

Conciliation Bodies as an Effective Tool for the Enforcement of Air Passenger Rights: Examination of an Exemplary Model in Germany

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Abstract—The EU Regulation (EC) No 261/2004 under which air passengers can claim compensation in the event of denied boarding, cancellation or long delay of flights has to be regarded as a substantial progress for the consumer protection in the field of air transport since it went into force in February 2005. Nevertheless, different reviews of its effective functioning demonstrate that most passengers affected by service disruptions do not enforce their complaints and claims towards the airline. The main cause of this is not only the unclear legal situation due to the fact that the regulation itself suffers from many undetermined terms and loopholes it is also attributable to the strategy of the airlines which do not handle the complaints of the passengers or exclude their duty to compensate them. Economically contemplated, reasons like the long duration of a trial and the cost risk in relation to the amount of compensation make it comprehensible that passengers are deterred from enforcing their rights by filing a lawsuit. The paper focusses on the alternative dispute resolution namely the recently established conciliation bodies which deal with air passenger rights. In this paper, the Conciliation Body for Public Transport in Germany (Schlichtungsstelle für den öffentlichen Personenverkehr – SÖP) is examined as a successful example of independent consumer arbitration service. It was founded in 2009 and deals with complaints in the field of air passenger rights since November 2013. According to the current situation one has to admit that due to its structure and operation it meets on the one hand the needs of the airlines by giving them an efficient tool of their customer relation management and on the other hand that it contributes to the enforcement of air passenger rights effectively.

Keywords—Air passenger rights, alternative dispute resolution (ADR), consumer protection, EU law regulation (EC) No 261/2004.

I. INTRODUCTION

CONSUMER protection regulations have arguably become a fast growing branch worldwide. Especially as a consequence of deregulation processes in the sector of public transport the airline industry remains in the main focus of lawmakers in the EU. Although a legal framework, primarily based on Regulation (EC) No 261/2004 and supplemented by an increasing body of case law, sets legal standards for several forms of service disruptions (e.g. overbookings, delays, flight cancellations), the vast majority of passengers remain unaware of their legal entitlements to receive compensation from airlines. The research made from an interdisciplinary law and economics perspective on air passenger rights intends to show that with the help of alternative dispute resolution (ADR) schemes the affected passengers can effectively enforce their rights. Moreover, as well the airline industry can profit in the

field of their customer relation management and quality assurance from the work of conciliation bodies. Therefore, the paper focusses on the Conciliation Body for Public Transport in Germany (Schlichtungsstelle für den öffentlichen Personenverkehr – SÖP), which was established in 2009 and can be regarded as an exemplary model.

II. LEGAL BACKGROUND OF AIR PASSENGER RIGHTS UNDER EU LEGISLATION

Initially, the adoption of Regulation (EC) No 261/2004 represented a great achievement for the protection of air passenger rights [1]. On February 17th, 2005 it came into force in order to strengthen the rights of air passengers in case of (some) irregular operations and to ensure that airlines act under harmonized conditions in a liberalized market (see recital 4 Regulation (EC) No 261/2004). The regulation sets up standards especially in the event of denied boarding, cancellation and delay of flights. Thus, it establishes minimum standards like re-imburement of the ticket price, re-routing to the final destination, rights to compensation and taking care of the passengers. It applies to passengers booked on all flights which depart from an airport in the EU and for all incoming flights into an airport in the EU if the air carrier possesses a valid operation license from an EU Member State (that is to say if the air carrier is a so called “community carrier” according to Art. 2c regulation (EC) No 261/2004). In addition to the EU Member States, the regulation is as well applicable in Iceland, Switzerland and Norway.

In the event of denied boarding (see Art. 4 Regulation (EC) No 261/2004) and in case of a flight cancellation - unless the passengers are not informed about it in good time (see Art. 5 Regulation (EC) No 261/2004) - the passengers have the following rights pursuant to Art. 8 Regulation (EC) No 261/2004:

- Reimbursement of the ticket price plus a return flight to the first point of departure as early as possible, if first part(s) of the journey serve(s) no longer any purpose to the passenger; *or*
- Alternatively, the right to being re-booked/re-routed to the final destination at the earliest opportunity or at any time which is convenient to the passenger.

- In addition, to these rights above, the passenger is entitled to receive a compensation according to Art. 7 Regulation (EC) No 261/2004.

The right to compensation established in Art. 7 of the Regulation (EC) No 261/2004 represents a “flat-rate damage compensation” which means that depending on the distance of the flight the Regulation (EC) 261/2004 fixes a certain amount of compensation:

- 250 EUR for all flights up to 1,500 kilometres (category 1)
- 400 EUR for all intra-EU flights of more than 1,500 kilometres and all other flights between 1,500 and 3,500 kilometres (category 2)
- 600 EUR for all other flights not falling under category 1 or 2 (category 3), that is to say of more than 3,500 kilometres

The fixed amount of compensation which is independent of the actually caused damage and as well independent of the ticket price differs fundamentally from other legal compensation regimes (e.g. those for railway, which foresees a ticket price reduction). There is another special feature in the compensation regime for air passengers concerning Art. 5 No 3 Regulation (EC) No 261/2004 according to which passengers are not entitled to the above mentioned fixed compensation if the air carrier can prove that the cancellation:

- was caused by extraordinary circumstances (beyond the airline’s control)
- and therefore, the cancellation could not have been avoided, even if the airline had taken all reasonable measures.

This regulation for an exclusion of liability also differs from other compensation regimes in the field of transport (that is to say similar regulations of exculpation do not exist in other regimes).

Besides, there are also further legal obligations for the airlines, for example that they have to take care of the stranded passengers, offer them refreshments and meals and have to take into consideration the special needs of passengers with reduced mobility and unaccompanied children. If the departure is delayed to the following day (or even later), passengers must additionally be offered a hotel accommodation including the transport from/to the airport (see Art. 9 Regulation (EC) No 261/2004). These obligations can never be excluded due to “extraordinary circumstances”; they - irrespectively of the airlines’ responsibility - have to be offered to every stranded passenger.

Since the regulation entered into force in February 2005 the European Court of Justice (ECJ) has developed the air passenger rights. It turned out that many loopholes and undefined terms of the regulation had to be clarified. One of the most famous decisions of the ECJ deals with the case *Sturgeon vs. Condor Flugdienst GmbH* [2]. The ECJ decided that “Passengers whose flights have been cancelled and passengers affected by a flight delay suffer similar damage, consisting in a loss of time, and thus find themselves in comparable situations for the purposes of the application of the right to compensation laid down in Article 7 of Regulation No 261/2004” [2]. Delayed passengers shall therefore have a right to compensation

pursuant to Art. 7 Regulation (EC) No 261/2004 “when they reach their final destination three hours or more after the arrival time originally scheduled by the air carrier” [2]. This means that also in the event of long delays (minimum three hours, no matter which flight distance) the passengers have the right to be compensated according to the above-mentioned standards (see Art. 7 Regulation (EC) No 261/2004).

This decision led to controversial discussions and was even regarded to be in conflict with the principle of the separation of powers. Ever since, the ECJ has confirmed its interpretation of the regulation in several other cases. Especially the term “extraordinary circumstances” as one of the key concepts of the regulation and which is not sufficiently defined by the EU legislator generated many cases. Accepted “extraordinary circumstances” in general are (see recital 14 of Regulation (EC) 261/2004 as well):

- political instability;
- meteorological conditions;
- security risks;
- unexpected flight safety issues;
- and strikes.

Finally, the above described short and incomplete extracts of the legal framework of air passenger rights with its constantly growing body of case law show that the establishment of the regulation, which was originally considered to be a milestone for the consumer protection, turned out to lead to a high demand of legal interpretation due to its large extend of legal uncertainty. In order to improve this situation, the commission suggested to reform the regulation and to overtake as well parts of the jurisdiction into the regulation. But up to now the EU institutions have not been able to agree on a revised version of the regulation [3].

III. LACK OF ENFORCEMENT AND ECONOMIC CONSIDERATIONS

In 2006 – just one year after the Regulation (EC) No 261/2004 came into force – the European Commission launched a first independent review of its effective functioning which was published in 2010 [4]. A following second review was published in 2012 [5]. Both evaluations proved that most of the affected passengers do not enforce their complaints and claims towards the airlines. Whereas the lack of clarity concerning the application of law and the risk of relatively high transaction costs when filing a lawsuit do not represent the only reasons which prevent passengers from enforcing their rights. It also seems to be a strategy of the airlines not to handle the complaints of the passengers or exclude their duty to compensate them, e.g. due to alleged so-called extraordinary circumstances like meteorological conditions.

Economically contemplated, there are comprehensible reasons for the passengers not to claim against the airlines. Taking the cost risk into account in relation to the relatively low amount of compensation and as well the duration of the whole process in court plus the personal trouble it seems to be very unattractive for most passengers to file a lawsuit. Due to this situation a new legal service sector, that is to say private

specialized service providers (e.g. EU claim, Flightright, Fairplane, ... etc.) have emerged to handle passengers' claims in return for a success fee of round about 25% (plus VAT) of the due compensation. As the clients do not risk spending any costs and fees if the trial does not succeed many passengers make use of the services. By the help of the increasing cases the service providers deal with, they are able to maintain comprehensive data bases, so that they can estimate whether a claim will be successful in advance. Having a look at the rising number of these service providers it is assumable that it is a successful and lucrative industry by now. However, they cannot change the long durations of the trials. It is also doubtful whether it is effective and efficient to occupy the courts with this large amount of small cases and whether a whole industry should profit from the inactivity of the airlines to deal with the complaints of their customers reasonably.

This situation shows that also the National Enforcement Bodies, which had to be established according to the EU regulation in order to ensure that the rights of the passengers were respected (see Art. 16 Regulation (EC) No 261/2004), are powerless. They are only entitled to start an administrative procedure and impose fines on airlines if they get to know about irregularities (which happened only few times in the past [4]). But they cannot directly support consumers with the enforcement of their individual claims.

IV. ESTABLISHMENT OF THE CONCILIATION BODY FOR PUBLIC TRANSPORT IN GERMANY (SCHLICHTUNGSSTELLE FÜR DEN ÖFFENTLICHEN PERSONENVERKEHR – SÖP)

Nowadays, in the European Member States there are different types of conciliation bodies which deal with air passenger rights. Most recently their development was additionally promoted by the Directive 2013/11/EU for alternative dispute resolution of consumer disputes [6]. Even before the directive was adopted and had to be implemented into national law in Germany, the legislator decided to require in the field of air passenger rights that the airlines have to take part in a special conciliation procedure concerning § 57a LuftVG [7]). Therefore, on November 1st 2013 a new law on ADR in aviation sector came into force (Gesetz zur Schlichtung im Luftverkehr [8]). Due to national and EU legislation, there are also other industries like the insurance, bank and energy sector which have to provide sector-specific ADR services for their clients for several years by now. It was recognized that in these typical cases with a low amount in dispute and many similar and relatively simple cases, ADR can help to solve these conflicts effectively.

The Conciliation Body of Public Transport in Germany (SÖP) is often identified as an example of best practice. Its organization and functioning will be described and it will be examined whether and why it can be an effective tool to solve the before mentioned dilemma of air passenger rights.

A. General Conditions for the Functioning of the SÖP

Originally, the SÖP was founded as an independent arbitration service in the field of train travels [9]. Meanwhile its competence includes travel as well by bus, ship and - since 2013

- by plane. The legal basis of the arbitration procedures depends on the mode of transport. As we have seen for the aviation sector the conciliation procedure became mandatory for the airlines which is regulated by §§ 57a LuftVG and the Gesetz zur Schlichtung im Luftverkehr (ADR in aviation sector) [8].

The aim of the SÖP is to conciliate consumers' complaints amicable and out of court [9]. It is a private non-profit institution in form of a registered association. For the consumers, the service is free of charge. The costs are borne by the transport companies. That is to say in the field of aviation matters by the airline which is member of the SÖP and its sponsoring association. According to German legislation the airlines are free to choose which ADR institution is responsible for them. They are even free to establish one on their own. If they do not become a member of a private ADR institution the procedure has to take place before the public conciliation body which is organized within the Ministry of Justice [10]. During the last three years most airlines operating in Germany have become a member of the SÖP [11].

The regulatory framework of the SÖP and its sponsoring association consists of an own association statute [12]; rules of procedure (internally for the executive board and as well for the procedure of conciliation [13]); and a membership fee scale.

In the aviation sector, the conciliation procedure is mandatory for dispute amounts up to 5,000 EUR. So, it depends on the airline, on what it agreed with the SÖP. On a voluntary basis, it is possible that disputes above 5,000 EUR can be brought before the SÖP by the passengers but it should be fixed in the contract.

The fact that the legal framework requires the opportunity of the ADR procedure only for consumers ("Verbraucher" according to § 13 BGB [14]) limits as well its personal scope. It means that the airlines are legally not obliged to join a conciliation procedure in which the other party is a legal entity which happens especially if the passenger went on a business trip.

B. Conciliation Procedure

As a precondition before the SÖP can start an ADR procedure the consumer has to give in his/her complaint directly to the airline which has two months to give an answer to the passenger (see Art. 57b paragraph 2 No. 5 LuftVG). Only if the airline does not answer or the passenger is not satisfied with the result he/she is eligible to involve the services of the SÖP. The SÖP procedure starts with the submission of an official request by the affected passenger (see § 3 Verfo [13]), for this purpose an online request form is offered and used in most cases. The SÖP confirms the receipt and keeps the applicant up to date concerning the continuing process. The airline receives the request as well and has the opportunity to give in an own statement concerning the consumer's complaint. Hereinafter the procedure can be continued in two different ways:

- The airline can acknowledge all the claim(s) of the consumer immediately or
- the airline gives in its own statement and the responsible conciliator of the SÖP is going to examine the case.

In the first of the above-mentioned ways, the SÖP is going to inform the consumer about the acknowledgement by the airline and the procedure is completed for both sides.

In the second of the above-mentioned ways, if the claim of the consumer is not justified the conciliator will terminate the procedure by explaining the legal situation to the consumer. Then he/she still has the opportunity to file a law suit against the airline (which by the way has presumable little chance of success). If the claim is at least partly justified the conciliator gives a recommendation how the procedure can be solved by assessing the situation legally. In his/her suggested recommendation the conciliator explains the situation and the legal background to the consumer. The procedure itself takes place in a written way and as well by phone calls whereas other ways of taking evidence and communication is not foreseen. The conciliator sends his report and the recommendation to both parties. Then, during the following two weeks the parties are obliged to let to know the SÖP whether they accept the recommendation or whether they do not. If both agree they enter into a contract with the content of the recommendation and the procedure is successfully concluded. In most cases, the parties agree with the recommendation made by the conciliator of the SÖP [15]. If one of the parties does not agree with the conciliation recommendation the service of the SÖP ends at that point and it is up to the parties to clarify the case before court. The conciliation procedure is excluded if a claim has already been pending at court or a court has already decided on the case.

C. Special Characteristics and Quality Requirements of the Conciliation Procedures

A special characteristic of the shown conciliation procedure is the voluntariness on both sides. At any point of the process the consumer has the right to stop the conciliation and to file a lawsuit instead. The airlines are legally obliged to take part in the procedure until the end but they also have the right not to accept the final recommendation, so that they are not bound to the recommendation, which leaves the opportunity for a clarification of the case before court (provided that the consumer is going to file a lawsuit).

Other important characteristics and quality requirements of the conciliation procedure of the SÖP and in general are the professional qualification of the conciliator; his/her independence and neutrality; the neutrality of the institution itself; and a transparent working style. Further characteristics which stand especially for an effective procedure are seen in low costs and short durations of the procedure (usually less than 3 months see § 8 Verfo [13]).

All conciliators at the SÖP are fully qualified lawyers. They decide only by law and justice. Only a person who has not worked for a transport company or its lobby for the last three years can become head of the SÖP. The SÖP provides information for consumers on its website. Some exemplary cases are published on the website (in an anonymous way) and besides other information an annual report of its work can be found on the internet.

For the consumer, the conciliation is a very effective tool because the costs are paid by the member companies of the

SÖP, so it is free of charge for the consumers. The companies pay on the one hand an annual membership fee and on the other hand a fee for every case that is examined by the conciliator, which means that in case that they acknowledge the consumer's claim immediately they stay free of charge for this case. The average duration of the process is only four to six weeks [16] which cannot be compared with a trial before court which lasts much longer.

V. CONCLUSION

On the one hand, by regulating that the airlines have to take part in a conciliation procedure in cases in which the rights of air passengers were violated and on the other hand, by having the SÖP as an existing conciliation body, the enforcement of air passenger rights has been successfully increased during the last years. The growing number of passengers who give in their complaints to the SÖP [17] shows that it was possible to motivate affected passengers to enforce their rights with the help of a conciliation procedure. These are passengers who probably did not know their rights; whose complaints were rejected or ignored by the airline and/or who were deterred from a trial before court due to the risk of the transaction costs and/or the unclear legal situation.

However, the fear that the conciliation bodies could be in competition with the courts is unfounded. If passengers prefer a trial before court, they are always free to choose this way of litigation. Also, the risk that the jurisdiction could get lost of cases that have a precedent character is no argument against the conciliation procedure because most cases pending at the SÖP would not have come before any court. On the contrary, due to the qualification of the conciliator he/she can reliably estimate whether a case is of that quality that it has to be decided by the court so that the SÖP would refuse to continue the procedure and recommend clarifying it before court. In conclusion precedents can be set on cases that usually would not have been brought before court.

Quiet positive is as well the fact that affected passengers are informed about the legal aspects of their cases. The conciliation body is not only that effective for the enforcement of the air passenger rights due to the cost absorption by the airlines and the short duration of the procedures, moreover it helps the airline as well to retrieve its relationship with its customers.

Finally, it is a great pity that the airlines have such a lack in their complaint management system which leads to the initially described situation. At this stage, in a way, the work of the conciliation bodies can be seen as a part of their customer relation management. Therefore, it is absolutely justified that they have to finance the conciliation procedures. One does not know, how the situation would have developed if the airlines had dealt the passenger complaints conscientiously. But what they should keep in mind is that if the passenger brings his/her complaint before the SÖP, then his/her concern contains already another complaint which has to be seen in the fact that he/she was not satisfied with the way, how the airline dealt with the original concern.

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