

The EU and UK approach to compensation for airline passengers favours consumer protection to the detriment of airlines.

A June 2014 judgment by the UK court of appeal interpreted the provisions of the European Council Regulation No. 261/2004 that provides for compensation and assistance that must be provided by airlines to passengers whose flights have either been cancelled or delayed to include such events caused by technical problems.

European Council Regulation No. 261/2004

Regulation 261 distinguishes three scenarios. Where a flight is delayed (depending on the distance of the flight and extent of the delay) the airline must only offer the affected passenger rerouting or reimbursement and assistance in the form of accommodation and meals. Where passengers are denied boarding against their will by an airline or where the flight is cancelled the airline must offer rerouting or reimbursement and assistance in the form of accommodation and meals and pay the passenger the prescribed monetary compensation, which is EUR 250 for all flights of 1500 kilometres or less, EUR 400 for all intra-Community flights of more than 1500 kilometres and for all other flights between 1500 and 3500 kilometres, and EUR 600 for all other flights. Compensation, however, is not payable by an airline where cancellation has occurred sufficiently in advance of the scheduled flight (as prescribed) or, if the cancellation notice period is inadequate, where the passengers are offered re-routing "allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival".

Despite Regulation 261 not providing for monetary compensation in the event of a flight being delayed, the European Court of Justice found, in a 2010 case, that the European Community principle of equal treatment requires comparative situations to be treated equally. The court held that the inconvenience and damages suffered by passengers as a result of cancellations and delays is comparable and therefore warranted like treatment. The court extended the remedies prescribed by Regulation 261 to circumstances that were expressly excluded by Regulation 261.

Decision of the UK court of appeal

The UK court of appeal supported this view in *Jet2.com Ltd v Huzar*. The court cited the need to raise the standards of protection and strengthen the rights of passengers in the overall context of European Community consumer protection.

In *Huzar* the airline, Jet2.com, relied on the exception found in Regulation 261 which provides that an air carrier will not be obliged to pay compensation if it can prove that "the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken". Regulation 261 offers examples of such circumstances which include unexpected flight safety shortcomings. The court referred to a previous decision by the European Court of justice relating to the proper interpretation of this exception and found that extraordinary circumstances exist only in the case of "events which, by their nature or origin, are not inherent in the normal exercise of the activity of the air carrier concerned and are beyond its actual control."

In the context of consumer and passenger protection the court interpreted this test in a narrow and strict manner such that extraordinary circumstances relate only to events which fall outside of the control of the airline as a result of such events being caused by extraneous acts of third parties, such as terrorist acts, or by climate difficulties. The court emphasised this view by stating that technical defects or problems in aircraft are, unless caused by events outside the activities of an airline (such as sabotage or hidden manufacturing defects), inherent in the normal activity of an airline and therefore do not constitute unexpected flight safety shortcomings. The court found that this was true regardless of whether technical problems come to light during ordinary maintenance or on account of failure to carry out proper maintenance. The court therefore equated a situation where a technical problem arises as a result of improper maintenance with a situation where an unforeseen and unforeseeable problem arises despite proper maintenance.

By this finding, the court has entirely eliminated fault as a factor when determining whether or not an airline is liable for compensation in terms of Regulation 261, giving no effect to the provision in Regulation 261 which provides that an airline should not be liable for compensation where it has taken all reasonable measures to avoid such extraordinary circumstances.

The mischief that Regulation 261 seeks to address has been overlooked. Regulation 261 attempts to curb the airline practice of overbooking flights by imposing penalties on airlines where passengers are denied boarding or whose flights were cancelled for such avoidable reasons.

Montreal Convention

It is worth mentioning that the compensation provided for by Regulation 261 is supplementary to similar compensation provided for by the Montreal Convention 1999. Article 19 of the Montreal Convention provides that a “carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo...[unless] servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.” The liability of the carrier, resulting from such delay, is limited to 4 150 Special Drawing Rights (SDR) for each passenger.

The Montreal Convention expressly states that it is comprehensive and exclusive allowing for no further liability save for that which is provided for by the Montreal Convention. Despite this, the European Court of Justice found that the Montreal Convention caters for damages of an individual nature whereas Regulation 261 provides for damages that are common to all passengers of cancelled flights, thereby allowing both the Montreal Convention and Regulation 261 to co-exist.

The UK court of appeal upheld the decision in *Dawson v Thomson Airways Ltd* and reasoned that the “loss of time inherent in flight delay constitutes an inconvenience that cannot be categorised as damage occasioned by delay as contemplated by the Montreal Convention”.

Effect of decision

The effect of these decisions is to place an ever greater burden on airlines on a near strict liability basis. Under the guise of consumer and passenger protection, the lawmakers and courts of the European Union and United Kingdom have put airlines, which operate in a very competitive industry with very slim margins, under undue strain. Ultimately, passengers will bear the adverse consequences of these obligations being placed on airlines in the form of increased fares.

Given that it is less costly to cancel a flight than to delay it (partly as a result of the exceptions that apply to compensation payable in the event of cancellation), airlines are more likely to cancel flights that would otherwise have merely been delayed, and thereby cause passengers even greater inconvenience.

With more airlines failing, in the face of increased costs and obligations being imposed on them, fewer options will remain and, as competition dwindles, consumers can expect a sharp rise in airfares.

As South Africa follows the developed world’s approach to consumer protection it is important for it not to place additional difficulties on an already overburdened airline industry in which several new market entrants have already failed.

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