DLA PIPER

THE AMBIT OF EC REGULATION 261/2004

Missed Flight Connections Outside The European Union

DLA Piper has been instructed to act on a number of cases for a non-EU carrier that test the scope of EC Regulation 261/2004 (**"Regulation"**) in respect of missed flight connections outside of the EU. The first of these cases has now been decided at County Court level, resulting in a successful win for the carrier.

This article explores the glimmer of hope the judgment brings to the industry in a step towards clarifying a complex question of the scope of the Regulation which has become shrouded in mystery following recent cases decided by the Court of Justice of the European Union (**"CJEU"**).

MISSED CONNECTIONS AND THE EU COMFORT ZONE

Upon the face of the Regulation, claims for delay under Article 6 do not give rise to an obligation to pay compensation to passengers. The text of the Regulation states that such compensation is triggered in the event of denied boarding and/or cancellation only, subject to specific circumstances.

A judgment handed down by the CJEU on 23 October 2012 (TUI Travel plc and Others -v- Civil Aviation Authority brought simultaneously and joined to Nelson and Others -v- Deutsche Lufthansa AG) (**"*TUI*"**), however, effectively rewrites the Regulation and awards Article 7 compensation to passengers who suffer long delays to flights of "*three hours or more*" upon arrival at their final destination.

Since *TUI*, the scope of the Regulation in respect of delayed flights departing the EU is now clearer, whilst the issue of missed connections is rather more opaque. It is generally accepted that, unless extraordinary circumstances exist, an EU carrier will be liable to pay compensation to passengers where it operates two directly connecting flights and a delay of less than three hours in duration to the first flight causes passengers to miss their connection departing the EU, and results in a delay of more than three hours upon arrival at their final destination.

The situation is less clear, however, where the carrier is a non-EU carrier and the connection is missed outside of the EU. In that situation, while an academic may argue that compensation would still be awardable on a straight interpretation of the *TUI* judgment, others question whether this was ever the intention behind the Regulation.

The most recent authority on missed flight connections is the Claimant friendly judgment handed down by the Grand Chamber of the CJEU on 26 February 2013, *Folkerts -v- Air France SA* (**"*Folkerts*"**). Mr and Mrs Folkerts flew with Air France, an EU carrier, from Germany to Paraguay via

Paris and São Paulo. Their first flight was delayed by two and a half hours meaning the Folkerts missed their onwards connections from Paris and São Palo, resulting in an overall delay of eleven hours to their arrival in Paraguay.

The CJEU ruled that compensation pursuant to Article 7 of the Regulation "*is payable to a passenger on directly connecting flights who has been delayed at departure … but has arrived at his final destination at least three hours later than the scheduled arrival time, given that the compensation in question is not conditional upon there having been delay at departure and, thus, upon the conditions set out in Article 6 having been met.*"

The *Folkerts* judgment therefore clarifies the position regarding compensation for delay where a passenger flies with an EU carrier and misses a connection on a flight departing the EU. However, it does not deal with the situation where a connection departing a non-EU state is missed later in the chain, as a result of a delay originating within the EU, whether the operating carrier is an EU carrier or a non-EU carrier.

TEST CASE RESULT

The issue was put before District Judge Birkby of the Sheffield County Court. A claim was brought by a passenger on behalf of herself and her son who flew with a non-EU carrier from Manchester to Dubai. They were delayed by eleven minutes on arrival at Dubai, with the result that they missed their onward connection to Sydney. The Claimants were delayed in their arrival in Sydney by nearly nine hours in total and claimed compensation pursuant to the Regulation in the sum of €600 each.

It was submitted on behalf of the carrier that the intentions behind the Regulation are reflected in Article 3 which states:

"*(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 … if the operating air carrier of the flight concerned is a Community carrier."

As such, it was submitted that the facts upon which *Folkerts* is based could be distinguished from the facts of the case in question as follows:

- the carrier involved in *Folkerts* was an EU carrier for the purposes of the Regulation (as per Article 2 and Article 3(1)(b)) unlike the carrier in question which was not an EU carrier; and
- the point at which the Claimants first missed their onwards connection *in Folkerts* was at an airport located within the EU (i.e. Paris), and not in a third country (as per Article 3(1)(a)).

District Judge Birkby held in favour of the carrier. In reaching his judgment, he focussed on two cases on which the Defendant carrier's submissions were premised.

First, the judgment of the Fourth Chamber of the then, European Court of Justice (**"ECJ"**) in the case of *Emirates Airlines – Direktion für Deutschland -v- Diether Schenkel* (**"*Schenkel*"**) held that the concept of "*flight*" within the meaning of the Regulation, and in the event of denied boarding, cancellation or long delays "*must be interpreted as consisting essentially in an air transport operation, being as it were a 'unit' of such transport, performed by an air carrier which fixes its itinerary.*" The ECJ added that, "*the fact that passengers make a single booking has no effect on the independent nature of the two flights.*"

In *Schenkel*, the ECJ therefore noted that "*flight*" is not a term defined in the Regulation in Article 2, headed "*Definitions*", nor is it defined in the other articles of the Regulation, and that "*'flight' must be interpreted in the light of the provisions of [the Regulation] as a whole and the objectives of that regulation.*"

As such, in the instant case, with regards to the objectives of the Regulation, it was submitted that in Recital 21, the drafters of the Regulation stated that sanctions (set out in the Regulation) "*should be effective, proportionate and dissuasive.*" It was further submitted that the application of the provisions of the Regulation to (a) non-EU carriers; and (b) in respect of flights which are not operated from airports located in a Member State, is neither effective nor proportionate.

Schenkel was cited in the High Court case and second key authority of *Sanghvi v Cathay Pacific Airways* (**"*Sanghvi*"**). This case concerned a passenger flying from London to Sydney via Hong Kong with a non-EU carrier. The passenger arrived late at Hong Kong thereby missing his connecting flight to Sydney and subsequently brought a claim for €600 compensation under the Regulation. It was the carrier's case that the Regulation was not applicable, as it is concerned only with passengers departing from an EU airport, but the delay in question resulted from a late departure from Hong Kong and not from the EU. In contrast, the Claimant submitted that the flights were not divisible and the Regulation applied because the journey had commenced in the UK. In finding for the carrier, and denying the Claimant compensation, Mrs Justice Proudman reiterated that the Regulation is only concerned with the individual flight components of any journey. Were it otherwise, a round-the-world ticket with various stopovers would fall within the scope of the Regulation.

District Judge Birkby agreed that the Regulation ceased to apply in Dubai. Thereafter, the connecting flight to Sydney operated separately and outside of the scope of the Regulation in accordance with Article 3(1)(b). The Judge relied on the judgments in *Schenkel* and *Sanghvi* which confirm that each of the flights in a connecting sequence should properly be regarded as separate flights, or "*units*."

THE FUTURE: THE NEED FOR A BINDING JUDGMENT

In the present case, permission to appeal has been granted and the Claimants have lodged their appeal notice. This begs the question of whether the appeal Judge will uphold the first instance decision. For now, the County Court judgment remains non-binding but persuasive in its reasoning.

Therefore, whilst the recent first instance decision is a promising step towards affording clarity to passengers and carriers alike, until a binding judgment is obtained at appeal level on the precise remit of the Regulation, the current state of limbo is bound to perpetuate.

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