



**WORKING PAPER**

**WORLDWIDE AIR TRANSPORT CONFERENCE (ATCONF)**

**SIXTH MEETING**

**Montréal, 18 to 22 March 2013**

**Agenda Item 2: Examination of key issues and related regulatory framework**

**Agenda Item 2.3: Consumer protection**

**RECOMMENDATIONS FOR A REALISTIC, PRACTICAL IMPLEMENTATION OF  
CONSUMER PROTECTION MEASURES**

(Presented by South Africa)

**EXECUTIVE SUMMARY**

This paper provides details on the progress being made in the implementation of Consumer Protection legislation and regulations in the Republic of South Africa. It also highlights practical constraints within which the aviation industry operates. Furthermore the paper highlights the disparity between the consumer protection rules between States and how this impacts airlines operations, and the necessity for a clear set of responsibilities and actions to address this problem. In addition, the paper outlines the major issues on this subject and makes recommendations on a realistic and practical implementation of consumer protection measures, which could be considered for global implementation.

**Action:** The Conference is invited to agree to the recommendations presented in paragraph 6.

**References:** ATConf/6 reference material is available at [www.icao.int/meetings/atconf6](http://www.icao.int/meetings/atconf6).

**1. INTRODUCTION**

1.1 Passengers have a right to expect excellent service from the airlines and the entire value chain, which makes up the passenger experience. Whereas the “effective agreement” for the flight experience is between the airline and the passenger, the entire value chain together with all States, industry partners and travel agents can influence the passenger experience. However, it is the airline that ultimately bears the responsibility of resolving consumer related problems, whatever they may have been. It is important to realize that all stakeholders do bear a collective responsibility of ensuring that the consumer’s rights are adequately protected.

1.2 The global airline industry is always subject to the fluctuating world economic developments and it is common cause that where there are either global or regional disruptions or negative economic trends, these are reflected in the global performance of the airline industry. Operating margins decline through a drop in passenger or cargo volumes and increasing operational costs. This

volatile trend has been prevalent since 2008 and has continued through 2012. Notwithstanding these developments, airlines, which are continuously under pressure to reduce costs and raise revenue, need to continue to strive to exceed the customer's expectation. Disruptions on operations always negatively impact passengers and require attention by airlines. The need for an effective, consistent, fair and reasonable consumer protection framework is therefore essential.

## **2. DEVELOPMENTS IN SOUTH AFRICA**

2.1 Consumer Protection has long been a principle supported by South Africa. In the absence of legislation, consumer issues were dealt with on an individual basis. Each airline had its own policy in resolving consumer complaints and providing the necessary compensation to consumers where this was required. There was some commonality between airlines but it was not a requirement per se. In addition the Air Services Licensing Councils required airlines to lodge guarantees to be used to protect consumers with unflown prepaid tickets in case of airline failure. However, such guarantees were almost always insufficient to cover the full extent of a major failure, which for example could lead to liquidation. Insurance against such failures was found not to be a viable solution.

2.2 South Africa, as part of its aviation policy review, had embarked in the process of creating a framework for the development of aviation specific consumer protection measures. However, this process was overtaken by the promulgation of generic consumer protection legislation, the Consumer Protection Act 68 of 2008. In light of this development, the consumer measures as contemplated in the Policy were not developed further and the attention of the airline industry was directed towards compliance with the Consumer Protection Act which came into effect on 1 April 2010.

2.3 The Act, which created the National Consumer Commission, is extremely broad to ensure that most entities supplying goods and services in South Africa and the transactions that they enter into (including the airlines) are covered. The Act applies to all transactions occurring within South Africa and/or where the service or part thereof is rendered in South Africa. The Act is, therefore, also applicable to foreign entities, including airlines, doing business in South Africa. The Act makes provision for industry sectors to formulate and gain accreditation for a sector specific Industry Code to be overseen and regulated either by an Industry Ombudsman or an alternatively designated official. The National Consumer Commission is currently in the process of drawing up Regulations as well as guidelines to regulate the accreditation of respective Industry Codes.

2.4 It is important to note that the airline industry has developed certain unique practices in order to provide the type of service consumers require whilst ensuring sustainability of the industry. Some of these practices appear to be in conflict with generally accepted consumer rights, for example the practice of overbooking, managing delays, and dealing with cancellation of flights by the airline or reservation by the passenger. To ensure compliance with the requirements of the Act, the Airline Community is in consultation with the National Consumer Commission, the general public and accredited consumer protection groups for the accreditation of the Airline Industry Code.

2.5 Although South Africa has followed the generic consumer legislation model with provision for an industry specific code, there are definite advantages for both airlines and consumers if aviation specific consumer legislation is promulgated considering the unique nature of the aviation business. In South Africa, there is a further overlap in the regulation of the airline industry whereby the air service licensing legislation mandates the regulator to look after the interests of users of air services. However the Consumer Protection Act now gives the National Consumer Commission jurisdiction over all airline related consumer complaints and rights infringements. The South African airline industry favours a model where the aviation regulators administer consumer rights and complaints.

### **3. ICAO SECRETARIAT'S WP/5 ON CONSUMER PROTECTION**

3.1 South Africa concurs with the views expressed in WP/5 that the perceived deterioration in quality is tied to a number of factors, including operational delays. It is important to recognize the role that all stakeholders (e.g. airlines, airports, airspace controllers, etc.) could play in impacting the customer experience. Furthermore, changes to certain air transport industry practices due to the necessity to comply with legislation can detrimentally affect the viability of the airline business. These factors need to be taken into account when formulating policies dealing with measures and the circumstances under which respective parties are assigned responsibility for compensating the affected customer.

3.2 With the emergence of low cost airlines, many operators have adopted innovative ways of marketing and selling their products, like the base fare for a core product with add-on fees for enhanced services. States should accept such innovation on the basis of full transparency of the mark up of the fare, such that a customer will know the full cost of the airline ticket prior to accepting the responsibility to pay for the ticket.

3.3 Doc 9587 (*the Policy and Guidance Material on the Regulation of International Air Transport*), Doc 9626 (*Manual on the Regulation of International Air Transport*) and Doc 9984 (*the Manual on Access to Air Transport by Persons with Disabilities*) provide the guidelines and recommendations on which States can develop consumer protection frameworks. As different regions have taken various consumer protection initiatives, it is important to ensure that the rules imposed by one jurisdiction are not in contradiction with those of another jurisdiction sharing a common flight. The general rule should be that the jurisdiction where the event impacting the consumer took place, should determine the remedy and compensation available to the consumer. However, other jurisdictional determinants should be allowed where it is either impossible and/or unfeasible for the consumer to obtain meaningful redress. The level of redress must always strike a balance between the inconvenience suffered by the consumer and the ability of the particular airline to afford such redress. In addition, in cases where it is proven that the event impacting the consumer was not in any way attributable to the airline, i.e. a *Force Majeure*, an act of a particular Government or Civil Aviation Authority or service disruption by the air traffic control and/or airport authority, the airline should not be held responsible for the compensation of the consumer. Airlines do in general comply with the guidelines and recommendations of the Doc series. States are encouraged to work with Airlines to address those areas where there are identified deficiencies. These issues should mainly be addressed in the Industry Codes under the respective legislation such as South Africa's Consumer Protection Act.

3.4 The work by the World Tourism Organization (UNWTO) in developing a draft Convention on the Protection of Tourists and Tourism Service Providers is noted and supported, and this should complement the programs and views expressed in 3.3 above.

### **4. CONSUMER ISSUES IMPACTING AVIATION IN SOUTH AFRICA**

4.1 Since the Consumer Protection Act has come into operation, it has become a priority for the airline industry to obtain approval of the Industry Code, as well as to decide whether it is necessary to put in place an Industry Ombudsman, or make use of an alternative dispute resolution mechanism to resolve consumers related disputes. The establishment of an Ombudsman will need to be funded by the airline industry itself. This brings with it added costs responsibilities which the industry can ill afford at this time.

4.2 The issues raised under ICAO WP/5 are relevant to the South African situation as they probably are to most, if not all jurisdictions. Nevertheless, the issues raised below summarize some of the core areas requiring attention in the Industry Code:

4.2.1 **Over Booking:** It is important to recognize that overbooking is an airline practice implemented specifically mainly due to the “No Show” factor and the consumers’ requirement for travel flexibility. Although the practice may result in denied boarding, it would definitely not benefit consumers if this practice was terminated. Specific scenarios and alternative means to resolve the situation of the consumer who is unfortunately impacted by the overbooking, must be detailed. Minimum compensation for consumers adversely affected must be determined.

4.2.2 **Cancellation:** Attempts must be made to timeously notify the consumer of the cancellation and consumers must be offered alternative options with the primary objective of ensuring that they are able to complete their desired travel without further disruption. Where such options are not acceptable or possible, then compensation guidelines should be stipulated. Consumers should be able to cancel their reservation and either rebook or obtain a refund.

4.2.3 **Delays:** Attempts must be made to timeously notify the consumer of all delays. Where the delay is within the control of the airline, guidelines should be provided whereby certain rights, facilities and appropriate compensation will be provided to the consumer, with the offer of alternative options.

4.2.4 **Upgrading and Downgrading:** Guidelines on how airlines should act where they have either upgraded or downgraded a passenger for whatever reason should be detailed.

4.2.5 **Baggage Handling:** The Airline must set out its policy to address or compensate the passenger in the case of lost, delayed or damaged baggage, taking into account equitable liability exclusions.

4.2.6 **People with reduced mobility or special needs:** Priority must be given to these persons when travelling and upon occurrence of any of the circumstances outlined above.

4.2.7 **Passengers to be informed of their rights:** Each airline must ensure that the consumer is aware of their rights in terms of applicable legislation including the Industry Code.

4.2.8 **Marketing and sales:** the necessity of including, in the Industry Code, issues like direct marketing, competitions, loyalty programmes, bait marketing etc. should be discussed.

4.2.9 **Compensation:** In terms of Competition legislation, it will be necessary to keep the Competition Commission informed and involved in the determination of specific compensation levels for each situation / scenario outlined above.

4.2.10 **Complaints Handling and Dispute Resolution:** there should be a clearly established complaints handling mechanism either through the establishment of an Ombudsman or through an alternative dispute resolution mechanism. A funding model to finance such an arrangement must be developed, as appropriate.

## 5. CONCLUSIONS

5.1 In light of the discussion above, the Conference is requested to conclude as follows:

- a) adequate satisfactory Consumer Protection framework is essential for States to deal with their specific consumer related cases;
- b) a multilateral approach proposed by ICAO should be strongly supported and all States should be encouraged to implement consumer protection measures in line with ICAO guidelines;
- c) a coordinated approach should be followed between ICAO and UNWTO to finalize international instruments which will avoid inconsistencies of approach to consumer protection;
- d) in setting up the Legislation, Regulations and Industry Code of Conduct, States should ensure that provisions for dealing with consumer protection are practical, fair and reasonable and above all ensure the sustainability of the airline industry; and
- e) States without Consumer Legislation or Regulations should develop such measures to ensure that Consumers are protected and are made aware of their rights. It is essential that specific characteristics of the airline industry are taken into account in formulating Consumer Protection measures;

## 6. **RECOMMENDATIONS**

6.1 The Conference is invited to:

- a) request ICAO to consider developing, in close coordination with the UNWTO, a global code of conduct on consumer protection; and
- b) request ICAO to continue to monitor new and emerging consumer protection related issues and provide guidance accordingly.

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