NO-SHOW CLAUSES:

ARE THEY ABUSIVE CLAUSE UNDER EUROPEAN LAW OR A NECESSARY EVIL?

by

Delphine Defossez*

ABSTRACT

No-show clauses (NSCs) have been used for decades by airline companies. They are accepted by the International Air Transport Association (IATA) and are embodied in Articles 3.3.1 and 3.3.2 of Recommended Practice 1724. However, there is a growing concern by passengers, the European Union (EU) Member States, and their judges that these clauses contain terms that cause unfair hardship and unjustly penalise consumers. Airline companies argue that NSCs are of crucial importance to their pricing policy in a highly competitive air travel market and that banning NSCs would contravene the Open Skies Agreement between the United States and the EU. Despite all the airline rhetoric of NSCs protecting their pricing, it is, in fact, a forfeiture that would not be tolerated in any other kind of contract. First, it operates like a material breach, in that the no-show causes total loss of all further contract benefits. Second, the clause, in fact, works like a forfeiture. Third, it operates like a liquidated damage clause. However, it does not meet the justifications thereof, instead functioning as a forfeiture clause. Lastly, the law of mitigation of damages applies, even if the passenger's no-show is deemed a breach. Under the doctrine of mitigation, damages cannot be recovered where reasonably or actually avoided. Thus, if the seat is sold, there should be

* LL.B. (Maastricht University), LL.M. (European University Institute); LL.M. (Swansea University); PhD candidate at Universidade de Brasilia (UnB), Bolista da CAPES.

a refund. Accordingly, this article demonstrates that NSCs constitute unfair terms well within the wording, meaning, and policy of the EU's Unfair Contract Terms Directive.

RÉSUMÉ

Les clauses de non-présentation (CNP) sont utilisées depuis des décennies par les compagnies aériennes. Elles sont acceptées par l'Association internationale du transport aérien (IATA) et figurent aux articles 3.3.1 et 3.3.2 de la Pratique recommandée 1724. Cependant, un nombre croissant de passagers, de juges et d'États membres de l'Union européenne (UE), s'inquiètent du fait que ces clauses puissent imposer des difficultés illégitimes et pénaliser injustement les consommateurs. Les compagnies aériennes affirment que les CNP revêtent une importance cruciale quant à leur politique tarifaire, dans un marché du transport aérien hautement concurrentiel, et que bannir les CNP contreviendrait aux accords de ciel ouvert (ACS), entre les États-Unis et l'UE. Malgré la rhétorique des compagnies aériennes quant au fait que les CNP protégeraient leur tarification, celles-ci constituent en réalité une privation de droits qui ne serait tolérée dans aucune autre sorte de contrat. En premier lieu, elles agissent comme une violation substantielle de ce dernier, car les conséquences de la non-présentation sont la perte de tous les autres avantages contractuels. En second lieu, la clause, en réalité, fonctionne comme une privation de droits. En troisème lieu, elle opère comme une clause de dommages-intérêts. Cependant, elle n'en rempli pas les conditions, et agit au contraire comme une clause de renonciation de droits. Enfin, la réglementation sur la limitation des dommages-intérêts d'applique, même si la non-présentation du passager est censée être une violation du contrat. Selon le concept de la limitation, on ne peut recouvrer de dommages-intérêts lorsque le préjudice a été effectivement ou raisonnablement évité. Ainsi, si le siège est revendu, un remboursement devrait être effectué. Par conséquent, cet article démontre que les CNP constituent des clauses abusives au sens et selon les termes et la politique de la Directive CEE concernant les clauses abusives dans les contrats conclus avec les consommateurs.

KEYWORDS

No-Show Clause; Unfair Terms; European Unfair Contract Terms Directive; Consumer Protection; General Conditions of Carriage; Right to Use a Ticket; Passenger Rights.

I. INTRODUCTION

Travelling is extremely common these days. Airlines including no-show clauses (NSCs) in ticketing terms is equally common. Indeed, in every contract of carriage made with an airline company, a NSC is included. This clause, embodied in Articles 3.3.1 and 3.3.2 of the International Air Transport Association (IATA) Recommended Practice 1724,[1] allows airlines to cancel without refunding a reservation in two situations: (a) when the passenger missed the first leg of a multi-leg itinerary, or (b) when the passenger missed the outbound flight of a round-trip itinerary. Given the highly competitive airline travel business, airline companies need to maximise their profit – or at least stabilise their anticipated income – while providing services to the widest range of customers willing to pay on their terms. Towards this end, through the use of NSCs, IATA has allowed airlines to sanction fliers who are burden to or try to cheat or abuse the system through no-shows resulting from personal negligence (e.g., not setting an alarm to be on time), unavoidable accidents (e.g., dropping a passport en route), or deliberate manipulation (e.g., changing travel plans for personal reasons).[2]

When buying a ticket, passengers are agreeing on the terms and bound by pre-formulated contracts, included in the terms of use. When the trip goes as planned, passengers do not need to worry about those terms in the contract of carriage. Unfortunately, unexpected circumstances do happen that might put existing travel plans at stake. When such circumstances occur, most passengers decide to simply not show up without cancelling the flight itineraries at the last minute. Whenever a passenger does not show up, NSCs within the contract of carriage are triggered and all the travel are cancelled. The passenger is not granted the right to claim refund as it is deemed to be at fault. Airlines argue that NSCs are necessary to minimise wastage of seats. At first sight, NSCs look like penalty clauses, which are detrimental to consumers as they operate as illegal forfeitures (with a total loss of contract value and refund), and should, therefore, be abolished. However, as will be argued, NSCs play an important role in protecting airlines. Therefore, a rational balancing of interests would preserve the validity of NSCs in one situation, while abolishing them in another. Indeed, although NSCs obviously have a harsh effect on no-show fliers, as the ticket was paid for and the seat is often resold, NSCs also protect the financial integrity of commercial airline companies operating in a highly competitive field.

Because of its real life harsh effects (missing a flight and be required to replace the entire round-trip ticket at additional cost), this clause has raised much concern among users and courts. Nonetheless, it is a difficult subject that only a few legislators and judges have addressed.[3] NSCs

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[1] Since the 35th edition of the *Passenger Services Conference Resolution Manual* of the International Air Transport Association (IATA), Recommended Practice 1724 is no more included. However, most airlines have copied this Recommended Practice in their general conditions of carriage or have amended their terms and conditions to reflect the terms included in the Recommended Practice.

[2] *Recommended Practice 1724: General Conditions of Carriage (Passenger and Baggage)*, PSC(MV79)1724, in IATA, *Passenger Services Conference Resolutions Manual: Part I & Part II*, 30th ed (Montreal: IATA, 2010) 1022, arts 3.3.1, 3.3.2 [*IATA Recommended Practice 1724*].

[3] See e.g. TJ-DF, Apelaçao Civel no Juizado Especial, 1 December 2005, ACJ 20050110145947 DF (Brazil) (consumer protection is very extensive and therefore such clauses have already been successfully challenged in court) [ACJ 20050110145947 DF]; TJ-PR, Processo Civel e do Trabalho, 25 June 2015, Recursos, RI 00349003920148160182 0 PR 0034900-39.2014.8.16.0182/0 (Brazil) [RI 00349003920148160182 0]; TJ-RJ, 14 October 2015, Recurso Inominado, RI 0091142820148190208 RJ 0009114-28.2014.8.19.0208 (since 2015, airlines are prohibited to cancel the return flight even though the passenger did not use the outbound part of the ticket) [RI 0091142820148190208]. See also *Convention on Contracts for the International Sale of Goods*, 11 April 1980, 1489 UNTS 3 (entered into force

leave a great deal of liberty to the carriers while restricting the freedom of passengers by, in a sense, compelling the passenger to use the ticket or to lose the money without any possible compensation. By the simple fact that the passenger did not board the first flight and did not call the airline, the contract between the passenger and the carrier is automatically broken, and all subsequent tickets are cancelled. However, even when contacting the airline, the passenger will be charged a fee to change the initial ticket. Such situation seems ridiculous, especially in light of some European Union (EU) instruments that have been enacted to regulate unfair contract terms. For instance, in Spain, the first instance court in Madrid ruled that the clause was abusive and that carriers have no power to force passengers to choose whether to take their flights or not.[4] German courts view NSCs as creating a disproportionate disadvantage against the consumer and, therefore, an unjust penalty.[5]

Looking from the perspective of airlines, it is understandable that they take the opportunity to cancel the travel if the passenger does not show up for the first leg of the trip. The clause protects the airlines against the shopping habits of the consumers, avoiding departure with an empty seat.

The financial implications, in this industry, are relatively high. The protection of the consumer is certainly of crucial importance. However, airline companies cannot bear alone the costs as they might suffer economic losses. The airline industry is a rather closed industry with few actors. The less actors are left, the more of a monopoly the sector will become. In March 2013, the European Commission issued a proposal revising Regulation 261/2004,[6] which, among others, proposed to ban NSCs in the case of a return journey of the same ticket when the passenger did not take the outward journey.[7] However, the Commission later "decided against a full ban of the "no show" policy because it would impair airlines from offering indirect flights at lower prices than direct flights and therefore hurt competition".[8] The European Parliament went further by amending

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1 January 1988). The Convention does not regulate penalty clauses. In fact, the drafters agreed to leave these clauses out of the Convention, due to wide divergences in the different legal system.

[4] Juzgado de lo Mercantil No 12, Madrid, *OCU v Iberia* (2012), 00254/2012 (Spain), online: notin.es <notin.es/wp-content/uploads/2012/10/Sent-Juzg-Mercantil-12-Madrid-11-sept-2012-NULA-CLAUSULA-NO-SHOW.pdf> [*OCU v Iberia*].

[5] Bundesgerichtshof (Federal Court of Justice), *British Airways*, 29 April 2010, 12-13, 32-34, Ref. Xa ZR 5/09 (Germany) [*British Airways*]. See also AG of Cologne, 5 January 2005, JurionRS 2005, 26152 (Germany) [JurionRS 2005, 26152]; Landgericht (Regional Court of Frankfurt am Main), 14 February 2007, 2-2 O 243/07 (Germany) [Case 2-2 O 243/07]; Oberlandesgericht (Higher Regional Court of Frankfurt), 18 December 2008, 16 U 76/08 (Germany) [Case 16 U 76/08]; Gregor Bischoff, Sven Maertens & Wolfgang Grimme, "Airline Pricing Strategies Versus Consumer Rights: Is there a Need to Maintain the "Full and Sequential Use of Flight Coupons"-Rule?" (Paper delivered at the 13th Air Transport Research Society World Conference, Abu Dhabi, United Arab Emirates, 27-30 June 2009) at 9-11 [unpublished].

[6] EC, *Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91*, [2004] OJ, L 46/1 [*Regulation 261/2004*].

[7] EC, Commission, *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air*, COM(2013) 130 final, 2013/0072 (COD) (13 March 2013), online: Europa <eur-lex.europa. eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0130&from=EN>.

[8] *Ibid* at 7.

the text as followed:

> Passengers shall not be denied boarding at the return journey, including one which consists of multiple flights**,** on the grounds that he/she did not take the outward journey of a return ticket or did not pay an additional charge for this purpose.[9]

However, the Council of the EU ultimately removed the provision from the proposal.

This article is based on the premise that NSCs are unfair, at least with regard to return flights. Regarding a multi-leg journey, the use of such clauses could be justified on some economic principles. This article will first briefly explain what are NSCs and then outline the pro and against arguments for their use. Thereafter, it will turn to the abusive clause and analyse whether the clauses are abusive under the European law. Finally, the Open Skies Agreement between the United States (US) and the EU (OSA) and Regulation 1008/2008[10] will be discussed.

II. WHY ARE NO-SHOW CLAUSES WIDESPREAD?

Some clauses in consumer contracts have been designed to meet the test of the genuine pre-estimate of loss and should be maintained. NSCs are the best example. The use of NSCs is as common as travelling, and they are included in every contract of carriage. NSCs were created to protect airlines by compelling travellers to perform their part of the contract and allowing airlines to escape liability in cases where consumers breach their obligations.[11] NSCs operate in two situations only: (a) when the passenger missed the first leg of a multi-leg journey, or (b) when the passenger missed the outbound flight of a round-trip itinerary. In cases when the journey is cancelled, the seat is sold to another customer. In fact, the seat is sold twice, with the airline company keeping the reservation price of the first booking and the payment for the ticket's re-sale.

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[9] EC, Parliament, *Report on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air (COM(2013)0130 – C7-0066/2013 – 2013/0072(COD))*, Doc A7-0020/2014 (22 January 2014) at 36, online: European Parliament <www.europarl.europa.eu/sides/getDoc .do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0020+0+DOC+PDF+V0//EN>.

[10] EC, *Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community*, [2008] OJ, L 293/3 [*Regulation 1008/2008*].

[11] The civil law approach to penalty clauses is that they are used to establish a penalty to be paid in case of non-performance with the intent to encourage performance.

For airlines, NSCs are essential mechanisms of their pricing policies.[12] The price of a round-trip ticket is lower than a one-way ticket. This is a tactic used by the airlines to make sure that the passenger flies both ways with their company.[13] The justifications of the clauses by the airlines vary based on the circumstance. Of course, the justification for a multi-leg journey is different from the justification for cancelling a return ticket. In situation (b), i.e. when the passenger missed the outbound flight of a round-trip itinerary, NSCs are abusive clauses as airlines withhold a sum of money in the form of an outbound ticket and, therefore, should be abolished. However, in the case of multi-leg journey, NSCs protect airlines as well as passengers of airports that do not provide direct routes to a specific place.[14] The debate as to whether NSCs should be abolished or not has never ended.

A. THE NEED OF NO-SHOW CLAUSES

According to the ticketing policies of Swiss International Air Lines,

> No-shows occur when the Travel Agent fails to cancel a booking that is not required by the customer which leads to inventory spoilage. If the reservation is not cancelled it may result in a No-show rebooking/refund restrictions may apply for no-show after ticketing. Un-ticketed segments which result in No-Show shall be liable to penalty fees.[15]

NSCs are often drafted in a similar way to this one. Thus, British Airways has a pretty similar clause:

> If you fail to cancel a booking before the check-in deadline for your flight and do not show up for the flight, we may decide to cancel your return or onward reservations.[16]

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[12] Bischoff, Maertens & Grimme, *supra* note 5.

[13] Juzgado de lo Mercantil, Bilbao, 3 July 2009, AC 2009/1802 (Spain) [AC 2009/1802].

[14] Jessica Boulet et al, "The EU Public Interest Clinic and BEUC present: Eliminating airline "No-show clauses" in the EU" (May 2015), prepared by the HEC-NYU EU Public Interest Clinic for BEUC (The European Consumers Organisation).

[15] Swiss International Air Lines, "Booking & Ticketing Policies of SWISS" (20 May 2014), cl 13, online: SWISS <www.swiss.com/CMSContent/corporate/agentnews/Documents/misc /SWISS_BookingTicketingPolicies_GDS_CHmarket_20MAY14.pdf>.

[16] British Airways, "General Conditions of Carriage: General Conditions of Carriage for Passengers and Baggage", cl 3c10, online: British Airways <www.britishairways.com/en-gb/information/legal/british-airways/general-conditions-of-carriage>.

Some airlines, such as Brussels Airlines or Alitalia, preferred to keep their clauses short and straightforward.[17] Surprisingly enough, in Iberia's terms and condition of carriage, no reference is made to NSCs.[18] Even more surprising, low-cost carriers, such as Ryanair, Easyjet, or Wizzair, do not make use of NSCs. Some air carriers, such as Emirates or Singapore Airlines, charge a penalty for a no-show. For instance, the passenger is subjected to pay an additional fee of at least US$ 400 for economy class and US$ 800 for business class in Emirates. Furthermore, under the policy of Emirates, missing the first leg of a multi-leg journey means that the return flight is also cancelled.

The justification for NSCs for multi-leg journeys is that air carriers are able to offer cheaper alternatives to consumers and compete for markets that would otherwise be inaccessible. For example, in a flight from Brussels to Brasilia with a stop in Paris, a passenger, who is ready to save money and go to Brussels, should be rewarded with a lower price. Indeed, an Air France flight from Brussels to Brasilia, connecting in Paris, is on average EUR€ 200 cheaper than booking the same flight from Paris to Brasilia. Without this clause, a lot of French passengers would buy their tickets starting in Brussels, but would only start their journey in Paris, leading to an empty or *quasi*-empty plane going from Brussels to Paris. The devil is in the details.

Banning NSCs might increase the price or lower the demand and lead to cancellation of routes. For passengers of major airports, the cancellation of some routes will not make a major difference. However, for smaller ones, this cancellation might be of crucial importance. For instance, Brussels Airport, which is a good size airport, does not offer any direct flight to Brazil or some Asian countries. Without NSCs, French and Dutch passengers, who come to Brussels Airport, would start their journey directly from Paris or Amsterdam Schiphol, leading to a decrease in the use of certain flights. Thus, NSCs for multi-leg journeys are essential mechanisms of pricing policies of airlines.[19] In this situation, NSCs are protecting the airlines by avoiding flights with *quasi*-empty planes as well as protecting passengers from smaller airports.

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[17] Brussels Airlines, "General Conditions of Carriage", cl 3.3.6, online: Brussels Airlines <www.brusselsairlines.com/com/misc/conditions.aspx> [Brussels, "General"]:

> Please be advised that in the event you do not show up for any flight without advising us in advance, we may cancel your return or onward reservations. However, if you do advise us in advance, we will not cancel your subsequent flight reservations. A new ticket will have to be reissued and its price recalculated based on the new routing.

Thus, under Alitalia's general conditions of carriage:

> If the passenger does not use the reserved seat and does not notify the Carrier sufficiently in advance, the Carrier may cancel, or ask another carrier to cancel, reservations for subsequent flights or for the return flight.

Alitalia, "Alitalia General Conditions of Carriage (Passengers and Baggage)" (May 2013), art 3.13, online: Alitalia <www.alitalia.com/content/dam/alitalia/files/us/Diritti%20passegg eri%20-%20Condizioni%20generali%20di%20trasporto%20-%20USA%20e%20Canada%20-%20Oct%202015.pdf> [Alitalia, "General"].

[18] See Iberia, "Conditions of Contract", online: Iberia <www.iberia.com/gb/carriage-condit ions/>.

[19] Bischoff, Maertens & Grimme, *supra* note 5.

When no direct route is offered, the air carrier needs to lower prices to compete with other airlines that do offer direct flights. Of course, the counter argument will be, when demand is higher and competition is lower, the air carriers will be able to charge more for the direct route. Although true, this does not take into consideration the fact that some travellers prefer opting for a longer, but less expensive flight. In a sense, NSCs with respect to multi-leg journeys allow for more options, providing choices that could suit different expectations. The person, who does not mind paying more to have a direct flight, can do so. And, the person, who is less time-sensitive, but does not want to spend too much, is also satisfied.

The argument concerning the other circumstance, i.e. regarding round-trip flights, is relatively weak and based on the so-called directional imbalance, namely that the demand might be stronger from A to B rather than from B to A. NSCs are used as part of the pricing mechanism of the airlines. Indeed, in the view of airlines, if the passenger only uses the ticket for the most expensive direction, it undermines the air carrier's ability to charge a higher price for the in-demand route. Some routes are more popular in one direction during high seasons, such as at Easter, during the Summer or Winter holidays.[20] For instance, during the Summer, the demand for Brussels-Marrakech is higher than Marrakech-Brussels. In order to make sure that the planes from Marrakech will come back (*quasi*-)full, the airline companies charge a lower rate for that trip. With this strategy, the profit is maximised. Without such policy, the airlines will have to raise prices for all passengers or cancel the flights to certain destinations.

The airlines raise another argument that is closely linked to the demand argument. Historically, mainline airlines or full-service carriers have sold round-trip tickets as one product and, therefore, NSCs allow for the differentiation between round-trip tickets and one-way tickets. The problem with this argument is that low-cost carriers sell round-trip tickets as two different tickets. Therefore, the difference between round-trip tickets and one-way tickets is no more as important as it once was. The airline companies further claim that they are deprived of potential revenue due to the unused seats, which represent a commodity until the moment the flight departs.

Airlines fear that they will have to completely restructure their pricing models. Therefore, according to them, the ban on NSCs would be commercially unfeasible. Nevertheless, this argument is weakened by the fact that there are nearly as many pricing policies as airline companies. Furthermore, major airlines make use of NSCs while low-cost carriers do not. Finally, NSCs are not the only price discrimination practice utilised by airlines. Other discriminatory practices include advanced booking, minimum stay rules, etc.[21]

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[20] Boulet et al, *supra* note 14.

[21] Bischoff, Maertens & Grimme, *supra* note 5 at 5.

In nearly every standard terms and conditions of carriage, the possibility to prove *force majeure* is left to the passenger. Although the air carrier might charge some fees for the issuing of a new ticket, the possibility is left to the passenger to show that such event has occurred.[22] However, in Brazil, consumers could just go to court and ask for compensation, even if there is an NSC, since such clauses have been ruled as abusive since 2005.[23] According to the 2005 judgment and a 2015 judgment, airlines are prohibited from cancelling the return flight even though the passenger did not use the outbound part of the ticket.[24] In most carriage contracts in Brazil, the procedure to follow for reimbursement is found in the ticket. NSCs are not of great use in those cases, because the consumer law of Brazil protects them to such an extent that it is unlikely for an airline to win their case relying on this type of clauses.

NSCs for the outbound part of a ticket do not make much more sense and, arguably, are unduly restricting the freedom of passengers. Indeed, some circumstances, e.g., an anticipated meeting, delayed trains, a family funeral, etc., might have forced the passenger to anticipate his or her journey. If the initial ticket is non-refundable and non-changeable, which is the case for most tickets, the passenger will be compelled to buy a new outbound ticket. The fact that the return flight is automatically cancelled by missing the outbound part of the original ticket cannot be justified. Although, NSCs are crucial in the airlines' opinion, they also waive the right to compensation for passengers and limit the airlines' liability. As argued by Koning and agreed by the author, NSCs also breach Article 3(1) of the Unfair Contract Terms Directive (UCTD)[25] of the EU, demonstrating the limitation of liability that exists.[26]

B. USING THE TICKET AS BOUGHT: IS IT A RIGHT OR AN OBLIGATION?

One of the important questions that the courts have been asked to answer is whether the use of the ticket is merely a right or whether it is part of the contractual obligation. The finding of a clause as being unfair is hinged on the finding that the use of a ticket is a right. Indeed, if the obligation of the passenger is only to pay for the ticket and the obligation of the airline is to carry the passenger from A to B, then NSCs are *per se* unfair terms. However, if the obligation of the passenger is to pay for the ticket and to use the ticket, NSCs are not *per se* unfair terms.

The Spanish courts, although the most proactive in this area, have had hard times to rule that

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[22] See e.g. Alitalia, "General", *supra* note 17, art 3.5.

[23] See ACJ 20050110145947 DF, *supra* note 3.

[24] RI 003490039201481601820, *supra* note 3; RI 0091142820148190208, *supra* note 3.

[25] EC, *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*, [1993] OJ, L 95/29, art 3(1) [*UCTD*].

[26] See e.g. Ingrid Koning, "The Enforcement of Airline Passengers' Rights in Europe" (2011) 2 REDC 359.

this type of clause is abusive. For instance, the Sentencia de Audiencia Provincial (SAP) court of Madrid in 2009 found the behaviour of the airlines unfair, while a judge in a case in Bilbao highlighted the fact that airlines try to increase their profit by offering round-trip tickets at a lower price than one-way routes.[27]

In the Spanish case *OCU v Iberia*,[28] the consumer rights organisation OCU (*Organización de Consumidores y Usuarios*) argued that the clause be abusive as it implies the unilateral revocation of the contract by the airline company. Such view was shared by the court. It was understood in the judgment that passengers receive a discount when they buy a full ticket, i.e. inbound and outbound. However, it was argued that it would be more reasonable that passengers lose this discount rather than losing the whole return ticket.

The proper information for the consumers is of crucial importance according to Article 5(1) of the Ley 7/1998, which transposed the UCTD, as required by its Article 6, into Spanish domestic law.[29] Proper consumer information must allow the company to obtain the acceptance of the consumer on the general conditions of a contract. A clause cannot be incorporated into a contract if one of these two important requirements is missing. If this is not the case, then Article 8 renders the clause null as being prejudicial to the consumer.[30]

The Royal Legislative Decree 1/2007 approving the re-cast text of the General Law for the defence of consumers and users, and related laws,[31] contains a general definition of the term abusive clause. According to Article 82(1) of the Decree, all stipulations not negotiated individually and all practices not expressly agreed that, contravening the requirements of good faith, give rise to a significant imbalance in the rights and obligations of the parties arising under the contract in a manner detrimental to the consumer or user, shall be regarded as unfair terms.[32]

Article 62(2) of the Decree prohibits the inclusion in a contract with consumers of clauses that will impose an onerous obstacle and is disproportionate compared to the exercise of the rights

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[27] AC 2009/1802, *supra* note 13; SAP de Madrid, 27 November 2009, JUR 010/70248 (Spain).

[28] *OCU v Iberia*, *supra* note 4.

[29] Spain, *Ley 7/1998, de 13 de abril, sobre Condiciones Generales de la Contratación*, BOE núm 89 (14 April 1998), arts 5(1), 6.

[30] *Ibid*, art 8.

[31] Spain, *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*, BOE núm 287 (30 November 2007) [*Real Decreto Legislativo 1/2007*].

[32] *Ibid*, art 82(1).

of the consumer.[33] Under this interpretation, NSCs thus convert a right into an obligation.[34]

Under Article 95 of the Spanish law on aviation, the obligation of the passengers is to pay the price, determine the dates, and then have the right to use the ticket in full or not.[35] The use of the ticket and the choice of the dates are, therefore, their rights, as was restated in a judgment of the Mercantile Court of Palma de Mallorca in 2010.[36] The Madrid court found that the loss of the entire ticket was disproportionate and unjustifiable, as the NSCs transformed such rights into obligations.[37] NSCs conditioned the rights of the passenger to occupy a seat in the chosen return flight by forcing the full use of the ticket. However, in the same decision, the judge added that the obligation of the passenger on top of paying the price was to appear within the minimal fixed anticipation time. Yet, the court found it abusive as it permits the companies to resell the same seat while making it virtually impossible for the passenger to make use of all the parts of the ticket purchased.

Moreover, airlines reserved their right to cancel the contract *de facto* for any non-compliance of the consumer with any of the obligations.[38] This results in an important imbalance between the rights and the obligations under the contract, which is contrary to Article 82(1) of the Royal Legislative Decree 1/2007.[39] Furthermore, the airline does not suffer any real prejudice as required by Article 62(2) of the Decree.[40] As a result, the use of the clause creates a disproportionate obstacle to the rights of the passenger.

Under Spanish law, the most appropriate sanction would be to deprive the consumer of the round-trip discount. In the eyes of the court, NSCs create a significant imbalance between the passenger and the company, as the company has the possibility to resell the seat and, therefore,

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[33] *Ibid*, art 62(2).

[34] See Karolina Lyczkowska, "El Presente y el Futuro de la Cláusula "No Show" en los Billetes de Avión", Centro de Estudios de Consumo (27 March 2014), online: University of Castilla-La Mancha <blog.uclm.es/cesco/files/2014/03/El-presente-y-el-futuro-de-la-cl%C3%A1us ula-no-show-en-los-billetes-de-avi%C3%B3n.pdf>.

[35] Spain, *Ley 48/1960, de 21 de julio, sobre Navegación Aérea*, BOE núm 176 (23 July 1960), art 95 [*Ley 48/1960*].

[36] Juzgado de lo Mercantil No 2, Palma de Mallorca, 22 March 2010, 00071/2010 (Spain) [Case 00071/2010].

[37] *Ibid,* Part 4, para 9.

[38] Lyczkowska, *supra* note 34.

[39] *Real Decreto Legislativo 1/2007*, *supra* note 31, art 82(1), provides:

> *Se considerarán cláusulas abusivas todas aquellas estipulaciones no negociadas individualmente y todasaquellas prácticas no consentidas expresamente que, en contra de las exigencias de la buena fe causen, en perjuicio del consumidor y usuario, un desequilibrio importante de los derechos y obligaciones de las partes que se deriven del contrato.*

[40] *Ibid*, art 62(2).

obtains payment twice for the same seat, whereas the consumer does not benefit from the curtailment of rights.

OCU requested the court to analyse the nullity of the NSCs, arguing that it was a violation of Article 87(4) of the Royal Legislative Decree 1/2007.[41] However, the court rejected this argument as Article 87(4) prohibits businesses, which are unwilling to carry out the requested service, to keep the amount paid if they are cancelling the contract. It would have been surprising if the court had accepted this argument and rendered a judgment based only on this argument. In fact, NSCs derive their abusive character from the unilateral and arbitrary revocation of the contract, and not from the refusal to reimburse passengers, which is a secondary issue. The court's final reasoning is that NSCs allow the airline companies to cancel a contract without performing their obligation and to keep payments made in exchange for such performance.[42] The court viewed NSCs as a way of unilaterally and arbitrarily dissolving the contract with the airline. The unilateral and arbitrary dissolution of the contract carried more weight with the court than the failure of the airline to reimburse consumers. Worth noting is the fact that the judgment did not refer to the question of how to calculate the amount of the reimbursement that corresponds to the return flight. The Spanish case is also silent about the use of the clause for multi-leg journeys.

The German Bundesgerichtshof (BGH, Federal Court of Justice) in a case against British Airways agreed with the judgments of the Spanish courts by stating that the consumer pays a certain price to be transported to a certain destination. Contrary to what airlines are claiming, this performance will not be impossible if the customer does not start one of the stages. The air transport with stopover is not a legally indivisible performance because the journey can be disassembled without depreciation and impairment of the performance through partial performances.[43]

Section 280 paragraph 1 sentence 1 and Section 283 sentences 1 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) provide that the passengers should at least be compensated. The German court BGH went further and held that the clause is to be considered as a contractual penalty, which is also against Section 309(6) of the Civil Code.

The German test is substantially the same as in the *Aziz* case,[44] even though the language differs. Indeed, to prove bad faith, the Court of Justice of the EU (CJEU) tried to answer the

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[41] *Ibid*, art 87(4).

[42] *OCU v Iberia, supra* note 4 at para 13.

[43] *British Airways, supra* note 5.

[44] *Aziz v Catalunyacaixa,* C-415/11, [2013] ECLI:EU:C:2013:164 [*Aziz*].

question whether it could be reasonably presumed that a consumer would have consented to the contractual clause if asked. The test applied by the German court is whether the term is surprising to consumers. Both tests revolve around the same concept: that the consumer would not imagine the clause as being part of the contract. In the opinion of the German courts, NSCs constitute an impermissible bad surprise. The courts (rightly) held that the airlines would have no justification for denied boarding in the absence of this clause.[45] Even when the plaintiff was aware of the clause, the German court BGH held that the NSC was in itself unfair.[46]

In the opinion of most German lower courts, the term "full and sequential use of flight coupons" is in breach of the principle of transparency.[47] In addition, the unclear wording results in an illegal usage of standard terms. However, such reasoning stands on thin ice as airlines could reformulate their terms and conditions to remove the unclear wording.

In almost all cases, German lower courts have ordered the payment of damages to consumers.[48] The courts have also dismissed the possibility that airlines could charge extra fees for taking only one leg of the flight, referring to Article 23 of EU Regulation 1008/2008.[49] Article 23(1) stipulates:

> Air fares and air rates available to the general public shall include the applicable conditions … The final price to be paid shall at all times be indicated and shall include the applicable air fare or air rate as well as all applicable taxes, and charges, surcharges and fees which are unavoidable and foreseeable at the time of publication …
>
> … Optional price supplements shall be communicated in a clear, transparent and unambiguous way at the start of any booking process and their acceptance by the customer shall be on an 'opt-in' basis.[50]

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[45] *Supra* note 5.

[46] *British Airways, supra* note 5.

[47] See *ibid*; JurionRS 2005, 26152, *supra* note 5; Case 2-2 O 243/07, *supra* note 5; Case 16 U 76/08), *supra* note 5.

[48] JurionRS 2005, 26152, *supra* note 5; Case 2-2 O 243/07, *supra* note 5; Case 16 U 76/08), *supra* note 5.

[49] *Regulation 1008/2008*, *supra* note 10, art 23.

[50] *Ibid*, art 23(1).

C. ABUSIVE CLAUSES

Consumer law has undergone a profound change in Europe in the recent years. The scope of consumer protection has been rapidly widening since the 1970s. This development has been triggered by the needs of the European market.[51] One of the core pieces of the EU consumer *acquis* is the Council Directive 93/13 on Unfair Terms in Consumer Contracts (or the UCTD), which was adopted to remedy the imbalance between the strong party, the seller or supplier, and the weak party, the consumer. The Directive applies to contracts concluded between the consumer and the seller,[52] wherein the consumer is defined as a natural person acting for purposes outside his trade, business, or profession.[53] As held by the CJEU, a legal person can under no circumstances be regarded as a consumer in accordance with the Directive.[54] Undoubtedly, unfair terms have an important impact in areas in which consumer contracts are not individually negotiated.[55] Because there is no legal ban on NSCs, a general unfair term is applicable and the consumer needs to rely on the decisions of the CJEU on unfair terms.[56]

NSCs breach the UCTD.[57] Article 3(1) of the Directive defines an unfair term as a term not individually negotiation that

> contrary to the requirement of good faith, … causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[58]

This definition is supplemented by Article 4(2), stating that an assessment of the unfair nature of the terms will not apply to the principal subject matter of the contract nor to the adequacy of the price and remuneration of the goods or services supplied in exchange, provided that these terms

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[51] See Paolisa Nebbia, "Unfair Contract Terms" in Christian Twigg-Flesner, ed, *The Cambridge Companion to European Union Private Law* (New York: Cambridge University Press, 2010) 216 at 216; Hans Schulte-Nölke, Christian Twigg-Flesner & Martin Ebers, eds, "EC Consumer Law Compendium: Comparative Analysis" (February 2008), online: European Commission <ec.europa.eu/consumers/archive/rights/docs/consumer_law_compendium_comparative_analysis_en_final.pdf>.

[52] *UCTD, supra* note 25, art 1(1). See also *Dirk Frederik Asbeek Brusse and Katarina de Man Garabito v Jahani BV*, C-488/11, [2013] ECLI:EU:C:2013:341.

[53] See *UCTD, supra* note 25, art 2(b).

[54] *Cape Snc v Idealservice Srl*, C-541/99, and *Idealservice MN RE Sas v OMAI Srl*, C-542/99, [2001] ECR I-9049.

[55] See generally Nebbia, *supra* note 51.

[56] See *VB Pénzügyi Lízing Zrt v Ferenc Schneider*, C-137/08, [2010] ECR I-10847; *Aziz*, *supra* note 44.

[57] See Koning, *supra* note 26 at 359-82; Hans-W Micklitz & Norbert Reich, "The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)" (2014) 51:3 CML Rev 771 at 780.

[58] *UCTD*, *supra* note 25, art 3(1).

are in plain, intelligible language.[59]

The issue of intelligible language is an important aspect of the assessment of a given clause and conveys the general transparency principle. The Preamble to the Directive provides for further directions regarding what is included in the assessment of abusive clauses:

> for the purposes of this Directive, assessment of unfair character shall not be made of terms which describe the main subject matter of the contract nor the quality/price ratio of the goods or services supplied; whereas the main subject matter of the contract and the price/quality ratio may nevertheless be taken into account in assessing the fairness of other terms; whereas it follows, *inter alia*, that in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer[.][60]

The fairness test, therefore, only applies to terms that have not been individually negotiated, particularly terms included in pre-formulated contracts where the consumer does not have the ability to influence the substance of the term.[61]

The wording of the UCTD itself stipulates that the fairness test comprises two elements: first, it must be determined whether a term causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer; and, second, whether the significant imbalance is in discordance with the requirement of good faith. All relevant facts must be assessed, as noted in Article 4(1) of the Directive.[62] The European Commission already had some concerns that the notion of unfairness expressed in a general clause would lack precision. Hence, a grey list was added as an annex to the Directive. While some EU Member States, such as Portugal, used the good faith principle alone as a general criterion, some other legal systems, such as the English one, were not familiar with the requirement, and, therefore, on top of the grey list, some guidelines were provided in Recital 16.[63] Although the UCTD stipulates the requirements of the test and includes

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[59] *Ibid*, art 4(2).

[60] *Ibid* at 30.

[61] *Ibid*, art 3(2).

[62] See *Freiburger Kommunalbauten GmbH Baugesellschaft & Co KG v Ludger Hofstetter and Ulrike Hofstetter*, C-237/02, [2004] ECR I-3403 (By national courts, the application of the Directive's requirements to actual contract terms exceeds the authority of the CJEU).

[63] Nebbia *supra* note 51 at 221; *UCTD*, *supra* note 25 at 30.

a non-exhaustive list, these requirements needed interpretation by the CJEU.[64]

In the context of standard contracts, the CJEU had the opportunity to interpret the "contrary to the requirement of good faith" in the *Aziz* case. Unfortunately, while this case can offer guidance, it is not a decisive case on NSCs. The test, based on Article 3(1) of the UCTD, requires the term to create a significant imbalance to the detriment of the consumer. The test has been enacted to protect consumers and avoid companies to abuse their power. On top of the assessment of whether an imbalance occurred, such imbalance must be contrary to the requirement of good faith. The CJEU took a somewhat English approach of the reasonable man, by asking "whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations".[65] In the same case, the CJEU defined "significant imbalance".[66]

As long as the test of "contrary to the requirement of good faith" looks at what the parties would have done, the test of "significant imbalance" is focused on national law. The court held that:

> to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable the national court to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.[67]

In *Banif Plus Bank*,[68] the CJEU held that the assessment of a contract term to determine whether it created a "significant imbalance" required a thorough examination of the entire content of the contract, particularly of all the rights and obligations set out therein.[69]

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[64] See Micklitz & Reich, *supra* note 57 at 771.

[65] *Aziz*, *supra* note 44 at para 69.

[66] See *ibid*.

[67] *Ibid* at para 68.

[68] *Banif Plus Bank Zrt v Csaba Csipai and Viktória Csipai*, C-472/11, [2013] ECLI:EU:C:2013:88.

[69] See *ibid* at para 40.

The CJEU further clarified the "significant imbalance" test in *Constructora Principado*.[70] In this judgment, the court held:

> the existence of a 'significant imbalance' does not necessarily require that the costs charged to the consumer by a contractual term have … a significant economic impact having regard to the value of the transaction in question, but can result solely from a sufficiently serious impairment of the legal situation in which that consumer … is placed by reason of the relevant national provisions[.][71]

The requirement of good faith does more than excluding certain types of conducts. Instead, as suggested, terms that create imbalance should always be treated as being contrary to good faith and, therefore, always regarded as unfair.[72]

Looking at these two tests, it seems that the assessment of the fairness of the airlines' contract is only possible by comparing the terms with general principles of contract law. Applying this view to NSCs, the basic contract binding a passenger to an air carrier requires the passenger to pay the required price and for the carrier to carry the passenger for the contracted trip. NSCs give the right to the airline company to not fulfil their part of the contract. Under such circumstances and all over Europe, general principles of contract law would require the party at fault to compensate the injured party.[73] However, in this specific case, NSCs preserve the airlines' right to refuse compensation. This creates a significant imbalance in the sense of the definition given by the CJEU. NSCs thus secure an "unduly advantageous transaction"[74] for airlines.

The so-called "core" contract terms are also excluded from the scope of the fairness test, however not entirely from the scope of the UCTD.[75] These terms are relating either to the definition of the main subject matter of the contract or the adequacy of the price. The exclusion

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[70] *Constructora Principado SA v José Ignacio Menéndez Álvarez*, C-226/12, [2014] ECLI:EU:C:2014:10.

[71] *Ibid* at para 30.

[72] See e.g. Hugh Beale, "Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts" in Jack Beatson & Daniel Friedmann, eds, *Good Faith and Fault in Contract Law* (New York: Oxford University Press, 1995) 231.

[73] See generally Junwei Fu, *Modern European and Chinese Contract Law: A Comparative Study of Party Autonomy* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2011).

[74] See e.g. Hugh Collins, "Good Faith in European Contract Law" (1994) 14:2 Oxford J Leg Stud 229 at 250.

[75] See *Caja de Ahorros y Monte de Piedad de Madrid v Asociación de Usuarios de Servicios Bancarios (Ausbanc)*, C-484/08, [2010] ECR I-4785.

only applies when the terms are drafted in plain and intelligible language, as noted in Article 4(2). The Directive skilfully avoids any infringement of the freedom of contract of the party. For instance, in insurance contracts, terms can escape the fairness test only if they clearly define or circumscribe the insured risk and if the restriction of the insurance liability is taken into account in calculating the premium. For this exception to apply, the deviations from the legitimate expectations of the consumer should be clearly stated and the price duly reduced.[76] Airlines argue that NSCs are clearly stated in the terms and conditions and that NSCs are taking into account in calculating the price of the ticket. As was explained earlier, one of the main rationales of the airlines upholding NSCs is based on the directional imbalance. Therefore, to offer cheaper round-trips than one-way tickets, the airline could argue that NSCs are calculated in the price of the ticket and, therefore, they are not unfair.

There is, nevertheless, one major problem with this argument; one of the most frequently raised issues refers to the intelligible language in consumer contracts. The conclusion, which was drawn in other contractual cases, can also apply to NSCs. Looking at a Hungarian case relating to the unfairness of a unilateral amendment of fees decided by the CJEU, without clearly setting out the method for fixing those fees, the method of amending the fees was regarded as contrary to the plain and intelligible language requirement.[77] NSCs produce a similar effect as to the method of evaluating the fee that must be paid by the passenger to use a return flight, which is not clearly determined, and only prices can be found. As held by German courts, NSCs can be considered incomprehensible to passengers.[78] Similar reasoning can be found in a Polish insurance market case. In that case, the Polish court held that the term could only be understood by insurance professionals and not standard consumers.[79] The German Court of Appeal went further and established that such clauses allow for arbitrary decision.[80]

The last exemption from the fairness test is that the contract term reflects mandatory statutory or regulatory provisions or provisions of a convention, noted in Article 1(2) of the UCTD. This exception is based on the assumption that conventions do not impose unfair terms on consumers under Recital 13.[81] The phrase "mandatory statutory or regulatory provisions" also covers rules that, according to the law, apply between the contracting parties as default rules. Since IATA is not an intergovernmental organisation, it cannot adopt any convention. Although NSCs are embodied

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[76] See e.g. Mário Tenreiro & Jens Karsten, "Unfair Terms in Consumer Contracts: Uncertainties, Contradictions and Novelties of a Directive" in Hans Schulte-Nölke & Reiner Schulze, eds, *Europäische Rechtsangleichung und nationale Privatrechte* (Baden-Baden: Nomos, 1999) 223.

[77] See *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt*, C-472/10, [2012] ECLI:EU:C:2012:242.

[78] *British Airways*, *supra* note 5.

[79] See Court of Appeal, 13 May 2009, VI ACa 1365/08 (Poland).

[80] See *British Airways*, *supra* note 5.

[81] *UCTD, supra* note 25 at 30.

in IATA Recommended Practice 1724, this is neither a convention nor a mandatory statutory or regulatory provision and, therefore, the exception is not applicable to NSCs.

Another justification, advocated by the airlines to fit NSCs within the civil law approach to penalty clauses, exists: the passenger's obligation is to fully use the ticket. Of course, airline companies do not incur many expenses if the passenger does not use one part of their ticket, as the seat has already been paid. However, under this perspective, the defaulting party is the passenger, who is, therefore, not entitled to compensation as, otherwise, he would gain from his own fault, which is against the general principles of contract law. Under this approach, NSCs are penalising passengers who refuse to perform their obligations, encouraging performance and deterring breach of a contract.

A clause fixing the price cannot be considered as unfair just because the price is too high. However, when such clause creates an imbalance, this cannot be excluded as unfair. NSCs fall into this category as their application creates an advantage on the part of airlines without any obligation on their part to return the price of the ticket. Only airport charges can be reimbursed. While the passenger is left with no return ticket and with the obligation to buy the ticket at the highest rate, assuming one is available, airlines have the possibility to resell the ticket, receiving a two-time financial benefit for the same seat. This possibility allows airlines to enrich themselves while stepping on the right of compensation or at least reimbursement of the return ticket of the passengers. In fact, the contract requires the passenger to pay the necessary price in exchange for the company's agreement to carry the passenger for a contracted trip. Therefore, if the airline does not carry the passenger, the passenger should be reimbursed or at least compensated.

The UCTD includes in the Annex a non-exhaustive list of presumptively unfair terms, which supplements the test of fairness, some of which can be applied to NSCs. Even though the elements in this list are just examples, which need to be assessed through the fairness test, they might have some persuasive effect on the CJEU.[82] The categories that are showing similar feature to NSCs are:

> (b) inappropriately excluding or limiting the legal rights of the consumer *vis-à-vis* the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations, including the option of offsetting a debt owed to the seller or supplier against any claim which the consumer may have against him;[83]

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[82] See *Commission v Sweden*, C-478/99, [2002] ECR I-4147.

[83] *UCTD, supra* note 25 at 33.

And:

> (d) permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract[.][84]

Let us consider the applicability of clause 1(d) of the Annex to the clauses of both British Airways and Swiss International Air Lines. According to the NSCs of these two airlines, when the passenger decides not to appear for boarding, the contract permits both air carriers to retain the price of the seat. Furthermore, if the passenger does not board, the rest of the trip is cancelled, and the companies do not have any obligation to provide any compensation. By its very nature, the clauses of the two airlines are unfair and fall within the meaning of clause 1(d) of the Annex as the companies retain sums paid without providing compensation to the consumer.

A discussion of clause 1(e) of the Annex may be relevant here, the application of which depends on the terms of the airline company. Clause 1(e) reads as follows "requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation".[85] In the case of British Airways or Swiss International Air Lines, the passenger is required to buy a new ticket, whereas, in the case of Air France/KLM or Lufthansa, penalties might be imposed. In the first case, the new ticket that the passenger will need to purchase might be double or triple the price, or the price difference is relatively small. However, the sum paid for the new ticket is not a compensation of any kind. To view the new ticket as a compensation is wrong. When purchasing the new ticket, passengers enter into a brand new contract, which creates new rights and obligations. The only situation in which the payment of a ticket could be regarded as a compensation is if the passenger was compelled to pay a fine, but could still use his initial ticket. Missing the first leg of the journey and having to buy a new ticket might be burdensome and expensive, but it cannot be considered a compensation.

The only clause in the general terms and conditions of carriage, which might fall under clause 1(e) of the Annex, is Article 3.4(b) of Air France/KLM that provides:

> Any non-compliant use by the Passenger (for example, if he or she does not use the first

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[84] *Ibid*.

[85] *Ibid*.

> Coupon or if the Coupons are not used in the order in which they were issued) noticed on the day of travel will result in the payment of [an] extra fixed-rate fee at the airport: €125 on short-haul flights (metropolitan France and Corsica), €250 for an Economy medium-haul flight, €500 for a Business medium-haul flight, €500 for an Economy or Premium Economy long-haul flight, €1,500 for a Business long-haul flight and €3,000 for a La Première long-haul flight (or the equivalent in the local currency).[86]

The clauses in Lufthansa's terms are even harsher and read:

> 5.6. Please be advised that if you do not show up for any flight without advising us in advance, we may cancel your return or onward reservation.
>
> 5.7. A service charge may be payable by a passenger who:
>
> 5.7.1. fails to arrive at Carrier's check-in-location at the airport or other point of departure by the time fixed by Carrier (or if no time fixed, sufficiently in advance of flight departure to permit completion of government formalities and departure procedures) and therefore, does not use space for which a reservation has been made for him, or
>
> 5.7.2. appear improperly documented and, therefore, not ready to travel, and as a consequence thereof does not use space for which a reservation has been made for him, or
>
> 5.7.3. cancels his reservation later than the time limit for cancellation prescribed by Carrier. The service charge shall not be payable if, due to a flight delay or cancellation, or omission of a scheduled stop, or failure to provide space, the passenger cancels his reservation or, for one of the aforementioned reasons, fails to arrive in time for departure.[87]

Lufthansa's clauses use the term "may", which is not an obligation, but rather an option for the airline to exercise at their sole discretion. It can be observed, under Article 5.7 of Lufthansa's terms, the passenger is faced with a penalty for missing the first leg of his journey. Therefore, some, not all, NSCs clearly fall under clause 1(e) of the Annex to the UCTD. Putting them all in the same package would tantamount to disregarding the variety of terms that exist.

As a general rule, clause 1(o) cannot be invoked, since this applies in the instance when the consumer is obliged "to fulfil all his obligations where the seller or supplier does not perform

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[86] Air France, "Legal Notices General Conditions of Carriage", art 3.4(b), online: Air France <www.airfrance.com/TR/en/common/transverse/footer/edito_cgt1_airfrance.htm>.

[87] Lufthansa, "Terms & Conditions - General Conditions of Carriage (Passenger and Baggage)", arts 5.6, 5.7, online: Lufthansa <www.lufthansa.com/online/portal/lh/cmn/ generalinfo?nodeid=2695465&l=en>.

his".[88] Indeed, NSCs are triggered by the non-performance of the passenger. As soon as the passenger performs his part of the contract, the airline company performs its part. Clause 1(o) refers to situations in which, for instance, a person paid for a service, but the service was not provided. If we see that the only contractual obligation of the passenger is to pay for the ticket, then clause 1(o) applies to NSCs since the airline has not performed its own obligations and the consumer has already complied with performance.

Clause 3.3.6 in Brussels Airlines' terms is the only NSC that appears to be fair. If the passenger enters into a contract with Brussels Airlines in advance, i.e. before the flight has taken off, the reservation will not be cancelled, and the passenger will be able to buy a new outbound ticket.[89] This clause is based on courtesy. In fact, when you are invited for dinner, and you realise you are running late due to traffic jam, you let the person know. Here, the airline company requires a bit of the same.

The EU had the chance to ban NSCs through a piece of legislation. If the proposal had gone through, the Union would have sent a strong signal to airline companies and European courts that NSCs are unfair terms. According to Article 6(1) of the UCTD, once a term is determined as unfair, it does not have legal effect and is, therefore, not binding on the consumer.[90]

In addressing the issue of and potential illegality surrounding NSCs, a route that has never been explored is to rely on Article 4(3) of Regulation 261/2004, which states:

> If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Articles 8 and 9.[91]

Nothing in this provision limits the right of the passengers with regard to some clauses in the contract of carriage. Moreover, under Article 8 of the same regulation, the airline is required to (a) reimburse within seven days the full cost of the ticket for the part of the journey not made and for the parts already made if the flight does no longer service the passenger's original travel plan, and (b) reroute to their final destination at a later date. This is especially true when one knows that,

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[88] *UCTD, supra* note 25 at 33.

[89] See Brussels, "General", *supra* note 17, cl 3.3.6.

[90] *UCTD*, *supra* note 25, art 6(1).

[91] *Regulation 261/2004*, *supra* note 6, art 4(3).

under the initial version of Article 4, this provision applied to return flights even when the passenger had not used the outbound part of a round-trip ticket and did not pay the required supplement. A new proposal to amend Regulation 261/2004 has been made. According to this proposal, there would be a new Article 4(4), among other new paragraphs, that would read as follows:

> 4. Passengers shall not be denied boarding at the return journey, including one which consists of multiple flights, on the grounds that he/she did not take the outward journey of a return ticket or did not pay an additional charge for this purpose. If boarding is denied to passengers against their will on such grounds, paragraphs 1 and 2 shall apply. In addition, the operating air carrier shall immediately compensate the passengers concerned in accordance with Article 7 and shall assist them in accordance with Articles 8 and 9.
>
> The first subparagraph of this paragraph shall not apply where the ticket includes multiple coupon flights and passengers are denied boarding on the grounds that carriage per journey is not used on all individual flights or not used in the agreed sequence as indicated in the ticket. [Am. 59][92]

Thus, as we can see, European legislators tried to get around the problem through the use of the provision concerning the illegal denial of boarding.

III. THE US-EU OPEN SKIES AGREEMENT ARGUMENT

The US-EU OSA is an agreement to liberalise the market between the Union and the US (among other aviation markets). The OSA includes a provision of freedom of pricing by the airlines without government intervention. Allowing the EU to ban NSCs would be a breach of Article 13(1), which reads as follows:

> Prices for air transportation services operated pursuant to this Agreement shall be established freely and shall not be subject to approval, nor may they be required to be filed.[93]

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[92] EC, *Position of the European Parliament adopted at first reading on 5 February 2014 with a view to the adoption of Regulation (EU) No …/2014 of the European Parliament and of the Council amending Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and Council Regulation (EC) No 2027/97 on air carrier liability in respect of the carriage of passengers and their baggage by air,* [2017] OJ, C 93/336.

[93] *Air Transport Agreement*, 25 and 30 April 2007, [2007] OJ, L 134/4, art 13(1) [*US-EU OSA*].

The definition of price is to be found in Article 1(7) and includes "conditions governing the availability of such fare, rate or charge".[94] NSCs, according to the airline companies, are a crucial aspect of conditions governing fares.[95]

International agreements concluded by the EU have primacy over Union legislation, as per Article 216(2) of the Treaty on the Functioning of the EU.[96] Furthermore, European law must be interpreted in a manner that is consistent with the agreements, as established by the CJEU in *Commission v Germany*.[97] For an international agreement to provide a basis for challenging EU secondary law, the agreement must confer specific rights to individuals.[98] Therefore, if these individuals are able to challenge the secondary law's validity in court under the international agreement, then the agreement prevails.

The problem with this argument is that it would prevent the Union to prohibit NSCs in relation to flights from and to the US, European airlines flying to and within the US, and US companies flying to and within Europe. Intra-EU flights will not be covered by this agreement unless the airline is a US-based carrier. Therefore, the OSA argument is not a viable one with regard to intra-EU flights.

The "shall not be subject to approval" means regulator's approval, but does not mean that the price is not subject to any laws. It would be very surprising if the drafters would have intended to exclude all possibility to apply consumer protection law to air contracts. Certainly, when reading Article 16 of the OSA, it reaffirms the importance of protecting consumers.[99]

Regulation 1008/2008 has a similar provision to Article 13(1) of the OSA. Article 22(1) of Regulation 1008/2008 stipulates that:

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[94] *Ibid,* art 1(7).

[95] Bischoff, Maertens & Grimme, *supra* note 5.

[96] *Consolidated version of the Treaty on the Functioning of the European Union*, 25 March 1957, [2012] OJ, C 326/47, art 216(2).

[97] C-61/94, [1996] ECR I-3989.

[98] See *Air Transport Association of America et al v Secretary of State for Energy and Climate Change*, C-366/10, [2011] ECR I-13755.

[99] *US-EU OSA*, *supra* note 93, art 16.

> Without prejudice to Article 16(1), Community air carriers and, on the basis of reciprocity, air carriers of third countries shall freely set air fares and air rates for intra-Community air services.[100]

The wording of the Regulation varies slightly from the OSA. In fact, the CJEU held that the carrier could set the air fares freely and precludes national law to interfere with this right.[101] In this regard, it would mean that a ban on NSCs would be contrary to this provision. Article 16(1) of Regulation 1008/2008 provides for a derogation to the EU Member States to impose a public service obligation with respect to a certain route or region to develop that region. Thus, the Regulation provides, "[t]he fixed standards imposed on the route subject to that public service obligation shall be set in a transparent and non-discriminatory way".[102]

Nothing in this provision supports an argument against NSCs. The right of the airline companies to fix prices seems even more far-reaching when read in conjunction with Article 23 of Regulation 1008/2008,[103] which only requires that the conditions be published somewhere.[104] The airlines can easily argue that NSCs are published on the Internet. However, reading Regulation 1008/2008 alone would not give the entire picture. The Regulation needs to be read in conjunction with the provisions of the UCTD. Consequently, the airline companies can set the prices as long as none of the terms of the contract happen to be unfair for the passengers.

IV. CONCLUSION

NSCs are unfair terms in the meaning of the UCTD. NSCs are consumer-unfriendly terms. Their use for round-trip tickets can hardly be justified. However, for multi-leg journeys, some justifications can be found. Judges in various EU Member States have reached the same conclusion, namely that NSCs represent unfair terms. Comparing major airline pricing policies with low-cost carriers offers some help, but it does have its limits. The full-service carriers have two choices when competing with low-cost carriers: one is to cut their costs, or second, penalising passengers, through the use of NSCs. For instance, a full-service carrier departing from a secondary airport, even when saving money, would probably not have much clientele. Passengers have some

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[100] *Regulation 1008/2008, supra* note 10, art 22(1).

[101] *Vueling Airlines SA v Instituto Galego de Consumo de la Xunta de Galicia*, C-487/12, [2014] ECLI:EU:C:2014:2232.

[102] *Regulation 1008/2008, supra* note 10, art 16(1).

[103] See *ibid*, art 23.

[104] See *ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV*, C-112/11, [2012] ECLI:EU:C: 2012:487.

expectations when it comes to full-service carriers, such as onboard services and more staff on the plane than is required by the law.[105] Consequently, some of the techniques that constitute the pricing policy of low-cost carriers can never be applied to full-service carriers.

NSCs are not the only price discrimination practice created by airline companies. Other discrimination practices include advanced booking, minimum stay rules, etc.[106] Therefore, stating that NSCs are commercially essential is not entirely accurate. The same holds true for the reduction of prices on one-way tickets for which airlines may have to withdraw from some markets, as serving such markets would be too expensive. It seems logical that, as long as there is demand, the airline companies will continue to operate those routes. However, since it is very difficult to calculate the cost of a specific flight, it might be that the profit of the companies on those specific routes is close to zero. If serving certain markets become too expensive, airlines should (and have) cut costs rather than unfairly penalising passengers.[107]

By selling round-trip tickets rather than one-way tickets, the airline companies force the passenger to buy tickets with the same company. Therefore, they make sure that their profit is always maximised. NSCs reinforce this practice by prohibiting the passengers from using round-trip tickets and only use the high-valued leg. However, with online aggregator services, such as Skyscanner or eDreams, it is now possible to buy an inbound ticket with one airline and the return with another airline company. For instance, going from Brussels to Brasilia with British Airways, and returning back with Avianca and Iberia. With this new form of ticketing, the competition has increased among companies. Therefore, rather than reducing competition, eliminating NSCs might increase competition within the European airline market by requiring airlines to compete for business on every leg of a passenger's trip.

Even though NSCs are part of the IATA Recommended Practice, such practice is non-binding. Nonetheless, that practice is now part of each and every contract of carriage. However, for a contract to be valid, it needs to comply with national law. Due to its non-binding nature, the recommendation of IATA needs to comply with national laws and not the contrary. As exemplified by a number of cases, NSCs are unfair towards the consumers under both the EU law and national laws of the EU Member States. Airline companies have never succeeded to justify the use of such clauses.

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[105] See Mark Smyth & Brian Pearce, *Airline Cost Performance: An Analysis of the Cost Base of Leading Network Airlines versus No-Frills, Low-Cost Airlines (LCCs)*, IATA Economics Briefing No 5 (July 2006) at 25.

[106] Bischoff, Maertens & Grimme, *supra* note 5 at 5.

[107] See generally Karsten Fröhlich & Hans-Martin Niemeier, "Competition among European Airlines – on the Role of Product Differentiation" in Peter Forsyth et al, eds, *Liberalization in Aviation: Competition, Cooperation and Public Policy* (Burlington, Vt: Ashgate, 2012) 63