

Client Bulletin

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An Update on EC Regulation 261/2004: Rules on Compensation and Assistance to Passengers for Cancellation or Long Delay of Flights and Denied Boarding

As outlined in last month's Client Bulletin, New York has become the first state in the United States to pass legislation placing the airlines operating at New York airports under an obligation to provide specific assistance to passengers whose flights are delayed. While the legislation has not been signed into law by Governor Spitzer, in understanding the significance and potential impact of the proposed legislation it is useful to take a look at some of the legal issues surrounding the implementation of the EC Regulation 261/2004 ("The Regulation"). The Regulation became effective in February 2005 and is applicable to all airlines offering flights from a European Union ("EU") airport, as well as to all EU airlines flying from a country outside the EU to an EU airport. The Regulation covers passenger rights in extended delay cases as well as remedies and rights available for cancellation and denied boarding scenarios.

Delays/Cancellations

Under the Regulation, in the case of a delay that is longer than two, three or four hours and depending on the distance of the flight, the operating carrier must offer passengers "care" and if the delay is longer than five hours, reimbursement or re-routing. Care consists of meals, beverages, two telephone calls, access to faxes and e-mails and hotel accommodations where necessary. No compensation (other than in the case of delay longer than five hours) is due in the case of delay, but such compensation is due in the event of cancellation of the flight.

The difference in remedies available and the fact that the Regulation has failed to provide a

definition for "delay" has led to considerable litigation in Europe on the issue of when a flight is to be classified as cancelled and when it is to be classified as delayed. The typical scenario is where the flight is delayed overnight and departs the next day. Local legislation in the EU countries provides little guidance to courts on how to differentiate between delay and cancellation in the above described scenario.

Several EU courts have wrestled with the issue and have derived three approaches: (1) a time based approach, namely, that after a certain period of a delay the flight is deemed cancelled; (2) flight number change; i.e., the retention of the same flight number will render a flight delayed as opposed to being cancelled no matter by how long the flight is delayed; and, (3) a totality of the circumstances, that is the court will look at all the circumstances in determining whether there was a delay or cancellation, including the waiting time, the retention or the change of the planned crew and the retention of the aircraft and passengers. Unfortunately, there is a certain lack of uniformity on the subject, which is an issue of importance to the airline industry that is responsible to pay compensation to passengers when flights are classified as cancelled and not delayed.

The question of "extraordinary circumstance" comes into play in the protection afforded to airlines by Article 5(3) of the Regulation in the event a flight is classified as cancelled. Should the flight cancellation be due to extraordinary circumstances, the carrier is absolved from the obligation to pay compensation even if the airline had failed to take certain steps beforehand in relation to giving notice of the cancellation. Most of the litigation under the Regulation has involved the definition of "extraordinary circumstance". There currently is at least one case on this issue pending before the European Court of Justice, the final arbiter on the interpretation of EC legislation.

Technical (mechanical) fault is the issue that comes up most often in this area. The majority of EU states' courts hold that an unforeseen technical fault with the aircraft that puts the safety of the passengers at risk is an "extraordinary circumstance". A minority of jurisdictions require a submission of clear proof that such a fault was present at the time of the cancellation, and an even smaller number held that even though an unforeseen technical fault is an extraordinary circumstance, the passengers should have been advised of the cancellation two weeks in advance for the carrier to avoid paying compensation. Strikes of the airline's staff or of the air traffic controllers or airport officials are generally not an extraordinary circumstance unless completely unforeseen by the carrier.

Denied Boarding

In the case of overbooking, the airline must first seek volunteers to give up their seat. If their number is insufficient the passengers who have been denied boarding must be offered compensation, re-routing or reimbursement of the ticket at the passenger's choice. The passengers must be offered care in the form of meals and refreshments, hotel accommodation where necessary, transport to/from the hotel and two telephone calls, faxes or emails. There has been little litigation of interest in regard to denied boarding despite the fact that a vast number of problems encountered by passengers are connected with denied boarding.

Enforcement of the Regulation

Article 16 of the Regulation, specifies that each Member State shall designate a body responsible for the enforcement of the Regulation. This body shall take the necessary measures to ensure that rights of passengers are respected. Most Member states have designated their relevant aviation administrative bodies as the body responsible for the enforcement of the Regulation. The procedure in a number of EU countries is that complaints on non-compliance by the passengers are first handled by these administrative bodies before they go to court. In a minority of countries claims under the Regulation can come before administrative courts only.

Legislation implemented by Member States pursuant to the Regulation establishes penalties to be applied to the airlines in cases of breach of the Regulation. The measures often are fines, the level of which depends on the seriousness of the breach and the recurrence of the conduct. In some EU countries the fines for serious breaches can reach several million Euros and criminal charges can be brought. The most serious breaches relate to denied boarding and cancellation. Breaches related to delay is usually a less serious breach. The average amount of fines is between ten thousand and fifty thousand Euros. The European Union Transport Commissioner monitors the levels of compliance with the Regulation within the EU states.



This month's Client Bulletin has been prepared by Maria Abramova, a lawyer with Gates & Partners in London, who recently sat for the New York Bar Examination and who is visiting at the offices of Condon & Forsyth LLP this month.

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