



International Civil Aviation Organization

WORKING PAPER

ATConf/6-WP/68

1/3/13

Revised

8/3/13

English only

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

CONSUMER PROTECTION: A JOINED UP APPROACH REQUIRED BETWEEN GOVERNMENTS AND INDUSTRY

(Presented by the International Air Transport Association (IATA), the Arab Air Carriers Organization (AACO), the Association of Asia Pacific Airlines (AAPA) and the Latin American and Caribbean Air Transport Association (ALTA))

EXECUTIVE SUMMARY

This working paper examines various issues relating to consumer protection in air transport, notably with respect to assistance in cases of denied boarding, cancellations and flight delays. It also discusses actions that should be taken by ICAO to minimize differences between consumer protection regimes, in conformity with existing passengers rights instruments.

Action: The Conference is invited to agree with the recommendations presented in paragraph 5

References: ATConf/6 reference material is available at www.icao.int/meetings/atconf6.

1. INTRODUCTION

1.1 The rising global demand for air travel, coupled with the successful pursuit of liberalization policies in some regions of the world, has led to more choice available to customers. Travellers can now choose from a variety of airline service models, ranging from traditional full service carriers which may offer an all-inclusive fare, to new model ("low-cost") carriers which may offer ancillary or optional services at an additional charge. The very existence, success, and now convergence of these models around the world illustrates the customer demand for these different options.

1.2 Competition in the airline industry remains strong. In Singapore for example, 90% of passengers travel on routes operated by two or more carriers. In Europe, the number of routes with two or more carriers tripled between 1992 and 2009. In many domestic and regional markets, the introduction of new model carriers has intensified competition. New model carriers currently account for 50% of seat capacity in India, and 20% of seat capacity across Asia-Pacific.

1.3 The Montreal Convention 1999, ratified by 103 of the 191 ICAO Member States, and which is intended to replace the existing Warsaw-Hague regime, creates an exclusive and uniform legal framework for air carrier liability in the international air carriage of passengers and baggage, including damages caused by flight delays.

2. RECENT DEVELOPMENTS

2.1 There has been a proliferation of national passenger rights regimes in recent years. Today over 50 countries have some form of aviation-specific passenger rights regime; 30 countries have introduced regimes in the past seven years. A major challenge is the conflicting regulatory responses taken by different states. In certain cases, regulations apply based on the State of Registration of the carrier; others apply to flights to and from a state territory. This situation creates difficulties for airlines and confusion for passengers. For example, a passenger denied boarding by a European carrier departing from a US airport, connecting at a point in the EU en route to Israel, could claim compensation under three different passenger rights regimes: the US Consumer Rule, EU Regulation 261-2004 and the Israeli Aviation Services Law.

2.2 Passenger rights regimes in effect today typically consider passenger entitlements in the case of events such as denied boarding, cancellations and flight delays. Some regimes contain provisions that have the unintended consequence of increasing passenger inconvenience. For example, requiring compensation after a delay of a certain number of hours, more often than not caused by air traffic control delays, is having the perverse effect of causing more cancellations and more serious disruption to passengers, instead of protecting them. Airlines no longer have an incentive to delay a flight rather than cancel it, since a delay will nonetheless incur costs. A cancellation is a more stressful and uncertain experience for the passenger. If a flight early in the day is delayed, passengers would normally be able to fly once the problem is resolved. If the flight were cancelled instead, passengers on the original flight would only be able to travel if and when seats were available on later flights or on other airlines. According to the US Government and Accountability Office, flights were 24% more likely to be cancelled before leaving the gate after the US tarmac delay rules went into effect, creating longer travel times and a more stressful experience for passengers.

2.3 Numerous provisions in existing and proposed passenger rights legislation add significant cost and operational complexity to airlines. These provisions range from requiring disproportionate compensation, greater than the price paid for the ticket in some cases, to requiring airlines to maintain dedicated staff and resources to meet government reporting requirements and comply with the multitude of regimes.

3. DISCUSSION

3.1 Passenger rights regimes have profound cost implications for passengers and businesses. For example, IATA estimates that compliance with EU Regulation 261-2004 will cost airlines EUR 4 billion annually. As a result, passengers and shippers can expect higher costs, as airline pass costs of compliance with these regimes on to passengers. In a business with thin profit margins, the cost of complying with multiple consumer protection rules can also damage competitiveness and render routes unprofitable, reducing connectivity and its associated benefits on economies and societies. For tourist destinations, this could make competing points more attractive for airlines to operate in and for cost conscious tourists to visit. Overlapping regimes also add to passenger confusion and uncertainty over what rights apply in any given scenario.

3.2 Air transport infrastructure has not kept pace with industry growth, resulting in capacity constraints at an increasing number of locations worldwide. This has led to delays and cancellations due to air traffic control restrictions or other capacity management issues, which can have knock-on effects at hub airports for days after such an event has taken place. Indeed, the majority of delays today are outside the control of airlines.

3.3 Articles 19, 22 and 29 of the Montreal Convention 1999 define the scope and limits of an air carrier's liability for flight delays and delayed baggage. The Convention also specifies a maximum limitation period of two years for liability claims arising from international air carriage. Several existing passenger rights regimes seem to be in contradiction of the Convention, as they set out differing rules for compensation in the case of delays, or different limitation periods for claims. The current situation therefore creates legal uncertainty, in conflict with conclusions of ATConf 5, which stated that States should minimize differences in the content and application of regulations with a view to avoiding legal uncertainty.

3.4 In addition to the above, there is a trend towards Courts applying local law when handing down decisions in certain specific cases in which the Convention should apply, bringing additional confusion to users, and airlines.

3.5 The evidence creates uncertainty on whether existing passenger rights regulations are actually delivering benefits to passengers. Airlines, already highly incentivized by their own cost consciousness, thin profit margins and the marketplace to avoid delays, make their best efforts to do so. In addition, the majority of delays are outside airlines' control; in Europe for example, 60% of delays can be attributed to weather, air traffic control and other factors. This proportion has remained substantially unchanged since the enactment of EU Regulation 261-2004.

3.6 While harmonization of consumer rights regimes would be a welcome development for the industry and consumers, the numerous, and different, national regimes already in place beg the question as to how this would effectively be done. Rather than focus on specific provisions or passenger entitlements, efforts at harmonization should begin with the existing international instruments already in place, in the form of the Warsaw-Hague regime and the Montreal Convention 1999, and strive to strike a balance between ensuring the adequate protection of passengers and burdening air transport with cost and operational complexity. Particular attention must be paid to the unintended consequences of any such legislation, as these may in fact deteriorate the passenger experience as opposed to improve it.

3.7 Passenger rights regimes for other transport modes are not comparable with aviation-related regimes, resulting in unequal treatment for aviation. For example, in the EU the regulations concerning compensation or care and assistance in the case of denied boarding, cancellation or delays for passengers travelling by rail or sea have not kept pace with aviation-related rules.

3.8 The competitive marketplace incentivizes carriers to provide a satisfactory customer experience to their passengers, lest passengers vote with their feet, and their wallets, for a competitor. Even on routes with one carrier, the threat of competition by new entrants or competition from connecting services compels airlines to respond to customer needs and expectations on service quality. Airline company websites, in addition to the proliferation of websites related to airline customer service as well as social media, allow customers to compare price and service levels and make an informed decision.

4. CONCLUSIONS

4.1 In light of the discussion above, the following may be concluded:

- a) the proliferation of passenger rights regimes has added cost and complexity to airline operations, resulting in additional costs to consumers and a loss of connectivity;
- b) the extraterritoriality of certain regimes, coupled with the seeming departure of some jurisdictions from the Warsaw-Hague regime and the Montreal Convention 1999, leads to legal uncertainty for both consumers and airlines. The uncertainty is compounded in cases where the countries in question have ratified these international agreements;
- c) the competitive marketplace incentivizes airlines to respond to customer needs and expectations; and
- d) there is a need for ICAO leadership in developing basic principles, or policy guidance, in conformity with the Warsaw-Hague regime and the Montreal Convention 1999 in an effort to harmonize the approach to consumer protection in an aviation context.

5. **RECOMMENDATIONS**

5.1 The Conference is invited to:

- a) request ICAO to develop basic principles, or policy guidance, under the indicative framework proposed in the Appendix to this paper, in conformity with the Warsaw-Hague regime and the Montreal Convention 1999; and
- b) request ICAO to establish a multidisciplinary group with the participation of States and industry in order to facilitate the aforementioned task.

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APPENDIX

EXAMPLE OF CORE PRINCIPLES ON CONSUMER PROTECTION

- National legislation should be consistent and in accordance with the international treaty regime on air carrier liability, constituted by the Warsaw-Hague regime and the Montreal Convention 1999;
- National legislation should not interfere with other States' ability to make legitimate policy choices, in accordance with the principle of sovereignty enshrined in the Chicago Convention 1944;
- Passenger rights regulations should allow consumers the freedom to choose an airline that corresponds with their desired price and service standards, and allows airlines the ability to differentiate themselves through individual customer service offerings;
- Passengers should be correctly informed of their legal and contractual rights and should know which regime applies in their specific situation;
- There should be no compromise between safety and passenger rights protection
 - Safety-related delays or cancellations should fall within the scope of extraordinary circumstances such as to exonerate air carriers from liability for such delays and cancellations;
- Passenger entitlements enshrined in regulations should reflect the principles of proportionality and extraordinary circumstances;
- Passengers should be treated comparably across transport modes, taking into account the particularities of each;
- Legislation should be clear and unambiguous.

— END —