

Civil Court, First Hall

Application number: 1059/2013AE

**Airgo Flugservice Gmbh & Co KG a company registered in Mainz, Germany
(registration number: HRA 4250)**

Vs

Air X Charter Ltd

Friday, 15th July 2016.

On the 7th November, 2013 plaintiff company file a lawsuit against the defendant company wherein it requested:

1. A declaration that defendant company did not honour its obligations according to an agreement dated 17th May 2013.
2. A declaration that defendant company is responsible for damages incurred by plaintiff company.
3. To liquidate the damages and condemn defendant company to pay the damages.

The plaintiff premised that:

By means of a contract dated 17th May 2013, defendant bound herself to provide an air service from Nice to London and back, on the 23rd and 24th May 2013.

The contract was never executed for the reason that the French authorities did not authorize the aircraft to depart from Nice airport, and this due to serious and material technical reasons. Consequently, defendant company could not perform the flight at the scheduled time of departure. In fact the aircraft departed without passengers at 17.08 and flew to Italy. The following day the aeroplane was not in Luton to pick up the same passengers that had been abandoned on the previous day. Consequently, the passengers had no other alternative but to make different arrangements and finally they travelled on a commercial flight to London, in order to execute the commitments they had in London.

Furthermore, the reason why the flight was not performed was due to a number of deficiencies for which the defendant is responsible, such as carrying an extra weight of 1,000 kilos, not having updated navigational charts and safety cards required by law.

Defendant company declared that she:

1. Was not in breach of contract.
2. Did not cause any damages to plaintiff company.

Issue.

Plaintiff company sued defendant company for damages¹, alleging a breach of a contract dated 17th May 2013 whereby defendant company bound herself to provide air transport to passengers from Nice to Luton, London on the 23rd May 2013 at noon. The plaintiff contends that due to technical difficulties with regards to the aeroplane, the flight was not performed at the scheduled time. Defendant contends that there was no breach of contract.

Substance.

1. Facts.

- 1.1 On the 17th May 2013, Plaintiff booked a flight from Nice to Luton, London on the 23rd May 2013. On the confirmation notice, the cancellation policy is printed: *".... 100% of the charter price if cancelled 24 hours prior or in case of a no show."* (page 6).
- 1.2 Time of departure was noon and time of arrival at Luton, London was 1:50 pm. A return flight was scheduled for the following day.
- 1.3 The price paid by plaintiff was €25,680.
- 1.4 On the 23rd May 2013, the aircraft landed at Nice airport at 11.27 a.m.
- 1.5 The French authorities ordered a SAFA Ramp Check². This commenced at 11.30 am³.
- 1.6 At 2.00 p.m. the French authorities issued the SAFA Ramp Inspection Report, with the findings (page 24)⁴. Due to the findings, the French authorities ordered that the corrective measures that had to be taken prior to departure, were *"A06: Pages of the missing revision sent by email and printed before departure; A14: According to AMM 5-50-02 (1) page 604, no maintenance action required; B10: safety cards sent by email and printed before departure."*
- 1.7 Although one of the issues raised by the inspectors was that the aircraft landed over the maximum landing weight, in the SAFA

¹ In a note filed on the 23rd December 2013, plaintiff company declared: *"... li l-ammont ta' danni li tippretendi li ghandhom jithallsu mis-socjeta konvenuta hija s-somma ta' hamsa u ghoxrin elf sitt mija u tmenin ewro (€25,680) li tirraprezenta l-ammont li thallas mis-socjeta attrici ghal servizz tal-ajru li ma giex rez kif pattwit bejn il-partijiet u dan oltre l-imghax skond il-ligi u l-ispejjez legali."* (fol. 35).

² Safety Assessment of Foreign Aircraft (SAFA).

³ Vide document SAFA proof of Inspection in France and Document DF4 (page 52) wherein it is confirmed: *"the SAFA inspection was performed by two qualified Ramp Inspectors. **The inspection began at 11.30 AM and finished at 02:00PM.**"*

⁴ In a letter dated 31st December 2013 sent to plaintiff's legal counsel by the Ministere de l-Ecologie, du Developpement durable et de l'Energie (page 52), it was stated: *"the SAFA inspection was performed by two qualified Ramp Inspectors. The inspection began at 11.30 AM and finished at 02:PM."* Erich Happel, the pilot, stated: *"The inspection took a little longer than I expected and the SAFA Ramp check was completed at 2.00 pm which was two hours from the planned departure time."* (page 107).

Inspection report it is confirmed that no corrective action was required (vide that part of the report dealing with *Actions Taken*, page 24). Erich Happel explained that this matter, "...was found not to be an issue at all since the landing was deemed to be acceptable in accordance with the aircraft's manufacturer's manual..." (page 108). From the SAFA report it appears that the captain's statement is faithful to the truth.

1.8 The aeroplane left Nice airport at 5.10 pm, without the passengers, to Cuneo, Italy.

2. According to the confirmation notice issued by defendant:

"When signing this confirmation the client and/or but not limited to associated parties, accepts in its full entirety the published terms and conditions that AIR X GmbH operate this contract to."

Jasmin Seibel, a dependant of plaintiff company, said:

"When Air X sent us Conf Notice 1, it said "... the client... accepts in its full entirety the published terms and conditions that Air X GmbH operate this contract to..."

I downloaded the Air X GTC from their website. There was only one set of GTC and that was issued by Air X Executive Jets GmbH (attached herewith and marked as GTC1)."

According to those terms and conditions (page 69) the client accepts up to 5 hours delay, in case of **unforeseen circumstances**.

3. The aircraft was not ready to fly at the scheduled time, after the French authorities ordered a SAFA Ramp check. There is no clear proof that defendant was responsible for the SAFA ramp check. Although Pierre Andre' Ramel said:

"Being familiar with regularly held standard SAFA Ramp Checks, I have never had experience of a SAFA inspector insisting on performing a Ramp Check while the passengers were already at the airport ready for boarding." (page 40).

This is **not** sufficient proof that SAFA Ramp Checks do not take place before a flight.

However, departure was further delayed due to the fact that on board of the aeroplane the authorities did not find:

3.1 updated instrument charts.

3.2 safety instructions⁵.

Therefore, at 2.00 pm the aircraft was not cleared to fly.

4. In the court's opinion, the SAFA Ramp check is **not** an unforeseen circumstance. Plaintiff contends that "*A SAFA check is not an unforeseen event as it is very much a part of civil aviation in the EU*" (page 320). This is true. All airlines know that it might happen. Furthermore, the technical issues revealed during the inspection were not extraordinary circumstances as they should have been addressed by the airline during maintenance or operation of the aircraft. This notwithstanding, such a consideration on itself does not automatically render the defendant company responsible for damages for the delay. Once a SAFA ramp check was ordered, it was not in the carrier's control as to how long it would take to complete.
5. With regards to the terms and conditions, the confirmation notice signed by both parties (Conf. Notice 6, page 76) states that when signing the document the client, "*... accepts in its full entirety the published terms and conditions that AIR X GmbH operate this contract to.*" This was evidently an oversight from defendant's side. Jasmine Seibel, plaintiff's employee, downloaded a copy of the terms and conditions which refer to Air X GmbH. At the time defendant's terms and conditions had not yet been published. Therefore, plaintiff only had the knowledge of the contents of the terms and conditions published by Air X Executive Jets GmbH. There is no proof that she queried the fact that the terms referred to *AIR X GmbH*. Jasmine Seibel might have understood that the other party to the contract was Air X Executive Jets GmbH, following the first proposal made by Air X GmbH (Doc. JS1, page 64). In fact plaintiff's initial claim was addressed to Air X Executive Jets GmbH⁶. By email dated 6th June 2013, defendant company replied that it booked the flight and that it operates under Maltese law. Since:
 - i. the contract was concluded with defendant company, the published terms and conditions referred to in the confirmation notice signed by both parties (page 76) were not applicable as they refer to a company that was not a party to the contract. Had the terms and conditions published by Air X Executive Jets GmbH applied, defendant company would not have invoked Maltese law as the applicable law to the contract⁷.

⁵ Vide SAFA Ramp Inspection Report (page 24).

⁶ Vide letter dated 29th May 2013 (page 46).

⁷ Vide email dated 6h June 2013 (page 48).

- ii. at the time of negotiation and conclusion of the contract defendant company had not published its terms and conditions⁸, it cannot invoke the terms and conditions that were published subsequently.

Although defendant contends that *"the only difference between the two terms and conditions are (a) the name of the companies and (b) the governing law. In substance, the terms and conditions remained the same,"* no proof was produced as to what German and Austrian law states on the matter. Therefore, the court cannot conclude whether the *governing law clause* made any difference.

6. Plaintiff company claims that it did not cancel the flight. On the 23rd May 2013, the aircraft left Nice airport at 5.08 pm to Italy. Xavier Freixes, one of the passengers, said:

"At 13.30 pm with no information as to the expected departure time, we tried to catch the next British Airways flight leaving at 13.50 pm to London City airport. We arrived at Terminal 1 in Nice Airport, but the gate was already closed. So we continued to wait for news on the expected departure time of the aircraft." (page 81)⁹.

The witness confirmed:

*"At 14.00 pm DF informed us that the captain had informed her that **he did not know if the aircraft will be able to fly that day. Due to this fact** we decided that we should go back to the office and to meet our fellow directors the next day in Nice. The directors were scheduled to arrive the next day from London on the booked aircraft."*

Dee Infante confirmed that at 2.00 pm she contacted the captain and asked for details. The witness claims that, *"... he couldn't confirm when the aircraft would be able to be ready for the flight."* At no point did Dee Infante say that the captain told her that he could not confirm whether the aircraft would be given clearance to fly on that day.

On the other hand the captain confirmed that when he informed the passengers that the SAFA Ramp check was completed, the lead passenger informed him:

"... that it was pointless for the aircraft to leave at this time since his appointment was in London and that it began fifteen minutes after the originally scheduled landing time and he would miss it...."

⁸ This fact was also confirmed by John B. Matthews, a Manager employed with defendant company.

⁹ This version is corroborated by an email dated 23rd May 2011 at 1.28 pm confirming the flight booking (page 179).

11. After some time passed, I informed the passenger that the departure was imminent and that the additional documentation requested was being sorted out. I asked the lead passenger to wait a few more minutes however by the time I got the documentation, they were no longer waiting to board the flight.” (page 107).

The court does not believe the statement that at 2.00 pm the captain told Dee Infante that he did not know whether the aircraft would be able to fly on that day. From the SAFA Ramp report it is obvious that there were only two corrective actions that had to be taken before the flight. There were absolutely no indications that the aircraft had been grounded by the inspectors or that the flight would be cancelled. At 2.00 pm the SAFA ramp check was over. The court understood that the aircraft’s captain was present during the inspection. Therefore, he would certainly have been informed of the pending issues, which were two.

Although the defendant company claims that, *“The inspection started at 11.30 am and finished at 2.00 pm with the aircraft being cleared to depart at that time,”*¹⁰ there is no proof that the aircraft was cleared to depart at 2pm. Paragraph 11 of Happel’s affidavit confirms that the aircraft was not cleared to depart at 2pm (page 107). However, there is not sufficient evidence that confirms that there was uncertainty as to whether the aircraft could travel to London on the 23rd May 2013. The only uncertainty related to the time of departure, since the airline had to provide the requested documents to the French SAFA inspectors and obviously be given a slot by the Nice airport authorities to depart.

The court is convinced that at 2pm the passengers had decided not to go to London, as they were already late for a scheduled meeting. In fact in an email sent by Carolin Loheit to John B. Matthews at 5.46 pm, she confirmed that the passengers had *“tight schedule meetings”* in London (page 124). There is no proof that at the booking stage plaintiff company informed the defendant company that the passengers would be on a tight schedule. It was only in an email sent at 17.46 that it was stated: *“Our client is very sensitive about an ON TIME departure due to very tied (recte, tight) scheduled meetings they are doing business trips for and paying a lot of money.”* (page 124).

Similarly, from a flight booking made by Dee Infante on that same day during the afternoon, there is no doubt that the passengers decided not to make use of the return flight from London to Nice scheduled for the 24th May 2013 at 8 London time¹¹. In fact tickets were issued for a flight from Luton, London to

¹⁰ Note of pleas filed by defendant company, paragraph 16.

¹¹ In her affidavit, Jasmin Seibel said: *“In the case of this booking I would like to point out that the time difference between UTC and Nic is + 2 hours and UTC to London is + one hour in May 2013.”*

Nice for four passengers on a British Airways aircraft (pages 182-189). The first ticket was sent by Grosvernortm¹² to Dee Infante by email at 3.27 pm (page 187). In view of this alternative flight booking, there is no doubt that the passengers had already decided not to make use of defendant's services and had left the airport. The request for a flight booking by Dee Infante would certainly have been made some time before 3.27 pm. In the circumstances, the court cannot accept the statement made by Xavier Freixes that they left the airport between 3.30 pm and 4 pm (page 170). In his affidavit, the witness confirmed that the decision to go back at their office was taken at 2 pm (page 81). Therefore they probably left at that time. The witness never mentioned that they left the airport between 3.30pm and 4pm. Dee Infante said that at 2pm she checked once more with the captain, who did not confirm when the aircraft would be ready for the flight. Based on these facts, in all probability it was at this time that the passengers decided not to travel to London and left the airport. In fact in her affidavit (page 84) she did not refer to other instances when she spoke to the aircraft's captain, whereas previously she mentioned the times when she contacted the captain.

7. Carolin Loheit said that at 2.30 pm she sent an email to AirX, "*... requesting feedback about the actual status of departure, as our flight tracking system did not show any departure yet. Air X did not reply. I sent another email to AirX at 15.43 pm local time requesting feedback on the actual status of departure*" (page 79). However, the alleged emails were not filed as evidence to corroborate this statement of fact. Furthermore, they are not mentioned in the email she sent to John B. Matthews at 5.46 pm (page 124).
8. Defendant company filed an email sent by John B. Matthews to plaintiff company, at 2.41 pm wherein it was stated that "*Within the legal terms and conditions you entered into, the aircraft is now fully prepared and ready for service.*" (page 28). Carolin Loheit said that she did not receive the email. The email was copied to two sections of defendant company. Till Rosenkranz, an employee of defendant company, confirmed that he received the email (paragraph 15 of his affidavit, page 112). Irrespective of whether or not this email was sent, the court has already concluded that at 2pm the passengers had decided not to carry on with the trip and started to make alternative arrangements for the flight scheduled for the 24th May 2013 from Luton, London.

9. In the note of pleas, plaintiff company argued:

(page 63). Since the time declared in the confirmation notice was 07.00 (UTC), departure was 8.00 am from London on the 24th May, 2013.

¹² The court understands that this is a travel agency.

"In law the principle of liability on the part of the aircraft operator for delay caused to passengers, was enshrined initially in the 1929 Warsaw Convention and then in its successor, the 1999 Montreal Convention for the Unification of Certain Rules for International Carriage by Air. That article holds:

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

Nevertheless, the carrier shall not be liable for damage occasioned by delay if 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."(page 322).

This provision of law applies to passengers and not the contract signed by the parties. Notwithstanding:

- i. The RAFA ramp check was a procedure over which defendant company had no control over. The ramp check took two and a half hours to complete. There is no evidence that defendant company was responsible for the long time it took the inspectors to complete the detailed check¹³. The ramp check was an extraordinary circumstance which could not have been avoided.
- ii. Once the ramp check was completed and the radio navigation and safety instructions were updated, the aircraft was ready to depart from Nice airport. There is no proof that defendant company took an unreasonable long time to provide the requested documents. However, by that time it is evident that the passengers had already taken the decision not to take the flight. Although the aircraft left Nice airport at 5.08 pm, this fact has no bearing on the court's decision. Once the passengers had left the airport, there was no reason for the aircraft to go to London (vide paragraph 12 and 13 of Eric Happel's affidavit, page 108).

10. According to EU Regulation 261/2004¹⁴, *Establishing common rules on compensation and assistance to passengers in the event of denied boarding*

¹³ The document at page 26 is proof that the ramp check was thorough.

¹⁴ This regulation applies "(a) to passengers departing from an airport located in the territory of a Member State to which the Treaty applies." (Article 3). According to paragraph 5 of the preliminaries, "Since the distinction between scheduled and non-scheduled air services is weakening, such protection should apply to passengers not only on scheduled but also on non-scheduled flights, including those forming part of package tours."

and of cancellation of long delay flights, the carrier¹⁵ has a duty to reimburse the passengers¹⁶ "... of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made..." (Article 8[1]), **"when the delay is at least five hours...."** (Article 6(1)(iii)). Since the delay was certainly not five hours long¹⁷, in terms of this regulation the passengers did not have a right to claim the cost of the flight¹⁸. Although, plaintiff reimbursed the passengers the full airfare, such a decision can have no repercussion on the defendant company.

Furthermore, the regulation provides that *"cancellation means the non-operation of a flight which was previously planned and on which at least one place was reserved."*¹⁹ In the case in issue, at no point in time did the airline declare that it would not operate the flight to Luton. It was just a matter of time until the relevant documents were delivered to the French authorities. A matter which was solved well before the five hour time limit.

11. The court concludes that the passengers decided not to keep on waiting for the flight's departure. On the basis of what Freixes and Infante said in their affidavit, this decision was taken at 2 pm. Once the captain did not confirm a definite time of departure, due to the actions that were required prior to departure, the passengers made other plans and left the airport. Under these circumstances, the statement given by Bernard Wallner is credible²⁰. It was the passengers decision not to keep on waiting and take the flight to London

¹⁵ "operating air carrier" is defined as "an air carrier that performs or intends to perform a flight under a contract with a passenger or on behalf of another person, legal or natural, having a contract with that passenger."

¹⁶ If they so chose.

¹⁷ Although the aircraft left Nice airport at 5.08 pm., the court concluded that the passengers left the airport at 2 pm. The aircraft captain confirmed that once the passengers had left the airport, there was no need to fly out to Luton and, "13. The aircraft remained in Nice airport until such time that we were ordered, by the handling officials, to leave as soon as possible from the airport since there was no space for the parking of other aircraft. I was instructed by Air X to fly the aircraft to Cuneo, Italy. The aircraft left for Italy just a few minutes after 17.00 hrs." (page 108). This statement is corroborated by Thomas Warton, vide paragraph 5 of his affidavit (page 165) and document TW1 (page 166).

¹⁸ The same applies to the obligation of re-routing (Article 8(1)(b)).

¹⁹ "According to Article 2(l) of Regulation No 261/2004, flight cancellation, unlike delay, is the result of non-operation of a flight which was previously planned. It follows that, in that regard, cancelled flights and delayed flights are two quite distinct categories of flights. It cannot therefore be inferred from Regulation No 261/2004 that a flight which is delayed may be classified as a 'cancelled flight' merely on the ground that the delay is extended, even substantially" (**Christopher Sturgeon et vs Condor Flugdienst GmbH**, delivered by the European Court of Justice (Fourth Chamber) on the 19th November, 2009).

²⁰ In paragraph 5 of his affidavit, he stated: "5. At around 14.00 hrs I received another call from Carolin who told me that the delay was too long and the passengers were so late that they missed their meeting in London. Carolin informed me that there was no need for the passengers to go to London any longer and the aircraft would not be required to fly out to London." (page 162).

and claim compensation after. Once the passengers left the airport, it was no longer possible for the defendant to execute the contract of carriage. Up to that time the carrier could not execute his obligation due to an extraneous cause, that is the SAFA ramp check which lasted for two and a half hours. Pierre Andre' Ramel, a pilot with an airlines licence, produced as a witness by plaintiff company confirmed:

"I would like to add that in my experience as a commercial flight captain, a SAFA Ramp Check which has no major issue and which occurs without findings normally takes approximately 30 minutes....."

In twenty years of operation, it is my experience that a ramp check is usually postponed if the departure slot is running and passengers are waiting for departure. Inspectors usually ask how much time they can have for the ramp check. It is possible to shorten a ramp check – the inspectors can decide to make only spot tests. The normal procedure and philosophy of a SAFA Ramp Check is not to disturb passengers and to avoid departure delays.

Being familiar with regularly held standard SAFA Ramp Checks, I have never had experience with a SAFA inspector insisting on performing a Ramp Check while the passengers were already at the airport ready for boarding." (page 39).

Furthermore, according to EU Regulation 965 of 2012, *"When performing a ramp inspection, the inspector(s) shall make all possible efforts to avoid an unreasonable delay of the aircraft inspected."* (ARO.RAMP.125 *Conduct of ramp inspections*, Annex II). The statement of captain Ramel confirms that in this case the aircraft's pilot encountered an extraneous cause which made it impossible for the aircraft to leave at the scheduled time. Moreover, based on these considerations with a flight set for departure at noon, it would have been unforeseen that a SAFA ramp check would last for two and a half hours. The court accepts that delay caused after 2pm was imputable to defendant, since clearance was not given because of two corrective actions that had to be taken by the aircraft prior to the flight. However, from the court's understanding of the evidence, this matter did not take more than forty five minutes to solve. Whether or not the email sent by John B. Matthews on the 23rd May 2013 was received²¹, it confirms that the aircraft was ready for departure just after 2.30 pm²².

²¹ In this respect it is relevant that the email was mentioned by John B. Matthews in another email sent to plaintiff company on the 23rd May 2011 at 17.11 (page 123). Although Carolin Loheht replied by email sent at 17.46, she did not contest Mr Matthews's claim that he had sent an email wherein reference was made to the legal terms and conditions of the contract of carriage.

²² The first line reads, *"Within the legal terms and conditions you entered into the aircraft is now fully prepared and ready for service."* (page 28).

Finally, in the court's opinion the decision taken by the passengers to leave, is equivalent to a cancellation, with no right to claim reimbursement of the cost of the flights, which is what plaintiff company is claiming²³.

For these reasons, the court upholds the pleas of defendant company and dismisses plaintiff's requests, with costs.

Anthony Ellul.

²³ As per cancellation policy imprinted in the confirmation notice dated 17th May, 2013 and signed by the plaintiff's representative.