

Regulation 261/2004 – denied boarding, cancellation and delay

Italian experience



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• *Legislation*

- Italian Law no. 12 dated as of 10 January 2004, ratifying the Montreal Convention dated as of 28 May 1999 (“*Convention for the unification of certain rules for international carriage by air*”), which governs liability of air carriers for death of, injury to, passengers and loss or damage to baggage or cargo in respect of domestic carriage. Montreal Convention entered into force in Italy on the 60th day (28 June 2004) after the 30 ratification (article 56, paragraph 6), as implemented and integrated by EU Regulation no. 889/2002 dated as of 13 May 2002.
- Italian Legislative Decree no. 206 dated as of 6 September 2005 (so called “*Consumer Code*”), implementing the Directive 29/2005/EC on unfair business-to-consumer commercial practices in the internal market.

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- Articles 941 and subsequent of the Italian Navigation Code (as amended by Italian Legislative Decree no. 96 dated as of May 9, 2005).
- EC Regulation no. 889/2002 dated as of 13 May 2002, amending Council Regulation (EC) no. 2027/1997 on air carrier liability in the event of accidents. EC Regulation no. 889/2002 reinforces the rules of the Montreal Convention on passengers and baggage transport and extends them to national transports of each State member of the Community.
- EC Regulation no. 261/2004 dated as of 11 February 2004, providing common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights.



- ***Italian Authorities' competences on passengers' protection***

- *Italian Civil Aviation Authority - ENAC*

ENAC is the Italian Civil Aviation Authority and the main body regulating aviation in Italy, as provided by article 687 of the Italian Navigation Code and Legislative Decree no. 250/97. In general, ENAC has competence for supervising air carriers and applying fines. In particular, ENAC is in charge for issuing fines to the airlines in breach of regulation 261/2004. ENAC issued the Passenger's Charter (namely, "*Carta dei Diritti del Passeggero*") and the Charter of Airport Standard Services. The Passenger's Charter is a practical vademecum of National, European and International regulation on air passengers' protection, explaining the claims and compensation procedures available to passengers in case of non compliance with the above regulation. The Charter of Airport Standard Services sets out the minimum quality standards airport operators are bound to comply with in providing their services.

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➤ Italian Antitrust Authority (namely, “Autorità Garante della Concorrenza e del Mercato”)

The Italian Antitrust Authority is an independent authority established by Law no. 287 dated as of 10 October 1990, having competence, *inter alia*, for preventing unfair commercial practices and advertising and for applying fines.

As far as air transport market, the Authority has recently fined three Italian air carriers for unfair commercial practices concerning the splitting up of the tariff and the elements of cost which are reimbursable in case of flight's cancellation. In particular, the Authority has considered unfair the inclusion of the fuel surcharge into the category “fees and airport charges” during the flights' booking process on-line, since it would be able to cause confusion for passengers with respect to fuel surcharge's reimbursement in case of flight's cancellation.

The Authority has further considered unfair the practice related to the acceptance by the passenger of the insurance policy during the flights' booking process on-line, given that this service was already pre-selected in the booking on-line system of the air carrier. As a consequence, consumers not interested in purchasing the service would be forced to an opt out.



➤ *Administrative Courts*

The Administrative Courts are (i) the Regional Administrative Court (namely, “*Tribunale Amministrativo Regionale*”) and (ii) the Supreme Administrative Court (namely, “*Consiglio di Stato*”). The Regional Administrative Court has jurisdiction upon ENAC’s and Italian Antitrust Authority’s decisions. The judgements issued by the Regional Administrative Court can be challenged before the Supreme Administrative Court.

➤ *Italian Civil Courts and Judges*

Italian Civil Courts and Judges have jurisdiction upon passengers’ claims. In particular, claims exceeding 5,000.00 Euro are brought before the Civil Courts and claims below 5,000.00 Euro (“small claims”) fall into the competence of the Judges of Peace (namely, “*Giudici di Pace*”). As far as the territorial competence, the Consumer Code provides the competence of the courts of passengers’ residence or domicile.



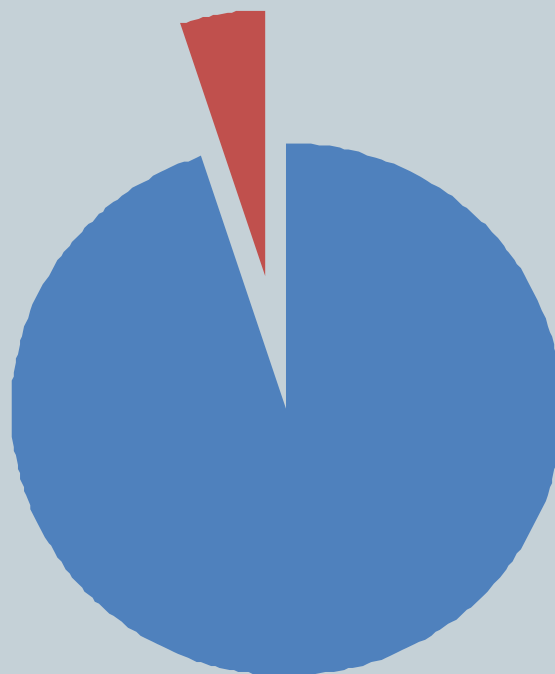
- *Italian experience on passengers' claims*

- Most of the passengers' claims fall into the competence of the Judges of Peace. Only passengers' claims exceeding 5,000.00 Euro are brought before the Civil Courts.
- The Judge of Peace generally (i) is not an expert in aviation matters, (ii) often applies the equity principle and (iii) is generally in favour of the consumers/passengers.

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- *Distribution of the small passengers' claims between the competence of the Judges of Peace and the Civil Courts*



Judges of Peace: 95%

Civil Courts: 5%

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- In the proceedings, air carriers usually meet serious difficulties to satisfy the burden of proof, especially in order to prove events of “force majeure” and aircraft technical faults. Sometimes the documentation provided by the air carrier (for example, technical log) is not considered valuable by the judge, as difficult to understand. For this reason, witnesses are often necessary, but expensive for air carriers.

- Often air carriers choose to settle claims with passengers for the following main reasons:
 - (i) attitude of the judges to admit indemnification of the so called “moral damages”;
 - (ii) heavy burden of proof;
 - (iii) high costs of defence before the courts of passengers’ residence or domicile.



- *Italian Experience*

- Judges of Peace have not the adequate experience to judge on aviation matter.
- Attitude to condemn air carriers giving indemnification for both article 7 of the EC Regulation no. 261/2004 and moral damages.
- Difficulties for air carrier in order to satisfy the burden of proof.
- High costs of defense compared to the amount of the claims.



- ***Impact of the judgement of the European Court of Justice on 19 November 2009 (Sturgeon)***

As everybody knows, by the recent judgement dated as of 19 November 2009 the ECJ:

- clarified the conditions whereby a delayed flight can be classified as “*cancelled flight*” within the meaning of EC Regulation no. 261/2004, underlining that a long delay is not sufficient to classify a flight as cancelled;
- extended the right to compensation provided by article 7 of EC Regulation no. 261/2004 to include passengers affected by a flight delay of at least three hours in arrival;
- stated that technical problems which come to light during maintenance of an aircraft or on account of failure to carry out such maintenance cannot constitute in themselves “*extraordinary circumstances*”.



➤ *Impact of the ECJ judgment on the Italian experience*

- In the Italian experience, Sturgeon judgment has not had a significant impact so far as the judges used to recognize the passengers' right to compensation in case of flight delay of three hours, or less, even before the ECJ judgment and, in any case, to indemnify passengers for both pecuniary and moral damages arising from flight delay on the basis of the provisions set forth by the Montreal Convention (which, as known, provides for higher limits of air carrier's liability) and/or on the basis of the general principles of law or equity provided by the Italian Civil Code and the Italian Navigation Code. Moreover, the "extraordinary circumstances" constituting an excusable delay were already restricted.



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As far as the moral damages, the Italian Supreme Court (Joint Sections) has recently offered a new interpretation of law concerning the indemnification of the so called “non pecuniary losses” (judgment no. 26972 dated as of November 11, 2008), stating, *inter alia*, that such damages (including the moral damages) cannot be automatically recognized, but have to be both substantial and proven.

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➤ *Measures taken by the Italian air carriers*

- In Italy, air carriers are represented by the Italian Air Carriers Association (namely “*Associazione Nazionale Vettori e Operatori del Trasporto Aereo, Assaereo*”). Assaereo exercises many functions in representation of the Italian air carries, following - *inter alia* - with ENAC the application of National, European and International regulation and monitoring changes and developments of the Italian case law in aviation industry.
- In July Assaereo has organized a conference where airlines, aviation authorities and consumers have discussed the passengers’ claims situation and common measures to be adopted.

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- Several proposals were considered of common interest:
 - (i) setting up of specialized councils for small passengers claims resolution
 - (ii) standard agreements approved by respective association of tour operators, handlers, travel agents and consumers, and standard conditions of transport;
 - (iii) the revision of the insurance policies' conditions.



- *Desirable amendments*

- Exclusion/revision of DBC rules for crisis situation.
- Exclusion of the concurrence of compensation provided by article 7 and indemnification for moral damages.
- Compensation must be proportional to the flight ticket's cost.
- Possibility to re-route passenger by alternative means of transport.

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- Clear distinction between cancellation and long delay and relevant consequences.
- Clarify conflict/concurrent application/limit of DBC and damages according to International and national rules.