Soffal News

Air transport

1. Fine levied by ACNUSA on air carrier: don't wait for the fine because it may be too late to challenge

Since the inception of our Air Transport newsletter, we have come on numerous occasions on the policy of the ACNUSA in respect of the fines levied on air carriers when infringing night flight rules.

The ACNUSA is the administrative authority in France in charge of controlling the respect by air carriers of the regulations on air nuisance, among which regulations for flights at night.
It may impose a fine up to 40,000 Euro for each infringement since 2014.

Over the years, the ACNUSA has not hesitated to apply the maximum "rate" (40,000 Euro), especially where the air carrier had already violated the regulation.
It was meanwhile interesting to see whether Courts would confirm this stringent approach adopted by the ACNUSA.

A decision levying a fine can indeed be challenged in first instance before the administrative Court of Paris (Tribunal administratif) and on appeal before the administrative Court of appeal (Cour d'appel administrative).

In a recent ruling of December 31st 2018, the Court of appeal confirmed a decision of the Acnusa.

The Court of appeal confirmed a fine of 23,000 € levied by the Acnusa against an air carrier. This fine had been reduced in first instance to 17,000 €. According to the Court of appeal, the fine could not be reduced because of two elements:

1- the hour of the landing, namely 23:48, instead of 23:30. An 18-minute infringement has been deemed unacceptable,

2- the air carrier had already infringed the rules applicable in airports in France on 11 occasions between August 23rd, 2012 and October 4th, 2017.
It is significant that the Court did not specify the type of infringement, making it clear that any previous infringement could potentially justify an increase of the fine levied for a future one. Also significant the fact that the Court reminded that the ACNUSA could have set the amount at 40,000 Euro maximum.

This ruling of the administrative Court of appeal confirms a pattern already noticeable in previous decisions, namely that Courts will confirm the fines of the ACNUSA.

This makes it all the more important for an air carrier, whom the ACNUSA notified an infringement or more, to appear at the hearing before the ACNUSA and submit written observations and not wait for its decision.

2. Right to compensation for delayed / cancelled flights: which court has jurisdiction to judge on the passenger's claim?

If passengers whose flights from the EU have been delayed or cancelled may seek compensation from the air carrier, they must however address one issue: ascertain which court has jurisdiction for their claim?

In a ruling of March 7th, 2018 (Cases Nr. C-274/16, C-447/16, C-448/16), the Court of Justice of the European Union (CJEU) helps clarify the question:

1- in two similar cases, a passenger had booked a flight from Spain to Germany, with a connection within Spain. However, a delay had occurred during the first leg of the flight (within Spain), carried out by an operating air carrier (Air Nostrum). The contracting partner of the passenger was not Air Nostrum but the air carrier which had taken over the flight to Germany, the final destination.
Which was the competent court for the claim of the passenger against the operating air carrier?

The Court judged that the passenger could sue the operating partner before the Court of the final destination (Germany).

To do so, it first pointed out that the operating air carrier "must be regarded as fulfilling the freely consented obligations vis-à-vis the contracting partner of the passengers concerned", which obligations arise under the contract for carriage by air.

The Court based itself here on Art. 3 (5) 2nd sentence of the EU regulation n°261/2004: "Where an operating air carrier which has no contract with the passenger performs obligations under this Regulation, it shall be regarded as doing so on behalf of the person having a contract with that passenger."

The Court decided then that **the relation between the passenger and the operating air carrier is also of contractual nature and therefore falls under the ambit of Art. 5 (1) a & b** of the EU regulation n°44/20011 which defines the competent court as follows:

> *"A person domiciled in a Member State may, in another Member State, be sued:*
>
> *1. (a) **in matters relating to a contract**, in the **courts for the place of performance** of the obligation in question;*
>
> *(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:*
> ***[…]***
>
> - *in the **case of the provision of services**, the place in a Member State where, under the contract,*

[1] This regulation was replaced by regulation (EU) No 1215/2012, but without change in respect of the provisions of article Art. 5 (1) (now at Art. 7 (1).

the services were provided or should have been provided,"

The Court indicated finally that the place where the service is deemed to have been provided is the place of arrival of the second leg of the flight, even though the delay occurred during the first leg (carried out by the operating air carrier).

2- In the third case, the passenger had booked a flight from Berlin to Beijing with an air carrier which had no seat and no subsidiary in the EU (Hainan Airlines). He could not have boarded. Was the EU regulation on jurisdiction applicable, even if the defendant was based outside of the EU?

The Court excluded that a passenger domiciled in the EU could rely on the EU regulation n°44/2001 to define the competent court for a claim made against an air carrier which has not its seat in the EU, nor a subsidiary.

The reason for that is that art. 5 (quoted above) does not apply to a defendant domiciled in a State outside the EU.

The passenger will hence have to rely on his / her national law to determine which Court should decide on his / her claim.

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