

# Aviation Liability 2021

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# Aviation Liability

## 2021

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Lexology Getting The Deal Through is delighted to publish the fourth edition of *Aviation Liability*, which is available in print and online at [www.lexology.com/gtdt](http://www.lexology.com/gtdt).

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes a new chapter on Austria.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Andrew J Harakas of Clyde & Co US LLP, for his continued assistance with this volume.



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# Netherlands

Robert Pessers

Van Traa Advocaten

## APPLICABLE TREATIES

### Major air law treaties

1 | To which major air law treaties related to carrier liability for passenger injury or death is your state a party?

These are:

- Warsaw Convention (1929), which came into effect on 29 September 1933;
- Rome Convention (1952), which was signed by the Netherlands on 7 October 1952 but was never ratified and has not become effective in the Netherlands;
- Hague Protocol (1955), which came into effect on 1 August 1963;
- Guadalajara Supplementary Convention (1961), which came into effect on 25 May 1964;
- Tokyo Convention (1963), which came into effect on 12 February 1970;
- Guatemala City Protocol (1971), which was ratified on 7 January 1983 but has not come into effect owing to a lack of ratifications;
- Montreal Protocols Nos. 1–4 (1975), which the Netherlands has all signed and ratified. However, only 1, 2 and 4 came into effect on, respectively, 15 February 1996, 15 February 1996 and 14 June 1998; and
- Montreal Convention (1999), which came into effect on 28 June 2004.

Pursuant to the Dutch Constitution, treaties of a generally binding nature have a direct effect in the Netherlands. Therefore, no implementation is needed. Nevertheless, the Montreal Convention has been incorporated into Book 8 of the Dutch Civil Code.

## INTERNATIONAL CARRIAGE - LIABILITY FOR PASSENGER INJURY OR DEATH

### Montreal Convention and Warsaw Convention

2 | Do the courts in your state interpret the similar provisions of the Montreal Convention and the Warsaw Convention in the same way?

There is only limited case law on these Conventions in the Netherlands. In the few cases available, similar provisions are interpreted in the same way.

3 | Do the courts in your state consider the Montreal Convention and Warsaw Convention to provide the sole or exclusive basis for air carrier liability for passenger injury or death?

There is no case law available on this. The liability of Community air carriers (these are air carriers with a valid operating licence granted by an EU member state) for passenger injury and death is also governed by EU Regulation 2027/97, as amended by EU Regulation 889/2002.

Pursuant to this Regulation, the liability of a Community air carrier in respect of passengers and their baggage is governed by all provisions of the Montreal Convention relevant to such liability. Also, this Regulation provides for additional obligations on the part of the air carrier in case of passenger injury or death (such as a minimum advance payment in case of death of a passenger).

### Definition of 'carrier'

4 | In your state, who is considered to be a 'carrier' under the Montreal and Warsaw Conventions?

Both the actual and the contractual carrier are considered to be a carrier under the Conventions. There has been limited discussion on this topic in the Netherlands. There is one judgment by the Amsterdam Court of Appeal in which the claim by a ground handler to invoke the Warsaw Convention to defend a claim by a carrier was denied.

Also, the Dutch Supreme Court decided on a case in 1992 that was subject to the Warsaw Convention and concerned a cargo claim. In this matter, cargo interests claimed that there can only be successive carriage if this has been explicitly agreed between the parties and if this is duly noted in the airway bill. The Supreme Court rejected this argument and held that successive carriage can also take place if this is foreseen by the parties when concluding the agreement, even though the names of the successive carriers are not yet known at that time. It was up to cargo interests to prove that sub-carriage took place instead of successive carriage.

### Carrier liability condition

5 | How do the courts in your state interpret the conditions for air carrier liability – 'accident', 'bodily injury', 'in the course of any of the operations of embarking or disembarking' – for passenger injury or death in article 17(1) of the Montreal Convention and article 17 of the Warsaw Convention?

There is not a lot of case law in the Netherlands on this. However, the following has been held by Dutch courts.

### Accident

Dutch courts agree that the term 'accident' requires an autonomous interpretation based on the Conventions. Therefore, recently, some Dutch courts followed the US Supreme Court's interpretation in *Air France v Saks* that liability arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. In addition, in some judgments, the courts ruled that a connection between the incident and the air transport has to be proven to constitute liability of the air carrier. In other cases, however, this latter requirement has been mitigated.

In a case where a passenger stated to have suffered injuries due to an allergic reaction that, according to the passenger, was caused by

food served on board the flight, the Amsterdam Court of Appeal held that the passenger must prove that the relevant meal contained the alleged allergens and that the passenger ate this meal. Also, the passenger had to prove that the cabin attendant who served the meal went through the menu with the passenger and confirmed to him that he could safely eat the meal, despite his allergies.

It is unclear yet whether the European Court of Justice decision in *Niki Luftfahrt* will lead to any changes.

### **Bodily injury**

No judgments have been rendered by Dutch courts on this condition.

### **In the course of any of the operations of embarking or disembarking**

No judgments have been rendered by Dutch courts on this condition.

### **No negligence defence**

6 | How do the courts in your state interpret and apply the 'no negligence' defence in article 21 of the Montreal Convention, and the 'all reasonable measures' defence in article 20 and the 'wilful misconduct' standard of article 25 of the Warsaw Convention?

The following has been decided in the few judgments rendered by Dutch courts on these issues.

#### **The 'no-negligence' defence (article 21, Montreal Convention)**

In a case where a passenger suffered injury owing to baggage falling from an overhead bin, the Amsterdam Court of Appeal decided that the airline provided insufficient substantiation of its 'no negligence' defence and held that the airline should at least have drafted an incident report showing the size and weight of the relevant baggage. Therefore, it could not be excluded that the airline should have taken the possibility of such an incident into account and should have taken precautionary measures, such as refusing the baggage or assisting in putting the baggage in the overhead bin.

#### **The 'all reasonable measures' defence (article 20, Warsaw Convention)**

A Dutch court held that for an airline to be able to invoke this defence, it must apply such measures that are reasonably available to prevent the incident and to avoid the damage. The court accepted the airline's defence in this case where a passenger suffered whiplash during turbulence. According to the court, the carrier took all reasonable measures by delaying the flight and warning the passengers of possible turbulence and by advising them to wear their seatbelts at all times during the flight.

#### **The 'wilful misconduct' standard (article 25, Warsaw Convention)**

In a case regarding theft of valuable goods during carriage by air, a Dutch court held that the air carrier was obliged to provide all relevant information regarding the handling of those goods to allow the claimant to substantiate its claim that there was wilful misconduct on the part of the air carrier. According to the court, in order for this claim to succeed, the claimant must prove that the carrier or its personnel acted recklessly while being conscious that damage would probably result from those actions. This implies a subjective standard. Also, in other cases regarding damaged or lost cargo, the Dutch courts assessed the claims based on all the circumstances of the matter. There are no judgments on this published regarding personal injury or death of passengers.

### **Advance payment for injury or death**

7 | Does your state require that advance payment be made to injured passengers or the family members of deceased passengers following an aircraft accident?

Article 5 of EU Regulation 2027/97, as amended by EU Regulation 889/2002, holds that a Community air carrier should without delay and in any event no later than 15 days after the identity of the natural person entitled to compensation has been established, make such advance payments as may be required to meet immediate economic needs on a basis proportional to the hardship suffered. In the event of death of a passenger, such an advance payment should not be less than the equivalent in euro of 16,000 special drawing rights per passenger. There is no case law on this.

This Regulation only applies to Community air carriers. In case of an aircraft accident where no Community air carrier is involved, Dutch law does not provide for the requirement that an advance payment is made to injured passengers or the family members of deceased passengers following an aircraft accident. However, in general, if such a claim is brought before a Dutch court, a court may allow a claim for an advance payment if liability is not disputed and if such an advance payment is reasonable in view of the damage. This will depend on the specific circumstances of the case.

### **Deciding jurisdiction**

8 | How do the courts of your state interpret each of the jurisdictions set forth in article 33 of the Montreal Convention and article 28 of the Warsaw Convention?

The following has been decided in only a few judgments rendered by Dutch courts on these issues.

#### **Domicile of the carrier**

No case law on this jurisdiction under the Conventions is available. Under Dutch law, the domicile of the carrier would be the legal residence of the carrier. If there is no legal residence, the actual place of business suffices.

#### **Principal place of business of the carrier**

No case law on this jurisdiction under the Conventions is available. Under Dutch law, the principal place of business is where the legal entity is situated according to legal regulations or its statutes.

#### **Place of business of the carrier through which the contract has been made**

In a matter regarding a cargo claim where the Warsaw Convention applied, the Amsterdam Court of Appeal ruled that this place of business does not necessarily have to be able to conclude the agreement by itself, but that it is sufficient if it would appear that the relevant office conducts all negotiations and confirms the agreement. Also in a matter regarding a cargo claim, the Amsterdam Court of Appeal ruled that an independent agency that acts on behalf of several airlines cannot be considered a 'place of business through which the contract has been made' under the Warsaw Convention.

#### **The place of destination**

The place of destination is the agreed place of destination between parties under the contract of carriage according to the Amsterdam Court of Appeal. In a matter regarding a cargo claim where goods were stolen during road carriage, which was subsequent to the carriage by air, the court decided that this carriage by road should be regarded as carriage by air and that the place of destination of the carriage is the final destination of the goods (regardless of the manner by which they were delivered there).

**Fifth jurisdiction created by article 33(2) Montreal Convention**

No case law on this jurisdiction under the Conventions is available.

**Forum non conveniens**

There is no Dutch case law on the question whether the Dutch courts would apply the forum non conveniens doctrine to a Montreal Convention or Warsaw Convention action. However, the forum non conveniens doctrine is not commonly used in the Netherlands. The European Court of Justice held that the forum non conveniens doctrine is incompatible with the Lugano Convention. Therefore, it can be presumed that the doctrine would not be applied by Dutch courts.

**Period of limitation**

- 9 | How do the courts of your state interpret and apply the two-year period of limitations in article 35 of the Montreal Convention and article 29 of the Warsaw Convention?

The limitation period is not subject to tolling and, in general, is held to be absolute. However, in a cargo case (subject to the Warsaw Convention) where parties had agreed to an extension of the two-year limitation period, a Dutch court held that invoking the limitation period despite confirming this extension, was unacceptable under the principles of reasonableness and fairness. In that matter, the two-year limitation period of the Warsaw Convention could not be invoked.

**Liability of carriage**

- 10 | How do the courts of your state address the liability of carriage performed by a person other than the contracting carrier under the Montreal and Warsaw Conventions?

No case law is available on this subject.

## DOMESTIC CARRIAGE - LIABILITY FOR PASSENGER INJURY OR DEATH

**Governing laws**

- 11 | What laws in your state govern the liability of an air carrier for passenger injury or death occurring during domestic carriage?

If the air carrier is a Community air carrier, the air carrier's liability in respect of passengers and their baggage is governed by all provisions of the Montreal Convention relevant to such liability. In case of domestic carriage by an air carrier that is not a Community air carrier, the air carrier's liability is governed by Book 8 of the Dutch Civil Code (DCC), which has implemented the Montreal Convention.

**Nature of carrier liability**

- 12 | What is the nature of, and what are the conditions for, an air carrier's liability?

The DCC applies the same conditions for air carrier's liability as the Montreal Convention (article 8:1393 DCC).

**Liability limits**

- 13 | Is there any limit of a carrier's liability for personal injury or death?

Article 21, Montreal Convention is exactly adopted in article 8:1399 DCC.

**Main defences**

- 14 | What are the main defences available to the air carrier?

The DCC includes the same defences as are included in the Montreal Convention.

**Damages**

- 15 | Is the air carrier's liability for damages joint and several?

Yes.

**Rule for apportioning fault**

- 16 | What rule do the courts in your state apply to apportioning fault when the injury or death was caused in whole or in part by the person claiming compensation or the person from whom the right is derived?

There is no case law on this. In the case of carriage by air to which the Conventions do not apply, article 8:1397 DCC contains the same provisions regarding contributory negligence as set out in article 20 of the Montreal Convention. The general rule of Dutch law is article 6:101 DCC, which holds that if circumstances that can be attributed to the person suffering the loss have contributed to the damage, the obligation to repair the damage is reduced by apportioning the damage between the person suffering the loss and the person who must repair the damage, in proportion to the degree to which the circumstances that can be attributed to each of them have contributed to the damage. However, a different apportionment will be made or the obligation to repair the damage will be extinguished in its entirety or maintained if it is fair to do so on account of varying degrees of seriousness of the faults committed or any other circumstances of the case.

When it comes to contributory negligence of an infant, the Dutch Supreme Court has held that if someone through negligence causes a serious danger, especially for infants who are in the vicinity, and such danger materialises in respect of an infant of whom, owing to the infant's age, can be expected to have only a limited understanding of such danger and a limited capacity to act upon such understanding, the principles of fairness demand that no claim can be made against such an infant for contributory negligence. From other relevant case law, it can be concluded that this rule applies to infants under 14 years old, unless it is shown that the infant acted with intent or recklessness in such a way that this is comparable to intent.

**Statute of limitations**

- 17 | What is the time within which an action against an air carrier for injury or death must be filed?

The limitation period is two years (article 8:1835 DCC). The period starts the day after the day of arrival or the agreed day of arrival. The limitation period is not subject to tolling and is generally deemed to be absolute. However, in a cargo case (subject to the Warsaw Convention) where parties had agreed to an extension of the two-year limitation period, a Dutch court held that invoking the limitation period despite confirming this extension, was unacceptable under the principles of reasonableness and fairness. In that matter, the two-year limitation period of the Warsaw Convention could not be invoked.

In order to safeguard a claim and avoid any future discussion, the claimant must begin legal proceedings within the limitation period of two years.

## THIRD-PARTY ACTIONS

### Seeking recovery

18 | What are the applicable procedures to seek recovery from another party for contribution or indemnity?

When a party is sued before a Dutch court, such a party can request the court's permission to begin third-party proceedings against a third party to seek recovery for the original claim. The original claimant is allowed to respond to such a request, after which the court renders judgment on this. If the third-party proceedings are allowed, the defendant in the main proceedings can claim from the third party whatever the defendant is held to pay to the original claimant.

The defendant in the main proceedings can also choose to await the outcome of those proceedings before seeking recovery from a third party or can commence separate proceedings simultaneous to the main proceedings.

### Time limits

19 | What time limits apply?

If a defendant wants to start third-party proceedings, this should be done immediately after the main proceedings are introduced before the court and before any defence on the claim itself is submitted.

Both in third-party proceedings and if a party seeks recovery in separate proceedings, such a party is bound by any legal or contractual limitation periods. The main limitation period under Dutch law is five years but this may differ, depending on the nature of the claim (for example, claims pursuant to a contract of sale as well as many aviation-related claims are subject to a limitation period of two years).

## LIABILITY FOR GROUND DAMAGE

### Applicable laws

20 | What laws apply to the liability of the air carrier for injury or damage caused to persons on the ground by an aircraft accident?

The Netherlands is not a party to the Rome Convention (1952). Dutch law does not contain specific rules governing liability for damage caused by operators of civil aircraft to persons on the ground. Therefore, such liability is governed by Book 6, Title 3, of the Dutch Civil Code (DCC) on unlawful acts, which regulates the liability of natural and legal persons.

### Nature and conditions of liability

21 | What is the nature of, and what are the conditions for, an air carrier's liability for ground damage?

Such liability is fault-based. Pursuant to article 6:162 DCC, an unlawful act is regarded a violation of someone else's right and an act or omission in violation of a duty imposed by law or of what according to unwritten law has to be regarded as proper social conduct, always as far as there was no justification for this behaviour. In order for a carrier to incur liability based on article 6:162 DCC, a set of conditions must be met. These are:

- it must be an unlawful act;
- it must be attributable to the tortfeasor;
- there must be damage;
- a causal relationship between damage and unlawful act; and
- relativity (meaning that there is no obligation to pay damages if the standard breached does not serve to protect against damage such as that suffered by the person suffering the loss).

### Liability limits

22 | Is there any limit of carriers' liability for ground damage?

No, there are no limits of carriers' liability for ground damage.

### Main defences

23 | What are the main defences available to the air carrier in a claim for damage caused on the ground?

There is no case law on this. The air carrier could argue that any of the tort requirements (article 6:162 DCC) have not been met. Whether or not such a defence could be successful depends on the circumstances of the matter.

## LIABILITY FOR UNRULY PASSENGERS AND TERRORIST EVENTS

### Applicable laws

24 | What laws apply to the liability of the air carrier for injury or death caused by an unruly passenger or a terrorist event?

Such liability will be governed by one of the Conventions (Montreal or Warsaw), depending on the injured or deceased passenger's routing and on whether the air carrier is a Community air carrier. A Dutch court will determine whether an accident occurred and therefore whether the carrier is liable, based on the specific circumstances of the case. In the Netherlands, no case law is available where such a claim was brought before the court.

### Nature and conditions of liability

25 | What is the nature of, and what are the conditions for, an air carrier's liability for injury or death caused by an unruly passenger or a terrorist event?

The claimant must prove that an accident as set out in the applicable Convention (Montreal or Warsaw) occurred.

### Liability limits

26 | Is there any limit of liability for injury or death caused by an unruly passenger or a terrorist event?

The air carrier's liability is unlimited, unless it can successfully prove one of the defences available under the Montreal Convention. When the air carrier successfully proves one of these defences, the damages are limited to the limit set out in the Convention.

### Main defences

27 | What are the main defences available to the air carrier in a claim for injury or death caused by an unruly passenger or a terrorist event?

The air carrier can invoke the defences as set out in the Conventions.

## LIABILITY FOR HARM CAUSED BY DRONES

### Applicable legislation

28 | Summarise the laws or regulations related to the liability for injuries or damage caused by drones.

The most important rules for the recreational use of drones (to be found in the Model Aircraft Order – *Regeling Modelvliegen*) are as follows:

- A private drone must not weigh more than 25kg (including cargo).



- There are places where you are not allowed to fly a drone, such as over crowds or built-up areas or in the vicinity of airports and other no-fly zones.
- You must always keep the drone in view.
- You are not permitted to fly higher than 120 metres, either above the ground or over water.
- You are not permitted to fly in the dark.
- You must always yield to other aircraft, such as aeroplanes, helicopters and gliders. This means that you must land immediately if you see an aircraft approaching. You should also stay away from accident scenes, since a drone can get in the way of emergency and police helicopters.
- You can use your drone to take aerial photographs for personal use. This is considered 'recreational use'. However, you are not allowed to violate other people's privacy. For example, you are not permitted to secretly film someone. If you want to film or photograph a person, you must first get their permission.
- If you don't follow the rules, you can be given a warning or a fine. It is also possible that your drone will be confiscated. The amount of the fine or the type of penalty depends on the nature of the offence. For example, the authorities will consider whether you were using the drone recreationally or in a professional capacity. And whether your actions put any other people at risk.
- If you use a drone commercially, you need certain licences. If you fly the drone yourself, you also need to have a pilot's licence.
- You also have to follow the same rules that apply to the recreational use of drones.

As from 2021, national rules will be replaced by a common EU Regulation. The purpose of this reform is to create a truly harmonised drone market in Europe with the highest level of safety. In practice, it means that once a drone pilot has received an authorisation from the drone's state of registry, he or she will be allowed to freely circulate in the European Union.

## CONSUMER PROTECTION AND PASSENGER RIGHTS

### Applicable legislation

- 29 | Summarise aviation-related consumer-protection laws or regulations related to passengers with reduced mobility, flight delays and overbooking, tarmac delay and other relevant areas.

EU Regulation 1107/2006 establishes rules for the protection of and provision of assistance to disabled persons and persons with reduced mobility travelling by air, both to protect them against discrimination and to ensure that they receive assistance. This Regulation applies to commercial passenger air services on departure from, on transit through, or on arrival at an airport, when the airport is situated in the territory of an EU member state.

EU Regulation 261/2004 provides that operating air carriers should give priority to carrying persons with reduced mobility and any persons or certified service dogs accompanying them.

Also, EU Regulation 261/2004 sets rules on compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights. Also, following decisions rendered by the EU Court of Justice, if passengers are denied boarding against their will, if a flight is cancelled and if a flight is delayed for more than three hours, passengers can claim compensation as set out in the Regulation, unless the carrier can show that the event was caused by extraordinary circumstances that could not have been avoided even if all reasonable measures had been taken.

EU Regulation 2027/97, as amended by EU Regulation 889/2002, sets rules for the liability of Community air carriers for passenger injury

and death. Also, this Regulation contains rules regarding baggage delays, destruction and loss of or damage to baggage.

## LIABILITY OF GOVERNMENT ENTITIES PROVIDING SERVICES TO CARRIERS

### Relevant laws

- 30 | What laws apply to the liability of the government entities that provide services to the air carrier?

Book 6, Title 3 of the Dutch Civil Code (DCC) on unlawful acts regulates the liability of natural and legal persons. Government activities must be reviewed in the context of article 6:162 DCC.

### Nature and conditions of liability

- 31 | What is the nature of, and what are the conditions for, the government's liability?

Article 6:162 DCC regulates unlawful acts. A government entity can be held liable for unlawful acts of management or unlawful factual acts. Also, a government entity can be liable based on contract.

### Liability limits

- 32 | Are there any limitations to seeking recovery from the government entity?

No, there are no limitations such as immunity or limitations based on public policy.

## CRIMINAL PROCEEDINGS

### Responsibility for accidents

- 33 | Can an air carrier be criminally responsible for an aviation accident?

Yes. Articles 168 and 169 of the Dutch Criminal Code provide that any person who intentionally and unlawfully or through negligence causes any aircraft to sink, be stranded or be wrecked, be destroyed, rendered unusable or damaged will be liable to a term of imprisonment or a fine (also depending on the endangerment of life). Pursuant to article 51 of the Dutch Criminal Code, criminal offences can be committed by natural persons and legal persons. If a criminal offence is committed by a legal person, criminal proceedings may be instituted and such punishments and measures as prescribed by law, where applicable, may be imposed: (i) on the legal person; or (ii) on those persons who have ordered the commission of the criminal offence, and on those persons who actually directed the unlawful acts; or (iii) on both persons referred to in (i) and (ii) jointly.

Further, article 3.8 of the Act on Aviation provides that it is prohibited to operate a flight with an aircraft that is not airworthy or does not have an airworthiness certificate. Additionally, article 4.1 of the Act on Aviation prohibits the operation of a flight without an Air Operator's Certificate, as well as the operation of a flight in conflict with the terms and conditions thereof. Anybody violating this provision will be liable to a term of imprisonment or a fine.



## Effect of proceedings

### 34 | What is the effect of criminal proceedings against the air carrier on a civil action by the passenger or their representatives?

The Dutch Code of Civil Procedure provides that a criminal conviction for a crime has conclusive evidential value of that fact in civil proceedings, unless the contrary is proven. This does not mean, however, that a criminal conviction for a certain crime automatically results in civil law liability.

## Compensation

### 35 | Can claims for compensation by passengers or their representatives be made against the air carrier through the criminal proceedings?

Yes, a victim can claim compensation by joining as a party to the criminal proceedings against the air carrier. Conditions for admissibility are:

- direct damage caused by the proven fact;
- conviction of the suspect (punishment or measure); and
- a claim of a simple nature.

## EFFECT OF CARRIER'S CONDITIONS OF CARRIAGE AND TARIFFS

### Liability

### 36 | What is the legal effect of a carrier's conditions of carriage or tariffs on the carrier's liability?

A carrier's conditions of carriage or tariffs can be invoked, provided that these are applied correctly and that these are not inconsistent with mandatory law, such as applicable Conventions and EU Regulations (on tariffs, see EU Regulation 1008/2008). In relation to passengers, it is of the utmost importance that the conditions of carriage or tariffs are not inconsistent with laws that are intended to protect consumers. If the conditions are in any way inconsistent with such laws, the Dutch Authority for Consumers and Markets may be entitled to impose fines.

## DAMAGES

### Damage recovery

### 37 | What damages are recoverable for the personal injury of a passenger?

Under Dutch law, a liable party is held to pay full compensation to its creditor, in such a way that the creditor is put in the position he or she would have been in, had the injury not occurred. Articles 6:95–6:110 of the Dutch Civil Code (DCC) contain rules regarding the heads of damages that are recoverable and the methods of assessment of damages. In principle, all damages that result from a liable act are recoverable by the person who suffers this damage. In the case of personal injury, this includes loss of earnings, medical costs, costs for hiring someone to take over household tasks and compensation for pain and suffering. Compensation for pain and suffering is mostly claimed in the case of physical injury. The compensation that may be awarded for pain and suffering depends on the severity of the injuries and on the consequences of the injuries to the injured party's life (for example, will there be permanent scars?). No case law is available on the question of whether an airline can be held liable for solely mental injuries. Also, *close relatives and next of kin of deceased or severely injured persons have a right of compensation for emotional loss. The amount of compensation varies between €12.500 and €20.000 depending on the relation to the deceased or severely injured person, to be paid by the person liable*

for the death or injury. There is no case law yet on the question whether an airline can be held liable for such compensation.

Dutch law does not recognise punitive damages. However, people who suffer from nervous shock injury as a result of an accident for which another party is liable may, under stringent conditions, also claim damage.

### 38 | What damages are recoverable for the death of a passenger?

Under Dutch law (article 6:108 DCC), damages awarded in case of death (in aviation claims and other claims) are limited to funeral costs, compensation for loss of support, compensation for emotional loss and (very rarely) nervous shock damage.

In short, pursuant to article 6:108 (1) DCC, dependants are entitled to claim damages caused by a loss of financial support or a loss of household support provided to them by the deceased at the time of his or her death. The group of persons that is entitled to claim such damages is limited to spouses, registered partners, minor children and people who the deceased actually maintained or was obliged to maintain by court order. When determining the loss of support, all relevant factors should be taken into account, such as mortgage instalments, costs of electricity, among others. Also, depending on the circumstances of the case, certain savings and financial benefits the claimant may have owing to the death of the deceased, may be taken into account when calculating the recoverable loss of support.

Article 6:108 (2) DCC constitutes the legal basis for compensation of reasonable funeral costs. Only the person or persons who actually incurred these costs is or are entitled to claim compensation.

Dutch law does not recognise punitive damages. However, people who suffer from nervous shock injury as a result of an accident for which another party is liable may, under stringent conditions, also claim damages.

## ACCIDENT INVESTIGATION AND FAMILY ASSISTANCE

### Investigatory authority

### 39 | Who is responsible in your state for investigating aviation accidents?

The Dutch Safety Board (DSB).

### Disclosure restrictions

### 40 | Set forth any restrictions on the disclosure and use of accident reports, flight data recorder information or cockpit voice recordings in litigation.

Article 69 of the Kingdom Act by which the DSB was instituted limits the possibilities for information obtained in the course of the DSB's investigations to be used in criminal, disciplinary or civil proceedings. Pursuant to Annex 13 of the Chicago Convention, article 69 of the Act explicitly includes data obtained from a flight recorder or from a cockpit voice recorder as such information. However, subsection 3 of article 69 holds that such data carriers may be used as evidence and be demanded for inspection or be seized, if it concerns a criminal investigation into a hostage-taking, murder, manslaughter or – in short – an offence with the intention of a terrorist attack.

However, in practice, parties have submitted the DSB report in proceedings and have invoked favourable information from the report. There is only limited case law on this and the outcome of these cases varies.

## Relevant post-accident assistance laws

41 | Does your state have any laws or regulations addressing the provision of assistance to passengers and their family after an aviation accident?

EU Regulation 996/2010 (as amended by EU Regulation 376/2014) sets criteria for assistance (article 21) and sanctions (article 23). Article 21 obliges each member state to draw up a national emergency plan that relates to assistance for victims of civil aviation accidents and their families. EU member states must also ensure that the airlines registered in their territory have an emergency assistance plan.

Pursuant to this EU Regulation, the Dutch government drafted the National Crisis Plan Civil Aviation Accidents. This plan sets out all the stakeholders' responsibilities, including assistance to passengers and their family.

## INSURANCE REQUIREMENTS

### Mandatory requirements

42 | Are there mandatory insurance requirements for air carriers?

Apart from the general provisions contained in EU Regulation 2027/97 as amended by EU Regulation 889/2002 and in the Montreal Convention, EU Regulation 785/2004 sets out minimum insurance requirements for air carriers and aircraft operators in respect of passengers, baggage, cargo and third parties. The Regulation applies to air carriers and aircraft operators flying within, into, out of or over the territory of an EU member state. The Regulation stipulates the following minimum insurance cover: 250,000 special drawing rights (SDR) per passenger, 1.131 SDR for baggage per passenger and 19 SDR per kilogram of cargo.

## LITIGATION PROCEDURE

### Court structure

43 | Provide a brief overview of the court structure as it relates to civil aviation liability claims and appeals.

Claims with an interest up to €25,000 are to be submitted to the sub-district sector of the competent district court. In such proceedings, the parties do not require legal representation. Claims with an interest of more than € 25,000 are to be submitted to the competent district court.

Judgments rendered by a district court can be appealed unless the financial value of the claim is less than € 1,750. A judgment of a court of appeal may be appealed against with the Dutch Supreme Court. The Supreme Court in principle deals with issues on the interpretation and application of the law and with the non-compliance of procedural rules only.

### Allowable discovery

44 | What is the nature and extent of allowable discovery/disclosure?

In the Netherlands, there are no disclosure or discovery proceedings as in common law jurisdictions. However, a party is under a duty to assert the relevant facts fully and truthfully. In all instances and in all stages of the dispute, the court may order the parties to provide information or to submit records. If parties do not provide the required information or records, the court may draw the conclusion that it deems appropriate to decide the dispute.

A party with a legitimate interest may demand in court (even if no proceedings on the merits are pending), review or copies of documents from another party with whom the applicant has a legal relationship.

The applicant should clearly indicate which documents he or she would like to inspect; 'fishing expeditions' are not allowed.

### Evidence

45 | Does the law of your state provide for any rules regarding preservation and spoliation of evidence?

Pre-examination of witnesses and experts is possible under Dutch procedural law. In addition, it is possible to seize evidence.

### Recoverability of fees and costs

46 | Are attorneys' fees and litigation costs recoverable?

The winning party is awarded the fixed court fee which depends on the financial value of the claim and which fee has to be paid by the claimant as well as the defendant before proceedings have started. In addition, the winning party is awarded a fixed fee for other expenses, including costs of lawyers. The latter fee is based on a graduated scale depending on the financial value of the claim, the number of submissions exchanged and whether or not oral hearings took place. In practice, these fees usually cover only a (small) part of the lawyers' fees.

## JUDGMENTS AND SETTLEMENT

### Pre- and post-judgment interest

47 | Does your state impose pre-judgment or post-judgment interest? What is the rate and how is it calculated?

Statutory legal interest starts to run from the day that the damage occurred and it is compound interest (article 6:119 Dutch Civil Code). The statutory interest is fixed by regulation and amounts at the moment to an interest rate of 2 per cent per year (in the case of non-commercial transactions) and 8 per cent per year (in case of commercial transactions). For contractual claims, a higher contractually agreed interest rate may be applicable.

### Settlements

48 | Is court approval required for settlements?

Court approval is required in case settlement is concluded with someone who is under a legal guardianship (for example, minors and mentally disabled persons).

49 | What is the effect of a settlement on the right to seek contribution or indemnity from another person or entity? Can it still be pursued?

A settlement in itself does not prohibit a settling party from seeking contribution or indemnity from another person or entity. When seeking contribution or indemnity, the claimant will have to substantiate its claim and the damage it suffered and will have to argue why the defendant is held to indemnify the claimant for this damage. Such a claim is decided on its own merits.

50 | Are there any financial sanctions, laws or regulations in your state that must be considered before an air carrier or its insurer may pay a judgment or settlement?

Apart from international sanctions that prohibit payments to certain persons or entities, the Dutch government takes measures to combat money laundering and terrorist financing. The measures are set out in detail in the General Guidelines for the Money Laundering and Terrorist Financing (Prevention) Act, the Sanctions Act of the Ministry of Finance

and the guidelines of the various supervisory bodies. These guidelines need to be adhered to in any payment made in the Netherlands.

## UPDATE AND TRENDS

### Key developments of the past year

#### 51 | What were the key cases, decisions, judgments and policy and legislative developments of the past year?

On 8 January 2020 The Hague District Court rendered a decision relating to the Martinair Faro accident of 21 December 1992. In this accident, 54 passengers and two cabin attendants died. Approximately 100 other passengers were severely injured. In December 2012, a number of the passengers who had been injured, as well as a number of next of kin of deceased passengers, commenced proceedings against Martinair and the Dutch state claiming that the Dutch Aviation Council, a predecessor of the Dutch Safety Board, misrepresented certain facts and that as a result thereof the amicable settlements that had been concluded with Martinair did not reflect the actual facts and prospects of the claims.

The claims against Martinair were dismissed in 2014 on the basis of the release and discharge provisions included in the settlement agreements as well as the two-year time bar in the Warsaw Convention 1929. However, in January 2020 the claims against the Dutch state were awarded. The accident investigation was carried out by the Portuguese aviation authorities. The Dutch Aviation Council was involved in the investigation, as Martinair is a Dutch airline. After the accident report was published, it agreed to answer questions from a legal foundation of victims and next of kin. According to the district court, the Aviation Council's answers to some of these questions were not fully accurate. For example, their answers about the cause of the accident were too conclusive. According to the court this resulted in amicable settlements with Martinair under the Warsaw Convention, which has a limit of liability which can be broken, that were less favourable than these could have been. According to the district court, there is a 20 per cent chance that the claimants would have been able to get a better settlement result. The Dutch state is ordered to pay 20 per cent of the losses and damages of the claimants to the extent these have not been compensated yet.

The Dutch state has decided not to appeal the decision. This is quite remarkable as the decision seems to be contrary to the principles underlying accident investigations, being that these do not concern themselves with the apportionment of blame or liability and that the findings cannot be used as evidence in civil or criminal proceedings.

In March 2020, the criminal proceedings against four suspects who are accused of involvement in the downing of Malaysia Airlines Flight MH17 on 17 July 2014 commenced in the Netherlands. In these criminal proceedings, the findings of the Joint Investigation Team have been presented. Also, next of kin of the victims of this crash intend to submit claims for damages in the criminal proceedings. The Criminal Court will need to assess these claims, bearing in mind the claims that may have been alleged by some of these next of kin against other parties involved.

### Coronavirus

#### 52 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Following the first lockdown, the Dutch government made available financial support packages for companies to enable them to continue to pay their employees and bills. During the summer these were reduced. This autumn a second lockdown followed and again support packages



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were provided. These support packages are not limited to aviation but have a fairly general scope and contain specific requirements that need to be met by companies for them to be eligible for support.

The Dutch government has specifically provided a support package for the benefit of the Dutch flag carrier KLM.

A number of legal writers have argued that existing legal concepts, such as *force majeure* and unforeseen circumstances, need to be applied less strictly than usual in covid-19 related cases. For example, it is argued that in case of damage caused by lockdown measures, such damage should be split among contract partners unless they have explicitly agreed otherwise. There is not a lot of case law yet; however, there are some examples of such leniency being applied in lower case law.

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