TURKISH LAWBLOG

11 October, 2018

Legal Liability of Passenger seated in Emergency Exit Seat

I. IN GENERAL

1. Emergency Exit Seats and Why Passengers Prefer Them

In line with the progress made in the transportation sector and in technology, comfort in commercial aircraft nowadays has improved and aircraft seats, the first examples of which were made of wicker, have evolved considerably. Notwithstanding the improved facilities, some people prefer seats next to emergency exit doors, in order to enjoy a wider legroom. This is because the legroom of seats located next to emergency exits is wider than that of other seats, except for those in business class.

Emergency exits are defined as doors, window exits or other types of exit of a plane, used as "exit points" in order to enable the execution of cabin evacuation within the shortest time. Emergency exit seats refer to each seat with direct access to such exit. The purpose behind designing the respective row wider, needless to say, is to facilitate the passengers' access to exits in an emergency. While the legroom in economy class is generally around 78 cm, such additional space afforded by emergency exit seats is 5 to 10 cm in single-aisle aircraft, and around 40 cm in wide-body aircraft.

2. Requirements for Being Seated in Emergency Exit Seats and Expectations from a Passenger Sitting in the Emergency Exit Row

The primary duty imposed on a passenger sitting in the emergency exit row is to provide assistance, "to the extent possible", in opening the emergency exit door and executing emergency evacuation in the event of an unexpected evacuation. Therefore, civil aviation authorities determine the qualifications sought to be permitted to sit in such seats through various regulations. As per Circular no. 51859319-010.06.02/E.2162 (the **"Circular"**) issued by the Directorate General of Civil Aviation of T.R. Ministry of Transportation and Infrastructure, the air operator is obligated to take and implement necessary measures to ensure that emergency exit seats are not left vacant during the critical stages of flight, and to inform the passengers who will be permitted to sit in these seats on matters such as the location and usage of the emergency exit.

The operator is also obliged not to permit, under any circumstances, passengers in certain categories to sit in emergency exit seats, if it is considered that they might prevent the rapid passage of other passengers or hinder the effective performance of the cabin crew's current duties. Among these are passengers who are not in a condition to act quickly; mentally or physically challenged persons; passengers beyond a certain weight; infants and children; deported, inadmissible or apprehended passengers; those travelling with pets; those responsible for another person in a way which would prevent the opening of the exit; and passengers who do not/will not agree to perform the associated duties and responsibilities. The Circular also provides that the operator is obligated to cause necessary measures to be taken in the course of "check-in" procedures, and that in the event passengers falling within the aforementioned categories are

present despite such measures, the cabin crew must ensure that appropriate passengers are seated in such seats.

Failing these, the operator will be faced with administrative fines as per the provisions of the Turkish Civil Aviation Act no. 2920 (**"TCAA"**) and the Regulations on Administrative Fines to Be Imposed by the Directorate General of Civil Aviation (**"CAR-AF"**).

II. CHARACTERIZATION OF THE LEGAL RELATIONSHIP BETWEEN THE PASSENGER AND THE CARRIER

In order to identify the legal liability of the passenger seated in the emergency exit seat, the legal relationship between the air operator and the passenger must first be characterized. In this section of the article, the mutual obligations of the parties will be determined and the legal institution under which the passenger should be held liable will be identified. To this end, the contract of carriage between the parties will first be addressed, and then it will be determined whether the obligation of the passenger sitting in the emergency exit seat is related to such contract, and - depending on the answer to such question - which legal institution such obligation should be subject to.

1. Contract of Carriage by Air

The primary obligation of the air operator is to get the passenger to the destination by air, while the obligation of the passenger is to pay a corresponding fee. When the carriage is performed in the air and by virtue of aircraft, a contract of carriage by air is present. As defined by Ülgen, *"A contract of carriage by air is an agreement under which one of the parties (the carrier) undertakes to transport passenger/baggage or goods (cargo) by air, and the counterparty undertakes to pay a fee in return."*[1] As per Article 850 et seq. of the Turkish Commercial Code no. 6102 (**"TCC"**), a contract of carriage by air constitutes a contract of carriage. Deriving from the definition, its essential components are the undertaking to transport, and the fee. In order to qualify as a contract of carriage by air, the transportation needs to be performed in the air and by virtue of aircraft. The subject of this article however, is limited to contracts of passenger carriage, which constitute a type of contract of carriage by air. Contracts of passenger carriage differ from other contracts of carriage by air due to the object of transportation being live persons.

Before the entry into force of the TCAA, it was argued that the provisions of the TCC, contracts of mandate/work and the general provisions of the Turkish Code of Obligations (**"TCO"**) would be applicable to contracts of carriage by air. With the TCAA, domestic flights in particular have undergone changes. As per Article 106 of the TCAA, *"Provisions applicable to domestic air transportation shall, unless provided for in this act, be the provisions of international agreements to which Turkey is a signatory party, and unless provided for in such agreements, the provisions of the TCC"* in contracts for domestic carriage. According to Ülgen, what is implied by "international agreements to which Turkey is a signatory party" are the Warsaw Convention of 1929 and the Hague Protocol of 1955. Thus, the provisions of the Warsaw Convention have become rules of national law.[2] It is general accepted in the doctrine that what is meant by "provisions of the TCC" are the provisions of Article 850 et seq.

In our legal system, the legal character of contracts for carriage, and more generally, contracts of carriage by air is debated. In the doctrine, contracts for carriage are treated as contracts for work, contracts of

mandate or as a separate agreement. The opinion advocated in this respect should also be valid in terms of contracts of carriage by air. The prevailing opinion in the doctrine, influenced by German Law, considers a contract of carriage as a contract for work, while it is understood that the opinion treating the contract of carriage as a contract of mandate is based particularly on the Swiss Code of Obligations Article 440/2. Said provision bestows a complementary character, with respect to contracts for carriage, on the provisions of contracts of mandate. According to authors adopting the third view on the other hand, a contract of carriage constitutes a separate agreement, different from both a contract for work and a contract of mandate. Ülgen also concurs with such latter view.[3] Ülgen finds it redundant to try to include the institution within the scope of other types of agreements, while the law has already regulated a separate type of contract.

Ülgen, justifiably as well in our view, separates the issue of identifying the provisions to be applied as complement in the event of legal gap from the issue of legal characterization of an agreement. Ülgen argues, also taking into consideration Article 1/2 of the TCC, that unless provided for in the TCC, a choice should be made between the provisions of contracts for work and contracts of mandate, and the provisions of such institutions should be applied. According to Ülgen, the provisions of contracts for work may be applied to cargo transportation, and the provisions of contracts of mandate may be applied to passenger and baggage transportation.[4] Although we also concur that a contract of carriage is a separate agreement, the provisions to be applied in the event of a gap should be determined based on Article 850/2 of the TCC. According to said provision, “Under the contract of carriage, the carrier undertakes to transport the goods to the destination and deliver them to the addressee there or to get the passenger to the destination, whereas the sender in cargo transportation and the passenger in passenger transportation undertakes to pay to the carrier the transportation fee.” In our opinion, especially the fact that the fee is an essential component of the agreement, and that the contract of carriage by air stipulates an outcome obligation dictates that in the event of a gap, the TCO’s provisions pertaining to contracts for work be applied.

In principle, contracts of carriage by air and specifically contracts of passenger carriage are not subject to any requirement as to form. Contracts of passenger carriage are among consensual[5] and synallagmatic agreements. The parties to a contract of passenger carriage are the carrier and the passenger. As per Article 850/1 c.1 of the TCC, “The Carrier is the person undertaking (…) the task of transporting the passenger (…) under the contract of carriage.” The passenger is defined as a person who is present on the plane on the basis of the contract of carriage and who is not flight personnel. In order to determine the obligations and rights of relevant parties in contracts of carriage by air, provisions of the TCAA, the Warsaw Convention, the Montreal Convention and the TCC need to be taken into consideration.

According to Ülgen, the carrier’s obligations should be listed as drawing up tickets and baggage slips, performing the transportation appropriately and on time, bringing the passenger alive and well, carrying the baggage brought by the passenger, taking the measures set forth under the law, and performing other subsidiary obligations and ancillary obligations.[6] The rights of the carrier, on the other hand, are two in general, which are the right to a fee and the right of retention on the baggage as collateral for the travel fee. The rights of the passenger inherently coincide with the carrier’s obligations. The passenger’s obligations are paying the fee, being present at the departure point at a certain time, and complying with rules and instructions.

The contract of carriage by air by itself falls short of establishing the obligations and legal liability of the

passenger sitting in the emergency exit seat. In other words, it would not be accurate to assert that the obligations of the passenger sitting in the emergency exit seat arise directly or at least solely from the contract of carriage by air. As will be addressed below, the liability of the passenger seated in the emergency exit seat arises, in our opinion, from a contract of mandate or some similar contract. In addition, we are of the opinion that the obligation of the passenger sitting in the emergency exit seat cannot be argued to have been imposed as to create a combined agreement together with the contract of carriage by air, since the parties' intentions to be bound in combined agreements exist only as long as the other agreement within the combined agreement relationship is validly existent. However in this case, it cannot be asserted that if one of the independent agreements becomes invalid or expires, the other agreement will automatically be rendered invalid.

According to the prevailing opinion in the doctrine, "agreements bearing foreign components" constitute a type of mixed agreement.[7] In these agreements, the parties primarily execute a nominate contract regulated by law (*within the scope of our subject, the contract of carriage*), but at the same time, one of the parties also undertakes as an ancillary obligation a component belonging to another type of nominate contract (*it will be explained below that within the scope of our subject, this contract is the contract of mandate*). A contract whereby the lessor undertakes the heating of the leased apartment, or a barter agreement under which one of the parties pays a certain amount of money for equivalence may be cited as examples to such agreements. In our opinion, the passenger's obligation arising from a contract of mandate, which will be addressed below, may constitute not a primary obligation such as the fee which is its obligation under the contract of carriage, but only an ancillary obligation. The primary obligations have been specified above, and it cannot be argued that an additional obligation imposed solely on the passenger seated in the emergency exit seat is a primary obligation under the contract of carriage by air. In this case, it may be asserted that there is an agreement bearing a foreign component between the parties. However, it should not be overlooked that there is debate in the doctrine whether these agreements can be considered as mixed agreements.

2. Liability of the Passenger Sitting in the Emergency Exit Seat Arising From the Contract of Mandate

In our opinion, the passenger seated in the emergency exit seat in air travel undertakes the obligation of performance related to the emergency exit seat as of the moment he/she answers in the affirmative the steward or the hostess asking *"Do you understand the rules of emergency evacuation?", "Will you be able to evacuate the passengers in the event of a potential adverse scenario?"* or a similar question. As is known, it is possible for the passenger to request, before the flight starts, to refrain from taking such responsibility. In the event the passenger, to whom their responsibilities have been recited, declares that they do not wish to undertake such obligation, the aircraft crew may change such person's seat with another passenger who accepts the legal liabilities of sitting in the emergency exit seat. Additionally, it seems possible, in principle, for the passenger seated in the emergency exit seat to communicate with the crew during air travel and change their seat for any reason.

Taking into consideration the above-mentioned scope of the emergency exit seat, the performance obligation undertaken by the passenger seated in the emergency exit seat appears closer to the scope of the contract of mandate regulated under Articles 502-514 of the TCO. Indeed, the structural components of the contract of mandate, which is not subject to a requirement as to form, can be listed as the performance of a task; independence in such performance; acting for the benefit of another; trust

relationship and the right to terminate if so wished; and the fee being a non-essential element.[8]Nevertheless, while the passenger accepting the duty, as explained above, is not paid any fee, some airlines charge extra money for the emergency exit seat. Additionally, the collective liability, as mandataries, of the multiple passengers sitting in such seats falls within the scope of Article 511/2.[9]

After establishing that the liability of the emergency exit passenger arises from the contract of mandate, it is important to identify the legal liability of the passenger. The fact that the passenger is seated in the emergency exit seat does not imply that they can provide the means to "certainly" evacuate the other passengers in the aircraft in the event of a potential adverse situation. Therefore the passenger does not have a commitment for a successful outcome against the airlines. However, the emergency exit passenger is required to demonstrate in such situations all diligence which a prudent mandatary is required to demonstrate. But what will happen if the emergency exit passenger exceeds the limits of their authority? For example, if a plane crashes immediately after taking off from an airport on an island and starts drifting, how will the act of an emergency exit attendant who, assuming the plane will fall into the sea, opens the door in good faith and thus exceeds the limits of their authority be characterized? In our view, such an act should be construed as an infraction of the contract of mandate. Again, in an adverse scenario, meaning in the event of a potential accident, the emergency exit passenger should not be considered to be the only person responsible for opening the emergency exit door. The airlines and therefore the aircraft crew are severally liable. The liability of the emergency exit passenger can even be argued to constitute a secondary liability. Moreover, such passenger performs such task independently according to instructions, does not receive a fee for such task and may leave the seat when he/she so wishes.

3. Criminal Liability of Passenger Seated in the Emergency Exit Seat

May the emergency exit passenger have criminal liability? We believe that action by omission may be deliberated in this respect. In order to be able to assert the existence of a commission by omission, there needs to be an act of omission; the perpetrator must be under a special legal obligation for preventing the occurrence of a certain outcome, and the perpetrator must have the means to prevent the occurrence of such outcome.[10] In the event the passenger, after accepting the responsibility of the emergency exit seat, does not perform in line with such responsibility in a potential adverse scenario (for example, does not make any effort to open the emergency exit door), the conditions cited above will have been met (*However, if it is predicted that the other passengers could not be saved even if the emergency exit passenger had performed his/her obligation, this might provide relief from responsibility*). Besides, in such a scenario, in the event other passengers are killed or injured due to the passenger's act of omission, Articles 83 and 88 of the Turkish Penal Code no. 5237 (**"TPC"**), titled *"Commission of Willful Murder by Act of Omission"* and *"Commission of Willful Injury by Act of Omission"* respectively, might even be applicable.

III. ANALYSIS OF THE VALIDITY OF THE AGREEMENT IN LIGHT OF THE LIABILITY IDENTIFIED

Contrary to popular belief, the rate of survival of passengers in plane crashes which have occurred between 1983 and 2000, according to research, is above 95%.[11] Although this is a considerably high rate, Article 27 of the TCO titled *"Nullity"* may come to mind in terms of analyzing the validity of the agreement. If, at the time of execution of the agreement, one of the obligations constituting the subject matter of the agreement is objectively (with respect to everybody) impossible, the agreement will not be

valid. Such impossibility may as well be an actual impossibility. The impossibility affecting the validity of the agreement is the objective impossibility present as at the time the agreement is made.[12] Therefore, even when the rate of survival in accidents is so high, the impossibility of the agreement's subject matter, although being a strained interpretation, may be argued with respect to the remaining 5%.

What should be kept in mind at this point is that the obligation of the passenger sitting in the emergency exit seat is not to save passengers from the crash, but merely to assist in the evacuation, meaning the passenger has not undertaken an outcome. Under the contract of mandate, the passenger sitting in the emergency exit seat is undertaking the obligation only to assist in the evacuation. As will be evident from such observation, accepting that the passenger has not undertaken an outcome becomes mandatory in order for the agreement to not be deemed null due to impossibility. This, in return, further supports our observation that the agreement of performance between the passenger and the air operator constitutes a contract of mandate.

IV. APPLICABLE LAW

The provisions of the TCAA, adopted from the Warsaw Convention and the Hague Protocol amending such convention, and the TCC will be applicable to domestic transportation with respect to the liability of the emergency exit passenger. In international transportation, the provisions of the Agreement, which will be determined based on whether the contract of carriage is for a one-way trip or a round-trip, the country of destination, and whether such country is a party to the Warsaw Convention or its amended version, as amended by one of its protocols or to the Montreal Convention, will be applicable.[13]

V. CONCLUSION - PERSONAL OPINIONS

In this article, the reasons why emergency exit seats are preferred and the qualifications required for picking these seats have first been addressed, then the contract of carriage by air, which is the principal legal relationship between the passenger and the carrier has been examined, and it has been concluded that it would be more appropriate to postulate that the liability of the passenger seated in the emergency exit seat actually arises from the contract of mandate. The criminal liability of the passenger sitting in the emergency exit seat has also been addressed in the article. Based on these matters, the validity of the agreement between the passenger and the carrier has been analyzed. An attempt to identify the applicable law has also been made in the article.

It is widely known that the passenger sitting in the emergency exit seat has a legal liability, but the subject has not been thoroughly addressed. The aim of this article is to draw attention to this matter and bring to light a question which may in the future provide basis for more detailed studies.

[1] Ülgen Hüseyin, Contract of Carriage by Air, Bayrak Publishing, ?stanbul 1987.

[2] Ülgen Hüseyin, Contract of Carriage by Air, Bayrak Publishing, ?stanbul 1987.

[3] Ülgen Hüseyin, Contract of Carriage by Air, Bayrak Publishing, ?stanbul 1987.

[4] Ülgen Hüseyin, Contract of Carriage by Air, Bayrak Publishing, ?stanbul 1987.

[5] As per Article 856 of the New Commercial Code, contracts for cargo carriage are now also among consensual agreements. In the period of the old code, however, contracts for cargo carriage needed to be considered as real agreements as per Article 768 of the TCC.

[6] Ülgen Hüseyin, Contract of Carriage by Air, Bayrak Publishing, ?stanbul 1987.

[7] Yavuz Cevdet, Law of Obligations Special Provisions, Beta Publishing, ?stanbul 2013.

[8] Gümü? Alper, Law of Obligations Special Provisions, Volume II, Vedat Publishing, ?stanbul 2015.

[9] Yavuz Cevdet, Law of Obligations Special Provisions, Beta Publishing, ?stanbul 2014. – *"As an example of the statutory solidary under TCO Article 162/2, TCO Article 511/2 provides that the liability of mandataries accepting collective mandate will be solidary even if they have made no declaration on being severally liable. A statutory presumption of solidarity is present in this case."*

[10] Ercan ?smail, Penal Law General Provisions/Special Provisions, ?kinci Sayfa Publishing, ?stanbul 2007 – *"The commission, through negative action, of an offense which can actually be committed by affirmative action is called commission by omission. In such offenses, an offense which is essentially committed through affirmative action has been committed by negative action in the current case. The following conditions must be met in order to assert the existence of commission by omission: 1) First, there needs to be an act of omission (…) 2) The perpetrator must be under a special legal obligation for preventing the occurrence of a certain outcome. For example, somebody entering into an agreement and agreeing to become a lifeguard. The obligation to prevent an outcome may arise from a) law, b) an agreement, c) a previously performed act (…) 3) The perpetrator must have the means to prevent the occurrence of the outcome."*

[11] Upon analyzing accidents involving 53,487 passengers between 1983 and 2000, The US National Transportation Safety Board has found that 51.207 of such passengers have survived. This rate corresponds to 95.7%.

[12] O?uzman M.Kemal - Öz M. Turgut, Law of Obligations General Provisions, Volume 1, Vedat Publishing, ?stanbul 2017 – *"It should be pointed out that the impossibility affecting the validity of the agreement is the objective impossibility present as at the time the agreement is made. The fact that such impossibility has subsequently been realized does not affect the outcome. (…) In order for the impossibility present at the time the agreement is made to affect the validity of the agreement, it needs to be an objective impossibility, meaning the subject matter of the agreement must be impossible for everybody. (…)"*

[13] Güner Meltem Deniz, Simultaneous Implementation of the Warsaw and Montreal Conventions, Provisions Applicable to the Contract of Carriage by Air and Urgent Need for the Revision of the Provisions of The Turkish Civil Aviation Act Applicable to Domestic Carriage.