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ERA Industry Affairs Group Meeting

Latest Case Law Updates on EC261 and Passenger Rights
9 and 10 September 2014

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OVERVIEW

EC261 – Reform process continues (slowly)

Case Law Updates:

- **Huzar v Jet2.com (CA 11 June 2014)**
- **Dawson v Thomson Airways (CA 19 June 2014)**
- **Germanwings v Henning (CJEU 4 September 2014)**
- **Van der Lans v KLM (C-257/14 (pending))**

EC261 REFORM PROCESS

Draft Regulation and report published 2014

Key points:

- **Compensation €300 up to 2,500 kms; €400 from 2,500 to 6,000kms; €600 above 6,000 kms**
- **Extraordinary circumstances – exhaustive list**
- **Delays – 3, 5, 7 hours (intra and "extra" EU)**
- **HOTAC – five nights; €125 per passenger**
- **Connecting flights – care and assistance (onward carrier)**
  – compensation by feeder carrier
- **Claim process (possible mediation/ADR under review)**

Time frame from completion – 2015 ??

HUZAR

Malaga to Manchester

- **Inbound flight fuel advisory warning traced to a fuel valve circuit wiring issue**
- **Replacement aircraft required**
- **Arrival back in Manchester 27 hours late**

<u>District Judge / First Instance</u>

- **Carrier took all necessary measures**
- **Beyond its control**
- **Thus, an extraordinary circumstance**

HUZAR

Manchester Appeal

Accepted that the technical fault was unexpected and could not have been predicted by inspection or regular maintenance

BUT

- **Stated the test was wrongly applied**
- **EC261 is to promote consumer protection**
- **It is the resolution of the technical problem which causes the delay/cancellation**
- **Once a problem arises, it is inherent in the normal activity of the carrier to have it resolved**
- **The resolution is within the control of the carrier**
- **Delay caused in attempting to resolve an unforeseen/unforeseeable technical problem cannot be said to be an extraordinary circumstance**

HUZAR - ARTICLE 5(3) AND WALLENTIN

Art 5(3)

> **"Carrier shall not be obliged to pay compensation … if the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken"**

Wallentin para 41

> **"Carrier must establish that, even if it had deployed all its resources in terms of staff or equipment and the financial means at its disposal, it would not have been able … to prevent the extraordinary circumstances with which it was confronted, from leading to the cancellation of the flight"**

HUZAR

***Wallentin* test:**

Technical problems can amount to extraordinary circumstances if the "… problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control".

"… frequency of the technical problems experienced by the air carrier is not in itself a factor"

Establishing that "an air carrier has complied with the minimum rules on maintenance of an aircraft cannot in itself suffice to establish that that carrier has taken all reasonable measures …"

COURT OF APPEAL

- The facts of Huzar had previously been adjudged as within Art 5(3)
- The NEB guidelines supported Jet 2's case

BUT

No appeal on second limb of Art 5(3): carrier unable to avoid the cancellation even by taking all necessary measures

So, what is "an extraordinary circumstance"?

Preamble (14) gives some examples: political instability, meteorological conditions, security risks, unexpected flight safety shortcomings, strikes

Preamble (15) – Extraordinary circumstance deemed to exist where the input of air traffic management decisions give rise to long delay/cancellation even though all reasonable measure are taken

HUZAR ANALYSIS

- **It was argued in the Court of Appeal for Jet2 that the concept of control is paramount. Can the carrier influence the event? If beyond control, it should not have to pay compensation**
- **If the problem could not have been anticipated and eliminated by proper maintenance, it would not be inherent in the carrier's normal activity**

Rejected

- **CJEU two limb test**
  - Nature or origin of the event causing the technical problems must not be inherent in the normal exercise of the activity of the carrier;
  - It should be beyond its actual control

Huzar's counsel argued:

Events by their nature are not inherent in the normal exercise of the activity of the carrier and therefore are beyond its control

The key is what is inherent in the normal exercise of a carrier's activities

Technical problem was beyond carrier's control but does not relieve it from obligation to pay compensation: Agreed with Manchester Court but for different reasons

HUZAR - COMMENT

- CAA had sought to intervene in CA to introduce the NEB guidelines into discussion but failed on procedural grounds
- Political decision to clear the Courts of small claims (?)
- What is left within Art 5(3)? It would seem that only freak weather or third party acts will apply. But is a snow storm in London in December "freak"?
- Supreme Court leave pending
- CAA intervention
- Decision on leave application likely in the Autumn and thereafter hearing and decision within a further six months

DAWSON

Flight Delay – Gatwick to Dominican Republic in December 2006

- Delay due to crew shortages
- Claim began in December 2012 just before six year limitation under the Limitation Act 1980
- Thomson argued a two year limitation applied

Montreal

- Delay
- Two year limitation
- Part of EU law under EC2027/97 (as amended EC889/2002)
- UK law Carriage by Air Act 1961

Exclusivity of Warsaw [and accepted would apply to MC99]

- Sidhu v BA 1997 H.L.

DAWSON

Compare EC261

- No limitation period stated
- Challenge in 2006 to the legality of the provisions dealing with delay as being contrary to MC99 [*IATA v DoT*]
- CJEU rejected the challenge on the basis that MC delay compensation was specific and individual and different in nature to that under EC261
- *Sturgeon* created a right to standardised compensation for delay in arrival. Seemingly in conflict to Art 19 MC99, **BUT** upheld in *Nelson v Lufthansa*
- *More v KLM 2013* CJEU determined that the issue of limitation under EC261 is a matter for national law [so how do we get consistency?]

DAWSON – COURT OF APPEAL

The arguments:

Carrier:

- It is a matter for English law
- MC99 exclusively governs all matters relating to claims against a carrier arising out of international carriage by air

Claimant:

- It is for the CJEU to determine the relationship between MC99 and EC261 and it has already clearly stated that they deal with separate aspects of damage caused by delay

Leave to Supreme Court

- A significant constitutional issue as to whether Treaty law prevails over UK law.

GERMANWINGS v HENNING CJEU 4 SEPTEMBER 2014

- Salzburg – Koln / Bonn
- Took off with a delay of 3 hours 10 minutes. Touched down with a delay of 2 hours 58 minutes.
- Parking position 3 hours 3 minutes. Doors opened shortly afterwards
- HeaRd before an Austrian Court which referred the case to CJEU for a preliminary ruling on what time corresponds to the arrival time
- Passengers are in a confined space under the control of a carrier
- There can be no contractual determination – it must be uniformly applied across Member States

RULING

- At least one of the doors open and passengers are permitted to leave

VAN DER LANS v KLM

- Technical problem claimed as an extraordinary circumstance
- 29 hour delay
- 10 questions referred to the CJEU (pending)
- Challenge to *Wallentin*
- Due to the significant level of inconsistency in approach across the lower, District Dutch Courts

CONCLUSIONS

- We cannot rely on the courts to give clear guidance, let alone the legislators!
- There remains great inconsistency both within Member States and across Europe
- The Courts are jammed by 261 claims – low value, high litigation cost
- A political determination will be imposed
- Airlines and their representatives need to continue to lobby

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