

EC REGULATION NO. 261/2004 – ITALIAN EXPERIENCE

1. LEGISLATION

- I. EC Regulation 261/2004 on common rules on compensation and assistance to passengers in the event of denied boarding and cancellation or long delay of flights.
- II. Articles 82-100 of Italian Legislative Decree no. 206 dated as of 6 September 2005 (so called “*Consumer Code*”), repealing law no. 111/95 which implemented Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.
- III. Montreal Convention dated as of 28 May 1999 (“*Convention for the unification of certain rules for international carriage by air*”) ratified by the Italian Law no. 12 dated as of January 2004. Montreal Convention on the passenger transport entered into force in Italy on the 60th day (28 June 2004) after the 30th ratification, as implemented by the EC Regulation 889/2002 dated as of 13 May 2002.

2. INTRODUCTION

During the last years, the aviation sector has undergone a fast development, according to many elements such as “Low Cost” the rise of low cost companies. Unfortunately, laws and regulations do not change so fast as sometimes the context requires. Nowadays, indeed, the Italian and the European law is unsuitable to face today’s problems, as demonstrated by last April’s episode of the volcanic ashes.

The EC Regulation 261/2004 on denied boarding, long delays and flight cancellation is the best example of such inadequacy. Despite one of its purposes is to uniform the applicable law in the European Union States, the lack of any disposition coordinating the Regulation 261/2004 with domestic or international laws drives to a different regulation for equal cases.

3. THE ITALIAN EXPERIENCE ON THE EC REGULATION NO. 261/2004. THE STURGEON JUDGEMENT

The Italian situation is peculiar compared to those of the other European countries. In relation to the competence, the small claims fall into the competence of the Judge of Peace; only when a claim exceeds 5,000 Euro it is brought before the Civil Courts¹. Usually the Judge of Peace has not adequate experience to examine aviation cases, often applies the equity principle and tends to privilege the passenger/consumer. For the air carriers it is very difficult to satisfy the burden of proof, especially in order to prove events of “*force majeure*” or/and aircraft technical faults. Furthermore the Judge of Peace tends to recognize also the indemnification for moral damages, whereas in the UK a judge admits only the compensation set out in the article 7 of Regulation 261/2004. As a consequence, in Italy, the costs of passengers’ claims have fast increased due also to the high costs of defence before the Courts of passengers’ residence or domicile.

In relation to the Sturgeon judgement², its consequences have not been so severe as in other EU countries. *Sturgeon* has the merit to clarify the definition of cancellation - that is still under control by the European Court of Justice³ - specifying that a long delay cannot be classified as

¹ In Italy, the passengers’ claims are today brought for 95% before the Judges of Peace and for 5% before the Civil Courts.

² Cases C-402C-432/07, *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH (C-402/07)* and *Stefan Böck and Cornelia Lepuschitz v Air France SA (C-432/07)*, judgment of 19 November 2009.

³ Cases C-83/10 and C-294/10.

cancelled⁴. The most controversial part of the judgement is the extension of the right to compensation provided by article 7 of the Regulation 261/2004 to long delays cases. Moreover it underlines that technical problems which come to light during maintenance of an aircraft or an account of failure to carry out such maintenance cannot constitute in themselves “*extraordinary circumstances*”.

Consequently, it has provoked in other jurisdictions, not in Italy, a heavy rise of the costs of passengers’ claims and made more difficult the burden of proof. For the reasons we mentioned before, the Italian situation has not instead changed.

4. REVIEW OF THE EC REGULATION NO. 261/2004

The Regulation no. 261/2004 has demonstrated to be unfit in facing “*extraordinary situations*”, such as the volcanic ash occurred last April 2010. The lack of a disposition which set out rerouting with an alternative means of transport - where is possible - had only made the critical situation worse⁵. This event has confirmed the need of a deep review of the entire Regulation no. 261/2004.

In particular, the desirable amendments are:

- (i) exclusion/revision of DBC rules for crisis situations;
- (ii) exclusion of the concurrence of compensation provided by article 7 and indemnification for moral damages;
- (iii) compensation must be proportional to the flight ticket’s cost;

⁴ *Sturgeon*, as above, point 36: “*there is a cancellation where the delayed flight for which the booking was made is ‘rolled over’ onto another flight, that is to say, where the planning for the original flight is abandoned and the passengers from that flight join passengers on a flight which was also planned – but independently of the flight for which the passengers so transferred had made their bookings.*”.

⁵ For instance, for a flight from Rome to Milan, considering the train service between the two cities, rerouting a passenger on a train, under extraordinary circumstances, could be beneficial to the passenger and as well to the airline.

- (iv) possibility to re-route passenger by alternative means of transport;
- (v) clear distinction between cancellation and long delay and relevant consequences;
- (vi) clarify conflict/concurrent application/limit of DBC and damages according to international and national rules.