

The Legal Rights of the Consumer in Cases of Air Travel Disruption

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Abstract: The Warsaw and the Montreal Conventions governing international air transport do not explicitly address particular areas of the relationship between the passenger and air carrier which have recently attracted attention of the authorities towards increasing regulatory activity. The most important areas of the increased regulatory activity are the assistance to passengers in cases of air travel disruption including denied boarding, long delay and cancellation of flights. At present, many states and groups of states have enacted legislations to address these issues and protect consumers in air transport sector; either through the enactment of specific legislation such as EC Regulation 261/2004 of the European Parliament and of the Council, the adoption of government administrative rules such as “Enhancing Airline Passenger Protections: Final Rule” which was issued by the US Department of Transportation (DOT). This study attempts to provide an overview of consumers’ rights according to these legislations which led to significant benefits for consumers in air transport sector and grant them rights much wider than the limited rights granted by the Warsaw and the Montreal Conventions. These legislations have led to improvement of the rendered services, increase the consumer options and improve the relationship between air transport industry and passengers. This should encourage other countries to adopt a similar legislation on consumer protection in air transport specifically or by including consumers in air transport in general legislation.

Key words: Consumer protection, Warsaw convention, montreal convention, denied boarding, delay, cancellation

INTRODUCTION

The international air transport has always been subject to a highly specialized regulatory regime of international law, laid down by the Warsaw and the Montreal Conventions of 1929 and 1999, respectively (Prassl, 2015). These conventions contain quite elaborate liability rules of air carrier, provisions regarding travel documents, jurisdiction and limitation periods (Koning, 2013). However, these conventions do not regulate certain aspects of the legal relationship between the passenger and air carrier such as the rights of passengers in cases of air travel disruption namely, denied boarding, long delay and cancellation of flights. As a result, there is an increasing demand on the part of the passengers as consumers for the relevant authorities to regulate these issues. Besides, competition between airlines does not necessarily guarantee a fair level or quality of service that a consumer would normally expect, especially in the light of absence of the information required for the consumer to make informed choices. Over the past decades, air travel has become more frustrating especially when

consumers’ experiences are not meeting expectations. This fact has been acknowledged by the ICAO claiming that there is a clear decline in the quality of services in the air transport sector. Consequently, many countries such as the European Union and the United States of America have realized the necessity to protect consumers effectively in air transport sector. Thus, they have enacted specific legislation to address this issue and to regulate issues that have not been addressed by the international conventions such as immediate compensation for flight delays without bring a lawsuit in court, overbooking and cancellations of flights.

The objective of this study is to discuss the concept of denied boarding of consumers, delay and cancellation of flights under the existing international conventions. It also examines the available remedies to consumers in air transport sector in cases of travel disruption under legislations of the European Union and the United States of America and the differences between them in addressing these issues. For this purpose, the study was prepared with reference to comparative and systematic analysis by applying a document analysis method.

Delay and cancellation: The Warsaw and the Montreal Conventions explicitly addresses delay in the carriage of passenger by air. Article 19 of both Conventions states that the carrier is liable for damage caused by delay in the carriage by air of passengers, baggage or cargo. While the meaning of delay is not mentioned in any of these conventions, the definition can be perceived as untimely arrival at destination (Dempsey and Johansson, 2010).

The delay occurs when the air carrier exceeds the specific time for flight departure (Ali, 2009). It constitutes substantially more than the time that would usually be necessary for a similar transport. This is likely to be in accordance with court cases where delay has been interpreted to mean “abnormal delay” (Dempsey and Johansson, 2010). For example, in *Jahanger v. Purolator Sky Courier* the court held that “‘delay’ should be construed as meaning ‘abnormal delay’, i.e., a delay resulting from the carrier’s failure to take all appropriate measures to ensure departure and arrival of the aircraft at the times specifically specified or indicated in [the] timetable.” (*Jahanger v. Purolator Sky Courier*, 615 F. Supp. 29 (E.D. Pa. 1985).

Likewise, the term cancellation is also not explicitly mentioned by both the Warsaw and the Montreal Conventions. However, the EU legislation has defined cancellation to mean “the non-operation of a flight which was previously planned and on which at least one place was reserved” (Article 2 (1) of EU Regulation (EC) No. 261/2004). In view of consumers rights, it is necessary to distinguish between the terms cancellation and delay of flights as the airlines tend to keep passengers on long waiting in an attempt to avoid the cancellation and paying compensation for passengers because of the cancellation of flights (Dam, 2011). This raises another issue that sometimes a long delay could become a cancellation but how do we know when delay is considered as cancellation? Do passengers need a new flight number or a new boarding pass? Do passengers have to get their luggage back? These were among questions asked to the Court of Justice of the European Union (CJEU), in *Sturgeon v Condor* (C-402/07 and C-432/07).

In this case, the CJEU held that a delay, despite its length cannot be considered a cancellation where a departure takes place in accordance with “the original planning i.e. its original itinerary, number, crew, etc.” A flight can only be considered “cancelled” if the airline puts passengers on another flight that is different from the one they had their bookings on. Thus, the Court kept a clear difference between delay and cancellation (Dempsey and Johansson, 2010; Dam, 2011; Prager, 2011). As for reasons of delay and cancellation, Nikomborirak found that increasingly crowded airports have

contributed to frequency of flight delays and cancellation. This is due to the fact that air passengers have encountered more regular and broad travel delays compared to previous time because the carriers today confront a different collection of difficulties, including complex security measures, expanding working expenses, heightened market rivalry and unpredictable weather. Furthermore, airlines are also subject to the pressure to increase incomes. It must be noted that the larger part of the delay is however outside the carriers’ control. For instance, the weather alone contributes to 50% of all delays and in certain cases, extreme weather may prevent operations of all flights (Schoonover, 2011). Maintenance on the part of the airlines also becoming one of the main reasons of delays such as an absence of available replacement airplane at airport terminal that urges flights to wait for mechanics and parts to be flown from maintenance centers (Ali, 2009).

Delays are inconvenient for passengers. Delays may cause corporeal damage for travellers such as a cancelled business meeting or a lost job interview or a lost cost of hotel reservation in the country of destination (Ajil, 2014). Delays may also cause incorporeal damage such as hardship resulting from long holding at the airport for delayed flights especially when passengers are accompanying children or the elderly. In addition to the significant financial losses for passengers, lengthy tarmac delays require passengers to remain uncomfortably seated for a long time, posing health dangers (Schoonover, 2011).

CONSUMER PROTECTION AGAINST DELAYS AND CANCELLATION

The International Civil Aviation Organization (ICAO) introduced the Standards And Recommended Practices (SARPs) to protect passengers by air from delays or cancellation in line with the provision of Annex 9 of Chicago Convention which clearly stated that “facilitation” is “to prevent unnecessary delays to aircraft, passengers and cargo...” Guidance materials directed to educate air passengers about their rights and obligations were also published in order to help States in publishing booklets relating to these guidelines. Regulation (EC) No.261/2004 on establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights was issued by the European Commission and repealing Regulation (EC) No 295/91 on establishing common rules for a denied-boarding compensation system in scheduled air transport which came into effect on 17 February 2005. This regulation provides some benefits to passengers in cases of delay depending on

hours of delay (Article 6 of the EU Regulation (EC), No. 261/2004). For example, the air carrier must provide meals and telecommunication if departures is delayed by 2 h for a journey which is less than 1,500 km, three hours for all other intra-EU flights and extra EU flights which their distance up to 3,500 km or 4 h for all different flights. Hotel accommodation must be given if departures will be on the next day (Article 9(1)(a)(b)-9(2) of the EU Regulation(EC), No. 261/2004). In the event that the delay is to surpass five hours, passengers are permitted the right to refund their ticket value including any parts of the journey that no longer serving any purpose in relation to the passenger's original travel plan (Article 8(a) of the EU Regulation (EC), No. 261/2004).

Moreover, after the decision of the ECJ in *Sturgeon v Condor* (C-402/07), passengers are entitled to compensation for the delay. In this lawsuit, the court compared the position of the passengers whose flights were delayed with the ones whose were cancelled. The court then deemed that both categories of travellers endure the same harm, specifically loss of time as both need further time to arrive at their destination than was estimated by the air carrier. Thus, travellers whose flights are delayed may depend on Article 7 to get compensation when they suffer a loss of time equivalent to or over three hours (Prager, 2011). In contrast, the US does not oblige airlines to pay compensation for passengers whose flights are cancelled or delayed. The airlines instead offer other options to travellers such as providing meals, return the value of ticket or provide hotel accommodations in their tariffs (Dempsey and Johansson, 2010). In this regard, the US focuses on guaranteeing the availability of pertinent information to clients instead of imposing the minimum level of treatment of travellers that all carriers must present. Airlines are allowed to create their own arrangements in connection with assistance so long as the data are made accessible to travellers. The availability of the information can assist the travellers in making their decisions in selecting the carriers with which they want to travel.

All of the issues mentioned above have been superseded through a number of legislations issued in the US For instance, in 2007, New York legislated "New York's Passenger Bill of Rights" which obliges carriers to supply their passengers with the necessities (e.g., sufficient food, drinking water and clean lavatories) when the passengers are on board and delayed for over three hours before departure. However, the statute does not protect the passengers where the delay occurs at the airport terminal before boarding and also does not allow the passengers to deplane in case of delay after the boarding.

In 2009, at the federal level, the US Department of Transportation (DOT) issued new rules namely "Enhancing Airline Passenger Protections No. 249 of 2009" to address the effects of long tarmac delays. Under these rules, every air carrier is obliged to create and execute a contingency plan for extended tarmac delays. Carriers' arrangements must ensure that sufficient food and water are given within two hours after the airplane leaves the gate. It also emphasizes the need to provide operable latrine facilities and sufficient medical care (Tang, 2013). Most important, the arrangement must involve an assurance that the airline won't allow an airplane to stay on the tarmac for over three hours without giving passengers a chance to disembark (Tang, 2013). In 2011, the US DOT promulgated a new set of rules called "Enhancing Airline Passenger Protections: Final Rule No. 79 April 25, 2011" to assure the rights of travellers by air in cases of flight delays and cancellations for international flights operated by foreign air carriers at the US airports. These rules have led to significant improvements in the air transport sector where cancellations have decreased from 2.16% in 2007 to 0.9% in 2012. In the same period, on-time arrivals have increased from 73.4-83.4%. While these rules do not address all the effects of delay because they are limited to delay that occurs on the tarmac, they at least ensure the provision of essential services for the passengers which are not provided by international conventions relating to air transport. The rules encourage airlines to apply the policies that lead to reducing delay and cancellation of flights.

Overbooking and denied boarding: Generally any person who wants to travel by air signs a contract with one of the carriers. According to this contract, the person reserves a seat on one of its flights, thus reservation means "the fact that the passenger has a ticket or other proof which indicates that the reservation has been accepted and registered by the air carrier or tour operator" (Article 1(g) of the EU Regulation (EC), No.261/2004). The nature of air transport allows the air carriers to exercise overbooking, whereby airlines sell tickets more than the available number of seats on the flight (Dempsey and Johansson, 2010). Overbooking is a distinctive issue that has great importance to the public and also to the air transport industry and one which has got considerable interest in the press (Rothstein, 1985). The overbooking issue emerges from the fact that clients either cancel their tickets or frequently fail to reach at the flight time. Therefore, air carriers tend to overbook in preparation for such cancellations to avoid flying with unoccupied seats (Gosavii *et al.*, 2002). Due to the fact that a seat in a plane is a perishable product and its benefit disappears when the gate closes for a flight, nothing can possibly

compensate for losses caused by unoccupied seats. An air carrier that does not exercise overbooking will lose great income because its flights will normally fly with numerous seats unoccupied. Therefore, air carriers practice overbooking to increase their profits (Chatwin, 1999).

However, the overbooking has its drawback in that the airlines would be in danger of not having sufficient seat for all the ticket-holders. When such a case emerges, the airlines are compelled to deny boarding demand to the additional ticket-holders and pay a penalty in the form of monetary compensation to the travellers who are denied boarding as well as the loss of customers' confidence (Gosavi *et al.*, 2002; Chatwin, 1999). If this practice is allowed without proper restrictions, it would adversely affect the interests of consumers and lead to disorder and instability of commercial transactions. Therefore, the legislations that allow overbooking policy have determined restrictions on its procedures (Kandari, 2001). The reason for regulating compensation and procedures of denied-boarding is based on "asymmetric information" which means that one party in a transaction has more or superior information compared to another (Patti, 2009). Most travellers do not realize the trade-off between the cost of the ticket and the possibility of being denied boarding. Given the information asymmetry, air carriers would have a tendency to misapply the overbooking policy if there is no penalty for doing so.

CONSUMER PROTECTION AGAINST DENIED BOARDING

Both the Warsaw and the Montreal Convention do not explicitly mention the term "denied boarding". However, there are recommendations from international organizations such as the International Civil Aviation Organization (ICAO) which have created guidance material on consumer interests in regard to denied boarding. The Latin American Civil Aviation Commission (LACAC) issued Recommendation A16-8 (Rights of the Users), encouraging its members to issue a set of rules protecting passengers against denied boarding. International Air Transport Association (IATA) recommended a practice which provides that a traveller has the right to be compensated and reimbursed of the unutilized part of the ticket in the case of denied boarding. However, this practice has non-binding effect. As a result, airlines have the ability to make their own overbooking and denied boarding strategies and remuneration rules, unless these are managed by the national administrative authority.

In the US, the DOT forces a compulsory auction method at the national legislative level so that passengers can give up their seats on an overbooked flight and set a ceiling for denied boarding reparations for domestic flights. A DOT rule obliges airlines to suitably notify and compensate travellers who are denied boarding. In 2011, DOT promulgated a final rule namely "Enhancing Airline Passenger Protections; Final Rule No. 79 April 25, 2011" to address issues concerning denied boarding, particularly inappropriate denied boarding compensation for travellers. According to this rules, the air carrier must pay to the passenger compensation up to USD 1,300 when the passenger is denied boarding due to oversold flights, depending on the delay of arrival at final destination (Part 250.5 of the Enhancing Airline Passenger Protections; Final Rule).

The EU Regulation 261/2004 also provides remedies for the problem of denied boarding. It obliges air carriers to call for volunteers before applying denied boarding. A volunteer is defined as "a person who has presented himself for boarding under the conditions laid down in Article 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits" (Article 2(k) of the EU Regulation (EC), No. 261/2004). Compensation for volunteers is to be determined by agreement between the volunteer and the air carrier (Article 4(1) of the EU Regulation (EC), No.261/2004). When the volunteer numbers are insufficient, the airline must choose passengers who are denied boarding. In this situation, the travellers are being able to request compensation as laid down in Article 7 and the right to refund and benefits as stipulated in Article 8 and 9 of this regulation (Article 4(2)(3) of the EU Regulation (EC), No.261/2004).

CONCLUSION

It is clear that the legislations enacted in EU and US have made a significant impact on consumer protection in the air transport sector. They have led to significant benefits for consumers in this sector and granted them rights much wider than the limited rights granted by the Warsaw and the Montreal Conventions. The trend of these countries toward enhancing consumer protection in air transport has led to improvement of the rendered services, increase the consumer options and improve the relationship between air transport industry and passengers. This should encourage other countries to adopt a similar legislation on consumer protection in air transport specifically or by including consumers in air transport in general legislation. Moreover, air transport companies should regularly review their policies,

procedures and practices to ensure that they are meeting the need of consumer in other countries which do not enact specific legislation to protect rights of consumers in air transport sector.

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