The Air Law Firm

eNewsletter

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Contents

Leasing Update *- English Court upholds tough terms of aircraft engine lease……………………..page 2*

Baggage Claims *– what constitutes a notice of complaint ……….page 3*

EC261 *– Exporting the European Laws to Third Countries…..page 5*

Aircraft Leasing – Courts will uphold even the ‘toughest’ of contracts

English Courts have consistently been slow to interfere with a commercial contract, even where one party has struck a bad bargain. The recent case of *Aquila WSA Aviation Opportunities II Ltd v Onur Air Tasimacilik AS* [2018] EWHC 519 (Comm) did not depart from this long-standing position. However, it serves as a timely reminder to lessees of the necessity for a well-drafted lease and the importance of pre-acceptance inspections.

On 11 September 2015, the parties entered into an agreement for the short term lease of an aircraft engine. The lease was intended to provide cover whilst another of Onur’s engines underwent a shop visit. Three months into the lease, a major failure occurred causing an aircraft to make an emergency landing with 186 passengers and 10 crew onboard. The engine was removed and no further use was made of the engine. Under the terms of the lease, Onur was responsible for insurance and maintenance, as well as placing the engine at Onur’s risk during the term of the lease.

Aquila issued proceedings for sums due under the lease. Despite being on risk for the engine, Onur defended the claim on the basis that the engine failure was caused by a latent defect. In particular, Onur contested that the defect in question had been the subject of numerous reports including an Airworthiness Directive and a Service Bulletin issued by the engine manufacturer. Although, the Airworthiness Directive did not require immediate action, it was Onur’s case that the engine was a “*ticking time bomb*” and that Aquila knew or ought to have known of the defect.

In examining the merits of the claim, the court focused on the following contractual provisions of the lease:

- The engine was leased on an ‘as is, where is’ basis.
- Aquila gave no warranties, guarantees, nor did it make any representations in respect of the engine.
- The execution and delivery of an Acceptance Certificate was a condition precedent to delivery of the engine.
- The Acceptance Certificate stated that:
    - acceptance of the engine was unconditional;
    - the engine had been insepcted;
    - the Acceptance Certificate was conclusive evidence that the engine satisfied the delivery conditions in the lease; and
    - Onur had no rights or claims against Aquilia in respect of the engine’s delivery condition.
- The lease had a boilerplate entire agreement clause.

Onur adavanced a defence based on 3 grounds:

1. The condition of the engine on delivery [with the latent defect] amounted to a breach of contract;
2. Onur was entitled to rescind the lease and/or the Acceptance Certificate owing to Aquila misrepresenting the condition of the engine; and
3. The condition of the engine on delivery amounted to a total failure of consideration as Onur had been denied the benefit of the engine.

The Court acknowledged that this was a "*tough contract*" for Onur. Nevertheless, following a long line of authorities, the court declined to interfere with a contract simply because one party had struck a bad bargain and things had not worked out well for them. The fact that the engine was delivered on an 'as is, where is' basis and all warranties and guarantees were excluded was "*staringly emphatic*". Onur had inspected the engine and was said to be satisfied that the engine met the conditions of the lease. Onur had signed the Acceptance Certificate, amounting to unconditional acceptance of the engine. In doing, Onur had also waived its rights to make a claim against Aquila in respect of any and all matters relating to the delivery condition.

Despite it being a "*tough contract*", the Court concluded that Onur should have been more diligent in its inspection to ensure it was in a sastifactory condition, prior to executing the Acceptance Certificate.

The Courts have consistently been slow to correct a bad bargain and this judgment does not depart from this established principle. However, the decision does serve as a timely reminder to parties to carefully consider the terms of any lease, be it an aircraft or engine, and diligently manage any pre-delivery insepctions to ensure the item is in a satisfactory conditions.

The Air Law Firm has a wealth of knowledge in drafting and negoitating aircraft and engine leases for both lessors and lessees. For further information on our leasing practice, please contact Aoife O'Sullivan, Diego Garrigues, Chris Smith or your usual Air Law Firm contact.

Baggage Claims – What Constitutes 'Notice of Complaint'?

Both Courts and airlines have long been divided as to whether a Property Irregularity or other verbal notification constitutes written notice of complaint within the meaning of the Montreal Convention 1999.

In April 2018, this issue came before the Court of Justice of the European Union. Case C-258/16 *Finnair Oyj v Keskinäinen Vakuutusyhtiö Fenna* concerned a subrogated baggage claim from an insurance company who had paid out a baggage claim under a personal travel insurance policy.

Several of our lawyers are listed among the most respected aviation practitioners in ***Chambers, Legal 500, Who's Who Legal and The Euromoney Expert Guides.***

"Aoife O'Sullivan has a vast knowledge of the aviation sector."

The Legal 500 UK

John Korzeniowski "always responds promptly to client's requests, he is extremely professional and knowledgeable in International Aviation Law, very proficient and Courteous".

The International Who's Who of Aviation Lawyers

"Chris Smith has an excellent grasp of the law and is attuned to the client's commercial sensitivities."

Chambers UK

"Chris Smith knows aviation law inside out, and is commercially minded"

The Legal 500 UK

A passenger had travelled from Malaga (Spain) to Helsinki (Finland). On arrival she found several items were missing from her checked baggage. The same day, the passenger notified Finnair, by telephone, of the irregularity. The representative entered the information into the Finnair electronic information system. 3 days later, the passenger again called Finnair to obtain a certificate for her insurance company.

The insurance company, Fenna, duly compensated the passenger and brought a subrogated against Finnair, seeking reimbursement for its outlay.

Finnair defended the claim on the basis that the passenger had not filed a written notice of complaint within 7 days following receipt of the baggage.

Article 31 of the Convention provides that:

"1. Receipt by the person entitled to delivery of checked baggage or cargo without complaint is prima facie evidence that the same has been delivered in good condition and in accordance with the document of

carriage or with the record preserved by the other means referred to in paragraph 2 of Article 3 and paragraph 2 of Article 4.

2. In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

3. Every complaint must be made in writing and given or dispatched within the times aforesaid.

4. If no complaint is made within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on its part."

The District Court and the Appellate Court reached differing decision. Therefore, the Supreme decided to refer the question to the CJEU of whether or not notice of complaint had been given by virtue of the passenger's telephone complaint having been recorded in Finnair's system.

The CJEU confirmed that **written notice** must be given by the passenger, within the stipulated time frame, to avoid the claim being extinguished.

The CJEU further found that a telephone complaint, recorded by Finnair staff in its information system, fulfilled the requirement of being in a written form. The entry into an information system was committing an oral statement to writing. Where necessary, the passenger can also check the accuracy of the complaint lodged and if required, file a further written notice amending, supplementing or replacing it, provided that any additional documentation is received within the time limits stipulated in Article 31.

This decision will make it difficult for air carriers to maintain that a Property Irregularity Report does not constitute written notice for the purposes of Article 31. On the basis that a large majority of irregularities are reported at the airport, reliance on this defence could diminish over time.

The Air Law Firm acts for a number airline's and insurance companies, providing baggage claims handling solutions. For further information on this article or our baggage claims service, please contact John Korzeniowski or Chris Smith.

EC 261 – Exporting the European Laws to Third Countries

Passengers delayed on connecting flights outside the EU can rely on the provisions of EC Regulation 261/2004 the CJEU has confirmed. Its judgment in the case C-537/17 *Wegener v Royal Air Maroc SA* means that scope of the Regulation now extends to flight disruption occurring at connecting airports located outside the EU.

Wegener concerns a passenger's journey from Berlin to Agadir, via Casablanca. Both sectors were operated by Royal Air Maroc with the intermediary stop in Casablanca requiring the passenger to change aircraft. The passenger was through-checked at Berlin, all the way to Agadir. The flight from Berlin to Casablanca was delayed and when the passenger arrived at the gate for her onward flight to Agadir, she was told by Royal Air Maroc staff that her seat had been reassigned to another passenger. It is not clear from the judgment whether Royal Air Maroc did not believe she would make the connection, owing to the delay to the Berlin – Casablanca flight, therefore proactively deciding to re-route the passenger or for some other reason. In any event, she was not allowed to board the flight, despite holding a valid boarding card.

The CJEU was asked to determine whether or not the act of refusing boarding to the Casablanca – Agadir flight fell within the scope of Article 3(1)(a) of the Regulation:

'This Regulation shall apply:

(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies

Royal Air Maroc defended the action on the basis that the connecting flight involved a change of aircraft and constituted a separate journey, and as Morocco is outside the EU, it fell outside the scope of Article 3.

The CJEU rejected the position taken by Royal Air Maroc. It is settled law of the CJEU that the right to compensation crystalises, in the case of a multi-sector journey, at the passenger's '*final destination'* (Case C-11/11 *Folkerts*). In the case of a journey sold as a series of directly connecting flights and under a single booking, the 'final destination' will be the destination of the final sector of that journey. The fact that the passenger changed aircraft was deemed to be irrelevant.

The CJEU concluded that Article 3(1)(a) of Regulation No 261/2004 must be interpreted as meaning that the regulation applies to a passenger transport effected under a single booking and comprising, between its departure from an airport situated in the territory of a Member State and its arrival at an airport situated in the territory of a third State, a scheduled stopover outside the European Union with a change of aircraft.

Given this judgment concerned the interpretation of Article 3 (Scope), this decision will mean events outside the EU now fall within the ambit of the Regulation where the feeder flight can be traced back to a departure from the EU. That said, the conclusions reached by the CJEU do lend well to arguing that flights (operated by non-EU carriers) that originate outside the EU, but that have a point of connection in the EU, will sit out side the scope of the Regulation.

For further information on this article or our services relating to EC261 claims, please contact John Korzeniowski or Chris Smith.

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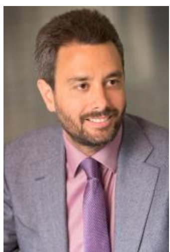

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