District Court realizes that the Montreal Convention neither defines the term "Agent" nor provides objective rules or guidelines to define it<sup>8</sup>.

Videla Escalada<sup>9</sup> deals with the issue of the airport operator's liability by saying: "When we started studying liability, we explained the methodology to be used and separated regulated cases from those that have no specific solution under positive law. We have now started to analyze the second part of our work, where we consider the hypotheses that have not been regulated so far, both abroad and in our country... As there are no special provisions regulating the issue, the airport operator's obligations for damages are subject to the rules of Civil Law."<sup>10</sup>

## AVIATION

Luongo expresses the following as regards the airport operator: "I will only address this subject very briefly as it is not within the scope of this work. The system regulating the liabilities arising from the international contract of carriage by air is indeed composed by two main parts: the user (passenger or freight forwarder) and the carrier. The damaged party will probably choose a direct action against third parties only in the cases where none of the studied conventions is applicable (or when the carrier can make valid use of a cause for exoneration in his defense), as this path implies having a highly demanding burden of proof and technical difficulties, as I stated in my previous chapter." <sup>11</sup>

In USA, highlighting the important consequences to aviation that might result from the Vumbaca case, Holland states that the judge extends the airport operator's potential liability *beyond the original considerations*, that is to say, liability to the passengers for any delays or damages not related to the basic and inherent activities of the airport terminal operation<sup>12</sup>.

We believe that the law itself (the Montreal Convention) provides the guidelines to identify the extension of the concept of agent of the carrier.

What would be the sense for the legal boundary fixed by the Convention as regards the carrier's responsibility when stating as physical limit that the damage should take place on board the aircraft or in the course of any of the operations of embarking or disembarking?

This specific situation where the Convention is not applicable is when the damage is not caused during embarking or disembarking operations.

Both operations take place inside the airport (but the carrier is still liable) and have the purpose of identifying, separating and, dividing the liabilities of the air carrier and third parties, as is the case of the airport operator.

Should the legislator have intended to make the airport operator subject to this system, he would not have established this *"legal boundary"*, this differentiation, between the air carrier and the responsible party for the passenger before or after these operative circumstances such as embarking and disembarking operations.

Expanding the system scope of application to the airport operator in the manner provided by the Vumbaca case would only distort the exceptional regime represented by the aeronautical legal system.

- **The concept of Agent of the air carrier in the Montreal Convention**

What did the Legislator understand by "Agent of the Air Carrier" then?

The concept of "Agent of the Air Carrier" is not an original concept of the Montreal Convention.

Article 20 of the Warsaw Convention already mentioned this figure. Luongo makes an in depth analysis of the concept of agent in his comprehensive work on Civil Liability in carriage by air and expresses: "Article 20 as well as many other articles of the Warsaw Convention mentions the carrier's "agents", thus we should briefly deal with this concept, for clarifying purposes.

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The original text in French uses the word “*préposés*.” Lena Paz explains that, based on the initial preparations (for the Warsaw Convention) *préposé* is “every person that has a relationship with the employer by virtue of any kind of agency agreement, which is as broad as possible, who can act on behalf and on account of the carrier”, in other words, *préposés* includes all people employed by the carrier and used by it to fulfill the contract and not only those people acting as the carrier’s agents or attorneys in fact, pursuant to the provisions of section 1869 of the Civil Code (2 sentences). Consequently, and as Perucchi states, the *préposé* concept in the Convention shall be understood as equivalent to servant, employee or agent of the air carrier, whatever the category and nature of the performed functions and as regards the point under consideration, it is enough for such person to take part in the “act of carriage” and therefore, continues Luongo, the translations of said term as “representative” shall be understood as referring to the “agent”<sup>13</sup>.

The Court states that there is an Agent when “...it perform[s] services in furtherance of the contract of carriage...”, that is to say, a person is an agent if the purpose of the rendered services is the fulfillment of the contract of carriage.

- **The airport service**

The concept of agent aims to be identified based on the agent's activities and not on the agent's quality or type of legal entity.

It becomes therefore necessary to identify the activities carried out by the airport operator to establish if they are included in the concept of agent based on the airport service it provides.

Likewise it is necessary to establish a limitation in the chain of activities provided in furtherance of the contract of carriage, because otherwise any subject who is directly or indirectly connected to the carriage by air could be having an impact on the contract of carriage and be considered an agent.

The problem is that, as in the case of the agent, there is not a valid universal notion of airport service that can establish that the one rendering those services is an airport operator.

National legal systems have doctrinaire concepts and fixed concepts on the matter.

In any case, the scope of the activities carried out by the airport operator will define in what measure it is acting as an agent, a situation that depends on each airport, each concession contract, each regulatory framework, in the end, in each case<sup>14</sup>.

Ultimately, following Judge Weinstein's reasoning, in the face of damages caused within the scope of an international contract of carriage by air, the following assumptions should be present to make the “involved” airport operator subject to the compensatory regime provided for by the Montreal Convention:

- the considered activity should be fit (direct and immediate) to assign the person performing it the condition of Agent of the air carrier I do not understand;
- the person performing said activity shall also have sufficient legal condition (legal nature) of airport operator. See above

*AVIATION*

In the absence of any of these assumptions, we would not be facing a case of airport operator's liability and thus the Montreal Convention would not be applicable.

- **Handling service**

We will not dwell on activities such as the ones carried out by airline employees<sup>15</sup> or by airport security service companies<sup>16</sup>, which, in certain cases, case law has deemed suitable enough so as to assign the renderer thereof the category of Agent of the air carrier.

We will analyze the *handling service* as it relates to the situation and activities involved in the Vumbaca case.

Judge Weinstein considers *handling* as the activity performed by Terminal One Group for the purpose of fulfilling the contract of carriage, which relates the airport terminal operator with the passenger.

The judge makes reference to precedents related to activities or services carried out by *handling* companies which, by rendering those activities, become Agents of the air carrier. This is the case with activities such as *aircraft cleaning*<sup>17</sup> and assistance given to *passengers with reduced mobility PRM* to board the aircraft<sup>18</sup>.

With this reasoning, the Court of the Vumbaca case considers that the activities carried out by the airport terminal operator at JFK were vital for Alitalia's carriage<sup>19</sup>.

Judge Weinstein considered that the *aircraft movement service from and to the terminal gates* was necessary to fulfill the contract of carriage between the carrier and its passengers and that the renderer of such services was an Agent of the carrier.

We could even connect the Court's considerations in the Vumbaca case, that is to say, the fact that said activities were carried out in furtherance of the contract of carriage, to the activities defined by Luongo as "...taking part in the act of carriage" or "carried out in furtherance of the contract."

Finally, the service was rendered through a third company called Aircraft Service International Group (ASIG), which did not release Terminal One from his relationship with the carrier, as Terminal One was the company responsible for handling services by virtue of the contract entered into with the Port Authority, and thus was covered by the Montreal Convention umbrella<sup>20</sup>.

In short, the Montreal Convention is applicable to the airport operator pursuant to the *handling* activities carried out by virtue of the airport terminal administration and operation contract entered into with the service owner (the Port Authority).

Therefore, if an airport operator is not responsible for this kind of activities, it shall not be deemed an Agent under the terms of Article 30 of the Convention.

Then, the novelty of the situation does not lie on the handling activity but on the reconfiguration of the notion and nature of the airport service and the appearance of the Airport Operator figure.



## AVIATION

Airport service and airport operator rights and duties, including its liability, for three decades have been modified. In fact, they have been constantly changing. This complexity is open to comprehensive and broad interpretation such as the one made by the New York District court.

- **The vertical integration as possible application element of the Agent concept under the terms of the Montreal Convention**

A circumstance present in the Vumbaca case could serve as a reasonable basis for Judge Weinstein's thoughts besides the agent concept that takes into account the handling activity as a link between the airport operator and the contract of carriage between the passenger and the carrier.

This is the case of the vertical integration between the airport operator and the carrier<sup>21</sup>.

We have already seen that Terminal One Group is a consortium of companies which is composed of five shareholders, four of which are airlines:

- Air France
- Japan Airlines
- Korean Airlines
- Lufthansa

That kind of ownership of the airport operator company is one of the modalities of vertical integration<sup>22</sup>, a typical legal/regulatory institution of competition law which many countries tried to limit and/or forbid at the beginning of the airport<sup>23</sup> concession process in<sup>24</sup> Latin America<sup>25</sup>.

In the Vumbaca case, and based on judge Weinstein's reasoning, if Alitalia, together with Air France, Japan Airlines, Korean Airlines or Lufthansa had been a shareholder:

- What would be the other more direct connection between the carrier, the passenger, the contract of carriage and the airport operator, apart from the fact that the carrier is the same company that operates the airport?
- What would be another argument to consider them as Agents of the carrier, that is to say, agents of themselves?
- Or, in any case, no longer consider it an agent but consider the possibility to include airport services in the clauses of the contract of carriage, as another element of the rights and obligations undertaken by the parties (carrier and passenger) as regards the flight.

Notwithstanding the ruling on the case, the dual character of airline (Alitalia Carrier) and airport operator shareholder (Alitalia Terminal One Group) would have been grounds for the passengers to sue under the umbrella of the Montreal Convention.

The Vumbaca case presents different aspects and points of analysis as regards the airport operator's liability in general and the application of the Montreal Convention in the case of a delay of carriage by air in particular.

## AVIATION

The airport service evolution and complexity confuses activities that in certain cases can appear as links between subjects and responsibilities which, as in the Vumbaca case, provide for the application of the Montreal Convention to subjects of civil aviation that could not have been imagined by the international legislator in 1999, as is the case of the airport operator through the handling activity or, eventually, through its company structure. (vertical integration).

Thus, the District Court ruling represents an interesting invitation to reevaluate the legal concept of civil liability and the remedy for damages in civil aviation, specially the complex issue of the delay of commercial carriage by air, but now in connection with new realities such as:

- the ownership and/or management of the airport used by passenger and carrier;
  - the demand of the States to render good-quality and efficient airport services to passengers;
  - the impact on activities which are not strictly carriage by air or airport service, such as *handling*, but complement the carrier and the airport operator;
  - the concept of the contract of carriage by air, specifically, the framework of the carrier's obligations and passenger's rights;
  - the airport capacity and congestion challenge;
  - consumers and users' rights protection, which has exceptional and supplementary application in the domain of carriage by air and general or direct application in airport services.
- **Conclusion: “Bear hug” or “Trojan horse” for the airport service?**

On the basis of Judge Weinstein's ruling in favor of the operator, applying his solution in a generic, universal or uniform manner might imply a “bear hug<sup>26</sup>” to the airport operator or, in a mythical Homeric note, a “Trojan horse” for airport services.

At first sight, the ruling indeed seems to be favorable to the airport operator as the plaintiff did not prove the situations provided for in Articles 17 and 19 of the Convention, which was cause for dismissal of the case without any kind of compensation being awarded to the plaintiff.

Delay in carriage by air may be one of the most important causes/sources of damages to passengers in civil aviation. In other terms, delay is one of the main causes of breach of the contract of carriage by the carrier, which makes it liable, even when said breach is caused by acts of its servants or agents. The same argument can be applied for bodily injuries of a passenger.

This reasoning in fact essentially extends the scope of the airport operator's liability to the carrier's own and exclusive domain.



## AVIATION

This situation has an impact on all the airport operations, and reaches vital sectors for the service, such as airport liability insurance. If cases as Vumbaca are filed in other courts, the insurance markets might want to take action on this matter and measure the risk - and the price - that situation might represent for the policies taken out by airport operators.

What would be the sense of supporting legal interpretations that connect the airport operator with the contract of carriage, and performance thereof?

If the idea is to include the airport operator in a limited liability system, with privileged protection, as the system implemented by the Montreal Convention, the number of claims for compensation might eventually be so large that, just thinking about that, discourages the idea of this application. It should be enough to imagine that all passengers of all delayed and cancelled flights due to a storm like the one that hit New York could be potential plaintiffs against an airport operator. Besides, the carrier would only be liable for its passengers, and the airport would be liable for all passengers of all flights of all airlines operating therein.

Legally, the airport operator is a subject that has no relationship whatsoever with the contract of carriage. The Montreal Convention sets out a liability protection system for the carrier which is also responsible for its agents.

The airport operator might, in some cases, render a deficient service with a negative impact on the carrier's operations, causing, for example, a delay of some flights.

However, these causes that can be attributed to airport services are minimum compared to the remaining causes that really cause flight delays and cancellations, many of which are attributable to carriers, others to third parties and others to reasons of force majeure or acts of God.

Applying to the airport operator the civil liability rules of the Montreal Convention for delays or bodily injuries implies ignoring the airport service's DNA, forcing the application of a legal system historically designed and built for the rendering of a service, carriage by air, with a completely different DNA, even when both services are inevitably connected and mutually necessary.

If judge Weinstein's criterion progresses, the legal relationship between the airport operator and the carrier shall be reformulated.

The impact of this ruling in future cases filed by passengers for damages sustained during the fulfillment of a contract of carriage is to be seen. Today, the airport operator is not liable for these damages as it does not have the nature of an Agent of the air carrier<sup>27</sup>.

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<sup>1</sup> N 11-5535. 2012 WL 1377074 E.D.N.Y Apr. 20, 2012

<sup>2</sup> "Legendary Federal District Court judge for more than 45 years." Refer to *Hollande Michael J "Applying the Montreal Convention to Airport Terminal Operators: The sword and the Shield". Air & Space Law 37, no6 (2012) 487-496.*

## AVIATION

<sup>3</sup> We should draw attention to the JFK case as a paradigm of vertical airport administration where airline companies are responsible for both airport operation and airport service. In other words, the airport service beneficiary shares ownership of the company rendering such service. At JFK, three terminals are operated by international airlines (T1, T4 and T7) and other four (T2/3, T5 and T8) by US airlines.

<sup>4</sup> April, 2011. Penalties can be up to 27,000 US Dollars per passenger in case of non-compliance with of the prohibition.

<sup>5</sup> Article 30 - Servants, agents - aggregation of claims.

1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention. 2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits. 3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

<sup>6</sup>Article 17 - Death and injury of passengers - Damage to baggage.

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking. 2. The carrier liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents. 3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage. 4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

<sup>7</sup> Article 19 - Delay The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

<sup>8</sup>The Convention "does not define "agent." The Supreme Court has provided no guidance (in which decision? Quote decision!). Id. The district Court did not rule on whether other entities might also be considered agents, or establish a test by which it could be determined when an entity is an agent covered by the Convention" N 11-5535. 2012 WL 1377074 E.D.N.Y Apr.20, 2012.Parag. 24.

<sup>9</sup>Videla Escalada Federico- Aeronautical Law - Book iv Volume B. Victor de Zavalia Editor. Buenos Aires. 1976. Page 719.

<sup>10</sup>For further details see Videla Escalada Federico Aeronautical Law, Op cit., Page 764.

<sup>11</sup>Luongo Norberto E "Treaty on Damages in carriage by air". Ad Hoc. Buenos Aires. 2009. Page 599.

<sup>12</sup>Holland Michael J "Applying the Montreal Convention to Airport Terminal Operators...Op. Cit.

<sup>13</sup>Luongo Norberto E "Treaty on Damages in carriage by air". Op cit. Page 255.

<sup>14</sup>This is a clear example of what essentially differentiates the contract of carriage from the airport service, as there are not as many definitions of the contract of carriage as of the possible airport services. This explains the importance of the uniformity principle in one case and the other (or in aeronautical law and airport law.)

<sup>15</sup>Reed v. Wiser, 555 F.2d 1079, 1089-93 (2d Cir. 1977)

<sup>16</sup>Lockerbie bombing, Scotland. Dec. 21, 1988, 776 F. Supp. 710, 714 (E.D.N.Y. 1991)

<sup>17</sup>Waxman v. C.I.S. Mexicana de Aviación, S.A. de C.V., 13 F. Supp. 2d 508, 514 (S.D.N.Y. 1998)

<sup>18</sup>Johnson v. Allied Eastern States Maintenance Corp., 488 A. 2d 1341, 1345 (D.C. 1985)

<sup>19</sup>TOGA is a terminal operator, not an international air carrier, its operations are vital parts of Alitalia's carriage... No reasonable juror could find that TOGA was not an agent of Alitalia for plaintiff's flight from Rome to New York. Parag. 24/25



## AVIATION

<sup>20</sup>Refer to Condon&Forsyth Newsletter. Summer 2012.

<sup>21</sup>For a detailed explanation on this matter, refer to Gonzalez Diego R., Airport Law. Prometeo Ediciones. Buenos Aires. 2013.

<sup>22</sup>Another possibility is when the carrier, without being shareholder, is a member of the Board of Directors of the airport company and participates in the decision making process. An (forming) example is the Tocumen Airport, Panama, where the act of incorporation of Tocumen S.A. provides for the participation in the Board of a carrier representative, in this case, Copa Airlines S.A.

<sup>23</sup>Chile, Brazil, Argentina

<sup>24</sup>Colombia

<sup>25</sup>Those opposing this principle are trying to stop the proliferation of the benefits that the ownership of shares or the participation in the company management might imply for some operators and not for others.

<sup>26</sup>well known figure that refers to the moment when the bear hugs its victim until suffocation, like the situation when a person apparently supports or acts in favor of another and ends up affecting what he was trying to protect

<sup>27</sup>Given the unique set of factual circumstances in Vumbaca and the careful attention paid to this issue by a distinguished and eminent Federal District Judge, Vumbaca will likely be cited as precedent in years to come with respect to damages recoverable under the Montreal Convention for delay claims, and also in a broader range of cases involving duties owed by airport terminal operators and airlines to passengers

## The Impact of Non-Governmental Organizations in Developing Space Law and Policy

Sidhant Sharma \*

### Abstract

*A non-governmental organization is an organization that is neither a part of the government nor falls into the category of organizations that carry out their objectives for profit. NGOs operate with the intention to have an impact on policy and society in relation to the particular field they are dedicated towards. This article will give a comprehensive outline on the impact that space related NGOs have made in developing space law and policy. In doing so, consideration will be given to the main reasons why NGOs are important in developing space law and policy. Additionally, the practices and objectives of specific NGOs will be considered to determine the impact that they have had in the development of space law and policy. This will include consideration of the following space related NGOs: International Institute of Space Law (IISL), Secure World Foundation (SWF) and Space Generation Advisory Council (SGAC).*

### Introduction

On 11th September 1963, The Institute of International law, a Non-Governmental Organization, adopted a unanimous resolution on 'exploration and utilisation of outer space and celestial bodies'.<sup>1</sup> Paragraph 1 of this resolution states:

“Outer space and the celestial bodies are not subject to any kind of appropriation; they are free for exploration and [for] use by all States for exclusively peaceful purposes...”<sup>2</sup>

Three months later, the General Assembly adopted Resolution 1962 (XVIII).<sup>3</sup> Paragraph 3<sup>4</sup> of this resolution complements the above quoted paragraph. Furthermore, the 1967 Outer Space Treaty,<sup>5</sup> hereafter referred to as OST, which is considered as the most important space law and policy treaty, inserted similar wordings in Article 2.<sup>6</sup>

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*SPACE*

The above stated information is not provided to dramatically conclude that it was the actions of a Non-Governmental Organization, hereafter referred to as NGO, which *began* the journey of implementing space law and policy since the general, yet crucial principles of *non- appropriation* and use of space for *peaceful purposes* were recognised in 1959 by the then *ad hoc* United Nations Committee on the Peaceful Uses of Outer Space,<sup>7</sup> hereafter referred to as the UNCOPUOS. On the contrary, the information is provided to state that NGOs for space- related activities have been active for a long time and if not in *beginning* the journey of space law and policy, they have been involved in playing *some role* in developing and enhancing it.

This article will attempt to analyse the actions of three space-related NGOs and evaluate the role they have played in developing space law and policy. These NGOs are Space Generation Advisory Council,<sup>8</sup> hereafter referred to as SGAC, Secure World Foundation,<sup>9</sup> hereafter referred to as SWF and International Institute of Space Law,<sup>10</sup> hereafter referred to as IISL. All these NGOs have a permanent observer status at the UNCOPUOS.<sup>11</sup> The reasons for choosing these three NGOs are twofold. Firstly, they deal in matters that are related to the topic of this article i.e. development of space *law and policy* unlike other some other NGOs that deal more specifically with the technical aspect of space activities.<sup>12</sup> Secondly, as will be made clear later in this article, even though the chosen NGOs have similar objectives, they all differ from each other either in the method or in scope of achieving those objectives, thus giving the author a wider perspective to consider.

Choosing these NGOs, however must not serve as an indication that other space-related NGOs in the legal and policy sector have a limited effect. In fact, NGO like European Space Policy Institute, hereafter referred to as ESPI has offered significant assistance to the law-makers of the mid and long term issues relevant to Europe's space activities. This includes extensive research, academic interactions, identifying key areas of development and facilitating the exchange of information and opinions to further develop relationships between global space actors. Yet, to contain the significant contributions made by all the NGOs like ESPI in an article would undermine their work, and it is because of this that the author has limited the scope to the above-stated NGOs.

**What is an NGO?**

Determination of what amounts to an NGO is essential as it helps in establishing a certain scope of this article. Having said that, there is no generally accepted definition of the term 'non-governmental organization' in international law.<sup>13</sup> Accordingly, each area of law that relates to NGOs establishes its own definition, as a reflection of the fact that the status and legal framework for NGOs varies from one part of international law to another.<sup>14</sup> There have been many attempts<sup>15</sup> in defining the term 'NGO' at an international, regional and national level. To analyse those attempts in detail would fall outside the scope of this article thus the author has adopted<sup>16</sup> a definition which stands as legally accurate under all those attempts and fits best with the current article. This definition being:



## SPACE

*“A private initiative which is free from governmental influence; has an aim that is not-for-profit, meaning that if any profits are earned by the organization, they are not distributed to its members but used in the pursuit of its objective.”<sup>17</sup>*

The above-stated definition makes the following clarifications for the purposes of this article: Firstly, the organization *must* have a not-for-profit aim. Thus, this excludes non-governmental organizations like SpaceX, or MarsOne. In fact as the Explanatory Report on the European Convention on the Recognition of the Legal Personality of NGOs concluded ‘This condition [the non-profit making aim] distinguishes NGOs from commercial companies...which exist to distribute financial benefits among their members.’<sup>18</sup> Secondly, being ‘free from governmental influence’ does not mean that the members of the NGO cannot be from governmental authorities for as long as ‘such membership does not interfere with the *free expression* of views of the organization’.<sup>19</sup> Accordingly, the same principle of ‘free expression’ applies where NGOs are getting funds, directly or indirectly, from government bodies.

### Why do we need NGOs?

The answer to this question would determine the potential impact that the NGOs can have on developing space law and policy. According to the author, there are two primary reasons for having space-related NGOs:

- NGOs play an important role in filling societal niches that governments are unable to do.<sup>20</sup> It does so because of its unique goals and structure whereby all members share a common passion, ideals and values in achieving the objectives of the NGO.<sup>21</sup> Furthermore since most NGOs work on the grassroots level and are highly focused, they are better able to understand the issue in hand and address it accordingly. An example of an NGO positively influencing law & order through its specific objectives is *Amnesty International*.<sup>22</sup> Due to this NGO, many abuses of human rights have been brought to the attention of the public and many unfair treatments have been suspended in the jails over the world.<sup>23</sup> A similar niche in knowledge of space law and policy is developed by space-related NGOs and will be tackled in detail below.
- According to a research conducted in 2012, the space exploration budget in major countries is very little with USA topping it with 0.18% allocation of its budget to space exploration.<sup>24</sup> This, according to the argument makers, is due to the low level of knowledge in citizens since if they are made aware of the benefits attached with space exploration, they will encourage their governments to spend more on these activities.<sup>25</sup> Thus, the argument goes that NGOs can help in enhancing the level of knowledge in people about the benefits of space exploration which would consequently lead to more exploration of space, resulting in the need of better regulations where expert opinions of space related NGOs could play a vital role.

*SPACE***Consideration of the space-related NGOs**

After generally dealing with the concept of NGOs and establishing their need to space-related activities, this article will now focus on three specific NGOs that were mentioned in section 1 above and consider their actions in developing space law and policy. Before doing so, this section intends to give a basic introduction to those NGOs and their objectives.

*Secure World Foundation*

SWF is a perfect example of NGOs having specific objectives thus giving them the opportunity to focus solely and specifically on achieving them. Not only is its objective limited to space related activities, it is further channelled specifically into space law & policy, space sustainability and environment security.<sup>26</sup> Through these activities, SWF wants to achieve 'secure, sustainable and peaceful uses of outer space contributing to global stability and benefits on Earth.'<sup>27</sup> Broadly, these objectives are implemented by 'increasing the knowledge about the space environment and the need to maintain it, promoting international cooperation and dialogue, and helping all space actors to realize the benefits that space can provide'.<sup>28</sup>

*Space Generation Advisory Council*

Unlike SWF, SGAC does not limit itself to specific space related activities. Thus, it expands its expertise into areas like space exploration, space law & policy, commercial space, small satellites, and space technologies for disaster management.<sup>29</sup> However, simply because SGAC tackles an expansive area of space related activities it does not mean it is not able to fulfil properly its objectives as an NGO. On the contrary, SGAC has over 4000 members globally, opening its membership only to people in the age of 18-35 years, thus a young, energetic and large group of members handles well an expansive area of activities.<sup>30</sup> Like SWF, SGAC's objective is to 'employ the creativity and vigour of youth in advancing humanity through the peaceful uses of outer space'.<sup>31</sup> SGAC achieves this by 'undertaking projects on key topics of relevance to international space policy, presenting the young professional viewpoint around the world and providing a dynamic forum in which students and young professionals can expand their knowledge of international space policy issues'.<sup>32</sup>

*International Institute of Space Law*

As the name suggest, the activities of this NGO is to enhancing space law. Like SGAC and SWF, the objective of IISL is to 'promote space law and the expansion of the rule of law in the exploration and use of outer space for peaceful purposes'.<sup>33</sup> IISL achieves this objective by 'holding meetings, colloquia, providing fora for individuals from different legal systems and regions of the world to engage in exchange of ideas relevant to space law and policy, publications of books, proceedings, reports, and position papers and cooperation with appropriate international organizations and national institutions in the field of space law'.<sup>34</sup> One of the ways in which IISL distinguishes itself is through publications of position papers on important legal issues.<sup>35</sup> In doing so, IISL gives its opinion on the particular legal matter it is addressing and since the position paper is adopted by a consensus of the board of directors, which consists of highly knowledgeable practitioners<sup>36</sup>

*SPACE*

in space law & policy, it gives these publications a massive credibility which could be further adopted by States, or organizations in space industry.

*General Observations*

Preceding sub-sections confirm the comment made in Section 1 of this article being 'each NGO has similar objectives but they all differ from each other either in the method or in scope of achieving those objectives' since all three of them follow different fields of space related activities like space sustainability or issues relating small satellites. While SWF and SGAC promote very specialised activities, eventually they come very close to promoting space law and policy. For example, according to SWF<sup>37</sup> and SGAC<sup>38</sup> space sustainability includes issues relating space debris which can be solved by publishing, or spreading awareness about the harmful effects of space debris and promoting space debris guidelines, which is similar to space law & policy. This observation is critical for this article as it shows that even though NGOs may focus on many specialised fields of space-related activities, they retain their interest in space law and policy by addressing its essential elements in context to those activities.

A comment should also be made on the objectives of the above-considered NGOs in that firstly, all of them are like each other and secondly, and more importantly, these objectives are in line with the intentions and the provisions of the 1967 Outer Space Treaty.<sup>39</sup> Such objectives are essential for two reasons. Firstly, it shows that the practice of these NGOs is not against the general principles already established in space law, since otherwise they would be sending an inconsistent message to the users of these NGOs, which would not only create confusion on the law but also affect the hard work put by States and UNCOPUOS in drafting those international treaties. Secondly, since the objectives are coherent with the international treaties on space law and policy, it encourages States, or organizations wanting to participate in space related activities to follow the proposals, publications or other activities of these NGOs seriously and positively. This becomes more important knowing that globally, although there exist international principles, but a lack of case law and precedents may create ambiguity on certain issues of space law, thus opinions by NGOs may provide a useful guidance.

**How do NGOs help in developing space law and policy?**

The term 'developing' has a subjective connotation. Although development of space law and policy must include activities of NGOs resulting in the implementation of national or international legislations, but it may also include indirect impact of the NGOs. Furthermore, as this section will indicate, it is not always easy to conclude whether actions of an NGO have resulted in the adoption of hard or soft law. Accordingly, this section will explore both the *initiative-taking character* of the NGOs, which creates a subtler impact on law and policy and its *active-participation character*, which intends to create hard or soft law at national or international level.

## SPACE

*Initiative-taking character* is one of the most important feature that NGOs possess. They personify this by relying on combination of different methods such as publications, educational activities and lobbying.<sup>40</sup> Thus, for instance, IISL is a partner in organizing the International Astronautical Congress, hereafter referred to as IAC, which is a platform for all scientists, agencies, policy-makers and other industry members to exchange their views not only on space law and policy, but general space related activities too.<sup>41</sup> Similarly, SGAC organizes Space Generation Congress in conjunction with IAC, hereafter referred to as SGC.<sup>42</sup> The purpose of SGC is to give the delegates of SGAC exposure to perspectives on space issues from organizations like NASA and UNCOPUOS.<sup>43</sup> Same note can be made of SWF, which organizes many events, mostly focusing on specific issues like small satellites and their benefits and risks,<sup>44</sup> or challenges given by space debris.<sup>45</sup>

An innovative *initiative* is offered by IISL in the form of Manfred Lachs Space Law Moot Court Competition.<sup>46</sup> The competition is held, first on a regional level and then on an international level, with a total of over 60 teams taking part in it.<sup>47</sup> Furthermore, the competition is distinguished by the tradition of judges of the International Court of Justice presiding over and judging the final world rounds.<sup>48</sup> The cases involved in this competition address important space law and policy matters, for instance the case of 2016 dealt with matters of space debris, rescue of astronauts, commercial spaceflight services and liability. The fact that young space lawyers from across the world address these issues on an international level not only enhances the knowledge of these young lawyers and the regions they represent but also enlightens on the different interpretations of space law and policy to other regions of the world.

Another example of *initiative-taking character* is the recent organization by SWF of an event in 2014, which dealt with the live issue of radiofrequency interference.<sup>49</sup> This included provision of information relating freedom of information, deliberate interference and governance of the geostationary arc.<sup>50</sup> This initiative by SWF included representatives from International Telecommunication Union, hereafter referred to as the ITU, Eutelsat and US International Broadcasting Bureau.<sup>51</sup> Although the issues addressed in this event only reiterated the provisions of ITU Radio Regulations<sup>52</sup> and Paper adopted by the Legal Subcommittee at its 39<sup>th</sup> session,<sup>53</sup> but when analysing the impact of NGOs in developing space law and policy, one must consider that the only way of ‘developing’ is not introduction of new proposals, but also reaffirming of the existing principles. Thus, such *initiations* by NGOs help in doing so.

Such *initiatives* have a subtle way of ‘developing’ space law and policy since not only do these *initiatives* introduce or reaffirm important legal matters in context to space related activities,<sup>54</sup> but they may also help in laying the groundwork for discussions and possible implementations of legal regulations at an international, regional or national level. IAC serves a good example of that where one of the main contribution<sup>55</sup> from IISL is *initiating*, i.e. organizing the event, thus the fact that the event attracts many policy-makers from around the world, it gives them a chance to discuss and learn more about each other’s policies and ideas which they may later use in implementing their own legal regulations.

## SPACE

Importantly, this *initiative-taking character* of NGOs is also supported by the United Nations. This can be portrayed through UN General Assembly Resolution A/59/116<sup>56</sup> which invited International Astronautical Federation, hereafter referred to as IAF, to arrange a symposium on satellite data integration for farming and environmental monitoring. Such actions show the confidence that is internationally maintained in NGOs in developing space related activities, hence also positively influencing law & policy making.

However, as it was mentioned at the start of this section, that development can have various meanings. Thus, NGOs also take actions whereby they *actively participate* in the creation and development of space laws & policies in the form of hard or soft law, instead of limiting themselves to *initiative* based actions as mentioned above. Those actions may include participation in processes either initiated by NGOs themselves or the ones organized on a national or international level by States. For instance, SGAC was invited by the European Commission in 2003 to provide the perspective for the future European space workforce during the consultation process for the Green paper on the European Space Policy.<sup>57</sup> Key recommendations made by SGAC at this consultation were to substantially increase the scope of EU space programs, strengthen and enforce space law, develop a treaty prohibiting space weapons and expand the scope of space related activities to human space-flights and exploration so as to inspire the growth of the industry.<sup>58</sup> Such actions can have an important impact in the development of space law and policy since promoting concepts like prohibition on weapons in space leads to further development of an important space law concept in *international cooperation*.<sup>59</sup> Another example of SGAC's *active* efforts in developing space law and policy can be their preparation of paper to be presented to UN Office of Outer Space Affairs, hereafter referred to as UNOOSA, giving their position on 'Definition and Delimitation of Outer Space and its connection with the issue of sub-orbital flights.'<sup>60</sup> Although this paper has not been officially presented yet, but the intention of doing so represents the motivation that SGAC carries in addressing such a critical space law issue, particularly when it comes to sub-orbital flights.<sup>61</sup>

SWF has also been *actively* involved in developing space law and policy. Its contributions to the work of the Group of Governmental Experts, hereafter referred to as GGE,<sup>62</sup> on Transparency and Confidence Building Measures,<sup>63</sup> hereafter referred to as TCBMs, in outer space activities serves as an example. Upon GGE's request to give inputs on TCBMs, many recommendations provided by SWF were eventually adopted in the consensus report of the GGE that was presented to the UN General Assembly in 2013.<sup>64</sup> These recommendations included exchange of information by States on national space policy, orbital parameters and military space expenditures. Further recommendations included notifications on risk reductions such as scheduled manoeuvres, emergency situations and intentional orbital breakups.<sup>65</sup> Although the contributions made by SWF were all in form of soft law but as GGE rightly recognized:

"The existing treaties on outer space contain several TCBM measures of a mandatory nature. Non- legally binding measures for outer space activities should complement the existing legal framework."<sup>66</sup>

Accordingly, the contributions of SWF and the content of the report should not be undermined simply because the adopted report has a non-binding effect.<sup>67</sup>

## SPACE

*Role at UNCOPUOS*

As was mentioned in section 1 of this article above, all the three NGOs discussed thus far have a permanent observer status at the UNCOPUOS. As permanent observers, they contribute to the discussions in the United Nations Committee.<sup>68</sup> UNCOPUOS operates as a perfect place for NGOs to discuss their objectives for the future and their accomplishments in the previous year.<sup>69</sup> A useful benefit of the UNCOPUOS for NGOs is that such a platform allows them to address the States directly, which may not always be the case at other events that are organized by NGOs themselves or by the States since those events may not include the attendance of all States. For example, in 2015, SWF used their permanent observer status at UNCOPUOS to introduce their *Handbook for New Space Actors in Space* which would address, in detail the international and national framework of space law and policy and best practices for responsible space operations.<sup>70</sup> The *Handbook*<sup>71</sup> is a commendable contribution in developing space law and policy since it addresses many issues relating that but a further note must be made, in that addressing such important contributions directly to the States leaves an instant impact on the delegates of the States of the activities that are carried out by NGOs that may enhance State's interest in those contributions offered by NGOs. A more specific example of that could be SGAC's announcement in 2016 on its work about the regulatory and economical aspects of Nano-satellites development process.<sup>72</sup> Nano-satellites are becoming more popular with private companies around the world,<sup>73</sup> thus a research into the regulatory and economical aspects of it could become beneficial information for many States. Therefore, providing such information at UNCOPUOS could attract the interest of States interested which may later lead to developments of their own national policies. Of course, all these consequences are speculative since it is not guaranteed that States will approach NGOs like SGAC to assist them or give them more information about their research in projects like Nano-satellites but the most crucial point to take from this subsection is that through NGOs observer status, it creates an additional and interesting *opportunity* for them to address States directly which *may* open many other future possibilities.

**Conclusion**

It is evident, based on the analysis carried out in the preceding sections of this article, NGOs like IISL, SWF and SGAC have had a significant impact in developing space law and policy. Such development only enhances upon understanding that there are many more space-related NGOs that carry similar activities as these NGOs.

There remains, however, a lack of clarity as to the *extent* as to which NGOs have contributed in developing space law and policy. The author is of the view, that even though such lack of clarity may exist, addressing this question is not important, if NGOs continue to positively offer development in space law and policy, like they have already done so. The author carries that opinion because as has been stated in section 5 above, a lot of 'development' of space law and policy carried out by NGOs is to reiterate the existing laws and principles of international space treaties to different regions of the world, and private bodies wanting to carry out space activities. In such circumstances, the question of *extent* is not relevant for as long as NGOs are reiterating those principles in the best way possible. Furthermore, getting an answer of the *extent* of contribution is not always easy. As has also been stated in section 5 above, a lot of actions of NGOs are *initiative-*

## SPACE

based such as publications, lobbying, or organizing events. It becomes very difficult, in such cases; to note specifically whether a future adoption of a law at national or international level has been a result of a particular NGO action.

Accordingly, the author submits that NGOs like SWF, SGAC and IISL have done a commendable job in developing space law and policy in their own ways and will continue to do so by positively influencing development and remaining an integral part of the industry, irrespective of the fact whether those actions would ever be quantified in terms of *extent*.

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<sup>1</sup>The Legal Regime of Outer Space', *Justitia Et Pace, Institut de Droit International, Session of Brussels, 1963*.

<sup>2</sup>According to the Institute of International Law, it is the French text of the resolution which is authoritative. The English text is a translation. English text has been taken from C.W. Jenks, *Space Law*, 416(1965).

<sup>3</sup>Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, 1962

<sup>4</sup>Paragraph 3 of the resolution states: "Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."

<sup>5</sup>Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, 1967.

<sup>6</sup>Article 2 of the OST states: "Outer Space...is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."

<sup>7</sup>Report of the Ad hoc Committee on the Peaceful Uses of Outer Space, UN Doc A/4141/25 (1959) 23.

<sup>8</sup><http://www.spacegeneration.org/>, (last visited on 6th January 2017).

<sup>9</sup><http://swfound.org/>, (last visited on 6th January 2017).

<sup>10</sup><http://www.iislweb.org/>, (last visited on 6th January 2017).

<sup>11</sup>See, <http://www.unoosa.org/oosa/en/ourwork/copuos/members/copuos-observers.html>, (last visited 20th January 2017)

<sup>12</sup>For more detail, see NGOs like The Mars Society, The Moon Society & International Academy of Astronautics.

<sup>13</sup>A. Lindblom, *Non-Governmental Organisations in International Law*, 36 (2005).

<sup>14</sup>*Ibid.*

<sup>15</sup>See, for example, the definition provided by the Economic and Social Council under the Consultative Relationship between the United Nations and Non-Governmental Organizations, paragraph 12 & 13. E/RES/1996/31 (1996). Also, see the definition adopted by the Council of Europe in 1986 under the Explanatory Report on the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, Strasbourg (1986).

<sup>16</sup>This adoption is inspired from submissions made by Anna-Karin Lindblom in the publishing *Non-Governmental Organisations in International Law* (2005).

## SPACE

- <sup>17</sup>For more critical analysis, see I. Rossi, *Legal Status of Non-Governmental Organizations in International Law* (2010). Also see C. Ku, *The Developing Role of Non-governmental Organizations in Global Policy and Law Making*, *Chinese Yearbook of International Law and Affairs*, Volume 13, page 142 (1994). For more detail on the non-profit-making character of the NGOs, see J.J. Lador-Lederer, *International Non-Governmental Organizations and Economic Entities*, page 60 (1963). For contrasting opinions on the non-profit making character, see H.H. Rechenberg, *Non-governmental Organizations*, *Encyclopedia of Public International Law*, volume 3, page 612 (1997).
- <sup>18</sup> *Explanatory Report on the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, page. 7, Strasbourg (1986)
- <sup>19</sup> See, UN Doc. ECOSOC Resolution 1996/31, Part 1, paragraph 12 (1996).
- <sup>20</sup> A. Lukaszczyk & R. Williamson, *The role of space related non-governmental organizations in capacity building*, (2009).
- <sup>21</sup> *Ibid*
- <sup>22</sup> *Its main objective is to conduct research and generate action to prevent abuses of human rights. See <https://www.amnesty.org/en/what-we-do/> for more details. (Last visited 20th January 2017)*
- <sup>23</sup> G. Reibaldi & M. Grimard, *Non-Governmental Organizations importance and future role in Space Exploration* (2015)
- <sup>24</sup> *Ibid*
- <sup>25</sup> *Ibid.*
- <sup>26</sup> See, <http://swfound.org/our-focus/> (last visited 9th January 2017)
- <sup>27</sup> See, <http://swfound.org/about-us/who-we-are/> (last visited 9th January 2017)
- <sup>28</sup> *Ibid*
- <sup>29</sup> See, <http://www.spacegeneration.org/projects.html> (last visited 9th January 2017)
- <sup>30</sup> A. Lukaszczyk, *supra* 20.
- <sup>31</sup> See, <http://www.spacegeneration.org/about/vision-goals-strategies.html> (last visited 9th January 2017)
- <sup>32</sup> *ibid*
- <sup>33</sup> See, <http://www.iislweb.org/introduction.html> (last visited 9th January 2017)
- <sup>34</sup> See, [http://www.iislweb.org/docs/2013\\_statutes.pdf](http://www.iislweb.org/docs/2013_statutes.pdf). (last visited 9th January 2017)
- <sup>35</sup> See, for example, IISL's recent position paper on *Space Resource Mining* where it considers the possible consequences and compliances of the U.S. *Commercial Space Launch Competitiveness Act* with International treaties like *Outer Space Treaty 1967*. <http://www.iislweb.org/docs/SpaceResourceMining.pdf> (last visited 9th January 2017)
- <sup>36</sup> See, <http://www.iislweb.org/board.html> (last visited 9th January 2017)
- <sup>37</sup> See, <http://swfound.org/our-focus/space-sustainability/> (last visited 9th January 2017)
- <sup>38</sup> See, <http://www.spacegeneration.org/projects/space-safety-and-sustainability.html> (last visited 9th January 2017)
- <sup>39</sup> More specifically, these objectives are verbatim to the Preamble of OST which recognizes 'the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes'.
- <sup>40</sup> See, D. Lapas, *The role of International Non-Governmental Organisations in Space Activities and Space Law*, (2010).
- <sup>41</sup> See, <http://www.iafastro.org/events/iac/> (last visited 11th January 2017)
- <sup>42</sup> See, <http://spacegeneration.org/event/sgc.html> (last visited 11th January 2017)
- <sup>43</sup> *Ibid*
- <sup>44</sup> See, <http://swfound.org/events/2014/small-satellites-benefits-and-risks> (last visited 11th January 2017)
- <sup>45</sup> See, <http://swfound.org/events/2012/trash-in-the-skies-the-challenge-of-space-debris> (last visited 11th January 2017).
- <sup>46</sup> See, IISL's website at [http://www.iislweb.org/html/20150805\\_news.html](http://www.iislweb.org/html/20150805_news.html) (last visited 11th January 2017)
- <sup>47</sup> *Ibid*
- <sup>48</sup> *Ibid*
- <sup>49</sup> See, <http://swfound.org/events/2014/orbital-slots-and-spectrum-use-in-an-era-of-interference/>, (last visited 11th January 2017)
- <sup>50</sup> *ibid*
- <sup>51</sup> See, [http://swfound.org/media/178052/final\\_agenda\\_ifri\\_2014.pdf](http://swfound.org/media/178052/final_agenda_ifri_2014.pdf), (last visited 11th January 2017)



## SPACE

<sup>52</sup> See, [http://www.itu.int/dms\\_pub/itu-s/oth/02/02/S02020000244501PDFE.PDF](http://www.itu.int/dms_pub/itu-s/oth/02/02/S02020000244501PDFE.PDF) (last visited 15th January 2017)

<sup>53</sup> See, *Some aspects concerning the use of the geostationary orbit*, A/AC. 105/738, annex III.

<sup>54</sup> See, for example, SWF's publications on crucial matters like national appropriation under Article II of OST 1967. <http://swfound.org/media/205288/reality-and-clarity-in-understanding-the-prohibition-on-national.pdf> (last visited 15th January 2017)

<sup>55</sup> Another essential contribution from IISL in this context is the publishing of the Report summarizing the proceedings from the event that serves as a useful guidance on the important space law and policy issues discussed at the Congress. See, <http://www.iislweb.org/publications.html> (last visited 15th January 2017)

<sup>56</sup> See, UN General Assembly Resolution A/59/116, paragraph 15 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/59/116](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/59/116) (last visited 15th January 2017)

<sup>57</sup> See, *Green Paper, European Space Policy* (2003).

<sup>58</sup> See, <http://www.spaceref.com/news/viewpr.html?pid=12193> for more details. (Last visited 15th January 2017)

<sup>59</sup> See, *Preamble of the Outer Space Treaty 1967*, which desires 'to contribute to broad international cooperation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes.'

<sup>60</sup> See, *SGAC's Annual Report, Page 84* (2014)

<sup>61</sup> For detailed analysis on the legal issues involved with sub-orbital flights, see T.M. Zwaan, S. Freeland, *Between Heaven and Earth: The Legal Challenges of Human Space Travel* (2010).

<sup>62</sup> The UN General Assembly regularly establishes such groups to investigate emerging concerns and make recommendations.

<sup>63</sup> The purpose of TCBMs is to encourage States in maintaining peace in outer space related activities. See, for example UNGA Resolution 61/75, adopted in December 2006, reaffirming that the prevention of an arms race in outer space would avert a grave danger to international peace and security.

<sup>64</sup> See, SWF's Annual Report 2013 at <http://swfound.org/media/163220/2013%20swf%20annual%20report%20to%20the%20board.pdf> (last visited on 15th January 2017)

<sup>65</sup> See, *Submissions made by Tiffany Chow, on behalf of SWF at* [http://swfound.org/media/105230/swf\\_gge\\_inputs\\_feb\\_2013.pdf](http://swfound.org/media/105230/swf_gge_inputs_feb_2013.pdf) (last visited on 15th January 2017)

<sup>66</sup> See, *Report of the GGE on TCBMs in Outer Space Activities*, Pg. 2.

<sup>67</sup> Also, even though recommendations and guidelines are voluntary, their adoption by consensus and the adherence by many states can contribute to such rules eventually developing into rules of customary law binding all states. See T.M. Zwaan, *Current issues & Prospects on International Space Law*, *Korean Journal of Air and Space Law* (2010)

<sup>68</sup> See, C. Brunner & A. Soucek, *Outer Space in Society, Politics and Law*, at 208 (2011)

<sup>69</sup> See, for example IISL's Statement by IISL's President at the 55th session of COPUOS Legal Subcommittee, 2016 where information about the 59th IISL Colloquium and Manfred Lachs Moot Court Competition was given to the COPUOS.

<sup>70</sup> See, *Statement by Christopher Johnson, SWF, on Agenda Item 3 "General Exchange of Views" at the UNCOPUOS* (2015)

<sup>71</sup> For more detail on the Handbook, see *A Handbook for New Space Actors in Space*, which includes a summary, and a detailed table of contents of the Handbook.

<sup>72</sup> See, *SGAC's Statement at the 55th Annual Legal Subcommittee of the UNCOPUOS*, presented by Ms. Minoo Rathnasabapathy (2016)

<sup>73</sup> See, for example, *Nano-Satellites Will Give Everyone Access to Space*, an article published by Peter Platzer in *Forbes* (2013)



## Limitation Period For Claims Arising from Regulation 261/2004 - Polish Supreme Court Resolution of 21 February 2017 - III CZP 111/16

Piotr Kasprzyk\*

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The specific issue as to the limitation period for making a claim arising from Regulation 261/2004 was examined in the case of *Cuadrench More vs Koniinklijke Luchvaart Maatschappij N.V. (Case C-139/11)*. The Court of Justice of the European Union held that the time limit for bringing a claim under Regulation 261/2004 was a matter for national law because the provisions for compensation from the Regulation fall outside the terms of the Montreal Convention.

On February 21<sup>st</sup> 2017, the Polish Supreme Court published its reasoning in the Cases *Passengers Rights vs Polish Airlines LOT*<sup>1</sup>. The court held that claims for damages provided for in Article 7 of Regulation No 261/2004 is time-barred within one year pursuant to Article 778 of the Polish Civil Code<sup>2</sup>.

Before that Resolution, there were great discrepancies in the judicial practice in Poland. One could make a claim in the civil courts within 1 year, 2 years, 3 years or even 10 years. There was also a ruling of an administrative court stating that such a claim is not time-barred at all since its character is administrative and not civil.

The 2017 Supreme Court resolution was taken in response to the following legal question presented by the District Court in Warsaw by order of 1 December 2016 (ref. Act XXVII Ca 3352/16) :

- Should the passenger claim arising from Article 7 of Regulation (EC) No 261/2004 be time-barred for a period of one year from the date of performance of the carriage or the date on which the carriage was to be effected, in accordance with Article 778 in conjunction with Article 775 of the Polish Civil Code?
- If the answer to the above question is negative, shall the passenger claim arising from Article 7 of Regulation (EC) No 261/2004 expire within two years from the date of arrival to the place of destination or the date on which the aircraft should have arrived or from the date on which the carriage was cancelled, in accordance with Article 35 of the Montreal Convention?

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## MISCELLANEOUS MATERIAL OF INTEREST

- If the answer to both questions is negative, shall the passenger claim arising from Article 7 of Regulation (EC) No 261/2004 be time-barred for a period of three years from the date on which the claim is due, in accordance with Article 442(1) § 1 of Polish Civil Code?
- If the answer to the above three questions is negative, shall the passenger claim arising from Art. 7 of Regulation (EC) No 261/2004 be time-barred for a period of ten years from the date on which the claim is due, in accordance with Article 118 in conjunction with Article 120 § 1 of the Polish Civil Code?

The Supreme Court stated that it was not possible to refer to the Montreal Convention because of the uniform case law of the Court of Justice of the European Union in this matter. Also the three-year limitation period resulting from Article 442(1) § 1 of the Polish Civil Code is not applicable as we are not dealing with a tort claim. We are dealing with a contractual claim, although the "compensation" in question is quite specific.

The one year limitation period results from the literal interpretation of Article 775 of the Polish Civil Code. The regime of contracts of carriage governed by the Civil Code is very general. These regulations are rarely used because many specific legislative acts - national and European - are in force. However, we apply Article 775 as such carriage is not governed by separate regulations. The European regulation 261/2004 does not regulate the issue of limitation of claims, therefore Article 778 was not excluded. Another interpretation will reach the same result: by going to the European regime, due to the case law of the Court of Justice we have to go back to the national law and look for claims closest to this claim. It will not be a ten-year general term for civil claims under Article. 118, but a specific one year term under Article 778, which explicitly refers to the contract of carriage of persons. A literal or functional interpretation leads to the same result.

The Supreme Court stated that the regulation refers to compensation, but in the meaning of the Civil Code it looks rather as a contractual penalty. This claim should be investigated as soon as possible. If there is an event described in the regulation, the passenger should immediately file a claim. The ten-year deadline is unacceptable in this case.

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<sup>1</sup>Case file no. III CZP 111/16.

<sup>2</sup>Article 778. Statute of limitations. Claims under a carriage contract become barred by the statute of limitations one year after the carriage was performed and, if the carriage was not performed, from the day on which it was to have been performed.

## Air traffic and Aircraft Noise Pollution in the ECHR's case law

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### Abstract

*The air traffic and aircraft noise represent complex subject matters, which continue to concern the specialists. The national authorities together with the entire aviation community have to pursue programs of aircraft noise control, trying to reduce people's griefs.*

*During the last decades several individuals considered that the air traffic noise represent a true noise pollution, affecting their lives in a significant manner, having a serious impact on health as well, and, as a consequence, they brought an action against their state. The issue emerged beyond national borders, to international jurisdiction, seeking state responsibility. The present paper analyses the relevant case law of the European Court of Human Rights on this matter in order to illustrate how the Strasbourg judges border the problem.*

### About air traffic and aircraft noise

During different phases of a flight, from take off to landing, the aircraft produces aircraft noise which constitutes a serious form of noise pollution, very disturbing for individuals. It is well known that the noise disturbance is subjective, being difficult to be evaluated. For this reason, the researchers have studied and continue studying the aircraft and airport noise.

Noise discomfort is a stringent problem for communities living in the vicinity of an airport. Noise pollution has significant adverse effects on the daily life of persons living in those communities, such as sleep disturbance, health effects, learning acquisition, and communication interferences. This situation led people to seeking solutions in front of national courts against the owner of the airport, or against the State for allowing the owner to use it. When justice was not obtained, the solution was to present the case to a higher fora, such as the European Court of Human Rights (*hereinafter referred to as the "Court" or "ECHR"*), for national of States parties to the European Convention of Human Rights.

One must admit that some of the most interesting jurisprudential creations of the Court are related to the inclusion of the right to a healthy environment into the sphere of protection of the right to a private life. This was possible by using the protection *par ricochet*.

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During the last decades, very often the Court was asked to rule on different topics related to healthy environment, including on noise pollution (air traffic and aircraft noise<sup>1</sup>, neighbouring noise<sup>2</sup>, road traffic noise<sup>3</sup>, wind turbines and wind energy farms noise<sup>4</sup>, industrial noise<sup>5</sup>, rail traffic noise<sup>6</sup>).

For the purposes of this paper, we shall analyse in the following section the Court's case law regarding the air traffic and aircraft noise in order to see how the Court solves this important issue.

#### ECHR's relevant case law

Analysing the ECHR's case law, it is obvious that several stages of interpretation can be distinguished in the approach of this phenomenon. The first stage is represented by the cases of *Baggs v. United Kingdom*<sup>7</sup> and *Powell and Rayner v. United Kingdom*<sup>8</sup> in which the Commission and the Court have stated that sonor pollution due to airport exploitation in the proximity of the claimants domicile represents an interference with their private life, finding a violation of the Article 8 of the European Convention on Human Rights (hereinafter referred to as the "European Convention").

In *Powell and Rayner* case, the claimants, who were living near the Heathrow Airport, exactly under certain flight departure routes, alleged violation of their right to respect for their private life and their home, among others. They sustained that, as a result of excessive noise generated by air traffic in and out of Heathrow Airport, they had each been victim of an unjustified interference with the respective right.

The Court admitted the economic importance of the Heathrow Airport, one of the largest and busiest international airports in the world, pointing that the existence of such airports in densely populated urban areas and the increasing use of jet aircraft are important in the interests of a country's economic well-being. Additionally, the Court recognized that several measures were taken by the English authorities in order to control, abate and compensate for aircraft noise, including without limitation, aircraft noise certification, restrictions on night jet movements, noise monitoring, introduction of noise preferential routes, runway alternation, noise-related landing charges, revocation of the licence for the Gatwick/Heathrow helicopter link. Taking this into consideration, the Court stated that "[i]n sum, no arguable claim of violation of Article 8 and, consequently, no entitlement to a remedy under Article 13 have been made out in relation to either applicant as regards noise caused by aircraft flying at a reasonable height and in compliance with air traffic regulations". Even though the Court did not find a violation of the UK's legal obligations under the Convention, this case is important because it demonstrates that *the Court accepted the fact that a healthy environment can be included in the sphere of application of Article 8 of the Convention*.

In a second stage, the case of *Hatton and Others v. United Kingdom*, which regarded the same issue of airport noise pollution, the Court had a different approach. The several claimants, in support of their requests, invoked the World Health Organisation's guiding lines. They pointed out that the night noise they were subjected to was frequently in excess of international standards: the World

## MISCELLANEOUS MATERIAL OF INTEREST

Health Organisation provided as a guideline value for avoiding sleep disturbance at night a single noise event level of 60 dBA L<sub>max</sub>; almost all the applicants have suffered night noise events in excess of this recommendation.

Moreover, the applicants pointed to the absence of any research into sleep prevention before the 1993 Scheme, and added that post-1993 studies and proposals did not amount to an assessment of the effect of night noise on sleep prevention.

The Court argued that, even though in the present case the noise disturbances were not caused by the State, but they emanated from the activities of private operators, the changes brought about by the 1993 Scheme are to be seen as a direct interference by the State with the rights enshrined in Article 8 of the Convention of the persons concerned.

Additionally, the Court emphasized that the State's responsibility in environmental cases could arise from a failure to regulate private industry in a manner securing proper respect of Article 8 of the Convention.

The Court analysed if, in the implementation of the 1993 policy on night flights at Heathrow Airport, a fair balance was struck between the competing interests of the individuals affected by the night noise and of the entire community. In order to reach that fair balance, states should take into consideration several circumstances, especially because in the area of environmental protection, *the simple argument of country's economic well-being is not enough for violating individual rights*. It is obvious that states have to minimize the interferences with such rights, trying to find alternative solutions and to attain their purposes without interfering with individuals. For this purpose, the Court considered that an adequate and complete investigation in order to find the best solution should precede any project interfering with human rights. In this case, the Court (the Third Section) appreciated that United Kingdom did not find this fair balance between the country's economic well-being and the right of the claimants to enjoy their domicile, as well as of their right to enjoy their private and familial life, reason for which it considered that Article 8 of the Convention was breached.

As a result of the judgment in this case, from that date, the Member States achieved more onerous obligations, such as to do previous investigations on the effects over the environment made by major proposed projects and activities which presented a risk of violating individual rights set out in Article 8 of the Convention.

After the above mentioned decision, the British Government was not satisfied with the results and at its request, the case was rendered to the Court's Grand Chamber. Surprisingly, the Grand Chamber took an opposite decision, stating that the measures taken by the United Kingdom were sufficient, meaning that it did not violate Article 8 of the Convention. This surprising decision was accompanied by a strong dissenting opinion of several judges - Costa, Ress, Türmen, Zupančič and Steiner, in which it was sustained that the decision is deviating from the previous case law of the Court, even representing a back-set by giving priority to economic considerations instead of health reasons. The Court considered the sensibility to noise of the claimants as characterizing a small percent of people. The tendency to minimize the sensibility to noise is against the global and regional preoccupations.

This dissenting opinion was very much supported, as in the above mentioned case, it was not proven that the claimants were instable or that their noise sensitivity was subjective. Therefore we in our turn appreciate that the constant trouble of sleeping at night, caused by the night flights, generates a positive obligation on the Member States, to assure that the regular people can enjoy normal sleep conditions.

In a nutshell, we consider that the Grand Chamber's decision in the *Hutton* case is deviating from the Court's case law and that the principle of small minority that should be protected by international human rights was not respected.

After a few years, the Court was asked again to rule on noise pollution in the case of *Flamenbaum and Others v. France*<sup>11</sup>. The applicants were the owners or joint owners of certain homes near the Sain-Gatien forest (not far from the Normandy coast's seaside resorts), classed as a natural area in terms of ecology, fauna and flora, at a distance of 500-2,500 metres from the Deauville Airport's main runway. Resting their claims on Article 8 and on Article 1 of the Protocol 1 of the Convention, they complained about several things: the noise disturbance due to the extension of the main runway, the decision-making process, the decline of their properties' market value caused by the runway extension, the insulation costs beard. The Court, acknowledging the legitimate aim of the French authorities, the region's economic well-being, and assessing the measures taken by the French authorities to limit and reduce the impact of the noise disturbance, found that a fair balance between the competing interests has been struck. Therefore, it held that in this case no violation of the above mentioned articles can be retained.

#### Final remarks

Throughout the time, the ECHR was not asked to analyse too many cases on air traffic noise, and in the cases it did, the Court did not adopt the same solution. This fact raises the concern of how the Court will deal in a future case.

Aircraft noise is, as the International Civil Aviation Organization (*hereinafter referred to as the "ICAO"*) underlines, "the most significant case of adverse community reaction related to the operation and expansion of airports"<sup>12</sup> fact which determines that the limitation or reduction of the number of individuals affected by this noise pollution is one of the main priorities of ICAO.

The air traffic and aircraft noise represent complex subject matters, which continue to concern the specialists. The national authorities together with the entire aviation community have to pursue programs of aircraft noise control. Additionally, the aircraft noise standards established at the international level have to be respected. For instance, since 1971, all commercial aircraft must meet the ICAO's noise certification standards from the first approval for operational use. In 2013, the ICAO's Committee on Aviation Environmental Protection agreed on a new global noise reduction standard, based on "Balanced Approach", which obliges its members to find solutions to reduce even more the aviation noise and emissions impact.

## MISCELLANEOUS MATERIAL OF INTEREST

The Balanced Approach contains four principal elements:

- making aeroplanes quieter by setting noise standards;
- managing the land around airports in a sustainable way;
- adapting operational procedures to reduce the noise impact on the ground;
- introducing operating restrictions.

It is praiseworthy that the aviation industry manage to reduce noise for decades. According to the studies, aircraft are “50% quieter today than they were ten years ago, and 75% quieter than the first generation of jet aircraft”<sup>13</sup>. In this respect, as a general remark, “it is estimated that the noise footprint of each new generation of aircraft is at least 15% lower than that of the aircraft it replaces”. But even though the aircraft are less noisy over the years, the growing amount of air traffic reflects that many EU citizens are exposed to high noise level.

However, because of the implication of the aircraft noise, this type of pollution remains high on the agenda of public concern.

At the regional level, the European Community tries to contribute in finding solutions, for instance it adopted the Regulation (EU) no 598/2014 on the procedures concerning the introduction of noise-related operating restrictions. The Regulation is compliant with international principles on noise management set out by ICAO.

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<sup>1</sup>E.g. cases of *Powell and Rayner v. the United Kingdom, Hatton and Others v. the United Kingdom, Flamenbaum and Others v. France*.

<sup>2</sup>E.g. cases of *Moreno Gómez v. Spain, Mileva and Others v. Bulgaria, Zammit Maempel and Others v. Malta, Chis v. Romania*.

<sup>3</sup>E.g. cases of *Deés v. Hungary, Grimkovskaya v. Ukraine*.

<sup>4</sup>E.g. case of *Fägerskiöld v. Sweden, Vecbaštika and Others v. Latvia*.

<sup>5</sup>E.g. cases of *Borysiewicz v. Poland, Martinez Martinez and María Pino Manzano v. Spain*.

<sup>6</sup>E.g. case of *Bor v. Hungary*.

<sup>7</sup>Case of *Baggs v. the United Kingdom*, application no. 9310/81, judgment dated 19.01.1985.

<sup>8</sup>Case of *Powell and Rayner v. United Kingdom*, application no. 9310/81), Third Section judgment dated 21.02.1990, available at <http://hudoc.echr.coe.int/eng?i=001-57622>.

<sup>9</sup>*Idem*, para. 46.

<sup>10</sup>Case of *Hatton and Others v. the United Kingdom*, application no. 36022/97, Grand Chamber judgment dated 8.07.2003, available at <http://hudoc.echr.coe.int/eng?i=001-61188>.

<sup>11</sup>Case of *Flamenbaum and Others v. France*, applications nos. 3675/04 and 23264/04, judgment dated 13.12.2012, available at <http://hudoc.echr.coe.int/eng?i=001-115143>.



## MISCELLANEOUS MATERIAL OF INTEREST

<sup>12</sup>Please see <http://www.icao.int/environmental-protection/Pages/noise.aspx>.

<sup>13</sup>Please see <http://aviationbenefits.org/environmental-efficiency/noise/>.

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## Legal effects and Review of Regulation 1107/2006 (disabled persons and persons with reduced mobility when travelling by air)

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### Abstract

The purpose of the study is to present content, effects and shortcomings of the Regulation 1107/2006 (“the Regulation”) concerning the rights of disabled persons and persons with reduced mobility when travelling by air. Indeterminacy of the term ‘PRM’ and inadequate information to carriers and airport operators about the need for assistance to PRMs hinders the adequate implementation of the Regulation. *Sui generis principle of solidarity implies that a charge for assistance to PRMs is levied on each carrier using an airport, proportionate to the number of passengers it carries to or from the airport, and this enables a high level of protection of PRMs.* As a counter-balance to the principle of solidarity, a principle of cost efficiency has been incorporated which puts an airport operator or the airport operator’s subcontractor under the obligation to keep PRM charges commensurate to PRM ground handling charges. In addition to implementation of the solidarity principle, the high level of protection of PRMs is also ensured by the obligation to adopt quality standards for ground handling of PRMs at all airports servicing more than 150,000 passengers, as well as both airport operators and carriers being obliged to train their staff how to provide the appropriate assistance.

The absence of clarity on the obligations of airport operators and carriers has resulted in inconsistency in the regime of responsibility for damage to wheelchairs or mobility equipment and other assistive devices.

### Introduction

Regulation 1107/2006 on rights of disabled persons and persons with reduced mobility in air transport (“the Regulation”) and Regulation EU 261/2004 on establishing common rules on compensation and assistance to air passengers in the event of denied boarding and of cancellation or long delay of flights, are the regulations by which passengers’ rights have been protected at an EU level.

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In EU, the Regulation establishes a unique legal frame for protection of the rights of disabled persons and persons with reduced mobility (“PRM passengers”) in air transport. Before the Regulation came into force, assistance to PRM passengers was provided by carriers or ground service providers. Since 26.07.2008 and upon full implementation of the Regulation<sup>1</sup>, providing assistance to PRM passengers has been distinct between airport operators and carriers.

This study is going to analyse almost all requirements of the Regulation<sup>1</sup>, referring especially to the area of its implementation, defining the designated points of departure and arrival, the transmission of information, establishing the ground handling quality standards, PRM charges, appeal procedure, areas of responsibility including responsibility of airport operators and carriers for the damage to wheelchairs and other mobility equipment or assistive devices.

### The notion of PRM passenger

A PRM passenger means any person whose mobility when using transport is reduced due to any physical disability (sensory or locomotive, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and adaptation to his or her particular needs of the service made available to all passengers<sup>2</sup>.

It is implicit from the very name of the Regulation that the notion of PRM passenger refers exclusively to disabled persons and persons with reduced mobility. However, the definition of ‘PRM passenger’ is too vague and leaves space for different interpretations and uneven implementation of the Regulation.

The scope of assistance and extension of the definition of a PRM passenger to other categories of passengers have resulted in recitals that are recommendations in a legal sense, and offer protection of the same rights as all other citizens by the prohibition of discrimination on the grounds of disability or lack of mobility<sup>3</sup>. In my opinion the definition of a PRM passenger is too extensive and it should refer only to disabled persons and persons with reduced mobility. It is necessary to define other categories of the passengers who need assistance in similar way, because the definition of a PRM passenger should not include persons whose condition requires appropriate attention and adjustment to their needs for special services, e.g. mothers/fathers with children whom need assistance. A new definition of a PRM passenger will require a change of other documents containing a definition of PRM passenger<sup>4</sup>.

The ratio of my explanation relies on the fact that the passengers who need appropriate assistance cannot be classified, in language terms, either as disabled persons or persons with reduced mobility, and separating the provisions concerning the persons whose condition requires appropriate assistance will not eliminate implementation of the Regulation for these passenger categories.

Implementation of the Regulation on disabled persons is incontestable. In practical implementation of the Regulation in Greece, United Kingdom of Great Britain,



Sweden, an obese passenger has not been treated as a PRM passenger<sup>5</sup>. It is obvious that an explicit exclusion of overweight passengers from the definition of a PRM passenger is wrong. For such passengers to fall within the scope of a 'PRM passenger' will depend on whether they are indeed a passenger with reduced mobility. This must be assessed on a case-by-case basis. In any event, an airport operator is obliged to assist a prospective mother who asks for assistance, for example. Whether a pregnant woman is a PRM passenger is to be evaluated case by case. However, a heavily pregnant woman's obligation to obtain a medical certificate as a precondition to fly is a clear indicator that she may be a PRM passenger<sup>6</sup>.

The Regulation 965/2012 on defining technical requirements and administrative procedures concerning air traffic operations makes a distinction between PRM passengers and unaccompanied children as special categories of passengers, and implicitly defines that the unaccompanied children cannot be categorised under the notion of a PRM passenger. On the other hand, by adopting the Interpretation Guidebook on implementation of the Regulation, the EU explicitly recommends not to apply provisions of the Regulation<sup>7</sup> to unaccompanied children.

According to IATA Recommendation from Resolution 700 and Recommendation 1700, the notion of a PRM passenger includes the following categories of PRM passengers: MEDA, STCR, WCHC, WCHS, WCHR, DEAF, DEAF/BLND, DPNA and MAAS PRM passengers<sup>8</sup>.

However, ECAC Doc 30, Part I with its latest modifications made in December 2015, recommends an assumption of the following categories under the notion of a PRM passenger: WCHC, WCHS, WCHR, BLND, DEAF/BLND and DPNA PRM passengers<sup>9</sup>. Recommendation of ECAC Doc 30 does not include MEDA, STCR and MAAS categories of a PRM passenger.

The Recommendation from ECAC Doc 30, Part I is imprecise since the Regulation includes the categories of passengers who require appropriate attention and adaptation of services to meet their particular needs. These are pregnant women, obese passengers, fathers and mothers of minors - for whom carriers avoid using IATA code MAAS (all other passengers that need assistance), but use WCHR code instead. Given the fact that MAAS code is not in use any more, some airport operators refuse to provide assistance to a PRM transfer passenger with MAAS or even WCHR code if an aircraft is on the open position<sup>10</sup>.

According to IATA Resolution 700, passenger on stretcher (STCR) is considered to be a PRM passenger. However, provisions of the Regulation 1107/2006 should not apply to such a passenger because an airport operator does not provide assistance to the PRM passenger but he is transported in an ambulance directly to the plane and goes on board assisted by medical staff, including a doctor who escorts a STCR passenger.



### Scope of implementation of the Regulation 1107/2006

Provisions of the Regulation apply to disabled persons or persons with reduced mobility who intend to use the services of commercial air transport at departure from an airport, transit through an airport or at arrival to an airport, when the airport is situated in the territory of a Member State to which the Agreement applies<sup>11</sup>.

Systemic interpretation indicates that provisions of the Regulation also apply to disabled passengers and passengers with reduced mobility not using commercial air transport. In other words, provisions of the Regulation apply to disabled passengers or passengers with reduced mobility on general aviation flights too (i.e. private aircraft, etc.)<sup>12</sup>.

I believe it would be more precise if the Regulation contained the wording “disabled passengers“ or “passengers with reduced mobility“.

It is inarguable that provisions of the Regulation are applicable at all airport in EU and by all EU carriers<sup>13</sup>.

Provisions of the Regulation are implemented from the door sill of aircraft of an EU carrier operating from airports in third countries to an airport in EU<sup>14</sup>.

Provisions of the Regulation do not apply to:

- Airports in third countries;
- Non-EU carriers that operate from an airport of a third country.

Due to establishing of the European Common Aviation Area (ECAA), EU extended implementation of the Regulation to Ireland, Norway and countries of South-East Europe: the Republic of Albania, Bosnia and Herzegovina<sup>15</sup>, The Republic of Bulgaria, the Republic of Croatia, Former Yugoslav Republic of Macedonia, the Republic of Island, the Republic of Montenegro, the Kingdom of Norway, Romania, the Republic of Serbia and interim missions of the United Nations at Kosovo, are under obligation to implement ECAC Doc 30 containing provisions on Ground Handling of PRM passengers<sup>16</sup>. A result of the establishment of the European Common Aviation Area is the extension of implementation of the Regulation to airports and carriers of Member States to which the ECAA Agreement applies.

In respect of third countries airports, provisions of the Regulation apply to EU carriers from the door sill of their aircraft, except in the event that air transport is performed from the airport in a Member State to which the ECAA Agreement applies.

### Prevention of denied carriage

Prevention of denied air carriage and prohibition of discrimination of PRM passengers is a reason (*causa*) for adopting the Regulation.

Air carriage may be denied:

- If a passenger does not have a valid ticket or reservation<sup>17</sup>;
- In case of meeting relevant safety requirements<sup>18</sup>;
- If the size of aircraft or its door physically prohibits embarking or air transport of a PRM passenger<sup>19</sup>.



The Community law is poor in respect of mandatory provisions related to safety conditions in carriage of PRM passengers by air. The Regulation 965/2012 on defining technical requirements and administrative procedures of air traffic operations stipulates that special categories of passengers, including PRM, are to be seated in a way not to obstruct emergency exits. Otherwise they could:

- Impede crew members in their duties;
- Obstruct access to emergency equipment;
- Impede the emergency evacuation of the aircraft<sup>20</sup>.

Excluding the explicit ban on allocation of PRM passengers to the seats that hamper access to aircraft exits, it is obvious that carriers are entitled to decide on the seat allocation. Depending on a type of aircraft they allocate PRM passengers to seats by the windows, in the middle of the row or by the aisle, and in cooperation with airport operators and providers of Ground Handling services, decide how to safely embark and disembark PRM passengers.

As a rule, the international air transport of PRM passengers must not be conditioned by having a medical certificate. Neither carrier nor airport operator is authorised to require a PRM passenger to have a medical certificate. However, for safety reasons the carrier is authorised to ask a PRM passenger to present a medical certificate for a heavily pregnant women, passengers using oxygen, and those suffering from infectious diseases, etc<sup>21</sup>.

A carrier, his agent or a tour operator, exclusively for safety reason, may require a PRM passenger to be escorted but is obliged to explain such a demand in detail. The explanation on necessity to have a person accompanying a PRM passenger may be communicated to a PRM passenger verbally, but on his request, the carrier, his agent or a tour operator are obliged to send him a written explanation within five (5) working days of receipt of the request<sup>22</sup>. As a rule, carriers require a PRM passenger to have a person accompanying him/her, according to General conditions of carriage and/or Passenger Handling Manual, if the PRM passenger is not able to take care of himself/herself, i.e. not able to breathe or eat on his/her own, to get up, communicate, use medical aids or use the aircraft toilet without assistance.

Criteria for the provision according to which a PRM passenger must have a person accompanying him, is that such a person provide him assistance only on board the plane and not at the airport. *The carrier, tour operator and airport operator are not authorized to ask the person accompanying a PRM passenger to assist him at the airport.*



### Notification of carriers and airport operators and transmission of information

PRM passengers are entitled to require assistance from carriers, their agents or tour operators. The Regulation stipulates that carriers, their agents or tour operators would take all necessary measures at their point of sale in the territory of the State to which the Treaty applies, including sales by phone or Internet, in order to be able to receive PRM passengers' requests for assistance<sup>23</sup>. Timeliness and quality of the service provided to a PRM passenger depend upon carrier's notification about a PRM's request and transmission of the information to airport operator. The biggest problem concerning the Regulation is PRM passengers' ignorance of their rights. *In cause-and-effect, a sore point of the Regulation is informing carriers about assistance required to be provided to PRM passenger, as well as communication of information by the carrier to airport operator.*

Ways of informing the PRM passengers about their rights include web pages of carriers, airport operators and managing bodies in charge of implementation of the Regulation.

In addition, EU recommends informing the PRM passengers about their rights by means of notices on air tickets, bills, etc<sup>24</sup>.

However, PRM passengers often do not understand abbreviations on airlines' web pages, and thus cannot determine the type of assistance the carrier is obliged to provide.

Consequently, it disables adequate preparation of the airport operator and carrier for the provision of such assistance.

The Regulation stipulates that the carrier, his agent or tour operator who have received a request for assistance at least 48 hours before scheduled time of departure has to forward the information at least 36 hours before announced time of departure to the airport operator or the operating carrier responsible for transporting the passenger<sup>25</sup>. *The reason (causa) for this provision is to enable carrier and airport operator to prepare for ground handling of a PRM passenger.* The carrier is informed about a PRM passenger's requests via e-mail, phone or the application on its web page<sup>26</sup>.

Carriers notify airport operators not later than 36 hours before a take-off by messages via the Societe Internationale de Telecommunications Aeronautiques (hereinafter referred to as: SITA messages). SITA messages forwarded by carriers are Passenger Assistance List (hereinafter referred to as: PAL message) and Change Assistance List (CAL message)<sup>27</sup>.

However, PAL and CAL messages are not present so much in practice. As a rule, carriers notify airport operators using Passenger Name List (PNL) messages containing a list of all passengers, including a system list of PRM passengers that has to be delivered to the airport operator not later than 24 before the flight, and not infrequently, 10 - 24 hours before departure. Usually, a number of PRM passengers on the PNL list do not correspond to the number of passengers who required assistance.

For that reason PNL messages are not a reliable indicator of the number of PRM passengers that will need assistance at the airport.

The mentioned messages are sent for departing PRM passengers only. Apart from SITA messages, carriers may inform airport operator on necessity to provide assistance using e-mail. This is mostly done by tour operators because they do not have access to SITA messages<sup>28</sup>.

For arriving PRM passengers, the airport operator is informed about the necessity to provide assistance via SITA Passenger Service Message (hereinafter referred to as: PSM message) or via SITA Passenger Transfer Message (hereinafter referred to as: PTM message).

It is obvious that airport operators are being notified in an untimely manner about the necessity for the provision of assistance, and they are mostly informed via SITA messages. For departing passengers the airport operators are informed 10 - 24 hours before the flight via PNL messages, while for arriving passengers via PSM or PTM messages, between 1 and 12 hours before landing of the aircraft to the point of destination<sup>29</sup>.

A flaws of PNL messages system is also that they include only IATA code for PRM passengers, but not a particular type of assistance a PRM passenger needs, for example a description of medical equipment, wheelchair size, registered trained dog, etc.

### Designation of points of arrival and departure

In cooperation with the Airport Users Committee or relevant organisations representing disabled persons and persons with reduced mobility, the airport operator shall designate points of arrival and departure within the airport boundary or at a point under the direct control of the managing body, both inside and outside buildings<sup>30</sup>.

The airport operator is entitled to designate points of arrival and departure on his own in case there is no the Airport Users Committee at the airport or if there are no organisations representing disabled persons and persons with reduced mobility in the local community.

*Linguistic interpretation of the provision indicates that the airport operator is obliged to designate at least two points of departure and arrival at the airport, out of which one has to be in terminal building. Causa of the provision is to facilitate announcement to passengers and enable the airport operators to provide assistance to PRM passengers.*

According to Regulation, points of departure and arrival have to be clearly sign posted and passengers must be able to receive basic information about the airport in accessible formats<sup>31</sup>. Accessible format of the information means that each category of PRM passengers must be able to access basic information about the airport and the type of assistance that the airport operator is obliged to provide to/from points of departure and arrival at the airport.

Points of departure and arrival are usually marked with a wheelchair sign, placed at strategic places like parking areas, taxi stands, bus stops and subway stops for departing and arriving passengers, under condition they are placed within the airport boundary<sup>32</sup>.

The airport boundary is the space within the protective perimeter fence being “under a direct control of the airport operator“, but can also mean the space out of the protective fence of the airport. *It is obvious from the above mentioned that the European Parliament and the Council the European Union, in Article 5 of the Regulation decided upon a technical definition of the airport, what means that the points of departure and arrival may be placed out of the perimeter fence of the airport*<sup>33</sup>.

Since the airport operator is obliged to set quality standards at the airport receiving over 150,000 passengers a year, a question arises whether the obligation of setting the points of departure and arrival is applicable only to EU airports with annual traffic of over 150,000 passengers or to all EU airports. The systemic interpretation indicates that setting the points of departure and arrival is an obligation of all EU airports, no matter how many passengers they have, while, on the other hand, the points of departure and arrival are a constituent part of the quality standard for the Ground Handling of PRM passengers, according to which the airport operator is obliged to establish quality standards and resources for realization of the obligations from Appendix I of the Regulation. This includes the signing of the points of departure and arrival.

#### Quality standards for assistance to PRM passengers

Airport operators with annual traffic over 150,000 passengers shall set quality standards for assistance in Ground Handling for PRM passengers in cooperation with the Airport Users Committee and organisations representing disabled persons and persons with reduced mobility. Flaws in the provision related to the setting of quality standards depending on a number of passengers arise where annual traffic fluctuates - something typical for smaller airports. Such an airport may have air traffic of over 150,000 passengers in one year, and the next year less than 150,000 passengers. This small imprecision does not diminish highly set EU standards. The request from Article 9 paragraph 3 of the Regulation is generally realised by publishing the quality standards on a web page of an airport operator<sup>34</sup>.

Regulation stipulates the airport operator's obligation, while setting the quality standards, to fully take into account internationally recognised policies and codes of conduct concerning facilitation of the transport of disabled persons and persons with reduced mobility, notably the ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility<sup>35</sup>. The internationally recognized policies and Codes of conduct concerning GH of PRM passengers are as follows:

- Annex 9 - Facilitation;
- ICAO Doc 9984 Manual on access to air transport of disabled persons and persons with reduced mobility;
- ECAC Doc 30, Part I, Chapter 5,
- IATA Resolution 700.

Quality standards for Ground Handling of PRM passengers must contain the obligations established in ECAC Code of Good Conduct in Ground Handling for Persons with Reduced Mobility<sup>36</sup>.

*Systemic interpretation indicates that quality standards must include the following - description of services, measures and resources the airport operator is going to use in order to meet the demands from the Annex of the Regulation, as well a level of service the airport operator is obliged to provide. Obligations from Annex I of the Regulation are legally binding and the airport operator cannot decide unilaterally or by agreement not to provide assistance set in Annex I of the Regulation. A carrier and airport operator may reach an agreement that the airport operator will provide additional services, apart from those from Annex I of the Regulation, or to render the services of better quality than set in the quality standards. According to linguistic interpretation it would be impossible that a carrier and airport operator could conclude an agreement and set, cumulatively, the additional services and of a higher standard than set in quality standards. However, purposive interpretation leads to the opposite conclusion since the reason (causa) for adopting the Regulation was to increase the level of protection of PRM passengers.*

In case of provision of additional services and services of higher standard by the airport operator, this results in additional costs for Ground Handling of PRM passengers, and so the airport operator may levy an additional PRM, which shall be a transparent cost related to the service, at a rate established after consultation<sup>37</sup>. The provision of additional PRM charge is of declarative character because the airport operator is exclusively obliged to meet costs for Ground Handling of PRM passengers.

*The agreement on GH service level is a sui generis unilaterally binding Agreement according to which the airport is obliged to provide appropriate level of Ground Handling services to PRM passengers.*

### **Right to assistance at airports**

An Airport operator is exclusively obliged to provide assistance to PRM passengers at departure, transfer and arrival, both at the airport and on board the aeroplane<sup>38</sup>.

At departure, the airport operator shall provide assistance to a PRM passenger from the point of departure to the embarking, and on board the plane from the door of the plane to the PRM passenger's seat.

On arrival, the assistance is provided from the PRM passenger's seat to the door of the plane, and at the airport, from the plane to the point of arrival.

The airport operator may provide assistance at the airport on his own or subcontract the provision of services.

Regulation sets obligations of the airport operator to provide assistance to a PRM passenger under the following conditions:

- Passenger holds a reservation;
- Carrier or his agent or the tour operator concerned have been notified about special needs of such a passenger at least 48 hours before the published time of departure of the flight.

## MISCELLANEOUS MATERIAL OF INTEREST

This notification pertains to a return flight, too, if both flights were contracted with the same carrier<sup>39</sup>.

The provision on the obligation to provide assistance is imprecise because it does not contain the obligation of the carrier to forward a notification of the required assistance to the airport operator at least 36 hours before the flight. Also, an obvious flaw of the provision for return flights is that notification of the airport operator depends on the fact that both flights are performed by the same carrier, which is unnecessary since the obligation to provide assistance exists regardless of the carrier with which a passenger concludes a transportation agreement. For flights, as already said, airport operators are as a rule notified by SITA messages forwarded from the airport of departure during take-off, which makes the carrier's obligation to forward the notification largely irrelevant (Article 6 paragraph 3) Regulation 1107/2006.

On the other hand, this provision is of declarative quality since the airport operator has to provide assistance even if not being informed about it, according to Article 7 paragraph 3 of the Regulation which says that an airport operator *is obliged* to make all reasonable efforts to provide assistance.

In case of subcontracting of the provision of assistance to PRM passengers, Ground Handling of PRM passengers is performed by:

- Airport operator's affiliated company,
- Third provider of Ground Handling services;
- Legal entities specialized for GH of PRM passengers<sup>40</sup>.

*The airport operator decides on subcontracting of services if not being a provider of Ground Handling at the airport.*

Regulation is contrary to Directive 96/67 which says that handling of passengers includes all kinds of assistance related to arrival, departure, transfer and transit of passengers<sup>41</sup>. In case of a discrepancy between provisions of the Regulation and Directive 96/67, the provisions of the Regulation shall prevail. Thus the assistance to PRM passengers is primarily rendered by the airport operator while access is subcontracted to third party providers of Ground Handling services and their independent performance of GH services to PRM passengers<sup>42</sup>.

*In other words, provision of assistance to PRM passengers is an exemption from the rule that Ground Handling of PRM passengers may be rendered by carriers or third party providers. Autonomous provision of assistance to PRM passengers by carriers is impossible because the very notion of subcontracting is contrary to the autonomous provision of Ground Handling services. Namely, subcontracting means a transfer of rights and obligations to a third legal entity.*

Furthermore, the Regulation does not stipulate the procedure for selection of subcontractors, nor the access to the infrastructure of the airport operator. The question arises whether a subcontractor must be a third party provider of Ground Handling services or it may be another third party legal entity. In the opinion of Marie Jose Viegas, a subcontractor should be a third party provider of Ground Handling services, i.e. a legal entity specialised for provision of Ground Handling services, and that the subcontractor, according to provisions of the Directive 96/67, should obtain an approval from a relevant Directorate of civil aviation<sup>43</sup>.

In cooperation with carriers, through the Airport Users Committee, the airport operator may subcontract on his own initiative or on the carriers' request.



This means that for subcontracting of Ground Handling of PRM passengers it is not necessary to obtain the carrier's approval. Consequently, it excludes implementation of 3.1 of the Main Agreement from 2013/2008/2004 of the Agreement on Ground Handling of aircraft, passengers, cargo, goods and mail, according to which it is necessary to obtain an carrier's approval for subcontracting of services<sup>44</sup>.

To assure quality of service, the Regulation, as a condition for subcontracting, sets a cumulative liability of airport operators for providing assistance at the airport as if the airport operator had rendered the service, as well adoption of the quality standards for Ground Handling of PRM passengers.

The systemic interpretation indicates that it is necessary for an airport operator to have an annual traffic over 150,000 passengers in order to subcontract the Ground Handling of PRM passengers.

### Assistance by carriers

The level of the service an carrier is obliged to provide to a PRM passenger has been set out in Annex II of the Regulation and includes the following: transport of not more than two pieces of mobility equipment, including the electric wheelchair, offering important flight information in accessible formats, transport of registered dogs in a cabin, allocation of a seat satisfying the needs of a PRM passenger, allocation of a seat to the person accompanying the PRM passenger, next to the PRM passenger.

*Unlike airport operators, the concept of reasonable efforts does not apply to carriers. The concept of reasonable efforts is applied only for allocation of the seat that meets the needs of a PRM passenger, bearing in mind that the seat should not hamper access to the door in the case of emergency..* Also, the carrier shall make all reasonable efforts to allocate the person accompanying the PRM passenger the seat next to the PRM passenger. This obligation of making all reasonable efforts is not absolute, but applicable only in the case where a PRM passenger requested assistance from the carrier as follows:

- at least 48 hours before the flight, and
- checked-in at least 1 hour before published time of departure or the time defined in advance by the carrier or his agent or a tour operator in a written form (including e-mail); or PRM passenger comes to the point of departure within the airport boundary or at the time defined in advance by the carrier or his agent or a tour operator in a written form (including e-mail); or, if the time was not fixed, at least two hours before published time of departure<sup>45</sup>.

In case the above mentioned conditions have not been fulfilled, the carrier is not obliged to apply the concept of reasonable efforts in allocation of a seat that meets needs of a PRM passenger or a person accompanying the PRM passenger next to his seat, or to provide assistance from Annex II of the Regulation.

### Charges for PRM passengers

Charges for PRM passengers are proportional to costs and should not exceed the costs of Ground Handling of PRM passengers. In case the PRM charge exceeds the GH cost, it would be contrary to Article 8 paragraph 1) of the Regulation which stipulates that assistance to PRM passengers is provided free of additional charges.

The opposite situation is possible, i.e. that charges for PRM passengers are less than GH costs.

The Regulation says that an airport operator may, on a non-discriminatory basis, introduce a special charge for provision of assistance to PRM passengers, under the condition that the PRM charge is justified, proportional to costs, transparent and established in cooperation with the Airport Users Committee<sup>46</sup>.

Since the charge for PRM passengers is not the airport charge, provisions of the Directive 2009/12 on airport charges do not apply to it. However, while establishing a PRM charge, the principle of cost efficiency, transparency, non-discrimination and consultation must be obeyed.

*PRM charge is justified when the principle of cost efficiency has been met and non-justified if the revenues resulting from PRM charges exceed the costs of Ground Handling of PRM passengers.*

A question arises whether a special PRM charge could be introduced where the PRM does not notify of the need to be provided with assistance in a timely manner, i.e. if the airport operator is authorised to define a higher special PRM charge in case he was not notified by the carrier on provision of assistance to PRM passenger within the deadlines defined by the Regulation.

Differentiation of a special PRM charge and setting out a special PRM charge higher than the basic one by the airport operator is possible only in order to provide a better quality GH service to PRM passengers. That invites additional costs for PRM passenger Ground Handling by applying the principle of transparency, non-discrimination, cost efficiency and consultations.

*Sui generis* solution would be to divide a PRM charge among carriers in proportion with a total number of all the passengers they have transported to/from an airport. *In other words, the basis for the PRM charge is not defined by the number of individually transported PRM passengers but a number of all the passengers transported to or from the airport concerned.* In opposite case, i.e. if the PRM charge was proportional to the number of transported PRM passengers, the costs of Ground Handling of PRM passengers could never be covered. To meet the cost efficiency principle, a principle of solidarity is being introduced to the detriment of non-discrimination principle, in a way that the carrier who transported the biggest number of passengers pays a PRM charge in spite of the possibility that there may be no PRM passengers on board, i.e. it is possible that a carrier finances PRM passengers' transport by the other carriers which have had less passengers but more PRM passengers. The principle of solidarity is explicitly integrated in recitals of the Regulation in a way that provision of assistance should be financed so that all the passengers using the airport share the burden equitably and to avoid disincentives for transport of disabled passengers and persons with reduced mobility. The most efficient way of funding is to charge all carriers using the airport, proportionally to the total number of passengers transported to or from the airport concerned<sup>47</sup>.

The principle of consultation is of a formal character because the airport operator is authorised to set up a PRM charge on his own if the Airport Users Committee's disagreement with the amount of the PRM charge.

The language interpretation indicates that the airport operator is not obliged to set up a special PRM charge or the charge integrated into a passenger charge. The PRM charge is established by setting the direct cost of Ground Handling service to PRM passengers (depreciation costs for the infrastructure and equipment<sup>48</sup>, cost for employees' salaries), indirect costs (maintenance cost for airport infrastructure), capital spending for acquisition of new equipment and administrative costs (cost for employees participating in purchase/acquisition of the new equipment, cost of training the staff for Ground Handling of PRM passengers, project leading cost, etc.).

In case the airport infrastructure is used by various categories of passengers, including PRM passengers, a PRM charge is established proportionally to the use of the airport by the PRM passengers<sup>49</sup>. This model can be used when a PRM charge is a constituent part of a passenger charge.

Other way of establishing a PRM charge is to calculate the costs of using the airport infrastructure and other costs (training and salaries of the staff who provide assistance to PRM passengers) resulting exclusively from Ground Handling of PRM passengers, and which are not integrated in a passenger charge. In other words, costs for use of infrastructure used by all the passengers, including PRM ones, are integrated into a passenger charge, and what is charged is only the costs resulting from use of airport infrastructure and human resources intended for Ground Handling of PRM passengers (ambulift, wheelchair, staff costs).

According to the current commercial practice, the airport operator is obliged to separate the accounts related to the assistance provided to disabled persons and persons with reduced mobility from the accounts of its other activities<sup>50</sup>. This begs the question whether the airport operator is obliged to separate the accounts, i.e. to keep separately incomes and expenditures resulting from Ground Handling of PRM passengers even in case the airport operator has not defined a specific PRM charge. The point of reference for obligation to have the accounts separated even in the case of not establishing a specific PRM charge, in terms of linguistic interpretation, is contained in the binding formulation "shall separate the account-keeping charges". However, I believe the systemic interpretation leads to a different conclusion, and that would be that according to the Regulation, in that, the airport operator is not obliged to separate accounts if the PRM charge is a constituent part of the passenger charge. Article 8 of the Regulation pertains to the "specific charge", while a situation of forming a PRM charge within a passenger charge has not been stipulated explicitly. If the airport operator decided to include a PRM charge into a passenger charge, they will not be applying provisions of the Regulation, but Article 4 of the Directive 96/67 on access to the market of Ground Handling services at EU airports<sup>51</sup>.

The reason for setting the accounts apart is meeting the principle of cost efficiency and transparent presentation of incomes and expenditures resulting from Ground Handling of PRM passengers. In case of forming a specific PRM charge, the airport operator is obliged to submit an annual overview to the Airport Users Committee where one exists or any other appropriate entity<sup>52</sup>, as well as to the enforcement body or bodies<sup>53</sup>, of charges received and expenses made in respect of the assistance provided to disabled persons and persons with reduced mobility<sup>54</sup>.

The obligation of submitting the annual overview to the Airport Users Committee is conditional and will not exist if at the airport concerned there is no the Airport Users Committee or a relevant Association of disabled persons. Significance and role of the Airport Users Committee and relevant organizations of disabled persons has been made irrelevant by their being involved only for advisory purposes and legally non-binding opinions.

The obligation of submitting the annual review to the relevant Directorate for Civil Aviation is unconditional if a PRM specific charge has been set up.

Further, in case the airport operator has not established a specific PRM charge or it is not contained in the passenger charge, the question arises whether the airport operator is obliged to submit the annual review to the Airport Users Committee of the relevant organisation of disabled persons where they exist, and the relevant Directorate for civil aviation. In spite of the language interpretation which indicates that the airport operator is obliged to submit the annual overview, I hold that the systemic interpretation indicates to quite the opposite conclusion, i.e. that the airport operators is not obliged to submit the annual overview to the Airport Users Committee or a relevant organization of disabled persons due to the fact that a free of charge assistance provided to PRM passengers makes irrelevant the implementation of the principle of transparency, consultation, non-discrimination and cost efficiency. In case a PRM charge is a constituent part of a passenger charge, the implementation of Article 1 paragraph 5 of the Regulation means the implementation of provisions of the Directive 96/67, and not provisions of the Regulation, which do not stipulate the airport operator's obligation to submit the annual overview to the Airport Users Committee or a relevant organisation of disabled persons and the Directorate for civil aviation.

### Training

Training of the staff providing assistance to PRM passengers has three aims in order to:

- Ensure that all the personnel, including those employed by any subcontractor, providing direct assistance to disabled persons and persons with reduced mobility have knowledge of how to meet the needs of persons having various disabilities or mobility impairments;
- Provide disability-equality and disability-awareness training to all their personnel working at the airport who deal directly with the travelling public;
- Ensure that, upon recruitment, all new employees attend disability related training and that personnel receive refresher training courses when appropriate<sup>55</sup>.

It is obvious that focus is on training of the personnel who provide direct assistance to PRM passengers.

Contrary to the provision on setting the quality standard implementing the obligations of ECAC Doc 30, Recital 10 of the Regulation 1107/2006 recommends implementation of the ECAC Doc 30, Part 1, chapter 5 and associated appendices, and especially the Code of Good Conduct in provision of Ground Handling services to persons with reduced mobility. This recommendation refers to implementation of the Code on good conduct, and it can be concluded that the focus has been placed on the training of the personnel who will provide assistance to PRM passengers.

The recommendation, and not an obligation, of performing the training in accordance with the ECAC Doc 30, Part I, is justified for the following reasons.

The immediate assistance to PRM passengers should be provided by employees from a department or service of the airport operator being specialised for Ground Handling of PRM passengers<sup>56</sup>. However, for cost-related reasons it is often impossible to set specialised services for Ground Handling of PRM passengers. Instead, the airport operator's employees and those of any sub-contractor who provide assistance to PRM passengers also perform other duties related to passenger Ground Handling. In a situation where there is no specialised department/service for Ground Handling of PRM passengers, the personnel to be trained for providing the assistance will be recruited among:

- Passenger check-in staff;
- Announcers - information readers;
- Lost & Found staff;
- Baggage Ground Handling staff, etc.

Disability-equality and disability awareness training, apart from the airport operator's employees, is also attended by a significant number of legal entities working at the airport, including the following: Customs, Border Police, security agencies, ticketing staff, parking collectors, catering staff at the airport (catering, restaurants, snack bars), special sales facilities (Duty Free shop, etc.)<sup>57</sup>.

In case the airport operator does not have a specific department/service for Ground Handling of PRM passengers, a large number of employees will be obliged to be trained in the provision of direct assistance to PRM passengers.

It is not clear if the airport operator's sub-contractors who have direct contacts with disabled passengers are obliged to attend the disability-equality and disability awareness training. According to the linguistic interpretation they are not obliged. This would practically mean that those airport operator's staff having direct contact with such passengers must be trained while the airport operator's sub-contractors who provide assistance to PRM passengers are not, which is opposite to the legislator's intention.

Carrier's cabin crew staff members are obliged to attend training on an immediate provision of attendance to PRM passengers, while the ticketing staff and carrier's representatives at the airport must be trained for disability-equality and disability awareness.

The provision according to which all new employees of both the airport operator and carrier have to attend disability related training is unfounded and challenged for valid reasons<sup>58</sup>. It is quite legitimate to train new employees who will directly be involved in Ground Handling or have direct contacts with PRM passengers, but the *causa* of the provision is a training of new employees, even if they do not have immediate contact with PRM passengers i.e. for example, those that perform administrative duties (commercial, legal, financial).

*The Regulation does not stipulate duration of the training of the airport operator's and carrier's employees. This is contrary to unification since it allows the Member States to define duration of the training on their own which can result in an uneven level of protection of PRM passengers.*

#### **Compensation for lost and damaged wheelchairs, other mobility equipment and assistive devices**

When wheelchairs or other mobility equipment and assistive devices are lost or damaged, it is essential to establish the applicable statutory instrument, i.e. applicable substantive law. According to the Regulation, the damage is compensated in accordance with rules of international, Community and national law<sup>59</sup>. In the international air traffic, liability of an carrier or carrier's agent for lost, destroyed or damage hold and cabin baggage has been defined by provisions of the Warsaw system<sup>60</sup> and the Convention for the Unification of Certain Rules for International. Carriage by Air (hereinafter referred to as: Montreal Convention).

For the reason of unification of liability for damage in the international transport of passengers and baggage by EU carriers, by the Regulation 889/2002, which had amended the Regulation 2027/97 **on carrier liability in the event of accidents**, the Montreal Convention was adopted, except for carrier's liability for the damage caused on cargo. Taking into account that wheelchairs, mobility equipment and assistive devices are legally treated as baggage, in the EU it is incontestable that in case of the damage that was caused on board, the applicable instrument is Montreal Convention, adopted by the Regulation 889/2002, which had amended the Regulation 2027/97 on liability of carrier in case of an accident. By the recital 18 of the Regulation, which is not binding, it is recommended that the penalties, including orders to pay compensation for damage to the passenger concerned, should be efficient, comparative and discouraging.

Wheelchairs, mobility equipment and assistive devices may be both hold and cabin baggage.

The wheelchairs, mobility equipment and assistive devices are treated as hold baggage if given to a check-in staff member during registration for flight of PRM passengers. The wheelchairs, mobility equipment and assistive devices are treated as cabin baggage if delivered to the airport operator's staff or the staff of the Ground Handling provider or the staff of carrier in front of the aircraft when they are marked with a DAA bag tag - Delivery at Aircraft<sup>61</sup>. Low-cost carriers generally do not allow that wheelchairs, mobility equipment and assistive devices are marked with DAA tags. Certain carriers allow marking of wheelchairs, mobility equipment and assistive devices with DAA tags DAA, but they also must be registered by an automatic bag tag<sup>62</sup>.

Legal consequences and carrier's responsibility for damage are different where caused in the hold and the damage caused in the cabin. Namely, the Montreal Convention defines carrier's objective liability for damage on hold baggage. The carrier's liability for damage to cabin baggage is subjective since the carrier is responsible for the damage to cabin baggage made by him or at the fault of his employees or his agents.



By stipulating explicitly the subjective liability of the carrier, his employees or his agents for the cabin baggage damage, it can be concluded that authors of the Montreal Convention established objective liability of the carrier, his employee and agents for damage on hold baggage, since there is no legal basis for exemption from liability if the carrier proves he was not guilty for the damage on hold baggage - but only if he proves instead that the damage occurred due to an imminent defect, bad quality or imperfection of the baggage<sup>63</sup>. In other words, the carrier cannot be exempted from liability if he acted in compliance with all aviation standards, i.e. if he took all available measures to prevent the damage, but only if the damage was caused by a defect on the wheelchair, mobility equipment and assistive devices.

It is beyond dispute that in case of the damage on wheelchair, mobility equipment and other assistive devices that was caused on board aircraft, the applicable instrument is Montreal Convention. However, generally the wheelchairs, mobility equipment and other assistive devices are not taken into the cabin due to its size.

Carriers' liability for hold baggage has been defined by provisions of the Montreal Convention and it starts from the moment a PRM passenger registers his wheelchair, mobility equipment and other assistive devices to a clerk at the check-in counter. In case the PRM passenger required assistance at the airport's point of departure, possible damage on a wheelchair, mobility equipment and other assistive devices that was made on the way from the point of departure towards the check-in counter, shall be determined in compliance with provisions of the national law to which point the conflicted legal norms of the international competent court.

When a PRM passenger takes over his wheelchair, mobility equipment and other assistive devices in the baggage claim area at contracted destination, there ends a liability of carrier for damaged wheelchair, mobility equipment and other assistive devices in international and national air transport<sup>64</sup>. In practical implementation of the Regulation, the question arise whether the airport operator is obliged to provide assistance to a PRM passenger with the transport of baggage from a conveyor belt to a point of arrival at the airport. The European Union, in its Interpretative guidebook on implementation of the Regulation, refers to Recital 5 of the Regulation and instructs that the airport operator is obliged to transport the baggage from the conveyor belt to the airport point of arrival<sup>65</sup>.

The consequence of such interpretation is that the airport operator, or his sub-contractor, is liable for damage on a wheelchair, mobility equipment and other assistive devices from the baggage claim area to the airport arrival point, due to implementation of the national law to which point the conflicted norms of the international competent court. Provisions of the Montreal Convention cannot apply to the airport operator and/or carrier's sub-contractor since they cannot be treated as the carrier's agents.

The Montreal convention does not stipulate area of carrier's liability for cabin baggage in the international air transport, but in order to avoid any dilemma in implementation of Montreal Convention to cabin baggage, it stipulates that the baggage means both hold baggage that has been registered and has a baggage tag, and the baggage that was not handed over and does not have a baggage tag<sup>66</sup>.

## MISCELLANEOUS MATERIAL OF INTEREST

It also stipulates that the carrier is liable for damage to cabin baggage, including passenger's personal belongings, if the damage resulted from fault of the carrier or his employees or agents<sup>67</sup>.

The carrier's scope of liability for cabin baggage, i.e. wheelchairs, mobility equipment and other assistive devices that are handed over next to the aircraft and marked with a DAA baggage tag correlates to the carrier's liability for passengers, since the cabin baggage goes with the passenger. It means that in the international air transport the carrier's liability for the cabin baggage, according to provisions of Montreal Convention, starts at the moment of a PRM passenger's embarkation on board aircraft (forming of a queue of passengers to embark the plane) and ends at the moment when the process of disembarkation from aircraft is finished (arrival of passenger into terminal building)<sup>68</sup>. In case of a transit landing, while passengers stay either in terminal building or on board a plane, the carrier remains liable for the cabin baggage, including wheelchairs, mobility equipment and other assistive devices that were handed over next to the aircraft and marked with DAA tag, and, also those which are not taken by PRM passengers during transit landings since the transit passengers are under control of the carrier in the international transport in terms of provisions of Montreal Convention. Carrier's liability for wheelchairs, mobility equipment and other assistive devices of transfer passengers, marked with DAA tags, which are taken to the aircraft if it is parked on air bridge or in front of the aircraft, i.e. whilst doors open in terms of international air transport and provisions of Montreal Convention, exists from the moment a PRM passenger leaves the aircraft and comes to terminal building, or, either the passenger is transported from the aircraft to the terminal, or uses an air bridge, or the passenger walks from the plane to the terminal. It ends at the moment of the passenger arrives to the terminal, while the liability of the carrier concerned or other carriers starts from the moment of the forming a queue of passenger for embarking on board the aircraft.

If a PRM passenger does not enter the terminal building but goes by bus directly to the next aircraft, there is no splitting of legal systems, since the whole transfer is defined by provisions of the Montreal Convention, under the condition that the transfer is performed by the carrier's agent.

If a PRM passenger's wheelchair, mobility equipment and other assistive devices marked with a baggage DAA tag has been destroyed, damaged or lost after entering the terminal building before a queue is formed for embarking of a transfer passenger on board a plane, applicable law is the national law. Implementation is indicated by norm of collision of an international competent court, while a passively legitimate party is the airport operator that will be able to exclude its liability for the damage by proving that he is not guilty for the damage caused on a cabin baggage.

The Regulation stipulates loss and damage as two kinds of damage to wheelchairs, mobility equipment and other assistive devices<sup>69</sup>. The provision for liability for damage would be more precise if a the 'destruction' of the wheelchair, mobility and other assistive devices had been explicitly defined<sup>70</sup>.



The Montreal Convention uniquely, and regardless of the baggage weight, stipulates the liability of carrier for the damage on hold and cabin baggage which has been limited to the amount of 1.000 SDR per passenger, irrespective of whether the wheelchair, mobility equipment and other assistive devices were a hold or cabin baggage<sup>71</sup>. Furthermore, the Montreal Convention missed a possibility of connecting a partial damage or loss of baggage which has impact on the total value of the baggage by calculating the amount of damage compensation depending on its total weight. According to the revision of the liability limit made by ICAO in 2009, carriers in international air traffic are liable for damage to hold and cabin baggage in the amount of 1.131 SDR per passenger, i.e. approximately 1.416,76 EUR. However, value of a PRM passenger's electric wheelchair may equal up to 20.000 EUR<sup>72</sup>. Proposal to change the Montreal Convention in terms of damage caused on a PRM passenger's assistive device seems to be unrealistic. A PRM passenger, in the event of a damaged device, may be compensated for the amount exceeding the mentioned amount of approximately 1.417 EUR in case:

- That he proves carrier's intention or gross negligence;
- The carrier renounces the implementation of limited liability in case of damaged baggage. Freedom of arranging the contracting relations is the basic principle of the law on obligations and is applied in the Montreal Convention, too<sup>73</sup>. Article 27 of the The Montreal Convention includes also a possibility of rejecting any kind of legal protection available according to the Montreal Convention, by what was done under the influence of the Japanese Initiative, IATA Inter-carrier Agreements of 1995 and 1996,
- That a PRM passenger, at the moment when registered baggage is delivered to the carrier, made a special declaration of interest in delivery at a destination and has paid a supplementary sum if the case so requires.

If the carrier, caused by his negligence, damage to a wheelchair, mobility equipment and other assistive device, the burden to prove a higher degree of liability is upon a PRM passenger, i.e. the passenger is obliged to prove that the carrier caused the damage on the wheelchair, mobility equipment or other assistive devices intentionally or neglectfully.

### **Airport operator's liability for damage on wheelchair, mobility equipment and other assistive devices**

A contract of air carriage is concluded between a carrier and a passenger, or between the carrier and party ordering the transport, according to which the carriers makes a commitment to carry the passenger and his baggage from the point of departure to the point of arrival, at the time according to a time table, i.e. at agreed time, and the passenger commits himself to pay appropriate charge. In order to fulfil the contract of carriage, airport operators and Ground Service providers perform certain activities i.e. marking of hold and/or cabin baggage with bag tags, transporting of registered baggage to a sorting area, handling the baggage in the sorting room, loading the baggage on board the aircraft and its unloading from the plane on arrival, handling the baggage in the sorting room and placing the baggage on a conveyor belt so that passengers can take the baggage from the belt after their disembarkation.

Carrier is liable for a wheelchair, mobility equipment and other assistive devices from the moment they have been handed over to a check-in clerk till they have been taken over from the baggage claim area<sup>74</sup>, whilst for the wheelchair, mobility equipment and other assistive devices marked with DAA tags and handed over by the aircraft, the carrier becomes liable from the moment of forming the queue for embarkation of passengers until the moment of entering the terminal building. It seems that liability scopes of the airport operator or Ground Handling provider and carrier overlap for the hold baggage from the moment of handing over the wheelchair, mobility equipment and other assistive device to a check-in clerk, and until the moment of loading them on board aircraft, and upon arrival from the moment of unloading the wheelchair, mobility equipment and other assistive devices from the plane until the moment of reclaim by the passengers. A question arises - who should be sued? Legally speaking, the most legitimate solution would be to sue the carrier due to the fact that, according to the contract of carriage, the carrier committed itself to transport a passenger and his baggage to agreed destination. Loss, destruction and damage of a wheelchair, mobility equipment and other assistive devices are a violation of the contractual obligation, i.e. failure to implement or defective implementation of contractual obligation. A carrier is liable for damage to the hold baggage by the principle of objective responsibility, and the passenger has to prove exclusively general conditions of liability for damage as follows: 1.) two different subjects of obligation (creditor- injured passenger, and debtor, carrier as a rule, 2.) damage must be caused by unlawful act of the debtor - carrier 3.) harmful act that caused the damage, 4) damage, and 5) cause-and-effect connection between the harmful act of debtor - carrier and the damage sustained by the injured party - PRM passenger. Practically, a PRM passenger can easily prove that he concluded a contract of carriage with carrier, and that failure to perform or defective performance of contractual obligations means a violation of the obligation/contract and as such is an unlawful act. That harmful act is the loss, destruction and damage of wheelchair, mobility equipment and assistive devices, and that the cause-and-effect connection is implicit in the violation of contractual obligation, which eventually caused the damage to the injured party, i.e. the PRM passenger.

For the damage on the wheelchair, mobility equipment and other assistive devices that were handed over as the hold baggage, a PRM passenger may file claim cumulatively against both the carrier and the airport operator.

In case the claims are filed either cumulatively or alternatively against the airport operator<sup>75</sup>, a passenger will be faced with a practical problem to prove that the airport operator is guilty for the damage. The question now arises about a legal relation between the passenger and the airport operator, i.e. if the airport operator is the carrier's agent in terms of Article 30 of Montreal Convention<sup>76</sup>.

Unlike the passenger and airport operator that do not have a contractual relation, the Agreement on provision of Ground Handling services is concluded between the airport operator and the carrier, according to which carriers pay charges for use of the airport operators' services and infrastructure. Passenger also pays a charge, included in a ticket price, for rendered service (check-in, baggage loading, etc.) and use of airport infrastructure. The question now is whether the passenger and the airport operator concluded the contract since the passenger, at the moment of check-in, pays a passenger charge for use of airport infrastructure to the airport operator. *Taking into account that the passenger pays a passenger charge for use of airport infrastructure (check-in, baggage loading, etc.) for the purpose of realization of the contract of carriage and not for the purpose of con-*

*cluding a separate contract with the airport operator, it may be concluded that the passenger and the airport operator are not in contractual relation.*

In other words, in case the airport operator is responsible for damage on a wheelchair, mobility equipment and other assistive devices, either being the hold or cabin baggage, the *airport operator shall have a non-contractual obligation to compensate the damaged baggage*. Practical problem related to argumentation of airport operator's liability for damage on the wheelchair, mobility equipment and other assistive devices is contained in proving of the general conditions of liability, as well as the fact that the airport operator is a passively legitimate party, i.e. in proving that the damage on the wheelchair, mobility equipment and other assistive devices happened while they were handled by the airport operator's employees and not while they were in a direct possession of the carrier. Proving the exclusive liability of the airport operator is possible only by bringing witnesses and by video recordings, requested through courts, of the incident that caused the damage.

In respect of a type of liability, it would not be fair that airport operators are liable for the damage on the wheelchair, mobility equipment and other assistive devices, either being the hold or cabin baggage, under more favourable conditions than carriers. In other words, both in national and international air transport, for the damage caused by lost, destroyed or damaged wheelchair, mobility equipment and other assistive devices registered as the hold baggage, there is an objective liability of airport operator, while for the damage on the wheelchair, mobility equipment and other assistive devices which are the cabin baggage, there is a subjective liability of airport operator. *Airport operator is liable for the damage on the wheelchair, mobility equipment and other assistive devices registered as the hold baggage of a PRM passenger only if after the check-in procedure, an employee of the airport operator caused the damage on the wheelchair, mobility equipment or other assistive devices, and the flight is cancelled or the passenger is denied boarding or he decided not to fly for certain reasons, or if the PRM passenger is called for safety reasons to remove the battery which is treated the dangerous goods from his wheelchair that was already registered and then he finds out it has been damaged*. According to provisions of Montreal Convention liability of an carrier for the damage exist if the damage happens during carriage, and in case of cancelled flight, denied boarding to a PRM passenger or his decision not to fly the carriage is not realized, there will be the objective liability of the airport operator for the damage on wheelchair, mobility equipment and other assistive devices due to implementation of provisions of the national law to which collision norms of the internationally competent court indicate.

In case the loss, destruction and damage on the wheelchair, mobility equipment and other assistive devices occur on departure, within the airport before registration of the wheelchair, mobility equipment and other assistive devices at the passenger check-in counter, or on arrival, upon taking over the wheelchair, mobility equipment and other assistive devices from the baggage claim area in terminal building or elsewhere within the airport, it will be considered the subjective liability of the airport operator, since the passenger in a direct possession of either hold or cabin baggage, due to implementation of provisions of the national law to which indicate collision norms of the internationally competent court.

The airport operator can exclude liability for the damage, either in a court proceedings or out of court procedure, if he manages to prove he was not guilty for the damage on the wheelchair, mobility equipment and other assistive devices, regardless of being the hold or cabin baggage.

The question is if the airport operator is an agent of the carrier in terms of provisions of the Montreal Convention. In Ronald Schmid's opinion, agency implies the following:

- Performance of the obligations assigned by the carrier, i.e. the carrier's transfer of authorities to other legal entity;
- Performance of these obligations must be for the purpose of realization of the contract on transportation;
- Agent must not have a monopoly on the market<sup>77</sup>.

Given the mentioned criteria, Ground service providers are the carrier's agents in terms of provisions of the Montreal Convention. The question now is whether the airport operator is the carrier's agent in the international cargo transport. Airport operator handles the baggage in order to realize the contract of carriage. However, agency means a transfer of carrier's authorities to airport operator. If the airport operator has a monopoly on the market, he cannot be considered the carrier's agent in terms of provisions of the Montreal Convention. The question is how to establish if the airport operator has a monopoly on the market. Ground Handling services to PRM passengers are primarily provided by airport operators, what is an exemption from the rule that ground service may be provided by carriers or third providers on their own.

In other words, airport operators have *sui generis* monopoly on the market in terms of provision of services to PRM passengers and thus, in case of destruction, damage or loss of wheelchairs, mobility equipment or other assistive devices, *cannot be considered the carrier's agents in the international air transport in terms of provisions of the Montreal Convention. Consequently, airport operators will not be able to use liability limits stipulated by provisions of the Montreal Convention.*

#### Enforcement body and its tasks

Each EU Member State shall designate a body or bodies responsible for enforcement of the Regulation. Generally speaking, a body responsible for enforcement of this Regulation is the Directorate for civil aviation of a Member State<sup>78</sup>. The Regulation does not set a requirement that regulatory body cannot be the same as a provider of assistance to PRM passengers. However, the enforcement body must be independent from the provider of assistance to PRM passengers. Legal *ratio* for establishment of an enforcement body is to ensure legal and functional independence of a supervisory body from airport operators and carriers.

The Regulation stipulated exclusive competence of the enforcement body for the following:

- Meeting the quality standards in Ground Handling of PRM passengers,
- Provision of assistance that airport operators are obliged for, including the obligations from the Annex;
- Implementation of provisions on PRM charges<sup>79</sup>;

- Taking measures concerning notification of PRM passengers on their rights from the Regulation and on possibility of raising an objection to the relevant body or bodies<sup>80</sup>.

In addition, the enforcement body is an appellative body in charge of deciding on objections of PRM passengers who are not satisfied with the way they were protected by the airport operator or carrier<sup>81</sup>.

Recital 17 of the Regulation, which is not binding, recommends that complaints related to assistance provided at an airport should be addressed to a body or bodies of the Member State to which the airport belongs, while complaints concerning the assistance provided by carrier should be addressed to a body or bodies of the member State that issued a licence for the operations aimed for the purpose of implementation of this Regulation. On the other hand, the binding provision of the Regulation stipulates an explicit competence of the enforcement body for carriers in terms of the flights departing/arriving from/to the airport located at its national territory.

Member States are entitled to appoint a separate body being competent for providing the assistance at the airport and deciding on justifiability and legality of especially established PRM charge.

Stipulating the possibility of having a special body for control of provision of assistance at airport implicitly empowers the States to also establish a special body for control the assistance provide by carriers. In other words, the language interpretation indicates that the Member State may appoint two or more bodies responsible for enforcement of the Regulation.

### Complaint procedure

The Regulation has stipulated a complaint procedure in two steps. A PRM passenger who considers that this Regulation has been infringed may bring the matter to the attention of either the airport operator or carrier, depending which of these two he thinks is responsible for infringement of his rights. A form of complaint has not been established by the Regulation, what means that a complaint may be lodged to the airport operator or carrier, both verbally and in a written form. The most frequent ways of lodging complaints to airport operator is by e-mail, handing them over at the information desk or boxes available in Terminal buildings<sup>82</sup>. Lately, web pages of airport operators also enable lodging of complaints<sup>83</sup>. Quality managers or heads of services or departments for Ground Handling of PRM passengers are responsible for establishing if the complaints have been justified.

*Lack of provision on the procedure for lodging a complaint is a failure to define an subjective and objective deadline in which a PRM passenger may lodge a complaint concerning the Ground Handling, the deadline in which airport operator or carrier is obliged to decide if the complaint has been justified, the deadline in which the PRM passenger is obliged to raise an objection against the decision of the airport operator or carrier, and, finally, the deadline in which the enforcement body has to make a decision about the PRM passenger's objection.*

Solution from the Regulation is opposite to unification since it applies substantive law of the Member State which defines deadlines for initiation, decision making and raising the objection in administrative procedures.

As already mentioned, if a PRM passenger believes his rights have not been protected adequately, the objection is to be raised to a relevant Directorate for civil aviation or other body appointed by a Member State.

The provision according to which the State that has received the objection which comes within the competence of a relevant body of another Member State is obliged to forward the objection to that Member State was rather vague until adoption of the Interpretative Guidebook on implementation of the Regulation concerning the rights of disabled persons and persons with reduced mobility, due to which the European Union eliminated the vagueness about a body being competent to decide on objections<sup>84</sup>.

Unlike the Regulation 216/2004 which includes an explicit obligation of carriers to inform passengers of their rights<sup>85</sup>, the Regulation does not include such an obligation, but Member States are responsible to take appropriate measures to keep the PRM passengers informed about their rights and the way of lodging a complaint to a specific body or bodies<sup>86</sup>. Better solution would be to have a provision according to which the airport operator and carrier are undoubtedly obliged to inform a PRM passenger about his rights. As a rule, Member States keep PRM passengers informed about their rights via web pages of the Directorate for civil aviation of a Member State and/or other relevant body for enforcement of the Regulation. Member States may in penalty clauses put the airport operators and carriers under an implicit obligation to inform PRM passengers about their rights by means of leaflets / web pages.

### Conclusion

The Regulation stipulates PRM related obligations of carriers and airport operators. However, imprecision of the definition of a PRM passenger has caused to diversification of implementation of the Regulation.

Practical issues in implementation of the Regulation are related to notification of carriers and transmission of information to airport operators on necessity to provide assistance to PRM passengers. Failure to forward PAL/ CAL and PSM messages results in unpreparedness of airport operators for provision of assistance to a PRM passenger.

In order to cover the costs of Ground Handling and protection of rights of PRM passengers, the Regulation has incorporated the *sui generis* principle of solidarity. Since the airport operators enjoy *sui generis* monopolistic position at the market in respect of Ground Handling of PRM passengers, in case of destroyed, damaged or lost wheelchairs, mobility equipment and other assistive devices in the international transport of baggage, they are liable for the damage limitlessly, through implementation of provisions the national law whose competence has been indicated by legal norms in case of conflict of law of the internationally competent court, and cannot be considered as an agent of carrier in respect of provisions of Montreal Convention. On the other hand, carriers are liable for the damage occurring during the international transport in a limited manner due to implementation of provisions of the Montreal Convention that was integrated into EU legislation in EU Regulation 2027/97 on liability of carrier in case of an accident (amended by the Regulation 889/2002).

Airport operator is primarily authorized for provision of assistance to PRM passengers, what is an exemption from the rule established in the Directive 96/67. The airport operator will decide to subcontract in case of not being a provider of Ground Handling services at the airport.

Airport operators may, but not are obliged to set a PRM charge. If they set a PRM charge, they are authorized either to set a specific PRM charge or to include it into the passenger charge.

EU, by adopting the Interpretative guidebook, eliminated certain confusions in implementation of the Regulation, especially in the part pertaining to the competence of the executive body.

In spite of adoption of the Interpretative guidebook, some imperfections of the Regulation have still not been eliminated:

- Notion of a PRM passenger does not correspond to the name of the Regulation;
- Insufficient awareness of PRM passengers of their rights and insufficient awareness of tour operators of PRM passengers' rights and IATA codes for PRM passengers;
- Lack of defined deadline, both subjective and objective one, in which a PRM passenger may lodge a complaint concerning Ground Handling, the deadline in which an airport operator or carrier are obliged to make a decision whether a PRM complaint is justified, the deadline in which a PRM passenger may raise an objection against a decision of an airport operator or carrier, and the deadline in which an enforcement body is obliged to make a decision on a PRM passenger's objection;
- Setting up the obligation upon all new employees who are not in direct or indirect contact with PRM passengers to attend a training, and failure to define duration of the training of airport operator's and carrier's employees.

In spite of the mentioned imperfections, EU managed to provide for a high level of protection for PRM passengers by adopting the quality standards for Ground Handling of PRM passengers at airport with annual traffic exceeding 150.000 passengers and by stipulating the obligation of airport operator's and carrier's employees to attend training for GH of PRM passengers.

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<sup>1</sup>Article 18 of the Regulation 1107/2006

<sup>2</sup>Article 2 item a) Regulation 1107/2006

<sup>3</sup>Recital 1) Regulation 1107/2006

<sup>4</sup>ICAO Doc 9984 Manual on Access to Air Transport by Persons with Disabilities, First Edition, 2013, p. XIII., ICAO Annex 9 - Facilitation, IATA Resolution 700

<sup>5</sup>Final Report, Application of the Regulation by the Member States, Phillipe & Partners, p 22.

<sup>6</sup>Interpretative Guidelines on the Application of Regulation (EC) no 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air, Brussels, p.2

<sup>7</sup>Commission Staff Working Document Interpretative Guidelines on the Application of Regulation EC No 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and persons with Reduced Mobility when Traveling by Air, p.3



<sup>8</sup>MEDA - Passenger whose mobility is reduced due to medical reasons, with medical pathology in progress, having a medical certificate that he or she can fly, issued by a doctor. STCR - passenger on stretcher, WCHC - bed-ridden passenger who needs a wheelchair from/to entrance to the plane, up the stairs to his seat on board aircraft. WCHC category includes bed-ridden passengers, passengers that can move only by means of a wheelchair or other mobility equipment. This category also includes persons with paralyzed legs who need assistance during embarkation/disembarkation to/from aircraft, but who can move in their own wheelchair, WCHS - passengers who can move by themselves in aircraft cabin but not upstairs/downstairs, and they need assistance for movement in Terminal building, from the Terminal to aircraft and vice versa, and from Terminal bldg to a transportation spot on the land (public) side of the airport, WCHR - passengers who can walk up and down stairs and move about in an aircraft cabin, but who requires a wheelchair or other means for movements between the aircraft and the terminal, in the terminal and between arrival and departure points on the city side of the terminal. BLND - weak-sighted and blind persons, DEAF - half-deaf and deaf persons, DEAF/BLND - blind and deaf persons who can move only if escorted, DPNA - persons with intellectual disability or impairment, MAAS (all other passengers that need assistance).

<sup>9</sup>ECAC Doc 30, Part I, Amendment 5, December 2013, p.5-2, 5-3

<sup>10</sup>Example of such airports: Zagreb and Munich

<sup>11</sup>Article 1 paragraph 2 Regulation 1107/2006

<sup>12</sup>More information available: Maria Jose Viegas, *Passengers with Reduced Mobility in the European Union: Legal Issues Regulation (EC) No 1107/2005* of 5 July 2006, Volume 38, Issue 1, February 2013, p.55-56

<sup>13</sup>Nationality of aircraft derives from Chicago Convention from 1944 and represents a basis for exchange of air freedoms through conclusion of bilateral agreements on air freedoms for the period between 1944 - 1998 and a ruling of European court of justice in the case involving EU and the Federal Republic of Germany - C. 467/98 (Open Sky ruling); after that EU got a mandate to negotiate and conclude Open Sky agreements with third countries. For that reason and in order to make common market and prevent discrimination, the concept of EU carrier became incorporated in Open Sky agreements.

<sup>14</sup>Maria Jose Viegas, *Passengers with Reduced Mobility in the European Union: Legal Issues Regulation (EC) No 1107/2005* of 5 July 2006, Volume 38, Issue 1, February 2013, p.56.

<sup>15</sup>Bosnia and Herzegovina incorporated provisions of the Regulation 1107/2006 into its legislation by adopting the Law on obligations in civil air traffic of Bosnia and Herzegovina („Official Gazette BiH, No: 51/15).

<sup>16</sup>Croatia, Bulgaria and Romania are signatories to ECAA Treaty and after becoming EU Member States, they had to adopt EU legislation, including the Regulation 1107/2006. Consequently, provisions of ECAA Treaty do not apply to these countries.

<sup>17</sup>Article 3 item b) Regulation 1107/2006

<sup>18</sup>Article 4 paragraph 1 item a) Regulation 1107/2006

<sup>19</sup>Article 4 paragraph 1 item a) and b) Regulation 1107/2006

<sup>20</sup>CAT.OP.MPA.155 Carriage of special categories of passengers (SCPs). Similar provision was in the Regulation EU 859/2008 on establishing technical requirements and administrative procedures being implemented in commercial air traffic, i.e. OPS. 1.260, which said: Operator shall establish procedures for air transport of persons with reduced mobility (PRM). (b) Operator must guarantee that PRM passengers will not have seats that could: (1) disturb the crew; (2) hamper access to emergency equipment; (3) disturb evacuation of a plane in case of emergency (c); the captain must be informed on transport of a PRM passenger.

<sup>21</sup>Evaluation of Regulation 1107/2006, Final Report and Appendices A-B, Appendix A, June 2010,

<sup>22</sup>Article 4 paragraph 4 Regulation 1107/2006

<sup>23</sup>Article 6 paragraph 1 Regulation 1107/2006

<sup>24</sup>Report from the Commission to the Council to the European Parliament and the Council on the functioning and effects of Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the Right of Disabled Persons and Persons with Reduce Mobility when Traveling by Air, p9.

<sup>25</sup>Article 6 paragraph 2 Regulation 1107/2006

<sup>26</sup>Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.76

## MISCELLANEOUS MATERIAL OF INTEREST

- <sup>27</sup>At Sarajevo International Airport air carriers do not inform the airport operator via SITA PAL and CAL messages.
- <sup>28</sup>For easier preparation of flights, tour operators send the information in SITA form, i.e. text in Word, which airport staff log into SITA application.
- <sup>29</sup>Disadvantage of PSM messages is in the fact they are issued upon closing the flight by the airport of departure or transfer, and the airport of arrival has time to prepare Ground Handling depending on the flight duration, which may be 1 hour to 10 - 12 on overseas operations
- <sup>30</sup>Article 5 paragraph 1 Regulation 1107/2006
- <sup>31</sup>Article 5 paragraph 2 Regulation 1107/2006
- <sup>32</sup>ECAC Policy Statement in the Field of Civil Aviation Facilitation, Doc 30 Part I, Eleventh Edition, 2009 p. 5-4 , Recital 5 Regulative 1107/2006
- <sup>33</sup>Article 2 item f) Regulation: „Airport” means any area of land specially adapted for the landing, taking-off and manoeuvres of aircraft, including ancillary installations which these operations may involve for the requirements of aircraft traffic and services including installations needed to assist commercial air services. Accordingly, airport means also the land out of the airport protective boundaries. Also, definition of airport car park from Article 2 item k) Regulation 1107/2006 means a technical definition of an airport, and that is a car park, within the airport boundaries or under the direct control of the managing body of an airport, which directly serves the passengers using that airport
- <sup>34</sup>Final Report, Assessment on rules on penalties applicable to regulation infringements 1107/2006, concerning the rights of disabled persons and persons with reduced mobility when travelling by the air, Phillipe & Partners, p 55
- <sup>35</sup>Article 9 paragraph 2 Regulation 1107/2006
- <sup>36</sup>ECAC Code of good conduct in provision of Ground Handling services to persons with reduced mobility is incorporated in Annex 5-C ECAC Doc 30
- <sup>37</sup>Article 9 paragraph 5 Regulation 1107/2006
- <sup>38</sup>Opposite to Maria Jose Viegas, Passengers with Reduced Mobiliti in the European Ubion; Legal Issues Regulation (EC) No 1107/2006, Air and Space Law, Number 1, February 2013, p.52.
- <sup>39</sup>Article 7 paragraph 1 Regulation 1107/2006
- <sup>40</sup>Evaluation of Regulation 1107/2006, Final Report,Steer Davied Gleave, June 2010,p. 32
- <sup>41</sup>Appendix 1 Directive 96/67 on provision of Ground Handling services at EU airports
- <sup>42</sup>Article 1 paragraph 5 Regulation 1107/2006
- <sup>43</sup>Maria Jose Viegas, Passengers with Reduced Mobiliti in the European Ubion; Legal Issues Regulation (EC) No 1107/2006, Air and Space Law, Number 1, February 2013, p.54. Consequently, Marie Jose Viegas holds that sub-contracting of handling service to PRM passengers may be done if the airport operator has an annual volume of over two million passengers or 50.000 tons of cargo, according to provisions of Directive 96/67. Namely, approval for third providers of GH services at the market of Ground Handling services is to be obtained under the condition that the airport operator has 2 million passengers a year or 50.000 tons of cargo. According to extensive interpretation, acceptable attitude is that GH service to PRM may be provided by specialized legal entities whose business is the provision of GH services.
- <sup>44</sup>Article 3.1 of Main Agreement SGHA 2013/2008/2004
- <sup>45</sup>Article 10 Regulation 1107/2006
- <sup>46</sup>Article 8 paragraph 2 and 3 Regulation 1107/2006
- <sup>47</sup>Recital 8 Regulative 1107/2006
- <sup>48</sup>Cost of new equipment are defined in a way to define annual depreciation of purchased equipment for handling of PRM passengers.
- <sup>49</sup>Commission Staff Working Document Interpretative Guidelines on the Application of Regulation EC No 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and persons with Reduced Mobility when Traveling by Air, p.15
- <sup>50</sup>Article 8 paragraph 5 Regulation 1107/2006
- <sup>51</sup>According to Article 1 paragraph 5 Regulation 1107/2006, provisions of Directive 96/67 are implemented if not contrary to provisions of Regulation 1107/2006
- <sup>52</sup>Other relevant bodies mean organizations of disabled persons.

- <sup>53</sup>Executive body means, as a rule, the competent Directorate of civil aviation.
- <sup>54</sup>Article 8 paragraph 6 Regulation 1107/2006
- <sup>55</sup>Article 11 Regulation 1107/2006
- <sup>56</sup>ECAC Doc 30, Part 1, Annex G, Training, 5G-4, 11 th Edition 2009
- <sup>57</sup>Security agencies, complementary parking services, catering services, ticketing may be a constituent part of the airport operator's organization
- <sup>58</sup>Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.134
- <sup>59</sup>Article 12 Regulation 1107/2006 has stipulated: Where wheelchairs or other mobility equipment or assistive devices are lost or damaged whilst being handled at the airport or transported on board aircraft. The passenger to whom the equipment belongs shall be compensated, in accordance with rules of international, Community and national law.
- <sup>60</sup>Warsaw Convention, Hague Protocol, Guadalajara Convention, Guatemala Protocol and Montreal Protocols 1, 2, 3 and 4 make the Warsaw system in a wider sense. Since the Guatemala Protocol and Montreal Protocol 3 have not come into force, the current Warsaw system is made of the Warsaw Convention, Hague Protocol, Guadalajara Convention and Montreal Protocols 1, 2 and 4.
- <sup>61</sup>DAA is a category of cabin baggage that cannot be taken in the cabin due to its size, weights, or lack of space in storages in smaller aircraft, but sometimes in bigger ones, so that a PRM passenger could use wheelchair, mobility equipment or assistive device at a transfer airport and final destination upon landing and parking of aircraft, if the aircraft is parked on an open position, or in front of air bridge if the aircraft is parked next to it.
- <sup>62</sup>Austrian Airlines allows marking of wheelchairs, mobility equipment and assistive device with DAA tags, but at the same time they must be registered as hold baggage. Such a solution enable air carrier, depending on commitments, whether to deliver the wheelchair or not to a PRM passenger at a transfer airport. Air carriers introduced double registration of wheelchairs, mobility equipment and assistive devices because of high costs in case of their loss or non-arrival at a final destination. When they are marked with DAA bag tags, a baggage check-in clerk first fill in the next transfer landing and a flight number. If wheelchairs, mobility equipment and assistive devices have not been delivered to a PRM passenger at transfer airport, then the airport operators or their sub-contractors do not know which is the final destination of the wheelchair, mobility equipment and assistive devices.
- <sup>63</sup>Article 17 Montreal convention
- <sup>64</sup>Wheelchairs, mobility equipment and other assistive devices are not taken over from baggage conveyor belt in order to prevent possible damage
- <sup>65</sup>Interpretative Guidelines on the Application of Regulation (EC) no 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and Persons with Reduced Mobility when Travelling by Air, Brussels p.14
- <sup>66</sup>Article 17 paragraph 4 Montreal Convention
- <sup>67</sup>Article 17 paragraph 3 Montreal Convention
- <sup>68</sup>Baker v. Landsdell Protective Agency - US District Court (SDNY) 18 Avi 18,497, Hexter v. Air France 1982 - US District Court S.D.N.Y., 563 F. Supp 932.
- <sup>69</sup>Loss of baggage means the air carrier's loss of physical control over handed baggage and impossibility of its delivery to immediate possession of a passenger. Damage means decreased value of the baggage and disruption of its original appearance and content.
- <sup>70</sup>Destruction of baggage means destruction of its content and impossibility of further use. The baggage will be considered destructed even if damage is of such character that repair costs would exceed the actual value of the baggage.
- <sup>71</sup>Article 22 paragraph 2 Montreal Convention
- <sup>72</sup>Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.72
- <sup>73</sup>Article 27 Montreal Convention
- <sup>74</sup>Wheelchair, mobility equipment and other assistive devices are not taken over from a conveyor belt because of a possibility to be damaged.
- <sup>75</sup>If an airport operator sub-contracted a service, charges will be pressed, either cumulatively or alternatively, against the airport operator's sub-contractor. The sub-contractor's liability is the same as that of the airport operator for the damage on a wheelchair, mobility equipment and other assistive devices.

## MISCELLANEOUS MATERIAL OF INTEREST

<sup>76</sup>Article 30 Montreal Convention stipulates: „1. If an action is brought against a servant or agent of the carrier arising out of damage to which the Convention relates, such servant or agent, if they prove that they acted within the scope of their employment, shall be entitled to avail themselves of the conditions and limits of liability which the carrier itself is entitled to invoke under this Convention. 2. The aggregate of the amounts recoverable from the carrier, its servants and agents, in that case, shall not exceed the said limits. 3. Save in respect of the carriage of cargo, the provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.

<sup>77</sup>Elmar Giemulla, Ronald Schmid, Wolf Muller - Rostin, Regula Detling - Ott, Rod Margo, Montreal Convention, (2010), Kluwer Law International, p. 26-19, Article 19

<sup>78</sup>Final Report, Application of the Regulation by the Member States, Phillipe & Partners, p 56, Identical information can be found in Evaluation of Regulation 1107/2006, Final Report, Steer Davied Gleave, June 2010, p.88

<sup>79</sup>Article 14 paragraph 1 and 2 Regulation 1107/2006

<sup>80</sup>Article 15 paragraph 4 Regulation 1107/2006

<sup>81</sup>Article 15 paragraph 2 Regulation 1107/2006

<sup>82</sup>Evaluation of Regulation 1107/2006, Final Report and Appendies A-B, June 2010, p.47

<sup>83</sup><http://www.schiphol.nl/Travellers/AtSchiphol/InformationForPassengersWithReducedMobility/ComplaintsAndSuggestions.htm>, [http://www.milanolate-airport.com/en/passenger-guide/passengers-with-reduced-mobility/prm-survey?code=PRM\\_SURVEY](http://www.milanolate-airport.com/en/passenger-guide/passengers-with-reduced-mobility/prm-survey?code=PRM_SURVEY)

<sup>84</sup>Commission Staff Working Document Interpretative Guidelines on the Application of Regulation EC No 1107/2006 of the European Parliament and of the Council of 5 July 2006 Concerning the Rights of Disabled Persons and persons with Reduced Mobility when Traveling by Air, p.17, 18

<sup>85</sup>Article 14 Regulation 261/2004

<sup>86</sup>Article 15 paragraph 4 Regulation 1107/2006



## State aid Measures and the New Draft Commission Regulation for Regional Airports

Anna Masutti\*  
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In order to make the action of the European Union more efficient regarding State aid to the air transport sector, the EU Commission has recently provided the new Regulation No. 651/2014, concerning the government of State aid. More specifically, the new Regulation provides for certain categories of State aid which are compatible with the internal market, in accordance to articles 107 and 108 of the Treaty.

Regarding the specific scope of State aid for airports, the admission is provided under circumstances set out by the Commission in a Communication on Guidelines on State aid to airports and airlines (2014/C 99/03).

In accordance to EU Communication on State aid, airports with annual passenger traffic between 3 and 5 million may, under certain specific circumstances, be supported by public interventions. Differently, airports with annual passenger traffic above 5 million are usually profitable and able to cover all of their costs (except very exceptional cases).

Concerning operating aid to airports, it is assumed that airports with annual passenger traffic of 1-3 million should not be able to cover the majority of their operating costs, whereas those with more than 3 million passengers are usually profitable and should be able to cover their costs. Therefore, as provided in the Communication, operating aid may be admitted if the airport's annual traffic should not exceed 3 million passengers.

Consequently, the question is whether the current European Guidelines on State Aid to airports and airlines are able to handle aid measures also for regional airports, given that public funding has a key role in the development of regional airports projects.

A clear example of public funding is the capital injection at "*Garda airport system*" (C2014/2242). In this case, the airport development plans envisage around 58 million euros of infrastructure works in ten years (2012-2021) for the expected growth in traffic and commercial development plans, which have been already launched. The allocated investments for these infrastructures were around 43.5 million euros at Verona airport and around 14.5 million euros at Brescia airport for the period 2012-2021.

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## MISCELLANEOUS MATERIAL OF INTEREST

The investment project is partly financed through capital injection by public shareholders. In this regard, the EU Commission notes that airports of any size, including the smaller ones, are competing to attract airlines. In accordance to the Guidelines, it is not possible to exclude small airports from the scope of application of Article 207 (1) of the TFEU. Moreover, in the over mentioned case the financing was already put at the disposal of the airport before the Commission notification. For this reason, Italy infringed Article 108 (3) of the TFEU and, as a consequence resources were frozen for months and the capital increase subscribed by the public shareholders was not used.

Nevertheless, the EU Commission reached the conclusion that the measure constitutes an aid compatible with the internal market. In fact, the “*Garda airport system*” serves a catchment area that is one of the largest districts in Europe and one of the most populous and economically developed areas in Italy.

This case, like others, has highlighted an important matter concerning public aid for small and regional airports. Consequently, the question is whether in the future it will be possible to implement public investments as quickly as possible without distorting competition in order to give the chance to airports to play a central function in economic growth and regional development.

An important role has been played by the Italian Ministry of Infrastructure and Transport on August 2016. The Ministry presented new guidelines concerning State aids aiming to develop air routes and promote air carriers. Such Governmental intervention, which has also been commented by the new independent Authority of Transport Regulation, aims to ensure a wider accessibility to a major number of air carries and the incentive of public investments.

On the 16<sup>th</sup> October 2016, it was approved a Draft Commission Regulation amending Regulation (EU) No 651/2014 released by EU, with the aim of revising exemption criteria also for airport (and ports) investment aid from prior Commission scrutiny under EU State aid rules. This Draft Regulation has the purpose to facilitate public investments in order to create jobs and growth whilst preserving competition by means of an administrative simplification of the procedure notification.

The Regulation sets out a specific section (*section 14*) for ‘regional airports’, which are defined as “airports with average annual traffic up to 3 million passengers”, and also for decreasing the regulatory burden and costs for public authorities and other stakeholders of the EU.

The criteria provided by the Regulation establish that aid should not exceed 50 per cent or 75 per cent of eligible costs of airports handling between one and three million and less than one million passengers per annum respectively, during the two financial years (preceding the year in which aid is granted). Furthermore, there should not be other airports located within 100 kilometres distance or 60 minutes travelling time by car, bus, train or high-speed train.

However, a lack of coherence still remains. In fact, the Regulation does not include State aid for airports with annual passenger traffic above 3 million and less than 5 million (as per the 2014 Airports guidelines) and it does not provide for operating aid and start-up for regional airports (as per the 2014 Airports guidelines) either.



## *MISCELLANEOUS MATERIAL OF INTEREST*

Moreover, there is no reference regarding the notification exemption in the particular case of airports in the same catchment area and managed by a single operator. Consequently, if several airports in the same catchment area are managed by the same operator, there cannot be any distortion of competition.

On the 6<sup>th</sup> December 2016, the Italian Authorities presented their position concerning the Draft Commission Regulation amending European Regulation No. 651/2014. Following the public consultation on the Draft, the Authorities considered that a real and an effective simplification of the administrative burden may be realized under the condition that operating aid to airports would be exempted from the notification procedure. In addition, they underlined the need to clearly define the instances of “small airports” which are exempt from the application of State rules.

On this matter, the Italian Authorities consider that airports for general aviation and those with a scant economic traffic should not be considered in competition with other airports in consideration of their small dimensions. Therefore, any public financing given to them should not be considered a way to affect competition or the trade relations between Member States.

In addition, the Italian Ministry of Infrastructure and Transport guidelines and the Authority of Transport Regulation intervention may be revised, in accordance to the Draft Commission Regulation (amending Regulation (EU) No 651/2014) for regional airports.

In conclusion, even though the Draft could be subjected to amendments, the EU Commission Regulation represents an important support instrument for regional airports, which are a substantial part of airports structures in Italy.



*FORTHCOMING EVENT*

## Executive Course International Contracts in Aerospace Industry

5-7 JULY 2017 ROME—ITALY

### Introduction

The second edition of the Executive Course offers a three day program, targeting mainly professionals and managers from the aerospace and aviation industry. This course provides a thorough theoretical and practical analysis of the various sources and principles of law that govern international contracts in aerospace and aviation industry. The first edition of the Executive Course (a sixday program) was held in 2016 in Torino.

### Objectives

During the course you will gain a comprehensive legal and business knowledge along with a practical understanding of key issues. By the end of the course you would have to:

- understand the basics of contract law and drafting principles widely applied in the aerospace and aviation industry;
- identify and analyze the sources of contract law;
- understand the rights and liabilities of parties involved in such contracts;
- understand liquidated damages and penalty clauses;
- understand arbitration clauses, choice of applicable law and ADR mechanisms;
- improved skills in recognizing and analyzing key legal issues, applying effective strategies and techniques to control the progress of negotiation and formation of a contract.

The lecturers are highly recognized academics with a longstanding reputation in aerospace and aviation law. The expansion of global trade has resulted in an increasingly high degree specialization in international contract practices. The jurisdictional complexity of such contracts has led to a rapid growth in the role of alternative dispute settlement mechanisms. For this reason the course also focuses on arbitration and alternative dispute settlement mechanisms. Arbitration is a rational alternative for international disputes, as it offers a neutral forum and avoids litigating in either party's national courts, especially in disputes involving states or incumbent operators.

The potential suitability of arbitration for space disputes has been acknowledged by the issuance of dedicated arbitration rules for outer space before the Permanent Arbitration Court in 2011.



## *FORTHCOMING EVENT*

### **Contents and Structure**

The course comprises three specialized modules (8 hours a day) and consists of lectures with a participatory approach to reinforce the participant's knowledge. The 2017 edition is structured in three modules:

MODULE 1 - Day 1: Aerospace Contract Law

MODULE 2 - Day 2: Insurance in Aerospace

MODULE 3 - Day 3: Negotiation and Settling Disputes in Aerospace. The training methodology combines a range of methods including traditional class work, group seminars and interactive problem solving.

### **Key information**

Duration: 3 full days

This course is recommended for:

- Professional and Managers of the industry;
- Other aerospace and aviation Professionals who deal with contractual issues;
- In House Lawyers.

### **Organizing Committee**

- Anna Masutti, University of Bologna - LS Lexjus Sinacta Law Firm - Italy
- Mario Comba, President of Istituto Universitario di Studi Europei; University of Turin
- Pablo Mendes De Leon, University of Leiden
- Maria Beatrice Deli, ICC Italy

### **Main Topics**

- The analytical framework of contract law;
- Drafting and negotiating a contract in the aerospace sector;
- General terms and conditions and battle of forms;
- Choice of law clauses;
- Transfer of risk and title limitation and exclusion of liability clauses;
- Penalties and liquidated damages clauses;
- Liability and insurance in aerospace. Aerospace product liability. Physical damage and liability cover for manufacturers and suppliers.
- Case history;
- Termination for convenience and for default;
- Dispute resolution;
- Negotiation techniques;
- ADR and arbitration;

## FORTHCOMING EVENT

**Venue:** Roma

**Registration fees:** The registration fee is 950,00 € + VAT

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