Travel Law: Flight Delays: Stop Making the Passengers Pay: U.S. DOT Should Adopt EU 261

By Thomas A. Dickerson

Are airlines liable for flight delays during domestic and international air transportation? Three different legal systems [U.S. (tariffs and contract of carriage, *Travel Law* §§ 2.04, 2.06[1]), EU (European Union Regulation No. 261/2004 (EU 261) and Montreal Convention (Article 19, *Travel Law* § 2A.04[3])] will be compared in terms of what, if any, compensation is made available to those unhappy travelers whose flights are delayed. Unfortunately for U.S. citizens, the EU ranks first in consumer protection, followed by the Montreal Convention while the U.S. system comes in last with, in effect, no form of mandatory passenger compensation for flight delays with the exception of airline oversales [14 CFR Part 250]. This explains why in several recent flight delay cases [see, e.g., *Giannopoulos v. Iberia* (2014)(discussed below)] passengers suffering injuries because of flight delays have encouraged the courts to look to EU 261 instead of the U.S. tariff system as authority for proper flight delay compensation.

What Is a Flight Delay?

A flight delay is any deviation from the contracted for departure and return times. A flight delay, which may involve the complete cancellation of a flight [see *Flaster/Greenberg P.C. v. Brendan Airways* (flight for 19 lawyers and staff cancelled allegedly resulting is loss of $50,000 in lost revenue); *In re Nigeria Charter Flights Contract Litigation* (cancelled charter flights)], may be caused by mechanical malfunctions [see *Feuer v. Value Vacations* (48-hour delay due to engine malfunction; disclaimer void)], bad weather [see *Vick v. National Airlines, Inc*. (bad weather no defense to aborted vacation), misconnections and schedule changes [see *Robinson v. American Airlines* (passenger misses flight because airline advances departure time by 10 minutes), strikes, false imprisonment and wrongful detention [see *Hudgins v. Southwest Airlines* (bounty hunters arrested and prosecuted for carrying guns on board commercial aircraft after being given permission to do so; jury awarded compensatory damages of $500,000 and $4 million in punitive damages), refusals to board, including racial and ethnic profiling and discrimination [*Travel Law* § 2.06[6]], overbooking [see below], failure to adequately screen security risks [see *Delta Airlines v. Cook* (passenger claims damages because airline allowed unruly passenger on board aircraft which was diverted to later remove unruly passenger)], medical emergencies and civil disorder [see *Jamil v. Kuwait Airways* (four-day delay because of coup in Pakistan)].

Who Pays for Flight Delays?

Not long ago the answer to "Who pays?" was that the passenger paid since being delayed was to be expected when flying on commercial aircraft. For example, in 1992 a court held in *Chendrimada v. Air India* that the passengers were forced to stay on a delayed aircraft for 11½ hours but there was no breach contract for the delivery of timely air transportation since flight schedules and timetables did not constitute a warranty or guarantee of punctuality.

U.S. Tariffs and the Contract of Carriage

The former Civil Aeronautics Board (CAB) and later the Department of Transportation (DOT) both pre- and post-Airline Deregulation Act (ADA) have allowed U.S. domestic airlines to file tariffs limiting their liability for schedule changes, flight delays and seat position. These terms should appear, at least, in summary form in the passenger's airline ticket or contract of carriage. The Courts have generally enforced these tariffs including provisions disclaiming liability for schedule changes [see *Hanni v. American Airlines* (9½ hours confined in aircraft on runway; tariff stating that "'Schedules are subject to change without notice. American is not responsible or liable for failure to make a connection or to operate any flight according to schedule'" enforced)], limiting damages [see *Hanni*, *supra* (tariff stating that "'Under no circumstances shall American be liable for any special, incidental or consequential damages'" enforced)], promising "best" available information [see *Hanni*, *supra* (tariff stating that "'American Airlines…will provide customer at the airport or onboard an (delayed) aircraft with timely and frequent updates'" may have been violated by allegedly "supplying false and misleading information" concerning the duration of the delay) and failing to provide food, water, and restroom facilities [see *Hanni*, supra (even though American may have violated one tariff provision by failing to provide food, water, restroom facilities during delay the court held that no damages were recoverable because of another tariff which disclaimed liability "for any special, incidental or consequential damages")]. Airlines may, however, voluntarily provide compensation and/or services such as food and hotel accommodations as set forth in their respective tariff filings.

Enhanced Passenger Protection Rules

As a result of the efforts of angry passengers who suffered many hours confined in delayed aircraft waiting on tarmacs during severe winter storms [see *Hanni*, supra] the DOT on April 25, 2011 enacted *Part 259-Enhanced Protections For Airline Passengers* "requiring air carriers to adopt contingency plans for lengthy tarmac delays and to publish those plans on their web sites; by requiring air carriers to respond to consumer problems; by deeming continued delays on a flight that is chronically late to be

unfair and deceptive; requiring air carriers to publish information on flight delays on their web sites; and by requiring air carriers to adopt customer service plans." Passengers must be given an opportunity to deplane "from an aircraft that is at the gate or another disembarkation area with door open." And domestic air carriers must acknowledge "a complaint [within 30 days of receipt] and [within] 60 days…provide a passenger with a substantive response" [*Travel Law* §§ 2.02[9][a], 2.06[7]].

No Private Right of Action and No Compensation

While helpful in setting forth DOT policy, no private right of enforcement was created nor was any passenger compensation mandated for flight delays notwithstanding the demands of consumer organizations [see, e.g., 74 F.R. 68988-68990 (Dec. 30, 2009) ("Flyerrights.org supports requiring carriers to incorporate their contingency plans into their contracts of carriage in order to provide passengers an avenue for redress for breach of contract"] [see also *Weiss v. El Al Israel Airlines* (no private right of action under *Oversales* regulation)]. Instead, the DOT decided to rely solely on enforcement actions and the imposition of stiff penalties [see *DOT Press Release 87-13* (October 25, 2013) (United Airlines fined $1.1 million for lengthy tarmac delays)].

Denied Boarding Compensation Increased

Airlines are permitted to deliberately sell more seats than are actually available on a given aircraft since it permits passengers to make reservations without any penalty should they cancel and allows air carriers to fill empty seats [*Travel Law* § 2.06[5]]. However, airlines must comply with the requirements of the DOT's *Oversales* rule [14 CFR Part 250]. The 2011 Enhanced Passenger Protection Rules also expanded the scope of the DOT's existing *Oversales* rule by (1) "increas[ing] the minimum denied boarding compensation (DBC) limits to $650/$1,300 or 200%/400% of the one-way fare, whichever is smaller," (2) "implement[ing] an automatic inflation adjuster for minimum DBC limits every 2 years," (3) "DBC must be offered to 'zero fare ticket' holders (frequent flyer award tickets)," (4) "requires that a carrier verbally offer cash/check DBC if the carrier verbally offers a travel voucher as DBC to passengers who are involuntarily bumped" and (5) "requires that a carrier inform passengers solicited to volunteer for denied boarding about all material restrictions on the use of transportation vouchers offered in lieu of cash."

Montreal Convention Article 19

For flight delays that occur during "international air transportation" between the 105 countries that are signatories to the Montreal Convention, Article 19 of the Convention provides "The carrier is liable for damage occasioned by delay in the carriage by air of passengers… the carrier shall not be liable…if it proves that it…took all measures that could reasonably be required to avoid the damage or that it was impossible for it…to take such measures." There has been much litigation over whether the delay was material [see *Paradis v. Ghana Airways Limited* (passenger "did not afford the airline an opportunity to perform its remaining obligations" before booking alternative flight)] or caused the injury being alleged [see *Onwuteaka v. Northwest Airlines* (passengers remaining on delayed aircraft for three hours not a claim under Montreal Convention) and whether the air carrier took all necessary measures to avoid the delay [see *Obuzor v. Sabena Belgium World Airlines* (5-day delay due to fog; all necessary measures taken to avoid delay)]. The Montreal Convention may [see *Paradis*, *supra*] or may not apply to "bumping" or "non-performance" [see *In Re Nigerian Charter Flights Contract Litigation* (non-performance claims not covered by Montreal Convention], *Kamanou-Gouse v. Swiss International Airlines* ("The Montreal Convention preempts all state law claims that fall within its scope… Here, plaintiff alleges non-performance of the contract rather than delay")]. Presently, Article 19 provides a maximum of 4,694 SDRs, or about $7,200, in flight delay compensation with this limitation removed if the passenger can prove that the airline's conduct was "done with intent to cause damage or recklessly and with knowledge that damage would result." This may be difficult to prove [see *Shah v. Pan American*] but not impossible.

EU 261

In several recent cases the courts have addressed the issue of whether European Union Regulation No. 261/2004 (EU 261) [see *Regulation 261/2004* and *Sturgeon v. Condor* (C-402/07) ("passengers are now entitled to the compensation as set out in Article 8 (EU 261) for any delay in excess of three hours providing the air carrier cannot raise a defense of 'extraordinary circumstances'… (as for the) definition of 'extraordinary circumstances,' technical faults within an aircraft should not be included" (Wikipedia) (last visited 3/12/2014)] which requires airlines to compensate airline passengers for certain delayed and cancelled flights departing from or arriving at airports in the European Union can be enforced outside of the EU. In *Giannopoulos v. Iberia* the passengers purchased two roundtrip tickets on American Airline's website for transportation from Dallas to Italy. American electronic ticket reflected "their travel itinerary and the terms and conditions governing their transportation" which relied on a tariff that provided that "Damages occasioned by delay are subject to the terms (of) the Montreal Convention… They include foreseeable compensatory damages by a passenger and do not include mental injury damages." American had an interlining or code sharing agreement with Iberia which was to provide return air transportation from Rome to Madrid, which was delayed five hours causing the passengers to miss their flight to

Madrid. Iberia's contract of carriage incorporated the "procedures for compensation described in (EU 261)."

In the subsequent lawsuit the passengers sought to enforce EU 261 as it appeared in Iberia's contract of carriage. Relying on the interlining or code sharing agreement the Court found that American's contract of carriage governed. In a related decision the same Court held that "EU 261 does not create a cause of action in U.S. courts" and "even if the European Commission intended that U.S. Courts be permitted to enforce its provisions—which the Court has held it did not—the Court would dismiss Plaintiffs' claim" because it is impliedly preempted by the Airline Deregulation Act (see also *Lozano v. United Continental Holdings* (EU 261 not intended to be enforced outside the EU"); *Volodarsky v. Delta Air Lines* (EU 261 does not provide a private right of action in U.S. courts); compare *Polinovsky v. Deutsche Lufthansa* ("plaintiffs have a right to proceed in this court despite the existence of an alternative enforcement mechanism under the EU")].

Conclusion

Air carriers governed by the EU and the Montreal Convention have come a long way in providing appropriate compensation for passengers who suffer damages from delayed air transportation. Such is not the case with the U.S. Notwithstanding enactment of the *Part 259-Enhanced Protections For Airline Passengers* and an occasional stiff penalty, U.S. passengers [with the exception of airline oversales] may not be compensated for flight delay damages since the DOT's tariff system allows airlines to disclaim and/or limit their liability. Travelers are well advised to read an air carrier's filed tariff to determine what, if anything, may be offered to delayed passengers.

Of course, the U.S. is not alone in this regard since other countries are still trying to develop appropriate remedial and compensation procedures [see, e.g., Li, *Flight Delay Compensation Standards In China*, 10 US-China Law Review 68 (2013); *Lack of compensation standard frustrates Chinese airline passengers*, www.wantchinatime.com (9/15/2013)].

Justice Dickerson been writing about travel law for 38 years including his annually updated law books, *Travel Law*, Law Journal Press (2014) and *Litigating International Torts in U.S. Courts*, Thomson Reuters West-Law (2014), and over 300 legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml.

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