THE AVIATION LAW REVIEW

NINTH EDITION

Editor
Sean Gates

THE LAWREVIEWS

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PREFACE

The Aviation Law Review continues to be among the most successful publications offered by The Law Review, with the online version massively increasing its reach within the industry not only to lawyers but to all those involved in the various aspects of management touched by laws and regulations that, from certain jurisdictions, flow like a river in full spate. Now that subscribers to Bloomberg Law and Lexus Nexus have access online, that of course has also significantly increased the readership.

This year I welcome a new contribution from Turkey, and extend my thanks and gratitude to all of our contributors for their continued support. I would emphasise to readers that the contributors donate very considerable time and effort to make this publication what it has succeeded in being; the premier annual review of aviation law. All contributors are carefully selected based on their knowledge and experience in aviation law. We are fortunate indeed that they recognise the value of the contribution they make and the value of the *Review* that it enables.

Notwithstanding the risks posed by new variants, at the time of going to press at least the threats posed by covid-19 to the world and the aviation business sector seem to be beginning to recede in some parts of the world, while others continue to languish where vaccinations have yet to become available, and where vaccine hesitancy is encouraged from dark alleys in social media up to the level of irresponsible political figures around the world. The damage wrought on aviation has been particularly severe consequent upon the grounding of airlines, the closure of airspace and the uncertainty as to when, and to where, flights may safely be taken. So far as lessors are concerned, attempts by lessees to moderate their financial exposure by reliance upon the pandemic by arguing that contracts have thereby been frustrated have been denied in several courts. As yet, no decisions have crossed my desk regarding operating leases, and decisions in respect of them will, of course, depend upon the terms of those leases. While there have been some bankruptcies, the majority of carriers have managed to cling on to financial life by virtue of reliance on governmental support, although this has not been routinely and equally available throughout the world.

In last year's preface I referenced the difficulties encountered by Boeing with regard to the damage to its reputation as well as the reputation of the Federal Aviation Administration (FAA) following the 737 MAX grounding. It was eventually, after extensive modification, declared safe to fly, but then came under renewed scrutiny six months later as a result of a potential electrical problem that led to the renewed grounding of more than 100 aeroplanes belonging to 24 airlines around the world in April 2021. The practice of the major aviation authorities around the world of accepting the type certificates of other regulators appears likely to be the most enduring victim of this debacle, with airworthiness authorities under very considerable pressure to make sure for themselves they are satisfied with the certification

of aircraft manufactured in other countries. The European Air Safety Authority has been under a particular spotlight in this respect and, according to European Aviation Safety Agency (EASA) Executive Director Patrick Ky:

> *we have a bilateral safety agreement (between EASA and the FAA) that was signed some time ago, under which the direction had been taken to reduce more and more the level of involvement of EASA on FAA-approved projects. Of course, given those tragedies for which we have seen, we have stopped this trend and we will increase our level of involvement and our independent review of US projects in order to build our own safety assessment of those projects.*

The impact of Brexit on aviation continues to be worked out, although the EU–UK agreement on the subject came into force alongside the trade agreement in 26 pages of the 1,449-page text. The agreement provides in broad measure that traffic rights between the UK and EU are preserved, cabotage rights are removed, cargo fifth freedoms are permitted allowing cargo to be on carried from one European destination to a third country, and vice versa, subject to bilateral agreements between the UK and the individual Member States of the EU. Ownership and control restrictions require that airlines must be owned and effectively controlled by nationals in their headquarters and that airlines must have their principal place of business in their own territory and hold an air operator's certificate from the competent authority in their own jurisdiction. There is an exception to this in that UK airlines are permitted to be effectively controlled by nationals of the EU, the European Economic Area or Switzerland. This ownership provision is echoed in the UK–US bilateral agreement permitting UK airlines to be owned by EU nationals while operating from the UK to the US. Clearly, the principal beneficiary of these provisions is British Airways, owned by IAG headquartered in Spain, which also owns other EU airlines.

The UK is no longer part of EASA, but there is close coordination between the Civil Aviation Authority of the UK and EASA as well as mutual recognition of licences.

The EU–UK agreement also touches upon the thorny and troublesome issue of EU 261 in that it aims for a high level of consumer protection and cooperation between the EU and the UK in this area. The European Union (Withdrawal) Act 2018 provides that regulations such as EU 261 are automatically incorporated into UK law, being known as retained EU law, unless and until they are revoked by an Act of Parliament. The regulation itself, therefore, continues to apply unless and until it is changed by the UK Parliament. That power does seem currently unlikely to be exercised among the myriad issues falling to be addressed by the newly empowered Parliament, although the opportunity may arise if the long-promised review of EU 261 in Europe is finally brought forward by the Commission for decision, when the issue could at least be debated. One can but hope that the regulation will be made more compliant with the terms of its preamble and original content before it is subjected to the legislative whims and activist fancies of the European Court of Justice (ECJ). However, decisions made up until 31 December 2020 will be retained in the UK and will be binding at least at first instance level, with limited powers given to the Court of Appeal and the Supreme Court to depart from past case law. Decisions after December 2020 will not be binding but will continue to be persuasive. The extent to which the UK will depart from ECJ case law has already been reviewed in two Court of Appeal cases, *Tuneln v. Warner* and *Lipton v. BA Cityflyer*. The Court of Appeal held that the power to depart from ECJ decisions should be used as an exception only, and that in the first case actually applied to a post-Brexit ECJ ruling in reaching its decision. In *Lipton*, the Court set out a list of matters to be considered

in determining its approach. These early decisions seem at least to indicate that the Court of Appeal and Supreme Court will require significant reasons to exercise their inherent power to depart from the law promulgated by the ECJ.

In the meantime it is clear that the Court of Justice of the European Union continues on its rampage against the safety, security and financial viability of aviation by its latest decision on the subject in the case of *Air Help v. SAS* of 23 March 2021. In this case, the Court has held, against the recommendation of its Attorney General, that a strike organised by a trade union of the staff of an air carrier that is intended in particular to secure pay increases does not fall within the concept of an extraordinary circumstance capable of releasing the airline from its obligation to pay compensation for cancellation or non-delay in respect of the flights concerned. The Court relied on its earlier decisions to the effect that in order to qualify as extraordinary, the event must not be inherent in the normal exercise of an air carrier's activity, and must be beyond its actual control, because the regulation has to be strictly interpreted to afford a high level of protection for air passengers and because the exemption from the obligation to pay compensation is a derogation from the principal that air passengers have the right to compensation.

As so frequently in the past, the Court has made these comments by ignoring some elements of the preamble to the regulation in favour of others, and misinterpreting other elements of the preamble so as to make the payment of pocket money to passengers take priority over the obligation imposed on Member States to procure general compliance by air carriers with the regulation and appoint an appropriate body to carry out enforcement tasks. In other words, states should make sure operators do not wrongly delay or cancel flights, with compensation being paid in the limited circumstances set out in the regulation, and not as a device to punish errant carriers or to jeopardise their financial viability. It cannot be said too often that the payment of compensation does not protect passengers and can be carried to extremes and, as in this case, actually jeopardise connectivity and safety.

In an act of particular judicial gymnastics in its *SAS* decision, the ECJ held that Preamble 14, which specifically states that extraordinary circumstances 'may, in particular, occur in cases of . . . strikes that affect the operation of an operating air carrier', did not assist SAS in the current case because a strike, as one of the ways in which collective bargaining may manifest itself, must be regarded as an event inherent in the normal exercise of the employer's activity and that, therefore, a strike whose objective is limited to obtaining an increase in pilots' salaries is an event that is inherent in the normal exercise of that undertaking's activity. The Court also, extraordinarily, held that 'since a strike is foreseeable for the employer, it retains control over events in as much as it has, in principle, the means to prepare for the strike and, as the case may be, mitigate its consequences'. In a continuing feat of legerdemain, the Court held that just because a carrier may have to pay compensation to passengers for cancellations or delays does not mean that the carrier has to accept without discussion strikers' demands. The air carrier 'remains able to assert the undertaking's interests, so as to reach a compromise that is satisfactory for all the social partners'. The effect of the decision, of course, is to hand to unions a weapon in their armoury of almost nuclear capacity to destroy the undertaking altogether unless its demands are met, since failure to comply leads to what are increasingly becoming ruinous levels of obligations to pay 'compensation' to passengers in respect of cancelled flights. It is becoming increasingly difficult to escape the conclusion that the ECJ has a covert purpose of the destruction of the airline industry in Europe, but it is hopefully difficult to imagine that this decision is one that the UK Court of Appeal would follow without demur.

Airlines in Europe need to stand together to resist the continued assault of the regulation on their very existence, for without such unity, to paraphrase Aesop, division can only produce disaster.

Once again, many thanks to all our contributors to this volume including, in particular, those who have joined the group to make *The Aviation Law Review* the go-to resource.

Sean Gates
Gates Aviation Ltd
London
July 2021

Chapter 22

SPAIN

Sergi Giménez Binder[1]

I INTRODUCTION

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, markets, 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 for exercising inspection and penal authority in civil aviation matters, and it takes the initiative to approve provisions in matters of aviation safety and passenger protection, among other things.

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

Spain is a 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);

b the Rome Convention 1933;

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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, and 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 agreement 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 licences must be obtained. As an exception, certain routes that 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 licence. 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.[2]

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 replaced by 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 maximum takeoff weight 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 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 or 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 that pertains to a state party to the 1944 Chicago Convention;

b the airline must hold an operator's licence that proves its ability to carry out the intended operations;

2 seguridadaerea.gob.es: under Permisos comerciales | AESA-Agencia Estatal de Seguridad Aérea - Ministerio de Fomento.

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 that 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 programme against illicit interference actions that has been approved by its supervisory authority; and

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, with 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 that somehow intervene in aviation, such as, inter alia, 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, and passengers. In addition to those general provisions, the LSA then sets out rules that specifically apply to specific participants or categories of participants. The International Civil Aviation Organization (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 of preventing 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, air traffic controllers (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 occurring in the Spanish territory, or where Spanish-registered aircraft or aircraft that are 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 is 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, 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 supplied 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 party 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 an 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 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 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). A 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 notice to decide whether it wishes to pursue 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 additionally requested information. 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 that 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 to 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 into 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 damage are generally awarded, as well as for indirect damage 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 are sometimes difficult to enforce even if awarded by foreign courts. In addition, 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 means 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 and 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 and 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 to 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

Manufacturers' 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 damage relating to private goods or services. This liability extends to 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, inter alia, their age, level of income and dependency of family members. 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 a basis for discussion. Recent experience with accidents in commercial flights indicates that compensation ranging between €30,000 and €200,000 is granted.

IX DRONES

Since the entry into force of Regulation (EU) 2019/947, on the rules and procedures for the operation of unmanned aircraftt, which took place on 31 December 2020, 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 on how drones must be treated by states.

From the perspective of European Union legislation, the main applicable pieces of legislation are:

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 amount of acceptable means of compliance and guidance material has been published to accommodate the considerable variety of use of drones and safety and security measures under cover of the AESA's jurisdiction.

Spain also has its own domestic legislation for drones. For the time being, 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, but has now partially been repealed by the new European regulations. A draft of new domestic legislation is currently being considered by the Spanish governmental authorities. AESA is the main governmental entity in charge of the control, surveillance and enforcement of applicable provisions, 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

regulations and acts that are also applicable to the operation developed by these aircraft, 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 obviously been been those related to the covid-19 crisis. The aviation industry has been severely hit by events. Since tourism is one of Spain's largest industries, the country is highly dependent on air traffic. Like other countries, restrictions on movement, enhanced health controls for travelers from abroad and other measures to control the virus spread have been approved, mostly in coordination with other EU countries. Spanish airlines have received more than €1,000 million in government-backed loans to assist with cashflow impasses. The merger between Iberia and Air Europa announced in December 2019 was suspended due to the pandemic, and has been restructured to account for the changed economic environment.

XII OUTLOOK

At the time of writing, the uncertainties arising from the economic crisis created by covid-19 are still on everybody's mind. In addition to the financial support that the industry in general is receiving from public authorities, it will have to be analysed whether the travel restrictions and public health controls currently in place will progressively be removed or whether they will become a permanent part of the travel experience. The logistics and costs associated with these measures are likely to adversely impact all players in the market.

Appendix 1

ABOUT THE AUTHORS

SERGI GIMÉNEZ BINDER

Augusta Abogados

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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