

DIARY DATES

**FOURTH INTERNATIONAL AIR LAW MOOT COURT
COMPETITION 2013**

9 – 12 March 2013

Abu Dhabi, United Arab Emirates

Laura Pierallini, Judge

BUCHAREST AIR TRANSPORT CONFERENCE 2013

6 June 2013

Bucharest, Romania

Laura Pierallini, Speaker

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**PLANNING AGREEMENT BETWEEN ENAC
AND ROME AIRPORT MANAGEMENT
COMPANY CHALLENGED BY THE ITALIAN
AIR CARRIERS ASSOCIATION AND THE
ITALIAN GROUND HANDLERS ASSOCIATION**

By Lorenzo Sperati

On 21 December 2012, the planning agreement between the Italian Civil Aviation Authority (ENAC) and *Società Aeroporti di Roma SpA* (AdR), which manages the two Rome airports (Ciampino and Fiumicino) was finally approved.

The planning agreement - which follows the other agreements already entered into between ENAC and the management companies of the Milan airports and Venice airport - was signed under the regulation introduced by Law 102/2009, governing the new fee system for the largest national airports (i.e., those dealing with more than 10 million passengers a year).

Despite the negotiations that led to the execution of the agreement, the new regulatory framework has failed to secure a widespread positive consensus. In particular, many of the air carriers involved believe that they will ultimately carry the burden of an unfair increase in the airports’ fees without the chance to negotiate or have their say.

On 26 February 2013, the Italian Air Carriers Association (Assaereo) and the Italian Ground Handlers Association have challenged the agreement before the Administrative Court of Rome, arguing that the criteria for determining the relevant fees are unfair and in breach of both Law 102/2009 and the applicable EU regulation (i.e. the EU Airport Charges Directive (2009/12/EC)).

The hearing for the discussion of the case is fixed for 18 December 2013.

NEW ITALIAN TAX ON AIRCRAFT “NOISE” (“IRESA”)

By Gianluigi Ascenzi

Italian Law 342/2000 established a new tax on aircraft “noise” that had to be actually applied by each Region of Italy with own regional law.

Until 2012, no Italian Region (except for Calabria Region) implemented such a tax regime. However, the Italian Court of State Auditors has recently required all Regions to comply. As a consequence, some of the major Regions



are issuing regional laws for implementation providing the payment of such tax starting from January 2013.

The amount of the tax is mainly based on weight and pollution class of each aircraft.

The tax has been subject to complaints raised by both the Italian air carriers and the Italian airports association (namely, Assaereo and Assoaeroporti).

In particular, air carriers and airports believe – *inter alia* – that the tax application is not uniform from region to region and furthermore it is not clear the correlation among the incomes which will be generated by such a tax and their use aimed at reducing the environmental impact caused by the aircraft.

**EUROPEAN COMMISSION’S PROPOSAL FOR
AMENDING REG. NO. 261/04**

By Caterina Pesci

On 13 March 2013, the European Commission published its proposal for amending the “controversial” Regulation No. 261/2004 in order to establish *common rules on compensation and assistance to passengers in the event of*

denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air. The proposal will be subject to the EU's ordinary legislative procedure, which is unlikely to be completed before 2015.

The Commission's proposal aims at offering a clarification and fine-tuning of the existing Regulation and introducing a bundle of new passenger's rights with the precise purpose of ensuring the effective application of air carriers' obligations. The proposal also contains a limited number of measures aimed at reducing the most costly aspects for air carriers arising by the application of the Regulation, also in order to take into account their financial capacities.

As expected, the Commission codifies the position taken by the European Court of Justice as to the passengers' right to compensate in case of long delays established in the *Sturgeon* judgement.

The innovative aspect is represented by the increase of the "time threshold" after which the right to compensation arises: five hours for intra-EU flights and other flights of 3.500 km or less, nine hours for flights between 3.500 and 6.000 km and twelve hours for flights of 6.000 km or more. Another amendment – which is going to be particularly welcomed following the significant burden imposed to air carriers during the 2010's closure of the airspace due to the Icelandic volcanic ash cloud – is the application of temporal and monetary limits to care obligations in case of delays and cancellations due to extraordinary circumstances. In those events, the proposal limits the right to accommodation to three nights at a maximum cost of 100 Euros per night with certain exemptions and conditions.

The proposal defines the term "extraordinary circumstances" in line with the European Court of Justice case law to mean "circumstances which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control" and provides a non-exhaustive list of circumstances to be regarded as "extraordinary circumstances" and of circumstances to be regarded as non-extraordinary.

The proposal also amends the right to re-routing by means of another air carrier or transport mode, adding that the other transport provider shall charge the contracting carrier with a price that does not go beyond the "average price paid by its own passengers for equivalent services in the last three months".

A further amendment involved the Regulation's provision on missed connecting flights. It is proposed to recognise a right to care to be provided by the air carrier operating the missed flight and, under certain circumstances, a right to compensation on the air carrier operating the delayed flight.

BEGINNING OF THE YEAR 2013 – MISCELLANEOUS MATERIAL OF INTEREST

1. INTERNATIONAL AIR LAW MOOT COURT IN ABU DHABI - EMISSIONS TRADE SCHEME

By Giuditta Gori

From 9-12 March 2013, the 4th International Air Law Moot Court was held in Abu Dhabi.

The event is yearly organized by the International Institute of Air and Space Law of Leiden University Law School in cooperation with the Sarin Legal Foundation from India. Thirteen teams participated from universities in Canada, China, India, Indonesia, Nepal, the Netherlands, Nigeria, Pakistan and Russia.

In the final round the China University of Political Science & Law and McGill University from Canada competed for first place, which was won by the Chinese team.

The 2013 competition case, which involved questions of public international law and international air law, has been focused on the OGC's Cap-and-Trade Regulation 101 on Emissions.

2. THE RECENT FOLKERTS CASE

By Marco Marchegiani

On 26 February 2013, the European Court of Justice ruled its judgement in the *Air France v Folkerts* Case C-11/11, which confirms and broadens the application of the *Sturgeon* decision.

In fact, the Court offered an extensive interpretation of Article 7 of Reg. No. 261/2004, stating that the right to compensation is also guaranteed to a passenger on directly connecting flights which are delayed on departure for a period below the "three hour threshold", but who arrives at the final destination with a longer delay (of three or more hours).

The decision was grounded on the same principle applied by the Court in the above recalled cases: to grant minimum rights to passengers facing with the inconveniences due to denied boarding or a cancelled or delayed flight.

In this specific case, the Court firstly remarks that, in light of the definition of "final destination" set forth in Art. 2(h) of the Regulation as "the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight", in cases of directly connecting flights, what is relevant for the right to compensation is only the delay beyond the scheduled time of arrival at the destination of the last flight taken by the passenger concerned.

The Court then goes on maintaining that an opposite approach would constitute an unjustified difference in treatment between passengers having the same kind of inconvenience.

Passengers on flights arriving at their final destinations three or more hours after the scheduled time would be treated differently depending on whether their first flight was delayed beyond the scheduled departure time by more than three hours or not, even though their inconvenience, linked to an irreversible loss of time, is identical.

Also with this recent decision the Court continues to go beyond the provisions of the Regulation "for the purposes of defining the term "delay" within the meaning of *Sturgeon* regarding compensation claims for delay pursuant to the regulation further to *Sturgeon*", even though the Regulation expressly states that a flight is not delayed if its actual departure time is not delayed in comparison to its scheduled departure time.

It also has to be noted that the relevant provision of the Regulation (Article 6) expressly defines term "delay", therefore there is no room for an analogous interpretation of Article 7 of Regulation in case of compensation claims for delay where no delay in departure occurred.

Furthermore, the Court seems to justify its argument affirming that "[...] the resulting financial consequences for air carriers cannot be considered disproportionate to the aim of ensuring a high level of protection for air passengers and [...] that the real extent of those consequences is likely to be mitigated in the light of three factors" in favour of the air carrier: the "extraordinary circumstances defence", the right to redress from any person who caused the delay and the 50% reduction of the amount of compensation for less than four hour delays.

The Court then finally concludes that in any case substantial negative economic consequences for air carriers are justified by the importance of the main objective of consumer protection.