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SUPREME COURT DECISION ON THE PASSENGER BURDEN OF THE PROOF THE RECENT PRACTICE OF ITALIAN JUSTICE OF PEACE

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The Italian Supreme Court (*Corte di Cassazione*) has recently ruled on the burden of the proof applicable to both Montreal Convention 1999 and to the EC Regulation 261/2004 claims for denied boarding, flight cancellation and delay.

Said ruling can be considered notable, given the rare frequency of proceedings pertaining the above claims being appealed in third and final instance before the Italian Supreme Court.

Indeed, most of the disputes regarding the possible disruptions in air transport of passengers ruled by articles 4 ("Denied boarding"), 5 ("Cancellation of flight") and 6 ("Delay") of the EC 261/04 Regulation, and by article 19 ("Delay") of the Montreal Convention 1999, are usually discussed before the Italian Justice of the Peace – JoP – offices, due to the fact that their value is in most cases limited (or purposely kept, as clarified below) within the JoP claim competence, i.e. below Euro 5,000.

Recent case law experience revealed as a common claimants' procedural strategy that of purposely maintaining the value of these claims within the abovementioned limit so to benefit of the competence of the Justice of the Peace, and this basically for two reasons: (A) JoP offices are

distributed throughout the territory, especially in a large number of very small towns where no tribunals sit: in this way a larger number of cases can be filed with courts; and, in addition to that (B) Justices of the Peace are honorary lay judges, introduced in 1991 (operating effective as of 1995) in order to deflate the work of Tribunals and take care of minor cases characterized by limited value, claims for restoration of damages for car accidents within the limit of Euro 20,000, condominium disputes, and similar. As such, since their introduction JoP offices have always had very limited aviation law background and experience.

The issue of the EC Regulation 261/2004 in connection with the extraordinary development of low-cost airlines that, also thanks to the Schengen acquis, expanded their commercial offer introducing in the last fifteen years several new destinations throughout the European Union territory, determined the contextual exponential growth of the number of disputes regarding air transport of passengers. Nonetheless, the multiplication of cases entrusted to their competence did not determine a consequent enhancing of JoP's aviation law knowledge and capability. In most cases, Justice of Peace remained staunchly linked to their customary "Robin Hood" attitude – strengthened by decades of case decisions on road accidents – of particular favor to plaintiffs/passengers, traditionally identified as the weak side of the contractual relationship.

Hence, it happens that a huge percentage of Justice of the Peace decisions tend to be – often unreasonably and without grounds – in favor of passengers, thus constituting negative precedents for the industry, and are not appealed by carriers in most instances to avoid costs' increases. The appeal of a JoP decision is heard by Tribunals, where magistrates would decide them in strict accordance with law.

Not limited to that, JoPs also tend to award compensation for delay/cancellation applying by analogy EC Regulation 261 monetary criteria also where such Regulation is not applicable.

This practice particularly affects extra-UE carriers – and flights operated by the same – in all those cases not falling under the applicability of EU Regulation 261 (limited to passengers departing from an airport located in the territory of a Member State to which the Treaty applies and passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Treaty applies).

A very peculiar example of this fact is represented by the most recent trend registered by the Civitavecchia Justice of Peace office's jurisprudence. Civitavecchia can be considered a key JoP for aviation matters, due to the fact that most of the claims raised against airlines having registered offices or a local branch in Rome Fiumicino airport fall under its territorial competence. This JoP has introduced a particular way of using analogy in cases where the compensation system established by the Montreal Convention applies.

According to Montreal rules the carrier is liable for damage occasioned by delay in the carriage by air of passengers, unless it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 19 of the Montreal Convention represents a typical damage compensation system that, also according to Italian civil law rules, requires that claimants provide rigorous evidence of the link existing between the occurred delay and the damage causation, as well as the quantification of the extent of the damage occurred. On the contrary, art. 7 of the EC 261/04 Regulation is generally regarded to as an indemnity system which identifies in advance the amount of compensation due for a specific event, regardless of the proof of the existence of damage or its quantification.

The JoP of Civitavecchia's current jurisprudence on this matter is such that in all cases in which the compensation system under Montreal Convention 1999 will be applicable, award is generally granted to passengers claiming for damages in the amount of Euro 600 (i.e. the compensation due for extra-Community flights of 3,500 kilometers and over). This based on the assumption that, even where no proof was given by plaintiff on the existence and quantification of alleged damages, they can be considered existing *per se* as a consequence of the occurred delay/cancellation. Damages are then quantified by analogy with article 7 of the EC Regulation 261 in the same amount (for indemnification) provided therein (*ex multis*, Civitavecchia JoP decisions no. 1653/2018 of November 22, 2018; 1422/2018 of September 21, 2018; 1423/2017 of November 13, 2017).

The recent case (Judgment no. 24547 of 5 October 2018) decided by the Italian Supreme Court (substantially confirming what previously stated by the same through former Order 1584 of 23 January 2018) affirmed a very important law principle which widely applies to all the above-mentioned cases. The Court stated that:

"*The passenger requesting damages deriving from denied boarding or flight cancellation (breach of contract) or from delay in relation to the scheduled time of arrival (incorrect fulfilment of the contract) has to submit evidence of the contractual basis of his rights and of the scheduled arrival time. In other words, the passenger has to submit the transport title, or the air-ticket or other similar evidence sufficing the mere allegation of the carrier's default. To the contrary, the carrier, who normally is a defendant, has to provide evidence of the correct fulfilment of the contractual obligations, or – in case of delay – that the flight was delayed below the thresholds provided by Art. 6, 1st paragraph, of EC Reg. 261/04*".

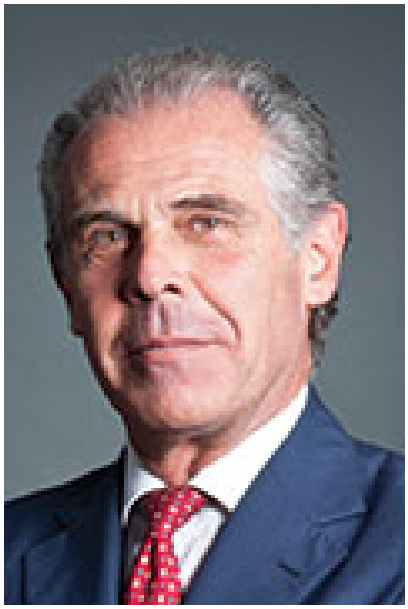
The passengers are therefore entitled to ask the joint applicability of both Montreal Convention 1999 and EC Reg. 261/2004, considering that the two disciplines are not in conflict and their applicability is aimed to protect the consumers' interests to the maximum extent possible. In

application of this principle, the Court has clarified that it is reasonable that the carrier's burden of proof be heavier than passengers' one, since the former has normally an easier access to independent sources of evidence regarding the flight time of actual departure and actual arrival.

Once the default of the carrier is established, and the compensation due under EC 261 is paid, however, in order to obtain any further compensation possibly due to them the passengers still have to prove their rights in this sense, according to the ordinary rules on the burden of proof, which is not reversed or subverted by the provisions of the Montreal Convention, nor by the Supreme Court decision in question.

The same decision further clarifies this very point: the Supreme Court in fact stated that a serious delay in air transport could indeed cause, for two professionals such as the applicants of the case in question, even severe damages from loss of work opportunities or reputational damage. Nonetheless, given the nature of such additional alleged damages, passengers must provide a rigorous and specific evidence, which cannot be limited to only general allegations. This because "*being a consequent damage, it is obviously the injured person who is called upon to prove its existence and to prove the concreteness of the prejudice suffered*".

This is a very important principle to which – hopefully – all the Justice of Peace offices will adhere in future cases.



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