

# The diverting nature of disruptive

Identifying and managing unruly or disruptive passengers on board aircraft can be problematic and result in aircraft being diverted. Sean Gates, ERA's Legal Counsel, reviews the liability of airlines in these circumstances

With the onset of spring, there have been increasing reports of disruptive passengers on board aircraft around the world. Flights have been diverted in the US, the Middle East and Europe, where a Ryanair flight was diverted to Berlin to offload six passengers for drunken misbehaviour. These incidents invite a review of airline liability, to and of the disruptive passenger, and to other passengers, including under EU261.

## Prosecution of offences

There has inevitably been much industry consideration of the problem over recent years and IATA's *Guidance on Unruly Passenger Prevention and Management* contains a series of recommendations as to prevention, identification, management and control. IATA has also recommended and is pursuing a lobbying exercise for the implementation of the Montreal Protocol 2014 to the Tokyo Convention on Offences and Certain Other Acts committed on Board Aircraft of 1963. As a delegate on behalf of the

insurance industry I worked with various aviation organisations at the Diplomatic Conference giving rise to the Protocol. Industry succeeded, to some extent, by enabling prosecution of offences at the airport of next destination of the aircraft instead of exclusively the jurisdiction of the state of registry of the aircraft itself, which for obvious reasons almost never happened. States attending the diplomatic conference refused to mandate compensation actions by airlines against unruly passengers but did agree to permissive language recognising airlines' rights to pursue such claims. States were not, however, prepared to change the test of whether a captain's conduct in diverting an aircraft or ordering the detention of a passenger was reasonable and therefore immune from prosecution either of crew members or the airline itself.

## Explicit approval

Industry sought a presumption of reasonableness unless the perpetrator could prove otherwise; for a number of reasons. First, it is recognised that cabin crew do not always have time to consult with the captain, but without his or her explicit approval any actions by them under the present law would be automatically "unreasonable". Obviously, captains are not always able personally to intervene making them reliant on decisions of and reports from cabin crew. Additionally, the existence of the test itself permits courts to second guess the captain's decision without the benefit of years of flying experience and while in a court rather than a flight deck.

Notwithstanding this issue, the Protocol itself has the potential to enhance an airline's rights. However, it is a long way short of coming into law since it requires accession by 22 states. Notably, no European states have yet



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even ratified the Protocol and only one state worldwide has acceded. Treaties in ICAO move very slowly and the EC should be encouraged to lead.

## Criminal and civil liability

The legal issues arising out of disruptive passengers fall into three principal categories. First, the criminal and civil liability of the disruptive passenger needs to be considered. In certain states it is an offence for passengers to endanger aircraft. In the UK, for example, being drunk getting onto or in an aircraft is an offence, although there have been only four convictions. Passengers whose conduct has led to diverted flights have been prosecuted, and in this context the "On Board Together" group organised by Jet2 has made significant progress raising public awareness and encouraging prosecutions. Jet2 has also publically named, shamed and blacklisted passengers for disruption. Various airlines have sued passengers for the costs of diversion and, where there is sufficient evidence, judgments have been obtained. There must be consideration of the impact on the airline's reputation of its seeking prosecutions of customers

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but, since this would benefit the silent majority, it should not be prejudicial.

## Substantial compensation

The criminal and civil liability of the airline and its employees to passengers who have been detained or ejected from an aircraft must be reviewed. Passengers have made claims for substantial compensation for wrongful imprisonment. There are no available reports of such claims succeeding though some may have been settled. However, employees should be assured of their employers' support in the context of a prosecution for wrongful imprisonment, which could otherwise be a serious factor inhibiting an appropriate response to disruption. Mistakes can be made. The passenger recently evicted for having a Middle Eastern appearance and texting about prayers could reasonably consider whether his treatment was justified. A widely circulated policy of supporting staff should be considered.

## Claims for delay

The third area of concern is the potential for claims for delay under EU261 arising as a consequence of diversions or delays in departure caused by disruptive passengers. Conceivably, the European Court of Justice might regard a diversion as to be expected and therefore not an extraordinary circumstance entitling an airline to defend a claim for compensation. Set against this, it is somewhat heartening to see that the National Enforcement Boards in Europe have reached a provisional agreement that passenger disruption should amount to an extraordinary circumstance but that, of course, remains a draft and is yet to be implemented. However, it is assumed that airlines would not take their possible exposure to liability for compensation into account when considering the appropriate response to disruptive passengers. ■



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