

THE AVIATION LAW  
REVIEW

EIGHTH EDITION

Editor  
Sean Gates

THE LAWREVIEWS

# THE AVIATION LAW REVIEW

EIGHTH EDITION

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# PREFACE

I am delighted to continue to be associated with *The Aviation Law Review*, of which this is the eighth edition. Aviation continues to be among The Law Reviews' most successful publications; its readership has been vastly enhanced by making it accessible online to over 12,000 in-house counsel, as well as subscribers to Bloomberg Law and LexisNexis. This year I welcome new contributions from France, South Korea and Spain, plus two new chapters concerning covid-19, as well as extending my thanks and gratitude to our other new contributors and to our regular contributors for their continued support. Readers will appreciate that contributors voluntarily donate considerable time and effort needed to make these contributions as useful as possible to them. All contributors are selected based on their knowledge and experience in aviation law, and we are fortunate to enjoy their support.

Covid-19 is inevitably the focus of attention in our sector as in all others. The loss of life is the paramount concern and dominates one's thoughts. However, the commercial devastation also has consequences for the wellbeing of humanity given the financial damage it is wreaking, which is particularly pronounced in the travel industry. With airlines grounded by travel bans and the closure of airspace, all the participants in the industry at large are facing financial collapse as revenue disappears and fixed costs remain. Lessors still need to be paid, routine maintenance cannot be ignored, staff have to be paid or discharged, and even with the patchwork of governmental support around the world, there are bound to be many who fail and a few, not necessarily among the most efficient, that survive. At the time of writing, it is too early to forecast the landscape post pandemic, but it will certainly be changed forever, with probably the most significant impacts on leisure and regional carriage, the former being more expensive to address distancing practices and the latter with their smaller balance sheets being less able to withstand the loss of revenue.

Much has been written on the question of whether contractual liabilities will be impacted by the consequences of the pandemic, and in this edition I am pleased to have worked with colleagues in Belgium and Germany, to whom I extend my thanks, on articles addressing these issues and on EU 261. The latter is a work of the Commission in progress at the time of writing with short- and long-term discussions ongoing concerning the pernicious effects of this extensively juridically rewritten regulation. The outcome of those discussions is awaited, albeit with some dread!

When I last wrote this preface, the shocking B737 Max disaster was unfolding. The method of self-approval adopted by Boeing with the support of the FAA has been the subject of much criticism, the more so since approval by the FAA has routinely been followed by other regulators hitherto without serious challenge and because the FAA was the last, rather than the first, influential regulator to ground the type following the two fatal accidents. The consequences are still unfolding, but in the meantime, Boeing has managed to refinance itself

and continues to deal with the claims of airlines whose fleets were grounded pre pandemic. The intervention of that virus may have perversely given the company some relief from its continuing obligations, though the damage to its reputation for trustworthiness will take longer to repair, leaving Airbus in a much stronger position. In addition, the ending of the merger talks with Embraer may lead to the reemergence of the latter as challenger in at least the single aisle jet market. The Federal Bureau of Investigation continues its criminal investigation of the certification of the type, following the establishment of a grand jury investigation of the certification process and the investigations based on the embarrassing disclosures of emails from within Boeing graphically charting the recognition of their engineers of the unsafety of the type.

It is hoped EASA will reconsider its reliance on other regulators' type certificates, as well as any reliance it places on European manufacturers for type approval. The cost of adequate regulation in all jurisdictions must be met centrally, as was heavily recommended as long ago as 2000 in the Rand Institute's report 'Safety in the Skies' on the aviation accident investigation process. The appetite of the EU in this respect and the willingness of Member States to pay in the current financial and political environment, are not reliable grounds for optimism in this respect.

The impact of Brexit on European aviation remains unclear with the latest indications being that a comprehensive deal may not be reached, though an arrangement regarding traffic rights is likely to be made regardless. Major carriers are securing air operator certificates from within states in the EU, and some are also now ensuring they satisfy the European tests for majority ownership. How IAG manages its interests in BA and Iberia/Aer Lingus will be of particular interest.

The second European Aviation Environmental Report (EAER) was published last year and provided an updated assessment of the environmental performance of the aviation sector published in the first report of 2016. It reports that continued growth of the sector has produced economic benefits and connectivity within Europe and is stimulating investment in novel technology but recognised that the contribution of aviation activities to climate change, noise and air quality impacts had increased, thereby affecting the health and quality of life of European citizens. Indeed, air pollution has repeatedly been identified as a factor in covid-19. The impact of the pandemic on environmental pollution has been well documented, and the reduction in air travel has contributed to this. There is pressure to attempt to secure the environmental benefits of the lockdown on a more long-term basis, which might accelerate the development of new technologies. If Member States would stop pandering to solipsistic sectional national and labour interests to permit the true operation of the Single European Sky ATM Research (SESAR) programme, massive environmental advantages could be secured, but as usual incompetent short-termism seems likely to prevail in politics to the detriment of industry and the environment. It is hoped one day we will see an unfettered SESAR introduced, although the decision by the EU to prevent UK carriers from using carbon offsets does not suggest an overwhelming dedication to the environment.

The UK airline insolvency review was established by the Chancellor to research better ways to deal with the collapse of airlines following the numerous recent high profile airline bankruptcies of Monarch, Thomas Cook, Flybe and others. The review has now reported. The obvious solution adopted elsewhere of using the assets of the insolvent airline to repatriate its customers is one of the alternatives recommended and it is hoped, notwithstanding the current stasis in legislation in the UK for other reasons, will be one given urgent attention. The creation of a special administration regime changing the purpose of an

airline's administration to the repatriation of its passengers as a first priority over payment of creditors and ensuring payments of salaries and costs during rescue efforts would enormously mitigate the cost otherwise imposed on taxpayers via the UK government's current approach of arranging and paying for alternative air transport from other operators where inevitably the rates charged are at the highest end of the spectrum. The government has yet to publish a formal response. However, on 25 September 2019, in response to questions about the collapse of Thomas Cook, the Secretary of State for Transport, Grant Shapps, told the House that the government would be looking at the reforms proposed by the review. In a subsequent letter to Lilian Greenwood, Chair of the Transport Committee, the Secretary of State wrote that he was determined to bring in a better system for dealing with airline insolvency and repatriation. The Queen's Speech delivered on 14 October 2019 included proposals for legislation on airline insolvency. Subsequent events have of course delayed the process but hopefully when normal services are resumed this too will be addressed.

The pandemic has highlighted the benefits of drone technology with medical and other supplies being delivered to vulnerable individuals and population centres by use of the technology. Airport closures have of course ceased to be a factor in the current times, but seem likely to resume and possibly even increase, led by environmental groups seeking to address the perceived threat of the industry to the environment. Various jurisdictions are contemplating a range of responses including tighter regulations on the use of drones over a low mass, and registration and insurance requirements for operators of larger and commercial vehicles. New technologies to counter potentially disastrous encounters with commercial aircraft are being developed, but inevitably these solutions will be met by new challenges in the remotely piloted vehicle arms race.

Once again, I would like to extend my thanks to the many contributors to this volume and welcome those who have joined the group. Their studied, careful and insightful contributions are much appreciated by all those who now refer to *The Aviation Law Review* as one of their frontline resources.

**Sean Gates**

Gates Aviation Ltd  
London  
July 2020

# SPAIN

*Sergi Giménez Binder*<sup>1</sup>

## I INTRODUCTION

The Kingdom of Spain is a member of the European Union. As such, the full regulatory body of EU law applies in the country as regards rules on access to, inter alia, market, slot regulation, competition law, state aid, passenger rights and accident investigation.

The main bodies that regulate aviation in Spain are the Directorate General of Civil Aviation (DGAC) and the State Agency for Aviation Safety (AESA), both under the umbrella of the Ministry for Development. The DGAC is responsible for the preparation of industrial and strategical policies and proposals for the aviation sector, the representation and coordination with other public administrations and with the European Union in matters of air transport policy, and the approval of aeronautical circulars. AESA has responsibility to exercise inspection and penalisation authorities in civil aviation matters and it takes the initiative to approve provisions in matters of aviation safety and passenger protection, among other topics.

Unlike other countries, Spain has a dual registration system for aircraft. The Aircraft Matriculation Registry (RMA) falls under the jurisdiction of AESA and is an administrative registry of aircraft, but not a registry of title or ownership. It is operator-based. The main effect of registration is that an aircraft is provided with a Spanish registration number (beginning with the letters EC, followed by a hyphen and a combination of three further letters, e.g., EC-XXX) and thus becomes a Spanish aircraft. The Central Moveable Assets Registry (RBM), under the jurisdiction of the Directorate General of Legal Safety and Public Faith, which in turn pertains to the Ministry of Justice, is a register of title, ownership and encumbrances over movable assets, including aircraft. The main effect of registration is that evidence is provided in respect of the status of ownership and liens over assets. With some exceptions, most transactions involving Spanish-registered aircraft must be recorded at both the RMA and the RBM.

## II LEGAL FRAMEWORK FOR LIABILITY

### i International carriage

The Kingdom of Spain is state party to the following air law treaties (all of them in effect), among others:

- a* the Warsaw Convention 1929 (as subsequently amended by the Montreal and Hague Protocols);

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<sup>1</sup> Sergi Giménez Binder is a partner at Augusta Abogados.

- b* the Rome Convention 1933;
- c* the Chicago Convention 1944;
- d* the Rome Convention 1952;
- e* the Hague Convention 1970;
- f* the Montreal Convention 1971;
- g* the Montreal Convention 1999; and
- h* the Cape Town Convention 2001.

In accordance with Article 94 of the Spanish Constitution, once an international treaty has been approved by Parliament, ratified by the King and published in the State Official Gazette, it enjoys a higher hierarchical status than domestic legislation; consequently, its provisions prevail over any conflicting internal rules or provisions. Spanish judges regularly apply international treaties when those are applicable.

Of course, the full body of EU legislation on air carrier liability applies in Spain, such as Regulation (EC) 2027/97, as amended by Regulation (EC) 889/2002 and Council Decision 2001/539/EC.

In addition to international treaties to which Spain is a party and EU legislation, the main Spanish domestic provisions applicable to aviation are:

- a* the 1954 Act on Pledges over Movable Assets and Mortgage without Displacement;
- b* the 1960 Air Navigation Act;
- c* Act 28/1988 on Instalment Sales of Movable Assets;
- d* the Air Safety Act 21/2003; and
- e* Royal Decree 384/2015 – Regulations for the granting of registration marks.

## **ii Internal and other non-convention carriage**

Since EU Regulation 889/2002 extended the applicability of the Montreal Convention to all intra-European flights, the principles laid out in the Montreal Convention are also in force in respect of purely Spanish domestic flights.

Spain is a signatory state of the 1952 Rome Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, and it came into force in 1958. The Convention's aim is to ensure adequate compensation for persons who suffer damage caused on the surface by foreign aircraft, while limiting in a reasonable manner the extent of liabilities incurred for this damage in order not to hinder the development of international civil air transport. The 1952 Convention embraced the principles of the 1933 Convention, but raised the liability limits.

From a domestic perspective, the 1960 Air Navigation Act also includes provisions to regulate carriers' liability for surface damage and basically follows the principles of the 1952 Rome Convention, although over the years the liability limits have been raised as well. Furthermore, in line with EU legislation, the Air Navigation Act expressly prevents carriers from using Spanish airspace if they cannot prove that they have insurance coverage for this specific type of damage.

## **iii General aviation regulation**

The general provisions relating to the liability of air carriers in commercial operations apply to civil aviation aircraft as well. Given the very nature of civil aviation, the chances for purely domestic accidents – and, therefore, for the application of the 1960 Air Navigation Act – are higher, although the EU legal framework generally makes no distinction in this respect.

#### **iv Passenger rights**

As part of the European Union, Spain applies the entire set of European legislation, directives and guidelines relating to the protection of passengers, along with the provisions contained in international treaties such as the 1999 Montreal Convention where applicable. The provisions of Regulation 261/2004, establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, are fully applicable in Spain, and AESA and the Spanish courts regularly enforce this body of law.

From a purely domestic perspective, Spanish consumer protection laws are embodied mainly in Royal Legislative Decree 1/2007 on the Protection of Consumers and Users and apply to all transactions that are considered to be 'consumer transactions'. Thus, to the extent that an airport operator engages in this kind of transaction, it will be caught by this legislation. Given the Spanish constitutional system, certain regions have issued their own consumer protection laws that prevail over the said Royal Legislative Decree in their respective geographical areas. Finally, the domestic consumer protection rules are generally applied and interpreted by the courts of justice so as to award the widest protection to air passengers.

#### **v Other legislation**

As a civil law country, the general principles of liability in Spain are set out in the Civil Code, which is based on a fault-based system. However, like many other countries, and particularly since its accession to the European Community, Spain has implemented liability principles in areas such as liability for defective products or product liability, direct action in anticompetitive behaviours, quasi-objective liability in environmental matters, direct criminal liability of company directors or officers in corporate crimes, widened criminal action in private and public corruption cases. It should be highlighted that the 2015 Package Travel Directive has been implemented in Spain by adding a full chapter devoted to this type of agreements in the General Act on Protection of Consumers and Users.

### **III LICENSING OF OPERATIONS**

#### **i Licensed activities**

Intra-EU routes are, in general terms, automatically authorised pursuant to Regulation 1008/2008, so that no specific commercial licenses must be obtained. As an exception, certain routes which are classified as being of public interest, as well as operations between the Canary Islands and Gibraltar, are subject to certain restrictions.

To commercially operate extra-EU routes community carriers must ask AESA to issue the relevant air traffic license. Normally this will require the existence of an air transport agreement between Spain or the European Union and the country in question. Most of these agreements demand that the airlines chosen to operate the air services have been formally designated by the Spanish aeronautical authority. Airlines from third countries will also need to be designated by their respective aviation authority and, before performing any scheduled flights, become accredited by AESA in accordance with the requirements set forth in Royal Decree 1392/2007.

Non-scheduled commercial operations are subject to different rules under the Chicago Convention 1944. Generally speaking, the Spanish authorities allow such operations to air carriers belonging to signatory States of the Chicago Convention if the state concerned applies a reciprocal treatment to Spanish air carriers.

AESA has published the various procedures and forms of documents (in Spanish and English) on its website under [https://www.seguridadaerea.gob.es/lang\\_castellano/cias\\_empresas/companias\\_aereas/permisos/default.aspx](https://www.seguridadaerea.gob.es/lang_castellano/cias_empresas/companias_aereas/permisos/default.aspx).

## **ii Ownership rules**

Shortly after Spain's entry into the European Community in 1986, nationality, ownership and control requirements were interpreted as referring to European citizens rather than only Spanish nationals, despite domestic legislation to the contrary. This topic is nowadays covered by the provisions of Regulation 1008/2008, on common rules for the operation of air services. Given the direct applicability of Regulation 1008/2008 in Spain, the requirements are identical to those of other EU Member States. Although the provisions of this Regulation are directly applicable, some follow-up and detailed provisions were approved in Spain, initially through the Ministerial Order of 12 March 1998, which was recently replaced by the Order TMA/105/2020. Thus, to the extent that interested parties comply with the requirements of Regulation 1008/2008 (as amended), access to the Spanish market – and thereby to the European Union market – will be granted.

Financial fitness is regulated under Article 5 of Regulation 1008/2008, and basically requires that applicants provide evidence that they can meet their financial obligations for a period of 24 months from the start of operations and their fixed and operational costs for a period of three months from the start of operations, without taking into account any income. Lower thresholds apply to operators with aircraft of less than 10 tonnes MTOW or less than 20 seats. AESA closely analyses and monitors the business plans submitted by interested parties to ensure that they are realistic and in line with the EU Regulation. AESA has particular regard to past experiences where financial troubles have led to the demise of a number of Spanish airlines.

The ownership provisions of Regulation 1008/2008 have become the subject of intense scrutiny within the context of the United Kingdom's exit from the EU. In June 2016, AESA published certain interpretative criteria relating to the term 'ownership and control', which must, however, be read in connection with the Interpretative Guidelines published by the European Commission in June 2017 and the Notice to Stakeholders of January 2019.

## **iii Foreign carriers**

Non-Community carriers must obtain accreditation from AESA before they are allowed to start commercial operations to/from Spanish airports. The main provisions to secure such accreditation are found in Royal Decree 1392/2007, and the procedure aims at ensuring the safety of operations, the protection of passenger rights and the protection of the environment. In general terms, applicants have to provide evidence of the following points:

- a* The airline must be under the supervision of an aeronautical authority which pertains to a State party to the 1944 Chicago Convention.
- b* The airline must hold an operator's license which proves its ability to carry out the intended operations.
- c* The fleet to be used for the Spanish operations must be registered at a state party to the Chicago Convention, comply with the requirements of the Chicago Convention in matters of airworthiness and noise, and also comply with Spanish and EU requirements concerning, inter alia, noise, navigation and communications equipment.
- d* The airline must have insurance coverage which complies with the terms of Regulation (EC) 785/2004 on insurance requirements for air carriers and aircraft operators.

- e* The airline must have a security program against illicit interference actions which has been approved by its supervisory authority.
- f* Compliance with any specific requirements contemplated in the applicable air services agreement.

Upon receipt of the application and all required documents, AESA must issue a decision within 40 days. If no decision is made within the said period, the application is deemed rejected. All decisions can be appealed with the Secretary General of Transportation and, as indicated above, with the contentious-administrative courts.

#### **IV SAFETY**

All security standards contained in European legislation and international treaties such as the Chicago Convention are applicable in Spain, chiefly under Regulation (EC) No 300/2008 on common rules in the field of civil aviation security. To take care of changing developments, the government publishes a National Programme for Aviation Security in Civil Aviation, which is updated on a regular basis, the last time being in February 2019.

From a domestic perspective, the main provisions are embodied in the Air Safety Act 21/2003 (LSA), although – as with EU legislation – there are detailed regulations in many specific aspects of aviation operations. Air safety is essentially under the control of AESA, although other governmental agencies (such as police bodies) cooperate with AESA as well.

The LSA imposes a number of rules that apply to all parties which somehow intervene in aviation: personnel, flight schools, aeroclubs, designers, manufacturers, maintenance and service providers, air operators, commercial airlines, aerial works, air navigation service providers, handling agents, airport and aerodrome managers, etc. – including passengers. In addition to those general provisions, the LSA then sets out rules that specifically apply to specific participants or categories of participants. The ICAO definition whereby general aviation is deemed to be ‘all civil aviation operations other than scheduled air services and non-scheduled air transport operations for remuneration or hire’ is also applicable in Spain and is used to distinguish general aviation from commercial and public transport.

In line with ICAO guidelines and EU legislation (mainly embodied in Regulation (EU) 996/2010 on the investigation and prevention of accidents and incidents in civil aviation, as amended), Spain has created the Commission for the Investigation of Accidents and Incidents in Civil Aviation (CIAIAC). Domestic legislation has developed in some detail the international provisions through Royal Decree 389/1998, the 2003 Air Safety Act, Royal Decree 1334/2005 and certain other Royal Decrees that periodically publish the State Programme of Operational Safety for Civil Aviation. In line with the legislative framework, the CIAIAC’s investigations are exclusively technical in nature, with the ultimate aim to prevent future accidents and incidents, and are not directed towards allocating any kind of liability.

Pursuant to the 2003 Air Safety Act and Royal Decree 389/1998, ‘any person’ who becomes aware of an accident or incident of civil aviation must ‘immediately’ report it to the closest authorities, who then must urgently contact the CIAIAC. Obviously, special reporting obligations are imposed upon pilots, operators, aircraft owners, aviation authorities, airport directors, ATCs and all other related services and bodies.



The detailed reporting system is set forth in Royal Decree 1334/2005, which applies to all events occurred in the Spanish territory or where Spanish-registered aircraft or operated by Spanish citizens are involved. All reports are directed to the DGAC, which then coordinates its activities with the CIAIAC and other relevant agencies.

## **V INSURANCE**

The insurance set forth under Regulation (EC) No 785/2004 on insurance requirements for air carriers and aircraft operators are fully applicable in Spain. Insurance and reinsurance activities can be carried out in Spain by Spanish entities and also by EU insurance companies, subject to the provisions of Directive 2009/138/EC (as amended) and Spanish implementing legislation (basically, the Act 20/2015). Although the insurance market has been largely liberalised inside the European Union, certain types of risks still must be insured by national insurance companies. Aviation risks of Spanish airlines must still be subject to insurance made by Spanish insurance companies, who regularly reinsure the associated risks in the international markets. Article 78 of the Act 50/1980 on Insurance Contracts states that an insured cannot claim directly from the reinsurer any compensation or require any other duty to be performed by the reinsurer. Thus, in principle, cut-through clauses are not directly enforceable in Spain if the relevant insurance contracts are subject to Spanish law. However, Article 107 of the same Act expressly allows the submission to foreign laws for aircraft insurance. Therefore, the validity of a cut-through clause will depend on the choice of law clause in the lessee's insurance contracts. Nevertheless, some legal scholars still consider that this type of clause is not enforceable in Spain based on a literal interpretation of the said provision.

## **VI COMPETITION**

There is no specific regulation or policy in Spain concerning airline access or competition, since all these matters are to be handled in line with EU policies and rules. No domestic sector-specific competition rules have been published, but given Spain's membership of the European Union, Spanish competition authorities are bound by and follow the legislation and guidelines that emanate from the EU. These are abundant as far as the aviation industry is concerned and focus mostly on state subsidies, concentrations of undertakings and fostering free competition.

The main body in charge of supervising competition rules in Spain is the National Commission for Markets and Competition (CNMC), which has jurisdiction over all economic areas. However, the CNMC is organised internally into various directorates, one of which is specifically in charge of transportation matters.

The CNMC follows in general terms the definitions, methods and criteria established by the European competition authorities, including the European Court of Justice, to define the relevant market. Since most of the transactions of the aviation industry have a EU dimension, they are ordinarily assessed by the European Commission rather than the Spanish authority.

It is difficult to provide a general rule in this connection, because the criteria depend on the type of transaction under analysis. When it comes to the review of potential state subsidies or actions against free competition the criteria are fixed and assessed on a case-by-case basis, taking of course into account existing precedents and guidelines.

When it comes to concentrations of undertakings, such as mergers between enterprises and company acquisitions, Spanish domestic competition legislation provides more detailed thresholds. Economic concentrations are governed by the 2007 Competition Defence Act when they fall outside the thresholds of the EU Merger Control Regulation 139/2004. Mergers are defined broadly and include the actual merger of two or more previously independent companies, the acquisition of control over an undertaking by another, the creation of a joint venture or the acquisition of joint control over an undertaking. As a general rule, concentrations of undertakings must be notified to the CNMC, in order to obtain approval when, as a consequence of the transaction, a share of 30 per cent or more is acquired in the 'relevant market'. Such market can be either the entire territory of Spain or a smaller, geographically defined market (e.g., a certain region). The communication is also mandatory when the turnover of the participants in Spain exceeds €240 million and at least one of them has a turnover of more than €60 million. However, no notification is needed if the turnover of the acquired company is less than €10 million, unless a market share of 50 per cent or more is achieved (*de minimis* exception).

In merger transactions, the CNMC has a period of one month from receipt of the notice to decide whether or not it wishes to pursue the investigations any further (the 'first phase'). If no decision is made within this time period, the transaction is deemed to be approved. If the CNMC decides to deepen the analysis, it opens the 'second phase' and then has an additional period of two months to issue a decision. This timing is often extended to take into account delays arising from the receipt of any information requested additionally. A final decision is then taken by the Council of Ministers within one more month.

Spanish domestic legislation essentially mirrors EU legislation as regards the remedies that the CNMC or the Courts can impose upon participants in transactions which are perceived to be in breach of competition rules.

## VII WRONGFUL DEATH

Spain is a state party to the Warsaw System, the 1999 Montreal Convention and, as a Member State of the European Union, the provisions of Regulation (EC) 2027/97 on air carrier liability are directly applicable by the Spanish courts. Specifically, the EU provisions also apply to domestic air transport when it is performed by Community carriers. Therefore, the domestic regulation contemplated under Articles 92-125 of the 1960 Air Navigation Act only come into play on a residual basis.

The damages awarded by Spanish courts aim at reinstating the injured party in the position it would have been in the event that no damage had been caused. Thus, direct damages for bodily injury and mental distress or moral damages are generally awarded, as well as indirect damages such as loss of income and similar concepts. Institutions of certain common law countries such as punitive damages are not part of the Spanish system, and sometimes difficult to enforce even if awarded by foreign courts. Also, the amounts awarded by Spanish courts are often more modest than those that can be obtained in other jurisdictions.

## **VIII ESTABLISHING LIABILITY AND SETTLEMENT**

### **i Procedure**

Liability claims fall, generally speaking, under the jurisdiction of the civil courts in Spain. In this respect, the commercial courts have exclusive jurisdiction in transportation disputes, which causes that most actions about passenger claims are discussed in these courts. However, where liability is claimed on the basis of body injuries or wrongful death, then usually the criminal courts will be involved, who also have authority to decide on the civil law aspects of such claims such as liable persons, amounts payable as damages, beneficiaries.

There is no fixed rule that can be given as regards the timelines for court actions in Spain. Since Spanish courts are chronically overloaded with work, the duration of claims often takes a long time, particularly in criminal cases. Where only civil matters are being disputed, the parties can spend about 12 months in the first instance, and if appeals are made then another six to 18 months should be accounted for. However, this very much depends on the specific court involved, although given the exclusive jurisdiction of the commercial courts to deal with transportation disputes there is a tendency that such matters are concentrated in a limited number of courts.

In principle, all parties potentially involved as causing the damage or having contributed to the damage can be asked to join a proceeding. Subject to the principles laid down in the Montreal Convention, liability is generally allocated on the basis of the fault or participation of each of the parties involved.

### **ii Carriers' liability towards passengers and third parties**

Spain is a state party to the Warsaw System, the 1999 Montreal Convention and, as a Member State of the European Union, the provisions of Regulation (EC) 2027/97 (as amended) on air carrier liability are directly applicable by the Spanish courts. Specifically, the EU provisions also apply to domestic air transport when it is performed by Community carriers. Therefore, the domestic regulation contemplated under Articles 92–125 of the 1960 Air Navigation Act only come into play on a residual basis. The liability system and limits of air operators are thus based on the mechanisms established by the said international treaties.

Additionally, certain actions or omissions of carriers could be considered as criminal offences under Spanish law. In fact, whenever an accident causes fatalities, a criminal investigation will be opened under the control of the courts to assess whether any such liability may exist.

### **iii Product liability**

Manufacturer's liability is governed in detail under Royal Legislative Decree 1/2007 on the Protection of Consumers and Users, and implements the terms of Directive 85/374/EEC. In general terms, manufacturers are liable for non-conforming products, and the law lists a detailed number of requirements for products to be found conforming. It is also established that, without prejudice to other contractual claims, all damaged persons have a right to be indemnified for the damage caused by goods or services. For the purposes of the Consumer Protection Act, the term damage encompasses personal damage, including death and moral damage, and material damages relating to private goods or services. This liability extends to the manufacturers of products and to their importers in the EU, who are jointly and severally liable.

#### **iv Compensation**

As discussed under Section VII, Spanish courts award direct and indirect damages, but not punitive damages. In accordance with European regulations, air carriers and their insurers are obliged to provide mandatory financial support to the victims of air accidents.

Spanish courts calculate the damages taking into account the specific circumstances of the victims, such as their age, level of income, dependency of family members, etc. The courts often resort to the objective criteria and amounts set out in the 2004 Act on civil liability and insurance for road transport, which, although not directly applicable to air accidents, are often used as basis for discussion. Recent experience with accidents in commercial flights indicates that compensations ranging between €30,000 and €200,000 are granted.

### **IX DRONES**

Until the entry into force of Regulation (EU) 2019/947, on the rules and procedures for the operation of unmanned aircraft (expected to happen by the end of 2020 after a recent extension), the legal framework applicable to drone operations in Spain is composed of international conventions and accords, European regulations and directives and domestic legislation.

At an international level, international conventions such as the Chicago Convention 1944 and the ICAO Circulars set forth the main rules of how drones must be treated by states.

From the perspective of European Union legislation, the main applicable pieces of legislation are, for the time being and until the entry into force of the said Regulation 2019/947:

- a* Regulation (EC) No. 216/2008, of the European Parliament and of the Council, of 20 February 2018;
- b* Regulation (EU) 2018/1139, of the European Parliament and of the Council of 4 July 2018 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency amending among others the former one;
- c* Regulation (EU) 2019/945, of 12 March 2019 on unmanned aircraft systems and on third country operators of unmanned aircraft systems; and
- d* Regulation (EU) 2019/947, of 24 May 2019 on the rules and procedures for the operation of unmanned aircraft.

Additionally, a large number of Acceptable Means of Compliance and Guidance Material has been published to accommodate the high number of varieties in the use of drones and safety and security measures under cover of the EASA jurisdiction.

Spain also has its own domestic legislation for drones. The core legal provision regulating the use of drones is Royal Decree 1036/2017, of 15 December, pursuant to which the use of civil remotely piloted aircraft is regulated. This Royal Decree contains the main terms and obligations that an operator must comply with to lawfully use drones. AESA is the main governmental entity in charge of the control, surveillance and enforcement of Royal Decree 1036/2017, although the Ministry of Internal Affairs also has jurisdiction for authorisations of certain specific operations where public security issues arise. In addition to this core provision, the legal framework governing drones is scattered across different other regulations and acts which are also applicable to the operation developed by these aircrafts, such as Royal Decree 384/2015 of, on Regulations of the Spanish Civil Aircraft Registry, the 1960 Air Navigation Act, the 2003 Air Safety Act and others.

## **X VOLUNTARY REPORTING**

As indicated under Section IV, under the 2003 Air Safety Act ‘any person’ who becomes aware of an accident or incident of civil aviation must ‘report it to the closest authorities. Special reporting obligations are imposed upon pilots, operators, aircraft owners, aviation authorities, airport directors, ATCs and all other related services and bodies. The system ensures the confidentiality of the reports and the reporters and no cases have been published where someone might have been blamed or punished for complying with his or her legal duty.

## **XI THE YEAR IN REVIEW**

Over the past year, the main topics of concern have been those related with the exit of the United Kingdom from the European Union, which directly affects some major Spanish carriers (Iberia, Vueling, Level) due to their being part of the IAG Group. In accordance with the EU Commission’s guidelines, both companies have submitted plans to show that they will continue being owned and controlled by EU citizens after Brexit.

In this context, in December 2019 a merger between Iberia and Air Europa was announced, with the aim of strengthening their position in the routes to Latin America and South America. This transaction is under review by the merger control authorities, and it is expected that both airlines will have to release a number of the slots which they presently hold.

Carriers operating in Spain have also been devoting a great deal of attention to the challenges arising from the increasing number of passenger claims under Regulation 261/2004 and the implementation of the GDPR.

## **XII OUTLOOK**

At the time of writing these lines the uncertainties arising from the economic crisis created by covid-19 are in everybody’s mind. The aviation industry has been among those most severely hit by the events, and it is difficult to predict when the situation will revert to something resembling normality. Tourism being one of Spain’s largest industries, the country is highly dependent on air traffic. While the government has published temporary legislation imposing restrictions on movement, mandatory quarantine for travellers from abroad and other measures to control the virus’s spread, it is also acknowledged that these measures need to be lifted sooner rather than later.

To assist the Spanish carriers with their cash flow impasse, the government has granted some state-backed loans to Iberia, Vueling, Air Europa and Air Nostrum for a total amount of more than €1 billion. It remains to be seen if this financial support will be enough to save the airlines from failure, because in addition to the operational issues and substantial loss of income, carriers all over Europe are facing massive claims for refund of the tickets paid by their customers.

The government has also announced that in the coming months it will impose a mandatory system of consumer arbitration, whereby all passenger claims will have to be settled by arbitration under the control of AESA. The system is currently being set up, and airlines have voiced their concerns about a mechanism that might take their right – and the consumer’s right – of access to justice.

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Sergi Giménez is a partner at Augusta Abogados, a mid-sized, full-service Spanish law firm known for its expertise in aviation law, among other practice areas. Sergi's career spans more than 30 years in the field of international business law. His professional career has always been closely linked to international law, due to his recurring work with multinational companies with business dealings in Spain and vice versa. In particular, Sergi has spent more than 20 years advising both national and international companies linked to the aviation industry, working on transactions of all kinds. In addition to airlines, his clients include the owners of aircraft and engines, lessors and financial companies. He also has lengthy experience in the tourism industry, providing advice to tour operators, hotel companies, cruise operators and companies of all types in the leisure sector.

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