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Spanair

Although it was probably not unexpected, Spanair's cessation of activities in January 2012 and the immediate application for protection from creditors were certainly one of the negative milestones in the Spanish commercial aviation history.

In the framework of the insolvency proceedings conducted before the Commercial Court no. 10 of Barcelona, the insolvency receivers considered Spanair's insolvency as guilty, as it understood that its Board of Directors should have submitted the application before January 2012. **The Commercial Judge, who shared the receivers' view, declared the insolvency to be guilty in the month of September 2014**. That way, Spanair's Board of Directors, which was composed by twelve individuals and entities well known in Barcelona and Catalunya, was held personally liable for an amount of 10.8 million Euro. Although the total liabilities of the company exceeded 500 million Euro, this was the sum that the Judge deemed adequate to compensate the damage which Spanair's directors caused the creditors for the delayed presentation of the insolvency request. The Commercial Judge also banned the twelve directors from holding any directorships for two years. The directors appealed against this judgement.

Through a **judgement issued on 29 April 2016**, the Provincial Audience of Barcelona has overruled the first decision, **declaring that the insolvency was fortuitous** and, consequently, exonerating Spanair's directors from any liability. According to the Audience, the directors did not unduly delay the application for insolvency nor did they aggravate the situation of the company.

The directors of Spanair did not unduly delay the application for insolvency because they attempted to rescue the company until the end.

The Provincial Audience of Barcelona agrees with the judge of first instance as regards the time at which SPANAIR entered its insolvency situation. According to article 2.2 of the Insolvency Act, the debtor who is not able to regularly comply with its matured obligations is in an insolvency situation. Based on the information submitted by the receivers, the judge deemed that **Spanair was in a situation of insolvency on 30 June 2011**, i.e., some six months before the application for insolvency protection was filed with the Court. On that date, the company owed some 60 million Euro to AENA for airport charges and was not capable of regularly paying the successive assessments for charges that AENA kept issuing. As a consequence, the directors of Spanair should have requested the declaration of insolvency with the period of two months foreseen in the

Insolvency Act, that is, before the end of August 2011.

Pursuant to the Provincial Audience, on 30 June 2011 Spanair was already in a situation of insolvency

In principle, the breach of the two-month period allows to presume that the directors have acted in a wilful or grossly negligent way, which entails that the insolvency must be declared as guilty. However, this presumption can be deactivated by presenting proof to the contrary. The Provincial Audience has accepted this, by understanding that **the Board of Directors did not remain inactive**, but was searching at all time for an alliance with an industrial partner (Qatar Airways, HNA Airlines) that made Spanair feasible. Already in the first judgment the Commercial Judge had agreed that the delay in requesting the insolvency was acceptable until 31 December 2011, due to the negotiations that SPANAIR was carrying out with Qatar Airways, although he also considered that the Board should have filed the application as soon as such negotiations were frustrated. The Provincial Audience considers, on the other hand, that the negotiations undertaken during the month of January with HNA Airlines and the European Commission, as well as with Qatar Airways itself, prove the absence of guilt by the directors. In fact, they asked for insolvency protection just a couple of days after the Catalan Government announced on 27 January 2012 its decision not to provide Spanair with further cash injections. According to the Provincial Audience, the directors would have acted negligently if they had requested the insolvency before exploring all possible options, because the company *"had much to gain if an agreement about its viability was reached and not too much to lose"*.

According to the first instance judge, the Board of Directors should not have allowed the **sale of tickets to the customers** knowing about the chance of having to apply for insolvency. This opinion was widely echoed in the media and among consumer defence organisations. The Provincial Audience plainly rejects this reasoning, considering it "not reasonable" from an insolvency perspective. The Audience understands that the best way of protecting the assets consist of an attempt to continue the business activity as long as feasibility is still possible. Without a doubt, this positioning of the Provincial Audience of Barcelona will serve as a point of reference for future airline crises, because the issue of the ongoing sale of tickets is usually among the first to be analysed.

***Sergi Giménez**, partner of the Aviation Law Department.*

EMPLOYERS RIGHT TO COMPENSATION FOR EMPLOYEE DELAYS

In its **judgement of 17 February 2016, case C-429/14 (Air Baltic Corporation AS)**, the European Court of Justice ("ECJ") has decided that articles 19, 22 and 29 of the *Montreal Convention 1999* must be interpreted so that an air transport operator who enters into an agreement for the international transport of people not directly with the passengers, but with their employer, is liable as against such employer for the damage caused due to the delay of the flights carried out by its employees under such transportation agreement and which arises from the additional expenses incurred. The ECJ has also resolved that the liability limit of article 22.1 Montreal Convention (4,150 SDR per passenger) must be calculated by multiplying such maximum amount by the number of passengers carried under the agreement between the air operator and the employer.

In the case at hand, a governmental body of Lithuania(the *"Special Investigation Service of the Republic of Lithuania"*) purchased through a travel agent from the airline Air Baltic certain flight tickets so that two of its agents flew, on official business, from Vilnius to Baki, with stopovers in Riga and Moscow. The connection flight Riga-Moscow suffered a delay, so that the agents lost their flight Moscow-Baku and had to wait for a flight on the next day. For this reason, their employer incurred into additional labour expenses (travel expenses and Social Security contributions), recovery of which it claimed from Air Baltic. The airline rejected the claim on the grounds that only the passengers could ask for a compensation, but under no circumstance a legal entity which was not a consumer.

The employer can claim from the air carrier the damage suffered in flights

made by its employees if the contract of carriage has been entered into by such employer

According to the ECJ, articles 19, 22 and 29 of the Montreal Convention do not restrict its scope of applicability to claims for damages caused by delays submitted by the passengers who are directly affected. Thus, **the Montreal Convention also includes and protects those claims for damages suffered by the contract parties to a contract of air carriage even if they are not passengers**, such as those of employers who acquire flight tickets for their employees to travel for labour reasons.

The judgement.could provoke an increase in the number of claims against airlines for flight delays by employers (companies, public bodies, etc.) who have acquired tickets for their employees. In these situations, if the employer suffers direct damages as a consequence of the delay, such as the increase of its labour expenses (for example, additional wages for overtime, per diems, contributions to social security, etc.), or of the travel expenses which it pays to its employees, now there is no doubt that it will be allowed to claim reimbursement from the airline. This, obviously, under the subjective liability regime with reverse burden of proof established by article 19 of the Montreal Convention, and subject to the maximum compensation limit of article 22, multiplied by the number of passengers affected by the delay.

Instead, the ECJ has not resolved what happens if both the employer and the employees request a compensation for damages from the airline and both can prove the existence of different types of damages. In principle, under article 22.1 of the Montreal Convention and in the interests of achieving the *"fair balance of interests"* referred to in the Preamble of the Convention (which is quoted in the judgement itself), we should understand that the liability limit of 4,150 SDR per passenger applies, and that this limit would apply to all claims put forward by the passenger and its employer.

***Manuel Gallego**, senior lawyer specialised in the regulatory, governmental and litigation aspects of the aviation industry.*

SPANISH REGULATIONS ON DRONES

Legal provisions on drones in Spain are developed under the **Act 18/2014, of 15 October**, which establishes the present regulatory framework while we wait for the approval of a new Royal Decree that will regulate the civil uses of Remotely Piloted Aircraft Systems ("RPAS") and will implement the future European Union provisions issued by the European Aviation Safety Agency ("EASA"). However, under the present situation of governmental uncertainty in Spain since the general elections of December 2015 it is likely that such new regulations will still need some time before they come to light.

Since the approval of the said Act the number of RPAS operators registered at the Spanish State Agency for Aviation Safety ("AESA") has increased every month, and by the end of 2015 there were more than one thousand operators.

The regulatory framework which affects RPAS in Spain is complex. As a general rule, article 50 et sea. Of the Act 18/2014 governs the operations of RPAS inside the Spanish territory. However, article 51 states that all issues not foreseen in the Act will be governed by the general laws and regulations applicable to aviation in Spain, since RPAS are considered to be aircraft. Since they are remotely piloted from the ground, RPAS will need to comply also with Spanish regulations relating to the use of the radio-electric spectrum. Further, if such aircraft are provided with a camera which takes images or captures video, the legal provisions on the protection of personal data, personal privacy and image will also become applicable. Finally, it must be taken into account that before taking pictures or videos with any kind of aircraft, a specific approval must be obtained from AESA.

The Act governs all those operations with RPAS whose aim is not merely recreational, so that **R/C aircraft models are excluded** from complying with its provisions. Spanish regulations use the criterion of the maximum takeoff weight or "MTOW" to establish the requirements for each type of RPAS. However, there are certain rules which are generally applicable to all RPAS, such as those relating to

their identification, documents, maintenance programmes, mandatory insurance, times and places where operations may be carried out, maximum height of operations, etc. It is noteworthy that the law sets out a clear distinction among RPAS of less than 25 kg of MTOW and those above this weight: the latter must be recorded at the Aircraft Register and their use is subject to higher control.

For their part, **RPAS pilots** must comply with a number of requirements, such as holding the relevant licence, having a specific authorisation for the RPAS to be operated, securing the relevant medical certificates contemplated under European laws, etc.

Aerial works undertaken by RPAS operators are made under their own **responsibility**. In this respect, AESA merely carries out a control over the communications which it receives before any start of operations. However, breaches of applicable rules can be denounced. If AESA decides to investigate a certain breach then the infringement procedure will be governed by the Aviation Safety Act, which is generally applicable to any kind of aerial operation in Spain. The penalties contemplated under article 55 of this Act begin with a simple admonition or fine of 60 Euro for small breaches, but can reach 4.5 million Euro for very serious breaches, which depend on the situation and the alleged facts. Other ancillary penalties and corrective measures can be imposed upon the breaching operator.

***Miquel Campos**, lawyer and certified advanced RPAS pilot, cooperates with specialised publicationS on drones matters on a regular basis.*

RECENT ACTIVITIES

Master Course on Airport and Aeronautical Management

During the month of May several lawyers of our firm have once again lectured on several topics pertaining to the Aviation Law module of the **"Master Course on Airport and Aeronautical Management 2016"** which the international business school "IT ÁEREA Aeronautical Business School" (www.itaerea.es) offers to industry professionals.

Meeting of the Legal Advisory Panel of the Aviation Working Group

On 25 May the **"Legal Advisory Panel**" of the Aviation Working Group ("AWG", www.awg.aero) met in London, with Sergi Giménez attending as a member of this body. This is a reduced group of experts that advises the AWG on matters relating to the interpretation, understanding and implementation into national laws of the 2001 Cape Town Convention and its Aircraft Protocol. For its part, the AWG is a non-for-profit organisation composed by the main aircraft and engine manufacturers, financial institutions and lessors, which intends to contribute to the development of policies and regulations that facilitate the financing and leasing of aircraft throughout the world.

Conference on Drones

On 26 May Miquel Campos participated in a conference organised by Foment del Treball in Barcelona under the heading **"Drones – current situation and perspective of uses by companies"**, which was attended to by reputable representatives of the industry and governmental bodies.

Seminar on Aviation Law at the LUISS Business School in Rome

On 16 June Sergi Giménez participated as a speaker at at experts' panel on aircraft financing held as part of the seminar styled "**The Dynamism of the Aviation Industry**", organised

by the LUISS Business School, of the LUISS Guido Carli University, in Rome. Well-known members of the European aviation industry attended the seminar, which discussed matters such as the free competition in the industry, airport charges, consumer protection and the regulations on RPAS.

IX International Congress of Air Law at the Universidad Internacional de Andalucía

On 23 and 24 June the **IX International Congress of Air Law**, organised by the Universidad Internacional de Andalucia (http://goo.gl/9vAumY) has been held in Baeza (Jaen). For two days some of the most reputed representatives of the academic and professional world have discussed issues of current interest. Our firm has been represented by Sergi Gimenez, who held a speech about "The new Regulations of the Aircraft Register".

Conference on Drones at the ICAB

On 28 June, Miquel Campos gave a lecture at the Barcelona Bar Association with the title **"Drones – present legal situation"**, where more than 200 lawyers and industry representatives attended. This shows the existing interest for these novel technologies. The attendants had the opportunity of "looking and touching" some of these special aircraft on site.

SCHEDULED ACTIVITIES

Annual Conference of the Cape Town Academic Project

On 13 and 14 September the 5th Annual Conference of the **"Cape Town Academic Project"** will be held in Oxford. This is a joint cooperation project between the law faculties of the Universities of Oxford and Washington, under the auspices of UNIDROIT, with the aim of facilitating the analysis and the development of the Cape Town Convention. At this year's conference a comparative study of the international registries for aircraft equipment, rolling stock and space assets will be made, along with an analysis of the opportunity of preparing a protocol for ships and vessels, the interaction between the Convention and European Union law, as well as a case study relating to the use of the Convention in airline insolvency situations. Our partner Sergi Gimenez intends to participate at the conference.

Annual Conference of the International Bar Association

Between 18 and 23 September the annual conference of the International Bar Association will be held in Washington D.C. As in past years, several partners of our firm will attend and participate in conferences, courses and networking opportunities. They will act as speakers and panellists at their respective commissions, including the Aviation Law Committee.

PUBLICATIONS

The online magazine "El Jurista", devoted to topics of legal interest and practice, published in May the article **"Spanish regulation of civil remotely piloted aircraft"**, authored by Miquel Campos, lawyer of our firm. The article can be accessed freely under the following link: http://www.eljurista.eu/2016/05/02/la-regulacion-espanola-de-las-aeronaves-civiles-pilotadas-por-control-remoto/

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