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NEW LEGAL ROUTES FOR AIRLINES

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THE READJUSTMENT OF THE COMPETENCES OF THE COMMERCIAL COURTS AND ITS IMPACT ON AIRLINES

The entry into force of the Act 7/2002, of 27th July, amending the Act 6/1985, of 1st July, of the Judicial Power changes the competence of the Commercial Courts establishing that the First Instance Court will now deal with passenger claims. This article will discuss the implications of this decision for the airlines.

Let us begin this article by pointing out that the Commercial Courts were created in 2003 with the purpose of setting up a specialized jurisdiction to deal with commercial issues that included, among others, air transport claims. According to the legislator then, this new jurisdictional order would improve the quality of the system, while favouring a more rational distribution of cases among the Spanish courts. However, it has now been decided to retrace the steps, withdrawing some of the competences granted to the Commercial Courts, such as the legislation on the defence of consumers (including passenger claims made under Regulation (EC) 261/2004[1] and the Montreal Convention of 1999[2]) and the collective actions regarding general conditions of contract, amid others.

For the sake of clarity and honouring Simon Sinek, we must start with the why, and according to the preamble of the Act 7/2022, this measure attempts not only to reduce the high workload of the Commercial Courts, but also to improve the specialization in the judicial decision-making (mainly in bankruptcy matters, certainly very relevant these days), which should not be hindered by the collapse of the high litigation derived from passenger claims.

Likewise, before continuing, it should be highlighted the legislative technique used, somehow striking, since the regulation has been made by exception to the general jurisdiction that the Commercial Courts have on transport matters. The Act 7/2022 lays down that the latter will not be competent to hear passenger disputes, thus inferring, and per contra, that such matters fall under the jurisdiction of the First Instance Courts. We have no doubts that it would have been simpler to make the regulation in a positive manner instead of by exception.

Secondly, it should also be noted that the rule provides a transitional regime under which claims filed before the entry into force of the Act 7/2022, and pending acceptance, will continue to be handled by the Commercial Courts. This decision, which we could understand from a practical point of view, will lead to a significant delay in the effectiveness of the measure, due to the long-time lag existing between the date of filing the claim and its acceptance (and the thousands of cases that, therefore, are pending). Also in this regard, it would have been easier to design other measures to avoid this unwanted situation, such as a deferred entry into force for the new regime.

The above will lead to an overlapping of competences in the Commercial and First Instance Courts, which raises many doubts as to its usefulness and effects, such as: what validity will be given by the First Instance Courts to the judgments issued by the Commercial ones during the past 20 years?, are we facing a new beginning of the configuration of the limits of Regulation (EC) 261/2004 and the Montreal Convention of 1999?, or will we see a continuous line of judicial decisions?, will there be ad-hoc training for the new judges so that they are prepared for the avalanche of new cases and the different and countless vicissitudes they will need to deal with?

The above even though the two different jurisdictional orders go hand in hand, but without forgetting the great diversity of interpretations that are currently made by the Commercial Courts, in terms of the substance (the scope of the rules) and the form (the required

[1] Regulation (EC) No 261/2004 of the European Parliament And Of The Council of 11th February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.
[2] Convention for the unification of certain rules for international carriage by air, Montreal, 28th May 1999.

proof) of this type of claims and, therefore, with the legitimate doubt of how this change of jurisdiction will affect the resolution of the passenger claims.

We must also mention that the new regime adds another factor of instability, as passengers will now be able to file their claims in their domiciles' First Instance Courts, which increases the potential number of court locations up to 140. This will not just increase the cost of defense for airlines (travel and staff costs will increase), but also will probably excite the interest of claimants (or claim platforms) to disperse disputes to find jurisdictions that are more "favorable" to their interests.

Additionally, in such a technical world as aeronautics, rather than more, the ideal is having fewer and more specialized courts, which would make more technical decisions, providing safety to the legal system. In fact, in our opinion, the legislator has lost an opportunity to follow the example of the Superior Court of Justice of Madrid which, under article 98.2 of the Act of the Judicial Power, designated the Commercial Court No. 18 Bis as the only specialized Court for transport matters heard in the capital.

Furthermore, the Act 7/2002 does not mention which court will be responsible for the enforcement of the decisions ruled by the Spanish Aviation Safety Agency (AESA) in its new ADR system[3] upon its entry into force, which was supposed to belong to the Commercial Courts. Neither does it clarify which jurisdiction will deal with appeals that airlines may file against these resolutions, an issue that was pending of clarification in Order TMA 201/2022. In this manner, two additional elements of legal uncertainty have been added to this type of aviation matters.

In accordance with all the above, it is worth reflecting on and criticizing how aviation law is being regulated lately. Good examples of this are the recent ADR procedure, which clearly leaves room for improvement in its form (although its application remains to be seen), the new and irrational sanctioning regime of the Air Safety Act, and now this change in the judicial bodies in charge of resolving the passenger claims.

From PionAirLaw we believe that the airline industry, which contributes significantly to the 12,5% of GDP that tourism generates in Spain, and produces almost 50.000 direct jobs, deserves a more rational, thoughtful, and, certainly, more consensual legislative measures.

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[3] Recall that Order TMA/201/2022, of 14th March, which regulates the procedure for alternative dispute resolution of air transport users, introduces into our system an Alternative Dispute Resolution procedure (ADR). For more information see this article written by the PionAirLaw team a few months ago https://www.linkedin.com/posts/diego-olmedo-de-c%C3%A1ceres_paper-on-new-adr-system-in-spain-for-pax-activity-6925467251231895552-6vAB?utm_source=share&utm_medium=member_desktop