

Do ferry companies and cruise ships offer sufficient protection to passengers travelling by sea and inland waterway?

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Speech by Mr J.F. LECLERCQ, General Prosecutor at the Supreme Court, on the occasion of the opening solemn audience of the Supreme Court of Belgium, on 3 September 2012. (Abstract)

Section 1. -Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004: object.

§1. - Making the transport over sea and inland waterway more attractive and stimulating the confidence in that means of transport.

1. "Luchtvaartmaatschappijen zijn niet gek op passagiersrechten"<sup>(1)</sup>.

Airline companies are not fond of passenger rights: that is the title of a provoking comment on the judgment STURGEON of 19 November 2009 of the Court of Justice of the European Union, written by professor Cees van DAM, honorary professor of European Private Law at the University of Utrecht and Visiting Professor at the King's College in London<sup>(2)</sup>.

The question whether ferry companies and cruise ships offer sufficient protection to passengers travelling by sea and inland waterway seems to me appropriate as on the one hand the Common law has treated the rights of passengers travelling by sea equally as those of passengers of flights<sup>(3)</sup> and on the other hand that question is clearly of practical importance particularly for the shipping routes between Belgium and the

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<sup>1</sup> I kindly thank Mrs Nathalie Van den Broeck, secretary-head of service of the office of the public prosecutor of the Supreme Court for having accomplished the English version of this study.

With regard to the quotation in the text of the study see C. van DAM, "Luchtvaartmaatschappijen zijn niet gek op passagiersrechten", NJB (Nederlands juristenblad) 19 March 2010, pp. 672 and following.

<sup>2</sup> C.J.E.C. 19 November 2009 (Christopher STURGEON and others against CONDOR FLUGDIENST GMBH and Stefan BÖCK and Cornelia LEPUSCHITZ c. AIR FRANCE S.A.), Joint cases C-402/07 and C-432/07, Rec. C.J.E.C. 2009-11, Part I, pp. I-10923 and following, with concl. of Mrs E. SHARPSTON, attorney general.

<sup>3</sup> H. KENFACK, "Panorama. Contrat de transport. Droit des transports janvier 2009 – décembre 2010", D.H. 2 June 2011 – n° 21, p. 1446.

United Kingdom and for the numerous Europeans who use the shipping route Calais-Dover and the shipping routes between Marseilles and Corsica or Sardinia, as well as for the devotees of cruises on the Rhine and the Danube.

2. After the protection provided by Regulation (EC) No 261/2004 of passengers of flights<sup>(4)</sup>, now the passengers travelling by sea and inland waterway are next. On 17 December 2010 the Official Journal of the European Union published indeed Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004<sup>(5)</sup>.

The object of Regulation (EU) No 1177/2010 is to consolidate the rights of passengers under the terms of national and international transport by sea and inland waterway including disabled persons and persons with reduced mobility.

§2. - European Union time scale of construction with regard to the rights of passengers in the field of transport.

3. Jacques ZACHMANN, Principal Administrator at European Commission, remarks that on the European Union time scale of construction one can notice only recently that the European Union tackles the rights of consumers and to be more specific the rights of passengers in the field of transports<sup>(6)</sup>.

That remark can be explained by the circumstance that the efforts of Europe at the start of the construction of Europe were more focused on the industrial re-organization such as, for example, the foundation of the Coal and Steel Community.

The customer was not on the list of priorities and even in the Treaty establishing the European Coal and Steel Community the connecting thread of the policy on competition seems to rest

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<sup>4</sup> Regulation (EC) n° 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91, JOUE n° L 46, 17 February 2004, p. 1.

<sup>5</sup> JOUE n° L 334, 17 December 2010, p. 1.

<sup>6</sup> J. ZACHMANN, "Les droits des passagers dans le domaine des transports", Travaux de la CEDECE, L'Europe des transports, Actes du colloque d'Agen, Université Montesquieu – Bordeaux IV, 7 and 8 October 2004, under supervision of Loïc GRARD, La Documentation française, Paris, 2005, p. 233. Il est à espérer qu'en responsabilisant l'Etat du port, les standards de sécurité pour naviguer soient aussi de mieux en mieux respectés: comp. G. CATALDI, "Problèmes généraux de la navigation en Europe (Rapport général)", L'Europe et la mer (pêche, navigation et environnement marin), Collection de droit international, Brussels, Bruylant – Editions University of Brussels, 2005, p. 144.

on the optimistic postulate that the well-being does necessarily well for the final customer.

The measures to open the national markets, implied services at reduced prices, and as counterpart the development of a policy to protect all customers, have contributed to the fact that the air and rail transport by high-speed trains became more accessible for customers.

It is therefore obvious that it was first the air transport that could benefit from the community achievements<sup>(7)</sup> even if aforesaid Regulation (EU) No 1177/2010 for all passengers when travelling by sea and inland waterway clearly aimed for consumers and as it consolidates the rights of consumers by transparent prices and a restriction on any kind of discrimination.

The process of opening the market of transport of persons by sea started in 1986 and was consolidated in 1992 with the opening of the markets of transport by sea and between member states.

However, the opening of the market cannot be considered as completed as long as the consumers, and not only the enterprises, are not able to draw a maximum of benefits out of it.

## Section 2. - Regulation (EU) No 1177/2010 and the obligations of carriers and terminal operators in the event of interrupted travel.

### §1. - The contents of Chapter III of the Regulation.

4. The obligations of carriers and terminal operators in the event of interrupted travel compose Chapter III of Regulation (EU) No 1177/2010 (articles 16 to 21).

From a didactic point of view, this Chapter III seems to be subdivided in four parts: the situation in the event of cancelled or delayed departures (articles 16, 17 and 18), the situation in the event of delay in arrival (article 19), the

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<sup>7</sup> J. ZACHMANN, "Les droits des passagers dans le domaine des transports", Travaux de la CEDECE, L'Europe des transports, Actes du colloque d'Agen, Université Montesquieu – Bordeaux IV, 7 and 8 October 2004, under supervision of Loïc GRARD, La Documentation française, Paris, 2005, p. 235.

Exemptions (article 20) and the right for passengers to appeal to apply common law (article 21).

The stipulations of Chapter III of this Regulation are by many considered as the most important ones of that text, so that these stipulations will probably be examined by others and therefore it is not necessary to elaborate on all articles in this study<sup>8</sup>).

§2. - The situation in the event of cancelled or delayed departures.

5. Three series of rights are provided for passengers in the event of cancelled or delayed departures. The three series of rights are the following. Article 16 establishes the obligation to give information and the right that results from it. Article 17 establishes the right for assistance. Article 18 creates for travelers a right for re-routing or reimbursement in the event of cancelled or delayed departures for more than ninety minutes; that is also the case if the delay or the cancelling can be anticipated. I remind that according to article 2.1.c of the Regulation, the articles 16.2 and 18 shall not apply on passengers travelling on a cruise.

6. I restrict myself to comment on article 17 of the Regulation entitled "Assistance in the event of cancelled or delayed departures".

Article 17 exposes the following:

"1. Where a carrier reasonably expects the departure of a passenger service or a cruise to be cancelled or delayed for more than 90 minutes beyond its scheduled time of departure, passengers departing from port terminals shall be offered free of charge snacks, meals or refreshments in reasonable relation to the waiting time, provided they are available or can reasonably be supplied.

2. In the case of a cancellation or a delay in departure where a stay of one or more nights or a stay additional to that intended by the passenger becomes necessary, where and when physically possible, the carrier shall offer passengers departing from port terminals, free of charge, adequate

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<sup>8</sup> See L. GRARD, "Consécration par l'Union européenne de nouveaux droits pour les passagers maritime et fluvial", *Revue de droit des transports* 2011, comm. 23, pp. 22 and following; H. KENFACK, "Panorama, Contrat de transport, Droit des transports, janvier 2009 – décembre 2010", *D.H.* 2011, 2 June 2011, n° 21, pp. 1446 and following.

accommodation on board, or ashore, and transport to and from the port terminal and place of accommodation in addition to the snacks, meals or refreshments provided for in paragraph 1. For each passenger, the carrier may limit the total cost of accommodation ashore, not including transport to and from the port terminal and place of accommodation, to EUR 80 per night, for a maximum of three nights.

3. In applying paragraphs 1 and 2, the carrier shall pay particular attention to the needs of disabled persons and persons with reduced mobility and any accompanying persons”.

7. Article 20 limits the scope of article 17.

According to article 20.1, that I remind does not apply on cruise ships (article 2.1.c), article 17 “shall not apply to passengers with open tickets as long as the time of departure is not specified, except for passengers holding a travel pass or a season ticket”.

Article 20.2 determines that article 17 “shall not apply if the passenger is informed of the cancellation or delay before the purchase of the ticket or if the cancellation or delay is caused by the fault of the passenger”.

In terms of article 20.3 “article 17.2 (I remind, concerns the event of accommodation) shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship”.

In article 20.3 the burden of proof belongs to the carrier.

8. The Considerations of the Regulation explain what should be understood by “accommodation” and by “weather conditions endangering the safe operation of the ship”.

Consideration 13 of the Regulation emphasizes the above-mentioned notion of “accommodation”. It prevails that “Adequate accommodation for passengers may not necessarily consist of hotel rooms but also of any other suitable accommodation that is available, depending in particular on the circumstances relating to each specific situation, the passengers’ vehicles and the characteristics of the ship”. It also mentions that “In this respect and in duly justified cases of extraordinary and urgent circumstances, carriers should be able to take full advantage of the available relevant facilities, in cooperation with civil authorities”.

As to the "weather conditions endangering the safe operation of the ship" Consideration 16 of the Regulation mentions that "should include, but not be limited to, strong winds, heavy seas, strong currents, difficult ice conditions and extremely high or low water levels, hurricanes, tornados and floods". According to Consideration 19, the Exemption provided by article 20.3 explains itself by the fact that "weather conditions endangering the safe operation of the ship are indeed beyond the actual control of the carrier". Loïc GRARD writes about this Exemption: "Cette réserve est propre au maritime. Elle a été conçue pour éviter que le transporteur ne soit tenté de prendre la mer par mauvais temps, juste pour éviter de devoir déboursier des montants trop importants. Pour un gros ferry, compte tenu du nombre de passagers, l'obligation peut en effet atteindre des sommes fort élevées"<sup>9</sup>).

As we observed already, article 17.2 submits the passenger accommodation on condition that "where and when physically possible"<sup>10</sup>. That condition appeared already in the text proposed by the Commission of European Communities. The European Parliament proposed to cancel that condition. The European Parliament justified its point of view as following: "Compensation should not be conditional on unspecified material circumstances. It seems completely unreasonable to oblige someone who has suffered at least one day's delay to meet the costs involved"<sup>11</sup>. The text of the Regulation does not maintain that Amendment.

### §3. - The situation in the event of delay in arrival.

9. Article 19 of the Regulation establishes the right for passengers for compensation of the ticket price in the event of delay in arrival. It does not apply in respect of passengers travelling on a cruise (article 2.1.c).

The compensation is in accordance to the outcome of the delay and the initially determined duration of the trip. However, a

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<sup>9</sup> L. GRARD, "Consécration par l'Union européenne de nouveaux droits pour les passagers maritime et fluvial", *Revue de droit des transports* 2011, comm. 23, p. 23.

<sup>10</sup> See above, n° 6.

<sup>11</sup> See EUROPEAN PARLIAMENT, Draft Report on the proposal for a directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (COM[2008]0816-C6-0476/2008 – 2008/0246[COD]), Committee on Transport and Tourism, Rapporteur: Michel TEYCHENNE, 27 January 2009, 2008/0246 (COD), p. 18/26.

compensation of 100% is generally excluded (see nonetheless article 19.2).

Article 19.1, an essential stipulation is as following:

"1. Without losing the right to transport, passengers may request compensation from the carrier if they are facing a delay in arrival at the final destination as set out in the transport contract. The minimum level of compensation shall be 25% of the ticket price for a delay of at least:

(a) 1 hour in the case of a scheduled journey of up to 4 hours;

(b) 2 hours in the case of a scheduled journey of more than 4 hours, but not exceeding 8 hours;

(c) 3 hours in the case of a scheduled journey of more than 8 hours, but not exceeding 24 hours; or

(d) 6 hours in the case of a scheduled journey of more than 24 hours.

If the delay exceeds double the time set out in points (a) to (d), the compensation shall be 50% of the ticket price".

Articles 19.3 and 19.6 define that the ticket price should be interpreted as in article 19.1:

"3. Compensation shall be calculated in relation to the price which the passenger actually paid for the delayed passenger service".

"6. The compensation of the ticket price shall not be reduced by financial transaction costs such as fees, telephone costs or stamps. Carriers may introduce a minimum threshold under which payments for compensation will not be paid. This threshold shall not exceed EUR 6".

One remarks that article 19.1 aims to "passengers that are facing a delay in arrival at the final destination", whatever theoretically the reason of their delay is (see, however, articles 20.2 and 20.4). It did not seem expedient to the authors of the Regulation to describe the potential reasons of delay at arrival; the traveler has theoretically in all cases right for compensation<sup>(12)</sup>.

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<sup>12</sup> See above, note 11, EUROPEAN PARLIAMENT, p. 19/26.

10. The Exemptions provided in articles 20.1 and 20.2, can also be applied on article 19<sup>(13)</sup>.

I remind that article 20.1 does not apply to passengers with open tickets and that article 20.2 does not apply to passengers informed of the delay before the purchase of the ticket or if the delay is caused by their fault.

11. Article 20.4 of the Regulation mentions two other cases where article 19 cannot be applied.

Article 20.4 exposes the following:

"4. Article 19 shall not apply where the carrier proves that the cancellation or delay is caused by weather conditions endangering the safe operation of the ship or by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken".

It is strange that this stipulation aims the event of "cancellation" whereas article 19 does not concern "delay in arrival".

As to the non-application of article 19 "when the carrier proves that the (...) delay (is caused) by weather conditions endangering the safe operation of the ship", article 20.4, reproduces the terms used in article 20.3, previously discussed<sup>(14)</sup>.

According to article 20.4 article 19 cannot be applied as well "the carrier proves that the (...) delay (is caused ...) by extraordinary circumstances hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken".

When reading the preliminaries, I intend to think that the text of the Regulation should be examined in the light of the words used in the scope of the autonomy of common law and one should not restrict to the idea of circumstances beyond one's control.

According to the non-exhaustive Consideration 17 of the Regulation, "Extraordinary circumstances should include, but not be limited to, natural disasters such as fires and

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<sup>13</sup> See above, n° 7.

<sup>14</sup> See above, nos 7 and 8.

earthquakes, terrorist attacks, wars and military or civil armed conflicts, uprisings, military or illegal confiscations, labour conflicts, landing any sick, injured or dead person, search and rescue operations at sea or on inland waterways, measures necessary to protect the environment, decisions taken by traffic management bodies or port authorities, or decisions by the competent authorities with regard to public order and safety as well as to cover urgent transport needs". I shall also add, for example, disturbances in the supply of electricity, petroleum, gas or water that are not due to the carrier. According to me the criterion is in the presence of unusual circumstances that could not reasonably have been avoided. However, I admit the difficulty to be very precise, unless one assumes that exceptional circumstances are only those that escape the real control of the carrier by sea<sup>15</sup>), which seems to be a severe criterion for this carrier by sea, hardly compatible with Consideration 17 of the Regulation. Does the carrier have to, if for example a social conflict escalates on board, satisfy to all demands of the sailors in order to avoid a delay at arrival? Personally, I doubt that very much.

I also notice that, according to article 20.4 the burden of proof of the above-mentioned weather conditions or the extraordinary liberating circumstances belongs to the carrier.

I remind once more that articles 19 and 20.4, cannot be applied on passengers travelling on a cruise, given article 2.1.c.

#### §4. Application of the common law.

12. The specific stipulations of Regulation (EU) No 1177/2010 on the Obligation of carriers and terminal operators in the event of interrupted travel do not preclude passengers from applying common law.

Article 21 of the Regulation stipulates that "Nothing in this Regulation shall preclude passengers from seeking damages in accordance with national law in respect of loss resulting from cancellation or delay of transport services before national courts, including under Directive 90/314/EEC". So one can eventually conceive a demand of damage for a moral

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<sup>15</sup> Comp. C.J.E.C. 19 November 2009 (STURGEON and others against CONDOR FLUGDIENST G.M.B.H. and BÖCK and others against AIR FRANCE S.A.), C-402/07 and C-432/07, Rec. C.J.E.C., p. I-10923, with concl. of attorney general Mrs E. SHARPSTON.

disadvantage, namely a disadvantage of psychological order that affects the passenger in his affection, his honor, or his good name (delay in the attendance of a marriage or of a congress where the passenger has to conduct a lecture, et cetera) <sup>(16)</sup> .

The principle of the eventual application of the common law existed already in the original Proposition of the Commission of the European Communities. During the preliminaries, the way of phrasing the stipulation was mainly discussed.

§5. - Lessons that may be drawn of the air transport.

13. Without making hasty connections, it might be interesting to remind the arrests of the Court of Justice of the European Union with regard to air passengers, so that we might be able to draw useful lessons for passengers travelling by sea or inland waterway.

Repeatedly the Court of Justice of the European Union has pronounced on the interpreting of the stipulations of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding or long delay of flights, and repealing Regulation (EEC) No 295/91 <sup>(17)</sup> .

This Regulation determines the right to compensation of the air passenger in the event of cancellation of a flight (articles 5 and 7).

However, article 5.3 determines that "an operating air carrier shall not be obliged to pay compensation in accordance with Article 7, 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." That article reminds of course article 20.4 of Regulation (EU) No 1177/2010, that I have examined with regard to the right of a passenger travelling by sea to a compensation of the ticket price in the event of delay of the ship in arrival. Article 20.4 provides indeed in an Exemption "where the carrier proves that the cancellation or delay is caused by (...) extraordinary circumstances hindering the performance of the passenger

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<sup>16</sup> On the compensation of moral damage, see C.J.E.U. 13 October 2011 (SOUSA RODRIGUEZ and others against AIR FRANCE S.A.), C-83/10.

<sup>17</sup> See above, note 4.

service which could not have been avoided even if all reasonable measures had been taken"<sup>(18)</sup>. The court of Justice of the European Union declares "Article 5(3) of Regulation No 261/2004 must be interpreted as meaning that a technical problem in an aircraft which leads to the cancellation or delay of a flight is not covered by the concept of "extraordinary circumstances" within the meaning of that provision, 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"<sup>(19)</sup>. Applied on transport by sea, that rule would be as following: a technical problem to a ship that causes the delay of the ship at arrival, cannot be considered as a notion of extraordinary circumstance such as article 20.4 of Regulation (EU) No 1177/2010, unless this problem is the consequence of events that are due to their origin or due to their nature not inherent to the normal performance of the activity of the shipping company, and cannot have any actual effect. This rule seems to me very severe for the shipping companies.

14. The Court of Justice of the European Union also declares "Article 5(3) of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 (...) must be interpreted as meaning that an air carrier, since it is obliged to implement all reasonable measures to avoid extraordinary circumstances, must reasonably, at the stage of organizing the flight, take account of the risk of delay connected to the possible occurrence of such circumstances". The Court also says: "It must, consequently, provide for a certain reserve time to allow it, if possible, to operate the flight in its entirety once the extraordinary circumstances have come to an end". The Court adds "However, that provision cannot be interpreted as requiring, as a 'reasonable measure', provision to be made, generally and without distinction, for a minimum reserve time applicable in the same way to all air carriers in all situations when extraordinary circumstances arise. The assessment of the ability of the air carrier to operate the programmed flight in its entirety in the new conditions resulting from the occurrence of those circumstances must be carried out in such a way as to ensure

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<sup>18</sup> See above, n° 11.

<sup>19</sup> C.J.E.C. 19 November 2009 (STURGEON and others against CONDOR FLUGDIENST G.M.B.H. and BÖCK and others against AIR FRANCE S.A.), C-402/07 and C-432/07, Rec. C.J.E.C., p. I-10923, with concl. of attorney general Mrs E. SHARPSTON.

that the length of the required reserve time does not result in the air carrier being led to make intolerable sacrifices in the light of the capacities of its undertaking at the relevant time. Article 6.1 of that Regulation is not applicable in the context of such an assessment”<sup>(20)</sup>. Article 6.1 provides that in the event of a flight to be delayed, the passengers shall be offered assistance by the operating air carrier.

It is possible that the Court of Justice of the European Union was inspired by the above-mentioned interpretation with regard to maritime transport.

### Section 3. Conclusion.

15. Do the ferry companies and the cruise ships offer sufficient protection to passengers travelling by sea and inland waterways?

It is of course excluded that I can answer that question, however, it is certain that the European Union does many efforts so that the answer would be positive. That same Europe that is sometimes the target of criticism on social scale, but on this scale one cannot in any case make any reproach as to the endorsement of Regulation (EU) No 1177/2010, especially with regard to the disabled passengers travelling by sea or inland waterways and the passengers with reduced mobility. The role of the European Union seems to me fundamental on this scale.

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<sup>20</sup> C.J.E.U. 12 May 2011 (EGLITIS and others against LATVIJAS REPUBLIKAS EKONOMIKAS MINISTRIJA, in presence of AIR BALTIC CORPORATION AS), C-294/10, European Transport Law-2011, p. 403.