

EGYPTAIR Flight MS 804 Crash: Aftermath and Liability Regime

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In our November 2015 edition we had the sad task of reporting on the loss of the Metrojet Airbus A329 aircraft in the Sinai desert on route from Sharm El Sheikh in Egypt to St. Petersburg in Russia and the regulatory and investigatory investigations to follow.

Tragically, on 19 May 2016 an EgyptAir Airbus A320 lost radar contact about 3.5 hours after taking off from Charles De Gaulle airport in Paris and just 10 minutes after entering Egyptian airspace. The 2003 built aircraft carrying 66 crew members and passengers was at an altitude of 37,000 feet when it “disappeared” from the radar.

As with the Metrojet disaster, speculation has raged about the cause of the tragedy. At the time of publication, investigators have recovered the aircraft’s “blackbox” flight recorders and analysis of the data is eagerly awaited given that the present available information is insufficient for the purposes of identifying the circumstances of the loss.

France’s aviation safety agency has said that the aircraft transmitted a series of automated messages indicating smoke in the cabin and a fault in the flight control unit, before losing contact. The Egyptian authorities have confirmed that investigators have received satellite reports indicating receipt of an electronic distress call from the plane’s emergency locator transmitter (“ELT”) shortly before the aircraft disappeared from radar.

As with Metrojet, and all aviation loss instances, there has been widespread media speculation as to the cause of the disaster ranging from a catastrophic mechanical failure to the possibility of a bomb planted by terrorists.

Unfortunately some media reports in the Middle East have attempted to provide explanations of compensation payable as a result of the loss of the aircraft and demonstrated a misunderstanding of the concepts involved in international aviation law. One article suggests that there is a special air navigation law that pays out set amounts to passengers’ families depending on the nationality of the victim and then lists a series of amounts payable based on their nationality.

As with all speculation in the aftermath of such terrible incidents, emotions run high and it is important to explain both the exact reasons for the airline incident (which will not be available until the incident is properly investigated) and also to accurately explain the legal concepts and international framework associated with aviation disasters and any consequential liability claims. Especially so as to avoid falsely raising expectations of bereaved families.

Aviation law is governed by international treaty and aviation liability claims are dealt with within a system which ostensibly provides an exclusive remedy for any passenger claim against an airline. The Convention for the Unification of Certain Rules for International Carriage by Air or “Warsaw Convention”, was ratified in 1929 and since that date it has been amended, updated and replaced through various instruments such as the Hague Protocol 1955 (the “Amended Warsaw Convention”), the Guadalajara Convention 1961, the Guatemala City Protocol 1971, and the Montreal Protocol No. 4 1975.

The Montreal Convention 1999 (the “Convention”) was drafted in an effort to modernise and consolidate the Warsaw Convention, and to replace the Warsaw system with a new uniform instrument. The intention behind the Convention is to achieve a level of global uniformity, to reflect a more prominent position of the passenger based on consumer rights, to reflect the balance of interests of consumers and air carriers, and to provide for reasonable compensation in the event of a claim against an airline.

The Convention applies to international carriage of passengers and cargo where the place of departure and place of destination are the territories of two member state parties, or the territory of a single state party if there is an agreed stopping place within the territory of a non-member state. To qualify as a member state party, a country must sign, ratify, adopt and bring the Convention into force by legislation in its own country.

As of 2016, there are 119 parties to the Convention worldwide. It is worth noting that other countries, such as Russia, have not ratified the new Convention and are still subject to the provisions of the Amended Warsaw Convention. For this reason, the liability claims arising from the October 2015 Metrojet loss in Sinai in Egypt on a flight scheduled from Sharm el Sheikh in Egypt to St. Petersburg in Russia are being dealt with under the old Amended Warsaw Convention.

The Convention came into force in Egypt on 25 April 2005 and in France on 28 June 2004. As both France and Egypt are member state parties to the Convention, and EgyptAir 804 was scheduled to fly between Paris and Cairo, the Convention applies to liability claims arising from the loss.

The airline is liable under Article 17 of the Convention, which provides that “the carrier is liable for damage sustained in the case of death or bodily injury on condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking”.

The level of compensation arising from Article 17 is provided by Article 21 of the Convention. This states that an airline cannot exclude or limit its liability for any damages up to 113,100 Special Drawing Rights (“SDR”). SDR is a form of currency determined by the International Monetary Fund and it is calculated on a basket of four key international currencies, the Euro, Japanese Yen, Pound Sterling and U.S. Dollar. The exchange rate of one SDR to one US Dollar is USD 1.40 (as at 1 June 2016), making the current compensation level under Article 21 equivalent to USD 158,550. Article 23 states that any SDR conversion exchange rate applied, especially in cases of judicial proceedings, will be determined at the date of the judgment.

Whilst an airline cannot exclude or limit its liability for compensation up to 113,100 SDR, it does not guarantee an automatic right to families of a passenger to recover this amount of damages. The level of damages awarded is still subject to strict proof and document verification.

Article 21 also allows families of a passenger or a passenger himself to claim a higher amount than the current threshold of 113,100 SDR, but this will still be subject to strict proof and the airline is allowed to raise two types of defences provided for in the Convention. These defences are that:

- such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
- such damage was solely due to the negligence or other wrongful act or omission of a third party.

Article 28 allows airlines, especially in aircraft accidents, to make advance payments to any party entitled to claim compensation and many airlines will make a provision for an advance payment in circumstances of total loss of the aircraft. However, advance payment does not mean that the airline is admitting any liability on its part and the payment amount will be offset against any further amounts that an airline may have to pay as damages.

Article 29 states that “any action for damages however founded” against an airline made under the

“Convention or in contract or in tort or otherwise” must be brought subject to conditions and limits of liability as set out under the Convention. In short, Article 29 expressly provides that the Convention is an exclusive regime and any action taken by the passenger or family members for compensation for death or bodily injury under Article 17 is an exclusive remedy. Article 29 further states that “in any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable”.

In addition to the Convention providing an exclusive remedy, the Convention provides that a party intending to bring a law suit is able to do so in five jurisdictions only. These are:

- in a country in which the carrier is domiciled;
- in a country in which the carrier has its principle place of business;
- in a country in which the carrier has a place of business through which the contract was made;
- at the place of destination; or
- in the territory of state party in which, at the time of the accident, the passenger has his principal and permanent residence, and to and from which the carrier operates services.

In terms of (i) and (ii) above, it is clear that EgyptAir is based and runs its commercial business from Egypt. Therefore, any claim made under (i) and (ii) above shall be brought in Egypt. In considering (iii) above, where the ticket was purchased and how it was purchased may be relevant factors. With respect to (iv) above, as Egypt was the destination, any party wishing to claim under this limb would have to file its action in Egypt. With respect to (v), regardless of the passengers’ nationalities, a claim can be brought within the territory of a state party where the passengers had their principal and permanent residence at the time of the accident. This would mean that an Egyptian passenger, who was residing in France could bring an action there after having proven that was his principal and permanent residence.

Another aspect of the Convention to be aware of is that there is an absolute two year limit in which claims must be commenced, otherwise the claim will be time barred under Article 35. This is calculated either from the date of arrival at the destination, the date on which the aircraft ought to have arrived, or the date on which the carriage stopped.

Knowledge of the Convention’s rules on exclusivity of action and limited jurisdiction to commence actions are important, particularly in light of the confusing media reports in the Middle East suggesting that passengers will be entitled to fixed amounts based on their nationality. This is not the case. Claims will be dealt with in accordance with the Convention and in the local jurisdiction in which the law suit is filed or in the jurisdiction in which the case is settled.

It is fair to say that there are several factors influencing the amount of any final award, including the victim’s salary, age and life expectancy, and these may differ from country to country. Furthermore, in some jurisdictions, for example the USA, a higher award may be granted based on the above factors. However, to say that there is a fixed amount payable based on a passenger’s nationality is quite wrong.

It is hoped that the investigating authority quickly recovers the aircraft black boxes and identifies the cause of the tragedy. In the meantime, it is also hoped that liability issues are resolved quickly, and in accordance with international aviation law, and that bereaved families are compensated accordingly.