



Legal Committee – Topic 1

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BACKGROUND PAPER ON PASSENGER PROTECTION IN INTERNATIONAL AIR TRANSPORT

I. Introduction

Passenger protection is a subject of private international air law which emerged in the 21st century. Passenger protection under this branch of law was confined to the provisions made under the Warsaw Convention of 1929 on the *Unification of Certain Rules for the International Transport by Air*. It focussed on the compensation of personal damages suffered by passengers during international journeys, and compensation of damage caused by delay. The successor convention of the Warsaw Convention, the Montreal Convention of 1999,¹ did not expand this scope.

However, in the course of the 1990s consumer protection received a higher place on the agenda of the international policymakers in the US and the EU to begin with, whereas the number of passenger complaints was increasing. These complaints not only pertained to damages caused by personal injuries or delay but also to denied boarding of passengers and cancellation of flights. The last mentioned events, that is, denied boarding and cancellation of flights, do not fall under the international carriage by air as defined by the mentioned Warsaw and Montreal Conventions, but are subject to domestic civil law.; this is at least the governing opinion based on regulatory regimes.

In order to enhance the position of the passenger and articulate their position in relation to airlines by providing clear and transparent remedies, the jurisdictions in all parts of the world, led by the initiatives of the EU in this respect, have drawn up measures in regulations pertaining to denied boarding, cancellation and delay. The content of such regulations must be accessible to passengers by publication on websites of airlines, in airports and, of course, in legal acts.

II. Context

EU Regulation 261/2004 has been subject to criticism by the airline industry since its adoption on 11 February 2004. Critiques have been related to, among others, the unclear terminology and provisions, the inconsistent use of terms and the excessive financial burden imposed on air carriers.

¹ Convention for the Unification of Certain Rules for International Carriage by Air, henceforth also referred to as: the Montreal Convention (1999) to which the EC acceded on 29 April 2004 to the Montreal Convention (1999) and which entered into force for the EC on 28 June 2004.

The International Air Transport Association (IATA) and the European Low Fares Airline Association (ELFAA) challenged the validity of Articles 5 to 7 of the DBC Regulation (2004) on a number of grounds, for instance, inconsistency of its Article 6 with provisions of the Montreal Convention on air carrier liability of 1999, failure to respect the principles of legal certainty, proportionality and discrimination, in proceedings brought before the High Court of Justice of England and Wales, Queen's Bench Division, against the Department for Transport, relating to the implementation of that Regulation.² Upon reference of seven questions by the UK High Court of Justice, the Court affirmed the validity of these provisions in its preliminary ruling.

Since its coming into being, national courts struggle with the application and implementation of the terms of Regulation 261/2004. This is evidenced by myriad cases which have been brought before such national courts and the Court of Justice of the EU. Those cases focused on the relationship between this EU regulation, and its compatibility with the Montreal Convention (1999), the dividing line between delay and cancellation; rights and obligations of passengers in cases of denied boarding, overbooking and delay; the scope of the term "extraordinary circumstances" (as to which see also below); the extent of the entitlements of passengers under Regulation 261/2004; the interpretation of the distances in this regulation and justifications (or not) for denial of boarding.

The relevant terms of Regulation 261/2004 are the following:

Article 5 prescribes that airlines shall offer assistance (meals, refreshments, hotel accommodation, transfer and messaging), the choice between re-routing and reimbursement, and shall compensate passengers whose flights were cancelled. Under Article 5(3) compensation shall not be paid if the cancellation is caused by „extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”

Article 6 obliges air carriers to provide, before the departure of the flight, assistance to passengers in the event of long delays, and reimbursement and a return flight to the place of departure if the delay exceeds 5 hours.

Article 7 sets the amounts of compensation to be paid for passengers whose flights are cancelled.

Regulation 261/2004 also provides for a right of care, that is, meals, drinks and accommodation if needed, for passengers,³ and refers passengers to opportunities for further compensation which may take into account the compensation received under Regulation 261/2004.⁴ Air carriers are not entitled to limit their obligations in relation to passengers.⁵

Meanwhile, other jurisdictions have more or less copied the European regulation.

Meanwhile, China has adopted a different, and broader approach designed to share the responsibilities and liabilities for delay and cancellation of flights among the various stakeholders, including airlines, Air Traffic Control Agencies, airport operators, providers of ground services and other parties. Each of them must explain why, for instance, a delay has arisen, and report the causes to the Civil Aviation Administration of China (CAAC) who can impose fines if there is a reason to do so.

² Case C-344/04, hereinafter referred to as 'IATA and ELFAA case';

³ See, Art. 9

⁴ See, Art. 12

⁵ See, Art. 15

The parties, principally airlines, must provide remedies in order to take away the inconveniences of the passengers caused by delay and cancellations. It is left to them how to arrange for remedies.

III. Questions

- A. Would you be in favour of requesting ICAO to convene a diplomatic conference in order to assess the shortcomings of the Montreal Convention on air carrier liability of 1999?
- B. If so, would you propose to amend the current convention, that is, the Montreal Convention of 1999, or
- C. Draw up a new convention encompassing more concrete measures for denied boarding and cancellation of flights?
- D. Alternatively, would you suggest that the current patchwork of domestic regulations should be studied by ICAO?
- E. If so, should ICAO be requested to give guidelines harmonising the similarities and differences between the various regulations?
- F. At a cursory glance you may observe that the approaches adopted by, for instance, the EU, on the one hand, focussing on the responsibilities and liabilities of the airlines, and China, on the other hand, involving all of the stakeholders in the value chain in terms of responsibility and liability for the compensation of damages caused by delay and cancellation is different. Taking these differences into account, would you find an amended convention, or the establishment of an entirely new convention, a realistic option?

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