CONFLICT-OF-LAW IN RELATION TO PASSENGER RIGHTS: REGULATION (EC) 261/2004 OR THIRD COUNTRY LEGISLATION?

The international nature of the aviation sector, particularly in the transport of passengers, presents, sometimes, a significant challenge for airlines in determining the applicable law with different legislations overlapping in a single scenario.

A brief historical overview shows that after an initial normative development based on bilateral agreements in the early XX century, passenger rights were regulated through multilateral conventions, being the most relevant in this regard the Warsaw Convention of 1929, still in force, and the Montreal Convention of 1999 (MC)[1].

Alongside this international development, legislative efforts have also been made at regional and state levels to protect passengers in cases of breach of the transport contract, yielding different results. In this context, within the European scope, we must inevitably make reference to Regulation (EC) 261/2004[2].

However, the European Union is not the sole international entity addressing passenger rights. As we will delve into later, there are other similar regulations which sometimes overlap, resulting in imbalances and unintended conflicts between the passengers and the air carriers' rights.

In this newsletter we will explore the challenge faced by airlines in determining and recognizing the rights of their passengers. As we will analyse, the attempt of the respective legislators to stablish limits on the application of the regulations is not free of uncertainties, requiring further development to avoid legal ambiguity, allow air carriers an operation with enhanced guarantees, and ensure an adequate protection of passenger rights.

SCOPE OF APPLICATION OF REGULATION (EC) 261/2004

From 1980[3] to 2008[4], the prevailing community-level standards for determining the applicable law for passengers was the determination of the consumer's place of residence. However, this standard was not universally applicable to air transport contracts, as it required that the passenger's residence was aligned with the point of departure or arrival of the flight[5].

The pursuit of this alignment between the passenger's place of residence (*forum domicilii*) and the flight's origin or destination sought to enhance legal certainty for the air carrier, considering that the latter operated in those countries and would therefore be knowledgeable about the applicable legislation.

The situation described above was complemented by the publication of Regulation (EC) 261/2004, which application is conditioned by two factors: on the one hand, by the point of origin or destination of the flight -i.e., within the community territory or originating from a third country-; and on the other, by the European or non-European condition of the carrier –i.e., whether or not it has a valid operating license issued by a Member State-. This significantly restricts the application of the Regulation in the case of the latter and, incidentally, generates an imbalance to the detriment of European carriers, particularly concerning competitiveness.

In this regard, Regulation (EC) 261/2004 establishes that its regime will apply to both European and non-European operators for all passengers departing from an airport within the territory of a Member State of the European Union. Furthermore, in the case of European carriers, its application extends to flights originating in a third country, unless that country's legislation recognizes "*benefits or compensation and assistance*[6]" for passengers.

Consequently, in operations on the same route originating from a non-European country, European carriers are required to assume the costs of the obligations imposed by Regulation (EC) 261/2004 along with the legislation existing in other countries related to the route, while non-community carriers will be exempt from the community norm.

[1] The Montreal Convention is applicable in Europe in accordance with Regulation (EC) n.º 2027/97 of 9th October 1997 on the liability of airlines in the event of an accident and Regulation (EC) n.º 889/2002 of the European Parliament and of the Council, of 13th May, 2002.
[2] Regulation (EC) No 261/2004, of the European Parliament and of the Council, of 11th February 2004, laying down common rules on compensation and assistance to air passengers in the event of denied boarding and cancellation or long delay of flights (hereinafter, "Regulation (EC) 261/2004).
[3] In 1980, the Rome Convention on the law applicable to contractual obligations was adopted.
[4] In 2008, Regulation (EC) n.º 593/2008 of the European Parliament and of the Council of 17th June 2008 on the law applicable to contractual obligations (Rome I) was adopted.
[5] Article 5.2 of the Rome I Regulation.
[6] Article 3.1.b) of Regulation (EC) 261/2004.

LACK OF SPECIFICITY ON THE EXCLUSION OF REGULATION (EC) 261/2004

In addition to the evident imbalance that this limitation creates between air carriers, the application of this standard is not without problems derived from its limited normative development.

In fact, this has led to the current lack of a clear standard about which benefits, compensations, and assistance provided by the legislation of the third country of origin imply the non-application of Regulation (EC) 261/2004. This hinders compliance with the applicable legislation –whether European or from the third country–. Likewise, the lack of uniformity is noticeable concerning the amount of compensation and the assistance rights that must be recognized to the passenger in the third country.

The above despite the intervention of the Court of Justice of the European Union (CJEU) and the European Commission, which have clarified –although with room for improvement– the standard for applying Regulation (EC) 261/2004 and, consequently, the characteristics that a certain legislation must have to proceed with the exclusion of the European Regulation.

According to the CJEU, the simple recognition of benefits and compensations in the legislation of a third country could lead to the protection of the passenger being governed by the legislation of that country and not by the European, even without the need for these rights to be effectively used, as long as they meet the purpose pursued by Regulation (EC) 261/2004[7]. The CJEU has also indicated that the terms "benefits or compensation and assistance" refer to different concepts that do not need to occur simultaneously. Therefore, the simple integration of any of these concepts, combined with the right to assistance, could imply the exclusion of European legislation[8].

This raises the following question: what should be understood by the concepts "benefits," "compensation," or "assistance" mentioned in Article 3 of Regulation (EC) 261/2004, when referring to legislations of third countries? We will try to answer this question by taking the European framework as a reference.

Regarding the first term –"benefits"– although the Commission exemplifies that travel vouchers are integrated within this concept[9], it is unusual for any legislation to determine exclusively these benefits without considering them as an alternative method to compensation, as recognized by Regulation (EC) 261/2004 itself[10].

Secondly, the term "compensation" we opine that it should have an economic character; otherwise, they would be benefits and, as for its quantification, the Commission established that it could vary from what is stipulated by European legislation[11]. This seems to be a suitable standard and compatible in comparative law for determining applicable legislation in the event of an air transport incidence. However, as we will see further, this is not an easy task.

Thirdly, regarding the "assistance," the Commission understands that it could be the same assistance rights recognized in European legislation[12]. However, it does not clarify whether all these rights (food and refreshment, accommodation, alternative transport, and communication) need to concur, or just the existence of any of them would be enough to establish the inapplicability of the European legislation. The

latter option should be adopted, as the contrary would grant to passenger the rights recognized in both legislations, leading to an overprotection and imbalance against the interests of air carriers.

As we anticipated earlier, various legislations have been approved that recognize the right to compensation for passengers, such as Canada's *Air Passenger Protection Regulations*[13], *Resolution n.º 400 of the Brazilian National Civil Aviation Agency, or the Decision 619 of the Andean Community*[15], among others; we can even refer to the bill currently under development in the United States of America.

To add further complexity to the matter, we must point out the problem arising from the fact that the regulations contained in each of the mentioned legislations differ from each other. This makes the homogenization and determination of the benefits, compensation, or assistance to be granted in each circumstance, even more difficult.

The complexity of the issue lies not only in determining the applicable law, but also in the strategies followed by some claim farms who, as is well known, have very professionalized methods that have little or nothing to do with passengers' rights.

We refer in particular, in this newsletter, to the filing of multiple lawsuits for the same facts in different jurisdictions, leading to an unjust enrichment for the passenger through the perception of several compensations (one for each legal regime that applies) and to an excessive increase in defence costs for the airlines.

Regarding the position of the Spanish courts, althoug our experience[16] indicates that courts are beginning to state the exclusion of the

[7] Whereas 1 of Regulation (EC) 261/2004.
[8] Paragraph 27 CJEU Judgment 17th September 2015 (Case C-257/14).
[9] IInterpretative Guidelines of Regulation (EC) 261/2004 (Official Journal of the EU, on 15th June 2016).
[10] Article 7.3 of Regulation (EC) 261/2004.
[11] Interpretative Guidelines of Regulation (EC) 261/2004 (Official Journal of the EU, on 15th June 2016).
[12] Paragraph 2.1.3 Interpretative Guidelines of Regulation (EC) 261/2004 (Official Journal of the EU, on 15th June 2016).
[13] *Air Passenger Protection Regulations* (SOR/2019-150), in force since 2019.
[14] The Resolution No. 400 of the Brazilian National Civil Aviation Agency (ANAC 400) dated on 13rd December 2016. For informational purposes, it should be noted that ANAC 400 sets a quantification of compensation higher than the one indicated in the community legislation, stated in Special Drawing Rights, a currency to which, to provide higher international uniformity, it would have been advisable for all legislations to refer.
[15] Decision 619 of the Andean Community dated on 15th July 2005. As an example, we can cite a clear distinction between Andean legislation and Regulation (EC) 261/2004, as while the former recognizes a compensation right in case of delay after six hours, European legislation sets the limit at three hours of flight delay for granting such compensation

Regulation (EC) 261/2004 in cases where there is an alternative application of third country legislation, we continue to encounter adverse and profoundly damaging resolutions for the reasons previously expressed.

However, we trust that we are at the beginning of the creation of a case law line that recognizes, without any ambiguity, the protectio of airlines against these kinds of unfair situations and strategies, where passengers and platforms seek the tortious advantage of the existence of two incompatible legislations that should never be applied simultaneously. We await to see if this issue is clarified by the European institutions to provide greater security to our system.

CONCLUSIONS

Considering the above, it is clear that European carriers should not be compelled to apply European legislation to flights departing from a third country to the European Union. This approach will avoid scenarios of unfair enrichment for passengers and over costs for airlines, provided that the legislation of the third countries establish a regulation similar to the Regulation (EC) 261/2004.

Furthermore, there is a need to define more clearly, within the context of the case law, the legal criteria and requirements that should be included in non-European legislations, as it seems impossible to expect a modification of the European legislation that would resolve this issue.

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[16] For instance, we can refer to the ruling of the Provincial Court of Madrid, Section 28, in the appeal file number 658/168, where we achieved the non-application of the Community legislation in favour of Andean legislation, among many others.