EU261: ENGLISH COURT OF APPEAL FINDS NON-EU AIRLINES LIABLE FOR MISSED CONNECTIONS

The English Court of Appeal gave judgment on 12 October 2017 in the cases of *Gahan v Emirates* and *Buckley v Emirates*, two joined appeals concerning liability of airlines under EC Regulation 261/2004 for missed connections and consequent delay at a passenger's final destination.

The issue has been a thorny one for airlines since the CJEU judgment in *Air France SA v Folkerts (Case C-11/11, 2013)* first extended the principle of EU261 compensation being payable for flight delays resulting from missed connections. Whilst there has been a degree of consensus in the courts of many EU Member States in favour of claimants, the English county courts (the usual forum for EU261 claims) have been split on the question. Some have decided for the passengers, but others have rejected claims and held that liability does not attach where the missed connection concerns a flight of a non-EU carrier departing from an airport outside the EU. Those judgments have been based upon analysis as to the correct scope of EU261, previous English High Court case law, and principles of extra-territoriality. The *Gahan* and *Buckley* appeals, each of which concerned flights by Emirates and missed connections in Dubai, were pursued largely with the aim of obtaining some certainty for airlines and passengers alike as to how claims of this type should be dealt with.

The Court of Appeal has come down firmly on the side of the passengers in this legal debate – perhaps not a great surprise given the broad consensus which already exists in courts in other EU Member States on this issue, and bearing in mind the *raison d'etre* of EU261 as consumer protection legislation which is, as the Court of Appeal referred to up front in its analysis of the law *"to afford a high level of protection for passengers, including against the inconvenience caused by delay to flights"*. However, although the actual result is not particularly startling, there is an unease about the consequences of some of the Court's analysis.

In brief, the Court of Appeal dismissed arguments as to scope of EU261 and extra-territoriality and confirmed liability for airlines. The following are the key points from the judgment:

- When assessing delay for the purposes of compensation under EU261, what matters is the passenger's final destination.
- If the carrier provides a passenger with more than one flight to enable him to reach his final destination, those flights must be considered together in assessing whether there has been a three hours' or more delay provided those connecting flights are taken without any break between them.
- EU261 applies to a non-EU carrier when it is present in the EU and imposes a contingent liability on the carrier at that point. Liability will crystallise if the passenger arrives at the final destination three hours or more later than scheduled, regardless of whether this final destination is within the EU or not.
- The Court of Appeal rejected the notion that this represents an extra-territorial application of EU261, concluding that the regulation applies because the non-EU carrier uses an EU airport; the activity which takes place outside EU jurisdiction – the missed connection and delay – merely quantifies the sanction for delay which is imposed within the jurisdiction.
- The Court of Appeal also firmly rejected arguments put forward on behalf of Emirates as to the application to non-EU carriers of CJEU case law which addresses (and seeks to resolve) the question of whether there is any conflict between EU261 and the Montreal Convention.

Although the judgment will not be wholly surprising for airlines and provides at least some answers, it also unfortunately also raises other uncertainties, such as the liability consequences where one airline contracts to provide carriage, but onwards connections are operated by a different carrier. In terms of territoriality and scope of EU261, the readiness of the Court to apply the regulation to flights which take place entirely outside the EU, on the basis of somewhat sparse reasoning in previous CJEU case law, is disappointing and represents another in the increasingly long list of judgments which extend airline liabilities under EU261 far beyond the original intent.

The Court of Appeal judgment will require careful review in light of the many missed connections claims currently stayed by the courts in England. At the time of writing this publication it is not known whether the *Gahan v Emirates* and *Buckley v Emirates* cases will be appealed further to the Supreme Court.

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