The Liability Aspects of the Volcanic Eruption on Iceland

The Blame Game Begins

The unprecedented chaos in the European and global air traffic caused by the ash cloud from the Icelandic volcano Eyjafjallajökull resulted in long delays and cancellation of flights all over Europe. The present article discusses the issue of air carrier liability to passengers and outlines the effects of the Montreal Convention 1999 and EU Regulation 261/2004. The essay also considers whether a State is liable to compensate an airline for loss of revenue as a result of the prolonged closure of airspace.

Arpad Szakal, LL.M. (Leiden)
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1. Introduction

On Wednesday April 14, 2010 the volcano under the Eyjafjallajökull glacier in Iceland has erupted for the second time in less than a month. The volcanic ash drifting across the Atlantic Ocean forced airlines to cancel flights first at UK airports, including London Heathrow, Europe’s busiest international airport, and later at airports located in Northern and Western Europe. The presence of the volcanic ash in the atmosphere resulted in the disruption of European air traffic stranding millions of passengers worldwide. Having learned from the adverse affects of volcanic ash on jet engines from previous incidents, European civil aviation authorities and ATNS providers decided not to allow any flights to take place in affected areas for almost a week, causing the airlines worldwide an estimated $1.7bn\(^1\) loss in revenues. Airlines are currently receiving an enormous number of claims for compensation from air passengers who have suffered long delays and cancellations at various European airports.

The first group of claimants will almost certainly comprise of cargo consignors/ consignees and passengers who are not covered by the relevant EU Regulation\(^2\). These claims will most likely be based on Article 19 of the Montreal Convention 1999\(^3\) which makes the “carrier liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo”\(^4\) unless the carrier relieves itself from liability under Art. 19 (second sentence) of MC99. Other claimants will almost certainly base their claims on EU Regulation 261/2004 which requires airlines to provide compensation and assistance to passengers in case of delay, denied boarding or flight cancellation. The Regulation exclusively applies to air passengers and not to air cargo. As the EU rules on consumer protection are very strict it is submitted that airlines will find it challenging to reduce their exposure and avoid having to reimburse and compensate their effected passengers.

The issue of State liability will also be discussed since, according to IATA’s Giovanni Bisignani, States will have to compensate the airlines for loss of business because the EU

\(^1\) International Air Transportation Association Press Release: [http://www.iata.org/pressroom/pr/Pages/2010-04-21-01.aspx](http://www.iata.org/pressroom/pr/Pages/2010-04-21-01.aspx) (last accessed 21.03. 10)


\(^3\) Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 28\(^{th}\) May, 1999

\(^4\) Article 19 MC99
closed the airspace without any evaluation of the danger posed by the volcanic ash in the atmosphere.

The volcanic eruption on Iceland ejected large amount of volcanic ash into the atmosphere that accumulated at high altitudes and drifted with the wind towards the European continent. Volcanic ash consist of small solid particles and it cannot be noticed on aircraft weather radar or ATC radars due to its very small size.\(^5\) The main risks posed by volcanic ash are engine malfunction, long term engine defect and external surface corrosion.\(^6\) There have been quite a number of occasions when an aircraft was affected by volcanic ash. Perhaps the most notable one happened on 24 June 1982 when a British Airways Boeing747-236B aircraft lost power in all its engines at 37,000 feet en route from Kuala Lumpur to Perth.\(^7\) The aircraft descended with no power from 37,000 feet to 12,000 feet at which point the pilot miraculously managed to restart three of the engines and land safely.

The volcanic eruption on Iceland has lead to the closure of Northern and Western Europe’s airspace. Article 9 of the Chicago Convention\(^8\) provides Member States the right to close their airspace. According to Article 9a of the Convention each contracting State may for reasons of military necessity or public safety, restrict or prohibit the aircraft of other States from flying over certain areas of its territory. An important criteria set out in Article 9 is that there should be no distinction made between the aircraft\(^9\) of the State whose territory is involved and aircraft of the other contracting States. Article 9b also states that each members State of ICAO is allowed to reserve the right, in exceptional circumstances or in an emergency situation, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any parts of its territory, provided that such a restriction does not discriminate as to nationality of aircraft of other member States.\(^10\)


\(^6\) Ibid. *Supra* note. 5.

\(^7\) The BA aircraft flew into a volcanic ash cloud caused by the eruption of Mount Galunggung which resulted in the failure of all four engines. The flight crew noticed St Elmo’s fire and an acrid smell and dust entered the cabin through the aircraft’s air conditioning system. The aircraft managed to escape the ash cloud and the pilot successfully restarted the engines. The air traffic controllers and the pilots could not identify the reason for the engine failure immediately after the event.


\(^9\) An aircraft which performs an international scheduled airline service

\(^10\) Chicago Convention, *Article 9b*. 
2. **Air Carrier Liability: Claims based on the Montreal Convention 1999**

It is unlikely that carriers will be held liable for delay under Article 19 of the Montreal Convention. However, it is expected that cargo consignors/consignees and passengers outside of the scope of Regulation 261/2004, such as those heading to the EU on a non-EU carrier, will attempt to bring a claim based on the ‘delay article’ of the Convention. Article 19 states: “The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo”. Accordingly, the claimant will be required to prove that his damage was caused as a result of the delay in the carriage by air. But who is entitled to bring a claim under Article 19? The difficulty arises from the fact that Article 19 does not specifically state who is entitled to claim.

**A. The plaintiff**

In principle the contractual partner (either the passenger or the consignor) of the air carrier has *locus standi* to bring a claim. In *X v Air Europa*\(^1\) it was held that it is irrelevant who have paid for the ticket, it is the passenger himself who has the right to bring an action against the air carrier. With respect to cases where the air ticket was purchased by a person, other than the passenger itself, with an interest in the passenger’s punctual arrival the following rule has been established in the case of *Pakistan Arts and Entertainment Corporation v Pakistan International Airlines Corporation*\(^2\). The case concerned a company which has organised entertainment events. For one of its events, the company has engaged performers who were passengers on tickets purchased by the company which had an interest in the timely arrival of the performers. The court held that the company organising the event was entitled to sue as a party to the contract of carriage due to its interest in the timely arrival of its business partners.

Shawcross and Beaumont argues that, as a result of the general terms of Art 19 as to the person of the claimant, virtually any person who can prove that he has suffered damage as a result of delay caused to a passenger or baggage or cargo, may claim under the Convention even if the damage was not foreseeable by the defendant or was a remote consequence of the delay\(^3\). The above was clearly not intended by the drafters of the Convention since it would create an unreasonable number of potential claimants. The decision in *Vasallo and Clare*

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\(^2\) 660 NYS 2d 741 (App Div, 1997) 25 Avi 18, 464
\(^3\) Shawcoss and Beaumont: Air Law VII [1009]
Trans Canada Airlines\textsuperscript{14} supports the view that third parties whose damage results from the delay do not have the option to recover because it could not possibly have been within the contemplation of the parties to the contract of carriage.

\textbf{B. The Defendant}

The wording of Art 19 states specifically that the claim for damages is directed against the airline. According to Article 36 MC99 the succeeding air carrier can also be considered as defendant, if he accepts passengers, cargo or baggage\textsuperscript{15}.

Given that European airspace was shut down by the relevant aviation authorities, claims based on Article 19 of the Montreal Convention will not be successful because the airlines will use Article 19’s second sentence\textsuperscript{16} to relieve themselves. The eruption of the volcano was clearly an “act of God” and in the event of an act of God/force majeure the avoidance of the occurrence of loss is not possible. In cases of force majeure even if the carrier would have taken all reasonable measures it would not have been able to avoid the loss. As it was completely impossible for airlines to resume their cancelled flights due to the closure of the European airports as a result of the volcanic eruption on Iceland the airlines will most probably argue that it was impossible for them to avoid the loss. Hence, a claim based on Article 19 MC99 will not necessarily lead to success.

\textbf{3. Air Carrier Liability: Claims based on EU Regulation 261/2004}

Airlines can expect a significant amount of claims based on EU Regulation 261/2004.

\textit{A. Categories of persons who are covered by the Regulation?}

The Regulation came into effect on 17\textsuperscript{th} February 2005. The aim of the regulation is to establish common rules on compensation and assistance to air passengers who suffer denied boarding, cancellation, long delay of flights and downgrading. The rights granted by the Regulation apply to all passengers departing from EU/EEA airports as well as to passengers

\begin{itemize}
\item \textsuperscript{14} (1963) 38 DLR (2d) 383.
\item \textsuperscript{16} According to which if the carrier is able to prove that all the \textit{reasonable measures} for the prevention of the loss had been taken or that it had been impossible for him to take those measures, the carrier shall be not be held liable.
\end{itemize}
departing from outside of the EU/EEA but arriving at an EU/EEA airport on a “Community carrier”, unless they have already received compensation or assistance in that third country. Passengers who are traveling free of charge or at a reduced fare not available to the public will not be able to claim under the Regulation. As the pre-requisite of application of the Regulation is that the passenger shows up for check-in on time, claimants who have not presented themselves at the check in counter on time will also find it difficult to base their claims on the Regulation. It is important to point out that under the Regulation passengers will not be able to claim for their lost or damaged baggage. Personal injury and refunds of charges and taxes are also beyond the scope of the Regulation.

B. Claims for Cancellation under the Regulation

During the chaos caused by the presence of volcanic ash in the airspace almost all flights in the Northern and Western part of Europe were cancelled. Thus, most travelers will base their claims on Article 5 of the Regulation which deals with cancellation. Article 5 provides that where a flight is cancelled, (like in most cases during the period of the flight ban) the Regulation requires airlines to offer passengers the following:

a. right to reimbursement of ticket or re-routing (Article 8);

b. right to care and assistance (Article 9); and

c. compensation which depends on the flight distance (up to Euro 600) (Article 7).

a. Right to reimbursement or re-routing (Article 8)

Passengers are entitled to the above rights even in very exceptional cases, such as the presence of volcanic ash in the atmosphere. According to Article 8 of the Regulation airlines will need to reimburse their effected passengers within 7 days for the full cost of the ticket purchase price for the part(s) for the journey not made (or for the parts already made if the flight no longer serves any purpose in relation to the passenger’s original travel plan); and when relevant, a return flight to the first point of departure, at the earliest opportunity. Alternatively, the airlines will need to offer re-routing under comparable transport conditions to the passenger’s final destination, either at the earliest opportunity or at a later date at the passenger’s convenience, subject to the availability of seats.

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17 Article 8 (a)
18 Article 8 (b)
The European Commission’s Information Document on Regulation 261/2004 confirms that in cases of re-routing, flights do not necessarily have to be operated by the airline the passenger originally booked his ticket with. Further, re-routing does not need to be by air but alternative transport modes “such as train, taxi or bus” can be offered to the passenger “if the distance to be covered is appropriate for such transport modes”.\(^{19}\) In case the passenger wishes to travel at a later date, rather than the earliest opportunity, the Commission’s guidance material provides that the “airline’s obligation to provide further assistance stops when the reservation is cancelled resulting in the passenger no longer being entitled to assistance”. Hence, the airline is not required to provide them with any kind of assistance beyond this point.

\(b\). Right to Care and Assistance (Article 9)

Article 9 of the Regulation (which deals with the Right to Care and Assistance) also provides that airlines have to provide their passengers with meals and refreshments in reasonable relation to their waiting time; hotel accommodation, in cases where an overnight stay(s) is necessary\(^{20}\) (which was in most instances the case); transport between the airport and place of accommodation; and two free phone calls, telexes, faxes or emails.

\(c\). Awards for Passengers (Article 7)

Airline passengers might base their claim on Article 7 because the Regulation expressly provides for compensation in the event of cancellation- EUR 250 for flights of 1,500 km or less, EUR 400 for intra EC flights of more than 1,500 km and for other flights between 1,500 and 3,500 km, and EUR 600 for all other flights.\(^{21}\) The Court of Justice of the EU held in the joined cases of \textit{Sturgeon v. Condor and Böck} and \textit{Lepuschitz v. Air France}\(^{22}\) that passengers who reach their destinations three hours or more after the original scheduled time of arrival are entitled to receive an award from the airline. In most cases, however, airlines will face claims for cancellations and not for delays. Further, Article 29 of the Montreal Convention forbids the grant of non-compensatory damages and the above standardized amounts do not serve the purpose of “compensation”.

\(^{19}\) The European Commission’s Information Document on Regulation 261/2004 \textit{ec.europa.eu/transport/air_portal/passenger_rights/doc/…/q_and_a_en.pdf} (last accessed: 23. 03. 10.

\(^{20}\) This rule is applicable to even those scenarios where the cost of these additional expenses (hotel accommodation etc) exceeds the price of the airplane ticket the passenger has paid for.

\(^{21}\) Articles 5 and 7

\(^{22}\) Joined Cases C-402/07 and C-432/07
However, Article 5 (3) of the Regulation, which provides a defence to the airlines, states that “an operating carrier shall not be obliged to pay compensation ... if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken”. In this particular event, the chaos caused by the volcanic ash in the atmosphere can easily be classified as an “extraordinary circumstance”. In the case of Wallentin-Hermann v. Alitalia\textsuperscript{23} the Court decided that the term “extraordinary circumstance” should only be applied to an event which “is not inherent in the normal activity of the air carrier concerned and is beyond the actual control of that carrier on account of its nature or origin”.

It seems that the circumstances caused by the Eyjafjallajökull volcano fall easily within the courts definition of “extraordinary circumstance” in Wallentin-Hermann v Alitalia. In this case, the cancellations throughout Europe were necessitated by the presence of dangerous volcanic ash in the atmosphere, which can be considered as very exceptional circumstance. Hence, the passengers might not be able to claim the additional compensation. However, under the rules of the Regulation, stranded passengers are nevertheless entitled to reimbursement and/or re-routing as well as to care and assistance (which in most cases included hotel accommodation in this particular “ash event”). It is submitted that the “extraordinary circumstances” defence will come handy to the European airlines and will save them some cash.

However, in the present situation the “extraordinary circumstances” defence of EU Regulation 261/2004 provides little help to EU and other airlines as it only relieves airlines from the obligation to pay the standardised compensations - up to the maximum amount of EUR 600 per passenger. The largest amounts that airlines will have to pay for will be have to be hotel and meal bills and other related expenses.

We have seen that a claim based on Article 19 of the MC99 might not necessarily lead to success, given that the airlines airline has a defence if it can show that it took all reasonable measures to avoid the damage, or that it was impossible to do so. Thus, most passengers who have been effected by the chaos will base their claims on EU Regulation 261/2004. The

\textsuperscript{23} Case C-344/04 (2006) ECR.
Regulation is fairly clear about the obligations of airlines in cases of flight cancellations and long delays and most airlines agreed to compensate stranded passengers.

The rules set out in the regulation did not seem to be that straightforward to Ryanair’s O’Leary who had initially vowed to limit the compensation of the airline’s customer to the original cost of their air fare. However, after the EU’s warning of Ryanair about the possible consequences of non-compliance with EU consumer rules, the airline announced that it would comply with the ‘unfair’ European legislation. Thus, despite the rebellious reactions and comments from some air carriers as a result of the “damaging effects” of the notorious Regulation 261/2004, the airlines will end up having to compensate effected passengers for their expense that occurred during the chaos caused by the ash cloud.

4. State Aid to Airlines?

Following the volcanic ash events, the International Air Transport Association (IATA) heavily criticized European governments for their lack of leadership in handling airspace restrictions. Mr Bisignani stated that “governments have not taken their responsibility to make clear decisions based on facts. Instead, it has been the air navigation service providers who announced that they would not provide service. And these decisions have been taken without adequately consulting the airlines. This is not an acceptable system particularly when the consequences for safety and the economy are so large.”

Bisignani’s statement implies negligence on the part of the governments. On the top of IATA’s allegations, British Airways requested financial compensation from both the EU and the British Government for the closure of airspace. The airline was arguing that the test fights it has carried out shown that the ash did not pose any kind of danger to the aircraft. The demand for compensation from the airlines is understandable as the airline industry is still struggling to recover from a steep fall in demand for air travel, brought on by the recent economic crisis. It is, however, arguable whether the UK Government can be held liable in tort for the loss of business of British Airways.

24 http://www.newser.com/article/d9f84a400/ryanair-u-turn-will-pay-stranded-customers-bills.html (last accessed: 23.03.10)
25 The airline can face fines ranging from EURO 5,000 to EURO 150,000 per complaint
26 http://airtransportnews.aero/print_article.pl?id=23057 (last accessed: 30.04.10)
27 http://news.bbc.co.uk/2/hi/8629674.stm (last accessed: 30.04.10)
The question of state aid should also be mentioned at this point. The tragic events of 11 September 2001 are comparable to the present chaos caused by the volcanic ash. Back in 2001, the airlines were battling with financial difficulties already when the terrorist attacks took place. Following the three day closure of the entire United States airspace the U.S. government announced a package of aid measures for U.S. airlines. After the American airlines received direct investment by the U.S. government the EU Commission considered the matter and stated that it would tolerate two specific types of aid measures, on the basis that they were permitted under the rules as being “aid to make good the damage caused by natural disaster or exceptional circumstances”:

- aid to compensate airlines for the costs of U.S. airspace being closed for four days, calculated on the basis of lost revenue,
- assistance in connection with insurance for a limited period.\(^{28}\)

The Commission’s approach on the matter was very soon approved by the Transport Council. The closure of a huge part of the European airspace as a result of the volcanic eruption on Iceland were completely unexpected and beyond the control of the airlines. Thus, from the author’s point of view, under the present circumstance airlines should be provided with an emergency state aid in a similar way like it was in the U.S. after 9/11.

5. Conclusion

Airlines around the world are struggling to recover from the economic crises. The decision by the European authorities not to allow airlines to operate has significantly slowed down this recovery process and airlines around the world has been very hardly hit as a result of the shutdown. Airlines across Europe have suffered significant interruptions to their business activities which resulted in loss of revenue. The event, being a natural disaster, was completely beyond the airlines control. Hence, the airlines should be provided financial assistance by their respective governments. Their claims for state aid are legitimate. Moreover, the airlines cannot be expected to look after every single one of their stranded passengers in such an unexpected situation. The closure of airspace was beyond their control,

hence it would be unfair towards the airlines if they would have to pay for the expenses of their stranded passengers. From my point of view the respective States would be in a much better position to take care of their stranded citizens wherever they are in the world. Making airlines pay for something which they could not possibly influence cannot be the right solution in the present situation.
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