



Committee on Economic Development of Air Transport – Topic 2

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¹ This paper reflects the author's personal views and cannot be considered as the views of ICAO.

THE QUESTION OF AIR PASSENGER PROTECTION

1. Introduction

For decades now, air passenger protection has been an evolving issue in international air transport. The regulatory framework are based on two distinctive parts: the Montreal Convention of 1999 (MC99) which governs the liability of air carriers for damages from accidents, loss of baggage and delays, and the ever expanding set of national (including regional) rules laid down by States (and regional organizations) to address issues falling outside MC99, especially flight cancellation, delay and denied boarding.

This briefing paper provides a background on national regulatory responses and ICAO work on consumer protection.

2. National regulatory responses on air passenger protection

Air travel has become commonly accepted as a commodity and no longer considered a luxury. Nevertheless, and despite a general reduction in airfares, passenger expectations remain high with respect to facilitation, comfort and timeliness of flights and, according to studies, the overall air travel experience today is often perceived as not meeting expectations.

Regulatory activity has expanded rights for issues linked to events such as flight cancellations, delays and denied boarding. In 2004, following previous legislation from 1991, the European Union adopted Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding, cancellation or long delay of flights. The US Department of Transportation promulgated a 2011 rule which increased compensation for passengers involuntarily denied boarding and established a maximum time i.e. three hours for domestic flights and four hours for international flights, during which time an aircraft may stay on the tarmac without allowing passengers to disembark. In November 2004, the Latin American Civil Aviation Commission (LACAC) adopted a recommendation urging its Member States to promulgate rules protecting passengers who hold confirmed reservations and have been denied boarding involuntarily. China, Saudi Arabia, Israel and Canada and many other States have also developed consumer protection rules. Besides flight cancellation, delay and denied boarding, the multiplicity of “unbundled” service options has complicated price transparency, which in turn has also triggered substantial regulatory activity. Further emerging areas of air passenger protection, to name a few, are the scope and timeliness of information to be provided to air passengers, access rights of passengers with reduced mobility and assistance to air passengers in case of massive airport or airline disruptions.

At the industry level, many airlines have adopted voluntary commitments (i.e. non-legally binding self-regulation) to clarify or improve their policies or practices with regard to certain customer services (such as fare offers, ticket refunds, flight cancellations, delays, denied boarding, baggage handling, response to complaints and special passenger needs), often in response to public pressure and to avoid regulatory measures.

The strengthening of regulatory responses has led to a vigorous discussion of whether specific new measures are appropriate or overly prescriptive, effective in practice or unduly burdensome. Some have even argued that market forces alone should be relied upon since under-performing services are ultimately driven out of the market. Indeed, States such as Australia and Singapore have taken an approach of relying on market forces and general consumer protection rules and working with consumer representatives to educate passengers on the key aspects of air travel, including what to consider when purchasing airline tickets and recourse options in the event of an airline service lapse.

Without a multilateral regulatory framework other than MC99, a major problem is the fragmentation of regulatory responses taken by different States. In certain cases, the regulations apply based on the location of the airport or on the State of registration of the air carrier; still others apply generally to flights to and from a State territory. Air carriers have a compelling need to know which rules apply to their operations and concern has been voiced with respect to overlapping regulatory requirements. In a business with generally thin profit margins, the cost of complying with multiple or inconsistent consumer protection rules can be detrimental to air carriers. Also to be considered is that within a single regulatory system, there is room for uncertainty due to competing interpretations. For example, EU Regulation 261/2004 has generated abundant case law, particularly with respect to the interpretation of “extraordinary circumstances”, including during massive disruptions. There is a growing view that the interests of all concerned stakeholders (passengers, air carriers, airports etc.) would be served by a clear delineation of rights and responsibilities and, where possible, by efforts to achieve greater regulatory convergence, if not fully harmonized rules.

3. ICAO work on consumer protection

ICAO is the international organization responsible for the regular revisions of liability limits under MC99. This is important to preserve the value of compensation provided under MC99.

Furthermore, ICAO has developed detailed guidance material on consumer protection including on air passenger rights which is contained in the *Policy and Guidance Material on the Regulation of International Air Transport* (Doc 9587, Part 5) and in the *Manual on the Regulation of International Air Transport* (Doc 9626, Chapter 10). It should be noted that issues relating to passengers with reduced mobility are addressed in the context of the ICAO Facilitation Programme and that a *Manual on Access to Air Transport by Persons with Disabilities* (Doc 9984) was adopted in 2013.

The Fifth Worldwide Air Transport Conference (ATConf/5, 2003) concluded that States should minimize differences in the content and application of regulations, with a view to avoiding legal

uncertainty that could arise from the extra-territorial application of national laws. As recommended by ATConf/5, and in order to assist States, the ICAO Secretariat developed a summary of airline and governmental responses to some of the more prominent consumer protection issues.

In 2010, the ICAO Assembly adopted Resolution A37-20 on ICAO's *Continuing policies in the air transport field*, which included notably a new clause stating that "consumer interests should be given due regard in the development of policy on regulation of international air transport." ICAO also conducted a study on the effectiveness of regulatory interventions in different regions with respect to consumer protection, including respective advantages and disadvantages of regulation and voluntary industry commitments.

On the occasion of the Sixth Worldwide Air Transport Conference (ATConf/6, 2013), ICAO acknowledged the fact that more and more states were adopting regulations in the field of air passengers rights and that a coordinated approach was needed. Pursuant to the recommendation of ATConf/6, ICAO has developed *Core Principles on Consumer Protection* ("Core Principles"). These high-level, non-binding and non-prescriptive principles are designed as guidance for States and concerned industry stakeholders in dealing with consumer protection matters.

The Core Principles are divided in three parts depending whether they should be implemented before, during or after the travel. ICAO encourages all Member States and concerned industry stakeholders to give regard to and apply the Core Principles in policy-making, and in regulatory and operational practices. Recognizing the dynamic nature of the air transport industry, the Core Principles will be a "living document", which would be refined and improved from time to time in the process of their implementation, based on the experiences gained and feedback received. The adoption of the Core Principles was a significant step towards regulatory and operational convergence and compatibility in this area.

To complement its guiding actions, ICAO keeps up to date a database identifying and summarizing the different rules adopted by its Member States in the field of consumer protection and particularly in the field of air passenger rights. This database enables passengers to access information about their rights depending on the country where they fly. It also allows Member States and concerned industry stakeholders to be aware about the different rules implemented in the world in the field of consumer protection.

During its 40th session, the ICAO Assembly confirmed the importance of air passenger protection and adopted Resolution A40-9 to urge Member States and concerned stakeholders to give regard to and apply the Core Principles in policy-making and regulatory and operational practices including in case of massive disruptions impacting aviation, and to keep ICAO informed of the experiences gained or issues encountered in their application. The Resolution also requests the ICAO Council to strongly support the exchange of views and good practices on the application of the Core Principles as this effort could help encourage compatibility among national or regional regimes, taking into account the needs of States for flexibility given their social, political and economic characteristics.

With the combination of further air traffic growth and sustained regulatory attention, it is expected that air passenger protection will remain a dynamic area in the years to come. Strengthened

cooperation among States can bring significant benefits to all stakeholders through gradually moving towards higher compatibility, convergence or, perhaps, harmonization of the regulatory framework. ICAO may have a key role in that process.

4. Non-exhaustive list of potential questions to be addressed by the delegates

1. What is your State's experience with air passenger protection?
2. Have the ICAO Core principles on consumer protection been useful for your State's efforts when developing its policy and regulations on air passenger protection?
3. As regards the planned review of the ICAO Core principles on consumer protection specifically, what are the key areas to focus on and any shortcomings to address?
4. What should be the scope of air passenger protection at multilateral level? Is the Montreal Convention of 1999 sufficient or further multilateral legal instrument(s) should be developed to address flight cancellation, delay, denied boarding, price transparency, access by passengers with reduced mobility, assistance in case of massive disruptions etc.?
5. Should ICAO play a more prominent role in the area of air passenger protection? If so, how and through which instruments? For example, should ICAO develop guidance material, a "global code of conduct", multilateral legal instrument(s) or standards and recommended practices with a view to converging, harmonizing or even standardizing States' air passenger protection regimes?

5. Selected Bibliography

Books, articles

See Bibliography to the Background Guide on Topic 2 of the Legal Committee: “*Passenger Protection in International Air Transport*”.

ICAO Documents

Sixth Worldwide Air Transport Conference, ATConf/6-WP/4 presented by the Secretariat: “Consumer protection and definition of passenger rights in different contexts”

https://www.icao.int/Meetings/atconf6/Documents/WorkingPapers/ATConf6-wp005_en.pdf

ICAO Core principles of consumer protection

<https://www.icao.int/sustainability/Documents/ConsumerProtection/CorePrinciplesBrochure.pdf>

ICAO database on aviation specific consumer protection regulations

<https://www.icao.int/sustainability/Pages/ConsumerProtectionRules.aspx>

Summary of the main passenger rights implemented in ICAO's member states

<https://www.icao.int/sustainability/Documents/C.215.WP.14804.REV1.EN.PDF>

Resolutions of the 40th session of the ICAO Assembly, Provisional Edition, October 2009

https://www.icao.int/Meetings/a40/Documents/Resolutions/a40_res_prov_en.pdf

ICAO Assembly, 40th session, A40-WP/92 presented by Finland on behalf of the European Union and its Member States¹ and the other Member States of the European Civil Aviation Conference: “Consumer protection/Air passenger rights”, Revision No. 1

https://www.icao.int/Meetings/a40/Documents/WP/wp_092_rev1_en.pdf

ICAO Doc 9587, Policy and Guidance Material on the Economic Regulation of International Air Transport

www.icao.int/Meetings/atconf6/Documents/Doc%209587_en.pdf

ICAO Doc 9626, Manual on the regulation of international air transport

www.icao.int/Meetings/atconf6/Documents/Doc%209626_en.pdf

2019 Revised Limits of Liability under the Montreal Convention of 1999

https://www.icao.int/secretariat/legal/Pages/2019_Revised_Limits_of_Liability_Under_the_Montreal_Convention_1999.aspx