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REFLECTIONS ON LIABILITY OF AIR CARRIERS FOR DELAY

DR VERNON NASE*

ABSTRACT

This paper provides an analysis of both international and Australian law on the liability of air carriers and compensation for delay. It discusses the need for States to develop standard regulatory responses to delay in international carriage. It uses the EC Regulation and the New Zealand legislation as models for developing clearer legal principles and ensuring appropriate compensation for passengers affected by delay. It concludes that domestic regulation and guidance regarding delay and overbooking of flights is required to ensure appropriate liability of air carriers and clarity for passengers.

I INTRODUCTION

*“Oh Mona, is this really the end
To be stuck in Beijing
With the Guangzhou blues again.”*
(With apologies to Bob Dylan)

As a general observation, travellers frequently misunderstand their rights and entitlements while travelling on seeming domestic flights as part of their overseas travel. Some would be surprised to learn that such legs are invariably conceptualised by the law as being part of international carriage and subject to the applicable international Convention, either a version of the Warsaw Convention system¹ or the Montreal Convention of 1999.² As long as the flight at the time of booking was

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1 *The Warsaw Convention (The Convention for the Unification of Certain Rules Relating to International Transportation by Air)*, opened for signature 12 October 1929, (entered into force 13 February 1933).

2 *The Montreal Convention (The Convention for the Unification of Certain Rules for International Carriage by Air)*, opened for signature 28 May 1999, 2242 UNTS 309 (entered into force 4 November 2003).

conceptualised as a leg of one undivided international carriage by air, it does not matter that a particular leg occurred within the borders of a particular country.³

II CLASSIFICATION OF INTERNATIONAL CARRIAGE

The author of this article recently found himself subject to a delay for a flight from Beijing to Guangzhou in southern China. While for most Chinese nationals on the flight this was domestic carriage governed by China's internal aviation laws, for the author, and other passengers en route to Perth in Western Australia, this is correctly classed as international carriage governed by the Montreal Convention on air carriers' liability.⁴

Delays on international flights in China are notoriously common.⁵ The general problem in China is that the use of air space is dominated by the military with only relatively narrow corridors, representing around 20% of Chinese airspace, available to passenger carrying commercial aircraft.⁶ The delay in the Beijing to Guangzhou flight encountered by the author resulted initially from mechanical problems in the aircraft, which led to complete cancellation of the flight and reallocation of passengers to later flights. In this case there was a three-hour delay spent standing in a line for transfer passengers in which foreign passengers were attended to last. The author was allocated to a later flight that left Beijing after the connecting flight had departed Guangzhou for Perth. The overall delay in departure was five and a half hours.

The author was engaged in international carriage by air. The governing law is found in Articles 1 and 18 of the Montreal Convention. Article 1 outlines the characteristics of international carriage of passengers by air. It places emphasis on the places of

3 Article 1(2) of the Montreal Convention defines 'international air carriage' as being "*any carriage in which ... the place of departure and the place of destination, whether or not there is a break in the carriage, are situated either within the territories of 2 High Contracting Parties, or within the territory of a single High Contracting Party if there is a stopping place in another country (whether or not that country is a signatory to the convention)*". Further, Article 1(3) provides that "[a] carriage ... is deemed ... to be one undivided carriage, if it has been regarded by the parties as a single operation."

4 China is a State Party to the Montreal Convention, effective from 31/07/05. Australia is also a State Party to the Convention, effective from 24/01/09.

5 Vernon Nase and Nicholas Humphrey, 'Angry People in the Sky: Air Rage and the Tokyo Convention' (2014) 79 *Journal of Air Law and Commerce* 701, 710; Jeff Stone, *Airline Passengers Revolt After Three-Day Delay in China* (16 July 2012) International Business Times <<http://www.ibtimes.com/airline-passengers-revolt-after-three-day-delay-china-723640>>.

6 Vernon Nase and Nicholas Humphrey, 'Angry People in the Sky: Air Rage and the Tokyo Convention' (2014) 79 *Journal of Air Law and Commerce* 701, 710.

departure and destination as being determinative. As indicated where they fall within the territory of two States parties to the convention or even within the territory of a single state “if there is a stopping place in another country”⁷ the flight is international in nature. Article 1(3) of the Montreal Convention provides that “a carriage ... performed by ... successive carriers is deemed ... to be one undivided carriage if it has been regarded by the parties as a single operation.”⁸ The adoption of this wording essentially stops carriers from avoiding being classed as engaging in international carriage by dividing up carriage into discreet legs. As observed in *Gerard v American Airlines*⁹, to determine this issue the courts will turn to the contract of transportation as evidenced by the passenger ticket and the circumstances surrounding the ticketing. In Gerard's case Nadeau J pertinently observed that the "courts often rely upon the contract of transportation in order to determine the parties' objective intent."¹⁰ The air carrier's knowledge that the flight is part of a longer, international voyage is also pertinent to the Court's conclusion. Here, literally every leg of the author's Perth – Guangzhou – Beijing – Guangzhou – Perth journey, all with the same carrier, is correctly conceptualized objectively as being international in nature.

In *Haldimann v Delta Airlines*¹¹ the Court observed that "[it](the Convention) enables international travellers to secure the benefits of the treaty regime even for segments of international transportation that are wholly within the territory of a signatory [...]"¹²

III COMPENSATION FOR DELAY

The author's flight was ticketed as one undivided carriage falling under the MC's Article 19 in the event of delay. Article 19 (Delay) provides that “[the] carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.” Article 19 also provides that “the carrier shall not be liable for damage

7 *Montreal Convention* art 1(2).

8 *Ibid* art 1(3).

9 *Gerard v American Airlines*, WL 220536 (Conn Super Ct, 2007).

10 *Ibid*.

11 See *Haldimann v Delta Airlines*, 168 F3d 1324 (DC Cir, 1999) where Williams J. observed that "the Pensacola-Gainesville journey was as a matter of law, part of 'international transportation'." Williams J, delivering the court's decision, had earlier observed that "[i]t may seem odd that Mrs. Haldimann's flights, occurring entirely within the United States and in themselves certainly capable of being viewed as a complete journey, should prove to be part of "international transportation". But the Convention aims primarily to 'achieve uniformity of rules governing claims arising from international air transportation.'"

12 *Ibid*.

occasioned by delay if it proves that it and its 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.” In essence this provision imposes on carriers a duty of due diligence to make reasonable efforts to “avoid the damage” as well as providing a defence for carriers. While "delay" is not defined in the convention Goldhirsh suggests that it means "untimely arrival at the place of destination."¹³ A standard clause in tickets or conditions of carriage frequently suggests that the carrier undertakes to make its best effort to carry the passenger and baggage within a reasonable time.¹⁴

As flagged above, an important distinction is made between avoidable delay (such as in the case of mechanical issues associated with aircraft), which entails liability and unavoidable delay (where the all reasonable measures defence is available to the air carrier).

Where a delay has taken place, arguably the resulting damage may include the cost of the following:

- accommodation and transportation in the event of a missed connecting flight; and,
- additional expenses (eg, an upgrade of the passenger’s ticket) in order to reach the destination via a different flight.¹⁵

The maximum compensation for delay under the Montreal Convention is set at the level of 4,694 SDR or \$AUD8, 413.33.¹⁶

13 Lawrence Goldhirsh, *The Warsaw Convention Annotated: A Legal Handbook* (Kluwer Academic Publishers, 2000) 101.

14 See, for example, Qantas Conditions of Carriage 9.2 (Late of Cancelled Flights) (“reasonable endeavours”) and Virgin Australia Conditions of Carriage 12.1 (“all reasonable endeavours”); see also Cathay Pacific Airlines Conditions of Carriage 10.2 (Cancellation, rerouting, Delays, etc.) reference to taking “all necessary measures to avoid delay” mirroring wording of Article 19 of the Montreal Convention.

15 Nikolai Ehlers, Elmar Giemulla and Ronald Schmid, *Warsaw Convention*, Supp. 7, February 1997, 1.

16 Conversion of SDR to Australian dollars is as at 16 August 2017.

In the author's case upon late arrival at Guangzhou he was fortunate to find myself towards the front in an orderly line and served by a supervisor who was fluent in English. Seeing that Perth bound passengers were being offered a flight leaving the following day for Melbourne, the author was reluctant to test if the carrier would provide hotel accommodation despite their obligation to do so under Article 19 of the Convention. He offered to travel via either Sydney or Brisbane, and to on-travel either the next day or the day after. As a consequence of the efficiency of the supervisor, his early place in the queue and his indication of flexibility he found myself on a flight to Sydney the same evening. In Sydney he was able to stay with friends and the following day he took a connection back to Perth. Despite the five hour delay in Beijing the end result was good in the prevailing circumstances. Reasonable options were offered to the passenger and accepted by the passenger at Guangzhou. The due diligence obligations of the carrier, even if not initially satisfied in Beijing, were ultimately fulfilled in Guangzhou.

Nevertheless, significant delays, as above, do emphasize the uncertain nature of the airline's obligations under the very generally worded Article 19. Additionally, most passengers are unaware of their rights and hence potentially vulnerable to airlines intent on avoiding their obligations.

IV AUSTRALIAN POSITION ON COMPENSATION FOR DELAY

In respect of domestic carriage by air within Australia, a recent Choice magazine study reveals that certain low cost domestic carriers refuse to provide meals or accommodation and transfers even where the delay is within the airline's control, such as with mechanical issues.¹⁷ All too frequently carriers 'Conditions of Carriage' contain vague and conditional references to delay in a situation where the relevant law fails to address the issue of passenger's rights in the event of a delay.¹⁸

17 See Jemma Castle, "Flight times not guaranteed," Choice Magazine, 11 April, 2017.

18 See, for example the use of the word "may" in 12.6 (Compensation) and 14.5 (Refusal of Carriage due to Overbooking) in Virgin Airline's Conditions of Carriage. Courts struggle with the use of the conditional tense, let alone the ordinary man in the street (the man on the Clapham Omnibus) attempting to construe the meaning of the conditions of carriage if provided with a copy.

The pertinent law here is the *Civil Aviation (Carriers' Liability) Act 1959* (Commonwealth).¹⁹ Section 28 of Part IV of the Act (and its State equivalents) provides for the basic liability of the carrier in the event of death or injury in an 'accident' and mirrors Article 17 of the Warsaw and Montreal Conventions. In the case of purely domestic carriage it is noteworthy that an equivalent text to Article 19 of the Montreal Convention (Delay) is not to be found in the provisions or wording of Part IV of the Act. In the absence of express legislative reference to the alleviating measures to be taken by domestic carriers, they are arguably in a position to deny compensation or accommodation to passengers subject to delay.²⁰ Further, anecdotal evidence suggests the responsible Commonwealth Department²¹ may not favour reform of the relevant laws. Castle cites a Departmental spokesperson in 2015 as stating the domestic air carriers are able to "offer cheap fares on the basis that the consumer elects to assume risks associated with cancellation or delay."²²

In a comparative sense a number of other jurisdictions have gone much farther than Australia in specifying and guaranteeing a basic level of compensation.

V COMPARISON TO OTHER JURISDICTIONS

For instance, in the European Union, under EC Regulation No. 261/2004 (Air Passenger Rights Regulation) from 2005 passengers are entitled to refreshments, telephone calls and hotel accommodation (if overnight wait is involved under Article 9 of the EU Regulation)²³ as well as compensation up to E600 depending on the length of the delay.²⁴ Across the Tasman Sea in New Zealand the applicable liability

19 The Commonwealth Act applies in the home jurisdiction of the author courtesy of the *Civil Aviation (Carriers' Liability) Act 1961* (WA) sections 3 (referring to the applied provisions of the Commonwealth Act and Regulations) and 6 (Application of certain provisions of the Commonwealth Act).

20 Castle, op. cit. referencing a recent Choice Magazine study revealing that Jetstar and Tiger Airlines refuse to provide meals or accommodation and transfers even where the delay is within the airline's control, such as with mechanical issues.

21 The responsible Department in this context is the Commonwealth Department of Infrastructure and Regional Development.

22 Castle op cit.

23 Castle, op.cit.

24 Regulation (EC) No. 261/2004 Article 7 (Right to compensation); see also Aviation Briefs (the Journal of the Aviation Law Association of Australia and New Zealand) – June/July 2007; see also Articles 4 (Denied boarding), 5 (Cancellation), 6 (Delay), 7 (Right to compensation), 8 (Right to reimbursement or re-routing) and 9 (Right to care) of EU Regulation 261/2004; see also Robert Lawson and Tim Marland, 'The Montreal Convention 1999 and the Decisions of the ECJ in the cases of IATA and Sturgeon – in Harmony or Discord?' (2011) 36 *Air & Space Law* 99.

regime prescribes for compensation as great as 10 times the cost of the ticket in the event of avoidable delay.²⁵ Additionally, section 91ZC(2) permits carriers, by way of special contract, to “increase the amount of the carrier’s liability under that subsection.”²⁶ This permits carriers to engage in industry endorsed voluntary schemes to reimburse passengers such as Bill of Rights programs voluntarily setting reimbursement levels.²⁷

VI OVERBOOKING AND DENIED BOARDING (AKA BUMPING)

The allied practice of airlines overbooking domestic flights in particular is subject to virtually no regulation in the Australian context. Not even the Australian Consumer Law seeks to provide for liability on the part of the Airline ‘bumping’ passengers from a flight. In contrast, in the United States the Department of Transport has prescribed for compensation where boarding is denied to a passenger (involuntary denied boarding) at a level of 4 times the cost of one-way fare up to a maximum of \$1,300.²⁸

VII CONCLUSION

Arguably, the general wording of Article 19 of the Montreal Convention creates a need for States to develop a standard regulatory response to delay in international carriage. Both the EC Regulation and the New Zealand legislation may serve as a model for Australia to develop clear legal principles and levels of compensation in appropriate circumstances. Domestically the practice of bumping passengers and, in particular, the unsympathetic response of budget carriers towards delay strongly supports the need for legislative intervention to provide a basic level of consumer protection. With overbooking practices there is, at very least, the need for legislative examination of the practices of air carriers with a view to establishing a uniform approach to be observed by all carriers. In the case of ‘bumping’ there is something inherently unsound about permitting air carriers to sell tickets for seats on aircraft that will not be available unless a certain percentage of passengers fail to present for the

²⁵ *Civil Aviation Act 1990* (NZ) section 91ZC(1) prescribes that the “liability of the carrier in respect of damage caused by delay is limited to the lesser of (a) the amount of damage proved to have been sustained as a result of the delay; or (b) an amount representing 10 times the sum paid for the carriage.”

²⁶ *Ibid* s 91ZC(2).

²⁷ *Aviation Briefs*, op. cit. noting that “[certain] airlines in the US have created their own ‘bill of rights,’ such as JetBlue Airways.”

²⁸ Alexander Anolik, ‘The Obligations of Airlines and the Rights of Passengers’ (2013) 30(3) *GP Solo* 10.

carriage. The mere tolerance of the regulators for the practice does not justify this practice. Once upon a time the carriers were able to place passengers on stand-by in the event of seats becoming available through late cancellation of a failure to appear. This orderly approach to a great extent appears to have given way to the systematic over-selling of tickets.

In short, the paucity of domestic regulation and guidance in the cases of both delay and denied boarding needs to be addressed by government. Equally, as has on occasion been suggested, and is permitted, for example, under the New Zealand legislation, air carriers may themselves create a scheme that provides a uniform response across all carriers, an industry-wide scheme. In any event, we ought not to preserve a system that leaves many travellers confused and unaware of their often “ill-defined” rights.