

Sapienza Università di Roma
Facoltà di Giurisprudenza - Dipartimento di Scienze Giuridiche

DEGREE COURSE «EUROPEAN STUDIES» (LM-90)

JEAN MONNET MODULE
TRANSPORTATION LAW AND COURT OF JUSTICE OF THE EUROPEAN UNION
(TLCJEU)

Prof. Francesco Gaspari

Summary:

- 1.The legal framework
- 2.The request for preliminary ruling to the European Court of Justice (case C-756/18)
- 3.The problem of the burden of proof in the French case-law
- 4.Some considerations waiting for the ECJ
- 5.Conclusions

1. The legal framework

☐ Regulation (EC) No 261/2004, Article 3

1. This Regulation shall apply:

- (a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies;
- (b) to passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies, unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier.

2. Paragraph 1 shall apply on the condition that passengers:

- (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
 - as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent, or, if no time is indicated,
 - not later than 45 minutes before the published departure time.

➤ EU legislation (including the EU Commission Interpretative Guidelines of 2016) does not define what “presentation for check-in” mean

☐ Regulation (EC) No 261/2004, Article 2(g):

‘reservation’ means the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator

➤ Lack of a precise indication on the burden of proof

➤ This has led to different approaches followed by the French case-law (High Court and local courts)

➤ Such conflict of case-law has determined a request for a preliminary ruling to the European Court of Justice

Burden of proof, compensation and assistance to passengers and Regulation (EC) No 261/2004: waiting for the European Court of Justice

2. The request for a preliminary ruling (case C-756/18) to the ECJ from the Tribunal d'instance d'Aulnay-Sous-Bois (France) lodged on 3 December 2018

❖ Question referred

1. Is Article 3(2)(a) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (1) ('Regulation No 261/2004'), to be interpreted as meaning that, in order to rely on the provisions of the regulation, passengers must prove that they presented themselves for check-in?
2. If so, does Article 3(2)(a) of Regulation No 261/2004 preclude a rule of simple presumption that the requirement that a passenger present himself for check-in may be regarded as satisfied if the passenger has a reservation that has been accepted and registered by the operating air carrier within the meaning of Article 2(g)?

3. The problem of the burden of proof in the French case-law

There are two views upheld in the French case-law.

A. Cour de cassation, Civil Division, 14 February 2018, 16-23.205

Facts:

- Mr and Mrs Y... and their children (the Y family) purchased three airline tickets from Company XL Airways France to fly (outward and return) Paris-Miami
- The return flight reached its destination with a 5-hours delay
- The applicant (the Y family) brought an action by application lodged at the local court (juridiction de proximité) claiming compensation on the basis of Regulation No 261/2004.

➤ The local Court (juridiction de proximité d'Aulnay-sous-Bois, 26 February 2016) rejected the claim.

❑ The applicant relies on two pleas in law in support of its action.

1. On one side, it alleges that:

- burden of proof has to follow the general rule, as laid down in Article 1315 of French Civil Code;
- pursuant to Alinea 2 of Article 1315, the airline company has to justify the significant delay, being passengers required to prove that they have a reservation on the concerned flight, without they need to prove their presence on board;
- in rejecting the request for compensation on the grounds that **(i)** the applicant had failed to prove that the electronic tickets submitted to the court establish the right to transport with a reservation accepted and registered by the defendant (airline company), and that **(ii)** the applicant did not submit reliable evidence supporting that it had boarded the flight and suffered from the 5-hours delay of flight XLF59, the local Court (jurisdiction de proximité) has reversed the burden of proof in breach of Article 1315 of Civil Code.

2. On the other side, it alleges that:

- Article 3 of Regulation 261/2004 – which defines its scope – does not contain any indication on the mode of proof with regards to the presentation of passenger for check-in, that is the only condition required together with the possession of a transport document or a reservation in order to apply its provisions;
- the proof of the boarding and the presence on board of concerned passenger, can only emerge from electronic registration of the boarding pass or from the passenger's electronic ticket before the airline staff at the airport gate;
- only the air carrier holds the electronic list stemming from such registration;
- in rejecting the request for compensation for the delay of flight XLF59 on the grounds that applicant did not submit reliable evidence supporting that it had boarded the flight and suffered from the 5-hours delay of such flight, the local Court (jurisdiction de proximité) required an impossible prove, thereby infringing Article 1315 of Civil Code.

❑ The judgment of the French High Court (Cour de cassation).

- Article 3, par. 2(a) of Regulation 261/2004 clarifies that the legal regime of such Regulation is applicable providing that passengers have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in.
- Pursuant to Article 1315 (now 1353) of Civil Code, “who alleges must prove” (*«Celui qui réclame l’exécution d’une obligation doit la prouver»*) and, conversely, “who pretends to be released must prove it” (payment made or the fact creating the extinction of the obligation).
- Given that the applicant (Y family) lodged an application requesting a compensation to the company XL Airways France, their electronic reservation, as well as an attestation of delay, as a no-name declaration, signed by itself, do not prove that the applicant was present at the check-in.
- Therefore, the local Court (jurisdiction de proximité) has, without reversing the burden of proof, nor requiring an impossible proof, correctly rejected the application (request for compensation), being the action unfounded.

B. Cour de cassation, Civil Division, 12 September 2018, 17-25.926

Facts:

- Mr X... purchased an airline ticket from Company XL Airways France (the company) to fly Pointe-à-Pitre-Paris.
 - The flight reached its destination with a 19-hours delay
 - The applicant (Mr X) brought an action by application lodged at the local court (juridiction de proximité) claiming compensation on the basis of Regulation No 261/2004.
- The local Court (juridiction de proximité d'Aulnay-sous-Bois, 12 May 2017) rejected the claim.

The French High Court confirmed the decision issued by the local Court, and hence rejected the request for a compensation by Mr X substantially based on the same grounds as the February 2018 HC judgment (missing reliable evidence pursuant to Article 1315 Civil Code).

C. Tribunal du 8^e arrondissement de Paris, 30 May 2018

Facts.

- On 28 April 2017 Nadeia X reserved a flight with Qatar Airways to Islamabad from Paris. The flight reached its destination with a delay of 4h and 23. The passenger requested for a compensation to the company “Claim Assistance”, via its online platform “Refund My Ticket” to help get compensation as laid down by Regulation 261/2004.
- Claim Assistance did not get any reply from the air carrier, and brought Qatar Airways before the local Court (tribunal d’instance du 8^e arrondissement), where the air carrier has its registered office.
- Qatar Airways answered that the concerned passenger must prove she was on board of the flight, pursuant to Article 1353 of Civil Code, according to which who alleges must prove. In this respect, the air carrier observes that the electronic reservation – the only document submitted by Mrs X – is not sufficient for the purpose. The air carrier asked for the boarding pass – a document that passengers do not always hold and that, in case of electronic *boarding pass*, is no longer available to passengers once landed.
- The air carrier leveraged arguments successfully developed by XL Airways before the French High Court (Cour de cassation, judgment 14 February 2018), above analysed.

The request for a preliminary ruling

- Claim Assistance's lawyer contends, principally, that no provision of Regulation 261/2004 shifts the burden of proof of reservation onto passengers. The applicant asks the Court to verify that, referring a question for a preliminary ruling to the European Court of Justice.
- The applicant recalls that Article 3 of Regulation 261/2004 only lays down that it shall apply « 2. on the condition that passengers: a) have a confirmed reservation on the flight concerned and (...) present themselves for check-in».
- The definition of « reservation» is set out in Article 2(g) as «the fact that the passenger has a ticket, or other proof, which indicates that the reservation has been accepted and registered by the air carrier or tour operator».
- The notion of «check-in» is not provided.

Passenger Name Record (PNR)

- However, in the alternative, the applicant requests that the defendant (Qatar Airways) be ordered (also applying penalty payment or *astreinte*) to provide the Passenger Name Record (PNR) concerning Mrs X, given that her name must be registered, pursuant to Article R 232-14 of Internal Security Code (*Code de la sécurité intérieure*) (in particular «*Statut du voyageur tel que confirmations, enregistrement, non-présentation, passager de dernière minute*»).
- As pointed out by the applicant, air carriers are the only ones holding evidence allowing passengers to prove their presence on board with PNR.
- Moreover, the boarding pass does not allow to prove that a passenger presents himself for check-in, but it only proves that he reserved a seat for the flight, and that reservations, however, represent a «**rebuttable presumption** of presentation for check-in and of presence on board».

Presumption of presence

On 30 May 2018, the local Court of Paris issued a decision.

In particular, it decided that *«the boarding pass, whose submission to Court by Mrs X is required by Qatar Airways, does not allow to the applicant to prove that she was on board»*. In fact, Qatar Airways invites passengers to print their boarding passes well in advance the scheduled departure.

The Paris Court states that *«if Mrs X must prove, pursuant to Article 1353 of Civil Code, that she was present on board, she benefits from a rebuttable presumption resulting from the reservation, presumption that Qatar Airways may overturn, in accordance to Article 1354 of Civil Code, thereby giving evidence that Mrs X was not onboard»*.

The Court ordered Qatar Airways to submit within 2 months a copy of PNR information concerning Mrs X, including in particular information about reservation, check-in, boarding and non presentation.

4. Some considerations waiting for the ECJ

- According to the ECJ case-law, the passenger protection provided by Regulation 261/2004 (including care and compensation) is recognized to all passengers, regardless of their presence at the check-in (see Leopoldo Tullio, in *Diritto dei Trasporti*, 2009, 367).
- Caring is a legal obligation to protect, which integrates the contract and which air carriers assume with passengers. This is shown by the fact that obligations exist regardless of the imputability of the impeditive fact to the air carrier.
- As a consequence, it is the fact impeding an air carrier to operate its service that determines the legal obligation to protect passengers by the concerned air carrier.
- Such an obligation integrates the contract between the parties (with reservation accepted and registered: Art. 2(g), Reg. 261) and therefore in this case it seems that the rebuttable presumption in favour of passengers with confirmed reservation may operate.

- However, Art. 3, par. 2(a) regulates different cases. Such a presumption seems can operate in case of cancelled flights (for which an *ex lege* exclusion is laid down: Art. 3, par. 2(a)), without therefore being necessary the “presence” of passengers for check-in, while for the other cases (delay, denied boarding) it seems that such presence is necessary.
- It is however sufficient that passengers “present themselves for check-in, stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier ...” (Art. 3, par. 2(a)). As a result, under a legal point of view, all passengers with an online check-in can be considered as present. By contrast, all other passengers would be excluded from such a presumption. This conclusion appears to be discriminatory.
- The Italian High Court (Corte di Cassazione, Order No. 1584 of 2018) affirmed that Reg. 261 makes provision for a general presumption of responsibility against air carriers.

5. Conclusions

Also in the light of the Italian case-law, Reg. 261 establishes a rebuttable presumption of responsibility against air carriers, which can be released to prove it by proving that passengers claiming protection (e.g., compensation) was not onboard, thereby not suffering - in concrete - any damages.

This is the conclusion reached by the local Court of Paris, that seems to be shareable.

In contrast, it seems not shareable the approach taken by the French High Court in 2018, that ends-up requiring an impossible proof to passengers, reversing the burden of proof on them, in breaching of the burden of proof principle (Article 1353 of French Civil Code and Article 2697 of Italian Civil Code).

Prof. dr. Francesco Gaspari is Attorney-at-Law (Italian qualified), with a PhD in Law obtained in 2011. He works as an Associate Professor of Administrative Law, as well as Adjunct Professor of European Union Law and of Public Law at Guglielmo Marconi University, School of Law, in Rome. From March 2017 he is qualified as an Associate Professor of Law and Economics and Navigation Law.

Contacts:

Address: Via Plinio 44, 00193 – Roma

Email: f.gaspari@unimarconi.it