

Corporate/Commercial Bulletin

March 2010

Fasken Martineau DuMoulin LLP

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- New rules in France for carriers, hotelkeepers and travel agencies

The Rome Convention 1952 on Damage Caused by Aircraft Updated

Alex Ferrari, London

The International Civil Aviation Organization (ICAO) Special Group, established to modernise the Rome Convention 1952 has produced two draft conventions; namely the *Convention on Compensation for Damage Caused by Aircraft to Third Parties, in the case of unlawful interference* (known as the *Unlawful Interference Convention*), and the *Convention on Compensation for Damage Caused by Aircraft to Third Parties* (known as the *General Risks Convention*).

- claims will be less complicated as the claimant will not need to prove that the operator was at fault, thereby avoiding complex evidentiary arguments on liability; and
- the operator will be aware of its maximum liability under the convention and arrange its insurance accordingly.

As regards the *General Risks Convention*, this follows the same format as the *Montreal Convention* in that the operator is subject to strict liability for damage up to a limit and thereafter it is only liable in so far as it is negligent. No supplementary compensation scheme is envisaged for this convention.

Accordingly, the operators are potentially liable for all the damage caused and it is extremely unlikely that they would be able to obtain sufficient insurance to cover their potential exposure under the convention. However, this convention has received little interest as domestic law

Overview of the draft conventions

The *Unlawful Interference Convention* (which encompasses acts of terrorism) caps the operator's liability in return for strict liability. Further, claims in excess of the cap are to be paid from a compensation fund contributed to by the operators, through mandatory payments by passengers and freight forwarders. The introduction of strict liability and the cap should mean that:

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in this area is already well established with operators' liability being limited to insurable levels. It is, therefore, unlikely that this convention will be ratified by many States, if it actually progresses to the ratification stage.

Unlawful Interference Convention

This convention applies to damage to third parties which occurs in the territory of a State party caused by an aircraft in flight as a result of an act of unlawful interference when the operator is based in another State, whether or not a party to the convention (article 2, para 1). The convention also applies, in certain circumstances, to damage to third parties in a non-State party where the operator causing the damage was from a State party.

The convention provides that the operator is strictly liable for the damage sustained by the third party caused by an aircraft in flight; the third party does not need to prove the airline was at fault (article 3). The third party's exclusive remedy is against the airline (article 27), in addition to the party causing the unlawful interference. However, the airline's liability is capped according to the weight of the aircraft – SDR 700 million for a wide-bodied aircraft¹ – and which can only be exceeded in exceptional circumstances (article 24). Damages in excess of the cap would be paid through the Supplementary Compensation Mechanism (article 4) funded by mandatory payments by passengers and freight forwarders (article 12) collected by airlines and rendered to the scheme. The maximum amount of compensation under the scheme is currently set at SDR 3 billion (article 19).

General Risks Convention

This convention applies to damage to third parties occurring in the territory of a State party caused by an aircraft in flight, other than as a

result of an act of unlawful interference, when the operator is based in another State party.

The operator is strictly liable up to a threshold tentatively set at SDR 250,000 to SDR 500,000 per claimant (article 3). The operator is also liable for all damage in excess of this limit unless it can prove that such damage was not due to its negligence or that it was solely due to the negligence of another party. There is no cap on the liability of the operator – the liability limit relates to each individual claim not to the event – and neither is there any compensatory scheme under this convention to reduce the financial impact on operators.

Current position

The final draft of these conventions is still to be agreed by the Legal Committee before they will go before the ICAO Council for consideration and approval before a diplomatic conference to approve the language in the conventions. After this it would be for the individual States to ratify the conventions, although it is still to be decided how many States need to ratify them before they would come into force.

Further, a working group has been set up to consider how to invest the compensation fund acquired under the *Unlawful Interference Convention* and is looking at other similar investment fund holding entities such as a superannuation fund in Canada with this in mind.

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¹ Which is in line with the operator's compulsory insurance obligations under article 7 EU Regulation No 785/2004.

New Rules for France's Travel Industry

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France is one of the most popular vacation destinations in the world and tourism accounts for 6.4% of its GIP according to the latest government figures. Tourists and business travellers visiting the Hexagon will notice, however, that its tourism infrastructure is wearing thin at the seams. After striving to improve how foreigners are received in France, the government started work on reforming the tourism sector, beginning with a clean-up of institutions and regulations. One of the main goals of this reform is to give those involved in tourism, including travel agents and other travel operators and hotelkeepers, the means of increasing their competitiveness faced with foreign competition.

1. The Legislative Background

True to French civil law tradition, the body of legislation governing the travel industry is found in the *Code du tourisme*, which was developed between 2000 and 2006.

French law also takes into account the directives of the European Community, including the Directive of 13 June 1990 on package travel, package holidays and package tours, intended to eliminate certain distortions in competition and standardize the rules governing consumer protection, and the "Services" Directive of December 12, 2006, the purpose of which is to reduce obstacles to the freedom of establishment and the free movement of services.

Various international conventions, including conventions on the carriage of passengers which limit the liability of air, rail and maritime carriers and the *Convention on the Liability of Hotel-keepers concerning the Property of their Guests*, complete the French legislative context.

Lastly, more general legislative and regulatory provisions, such as those found in the *Civil Code* and the *Code de la consommation*, also apply.

2. The Institutional Context

Without going into details about the administrative organization, the structures which existed prior to the reform were many and varied: the *Direction du tourisme*, *ODIT-France (Observation, Développement et Ingénierie Touristique)*, *Maison de la France*, *Commission départementale de l'action touristique* and prefects.

The reform brings simplicity and transparency. The role of developing and monitoring tourist activity is essentially entrusted to the new *Agence de développement touristique de la France "Atout France"*, which will act through two commissions.

The *Commission de l'immatriculation* is in charge of the registration and supervision of agents and other travel operators. Its composition is subject to rules of impartiality and independence, a major innovation when one considers that, previously, a commission made up of members of the profession was involved in the process of granting licences to newcomers to the industry.

The *Commission de l'hébergement touristique marchand* is responsible for developing and monitoring the classification of hotels and other types of accommodation. Industry professionals are represented on this commission which makes sense given that its mission is prescriptive, whereas the first commission has the authority to register and monitor industry participants.

3. Changes to the Code du Tourisme

3.1. Sale and Organization of Trips

Only one category of operators with a broadened field of activity

France is now compliant with the principle of the “Services” Directive according to which service providers should not, subject to certain exceptions, be compelled to carry on one specific activity exclusively. This despecialization of travel agencies’ activities should allow them to adapt to the current position, and in particular the arrival of on-line businesses. The legislator went along with this measure by changing the rules relating to commercial leases to allow travel agencies to add related activities to their principal activity, which they were not permitted to do previously.

In conjunction, and also in the spirit of the “Services” Directive, the circle of service providers and suppliers of travel related products is no longer limited to travel agents. Other operators, such as conference organizers, can henceforth join it by submitting to the corresponding formalities and obligations.

A unified registration procedure with less stringent prerequisites

All operators are now subject to a single registration system, which replaces the four separate authorizations previously in place. Registration applications must now be reviewed within a prescribed time period. These procedural improvements, in addition to the new impartiality requirement for the Commission in charge of registration, are welcome and will no doubt help operators forget that registration is no longer free, although it only has to be renewed every three years upon payment of a registration fee capped at 150 €

Certain operators are exempt from the registration requirement; this is the case for air and rail carriers issuing tickets under certain conditions set out in the law.

Some substantial conditions which have to be met to be allowed to register, such as those relating to professional qualifications, have become less onerous. On the other hand, requirements regarding insurance and the providing of financial security, which are neither unreasonable nor disproportionate given the Stated goals remain, on the overall, unchanged.

These registration provisions thus now comply with EC law regarding the free providing of services. Finally, transitory rules apply to holders of permits issued under the former rules.

Harmonized liability for travel packages

The legislator had to juggle with two concepts often perceived as irreconcilable: the competitive position of French companies and consumer protection.

As a result of the France’s decision to give precedence to consumer protection when the 1990 Directive was incorporated into French law, a travel agent was caught between its unlimited liability for damage suffered by consumers due to non-performance or faulty performance of the services included in the package – regardless whether it was the organizer or retailer of the package – and the limitations of liability which could be set up against it by the trading partner responsible for the breach under the above-mentioned international conventions. Henceforth, these limitations of liability can be used as a defence against consumers.

Other adjustments regarding travel operators

The *Code du tourisme* now covers a product which was developed over the years without any legal framework: the “gift set” containing a coupon entitling the person to a trip, accommodation or other related services. The issuer of such coupons is considered a travel operator required to register and, accordingly, to meet the related requirements. On the other hand, the distributor of gift sets, who is the party in direct contact with the final consumer, is not bound by these requirements, which obviously will not please consumer rights advocates.

Lastly, the reform corrects an anomaly which subjected virtual (on-line) agents and physical agents (those with a storefront) to different rules. Under the provisions of the *Code de la consommation* regarding “distance” contracts, that is contracts formed by parties in different locations, the agents were strictly liable to consumers for non-performance of the contracts, whereas storefront agents were not subject to strict liability for contracts involving only “dry” carriage services. The *Code du tourisme* rectifies this situation in favour, once again, of travel professionals, who all henceforth benefit from the regime under the *Code du tourisme* which excludes strict liability for “non-package” trips, whether a “distance” contract is involved or not.

3.2. Hotel classification

The effects of the changes made in 2009 in terms of hotel classification, which changes were part of the government’s goal of levelling the playing field for French hotels and attracting international business clients, will no doubt be modest. The rules on hotel classification have certainly been cleaned up on paper, but they do not contain any measure involving the physical renovation of hotel premises whereas the general consensus is that the tourist

infrastructure no longer corresponds to the standards to which a foreign clientele have become accustomed.

The reform has resulted in new hotel classification standards: the number of categories of hotels has been reduced from six to five, with a new designation – from one to five stars – more consistent with international standards. The criteria regarding quality, which cover equipment, customer service, accessibility and sustainable development, have been upgraded, although some believe that the upgrading did not go far enough. The *Commission de l’hébergement touristique marchand*, in charge of developing this classification, is also responsible for reviewing it at least every five years.

The classification procedure, which is still optional, has also been revised: it is up to hotelkeepers to have an inspection certificate issued by a certified body and file it along with the prescribed form. The prefect then reviews the file within one month and the classification decision is published on the *Atout France* web site.

The classification is henceforth limited to five years and establishments holding a classification issued under the former provisions have until July 21, 2012 to ask for new stars.

The reform of the *Code du tourisme* is neither a revolution nor a Godsend for tourism professionals, who will have to take more voluntary action and come up with the human and financial resources they need if they wish their industry to be able to withstand foreign competition.

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