

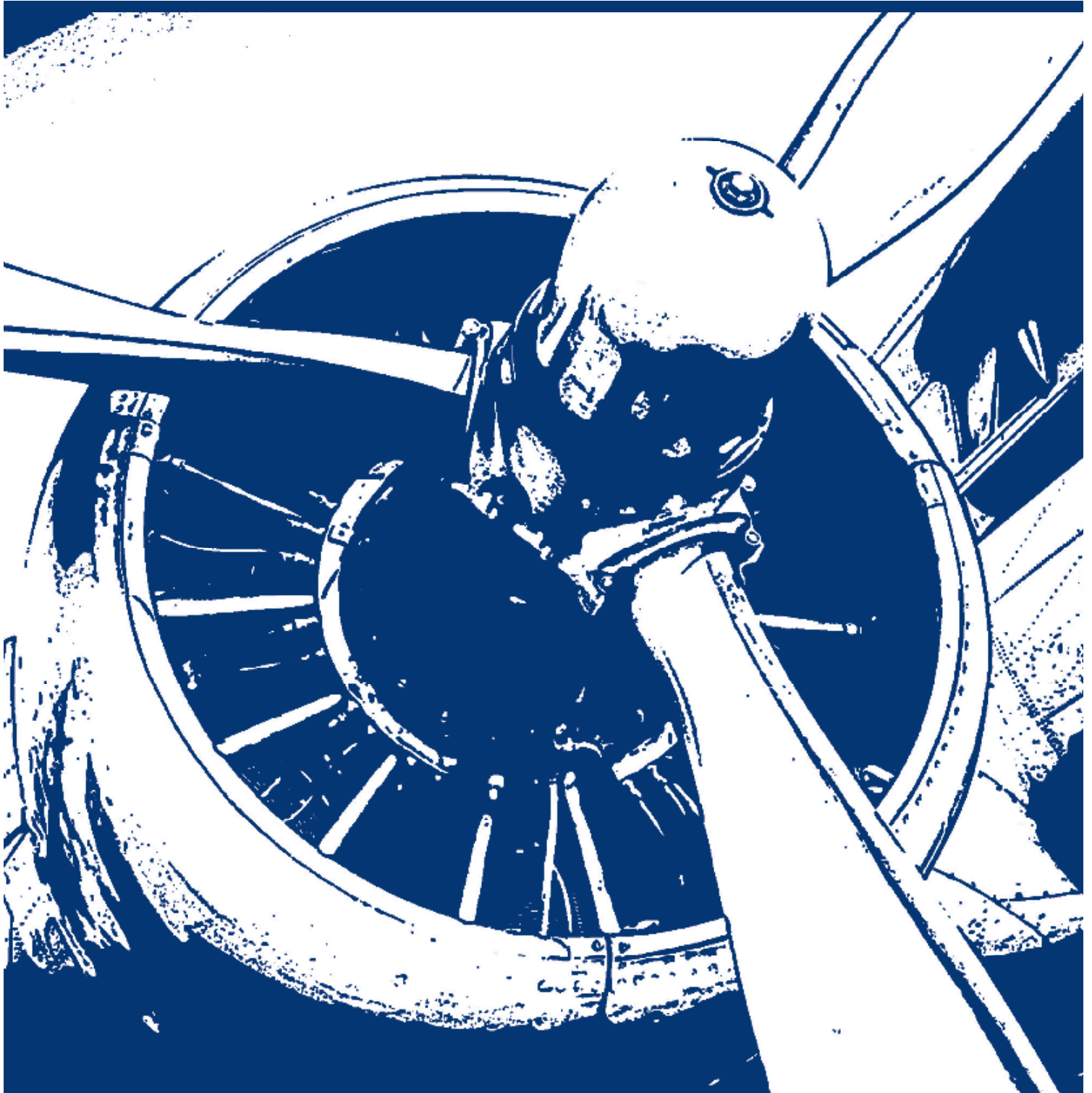


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Aviation Law Committee News

Committee Update from the International Bar Association Legal Practice Division

VOL 18 NO 1 JUNE 2017



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This update is intended to provide general information regarding recent developments in aviation law. The views expressed are not necessarily those of the International Bar Association.



Grounded? How the Thai police have enforced the Act

Since the Act came into force, the number of charges and prosecutions at Bangkok's two airports have been relatively minimal, particularly given annual passenger numbers. There do not appear to have been any arrests and no unruly passengers have been deported.

The majority of offenders appear to have been issued with fines and/or warnings. These have been primarily for smoking

and the use of mobile devices when this is prohibited. A more rigorous application of the Act going forward would serve to enhance the deterrence.

Flying forward

The willingness of passengers to share their views, as well as still and video footage of such incidents, may spur greater enforcement and greater awareness, particularly where passengers are critical of the response of the crew and the airline.

Montreal Convention enforcement in Ukraine

UKRAINE

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Annotation

Carrier responsibility rules provided in the Montreal Convention are used both for international and home flights. The Ukrainian courts dealing with aviation disputes meet certain difficulties in their application due to convention misinterpretation and judges' inexperience. Stated problems together with non-application of the *res ipsa loquitur* rule push potential claimants to forum-shopping to receive favourable judgment.

1. The Montreal Convention is effective for Ukraine since mid-2009. In 2013, new rules on passenger and baggage transportation based on the Montreal Convention regime of the carrier responsibility (the 'Ukrainian Rules') were enacted. In such a way, the Montreal Convention carrier responsibility regime is spread over international and home flights.
2. The Ukrainian Rules are based not only on the Montreal Convention but on European Commission (EC) Regulation 261/2004 as well. Correspondingly long delays in Ukraine are under similar regulation as in the EC, excluding treatment of extraordinary circumstances. EC Regulation defines that 'extraordinary circumstances which could not have been avoided even

if all reasonable measures had been taken may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.'

In its judgment, the European Court held that these circumstances 'must be interpreted as meaning that a technical problem in an aircraft that leads to the cancellation of a flight is not covered by the concept of "extraordinary circumstances", unless that problem stems from events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control'. The Ukrainian Rules define, among other things: technical obstacles that arise due to rejections and nuisance failures; electrical and communication systems malfunction; and problems with equipment and software as extraordinary circumstances. Thus, in the case of a dispute consideration in Ukraine, carrier negligence in due aircraft maintenance resulting in delay in transportation may be 'excused'.

3. Another possibility for the carrier to escape responsibility in Ukraine has

arisen due to usage of the Russian official text of the Montreal Convention, of which Article 19 releases the carrier from responsibility for delay in carriage by air of passengers, baggage or cargo, if the carrier proved it took all reasonable and necessary measures to prevent such delay. The English text of the Montreal Convention uses the concept of reasonable measures in contrast to the concept of necessary measures used in the Warsaw Convention.

4. Although Ukrainian law allows claims against the airlines for delay in the carriage by air of passengers, baggage or cargo; damage sustained in case of death or bodily injury; and destruction loss, damage or delay of checked baggage, the Ukrainian courts mainly consider disputes as to delay in transportation and damage to baggage and cargo.
5. There were only a few cases considered by the Ukrainian courts that dealt with death and bodily injury claims arising due to an aircraft crash on the local route Odessa-Donetsk on 13 February 2013. The Ukrainian courts are inexperienced in considering death and injury claims. As Ukrainian judges in general do not speak English or another foreign language, they do not read foreign court judgments, and may not study the foreign doctrine in the field. These are the grounds for misinterpretation and misuse of the Montreal Convention and its regime of carrier responsibility in the court practice.
6. First, the courts do not establish whether what happened on board may be treated as an accident as the Convention has no definition of the accident. In death cases, the accident is treated as having taken place if a claimant submits a report on investigation of the aircraft crash prepared by the special air investigation bureau.
7. In injury cases, a claimant needs to prove not only the fact that an injury occurred on board, but also the carrier's guilt as well, as Ukrainian courts do not know and use the concept of negligence and the *res ipsa loquitur* rule.
8. In the case of death or damage, the courts do not check whether an incident

happened due to negligence or another wrongful act or omission of the carrier. As an example, the aircraft crash on the Odessa-Donetsk route on 13 February 2013 occurred due to 'loss of the plane's speed during landing at meteorological conditions to which the captain of the plane was not trained and allowed'. The court did not consider usage of poorly trained personnel as carrier negligence and did not break the limits of the carrier responsibility provided by the Montreal Convention.

9. As Ukraine was not a party to the International Air Transport Association (IATA) Inter-carrier Agreement on Passenger Liability 1995, some Ukrainian courts treat the first level of carrier responsibility stated in the Montreal Convention as an 'unconditional limit of responsibility to be compensated by the carrier' or as 'minimum payment' irrespective of the amount of damages received by the passenger, but not as a ceiling within which limits the claimant should prove his or her damage.
10. As there is no clear prohibition or allowance for pre-impact damages in Ukrainian law and considering that they are usually claimed in death cases, we consider that pre-impact damages are not recoverable in Ukraine. Punitive damages are not allowed under Ukrainian law.
11. Ukrainian courts satisfied passengers' claims based on 'inconvenience created due to aircraft crash', or 'break in routine rhythm of life that affected claimant's physical health', that is, psychological damage not connected to bodily injury are satisfied.
12. At the same time, Ukrainian courts refused to satisfy claims on psychological suffering due to delay in baggage carriage, even if such claims are within the limits of the Montreal Convention. The grounding was based on absence of clear allowance of such claims in the Montreal Convention itself.
13. These are 'peculiarities' in consideration of air claims in Ukraine which prove that the Montreal Convention enforcement needs some improvement.