

PASSENGERS' PROTECTION AND RIGHTS IN INTERNATIONAL CIVIL AVIATION

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ABSTRACT

Air transport is of critical importance to move passengers and cargo from one place to another on a global scale. *Subsistence, sustenance, growth and profitability* of the air transport industry are dependent on the demand for transport from passengers and cargo as the main sources of revenue of the airline industry. The forces of globalization and liberalization, coupled with the very rapid development of low-cost operators, have tempered the growth and profitability of the aviation industry whilst, at the same time, greatly increasing the consumer (passenger and air freight user) advantages in terms of expanding the gamut of their choices, better quality and lower prices. The ever-expanding markets in the Asia and Pacific region hold great promise for a rapid growth of the aviation industry in years to come.

Currently, the international civil aviation community is faced with many challenges evolving from globalization, liberalization of economic regulations, privatization of airlines and airports, commercialization of government services providers, increasing environmental controls, and the emerge of new technologies. To deal effectively with these challenges and issues will require a high level of cooperation among civil aviation authorities, airlines, airports, and providers of air services and products. Airlines under the new free trade regimes have been exposed to many changes and although GATS has an important role to play in this important field, the convergence of economic, safety, security and environmental issues makes a strong case for keeping regulation in these critical issues under the ICAO aviation umbrella.

As air transport experiences structural, policy and regulatory environment changes, in the era of free trade it would be interesting to critically examine the impact of the aforementioned changes on the rights and protection of passengers. In this relation, it becomes very important to review the international, regional, and national efforts which have been made to enhance consumer protection and also have an important bearing on the rights of airline passengers. The thesis also addresses some emerging, non-traditional consumer protection issues, such as health, racial discrimination and the rights of disabled passengers

In view of the above, the well-developed consumer protection regimes in the United States and the European Union (EU) would be examined in depth and the results of its analysis would be used to develop a suitable model airline passenger protection in the rapidly expending economies of the Asia and Pacific Region.

RESUME

Les transports aériens sont d'une importance majeure pour déplacer les passagers et les cargaisons d'un endroit à l'autre sur une échelle globale. *La subsistance, l'équilibre, la croissance et la rentabilité* de l'industrie des transports aériens dépendent de la demande du transport des passagers et de la cargaison comme sources principales de revenu de l'industrie de ligne aérienne. Les forces de la globalisation et de la libéralisation, couplées au développement très rapide des opérateurs peu coûteux, ont gâché la croissance et la rentabilité de l'industrie d'aviation tandis que, en même temps, augmentant considérablement les avantages du consommateur (utilisateur de fret aérien et les passagers) de façon à augmenter la gamme de leurs choix, une meilleure qualité et des prix inférieurs. Les marchés en croissance constante de l'Asie et Pacifique tiennent la grande promesse pour une croissance rapide de l'industrie d'aviation pour les années à venir.

Actuellement, la communauté internationale d'aviation civile est confrontée à beaucoup de défis évoluant de la globalisation, de la libéralisation des règlements économiques, de la privatisation des lignes aériennes et des aéroports, de la commercialisation des fournisseurs de services de gouvernementaux, des contrôles de l'environnement accrus, et de l'émergence de nouvelles technologies. Traiter efficacement ces défis et ces questions exigera un niveau élevé de coopération par les autorités, des lignes aériennes, des aéroports, et des fournisseurs d'aviation civile des services aériens et des produits. Les lignes aériennes sous les nouveaux régimes de libre échange ont été exposées à beaucoup de changements et bien que GATS ait un rôle important à jouer dans ce domaine à la convergence économique, sûreté, sécurité et les questions environnementales fait un point de droit fort pour maintenir réglementaire dans ces questions critiques sous le parapluie d'aviation d'ICAO. Car les transports aériens éprouvent des changements structurel et politique de normalisation d'environnement, de l'ère du libre échange il serait intéressant d'examiner à la loupe l'impact des

changements mentionnés ci-dessus du côté des droits et de la protection des passagers. Dans cette perspective, il devient très important de passer en revue les efforts internationaux, régionaux, et nationaux qui ont été conçus pour augmenter la protection des consommateurs et pour avoir également supporté les droits des passagers des lignes aériennes. La thèse adresse également une certaine émergence, questions non traditionnelles de protection des consommateurs, telles que la santé, discrimination raciale et les droits des passagers handicapés.

En raison de ce qui précède, les régimes bien développés de la protection des consommateurs aux Etats-Unis et l'union européenne (UE) seraient détaillés examinés et les résultats de cette analyse seraient employés pour développer une protection modèle appropriée de passager de ligne aérienne dans les économies qui se développent rapidement de l'Asie et du Pacifique.

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INTRODUCTION

The air transport industry is of critical importance to move passengers and cargo from one place to another. In the past few years, air transport has experienced substantial growth. As per the figures cited by the International Air Transport Association (IATA) 'in the period from January 2006 through January 2007, air passenger traffic grew at an annual rate of 5.7 percent'¹ Liberalization and deregulation of the air transport and the rapid development of low-cost carriers (LCCs) have contributed significantly to this growth. Countries such as the US, and those of the EU, have been trailblazers of the liberalized and deregulated air transport market. The US liberalized its domestic aviation market by removing all operational restrictions on its airlines when it passed the Airline Deregulation Act in 1978. EU countries embraced liberalization by adopting the 'Third Package' in 1992 that allowed airlines within the EU greater latitude on operational, price and ownership matters.

Studies have indicated that apart from causing expansion in the air transport, liberalization has led to the significant enhancement of consumer choice and lower fares. For example, the deregulation of the US domestic market is estimated to have provided additional welfare gains of around USD 6 billion (period not specified) to passengers through greater choice and lower fares.² However, the quoted figure of welfare gain is disputed by authors Paul S. Dempsey and Laurence E. Gesell in their book on 'Airline Management: Strategies for the 21st Century'³ who have stated the following:

"About \$4 billion of the \$ 6 billion was attributed to the value of the enhanced flight frequency for business travelers (calculated at an implausible 1.5 times their hourly wages). But only about 7 percent of passengers fly on an unrestricted coach ticket (and are able to fly at short notice as the business needs change), and they pay a price for air transportation which is radically higher than before deregulation, even adjusted for inflation. Ninety -three percent of passengers are saddled with advance purchase, Saturday night stay-over restrictions, which cause an enormous waste of

¹ IATA Press Room, downloaded from http://www.iata.org/pressroom/facts_figures/traffic_results/2007-02-02-01, accessed on 23/02/2007.

² Airline Deregulation, IATA Economic Briefing, downloaded from http://www.iata.org/NR/rdonlyres/C3216440-783D-438E-AF51-7AEC69119B1A/0/IATA_AirlineLiberalisation.pdf, accessed on 20/04/2007.

³ Paul S. Dempsey and Laurence E. Gesell, Chapter 10, Airline Management: Strategies for the 21st Century, US (1997) at pp 463.

opportunity costs and additional weekend hotel and meal expenses which have never been taken into account by the study.”

Further liberalization has also led to exponential benefits for passengers of international air transport. For example, liberalization of air transport between India and the UK in 2005 resulted in a doubling of the weekly flights to 200 in less than a year⁴, indicating a positive outcome. To summarize, the underlying figures from InterVistas study that best describe the relationship between the liberalization of international air transport sector and air traffic growth are as follows:

“Traffic growth subsequent to liberalization of air services agreements between countries typically averaged between 12 and 35 percent, significantly greater than years preceding liberalization. In a number of situations, growth was at rates exceeding 50 percent, and in some cases reached almost 100 percent of the pre-liberalization rates.”

Thus, domestic and international air passengers seem to be the biggest benefactors of the ongoing process of liberalization and deregulation in the sector.

This thesis will examine the period post-deregulation in the mature, sophisticated air transport markets of the West such as the US, the EU, and Canada. In the deregulated aviation era the subsistence, sustenance and growth of the air transport industry seems to be increasingly dependent on the demand generated for transport by passengers and cargo. A study conducted by the InterVistas Group, sponsored by the major aviation stakeholders such as the International Air Transport Association (IATA), Air Transport Action Group (ATAG), and Airports Council International (ACI), stated that *“liberalizing air travel directly benefited economies not only by increasing GDP, employment, travel, tourism, and exports. Increasing air travel also led to significant gains in the quality and quantity of direct service offered to various communities worldwide.”*⁵ Thereby, it can be said that the forces of globalization and liberalization in the air transport sector have fueled industry growth by greatly increasing consumer (passenger and air freight users) prosperity. Prosperity for the consumers of air transport that has resulted from the

⁴ Supra Note No: 2.

⁵ Executive Summary of the study on ‘The Economic Impact of Air Service Liberalization’, downloaded from http://www.iata.org/NR/rdonlyres/A4E8E352-FF3E-4BFD-B020-9E7DBADC32_B3/0/liberalization_air_transport_study_30may06.pdf, accessed on 22/02/2007.

expansion of the range of choice, improved service quality standards and the lowering of fare prices.

Thus, it can be seen that the matured deregulated aviation markets of the West (US, EU and Canada) and the rapidly developing aviation markets of Asia such as China and India have benefited significantly, and will continue to benefit, from the pervasive process of liberalization. These relatively newly deregulated markets of Asia stand to learn a great deal from the well-established regime of consumer protection laws of the deregulated markets of the West.

Today's airlines are subject to market determinism. The contemporary climate of free trade calls for necessary legal changes to ensure a continuing safe and fair service. However, compared to other service sectors like information technology, and telecommunication, aviation seems more tightly regulated, as can be seen from the cautious non-inclusion of crucial elements of the air transport sector in the Air Transport Annex to the General Agreement on Trade in Services (GATS). But the sector is gradually embracing change, which can be seen from replacement of the bilateral Air Service Agreement (ASA) (traditional Bermuda I and II type Air Service Agreements) signed by the nations of the world by the new 'Open Skies' agreements granting more latitude to the airlines and other air service operators.

However, it should be remembered that in the new age, reorganization and market determinism of the sector in no way conveys a hands-off approach by government. Liberalization of air transport merely means a reprioritization of government's regulatory role. This will be explained in detail in the following chapters. Therefore, the thesis will largely examine the changing role of the government in the regulation of airlines for the protection of air passengers. It will present a critical examination of the impact on the rights of passengers of the ongoing process liberalization and deregulation in the domestic and international air transport sector. Thus, Chapter 1 will focus on consumer's rights in terms of delay and cancellations, denied boarding and overbooking, and the issues of fair pricing and misleading advertising. It will be seen that there are significant differences internationally and nationally in how these issues are approached. Chapter 2 will explore the extent of baggage mishandling in the industry together with regulations, costs and subsequent implications for airlines and passengers. Chapter 3 examines the increasingly high profile subject of air passenger health and the challenges of preventing the spread of communicable diseases through air travel. Chapter 4 discusses respectively discrimination experienced by customers through racism and the challenge of transporting passengers in the

current era of fear of terrorism. In Chapter 5, it will be shown that 10 percent of the world's population lives with disability, and that this needs, in social as well as legal terms, to be fully recognized and embraced by the world aviation community. The conclusion chapter discovers the positive consequence of deregulation and favorable regulatory consumer protection efforts made by the governments of US, the EU and Canada. It supports the adoption of similar regulation in the newly deregulated aviation markets such as India and China.

In the broad field of air passenger protection, the outcome of the ICAO International Diplomatic Conference on Air Law in 1999 (Montréal Convention 1999) was a milestone in international civil aviation when it succeeded in modernizing and consolidating the Warsaw Convention of 1929 comprised of six different international legal instruments of private international law into a single legal instrument that will provide, for many years to come, an adequate level of compensation for those involved in international air accidents or incidents. The new Montreal Convention of 1999 offers greatly improved compensation, protection and reflects the following main elements⁶:

A major feature of the new legal instrument is the concept of unlimited liability in relation to passengers. Whereas the Warsaw Convention set a limit of 125,000 Gold Francs (equivalent to approximately USD 8,300) in case of death or injury to passengers, the Montreal Convention of 1999 introduces a two-tier system. The first tier provides for strict liability up to 100,000 Special Drawing Rights (SDRs), a figure equivalent to about USD 135,000, irrespective of the carrier's fault. The second tier is based on presumption of fault of the carrier and has no limit of liability; in cases of aircraft accidents, air carriers are called upon to provide advance payments without delay to assist entitled persons in meeting immediate economic needs (the amount of the initial payment will be subject to national law and will be deductible from the final settlement); air carriers must submit proof of adequate insurance which guarantees the availability of financial resources in case of air accidents; legal action for damages resulting from the death or injury of a passenger may be filed in the country where, at the time of the accident, the passenger had his or her principal and permanent residence, subject to certain conditions; facilitation in the recovery of damages without the need for lengthy litigation; simplification and modernization of documentation related to passengers, baggage and cargo. This permitted the development of electronic ticketing that will be used in 95 percent of all tickets issued worldwide early next year.

⁶ Adrianus D. Groenewege, from the unreleased 4th edition of the Compendium of International Civil Aviation, Canada

Early in September 2003, the United States became the 30th ICAO Contracting State to ratify the Montreal Convention of 1999, which replaced the Warsaw System Convention of 1929 on compensation in cases of international air accidents and entered into force on 4 November 2003. On the occasion of the ratification of the Montreal Convention, Dr. Assad Kotaite, President of the ICAO Council, commented as follows:

“In developing the new Montreal Convention, we were able to reach a delicate balance between the needs and interests of all partners in international civil aviation, States, the travelling public, air carriers and the transport industry. Victims of international air accidents and their families will be better protected and compensated under the new Montreal Convention, which modernizes and consolidates seventy-five year old system of international instruments of private international law into one legal instrument.”

As at 30 June 2007, seventy-two, Contracting States are Parties to the Montreal Convention of 1999 and meanwhile several more countries have been added.



Chapter I

CONSUMER PROTECTION OF BASIC AIRLINE SERVICES

Introduction

The era of deregulation of the 'Air Transport Sector' has provided both advantages and drawbacks for its passengers. Customers benefit from the broadening of services and lowering of fares, while simultaneously experiencing neglect at the hands of the airline. This chapter examines the legal protection offered by the regulations of international organizations and national government bodies against airlines when passengers experience problems due to any of the following: delay and cancellations; denied boarding and overbooking; fares, misleading advertising and airline misrepresentations; contract of carriage; and miscellaneous consumer issues.

Delay and Cancellations

Airline delays and cancellations are the most common cause of air passenger frustration. Air traffic has grown during the new age of liberalization and deregulation of the sector, with multiple airlines at present offering no-frills, low cost services, without airport infrastructure undergoing concurrent expansion. This has led to frequent delays and cancellations. The annual reports published by the US Bureau of Transportation Statistics (BTS)¹ reveal the magnitude of this problem. In the period between January 2006 through December 2006, 1,615,537 cases of arrival delays² and 121,934 cases of flight cancellations³ were reported.

Apart from subjecting passengers to distress and discomfort, airline delays and cancellations also drive up the operating costs of the airline. In 2005, the Air Transport Association of America (ATA) admitted that, "delays drove up the direct operating costs of U.S. airlines by an estimated USD 5.9 billion (period not specified). On average, extra fuel burn and crew time of the airlines is

¹Rule 14CFR Part 234 requires the air carriers that file airline service quality performance reports under Part 234 to also collect and report the causes of airline delays and cancellations. The Report primarily aims at providing the consumers of air transportation with information on air carrier quality. The BTS Report on 'Delays and Cancellations' of 2006 contained information collected and shared by 19 major US Carriers. For the purposes of the Report, any delay is said to occur when the flight arrives or departs 15 minutes late at the airport gates, and cancellation occurs when a flight does not operate within 7 days of the scheduled departure time as listed in the Computer Reservation System. A summary monthly report entitled 'The Air Travel Consumer Report' on-time performance of various air carriers can be obtained from the Department of Transportation website.

²On time Performance-Flight Delays at a Glance, Bureau of Transportation Statistics, downloaded from http://www.transtats.bts.gov/HomeDrillChart_Month.asp?Sel_Year=2006&Arr_Del=1&Sel_Carrier=000&Sel_Airport=000&URL_SelectYear=&URL_SelectMonth=, accessed on 12/03/2007.

³Ibid Note 2

estimated at \$39.21 per minute, followed by maintenance and aircraft ownership (\$19.75 per min) and all other costs (\$3.37 per min)."⁴ Concurrently, cancellations and consequent passenger compensation packages leads to further mounting of costs for airlines. This demonstrates that it is also in the best interests of air carriers to avoid delays and cancellations of scheduled flights.

Recently, Federal Aviation Administrator (FAA) Marion C. Blakey remarked that, "*the National Airspace (NAS) of the United States had reached a critical mass and the delay in 2006 had reached record all time high.*"⁵ This indicates how infrastructural deficiencies serve as a stumbling block to the growth of the aviation industry in the US. However, it is important to note that airlines have little or no power in addressing these infrastructural inadequacies.

The European Union is characterized by a sheer lack of on-time performance statistics compared to the US. The Community Air Passenger Reporting System (CAPRS), a program for publication of the data pertaining to performance of Community air carriers on a public website that entered the pilot phase in 2005 but was not implemented. The reasons for this will be discussed in detail in the following chapter.⁶ However, the Association of European Airlines (AEA), a non-profit trade association comprised of thirty one major European air carriers, provides credible punctuality performance data for European Union (EU) airlines. It recorded a 66.3 percent on-time arrival and 67.2 percent on-time departure between January-December 2006.⁷ The IATA Economic Briefing of 7 March 2005 has estimated that, "*the strict compensation regime of the European Union (EU) cost the European airlines EUR 283 million and EUR 176 million for long delays and cancellations respectively. This illustrates the debilitating effects of delays and cancellations on the European airlines.*"⁸

Regulatory Safeguards against Delays and Cancellations

The International Civil Aviation Organization (ICAO), a specialized agency of the United Nations based in Montreal, has provided less by way of authoritative regulations. However, there are ICAO Standards and Recommended Practices (SARPs) to protect air passengers against delay or cancellations. There is one single provision in Annex 9 to the Chicago Convention of 1944 on

⁴Cost of ATC Delays, ATA Economics and Delay, downloaded from <http://www.airlines.org/economics/specialtopics/ATC+Delay+Cost.htm>, accessed on 14/04/2007.

⁵Marion C. Blakey, Speech on 'Funding the Second Century of Aviation' on 14 February, 2007.

⁶Pilot phrase of the CAPRS Project, Final Report dated June 2005, downloaded from http://ec.europa.eu/transport/air_portal/traffic_management/studies/doc/finalized/2005_caprs_final_en.pdf, accessed on 12/02/2007.

⁷AEA Consumer Report for the period between January-December 2006, downloaded from <http://www.aea.be/AEAWebsite/webrsc/SerQty/DL/CR06-Q4.pdf>, accessed on 14/07/2007.

⁸IATA Economic Briefing on the cost of EU Regulation of 7 March 2005, downloaded from <http://www.iata.org/NR/rdonlyres/4EEE1567-29E3-49F7-8A2E-20E42801CC68/0/costEUregulation.pdf>, accessed on 13/02/2007.

'Facilitation' which requires the passenger facilitation processes at airports to be designed in a manner that they cause least difficulty and delay.⁹ However, the ICAO has formulated comprehensive 'Guidance Material' for the Contracting States that supports voluntary approaches for regulation of service quality of their air carriers and encourages them to publish manuals and booklets informing the air transport users of their rights and obligations.¹⁰

International Air Transport Association (IATA) has prescribed remedial measures for passengers who encounter delays and cancellations on the flights operated by their member airlines. The Recommended Practice 1724 of the IATA Passenger Services Conference Resolutions Manual recommends its member airlines *"to take all necessary measures to avoid delays in carrying the passenger(s) and his/their baggage, failing which, for reasons not under their control, if delays or cancellations occur, the member airlines are required to carry the passenger on another of its scheduled services or provide refunds or re-route the passenger to the destination by its own carrier or another carrier or by the surface transportation."*¹¹ Although the manual rules appear to be only of a recommendatory nature, they are diligently followed by the IATA members, providing 94 percent of scheduled air services worldwide.

In the US, no federal law addresses delay and cancellation of domestic flights. The Airline Deregulation Act of 1978 (ADA) is said *"to pre-empt the application of any state consumer protection law or any law, regulation or provision that is said to have an effect on the price, route or service of an air carrier."*¹² The Supreme Court's ruling in *Morales vs. Trans World Airlines Inc.*,¹³ had previously upheld the above view and required the phrase *"effect on price, route or service"* to be given broad interpretation.¹⁴ Thus the state courts are pre-empted from taking action against complaints of delay and cancellations. However, most of the international carriers that fly to or from the US are obliged to compensate the passengers in case of delay according to provisions of the Warsaw (W29) or Montreal Convention (M99).¹⁵

⁹Chapter 2 on Entry and Departure of Aircraft, Annex 9 on 'Facilitation' to the Chicago Convention of 1944 at pp 2-1.

¹⁰Economic Policy Section, Consumer Interest, downloaded from http://www.icao.int/cgi/goto_m_atb.pl?icao/en/atb/ecp/ConsumerInterests.htm, accessed on 12/01/2007.

¹¹Article 10 on Schedules and Cancellation of Flights, Recommended Practice 1724, IATA Passenger Services Conference Resolutions Manual, 23rd Edition, Montreal at pp 899.

¹²Attorney General Salazar urges United Airlines to heed to consumer protection obligations, downloaded from http://www.ago.state.co.us/press_detail.cfm?pressID=567, accessed on 12/10/2007.

¹³*Morales V. Trans world Airlines* 504 U.S. 374 (1992)

¹⁴Paul S. Dempsey and Laurence E. Gesell, Chapter 6 on 'Air Carrier Regulation', *Air Commerce and the Law*, US (2004) at pp 241

¹⁵Article 19 of the Warsaw Convention (W29) provides that "the carrier is liable for damage occasioned by delay in carriage by air of passengers, baggage and cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could be reasonably required to be taken to

The compensation for delays and cancellations of domestic flights in the US are dependent on the voluntary initiatives of the airlines, popularly known as 'Airline Customer Service Plans'. The Aviation Consumer Protection Division of the US Department of Transportation (DOT) lists many such airline voluntary commitments. The members of the Air Transport Association of America (ATA) have agreed on a '12 point Customer Service Commitment' in consort with the Congress and the US Department of Transport (DOT)¹⁶, to provide the following remedy in case of delays and cancellations to stranded passengers:

*"The airlines will make every reasonable effort to provide food, water, restroom facilities and access to medical treatment for passengers aboard an aircraft that is on the ground for an extended period of time without access to the terminal, consistent with passenger and employee safety and security concerns. Each carrier will prepare contingency plans to address such circumstances and will work with other carriers and the airport to share facilities and make gates available in an emergency."*¹⁷

The important network airlines such as American Airlines¹⁸, United Airlines¹⁹, and Northwest Airlines²⁰ have, through an internal policy or a special consumer plan, or inclusion by way of a clause in their present Contract of Carriage, agreed to compensate passengers whose flights are delayed or cancelled. However, the compensation provided by the airlines is largely discretionary and non-uniform in nature. A few low-fare airlines may not provide any amenities to the stranded passengers at all, while some may only offer amenities if, for example, the delay is caused due to bad weather or circumstances beyond the airline's control. The voluntary initiative called the 'Bill

avoid the damage or that it was impossible for it or them to take such measures." And Article 19 of Montreal Convention 1999 "the carrier is liable for damage occasioned by delay in the carriage of air passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage 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 or that it was impossible for it or them to take such measures."

¹⁶Are airlines improving customer service?, downloaded from <http://www.usatoday.com/money/perfi/columnist/lamb/0013.htm>, accessed on 14/02/2007.

¹⁷First 12 Point Customer Service Commitment, downloaded from http://www.airlines.org/customerService/passengers/Customers_First.htm, dated 12/01/2007.

¹⁸Customer Service Plan, effective from December 15, 1999, provides strategies for dealing with delay, cancellations and diversion events, downloaded from <http://www.aa.com/content/customerService/customerCommitment/CustomerServicePlan.html>, accessed on 12/01/2007.

¹⁹Remedies for dealing with delay and cancellations available on the 'Contract of Carriage' of the United Airlines, downloaded from <http://www.united.com/ual/asset/COC15JAN07.pdf>, accessed on 12/01/2007.

²⁰Remedies for dealing with delay, cancellations available on the 'Customer Service Plan' of the North West Airlines, downloaded from <http://www.nwa.com/plan/comm2.html>, accessed on 12/01/2007.

of Rights',²¹ touted to be the strictest of its kind in the industry, was introduced by JetBlue Airlines, a low cost carrier in the US, to protect passengers against delays and cancellations.

The European Union has adopted a very serious approach towards delays and cancellations, as they realized that air passengers are in a weak position to defend themselves against the air carriers. Governmental intervention is currently forced to protect the rights of air passengers because otherwise, especially in the case of delay and cancellation, passengers would be required to rely on the goodwill of the carrier to continue their journey or return home. This would place passengers in a vulnerable position, especially when stranded far from home.²²

The European Commission (EC) Regulation No. 261/2004²³ establishes common rules for compensation and assistance to passengers in the event of cancellation or long delay of flights. The new regulations are revolutionary since they cover both scheduled as well as non-scheduled air services. They also cover the air carriers that operate from a third country²⁴ into the Community, provided that the Community air carriers are given reciprocal treatment (compensation and remedies) in the third country.

Article 6 of the Regulation stipulates conferral of 'certain kind of benefits' on a passenger in case of delay by a 'specified number of hours'. The article entitles passengers stranded due to long delays to the following:

- meals and refreshments²⁵, and
- hotel accommodation²⁶, when a delay obliges a passenger to stay overnight, and
- right of transport²⁷ between the airport terminal and place of stay,
- free of charge telephone calls,²⁸
- right of reimbursement and re-routing²⁹, when a passenger is delayed for at least five hours.

²¹The airline introduced a charter called 'Bills of Rights' on the 20 February, 2007 to win back the customers angered by the airline's delays and cancellations. In its Bill of Rights, JetBlue promised to "compensate the passengers a full refund, a credit or a voucher, for cancellations of flights within 12 hours of its scheduled departure because of problems within its control. If the airline delays a flight in a situation within its control, passengers would receive vouchers ranging from \$25 to the full amount of a round-trip ticket, depending on the length of the delay.

²²Information for Passengers, downloaded from http://ec.europa.eu/transport/air_portal/passenger_rights/information_en.htm, accessed on 13/01/2007.

²³It repealed the Regulation (EEC) No. 295/91 that entered into force on 17 February 2005

²⁴Article 3(1)(b) of Regulation 261/2004

²⁵Article 9(1)(a) of Regulation 261/2004

²⁶Article 9(1)(b) of Regulation 261/2004

²⁷Article 9(1)(c) of Regulation 261/2004

²⁸Article 9(2) of Regulation 261/2004

The validity of the Regulation 261/2004 was challenged by the International Air Transport Association (IATA), the European Low Fares Airline Association (ELFAA) and Hapag-Lloyd Express, at the High Court of Justice of England and Wales. The validity of these regulations was challenged on the following grounds:

- The compensations for ‘Delay’, ‘Cancellation’ and ‘Denied Boarding’ are contrary to Article 17-37 of Montreal Convention 1999 to which some European States are signatories and its purpose of ‘unification of the compensatory regimes’ prescribing liability limits. The regulation has also been criticized often, since it requires carriers to compensate passengers for delay occurring for reasons not under their control such as air traffic delays or snowstorms. This gives rise to a temptation among the airlines to fly despite the existence of foreseeable dangers to its safety. The regulations are perceived in the industry to be creating perverse incentives for airlines to fly regardless of safety issues.
- Disproportionate sanctions contradict the ‘Proportionality Principles’ of the European Community laws, thereby indicating that the sanctions do not match the purpose of the Regulations.
- Discrimination against other modes of transport: the measures prescribed in the articles of the Regulation impose the same obligations on all air carriers, without distinction, on the basis of their pricing policies and the services that they offer. Furthermore, the Community law does not impose the same obligations on other means of transport such as rail and surface transport.

On 10 January, 2006, the European Court of Justice (ECJ) upheld the validity of the Regulations. As noted above, an often-stated concern regarding the Regulation that requires compensation for air passengers for delays and cancellations by airlines that fly despite adverse weather and mechanical problems overlooking passenger safety. Professor Paul Dempsey, Robert Hardaway and William E. Thoms in their book ‘Aviation Law and Regulation’ state the following:

²⁹Article 8(1)(a) of Regulation 261/2004

“Such a regulation would put an airline under undue pressure to fly despite mechanical problems and adverse weather conditions to avoid penalty.”³⁰

On the other hand, the voluntary approach towards regulation adopted by the US is also viewed as consumer unfriendly and lacking in diligence.³¹ The US system is one where the carriers have the discretion to choose to bind themselves through their contract of carriage with a clause to provide passengers compensation on a monetary as well as non-monetary basis. Nevertheless, airlines that voluntarily make a commitment to compensate airline passengers for delay and cancellations are rewarded by consumer loyalty. The ICAO Fifth Worldwide Air Transport Conference of March 2006 asked the Contracting States to treat regulatory and voluntary commitment approaches as beneficial. Each Contracting State was then asked to examine and segregate the elements of consumer interest in service quality and allocate them accordingly within either of the approaches. States should initially rely on voluntary commitments by airlines and service providers, and when voluntary commitments were not sufficient, States were asked to consider regulatory measures.

In Canada, a booklet called ‘Fly Smart’, published by the Canadian Transportation Agency (CTA), offers guidance and advice to passengers who have experienced flight delay and cancellation. The booklet advises these passengers to lodge their complaint with the air carrier in the first instance and, if they are not satisfied with the carrier’s response, they should lodge their complaint with the ‘Canadian Transportation Agency’ (CTA). The Agency initially enters into an informal mechanism of dispute resolution through dialogue with the air carrier. The CTA then attempts to persuade the airline to settle with the passenger in accordance with the ‘Terms and Conditions’ of carriage. This informal mode of dispute settlement³² has a high success rate. However, should the dialogue fail or if the passenger is dissatisfied with the outcome, the CTA can then be asked to initiate a formal dispute settlement process, which is of a quasi-judicial nature. The outcome of the formal process would lead to a decision which is binding for both parties.

In June 2000, the post of Air Travel Complaints Commissioner was created to review complaints and initiate a mediation process between passengers with a complaint and the airline, as per Bill

³⁰ Paul Dempsey, Robert Hardaway and William Thoms, Consumer Protection, Chapter 4, ‘Air Law and Regulation’, Volume 1, Issue 0 at pp 4-9

³¹ Ibid Note 30

³² Fly Smart, downloaded from http://www.cta-otc.gc.ca/air-aerien/flysmart/flysmart_e.pdf, accessed on 14/01/2007.

C-26. The Commissioner was also responsible for producing a semi-annual report which detailed the nature and number of air travel complaints. Subsequently, the office of the Commissioner was removed in the year 2005 due to budgetary constraints; the responsibilities formerly discharged by the Commissioner are now discharged by the Canadian Transportation Agency.³³

Denied Boarding and Overbooking

Some passengers are denied boarding despite their on-time arrival at the airport for flights on which they have a confirmed booking. Airlines overbook their flights as a standard business practice, anticipating some last minute cancellations. It is a practice common to all airlines. Mr. Leo van Wijk, the President and Chief Executive Officer of KLM Royal Dutch Airlines, states in his address at the launch of the European Airline Passenger Service Commitment, that:

“‘Denied Boarding’ is an emotive issue. And let me make myself clear, as airlines, we do not try to downplay the issue, but ‘denied boarding’ is a consequence of the flexibility the airline wishes to offer its valued customers and which is highly appreciated by them. While airlines wish to make money on the one hand and offer its customers attractive products at attractive prices on the other hand, denied boarding is the inevitable byproduct of only a very limited number of flights affecting well below 1 percent of all passengers.”³⁴

Denied boarding happens for various reasons. These range from those passengers who fear being denied boarding or who are unsure of their travel plans making multiple reservations and then not showing up on the appointed day, to those who honor one reservation without canceling the others.³⁵ Air travel being a ‘perishable product’³⁶, once an aircraft takes off; nothing can be done to make up for losses resulting from empty seats.

In the past, airlines have tried to tackle the problem of ‘no shows’ by including ticketing time limits, re-confirmation requirements, and imposition of service charges. However, as Barbara

³³Air Travel Complaints Report, January-June 2006, downloaded from <http://www.transport2000.ca/>, accessed on 13/01/2007.

³⁴Address of Leo van Wijk at Association of European Airlines on 14 February, 2002 at the launch of the European Airline Passenger Service Commitment, downloaded from http://www.aea.be/dbnetgrid2/htmleditor/UploadFiles/APSC_leovw.pdf, accessed on 13/02/2007.

³⁵Barbara Reukeena, Chapter 2 on Overbooking, ‘Discriminatory Refusal of carriage in North America’, The Netherlands (1982) at pp21.

³⁶Supra Note 14 at pp 241.

Reukeena claims, *"although these schemes have reduced the number of no shows, they fostered the growth of customer ill will to such an extent that they were abandoned in favor of current flexible system which leaves airline customers the maximum freedom in making, changing and honoring of airline reservations, and also allows them to recover their full value if the reservation is not used."*³⁷ Statistically, however, it was found that *"before the airlines adopted the ticketing restrictions, an airline typically lost 20 percent of passengers due to the problem of no-shows but 'the average no-show rates' have dropped to 10-15 percent with more fare penalties and better efforts by airlines to firm-up bookings."*³⁸ The statistics published by the US Department of Transportation (DOT) reveal that in the period between October to December 2006, there were 140,947 cases of voluntary and 12,238 cases of involuntary bumping due to overselling by the airline.³⁹ In the EU, denied boarding, delays and cancellations are said to have cost the European airline industry approximately 600 million EUR (period not specified).⁴⁰

Regulatory Safeguards against Denied Boarding and Overbooking

The International Civil Aviation Organization (ICAO), the primary international multilateral aviation organization, has developed guidance material for the Contracting States regarding regulation of denied boarding, which requires them to inform the air passengers and shippers of their rights and obligations.

In 2000, the International Air Transport Association (IATA) laid down a global framework for the airlines, asking them to develop their own service commitments and compensation plans for 'Denied Boarding' and 'Overbooking' which needs to be in tandem with the requirements of

³⁷Supra Note 35

³⁸Dr. Peter Belobaba, 'Flight Overbooking: Models and Practice', downloaded from <http://ocw.mit.edu/NR/rdonlyres/Aeronautics-and-Astronautics/16-75JSpring-2006/E2A09BF6-E275-431B-9C07-2C98BEA50541/0/lect19.pdf>, accessed on 18/07/2007.

³⁹US DOT Air Consumer Report of March 2007, downloaded from <http://airconsumer.ost.dot.gov/reports/2007/March/200703atcr.pdf>, accessed on 22/04/2007. (As per the Rule 14 CFR 250.10, the airlines have been required to furnish a quarterly report of their figures on the number of passengers 'bumped' from their flights. The Report thereby covers all instances of bumping from scheduled passenger domestic flights and international flight segments that originate in the United States. In many countries, distinction has been made between 'voluntary' as well as 'involuntary' bumping or denied boarding. The former refers to passengers who offer to give back their reservations to the airline voluntarily, and the latter refers to passengers who are bumped involuntarily after being given a written statement describing their rights and detailed explanation of the 'Denied Boarding' Policy of the Government. The airlines were asked by the DOT to report on passengers denied confirmed space in the Form 251 by a DOT letter dated 19 November 1996, sometimes referred to also as the "Bumping Report."³⁹ The form is required to be filed by both U.S. and foreign airlines, submitted to the Department of Transportation (DOT), on information pertaining to airline oversales. This information is then compiled and published in the *Air Travel Consumer Report* to assist the public.³⁹ In 2006, the reporting instructions and requirements of Form 251 were revised and the changes communicated to the airlines through a DOT letter dated 21 April 2006).

⁴⁰Speech of Bisganni Giovanni, 'We Can Do Better', at European Aviation Club, dated 16th March 2005, downloaded from <http://www.iata.org/pressroom/speeches/2005-03-16-01.htm>, accessed on 15/01/06.

government imposed regulations and legislations.⁴¹ This information should be provided upon request to the passenger.⁴² In the case of denied boarding due to circumstances not under the control of the carrier, the provisions of the IATA Recommended Practice (RP) 1724 require arrangements for alternative transportation to be made on its own carrier or by another carrier, or to refund these passengers. The IATA Recommended Practice 1799⁴³ established a set of practices to be followed by the member airlines wishing to set up their compensation schemes. These rules entitle a bumped passenger to be given facilities such as free telephone calls, meals and refreshments. The airline members (except the US carriers) are required to issue a 'Notice of Overbooking'. This comprises the contents mentioned in IATA Resolution 724a -- Passenger Ticket - Notice of Overbooking of Flights⁴⁴ for passengers with confirmed reservations (resolution not applicable to USA). It informs them of airlines 'denied boarding' compensation schemes and makes them available at airline offices.

In the United States, overbooking and consequent bumping is perceived as a matter of general business practice that is required to offset the heavy costs of operating an airline as well as mounting fuel prices.⁴⁵ Denied boarding and bumping of passengers should take place as per the well established rules or policies of the airline, otherwise it would be considered illegal and arbitrary. In the past, the Civil Aeronautics Board (CAB) disseminated the 'Boarding Priority Rules' with the intention of preventing unlawful discrimination, and also of determining the priorities among ticket holders as to who could be prevented from boarding. These rules were developed when a method for ascertaining which passengers board first was being established. Thus, the carrier was required to establish and maintain their own priority boarding rules.⁴⁶ These rules have now changed, and most functions formally performed by the CAB are now discharged by the Department of Transportation (DOT).⁴⁷

Rule 14 CFR Part 250 applies to all flights engaged in domestic and international travel in the US. Carriers are required to deny boarding to the smallest number of people holding a reserved

⁴¹IATA Global Customer Framework, downloaded from http://www.iata.org/NR/ContentConnector/CS2000/Interface/sites/mgr/file/GLOBAL_CUSTOMER_FRAMEWORK2.pdf, accessed on 12/01/2007.

⁴²Ibid Note 41.

⁴³Recommended Practice 1799 on Denied Boarding Compensation, IATA Passenger Services Conference Resolutions Manual, 23rd Edition, June 2003 at Pg 1234.

⁴⁴Resolution 724a on Passenger Ticket-Notice of Overbooking of Flights (Except US/US territories), Passenger Services Conference Resolutions Manual, 23rd Edition, June 2003 at pp 368.

⁴⁵Supra Note 35 at pp 21.

⁴⁶ Ibid Note 45

⁴⁷Supra Note 14 at Pg 238 (Transfer of functions happened, when an estimated 209 functions initially discharged by the CAB, were later transferred to the DOT, out of which seven of them were direct consumer protection measures, which included the 14 CFR Part 250 that dealt with 'Over sales'.)

space. Initially, carriers must bump passengers on a voluntary basis, in exchange for compensation.⁴⁸ In the case where an insufficient number of them volunteer, the carrier can proceed with involuntary bumping of people for compensation pursuant to the 'Boarding Priority Rules' established by the airlines. These Rules should not make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust or unreasonable prejudice or disadvantage in any respect whatsoever.⁴⁹ The carrier is expected to provide an involuntarily bumped passenger with a written statement of the terms, conditions, limitations of denied boarding compensation, and description of the carriers' boarding priority rules and criteria.⁵⁰

The Department of Transportation (DOT) Rules⁵¹ require airlines to provide substitute transportation or compensation or other mutually negotiated benefits like free coupons for meals, free phone calls and hotel accommodation while passengers wait for their next flight. However, in the case of involuntary bumping, passengers must be provided with an 'on-the-spot denied boarding compensation'. The amounts of compensation may vary depending on how much delay the bumped passengers are likely to experience when carried by alternate transportation arranged by the airline⁵²

There are forums available for resolution of disputes concerning 'Denied Boarding' and 'Overbooking'. The passengers with grievances can perhaps take the issue up with the airline, and on failing to find a satisfactory response, can direct their grievances to the Aviation Consumer Protection Division of the DOT. Normally, airline has officers designated as Customer Service Representatives at airports who issue compensation checks, meal coupons and hotel rooms for stranded passengers. A passenger can initially expect to resolve his or her issue with this officer, failing which he can approach the Consumer's Office located at the corporate office of the airline.

⁴⁸Title 14CFR 250.2 (a) and (b)

⁴⁹Title 14 CFR 250.3

⁵⁰Title 14 CFR 250.9

⁵¹Fly Rights—A consumer guide to Air Travel, downloaded from <http://airconsumer.ost.dot.gov/Publications/flyrights.htm>, accessed on 12/01/2007.

⁵²If the airline arranges substitute transportation that is scheduled to arrive at the destination between one and two hours after the original arrival time (between one and four hours on international flights), the airline must pay an amount equal to one-way fare to the final destination, with a \$200 maximum. If the substitute transportation is scheduled to get to the destination more than two hours later (four hours internationally), or if the airline does not make any substitute travel arrangements, the compensation doubles (200% of the fare, \$400 maximum).

In the European Union, Regulation 261/2004 provides remedies for the cases of passenger inconvenience resulting from 'Denied Boarding' and 'Overbooking'. Article 4 of the EC Regulation deals with such cases. It requires the carrier to either reimburse or re-route passengers who are voluntary bumped. In the case of involuntary bumping, passenger(s) is(are) entitled to an additional compensation package as prescribed by Article 7, and the right to reimbursement, re-routing and benefits promised in Article 8 and 9 of the EC Regulation 261/2004.

The European legislative and legal institutions have played a very proactive role in creating strong consumer protection regimes. Article 153⁵³ of the EC Treaty is a comprehensive consumer protection provision that provides the European Council (EC) with sweeping powers to adopt measures for protecting the health, safety and economic interests of consumers, as well as promoting their rights to information, education and the right to organize themselves in order to safeguard their interests. Article 80(2)⁵⁴ of the EC Treaty also provides the European Council with the necessary powers to extend appropriate provisions of the treaty to rail and air transport. Thereby, Article 80(2) and Article 153 concomitantly provide the European Council with the power to strengthen consumer protection measures for air transport users.

In Canada, those customers denied boarding due to overbooked flights must be compensated by the carriers. Any dispute with respect to the amount of compensation or benefits offered to these passengers may be taken up with the carrier and, if the response is found unsatisfactory, the matter can then be taken up with the Canadian Transportation Agency (CTA).

⁵³Article 153(1) In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests. 2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities. 3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:

- (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;
- (b) measures which support, supplement and monitor the policy pursued by the Member States.

4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b). 5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

⁵⁴Article 80(1) The provisions of this title shall apply to transport by rail, road and inland waterway. (2). The Council may, acting by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport. The procedural provisions of Article 71 shall apply.

There are other reasons for denying boarding to passengers such as security, critical ill health, and those who are unruly. But the airline would not provide compensation, benefits and refund to passengers who are denied boarding for these reasons. The airline may choose, however, to proceed according to its policy or discretion in such cases.

Fares, Misleading Advertising and Airline Misrepresentations

The average air transport user is likely to have experienced dissatisfaction in relation to the impact of airfare advertising on his or her purchasing decision. Many passengers have complained of the differences that exist between the advertised rates of tickets and the price at which they are finally sold. Other categories of complaints about airline advertisements are that they are unfair and offensive.⁵⁵ The United States Department of Transportation (DOT) website has created a separate category of complaints on 'Fares' and 'Airline Advertising'. The former covers complaints regarding 'incorrect or incomplete information about fares, discount fare conditions and availability, overcharges, fare increases and level of fares in general',⁵⁶ while the latter entails complaints regarding 'advertisements that are unfair, misleading or offensive to consumers'.⁵⁷

Regulatory Safeguards against Fares, Misleading Advertising and Airline Misrepresentations

A significant number of states have developed regulatory measures addressing the issues of misleading advertising. Some states have also required their airlines to make provisions to deal with the problem relating to internal tariffs.⁵⁸ The ICAO has prepared guidance material on airline fare guarantees.

Historically, the International Air Transport Association (IATA) has had a strong presence in the area of establishing international fares, rates, charges and applicable conditions. At the Chicago Conference on International Civil Aviation in 1944, it was agreed that the complex task of negotiating detailed agreements on international fares and rates should be delegated to the IATA Traffic Conferences. The first IATA Annual General Meeting, held at Montreal in December 1945, adopted detailed Provisions for the Regulation and Conduct of the IATA Traffic

⁵⁵ As per the complaints reported on the US DOT website.

⁵⁶ Air Travel Consumer Report, December 2006 edition, downloaded from <http://airconsumer.ost.dot.gov/reports/2006/December/0612atcr.pdf>, accessed on 12/01/2006.

⁵⁷ Ibid Note 56

⁵⁸ Supra Note 10

Conferences, which, having received all necessary approvals from governments, constituted the charter and constitution of the IATA Traffic Conferences.

The first worldwide IATA Traffic Conferences were held in Rio de Janeiro, Brazil, from 30 September through 16 October 1947, which adopted some 400 Resolutions covering fares, rates, charges and applicable conditions by unanimous consent of airlines concerned and the Resolution became effective after approval by interested governments. This transformed the individual routes of IATA Member airlines into a fully integrated and standardized international air transport system. In the years that followed, the IATA Traffic Conferences developed into very effective and unique machinery for the establishment of international fares and rates, through a large number of voluntary agreements, reconciling the widely divergent commercial interests of competing airlines. For thirty years, the agreements reached through the IATA Traffic Conferences represented the best practicable accommodation possible between the needs and proposals of the airlines on the one hand, and the interests, theories of regulations and expressed desires of governments on the other hand.⁵⁹

In November 1978, the U.S. Congress passed the Airline Deregulation Act with the main objective that the marketplace should determine the airlines' business decisions in the future. This meant that the U.S. Government's role in the new regulatory environment would be to protect the competitive process, not individual competitors. As a result, fundamental changes had to be made in the machinery of establishing international fares and rates through the IATA Traffic Conferences. The name was changed to IATA Tariff Coordinating Conferences that reflected their new authority, status and modus operandi. In the past, any IATA Member airline operating international services was automatically a participating airline in fares and rates agreements of the appropriate IATA Traffic Conferences but this became optional for the Tariff Coordinating Conferences.⁶⁰

One of the commitments incorporated in the 12 Point Customer Service Commitment of Air Transport Association of America is that each airline should offer the lowest fare available to each customer on the airline's telephone reservation system.⁶¹

⁵⁹ Adrianus D. Groenewege, from the unreleased Fourth Edition of the Compendium of the International Civil Aviation, Canada

⁶⁰ Ibid Note 59

⁶¹ Supra Note 17

In the United States, domestic air fares are subject to less interference from the government due to deregulation of the air transport sector by the Airline Deregulation Act (ADA) of 1978.⁶² Author Andrew J. Roman states that “‘Deregulation’ is a not a complete ‘hands-off’ approach of the government regulators, thereby he wishes to call deregulation, a policy of re-regulation where government regulators still get to choose some areas that could be regulated by them.”⁶³ “It is the marketplace, instead of government regulators that gets to decide how much of the service is to be offered, where and at what price.”⁶⁴ Thereby, airline fare fluctuations are often viewed to be the consequence of the deregulation of the airline sector, the latter thus being identified as highly unpopular with US air passengers. On the other hand, the international fares in the US are regulated very differently.

The DOT Office of Aviation Analysis produces a Quarterly Report called the Domestic Airlines Fare Consumer Report⁶⁵ that offers consumers the opportunity to make average fare comparisons: As per the report, the industry experienced a 10 percent fare climb over the same period in the previous year. Business fares climbed by 18 percent and leisure fares climbed up by 9 percent.⁶⁶ In the ‘Fly Rights’ manual published by the DOT, the passenger’s right to choose from a wide range of fares has been recognized.⁶⁷ Furthermore, the DOT has also provided the passengers with tips on fare shopping.

As regards tackling misleading advertising, the DOT follows the full disclosure principle of fare advertising. Section 399.84⁶⁸ of the Department’s regulations requires any advertisement or solicitation for air transportation that states a price for such air transportation to cite the entire

⁶²Domestic Pricing, Office of assistant secretary for Aviation and International Affairs, downloaded from <http://ostpxweb.dot.gov/aviation/domesticaffairs.htm>, accessed on 17/04/2007

⁶³Andrew J. Roman, ‘Electricity Deregulation in Canada: An Idea that is yet to be tried’, 40 Atlanta Law Review (1999) at pp 99.

⁶⁴Dominic L. Daher, ‘The proposed federal taxation of the frequent flier miles received from employers: A good Tax Policy or Bad politics’, 16 Akron Tax J. 3 2001

⁶⁵Domestic Airlines Fare Consumer Report, Second Quarter 2006 Passenger and Fare Information, December 2006, downloaded from <http://ostpxweb.dot.gov/aviation/domfares/web062.pdf>, accessed 13/01/2007 (As per the report ‘the averages tend to fluctuate due to a wide range of fares offered in the US domestic fare market. A high average fare in a market ‘is an indication that a broad range of fares are available and that the number of seats sold at low fares are likely to be both very limited and subject to various travel restrictions, and a low fare average points to trends that are contrary to the above. The Report provides the customer with insights over the comparative fare averages of different carriers serving the same routes, carriers offering different services (Non-Stop vs. One Stop services), fares sold over internet, different market (Long Haul vs. Short Haul markets).’)

⁶⁶US air fares reach a record high, downloaded from <http://www.travelmole.com/stories/110073.php?mpnlog=1>, accessed on 13/01/2007.

⁶⁷Supra Note 51

⁶⁸Title14 CFR 399.84

price to be paid.⁶⁹ Carriers have been permitted to separately state, the government-imposed and approved per-passenger taxes and fees, such as customs fees and departure taxes. However, their existence and amount need to be clearly indicated in the advertisement.⁷⁰ This helps the customer to calculate the actual fare or the range of fares.

While marketing the fares on the internet,⁷¹ the DOT has asked airlines to follow the same rules that need to be followed while advertising fares over print and broadcasting media. The advertisements which do not comply with this full disclosure policy violate both section 41712 of Title 49 and section 399.84 of the Department's regulations. Enforcement action would be pursued against such advertisements, leading to the pronouncement of a consent order against the carrier for such violations. In 2006, the DOT introduced an NPRM⁷² seeking to amend its advertising rule created in 1984, for which four options were considered as plausible replacements of the 'full disclosure' rule, which are as follows⁷³:

“Maintain the current practice either with or without codifying all of its elements in the rule; or end the exception for government-imposed charges and enforce the rule as written; or revise the rule to eliminate most or all requirements for airfare advertisements but require that consumers be apprised of the total

⁶⁹DOT Letter dated 1 May 1992, downloaded from <http://airconsumer.ost.dot.gov/rules/19920501.htm>, accessed on 12/01/2007.

⁷⁰ Ibid Note 68. (In another letter from DOT dated 20 December 1994, to airlines, it set out the norms for other kinds of advertising malpractices by the air carriers such as promotional advertisements offering 50% discounts on the fare, and two for one. 'In the former, the DOT required the ticket to be offered at the benchmark fare for sale in reasonable quantities for a reasonable period prior to offering the fare at current fare and the ad should clearly identify and describe the "benchmark" fare (the fare to which the advertised fare is being compared). In the case of the latter, DOT stated that the advertised fare would be considered deceptive, if 'the fare that must be purchased to take advantage of the promotion is higher than other fares of that carrier in the same market, and this fact is not prominently and clearly disclosed in advertisements for the two-for-one fare. With regard to the charges that are collected by foreign countries or by authorities other than the air carrier, section 41712 of Title 49 requires the existence of these charges to be declared and the charges that need to be collected by the foreign authority to be highlighted.)

⁷¹The Department has permitted a full explanation of taxes, fees and conditions to be provided by hyperlinks. Specifically, internet fare advertisements that quote a fare that is not a full fare or that has significant restrictions should have an explicit statement that additional charges apply immediately adjacent to the fare with a hyperlink to a full explanation. Alternatively, those advertisements should highlight the fact that additional fees, restrictions, or conditions apply to a specific fare or list of fares, including "free" fares, with an asterisk or other symbol immediately next to the fare or list of fares, together with a concise explanation for the asterisk or symbol (e.g., "taxes, fees, and restrictions apply") in reasonably close placement to the relevant fare or fares. (Please also refer to the DOT Letter on marketing of airline fares to public over the Internet, dated 18 January 2001, downloaded from <http://airconsumer.ost.dot.gov/rules/19961119.htm>, accessed on 13/01/2007.)

⁷²OST Docket No. 2004-19083, Notice of Proposed Rulemaking (NPRM) to Amend 14 *Code of Federal Regulations* 257.5(d)

⁷³OST 2005-23194 , NPRM on Price Advertising

purchase price before the purchase is made; or eliminate the full-fare advertising rule in its entirety.”⁷⁴

The majority among airlines and public did not support relaxation of the DOT’s present advertising rules. The DOT’s current advertising regulations were viewed as being not particularly stringent. Furthermore, specific provisions of the Airline Deregulation Act preclude the state consumer protection laws that could have been applicable in cases where consumers were misled by airline advertisements; these provisions prevent the enactment and enforcement of any state law(s) related to pricing.⁷⁵ The Federal Trade Commission (FTC)⁷⁶ and other state agencies were barred from regulating airline advertising strategies, which became the sole preserve of the DOT. The relaxation of fare advertising regulations would give airlines a free rein to charge passengers whatever they want. Many critics fear that some costs, such as those related to fuel, surcharges, and insurance costs would be included in the air fare without the knowledge of the passenger.

There have been other forms of rules in the past on airline fare advertising. The National Association of Attorneys General (NAAG) adopted comprehensive guidelines for marketing and advertising in the airline industry. It required normal, as well as promotional, fares advertised by the airlines to be clear, discernible, informative, and legible. However, the action to be taken for violation of these guidelines is pre-empted by the provisions of Airline Deregulation Act of 1978 (ADA) that prevent the enactment and enforcement of any state law, regulation or provision related to price, route or service of an air carrier.

In the European Union, the liberalization of the aviation sector due to the creation of the single European market in 1987 led to the creation of many benefits for air passengers. The EU Regulation 2904/92 lifted the regulatory controls on airline fare setting, except when faced with public service obligations. The Community carriers have also been given the right to fix lower

⁷⁴Supra Note 72

⁷⁵49 USC 41713 (b) (2002) that states that “Except as provided in this subsection, a state, political subdivision of a state, or political authority of at least two states may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”

⁷⁶The FTC has jurisdiction over advertisements for most products and services. Congress has given other government agencies the authority to investigate advertising by airlines, banks, insurance companies, common carriers, and companies that sell securities and commodities, downloaded from <http://www.lawpublish.com/ftc-adfaq.html>, accessed 20/01/2007.

prices than ones existing for similar products in the market.⁷⁷ The community carriers are thereby free to fix their fares and file them later with the Member States.

On 18 July 2006, the EU Commission announced a proposal for a regulation that would lead to a crackdown on advertisements that have the propensity to confuse and mislead the consumers of air transport. The proposed regulation is said to ensure that airlines publicise the full cost of tickets including fuel surcharges, taxes and processing fees, on their websites. Further, it would ban airlines from charging customers differently for online bookings in different Member States.⁷⁸ It is anticipated that this regulation will become effective in 2007.

In Canada, a complex regulatory structure exists for the regulation of airline fares and misleading advertisements. Different channels are available for the distribution of airline tickets such as the travel agents, internet and wholesalers. Each of these categories is subjected to regulatory oversight of different bodies in Canada. Travel agents and wholesalers are subjected to the regulatory controls of the provincial governments of Ontario, Quebec and British Columbia, even though the airlines are subject to federal control. In some provinces, airline advertising is subject to sector-specific legislations, and in some provinces they are subject to general consumer protection legislation.⁷⁹ A letter dated 22 February 2006, by the Economic Division of the 'Library of Canadian Parliament' published the various taxes and surcharges collected by the carrier on the tickets purchased to create clarity in Canada on behalf of the Canadian and the foreign governments.

There are no federal laws that directly offer help in dealing with the problem of deceptive or misleading airline advertisements, but the federal Competition Act provisions such as 'Sections 52 (false or misleading representations - knowingly or recklessly), 74.01 (false or misleading misrepresentations to the public), 74.04 (representations as to "bargain price") and 74.05 (sale above advertised price)'⁸⁰ can be applied to the problem of misleading advertising. The Canadian Customer Handbook of 2006, published by the Canadian Office of Consumer Affairs, has given consumers the option of either complaining to the Advertising Standards Canada, a non-governmental body composed of advertisers, representatives from advertising agencies, the

⁷⁷The internal aviation market: economic regulation, downloaded from http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/doc/2006_09_13_eu_aus_seminar/eu_aus_internal_relation_en.pdf, accessed on 13/01/2007.

⁷⁸EACA Monthly Newsletter of July, 2006, downloaded from www.vea.nl/site/content/files/eaca-monthly-newsletter-july-2006.doc, accessed on 20/01/2007.

⁷⁹Options for greater transparency in airfare advertising, downloaded from <http://cmcweb.ca/epic/site/cmc-cmc.nsf/en/fe00083e.html>, accessed on 14/07/2007.

⁸⁰Ibid Note 78

media, and consumers, or of approaching the Canadian Competition Bureau with their complaints.⁸¹

Contracts of Carriage

An airline is expected to give notice of the terms and conditions for carriage to its passengers. A ticket usually lists these terms and conditions through reference to them. They mostly include binding provisions on such issues as liability limitation, terms of claims, reservation rules, restrictions, refusal of carriage, and free baggage allowance. In the US, the Federal Aviation Act requires airlines with a seating capacity of 60 seats⁸² to file a copy of their tariffs with the federal government and to make them available to the public. However, post-deregulation, such a requirement has been abandoned as the US DOT stopped regulating airline tariffs and acting as a guardian of public interest. Yet, recognizing the potential for abuse by airlines if a hands-free approach is adopted, the courts have come to the aid of passengers by upholding the common law principles of contract⁸³ and not limiting the duties of the stronger party.⁸⁴

In the European Union, the airline usually bases their terms and conditions of carriage on the IATA Resolution 724 on 'Notice of Conditions of Carriage' and Recommended Practice 1724 on 'the General Conditions of Carriage' of the IATA Passenger Services Conference Resolutions Manual. This helps the EU to ensure that there are no unfair terms in the contract, but still there is no guarantee of high-level protection for passengers. To improve the airline services offered to the passengers and in order to strengthen the level protection offered to them, the European Commission adopted a legislative approach to a proposal regarding airline contracts with the passengers on 21 June 2000, and later on 10 May 2001. The EU and ECAC have also adopted a framework dialogue to improve the airline's services to passengers in the form of certain voluntary commitments. These voluntary commitments take care of most of the operational and commercial conditions of contract such as lowest fare, notifying passengers of delays/cancellations, baggage delivery, assistance of passengers during delay, refunds, and measures for speeding up check-ins.

Miscellaneous Consumer Issues

⁸¹Consumer Tips-Misleading Advertising, downloaded from <http://consumer.ic.gc.ca/epic/site/oca-bc.nsf/en/ca01497e.html>, accessed on 18/01/2007.

⁸²Section 403 of the Federal Aviation Act 1958 (Also see supra note 35)

⁸³Supra Note 14 at Pg 252

⁸⁴Ibid Note 82

Other issues that have a bearing on airline consumers are the computer reservation systems, airline code sharing and consumer credit protection.

The Computer Reservation System (CRS) has a significant influence on the decisions of the air travel buyers. In its earliest stages, the CRS was owned by the airlines thus presenting them with an opportunity to abuse technology by selling their tickets through the creation of a 'screen position bias'. Apart from being uncompetitive practice in its nature, this practice inhibited consumer choice. This situation resulted in the establishment of CRS regulations in 1984 that were re-issued in 1992.⁸⁵ The Regulations aimed at addressing any evidence of bias by prohibiting the discrimination of booking data for a fee shared with participants and non-participants, and by prohibiting undue contractual terms with travel agents. The Regulations of 1992 expired in 2004 and were amended on 31 January 2004 for codification in Title 14 CFR, part 255. Most of the previous provisions, with the exception(s) of those regarding the prohibition of display bias, and those foreclosing certain undue contract clauses of the airlines that would allow their market power to prevail, were eliminated.⁸⁶ Recently, the DOT on 20 February 2006, also eliminated its restrictions pertaining to the Code Sharing arrangements that required that those airlines owning, controlling and operating these systems to deny access *"to two or more carriers whose flights share a single designator code and discriminate against any carrier because it uses the same designator code as another carrier."*⁸⁷ In the European Union, the EU Regulation (EEC) 2299/89⁸⁸ requires the owners of CRS to allow equal and non-discriminatory access: carriers are required to communicate with equal care timeless information to all CRS users requesting information on fares and schedules.⁸⁹ In Canada, the CRS Regulations have been in operation since 6 June 1995, but these regulations are expected to be amended to soften the regulatory aspect of CRS. This acknowledges the change in technology involved in the distribution of airline tickets that has led to the emergence of many alternative channels for the distribution of airline tickets, which are slowly starting to become popular.⁹⁰

⁸⁵Internet Travel Industry, downloaded from <http://www.consumerwebwatch.org/dynamic/travel-report-internet-travel-industry.cfm>, accessed on 13/01/2007.

⁸⁶Final rules on CRS, DOT 14 CFR Part 255, downloaded [http://www.dot.gov/affairs/Computer% 20Reservations% 20System.htm](http://www.dot.gov/affairs/Computer%20Reservations%20System.htm), accessed on 16/01/2007.

⁸⁷Airline News- North America, Air guide of 27 June 2006.

⁸⁸As amended by the amending Council Regulation (EEC) No 3089/93 of 29 October 1993 and Council Regulation (EC) No 323/1999 of 8 February 1999,

⁸⁹European Union Fact Sheet, Downloaded http://www.europarl.europa.eu/facts/4_10_2_en.htm, accessed 18/01/2007

⁹⁰Regulations amending CRS Regulations, Vol. 137, No. 43—October 25, 2003, downloaded from <http://canada.gazette.gc.ca/part1/2003/20031025/html/regle15-e.html>, accessed on 10/01/2007.

Code Sharing is the practice of labeling an aircraft operated by another carrier as one's own, creating bias through multiple listing on the screen display of reservation systems. Apart from having a detrimental effect on open competition, code sharing conceals the identity of the carriers from the consumers who are then forced to travel with carriers they may never have intended to fly with due to poor safety and quality records. In 1985, the DOT required U.S. carriers to provide consumers with reasonable notice regarding the existence of a code-share arrangement as per 50 FR 38508, to enable them to make informed decision(s): *"The Department further strengthened its consumer notification rules and policies to ensure that consumers have pertinent information about the airline code-sharing arrangements and long-term wet leases in domestic and international air transportation through the adoption of 14 CFR part 257 on 15 March 1999."*⁹¹ In the EU, the Regulation 2111/2005/EC established a Community list of air carriers who were subject to an operating ban within the Community, aimed at informing air passengers of the identity of the operating air carriers.

There are a plethora of laws in the US and the EU governing the area of consumer credit protection. The primary aim of this legislation is to induce fairness in the transactions between the air carriers entering into credit transactions with their consumers, primarily for the protection of the latter. The Consumer Credit Protection Act of the US and a code of conduct in the EU govern the relations between financial institutions, traders, service establishments and consumers. The rules aim at harmonizing trans-frontier electronic payment systems, and the criteria under which banks should provide written information to the client about the charges. The aim is also to ensure that double charging for transfers ceases, and that transfers are executed within a reasonable time period.⁹²

Conclusion

With respect to the basic airline service the US, the EU and Canada approach air passenger consumer protection very differently. Although the legal safeguard regimes for consumer protection in each of these nations creates some certainty domestically, on an international level the stark differences in approach creates uncertainty. Attempts should be made to synchronize the voluntary commitment models of consumer protection established in the US, and the strict regulatory model of consumer protection espoused by the EU. Following the ICAO Fifth

⁹¹ Rule 64 Fed Regulations 12838.

⁹²Consumer protection measures, downloaded from http://www.europarl.europa.eu/factsheets/4_10_2_en.htm, accessed on 15/01/2007.

Worldwide Air Transport Conference of March 2006, the abovementioned states have been asked to minimize the difference in content, application and implementation of these regulations.

The Montreal Convention became effective in September 2003, and is widely recognized as a very important milestone in the world of civil aviation. As a result, a substantial percentage of passengers are now covered by a much higher level of compensation in case of international air accidents or incidents. Most likely, the current percentage of passengers covered by the Montreal Convention will increase steadily in years to come.



Chapter II

AIRLINE BAGGAGE MISHANDLING AND CONSUMER PROTECTION

Introduction

There has been increasing incidents of mishandled airline baggage. The reasons for this include: lack of sufficient ground handling staff; damaged and missing luggage tags; lengthy security measures at airports; and reduction in loading and unloading time at airports. Moreover, luggage theft from the baggage claim area is often attributed to the airline baggage mishandling. As SITA, a Geneva based technology firm puts it, *"the biggest trouble spot that causes nearly two-thirds of mishandling incidents, is while transferring bags from one flight to another."*¹ If the current industry trends are anything to go by, one can predict that the increasing air passenger volumes will remain inversely proportional to the quality of service offered by these carriers.

A Statistical Overview of Mishandled Baggage

In the US, on a typical day, airlines lose nearly 10,000 bags², which costs them almost USD 2.5 billion annually, causing the financially-troubled airlines to cut corners.³ The burden of costs borne by an airline in the United States (where airlines are responsible for baggage handling) from baggage loss is immense. Katherine Mayer, the Vice President of Airport Services, SITA, presents an example of the magnitude of the financial loss accruing to the airline from baggage mishandling:

"An airline like Delta will spend \$ 100 million a year locating and returning 1 million of the 80 million bags it flies-an average of \$ 100 a bag."⁴

¹ Lost Luggage fuels a booming business, downloaded from http://www.denverpost.com/travel/ci_4701887, accessed on 28/02/2007.

² RDIF baggage tagging for US airline industry, downloaded from http://www.rfidlowdown.com/2006/11/rfid_baggage_ta_1.html, accessed on 15/02/2007.

³ SITA Handout on Straightforward Baggage Management at pp 3.

⁴ Saving Private Luggage, downloaded from <http://www.atwonline.com/channels/safetySecurity/article.html?articleID=1217>, accessed 12/02/2007.

Baggage handling is an important ingredient in the airline-passenger equation. According to the Airline Quality Rating (AQR)⁵ unveiled in 2000, the quality of airline services is deteriorating due to inflated business fares, cancelled flights, lost baggage, and incidents of air rage. The latest AQR Report of 2006 notes that, *"the complaints of baggage mishandling have increased by 17 percent in 2005 over the previous year and the rate of mishandled baggage jumped from 4.83 per 1,000 passengers to 6.06 in the same year."*⁶ According to the US Bureau of Transportation Statistics (BTS), the instances of baggage mishandling were startling *"the U.S. carriers posted a mishandled baggage rate of 8.93 reports per 1,000 passengers in December 2006, up from both December 2005's rate of 7.80 and November 2006's 6.32 rate."*⁷ The volume and range of complaints reveal dissatisfaction with the way in which airlines respond to incidents of mishandled baggage; financial constraints mean airlines have a smaller workforce to deal with complaints, and also have a smaller budget for customer compensation.

Meanwhile, the European carriers' baggage handling record is lacking in transparency. The Community Air Passenger Reporting System (CAPRS) which publishes data regarding denied boarding, delays, baggage mishandling and performance of European Community air carriers on a public website was due to enter into the pilot phase in 2005; however it was not implemented. The European Commission Office of Director General of Energy and Transport's new program was intended to help European passengers make informed air travel choices through the availability of carrier comparisons. However, only 16 of the 51 European Community carriers agreed to share their data voluntarily, and those which agreed to participate were not willing to share equal data, fearing distortions in competition. This led to the failure of the project.⁸ Thus, the data on the website remained restricted to the public.⁹ The failure of the voluntary approach for data collection and dissemination adopted by the EU became an advantage for the legislative regulatory approach¹⁰ adopted by the US Department of

⁵The Airline Quality Rating is a summary of month-by-month quality ratings for U.S. airlines that have at least 1% of domestic passenger volume in the previous year. Using the Airline Quality Rating system of weighted averages and monthly performance data in the areas such as on-time arrivals, involuntary denied boarding, mishandled baggage, and complaints of 12 airline complaint area comparative performance figures are derived for the previous calendar year. This research monograph contains a brief summary of the AQR methodology, detailed data and charts that track comparative quality for domestic airline operations for the 12-month period of 2005, and industry results.

⁶Report stating that airline services have experienced negative effects, downloaded from http://www.usatoday.com/travel/flights/2006-04-03-airline-quality_x.htm, accessed on 17/02/2007.

⁷Mishandled baggage statistics, downloaded from http://www.bts.gov/press_releases/2007/dot016_07/html/dot016_07.html, accessed on 19/02/2007.

⁸Transport with a human face, Memo circulated by the EC Office of Director General for Energy and Transport, Energy and Transport Europe Digest at pp 6.

⁹Pilot phrase of the CAPRS Project, Final Report dated June 2005, downloaded from http://ec.europa.eu/transport/air_portal/traffic_management/studies/doc/finalized/2005_capsr_final_en.pdf, accessed on 12/02/2007.

¹⁰ Ibid Note 9

Transportation. The Association of European Airlines (AEA), a non-profit trade association comprised of thirty-one major European air carriers, voluntarily publishes trusted air transport data in relation to on-time performance and service quality. According to their data, *"the member carriers in the last quarter of 2006 report that on average 15.7 bags per 1000 have gone missing and, in most cases, nearly 85 percent of the time, the bags have been recovered by the airline."*¹¹

Regulations of Mishandled Baggage

The International Civil Aviation Organization (ICAO) has developed procedures for the handling checked baggage under the provisions of Annex 9 to the Chicago Convention, 1944. The Contracting States have been asked to allow their operators to forward mishandled baggage to the location of its owner without penalizing them for the mishandling.¹² The Contracting States should further permit the transfer of the mishandled baggage between international flights at the same airport without subjecting the baggage to further examination except when required for security reasons.¹³ Furthermore, the Contracting States have to keep procedures pertaining to the clearance of mishandled baggage for the aircraft operator to the minimum, and permit the operator to open such baggage to ascertain the owner.¹⁴

The provisions of the Montreal Convention make the airline responsible for the carriage of the baggage checked in with them by the passenger(s), from the time they are checked in at the departing airport, through to the time of arrival at the destination airport. Article 3 of the Montreal Convention requires a baggage tag to be issued to the passenger for each piece that is checked in with them, and the Montreal Convention liability limits is said to apply to them. Article 17 holds the airline responsible for baggage that is not returned to the passenger by 21 days after their journey with the airline. Article 22 requires the airline to pay *"1000 SDRs for destruction, loss, delay or damage to baggage per passenger, unless the passenger declared a higher value at the time of its check-in."*¹⁵

¹¹AEA Mishandled Baggage, Consumer Report of January-December 2006, downloaded from [http://www.aea.be/AEA Website/ webrsc/ SerQty/DL/CR06-Q4.pdf](http://www.aea.be/AEA%20Website/webrsc/SerQty/DL/CR06-Q4.pdf), accessed on 19/02/2007.

¹²Standard 3.61 of Chapter 3 of Annex 9 on 'Facilitation' of the Chicago Convention 1944

¹³Standard 3.63 of Chapter 3 of Annex 9 on 'Facilitation' of the Chicago Convention 1944

¹⁴Standard 3.64 of Chapter 3 of Annex 9 on 'Facilitation' of the Chicago Convention, 1944

¹⁵Statement issued by the IATA, downloaded from <http://www.iata.org/nr/rdonlyres/98751481-b436-4c1c-971d-4871fb50f262/0/rfidbaggageinformation.pdf>, accessed 13/02/2007.

On the other hand, the International Air Traffic Association (IATA), has been constantly working to improve and standardize industry practices for efficient baggage management systems. The IATA is not a regulatory body, but its industry standards and practices are considered of paramount importance since the body represents a significant majority of airlines offering international scheduled air services. In order to deal effectively with mishandled baggage, the IATA proposes institutional solutions for its members to follow. It has developed various industry standards and procedures, ranging from providing a format for the baggage tags to sophisticated electronic messages that transmit baggage details to all the involved stations.¹⁶ IATA is also considering to introduce the new Radio Frequency Identification (RFID) technology that promises better, more efficient and cost-effective handling of airline baggages. It has asked the airports and airlines to switch over from their current, traditional baggage barcode systems to the radio frequency technology driven baggage identification systems. This technology is said to have 99 percent read rates, making baggage tracking and recovery easier, resulting in significant reduction in baggage mishandling costs. The IATA has also established a global industry standard for the use of RFID technology for baggage management. The airline body has a projected cost saving of USD 760 million annually, to be generated by implementation of the Radio Frequency Identification management system (RFID).¹⁷

The IATA guidelines include Resolution 743¹⁸ which lays down procedures for its members to follow in dealing with lost, found and unclaimed checked baggage. The resolution requires members to pass lost, unclaimed and unidentified baggage to the local lost and found office (LL office) of the carrier at the destination shown on the baggage tag. These rules require the establishment of a Central Baggage Tracing system (LZ) office where information regarding the recovered baggage can be logged. However, members of the Air Transport Association of America (ATA) are exempted from following the aforesaid IATA rules for handling their unclaimed baggage as they are required to follow procedures prescribed in a separate ATA Resolution on the issue. In a different Resolution 744¹⁹ IATA members are required to establish a 'Local Baggage Committee' (LBCs) at airports that can serve more than three scheduled

¹⁶IATA Air Passenger Rights in the EU, downloaded from <http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/mgr/file/GPcomfinal.pdf>, accessed on 16/02/2007.

¹⁷Radio Frequency Technology for Baggage Management, downloaded from <http://www.iata.org/events/agm/2005/newsroom/fact09.htm>, accessed on 16/02/2007.

¹⁸Resolution 743 on 'Found and Unclaimed Checked Baggage, IATA Passenger Services Conference Resolution Manual, pp 608 and 609.

¹⁹Resolution 744 on 'Local Baggage Committees', IATA Passenger Services Conference Resolution Manual, 23rd Edition at pp 629-633.

carriers, where interline baggage is transferred between carriers, and the member(s) baggage is handled by another carrier. These Committees have many functions in relation to baggage management, such as: performance-checking of each carrier for a standard review of the causes of baggage misconnections; the establishment of procedures for transfer of baggage; monitoring and making recommendations regarding baggage handling methods.

As per IATA Recommended Practices 1724 -- General Conditions of Carriage (Passengers and Baggage), a carrier on a non-international flight is liable for checked baggage where there is negligence on their part; compensation has to be made on a per kilogram basis. Similarly, the carrier is also responsible for unchecked baggage when it is negligent. There are other important recommended practices that deal with baggage mishandling such as, the Recommended Practice 1740(e)²⁰-- Baggage Taken in Error-Notice requirements to Passengers; Recommended Practices 1743(a)²¹-- Tracking Procedure for Missing Checked Baggage; Recommended Practices 1743(d)²²-- Baggage Theft, Pilferage and Fraudulent Claim Prevention; Recommended Practices 1743(e)²³-- Baggage Irregularity Report; and RP 1744²⁴ -- Local Baggage Committee Bylaws, Terms of Reference and Operating Rules for the Local Baggage Committees.

Furthermore, IATA has developed standards and procedures for mishandled baggage which are contained in the IATA Airport Handling Manual. These standards and procedures deals with ground handling services available at various airports and bear resemblance to their counterparts in the IATA Passenger Services Conference Resolutions Manual mentioned in the preceding paragraph. For example, the AHM 278²⁵--Local Baggage Committees requires members to establish Local Baggage Committees at each airport and is similar to the Resolution 744²⁶ on the Local Baggage Committees in the IATA Passenger Services Conference Resolutions Manual. The Airport Operating Rules established under AHM 278 provide

²⁰RP 1740e on 'Baggage taken in error – Notice to passengers', IATA Passenger Services Conference Resolutions Manual, 23rd Edition at pp960.

²¹RP 1743 (a) on Tracking procedure for missing checked baggage, IATA Passenger Services Conference Resolutions Manual, 23rd Edition at pp 961-962.

²²RP 1743 (d) on Baggage Theft, Pilferage and Fraudulent Claim Prevention, IATA Passenger Services Conference Resolutions Manual, 23rd Edition at pp 968-969.

²³RP1743(e) on Baggage Irregularity Report, IATA Passenger Services Resolution Manual, IATA Passenger Services Conference Resolutions Manual, 23rd Edition at Pg 970-971.

²⁴RP 1744 on Local Baggage Committee Bylaws, Terms of Reference and Operating Rules, IATA Passenger Services Conference Resolutions Manual, 23rd Edition at pp 972-973.

²⁵ AHM 278 on 'Local Baggage Committees', IATA Ground Handling Manual, 22nd Edition at pp 163-168.

²⁶Supra Note 19 (established as per the procedures set out in the RP 1744 of the IATA Passenger Conference Services Resolution Manual on the 'Bylaws' and 'Terms of Reference' for a Local Baggage Committee).

guidelines for the Local Baggage Committee regarding the resolution of problems related to interline baggage, transfer facilities and procedures. The Resolution requires carriers to establish a daily standard method for reporting interline baggage mishandling cases. This then forms the basis of a monthly Interline Baggage Misconnection Summary Report to be submitted to the Chairman of the Local Baggage Committee, who submits the report to the member carriers for discussions on solution seeking. AHM 280 on 'Baggage Theft and Pilferage Prevention' provides guidelines to member carriers that need to be followed in order to help reduce baggage theft and pilferage.

Air Transport Association of America (ATA) has emphasized the importance of prompt delivery of baggage at the destination: it places as much importance on this as on the safe transportation of passengers. The IATA has expressed concern over the US airline industry's annual loss of one percent of total checked baggage. The IATA considers this to have a serious detrimental effect on passenger loyalty. Annually, the ATA addresses the issue of airline baggage mishandling by publishing a two hundred page manual containing some important recommendations on baggage service procedures. The procedures range from specifications for baggage information that are transmitted between the carriers, to specifications that lay out in detail the design and content of the bar-coded baggage tags.²⁷ The ATA members have agreed award generous compensations in accordance with the Montreal Convention compensation regime for mishandled baggage.²⁸

The US Department of Transportation (DOT) is the federal body responsible for regulating airline service and performance. It has a Consumer Protection Division entrusted to handle complaints from the public. Thus, baggage mishandling is a major area of airline service subject to DOT regulatory scrutiny. Regarding this, in its booklet 'Fly Rights', the DOT has made suggestions about the resolution of problems resulting from delayed, damaged and lost baggage. The booklet notes that each airline is liable for damages caused in relation to mishandled baggage. As per the booklet, the airline is responsible for consequential damages; the extent of liability is prescribed in the rules for the delayed, damaged and lost baggage.

²⁷Statement of the ATA before the US Subcommittee on Aviation of Committee of Transportation and Infrastructure of US House of Representatives on checked baggage handling systems, downloaded from <http://www.airlines.org/government/testimony/testimony.htm>, accessed on 18/02/2007.

²⁸ Ibid Note 27

In the first instance, claims with respect to baggage mishandling should be made to the airline customer office. Indeed, most such claims are resolved at this level. However, should a breakdown in the dialogue between the aggrieved passenger and the airline result, the passenger has recourse *"to other forums that may result in speedier resolution of their dispute with the airline, such as the DOT Aviation Consumer Protection Division, state government-run consumer protection groups, or city or county consumer protection departments, or consumer hotlines run by local newspapers. These forums try to resolve the dispute through effective mediation, persuasion and publicity."*²⁹ In cases where a settlement is not reached, a passenger can then approach the small claims courts in the jurisdiction where the airline operates.

Pursuant to Part 14 CFR 254.4, the ceiling limit of liability for mishandled baggage on a domestic US air carrier has been set at less than \$2,800 per passenger for delayed, damaged or lost baggage. Every two years, the DOT adjusts these amounts, as per the changes in the Consumer Price Index, and it appears to have revised the limit in 2004.³⁰ On the contrary, baggage lost on international flights is compensated according to the well-established liability limits of the Warsaw Convention of 1929 and the Montreal Convention of 1999 that became effective in the US from November 2003. Furthermore, the US DOT also publishes a monthly Air Travel Consumer Report which cites baggage mishandling data. This report is simultaneously filed with the DOT's Bureau of Transportation Statistics (Office of Airline Information) for an annual assessment and comparison³¹. This can provide passengers with useful information when choosing which airline to fly with.

In the European Union, the regulation of issues surrounding mishandled baggage is based on a balance between 'Community Regulation' (EC regulations) and 'Voluntary Commitments' (contracts) of the airlines. The airlines in the EU have agreed to non-binding, voluntary commitments in fourteen core areas of consumer protection contained in a code entitled the 'EU Airline Passenger Service Commitments'. One of the commitments requires *"Each airline to make an effort to deliver mishandled baggage to the passengers within 24 hours of their arrival at the destination at free charge"*.³² Furthermore, EC Regulation 889/2002 requires the

²⁹ Fly Rights - A Consumer Guide to Air Travel, downloaded from <http://airconsumer.ost.dot.gov/publications/flyrights.htm>, accessed on 13/02/2005.

³⁰ Ibid Note 29

³¹ BTS On-Time performance Report, May 7 2007, downloaded from http://www.bts.gov/press_releases/2007/dot04607/html/dot046_07.html, accessed on 1/06/2007. (Also see Supra Note:7)

³² EU Airline Passenger Service Commitment, downloaded from http://ec.europa.eu/transport/air_portal/passenger_rights/doc/2001/commitment_airlines_en.pdf, accessed on 13/02/2007.

Community carriers operating international air services to award compensation for delayed, damaged and destroyed baggage according to the Montreal Convention 1999. This regulation provides a framework for air carriers when compensating their passengers, but only in the event of accidents. Thus, the cases of mishandled baggage which result from instances other than accidents fall within the remit of the airlines voluntary commitments regarding compensation: *"The information on the limitation of liability in the case of baggage mishandling would have to be made available to the passenger at the points of sale."*³³ Apart from the usual responsibility of making arrangements for the on time arrival of passengers, most airlines aim at the prompt return of the baggage checked-in with the airline as their primary responsibility.

Most of the European carriers follow the Recommended Practices (RP) 1724 of the Passenger Service Conference Resolutions Manual, although they are not obliged to do so. Article 9 of the RP 1724 lists the conditions of carriage of passenger baggage.³⁴ Pursuant to the article, a carrier is expected to carry checked baggage in the same aircraft as a matter of practice, unless it decides that is impractical to do so and thereby needs to carry it on a subsequent flight. There are other conditions listed in the RP in relation to free baggage allowance, excess baggage allowance, excess value declaration and delivery of baggage to passenger(s) on arrival. Article 16 of the RP lays down the rules pertaining to the liability of non-international carriers and it states that the carrier is responsible for the damages for mishandled baggage only in the case where there is negligence on their part. Furthermore, carriers are responsible for the consequential damages³⁵ on the route they fly.³⁶ The EU members of the IATA may also incorporate in their conditions of carriage the format mentioned in the IATA Resolution 724³⁷ that deals with the 'Notice and Conditions of Contract'. This requires that the carrier operating on an international route to be liable under the provisions of the Convention (Warsaw or Montreal Convention), depending on the version of the convention that the state of the operator is a party to. The passenger ought to be informed that the service offered by the airline in relation to customer and luggage is subject to the provisions contained in the ticket. Clause 9 of the IATA Resolution 724³⁸ on the 'Conditions of Carriage' requires that an airline undertake to carry passenger and baggage with reasonable dispatch, and to use their best efforts in doing so.

³³ Airlines Contract with Passengers, A European Commission consultation paper of the Directorate General of Energy and Transport with the Directorate General of Health and Consumer Protection dated 7th June 2002 at pp10.

³⁴ Clause 9 of the IATA Recommended Practice 1724 on General Conditions of Carriage (Passenger and Baggage), Passenger Conference Resolution Manual, 23rd Edition of June 2003 at pp894.

³⁵ 16.3.5 of the RP 1724.

³⁶ 16.3.1 of the RP 1724.

³⁷ IATA Resolution 724, Passenger Conference Resolution Manual, 23rd Edition of June 2003 at pp 365-366.

³⁸ Ibid Note 37 at pp 366.

In Canada, mishandled baggage cases are heard by an administrative, federal authority called the Canadian Transportation Authority (CTA). The complaints regarding mishandled baggage on all domestic and international flights originating and terminating in Canada are mostly lodged with the CTA. However, in most cases, the complaints can be easily resolved by taking up the matter in the first instance with the airline flown. Airline baggage complaints on domestic flights are settled according to the voluntary liability limits set by the airlines in their 'Contracts of Carriage', and according to the value of the goods lost. The airline policy on compensating domestic passengers for delayed baggage is often ad hoc and found to vary widely: *"Few airlines publish rules for compensating travellers for delayed baggage, although most offer amounts ranging from \$50 to \$150 for delays beyond a day, sometimes only if the passenger is irate and insistent."*³⁹ On the contrary, the compensation for lost baggage on international flights is more uniform since it is consistent with well-established compensation regimes, such as the Warsaw or Montreal Convention.

Conclusion

In many areas of the world, liberalization of the airlines has increased the opportunities for travel. The multiplicity of air carriers, together with the increased demand for air travel, have made service quality and pricing key components for the marketability and survival of an airline. An airline's primary duty is the safe transportation of passengers; however, customers' baggage must also be delivered within a reasonable time frame at the designated destination. If baggage mishandling incidents occur, passengers are entitled to a full explanation, and the baggage should reach the destination within twenty four hours. Moreover, passengers are entitled to full reimbursement for damage or loss. The Montreal Convention also simplifies the system of claims for lost, damaged, destroyed or delayed baggage and cargo. For baggage, a passenger would be able to claim up to 1,000 Special Drawing Rights (SDRs), a figure equivalent to about USD 1,350 in normal circumstances, but could claim more if he or she has made a special declaration and has paid an extra fee, if so required, when checking the baggage.

In most cases, legal guidance indicates that passengers with complaints regarding mishandled baggage should approach the airline directly. The subsequent step, if needed, is usually to approach the administrative created by the respective country's Department of Transport. Most

³⁹Non stop Lost Baggage woes, downloaded from <http://www.littleindia.com/news/147/ARTICLE/1210/2006-01-12.html>, accessed on 12/02/2007.

complaints are resolved at the airline level itself, in accordance with its 'Conditions of Carriage'. The level of liability for mishandled baggage varies widely depending on whether the incident took place on an international or domestic flight. Thus, even though a well-established structure of complaint resolution and compensation is in place for passenger protection, there is still a serious problem about baggage mishandling. It is doubtful whether RFID technology will bring about the desired improvements. The development of a broad based baggage strategy and global improvement program is needed.



Chapter III

AIR PASSENGER HEALTH AND CONSUMER PROTECTION

Introduction

Air transport enjoys the distinction of being the prime long haul, cross continental carrier of passengers and cargo. In the US alone, approximately 85 percent of long-haul public carrier transportation and nearly 95 percent of international travel is by air.¹ As international travel has become an inevitable feature of modern life, vital health-related concerns come to the fore. Today, health issues constitute an important challenge to the aviation industry.

From mid-2003, the SARS pandemic had a debilitating effect on consumer confidence in the airline industry. According to the New England Journal of Medicine, the SARS outbreak killed 800 people in China in 2002 and infected 8000 people worldwide. Airline passengers who sat closest to each other were most at risk.² In a major case of airborne SARS transmission, some 22 persons out of 119 people on-board were infected with SARS from a single infected co-passenger.³ In March and April 2003, the number of air passengers decreased by 0.8 percent year on year.⁴ Many airlines, such as KLM, Cathay Pacific, Qantas, and Air India, cut flights bound for the affected provinces of China and Hong Kong. The IATA indicated a decrease of 2.4 percent in international passenger traffic in 2003 compared with 2002. This decline was mainly attributed to the SARS outbreak.⁵

Earlier in 1992, the largest cholera outbreak of the 20th century was reported among the passengers on a flight from Buenos Aires to Los Angeles.⁶ Mark A. Roberts also points out, "*As per epidemiological mapping of the recent influenza epidemic, aircrafts have been a major factor in the rapid spread of new viral strains.*"⁷ Thereby, it has been said that "*the modern*

¹ Stanley R. Mohler, Civil Aviation Medicine, Fundamentals of Aerospace Medicine, Lippincott, Wilkins and Williams, Second Edition, Philadelphia, 1996 at Pg 747.

² Air Travel Fuelled SARS Spread, downloaded from <http://news.bbc.co.uk/2/hi/asia-pacific/3329483.stm>, accessed on 12/10/2006.

³ Ibid Note 2

⁴ War and SARS Hit UK Travel, downloaded from <http://news.bbc.co.uk/2/hi/business/3012953.stm>, accessed on 23/09/2006.

⁵ International Traffic Statistics, December 2003, downloaded from www.iata.org/pressroom/economics_facts/stats/2004-01-28-01.htm, accessed on 23/09/06

⁶ Mark A. Roberts, 'Role of Aviation in transmission of Disease', Fundamentals of Aerospace Medicine, Lippincott, Wilkins and Williams, Second Edition, Philadelphia, 1996 at pp 1007.

⁷ Ibid Note 6

*jetliners have become veritable incubators of potential diseases.*⁸ In typical economy class air travel, many passengers sit in cramped seats, leading to the rapid spread of many dangerous communicable diseases like TB, Avian Flu, respiratory infections, etc. Most of the pathogens are spread due to poor air circulation: high recirculation air rates, and low rates of provision for outside air.

Classification of Health Conditions afflicting Air Passengers

Air travel can expose passengers to many illnesses and diseases, which can be divided into two categories as follows:

- 1) **Illnesses peculiar to flying:** the spread of communicable diseases like TB; influenza; cholera etc; deep vein thrombosis (DVT); decompression sickness; motion sickness; allergies caused by the spraying of disinfectants in the aircraft; etc.
- 2) **Illnesses accentuate by flying:** eye traumas due to extreme turbulence; neurosis; seizures and heart diseases; other in flight medical emergencies; ear, nose and throat problems; asthma; etc.

Aviation related health issues have always been the concern of international organizations, governments, national health authorities, airlines, and airports. This chapter examines the adequacy and efficacy of the various international and national laws, regulations and policy solutions which, together with the Warsaw Convention of 1929 and the Montreal Convention of 1999, have been created to protect the physical health of the air passengers.

Regulations for Protection of Air Passenger Health

The non-local nature of communicable diseases led to the development of international regimes for the prevention, containment and development of surveillance systems for these diseases. Contrary to popular belief, the focus of general international law on health began around 200 years ago. Since the beginning of the 19th century, the spread of communicable diseases has been regulated at international level. Indeed, author Abijiofor Aginam states that:

⁸ Air Safety Weekly, Volume 14, No: 11, 20 March 2000, Washington DC.

*“Communicable diseases never came within the normative concerns of international law until the nineteenth century. The transnationalisation of infectious diseases during the European cholera epidemics of 1830 and 1847 catalyzed the evolution of multilateral governance of communicable diseases.”*⁹ He traces back the development of international regimes concerning communicable diseases to 1851, when France convened its first international Sanitary Convention.¹⁰ As a result, today we see many pre-existing regulatory regimes addressing a wide gamut of health issues ranging from general health issues like the prevention of the spread of communicable diseases, to aviation-specific health issues such as the disinfection of aircraft. The health issues confronted by air passengers have been regulated by many international organizations such as the World Health Organization (WHO), the International Civil Aviation Organization (ICAO), the International Air Transport Association (IATA), and the Airports Council International (ACI). Thus, international laws and regulations to protect air passengers’ health do exist, but they are amorphous in form. However, the main international organizations listed above are currently working together to create a unified strategy and a standard set of regulations.

ICAO has created certain Standards and Recommended Practices (SARPs) regarding the health of the air passengers under the mandate provided by Article 44 of the Chicago Convention of 1944. The aforesaid article empowers the ICAO to develop and foster the safe, orderly planning and growth of international civil aviation throughout the world.¹¹ However, health issues have been approached indirectly by the ICAO, to the extent they affect air safety. The UK House of Lords Select Committee on Science and Technology on Air Travel and Health of 2000 points out that *“whilst it is questionable whether the active promotion of health issues falls within the existing remit of either the ICAO or the JAA, there is some room for maneuver insofar as health issues impinge on aviation safety, the main concern of both organizations.”*¹²

Article 14¹³ of the Chicago Convention of 1944 entrusts the Contracting States with the responsibility of preventing the spread of communicable diseases such as cholera, small pox,

⁹ Abijiofor Aginam, ‘International Law and Communicable Diseases’, Theme Paper Bulletin of the World Health Organization, 2002, 80(12) at pp 946.

¹⁰ Ibid Note No: 9

¹¹ Article 44(a) of the Chicago Convention.

¹² Government’s Response to the Select Committee’s Report on Science and Technology on Air Travel and Health dated 15th November, 2000 from http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/pdf/dft_aviation_pdf_503565.pdf accessed on 20/09/2006.

¹³ Article 14 of the Chicago Convention states that *“Each Contracting State agrees to take effective measures to prevent the spread by means of Air Navigation of cholera, typhus, small pox, yellow fever, plague, and such other*

yellow fever, plague and typhus by means of air navigation. However, the scope of the provision sounds ambiguous and has not been modified since its inception in 1944.¹⁴ Gael Poget states that *"the disposition of this provision looks very outdated as smallpox has been eradicated since December 1979 as certified by scientists and confirmed by the vote of the World Health Assembly in 1980."*¹⁵ The provision does provide a lengthy list of communicable diseases and also allows for additions to be made later. Furthermore, according to its mandate, the ICAO recently dealt with SARS.

The ICAO is responsible for the establishment and implementation of the Standard and Recommended Practices (SARPs) under Articles 37 and 38 of the Chicago Convention, 1944. Such standards have been codified in the 18 Annexes to the Chicago Convention, covering many fields such as personnel licensing, aeronautical charts, facilitation, and environment protection. No separate Annex exists to date covering the health issues of civil aviation, but some of these aspects have been covered as ancillary issues in a few existing Annexes to the Chicago Convention of 1944. For example, Parts D and E of Chapter 2 of Annex 9 to the Chicago Convention lay down a broad framework for the disinfection of aircraft.¹⁶ Moreover, Part E of Chapter 8 of the Annex 9 deals with the implementation of International Health Regulations. Standard 8.12 requires *"the Contracting parties to comply with the International Health Regulations formulated by the World Health Organization (WHO) for entry, departure and transit of the passengers and their baggage, cargo and other articles."*¹⁷

Working Paper 20, proposing an amendment to Annex 9¹⁸ of the Chicago Convention in its health related provisions was introduced. The ICAO Council accepted it without changes. This paper proposed amendments regarding facilities available at airports to deal with public health emergency incidents; the implementation of International Health Regulations; and the development of a National Health Plan to deal with public health emergencies.

Communicable Diseases as the Contracting States shall from time to time decide to designate, and to that end Contracting States will keep in close consultation with the agencies concerned with international regulations relating to sanitary measures, applicable to aircraft. Such consultation shall be without prejudice to the application of any existing international convention on this subject to which the Contracting States may be parties."

¹⁴ Gael Poget, Legal Aspects of Facilitation in Civil Aviation: Health Issues, LLM Thesis, Institute of Air and Space Law, McGill University, Montreal, October, 2003 at pp 31

¹⁵ Ibid Note 14

¹⁶ Standard 2.22 to 2.29, Part D, Chapter 2, Annex 9 of the Chicago Convention 1944. (Mainly requiring the Contracting States to limit and review their requirement for the disinfection of aircraft cabins and flight decks and to accept those methods that are recommended by the World Health Organization that cause least injury to the health of the passengers).

¹⁷ Standard 8.12, Part E, Chapter 8, Annex 9 of the Chicago Convention.

¹⁸ C-WP/12788, ADOPTION OF AMENDMENT 20 TO ANNEX 9 – FACILITATION, Council 179th Session dated 23/10/06

Annex 14¹⁹ on aerodromes requires an emergency unit to be established that coordinates the emergency response of all existing health agencies such as medical and ambulance services. The ICAO standard on design and airworthiness of aircraft plays an instrumental role in ensuring the safety of passengers and crew. The relationship of such provisions to the health of air passengers is indirect. For example, the provisions relating to the pressurization and ventilation of passenger cabins, oxygen supplies, and emergency evacuation of aircraft which affect seat design and cabin configuration have an indirect bearing on air passenger health.²⁰

The ICAO has also created an assembly resolution to protect the health of air passengers. *"It is not a regulatory authority. It relies on its Contracting States to introduce national legislations to implement their regulations and resolutions."*²¹ ICAO Assembly Resolution A 29-15 requested that all Contracting States progressively ban smoking onboard all their international flights by 1 July 1996. This resolution was given effect in national law. The US, through title 49, VII§ 41706, and the United Kingdom, through the voluntary initiatives of airlines, have banned onboard smoking.

Assembly Resolution A35-12 of 2004 (add date) aims at preventing the spread of communicable diseases through air travel. The protection of health of passengers and crews on international flights should be considered as an integral element of safe air travel; conditions should be put in place to ensure health is safeguarded in a timely and cost-effective manner.²² Under the mandate of Article 14, it can be seen that the ICAO has played a leading role in preventing the spread of communicable diseases. The most remarkable example is the part played by the ICAO during the outbreak of SARS. At this time, the ICAO convened a meeting in June 2003 in Singapore that led to the development of eight important recommended rules,²³

¹⁹ Standard 9.1 of Chapter 9, Annex 14 of the Chicago Convention

²⁰Regulatory Measures, Select Committee on Science and Technology, Chapter 3, downloaded from <http://www.publications.parliament.uk/pa/ld199900/ldselect/ldsctech/121/12105.htm>, accessed on 15/10/2006.

²¹ Email communication dated December 18, 2006 with Dr. Tony Evan, Chief of Aviation Medicine, ICAO, Montreal

²² A35-12 of ICAO 35th Assembly

²³ An international airport is considered as having adequate protection against SARS, if the following protective measures have been adopted:

- An airport public health emergency official has been appointed as responsible for the implementation of all SARS protective measures.
- Warning to passengers that those who display symptoms of SARS will not be allowed to board the aircraft.
- Screening departing passengers for SARS symptoms according to WHO guidelines.
- Disembarking passengers arriving from affected areas are normally screened by responding to questionnaires, completed during the flight or at the latest, immediately upon disembarkation.

for airports to prevent the spread of SARS. These were used subsequently to prevent the spread of SARS and assisted airports in drawing up a harmonized contingency plan to combat its resurgence.

ICAO also has a specialized section called 'Aviation Medicine Section'²⁴ that reviews some health issues experienced by air passengers. Mr. Tony Evan, Chief of the Aviation Medicine Section of ICAO, stated that:

"ICAO works closely with WHO and other international organizations to ensure that a consensus view is developed. Working groups developing guidelines and standards will usually include representatives of all relevant organizations. Such cooperation is invaluable."²⁵

Some of the main responsibilities of the Section involve the maintenance and review of the Manual of Civil Aviation Medicine (Doc 8984) relating to the licensing of flight crew and other personnel for the use by medical examiners under the provisions of Annex 1 to the Chicago Convention, the development of SARPs, and the publication of guidance material for containing the risk of transmission of communicable diseases by air. A preparedness plan similar to the SARS plan of 2003 was developed by the ICAO in coordination with the IATA, the ACI and the WHO for the Contracting States for containing the spread of influenza on its occurrence.²⁶

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- All passengers are provided with information about SARS symptoms and the appropriate public health contact numbers if available.
 - Procedures are in place to respond to the arrival of an aircraft with a possible SARS case on board.
 - All airport workers are subject to daily temperature screening at the beginning of their work shift.
 - Workers are reminded by posted information or other means of their obligation not to report to work if they are unwell.

²⁴ "Aviation medicine is the branch of occupational medicine which encompasses all aspects of the man/machine interface in the aviation environment. It applies not only to flight crew, their fitness, certification and operational environment, but also to passengers, and for example to the safe carriage of those who are unwell. The Section is a collaborative effort of the organization with other international organizations such as the World Health Organization; Aerospace Medical Association; International Academy of Aviation and Space Medicine that cooperate and coordinate with the Chief Medical Officers of civil aviation authorities around the world; and the Medical Directors of various airlines.

²⁵ Supra Note 21

²⁶ Guidelines for States concerning the Management of Communicable Diseases posing serious Health Risks, downloaded from http://www.icao.int/cgi/goto_m_med.pl?icao/en/med/avmedavianinfluenza.htm, accessed on 23/08/2006. These guidelines mainly stress on the following main aspects:

The ICAO's Aviation Medicine Section has formulated programs aiming at creating awareness of the medical and health aspects in civil aviation through seminars and lectures. The ICAO has played a pioneering role in the development of 'Passenger Locator Cards' to trace passengers after their arrival at a destination to be issued by health authorities on detection of a sick passenger onboard.

Health issues have received the sustained attention of the IATA which has a wide membership of 260 passenger and cargo airlines:²⁷ *"It's a trade association that makes regulations in the form of guidelines and recommended practices that do not have the force of law."*²⁸ The IATA aims at developing a framework for airlines to deal with passenger health issues in a cost effective manner: *"It regulates the health issues of passengers as a commitment to its Operational Safety Audit Program called IOSA."*²⁹ The IATA Medical Advisor Activity Report³⁰ summarizes the role of the IATA in realm of passenger health by stating that:

" The issue of passenger health is getting more and more attention. And with ICAO's intention to bring it to an international level, we remain active in putting forward what IATA and airlines have done already in protecting health and preventing any impractical and costly proposals for the airlines."

The IATA Medical Manual provides expertise to airline operators for handling health issues in a cost-effective and efficient manner. A team of experts called the 'Medical Advisory Group'³¹

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- Creation of contact points at the National Aviation Authority, Designated Airports for preparation plan formulation and implementation
 - Expertise- sharing between national and regional networks.
 - Ensuring a good linkage and better coordination among the various stakeholders in aviation.
 - Guidance to be provided for general prevention based on information provided by WHO for prevention the spread of the Communicable Diseases.
 - Better information dissemination of health risks at trip planning and ticket booking stage. (Such information can be included in the health, airline, travel agents and medical association websites.)
 - Consistent advice from the National Health Authorities to advise passengers on postponement of travel and when seeking medical advice on potential risks or emergence of risks
 - Creation of consistent health requirements for entry and denial of entry into state, in accordance with WHO requirements.
 - A good communication system in the system.

²⁷ IATA About Us, downloaded from <http://www.iata.org/about/>, accessed on 29/08/2006.

²⁸ Dr. Claude Thibeault, Medical Advisor, IATA, Montreal, Canada.

²⁹ Ibid Note 28

³⁰ Activity Report, Medical Advisor, downloaded from http://www.iata.org/NR/rdonlyres/B687CC9E-7D27-4263-8478-3727A375BA8F/0/Med_activity_report2004.pdf, accessed on 15/08/2006, at pp 2.

³¹ IATA Medical Advisory Group, http://www.iata.org/workgroups/medical_advisory_group.htm, accessed on 25/09/2006. The group consists of 10 members who specialize in aviation medicine and occupational health appointed by the Regional Director. The Group has been coordinating with other international organizations such as WHO, ICAO and

offers advice to the air industry and stakeholders for handling medical problems related to air travel.³² This group has been lauded for its formulation of useful guidelines, ranging from general health issues to those which address the issues of the prevention of the spread of communicable diseases. The IATA has formulated guidelines for cabin crew, cleaning crew and passenger/gate agents to deal in a very rational and cost-effective manner with situations of the outbreak of communicable disease(s). The guidelines require cabin crew to act in a definite, planned manner in dealing with a suspected case of communicable disease.

IATA also issued various briefings on the issue. For example, in July 2005, it issued an important briefing requiring thermometer to be made available in airline medical kits³³ as fever is a very common symptom of many communicable diseases. Three types of common thermometers were approved for use. This brief contributes to the early detection of communicable diseases and its prevention. The IATA has also developed a template for air carriers called the Emergency Plan and Response Checklist³⁴ which outlines a management strategy to deal with public health emergencies. It has been monitoring the developments in cabin air quality and has adopted standards that serve both passengers and crew without imposing undue costs on the airline. It has also been involved with partner organizations such as the WHO to improve the accuracy and availability of passenger information because on-board transmission of disease seldom comes to light immediately, thereby making it difficult to locate passengers.³⁵

IATA has formulated Recommended Practices for the carriage of passengers with infectious diseases³⁶ in its Passenger Services Conference Resolutions Manual. It operates in the event of its member having 'unknowingly' or 'unwittingly' transported passengers with infectious diseases. These recommended practices require members to dissuade passengers who are suffering from infectious disease from travelling. IATA has been looking at ways to improve

regional airline trade associations on issues of health and medicine related to the aviation industry. The Group has also been actively involved in the reviewing and updating of board medical care and health issues, IATA Medical Manual and In flight Management Manuals.

³² Supra Note 31

³³ IATA Briefing on Availability of Thermometers in Medical Kits, 12 July 2006, downloaded from http://www.iata.org/NR/rdonlyres/6EC905AD-8EBD-4D2E-8D20-769DC35581A1/OnBoardo/thermometer_Medical_Kits.pdf, accessed on 26/08/2006.

³⁴ IATA Public Health Emergency Response Plan, Version 1, 30 November 2005, downloaded from http://www.iata.org/NR/rdonlyres/1D412DF9-289B-4508-BE9DA57C4A84F103/0/AirlinesERPChecklists_V1_Nov30.pdf, accessed on 27/09/2006.

³⁵ Guidelines for Cabin Crew, Tuberculosis and Air Travel, downloaded from http://www.who.int/tb/publications/2006/who_htm_tb_2006_363.pdf, accessed on 23/09/2006.

³⁶ IATA Recommended Practice 1798, Carriage of Passengers with Infectious Diseases, Passenger Services Conference Resolution Manual, 23rd Edition, June 2003.

the accuracy and availability of passenger information. It has been working towards developing 'Passenger Locator Card' further, (originally developed by the ICAO) in collaboration with partner organizations like WHO, IATA, and ACI. An interim locator card has already been developed.

The World Health Organization (WHO) is an UN specialized agency that concerns itself with trans-boundary issues of health. It was established in 1948 and has one of the largest memberships. The following provision(s) provide it with the authority to legislate over aviation health issues:

The preamble of the WHO Constitution describes the WHO's objectives. It recognizes the unequal development in different countries for the promotion of health and control of disease, especially communicable disease. Thus, the WHO has a broad mandate as an organization³⁷ to regulate general health issues, with some of its functions specifically aimed at airline passengers' health. Article 18 (m) and Article 19 of the Constitution have provided the World Health Assembly with the broad mandate to take any other appropriate action to further the objective of the organization and to adopt conventions and agreements with respect to any matter that is within its competence respectively. Article 21 of the Constitution gives the World Assembly the authority to adopt Regulations on certain health concerns.³⁸ The Executive Board

³⁷ Article 2 describes the Functions of the Organization:

- (c) to assist governments, upon request, in strengthening health services;
- (d) to furnish appropriate technical assistance and, in emergencies, necessary aid upon the request or acceptance of governments;
- (g) to stimulate and advance work to eradicate epidemics, pandemic and other diseases;
- (k) to propose conventions, agreements and regulations, and make recommendations with respect to international health matters and to perform such duties as may be assigned thereby to the organization and are consistent with its objective;
- (p) to study and report on, in co-operation with other specialized agencies where necessary, administrative and social techniques affecting public health and medical care from preventive and curative points of view, including hospital services and social security;
- (q) to provide information, counsel and assistance in the field of health;
- (r) to assist in developing an informed public opinion among all peoples on matters of health;
- (s) to establish, and revise as necessary, international nomenclatures of diseases, of causes of death and of public health practices;
- (t) to standardize diagnostic procedures as necessary;
- (u) to develop, establish and promote international standards with respect to food, biological, pharmaceutical and similar products;
- (v) generally to take all necessary action to attain the objective of the Organization.

³⁸ The Health Assembly shall have authority to adopt regulations concerning: (a) sanitary and quarantine requirements and other procedures designed to prevent the international spread of disease; (b) nomenclatures with respect to diseases, causes of death and public health practices; (c) standards with respect to diagnostic procedures for international use; (d) standards with respect to the safety, purity and potency of biological, pharmaceutical and similar products moving in international commerce; (e) advertising and labeling of biological, pharmaceutical and similar products moving in international commerce.

is the executive body of the World Assembly whose functions have been codified in Article 28³⁹ especially to carry out the duties assigned to it by the World Assembly.

The WHO primarily legislates on the 'International Health Regulations' (IHR). These are legally binding multilateral instruments that focus on the global surveillance of communicable diseases.⁴⁰ *"A revision of the International Health Regulations, referred to as IHR (2005), was unanimously adopted on 23 May 2005 by the World Health Assembly and these regulations have entered into force in June 2007."*⁴¹

The major changes in the new IHR include the notification by the WHO⁴² of all health-related emergencies of international concern and the verification of information of such events when required; the establishment of focal points within the state that could act as a link between the states and the WHO on IHR matters; and the setting up of basic public health capacities at the primary, intermediate and national levels, in order to detect, report and respond to public health risks and potential public health emergencies of international concern. States are required to provide routine inspection and control activities at international airports, ports and some ground crossings to prevent international disease transmission.

These regulations have been criticized on the following grounds⁴³:

1. Failure of the implementation of these rules in the global spread of cholera, yellow fever and the plague, etc.
2. Fear of notification of outbreaks to WHO which would lead to the imposition of excessive measures, embargo and other reprisals imposed, affecting trade, travel and the tourism industry.⁴⁴

³⁹ Article 28 of the WHO Constitution specifies 'The functions of the Board shall be: (a) to give effect to the decisions and policies of the Health Assembly; (b) to act as the executive organ of the Health Assembly; (c) to perform any other functions entrusted to it by the Health Assembly; (d) to advise the Health Assembly on questions referred to it by that body and on matters assigned to the Organization by conventions, agreements and regulations; (e) to submit advice or proposals to the Health Assembly on its own initiative; (f) to prepare the agenda of meetings of the Health Assembly; (g) to submit to the Health Assembly for consideration and approval a general program of work covering a specific period; (h) to study all questions within its competence; (i) to take emergency measures within the functions and financial resources of the Organization to deal with events requiring immediate action. In particular it may authorize the Director-General to take the necessary steps to combat epidemics, to participate in the organization of health relief to victims of a calamity and to undertake studies and research the urgency of which has been drawn to the attention of the Board by any Member or by the Director-General.

⁴⁰ Supra Note 9 at pp 947.

⁴¹ International Health Regulations 2005, downloaded from <http://www.who.int/csr/ihr/en/>, accessed on 29/ 10/2006.

⁴² Frequently asked questions about the IHR, downloaded from <http://www.who.int/csr/ihr/howtheywork/faq/en/index.html#info>, accessed on 24/09/2006

⁴³ Supra Note 40 at pp 947-948

3. Inclusion of only three diseases within their ambit.
4. Lack of surveillance capacity.

The WHO has launched many health programs rightfully regarded as consumer protection initiatives. It launched the 'Epidemics and Pandemics Alert and Response' (EPR) following the realization that epidemics could place sudden, extreme demands on health systems. The EPR aims at preparing member nations to identify and control the spread of communicable diseases through epidemic preparedness and response in accordance with IHR.⁴⁵

In January 2005, the WHO developed a booklet entitled 'International Travel and Health'⁴⁶ that enumerates the health risks associated with international travel. It has prepared guidelines for the prevention and control of TB which were revised in 2006, having been devised initially in the year 1998. The guidelines include specific recommendations for passengers, aircrews, physicians, health authorities and airline companies. They are applicable to all domestic and international airlines worldwide.⁴⁷ Based on these guidelines, some industrialized countries screen immigrants, refugees and asylum seekers for TB.

Furthermore, the WHO has done significant work regarding aircraft disinfection when carriers arrive from countries where insect vectors are known to spread disease. In 1995 and 1997, it made recommendations⁴⁸ for the regulation of the methods used in disinfection of aircrafts. Disinfection has been recognized as a public health measure that is regulated by Annex 3 of the current International Health Regulations.

The Airport Council International (ACI) is a major international stakeholder in air transport industry. It aims at maintaining and developing a safe, secure, environmentally compatible,

⁴⁴ Abijiofor Aginam states that the Cholera outbreak in Peru led to the loss of \$700 millions in trade and other losses. India lost \$1.7 Billion loss in trade, travel and tourism in 1994 due to the Plague outbreak.

⁴⁵ Epidemic and Pandemic Alert and Response, World Health Organization, downloaded from <http://www.who.int/csr/en/>, accessed on 21/10/2006.

⁴⁶ International Travel and Health Manual 2005 available at http://whqlibdoc.who.int/publications/2005/9241580364_chap2.pdf, accessed on 23/09/2006.

⁴⁷ Supra Note 35 at pp v.

⁴⁸ The Recommendations have approved the following methods:

- 1) The block spray method
- 2) Pre-flight and top-of-descent spraying are similar to the blocks away method, except that aircraft are sprayed on the ground before passengers board.
- 3) This allows overhead lockers, wardrobes and toilets to be opened and properly sprayed with an insecticidal aerosol containing permethrin. Further in-flight treatment with a quick-acting knockdown spray is applied. Residual spraying involves the regular application of a residual insecticide to internal surfaces of aircraft except in food preparation areas, at intervals based on the duration of effectiveness. In addition, spot applications are made to surfaces that are frequently cleaned.

efficient and prospering air transport system.⁴⁹ It participated in the 7-8 February 2006 meeting held in Singapore to draw up guidelines for airlines and airports based on the 'WHO Influenza Preparedness Plans' and provided its members with an update on the same. It also worked closely with the WHO on the revision of the International Health Regulations. ACI has drawn up an interim set of recommendations⁵⁰ enabling airport authorities to work closely with national health authorities to develop a strategy for dealing with spread of epidemics such as Avian Influenza, SARS, and TB.

In the European Union, aviation health issues have been dealt with through a more general approach: *"The European Union has a range of legislations regulating the economic and safety aspects under its 'Common Air Transport Policy', and more limited regulations for protecting the consumers. It does not have a legislation specifically related to passenger health."*⁵¹ However, the Joint Aviation Authority (JAA) is a regulatory body associated with ECAC and it has established technical regulations called the Joint Aviation Regulations (JAR) which harmonizes air transport standards among the European States: *"JARs deals with air passenger health directly as well as indirectly i.e. they deal with air passenger health directly by prescribing minimum medical first aid requirements provisions and indirectly by prescribing standards dealing with environmental conditions including ventilation, heating and pressurization."*⁵² Some important JAR's which have had a bearing on air passenger health are modelled on the SARP's of the Chicago Convention, 1944: JAR-FCL3 is based on Annex 1 to Chicago Convention, 1944, dealing with medical requirements of pilot licensing.

The JAR-OPS 1 contains requirements and guidance material for on-board medical kits. The JAR-OPS 1.055 requires an operator to ensure immediate communication to the rescue coordination centers, and lists information on the emergency and survival equipment to be carried on board all airplanes.⁵³ The JAA also requires first aid kits to be carried on all commercial aircraft and that the crews are trained in first aid; the number and use of these kits is to be determined according to number of passenger seats. The contents specified for these kits is basic in nature and there is a requirement to carry an extended medical kit on aircraft with more than 30

⁴⁹ Missions of ACI, downloaded from http://www.airports.org/cda/aci/display/main/aci_content.jsp?zn=aci&cp=1-2-9_9_2_, accessed on 24/09/2006.

⁵⁰ Avian Influenza ACI Update, Issue 1 of January 2006, downloaded from http://www.airports.org/aci/aci/file/Free%20docs/Bulletin_1_Avian%20Influenza_01_2006%281%29.pdf, accessed on 29/09/2006 at pp 3

⁵¹ Supra Note 20

⁵² Ibid Note 51

⁵³ JAR OPS 1: Air Commercial Transportation Regulations, downloaded from <http://www.jaa.nl/publications/jars/jar-ops-1.pdf>, accessed on 15/10/2006.

passenger seats and when the aircraft at some point in its journey is more than 60 minutes flying time from an aerodrome at which medical assistance is available.⁵⁴ The JAR 25 on 'aircraft environment' is said to have a bearing on air passenger health as it prescribes standards for minimum cabin air pressure, maximum levels of carbon monoxide, carbon dioxide and ozone, and minimum ventilation flow rates. *"The new European Aviation Safety Agency (EASA) that replaced the Joint Aviation Authorities (JAA) became operational in September 2003, and is neither an international organization nor an association of national administrations. Unlike the Joint Aviation Authorities (JAA), EASA is an executive body—created by the so-called EASA Regulation—that has taken over several regulatory functions previously exercised by the national civil aviation administrations of European Union Member States."*⁵⁵ The JAA programs and activities have been transferred to EASA.

In 2002, the European Community established the European Aviation Safety Agency (EASA),⁵⁶ with the object of progressively replacing the Joint Aviation Authorities (JAA). This also constituted a key part of the European Union's strategy to establish and maintain a high and uniform level of safety in Europe. The new European Safety Agency (EASA) is neither an international organization nor an association of national administrations. Unlike the Joint Aviation Authorities (JAA), EASA is an executive body—created by the so-called EASA Regulation—that has taken over several regulatory functions previously exercised by the national civil aviation administrations of European Union (EU) Member States.

The European Aviation Safety Agency (EASA) is the centrepiece of the European Union's strategy for aviation safety and its mission is to promote the highest common standards of safety and environmental protection in civil aviation. As an independent EU body under European law, EASA is accountable to the EU Member States and the EU institutions. A Management Board with representatives from the EU Member States and the European Commission adopts the Agency's budget and work program. The aviation industry is actively involved in the Agency's work through a number of consultative and advisory committees. There is also an independent Board of Appeal. While national authorities continue to carry out the majority of operational tasks, such as certification of individual aircraft or licensing of pilots, EASA develops common

⁵⁴ BMA Impact of flying on passengers: A Guide, downloaded from [http://www.bma.org.uk/ap.nsf/AttachmentsByTitle/PDFFlying/\\$FILE/Impactofflying.pdf](http://www.bma.org.uk/ap.nsf/AttachmentsByTitle/PDFFlying/$FILE/Impactofflying.pdf), accessed on 14/10/2006. (An extended medical kit will contain a range of items including injectable drugs for use by doctors or other healthcare professionals. The first aid training includes aspects of altitude physiology, also including treatment for hypoxia.)

⁵⁵ Adrianus D Groenewege, from the unreleased Fourth Edition of the Compendium of International Civil Aviation

⁵⁶ Ibid Note 55

safety and environmental rules at the European level. It monitors the implementation of standards through inspections in EU Member States and provides the necessary technical expertise, training and research. EASA is also responsible for type-certification, i.e., the certification of specific models of aircraft, engines or parts approved for operation in the European Union.⁵⁷

Currently, the main EASA tasks include rulemaking: drafting safety legislation and providing technical advice to the European Commission and to the Member States. Within the next two years, the EASA responsibilities will be extended to other additional important areas of air safety, such as rules and procedures for civil aviation operations, licensing of crews in the Member States, and certification of non-Member State airlines. In the long-term, it is also likely that EASA will play a key role in the safety regulation of airports and air traffic management systems. Since its inception, EASA is developing close working relationships with counterpart organisations across the world including the International Civil Aviation Organization (ICAO), the Federal Aviation Administration (FAA) in the United States and the aviation authorities of Canada, China, Brazil, Israel, and Russia. Working arrangements between the Agency and these organizations are aimed at harmonizing standards and promoting best practice in aviation safety worldwide.

As of 1 January 2007, EASA membership comprised the 27 EU Member States, as well as Iceland, Liechtenstein, Norway and Switzerland as non-EU countries that have adopted the European Union (EU) aviation safety legislation. The latter is an important step towards a more integrated safety system in Europe and underlines the key role of EASA in this system.

The European Civil Aviation Conference (ECAC) is an important recommendation making body comprised of 42 European States. It commenced its work on air passenger health issues in October 2002. In the same year, a Working Group was established called Aviation Passenger Health Issues (APHI) Working Group. The group developed recommendations and guidance material for effectively dealing with the health of air passengers.⁵⁸ The most notable work of the group has been the issuing of a manual entitled 'Manual on Air Passengers Health Issues' that codifies the responses to concerns that may arise with respect to individual passenger's health. The 35th Assembly of ECAC⁵⁹ adopted this work. The Manual mentions a few requirements

⁵⁷ Supra Note 55

⁵⁸ Assembly 35th session Working Paper, downloaded from http://www.icao.int/icao/en/assembl/a35/wp/wp034_en.pdf, accessed on 21/09/2006.

⁵⁹ ECAC Passenger Health, downloaded from <http://www.ecac-ceac.org/index.php?content=santepassager>, accessed on 12/10/2006.

such as the reporting of medical incidents large and small. It pays little attention to the prevention of communicable diseases. However, this shortcoming was rectified in August 2005, when the Director General of ECAC asked for a coordination of efforts to deal with the spread of communicable diseases. Later, a small ad-hoc group of experts developed initial guidelines to contain the spread of communicable diseases for airlines and at airports within the EU. In June 2006, the Director General endorsed the ECAC draft of December 2005 that was reviewed and updated by AHPI, according to the new guidelines for the Prevention of Communicable Disease developed at the Singapore ICAO high-level workshop.⁶⁰

In response to a January 2000 consultation document on air passenger rights in the European Union, the European Commission submitted a paper to the European Parliament and the Council in June 2000 entitled the 'Protection of Air Passengers in the European Union. Suggestions were made regarding the assessment of the impact of cabin conditions on passengers' health, and also for legislation to improve the information available to passengers to make well-informed choices and to create new rights for passengers.⁶¹

National Regulations on Air Passenger Health

The most prominent national regimes pertaining to air passenger health that served as de-jure consumer protection regimes have been established in countries such as the United States, the United Kingdom, and Singapore. The regimes pertinent to this research will now be briefly discussed. The United States has made moves towards improving air passenger health. Most of the airlines in United States offer on-board medical assistance to their air passengers: "*many of the world's airlines have greatly increased their capacity for providing medical care to passengers in-flight by enhancing their on-board emergency medical kits (EMKs).*"⁶² In 1998 the Aviation Medical Assistance Act was passed requiring the FAA to ensure that medical assistance be provided by the airlines and at airports. It also created concurrent limited federal and state liability regimes for the airlines and individuals called upon to offer assistance to passengers.⁶³ When an on-board emergency occurs, airline staff can request that an onboard

⁶⁰ Ibid Note 57

⁶¹ Supra Note 20

⁶² Medical Guidelines for Airline Travel, Aviation, Space, and Environmental Medicine, Vol. 74, No. 5, Section II, May 2003 at A3.

⁶³ On 6 June 2000, the FAA issued a decision (65 Fed. Reg. 35971) stating that the agency would not propose a regulation to require AED's at airports. As part of the Aviation Medical Assistance Act of 1998, the FAA was to

doctor help them provide assistance to the patient. When a doctor or airline staff member provides assistance to a passenger in distress they become vulnerable to legal liability. Thereby, the Aviation Medical Assistance Act provides a 'Good Samaritan' legal regime absolving the above from legal liability unless there is gross negligence and willful misconduct on their part.

Most of the airlines today are equipped with air defibrillators called AEDs, to deal with passengers who develop cardiac arrests on-board. Automatic external defibrillators (AEDs) form one part of the chain for the treatment of cardiac arrest(s). They were required to be present on all U.S. air carriers by July 2004. A growing number of airlines around the world have been carrying AEDs on-board to treat passengers who develop cardiac arrest.⁶⁴ *"In fact, Aviation Medical Association has demonstrated strong support for the American decision to equip certain planes with defibrillators. They sponsor airline conferences on defibrillators. At these conferences, the air carriers state that cardiac arrests events constitute most common in-flight emergencies causing medical (aircraft) diversions."*⁶⁵ However, this inclusion of AED in medical kits has enhanced the medical care to be provided to the air passengers at an unanticipated high price for the airline industry because of the higher standard of care.⁶⁶

Automatic external defibrillators (AED) have been considered a medical device that requires the approval of the Food and Drug Administration (FDA) for use by airlines. The performance standards for use of AED's are subject to the 1976 Medical Device Amendment rules. All medical devices have been classified into three categories⁶⁷ according to the energy used by the equipment. The administration of AED on-board is therefore viewed as a similar procedure to the administration of prescribed drugs by a licensed medical professional. The administration of AED by flight attendants may lead to fatal consequences if not carried out properly. The

determine whether such devices should be required at airports. Based on its review, the FAA stated that the majority of medium to large airports have "already taken the necessary steps to provide for the medical capability to address cardiac events at their individual facilities." FAA also questioned whether it had the authority to require defibrillators at airports. Since our legislation was enacted in 1998, commercial airlines have been in the process of installing defibrillators in their aircraft. Most of the major carriers have them installed with the exception of United, Continental and Southwest, but these are in the process of doing so. According to the FAA, 108 of 130 airports surveyed have defibrillators.

⁶⁴ Medical Guidelines for Airline Passengers, Aerospace Medical Association, Alexandria, May 2002 at pp A3

⁶⁵ Julie A. Buffington, Airlines, Defibrillators and enhanced Medical Kits: Filling a void or creating a duty, 1999, Journal of Air Law and Commerce, at pp 505.

⁶⁶ Ibid Note 64 at pp 500.

⁶⁷ Class 1 devices are subject to general control for registration, listing requirement, compliance with good manufacturing practices, records, report requirements, susceptibility to special remedies for violation. Class 2 and 3 devices are subjected to additional controls. AED is classified into later two 2 classes according to the energy they produce.

administration of AEDs requires a notice under Section 510(k) of FDA Regulations: "*If the device is cleared for use, it is up to the end user to provide proper staff training.*"⁶⁸ However, there is no complete immunity from liability because as per the Second Reinstatement of Torts, "*Common carriers and airlines have a duty to provide 'reasonable' medical care when the need for it becomes apparent.*"⁶⁹ Compliance with the 510(k) provision mentioned above cannot be used as a defence against manufacturers in product liability suits as held in *Medtronic In vs. Lohr*.⁷⁰ Furthermore, the court held in this case that "*the amendment 1976 does not preempt all state regulations allowing law of negligence claims against the device manufacturers.*"⁷¹

Passengers who help airline staff in a time of need are insulated from any claims of negligence under Federal or State statutes if they have exercised reasonable standard of care and are not guilty of gross negligence or willful misconduct.⁷² The higher duty of care that was imposed on common carriers under section 323 and 324 of the Second Reinstatements of Torts is not applicable to the administration of AED to passengers in distress. In *Gingeleksie vs. Westin Hotel Co*⁷³, it was held that when an ill hotel guest died during the transportation that he had himself requested as an emergency, the hotel, as well as the car service, were duty bound under Section 314 (a) of Second Restatements of Torts to provide aid because of the special relationship. This incident, together with the above legislation, demonstrates that common carriers have a duty to aid all passengers by taking reasonable action if they have reason to know that a particular passenger is ill.

In the past, the FAA has issued many health advisories directed at air passengers or airline staff. For example, the 2001 advisory that dealt with the first aid program of air carriers⁷⁴ aimed at training air crew members on first aid programs, protection from blood borne pathogens, and other sources of communicable diseases. The FAA provided guidelines to air crew members⁷⁵ for using AEDs and enhanced medical kits. The Federal Air Regulations (FAR) prescribe specific contents for basic level emergency medical kits. Another FAR prescribes the minimum requirement for cabin air ventilation. The stipulation states that 10 cubic feet per minute of

⁶⁸ Supra Note 66

⁶⁹ Restatement (Second) of Torts 314 A (1965)

⁷⁰ *Medtronic In vs. Lohr* 1995 US SC. 96-754.

⁷¹ Ibid Note 69

⁷² Section 5(a) of Aviation Medical Assistance Act of 1998.

⁷³ 1998 WL 279393 at **2 (9th Cir. 1998).

⁷⁴ AC 120-44A, Air Carrier First Aid Programs dated 06/06/2001.

⁷⁵ AC 121-33B, Emergency Medical Equipment dated 01/12/2006.

fresh air per flight is necessary for passenger comfort⁷⁶. There are other FAA regulations that prescribe design and operational specifications for carbon dioxide, carbon monoxide, ozone, ventilation, and cabin pressure.⁷⁷

The regulations that have a significant bearing on air passenger health relate to smoking that, as noted earlier, has been banned on all domestic and international flights in the United States: *"It is prohibited on all domestic scheduled-service flights, with the exception of flights over six hours to or from Alaska or Hawaii. This ban applies to domestic segments of international flights on both U.S. and foreign airlines (e.g., the Chicago / New York leg of a flight that operates Chicago/ New York / London). However, the ban does not apply to non-stop international flights during the time that they are in the U.S. airspace (e.g., a Chicago / London flight). The prohibition is thereby location-specific and applies to passenger cabin and lavatories, but not the cockpit."*⁷⁸

Other government agencies such as the Center for Disease Control and Prevention (CDC) have played a major role in covering air passenger's health concerns in their Yellow book. The CDC has also issued two types of notices to travellers about specific situations: travel alerts and travel advisories. *"Travel alerts inform travellers of health concern(s) in a particular region and provide advice to them on specific precautions needing to be taken. A travel advisory notifies travellers of potentially more serious situations and advises that non-essential travel be postponed."*⁷⁹ Furthermore, CDC publishes guidelines at regular intervals addressing health issues of vital concern to air travel. This relates especially to the passenger-tracking regulation.⁸⁰ Another important CDC and WHO guideline exists on when and how to notify passengers and flight crew about exposure to infectious diseases aboard a commercial aircraft.⁸¹

In the US, forced detention or restriction of movement cannot be legally imposed on grounds of health unless the declaration of a public health emergency is made by either the President or the State Governor. According to USDOT: *"This is not likely to happen before numerous cases start appearing, both abroad and probably in the US. Means of motivating voluntary*

⁷⁶ FAR 25.831.

⁷⁷ Subcommittee on Aviation Hearing on Cabin Air Environment.

⁷⁸ Fly Rights – A Consumer Guide to Air Travel, Aviation Consumer Protection Division of DOT, downloaded from <http://airconsumer.ost.dot.gov/publications/flyrights.htm#health>, accessed on 21/10/2006.

⁷⁹ SARS Information for Travelers, Provided by CDC, downloaded from http://health.yahoo.com/topic/infectiousdisease/resources/article/cdc/Asthma_and_Allergy_cdc_sars_info_for_travelers

⁸⁰ Guidelines on passenger tracking published in the Federal Register on November 30, 2005.

⁸¹ Alexandra Mangili, Transmission of infectious diseases during commercial air travel, The Lancet, Vol 365 12 March 2005, at pp 994.

compliance is ideal from the public health point of view. Screening procedures by some combination of education and incentives needs further study and so does the decision criteria for legalizing enforcement of involuntary screening of uncooperative passengers by governors or presidential declarations of a public health emergency."⁸²

The DOT has a strong obligation towards resolving the grievances of air passengers. The airline's consumer unit is the most appropriate mode for the redressal of grievance at the first level. If the airline fails to respond adequately to air passengers the latter can then approach the DOT Aviation Consumer Protection Division.⁸³ Health issues have been considered a chief component of the fly rights of air passenger.⁸⁴ Airlines also have a responsibility towards their passengers to prevent the spread of communicable diseases through the normal course of flying with them. An air carrier has the right to refuse transportation to a person or to require the person to provide a medical certificate stating that the disease at its current stage is not transmittable; or the carrier can impose extra conditions on the passenger.⁸⁵

A bill was introduced called the 'Passenger Fair Treatment Act' seeking to enhance the protection offered to airline passengers through an amendment in Title 49 of the United States Code. The Act requires each air carrier to hold a certificate of public convenience and necessity under section 41102 to submit a plan of fair treatment of passengers in inter-state transportation.⁸⁶ One such stipulation under the Act requires the carrier to submit its plan for providing food, water, restroom facilities, and access to medical treatment for passengers aboard an aircraft that is on the ground for an extended period of time without access to the terminal. The Act also seeks to impose a month's complaints reporting system on the air carriers regarding various issues. These complaints regarding the services of the airline can include violations of passenger health through negligence, commission or omission.

In the United Kingdom, a considerable amount of research has been directed at health issues pertaining to air transport. In particular, there has been a lot of ongoing research regarding cabin air quality, and DVT. Various government departments such as the Department of Health

⁸² A presentation to the U.S. Department of Transportation, downloaded from <http://www.volpe.dot.gov/ctug/docs/abt-120805.doc>, accessed on 15/11/2006.

⁸³ DOT Flying Rights - A Consumer Guide to Air Travel, downloaded from <http://airconsumer.ost.dot.gov/publications/flyrights.htm>, accessed on 28/08/2006.

⁸⁴ Ibid Note 83

⁸⁵ DOT Information for Air Passenger with Disability, downloaded from flying.hts.htm, accessed on 25/08/2006.

⁸⁶ Airline Passenger Fair Treatment Bill, downloaded from <http://testimony.ost.dot.gov/final/billpr.htm>, accessed on 12/09/2006.

(DOH), Department of Transport (DfT), and Civil Aviation Authority (CAA) have in the past been involved in research and drawing up developments relating to air passenger health. Airline passenger and crew health has been prioritized. This has resulted in the establishment of regulatory precepts with the tabling of the Select Committee Recommendation on air passenger and crew health. This led the UK government prioritizing these issues and forming the Aviation Health Working Group in 2000, an inter-departmental study group that further investigated the health aspects of air travel, including cabin air quality and safety.

According to Alexander Mangili: *"In a detailed study of cabin air quality released in 2004, the group concluded that temperature, humidity, air speed, and concentrations of carbon monoxide, carbon dioxide, and microbiological flora aboard 14 commercial flights using British Aerospace 146 and Boeing 300 aircraft were similar. The European Cabin Air study coordinated by the Building Research and Consultancy still continues to investigate environmental aspects within the passenger cabin. These efforts have led to improved international regulations for the certification, inspection, and maintenance of aircraft environmental control systems."*⁸⁷ Booklets from the Department of Health (DOH), including health advice for travellers released by the Air Transport Users Council (AUC), have been found to be other important sources of health information.⁸⁸

Many studies have been conducted in past in the UK to establish a link between Deep Vein Thrombosis (DVT) and air travel; they have not been conclusive. However, it is hoped that the results of the WRIGHT Study, a major research project undertaken by WHO and funded by the UK government, will provide more conclusive information and result in a significant breakthrough. To date, though, in many cases in which airlines have been sued regarding DVT, judges have demonstrated inconsistency in siding with the air passenger.⁸⁹ This puts DVT on top of the list of anxieties for the airlines: *"The DVT-afflicted passengers and families, as well*

⁸⁷ Supra Note 80 at pp 990.

⁸⁸ Air travel and health - Government response to Select Committee report, downloaded from http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/page/dft_aviation_503565-02.hcsp#TopOfPage, accessed on 14/11/2006.

⁸⁹ Virgin Atlantic Airlines incident, where a passenger received a settlement worth more than \$20,000 (13,000 pounds) for injuries sustained from a London to Los Angeles flight spent crammed into her seat next to another passenger who was too large for just one seat. Or this summer's \$800 award to a passenger aboard JMC Airlines who sued because of the plane's "intolerable" 29-inch seat pitch; but in cases like *M.B Willy vs. Delta Airlines* (2004 U.S Court of Appeals, 5th Circuit), *M. Shawn Blansette vs. Continental Airways* (2004 U.S Court of Appeals, 5th Circuit), the courts sided with the airlines and have ruled that airlines do not have a duty to warn its passengers of risks of DVT when flying with them.

guardians of those affected, have appealed to government to support a private member bill in the UK that would make the airlines responsible for illnesses caused by air travel."⁹⁰

Another major issue afflicting airlines is the risk they run in terms of vulnerability to bio-terrorism. The air passenger today is vulnerable to bio attack from terrorists. Hypothetically, a small can of germs and biotoxin when released on the aircraft can result in catastrophe. In the past, many international conventions have covered various aspects of bio-terrorism. The Biological Toxin and Weapons Convention of 1975⁹¹ bans the development, production, stockpiling, acquisition, and retention of microbial or other biological agents or toxins in types and in quantities that have no justification for prophylactic, protective or other peaceful purposes. It also bans weapons, equipment, or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict. The actual use of biological weapons is prohibited by the 1925 Geneva Protocol. In order to secure the air traveling public from being vulnerable to attack by bio-terrorists, the ICAO's Air Security instruments⁹² may be relevant for air passengers. On September 7-8, 2006, the United States and Switzerland Government co-hosted an informal exercise called the Bioterrorism International Coordination Exercise (called "Black ICE") in Montreux, Switzerland. This two-day informal exercise was an opportunity for officials from numerous international organizations to examine the critical cooperation and coordination issues that would be necessary to respond to an international bio-terrorism attack.⁹³ The exercise was aimed at creating awareness among the international community, in the event of a bio-terrorism attack. It outlined the following: the authorities that would be involved in the matter; the complexity of seeking a cross border solution; the unique convergence of public health, security, transportation, law enforcement, and humanitarian issues inherent to a bio-terrorism threat.

In the European Union, however, a strategy has been drawn up for dealing with a bio-terrorism attack. As early September, 2001, the EU Council and Commission developed a program laying down the measures to be taken to establish the following: (1) a health expert consultation; (2) mechanism strategies on availability; (3) stocks of serums; (4) vaccines and antibiotics; and (5)

⁹⁰ DVT Victims mother in law lobby, downloaded from http://news.bbc.co.uk/2/hi/uk_news/england/manchester/3685255.stm, accessed 23/10/2006

⁹¹ Biological Toxin and Weapons Convention of 1975, downloaded from <http://www.interpol.int/PublicBioTerrorism/links/intOrg.asp>, accessed on 12/11/2006.

⁹² Convention on Offences and Certain Other Acts Committed On- Board Aircraft, signed in Tokyo, 1963, Convention for Suppression of Unlawful Seizure of Aircraft signed at Hague, 1970, Convention for Suppression of Unlawful Acts against Civil Aviation, 1971,

⁹³ Press Release, JOINT PRESS Statement of United States and Switzerland on a Bioterrorism and International Coordination Exercise, downloaded from http://bern.usembassy.gov/pr_09082006.html, accessed on 15/10/2006.

a European network of experts for evaluating risk. The Directorate-General for Health and Consumer Protection was instrumental in creating a network and a rapid alert system in 1999 for the early detection and effective control of the spread of communicable diseases. The United States has relatively well-developed systems for dealing with bio-terrorism attacks. The Department of Homeland Security (DHS) has devised a nation's Biodefense strategy, described in the 'Homeland Security Presidential Directive (HSPD)-10: Biodefense for the 21st Century' that clearly defines the Department of Homeland Security's (DHS) role and focuses efforts on non-medical countermeasures.⁹⁴ The air transportation protection-related activities concentrate on two major areas: (1) the protection of airports against biological attacks to include systems designs, concepts of operations and detection systems, and (2) the development of advanced detection technologies that have application for the protection of individual aircraft, if cost-benefit analyses warrant. Thereby, the Department of Homeland Security, Science and Technology Bioterrorism Countermeasures Strategies and the Commercial Aircraft Protection (CAP) program initiated a systems study for the protection of airports and commercial aircrafts respectively, and for the exploration of cost-benefit tradeoffs and design of CBRN (chemical, biological, radiological and nuclear) detection systems.⁹⁵

Conclusion

Over the past few years there has been an increased focus on health issues affecting air passengers. However, this awareness has mostly resulted in spiraling litigation costs⁹⁶ during pandemic peak seasons that often lead to serious revenue losses due to mounting passenger

⁹⁴ Aviation Subcommittee Report of prevention of Pandemics in Air Travel, downloaded from <http://www.hou.se.gov/transportation/aviation/04-06-05/04-06-05memo.html>

⁹⁵ Supra Note 93

⁹⁶ There were many cases in the past few years (2000-2005) that addressed the issue of Air Passenger Health, which are as follows: "There have been attempts by claimants in several signatory states to establish article 17 liability for DVT brought about, or said to be brought about, by air travel. I have already referred to *Scherer v Pan American Airways Inc* 387 NYS 2d 580 in which a DVT article 17 claim was rejected by the Supreme Court of New York. The most important DVT authority is the recent decision of the High Court of Australia in *Povey v Qantas Airways Ltd* [2005] HCA33. Gleeson CJ and Gummow, Hayne and Haddon JJ gave a judgment rejecting the argument that the onset of DVT brought about by the conditions of passenger travel on the flight could be said to have been caused by an article 17 accident. the recent US Supreme Court decision in *Olympic Airways v. Husain* 124 S.Ct. 1221 (2004). This was not a DVT case. An asthma sufferer, to whom ambient cigarette smoke represented a considerable health risk, asked for and was allocated seats for himself and his wife in the non-smoking section of the aircraft. Once aboard the aircraft he realised that the allocated seats were only three rows away from the smoking section. He, or his wife, asked a flight attendant if he could move to a seat further away from the cigarette smokers. The flight attendant said no other seats were available. This was untrue. During the flight the asthma sufferer became affected by ambient smoke from the smoking section and suffered a serious asthma attack from which he died. A claim was made by his widow under article 17. The issue was whether his death had been caused by an article 17 accident. But for the intervention, as a link in the causal chain, of the exchanges between the asthma sufferer (or his wife) and the flight attendant the case would have been difficult to distinguish from the DVT cases. The issue was whether that link made all the difference. The majority of the Supreme Court, concurring in an opinion delivered by Justice Thomas, held that it did." (Refer to DVT and Air Travel Group Litigation [2005] UKHL 72.)

costs, declining passenger traffic flows, and the castigation of air travel as spreading communicable diseases. Inconsistent rulings from the courts have further contributed to difficulties for airlines which now have health issues to add to other pressing concerns for which they are responsible, in particular safety, and security of transport services. At the same time, health has been seen as an important component of air passenger rights. In principle, the airlines and airports have an obligation to ensure they do not cause jeopardy to the health of air passengers who fly with them, or who use the airports. This Chapter aimed to examine the many consumer protection and quasi-consumer protection regimes which now exist alongside the normal recourse to compensation offered by the Warsaw and Montreal Conventions.

Furthermore, it was viewed as important in this chapter to create awareness about the health risks associated with flying based on full disclosure principles, rather than on the caveat emptor principles of the past. Awareness is key to airline passenger protection. Airlines, and airport authorities, should provide passengers with an initial forum for recourse as regards complaints about violation to their health. They should also attempt to participate in and make contributions to research studies on DVT, cabin air quality, in-flight medical emergencies, and new health issues, etc. Airlines should also record and ensure the compilation of a database on problems relating to air passenger health, and endeavor to follow and implement the regulatory health precepts established by international and national bodies discussed in this chapter. The implementation of these health regulations, together with the Warsaw and Montreal Conventions, would significantly contribute to air passenger health protection.



Chapter IV

RACIAL DISCRIMINATION AND PROFILING OF AIR PASSENGERS

Introduction

From the attacks of September 9/11 to the foiled plot of the mid Atlantic flight of August 2006, terror has been an issue of paramount importance. The use of civil aviation in the perpetuation of grievous acts of terrorism has affected the progress of the industry. At the ICAO's High Level Ministerial Conference held on 25 September, 2001, it was pointed out that *"the events of September 11, 2001 have had a major negative impact on the world economies and the air transport that is unparalleled in history, and restoration of consumer confidence in the air transport and assurance of health of the air transport industry are both vital, and many states have already effected measures to this effect."*¹ In the current climate of high costs, stiff competition and fear of terrorism, the airline industry is detrimentally affected.

The American Civil Liberties Union (ACLU) claims that *"in 2004 approximately 67 percent of passengers who were subjected to personal searches on entering the United States were people of color."*² Amnesty International estimated that *"approximately 32 million Americans, equivalent to the entire the population of Canada, were victims of racial profiling and an estimated 87 million Americans stand a high risk of being subjected to future racial profiling."*³

Defining "Racial Profiling"

Defining "Racial Profiling" is the first step towards understanding, analyzing and recommending solutions to effectively deal with the issue. However, it is challenging to arrive at a clear and concise definition of racial profiling that is adhered to consistently. In his paper, 'Racial

¹ Ruwantissa Abeyratne, 'Events of September 11, 2001', 'ICAO's Response to security and insurance crisis', Air and Space Law, Volume 276, Kluwer Law International, The Netherlands, December 2002, at Pg 408.

² Macro Macdonald, 'Rational Profiling in America's Airports', BYU Journal of Public law, Volume XVII, 2/05/203, at pp136

³ Threat and Humiliation – Racial Profiling, Domestic Security and Human Rights in United States, A Report of Amnesty International and US Domestic Human Rights Program, Second Printing, New York, October 2004, at pp 6

Profiling: Issues and Federal legislative proposals and Options'⁴, Garrine P. Laney highlights the different definitions that exist on racial profiling:

*"Racial profiling may be defined as all law enforcement activities that are solely initiated on the basis of race, while another may focus only on the context of vehicle stops. The term racial profiling may overemphasize race, leaving out ethnicity, gender and other considerations as factors that influence enforcement action."*⁵

Theoretical Justifications for and against Racial Profiling at Airports

Racial profiling at airports is a socio-legal issue, and understanding the social sphere is very important for drawing up legal solutions. Racial profiling is one of the issues affecting the health and vitality of the aviation industry today. The airlines already protest against the costs incurred in ensuring the safety and security of passengers, which is in fact mainly the State's responsibility. Additionally, airlines feel they are unduly blamed for the practice of racial profiling. Following the foiled plot to bomb trans-Atlantic flights in 2006, many low cost, 'no frills' airlines, such as Ryan Air, threatened to claim compensation from the Department of Transportation for the subsequent additional security measures they were then obliged to introduce.⁶

The growing incidents of aerial terrorism by Arabs ever since the 1960's, and the events of September 11, 2001, have given rise to a phenomenon called 'flying while Arab'. Richard Lowry writes in his paper 'Racial profiling increases border security': *"No one likes to say it out loud, but more than half the people on the FBI's Most Wanted List are called Mohammed, Ahmed or Both."*⁷

⁴ Garrine P. Laney, 'Racial Profiling: Issues and Federal Legislative Proposals and Options', CRS Report for Congress, Submitted on February 17, 2004, Congressional Research Service, Library of Congress, at Pg 2, information available online and was access and downloaded on 12/08/2006 from the website below:
http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL32231_02172004.pdf

⁵ Supra Note 4

⁶ Ryan Air Issues Security Ultimatum reported in the BBC News on August 18th, 2006, online information can be obtained from http://news.bbc.co.uk/2/hi/uk_news/5261908.stm accessed on 20/08/2006.

⁷ Richard Lowry, 'Racial Profiling increases Border Security', Protecting America's Borders, Thomson Gale, Miami, 2005, at pp 23.

Racial profiling was conceived from the Israeli practice of classifying traveling passengers into three categories⁸: Local Jews, foreign Jews, and non- Jewish foreigners. The last category receives most attention and, furthermore, if the passenger has an Arab name then he or she will be searched more vigorously. Checking all passengers can cause undue delays for the airlines. In consideration of the pattern of terror that suggests involvement of people of Middle Eastern descent, airlines adopt the policy of screening a few passengers who they perceive as posing more threat to the traveling public. The idea behind such a program is to focus on passengers who seem more risky than others. Author Richard Lowry again suggests in his paper that, *"Racial profiling is a way of whittling down security load by separating passengers for extensive checks in accordance with the threat they represent."*⁹

Racial Profiling can save money for airlines operating in a very competitive environment by reducing the need for airlines to buy equipment for screening. Furthermore, an airline that has a huge security infrastructure is less attractive to passengers, and puts pressure on the space available at airports. Daniel Eisenberg in his paper states:

"At its root is an inherent conflict of interest: profit-driven airlines are largely responsible for screening passengers. The more money and time they spend in that process, the less efficient and profitable they become. It's not that they strive to be lax, but security isn't their business."¹⁰

Jeremy Bentham's principle of 'Utilitarianism' serves as a good basis to support and sustain the practice of racial profiling. Utilitarianism has been used as an argument for many different political views.

"In his essay on liberty and other works, John Stuart Mill argued that utilitarianism requires that political arrangements satisfy the "liberty principle", according to which "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."¹¹

⁸ Supra Note 7 at pp 26.

⁹ Ibid Note 8

¹⁰ Daniel Eisenberg, 'The system has been vulnerable for years. Marginal improvements aren't enough', information available on the website accessed on 22/08/2006 at the link given below: <http://www.time.com/time/covers/1101010924/bsecurity.html>

¹¹ Utilitarianism, online information available and was accessed on 17/08/2006 from the link below : <http://en.wikipedia.org/wiki/Utilitarianism>

In this way, racial profiling, which exposes a particular minority group to greater scrutiny on public safety considerations, becomes reasonable as well as sustainable. *“Approximately half of the Americans supported curbing the civil liberties of Muslims for fighting terrorism, in a National Poll conducted by Cornell University in December, 2004.”*¹² Thus, in summary, it can be said that:

“Increased scrutiny of a particular race is justified because it’s a public safety issue, which is a major factor in deciding whether to profile any group or not.”¹³

The vociferous arguments against the practice of racial profiling are traditionally centered on the concepts of racial discrimination and violation of civil liberties. Many such arguments against profiling at airports are based “on the blurred line between the prejudicial animus based discrimination and measured, rational and controlled profiling. Profiling solely based on race is considered futile from a practical point of view, but the measures that consider multiple factors like race, age and gender may be justified in certain circumstances.”¹⁴ Thereby, racial profiling as a practice, *“when violently opposed to the ‘equal treatment clause’ of the constitution, can equally find good support from the ‘general welfare clause’ of the US constitution which makes security the primary responsibility of the state.”*¹⁵

American history is full of security legislation made in haste, targeting one or other minority group. Macro Macdonald in his article states as follows:

“America’s checkered history of race relations no doubt contributes to its hesitancy to avoid security measures that, though initially well intentioned, might become a pretext for inappropriate discrimination of minorities. Some of the country’s most regrettable episodes occurred during attempts to shore up national security, including Alien and Sedition Act of 1798 and President Lincoln’s suspension of writ of Habeas Corpus.”¹⁶

¹² Poll shows US views on muslim Americans, downloaded from <http://www.msnbc.msn.com/id/6729916/>, accessed on 12/08/2006.

¹³ Supra Note 4 at CRS-5

¹⁴ Supra Note No: 3 at pp 119

¹⁵ Barry B. Friedman, ‘Policy point and counterpoint- Profiling at Airports’, International Social Science Review, Fall/ Winter 2004 also available online and was accessed on 15/08/2006 from the link below : http://www.findarticles.com/p/articles/mi_m0IMR/is_3-4_79/ai_n9532554/pg_3

¹⁶ Supra Note 2 , at pp 121

The use of race as the main criteria to screen one group of people more rigorously than another is unscientific. Race factors become blurred today as more cultures and races intermix and intermarry. A child born to an English father and Arab mother may not resemble either of them. So, the search for the Middle Eastern profile may prove to be completely futile. Of the 19 men who were involved in America's biggest mass murder, not all looked stereotypically Middle Eastern. Profiling based on race might motivate terrorists to hire assassins from non-targeted groups. Greg Bates¹⁷ explains this:

"Terrorist groups, by keeping their more swarthy comrades in background support roles, could use lighter skinned people in the more public roles to actually carry out the terrorism. To further evade racial profiling, such a group could be heavily comprised of women."¹⁸

Some claim that racial profiling can be compared to acknowledging the pragmatism present in old institutions of racism. Emphasis on race-based profiling does not offer 100 percent protection from terrorist attacks as it ignores the possible involvement of members of other races (non-minority races) in incidents of mass murder. It could mean that many dangerous white criminals like Tim Mc Veigh¹⁹ and Richard Reid²⁰, who have made a significant contribution to the history of mass murder in America, are more likely to escape prosecution and imprisonment. *"In fact, one domestic security perspective claims that the bottom line is that nobody knows what the next terrorist, serial killer, or smuggler would look like."*²¹

The practice of racial profiling could lead administration and enforcement agencies into a 'slippery slope' and 'genie out of the bottle effect'. Racial profiling of Muslim men of Arab and Middle Eastern descent has slowly led to targeting of other groups of men who have close resemblance to the main group. As in the aftermath of September 11, attacks on American Sikhs, a non-Muslim religious minority in America, seem to have increased, and targeting of Muslims from South Asia, such as Pakistan and India, have also been on an increase. Furthermore, some authors have also discarded the practice stating that it is like a 'genie in the bottle', once released, it is difficult to put it back in the bottle because racial profiling at airports does not prevent

¹⁷ Greg Bates, 'Return of Racial Profiling' available online and was accessed on 12/08/2006 from the link <http://www.counterpunch.org/bates08202004.html>

¹⁸ Supra Note 16

¹⁹ Tim Mc Veigh was responsible for the Oklahoma Bombing

²⁰ Richard Reid was caught in December 2001 trying to blow up an aircraft from Paris to Miami by using explosive fitted in his shoes. He was a British citizen and had converted to Islam

²¹ Amnesty International, 'Racial Profiling does not increase border security', 'Protecting America's Borders', Thomson Gale Publications, United States, 1st Edition, 2005 at pp 33

similar targeting of minority groups in other public places such as the metro, highways, public libraries, and tourist spots. The consequences of racial profiling are difficult to contain, leading to ongoing difficulties for members of a particular race and ethnicity.

Legal Ramifications of Racial Profiling at Airports in the United States and European Union

In the wake of the 9/11 attacks, the United States woke up to a new trend of aerial terrorism. The 2001 event is one of the deadliest in America's history, claiming the lives of 3,000 innocent Americans. Racial profiling is not new in the US: it permeates through most other law enforcement activities aimed at controlling drugs, guns, and terrorism. Before examining the legal ramifications of racial profiling at airports, it becomes imperative to discuss vectoring of this phenomenon, i.e. how and why the state arrived at such a practice and whether other stakeholders are also responsible.

Transport is the backbone of an economy. The nature of the transport industry involves substantial elements of social /public interest in favor of the poor and the old²², substantial economies of scale, significant barriers to entry and the existence of a monopoly (natural monopoly). Given this, a government's interplay and level of involvement with the markets depends on the type of incumbent government (i.e whether it is a capitalist or a communist regime in power). In a typical capitalist regime, there is a disjunction between ownership, operation and regulation of the markets. For example, in a capitalist system, the government may retain the controlling stake in the transport industry. However, the latter may be driven by profit focused private entrepreneurs. The government's role is one of regulating the industry to ensure that the "public interest" is preserved. Richard A. Posner defines public interest as follows:

"The interests of all who are affected by the industry- consumers, shipper, receivers, passengers, stockholders, employees, employers, large and small – to enjoy safe, adequate and dependable service at a reasonable price....to be treated fairly."²³

²² Richard A. Postner, 'Government and the Market' in Paul Dempsey and Laurence Gesell, Air Commerce and Law, Chapter 2, Coast Aire Publications, United States, 2004, at pp 33

²³ Ibid Note 22 at pp 34

Government exercises paternalism in the protection of its citizens *“who haven’t sufficient information to perceive risks and make rational choices, to shield them from erroneous decision making or to protect them from negative externalities before they occur.”*²⁴ Whether in a deregulated or a regulated transport market, the element of safety is always the concern of the state. Prof. Peter Turribull states in his paper entitled ‘Deregulation, Regulation or Reregulation of transport?’, that:

*“Strictly speaking, the term “deregulation” is a misnomer: deregulation does not signal the end of regulation, especially in crucial areas of transport such as safety, and deregulatory measures are invariably accompanied by new and often more explicit regulatory structures.”*²⁵

Although public transport safety is the primary responsibility of the state, airlines also share the responsibility. Therefore, airlines also have *“a duty to exercise the highest degree of care as ‘common carriers’ towards passengers, protecting them against foreseeable assaults from the fellow passengers.”*²⁶ Under Article 8 of the ‘IATA Recommended Practice (RP) 1724 on ‘General Conditions of Carriage (Passenger and Baggage)’ of June 2004 that deals with ‘Refusal and Limitation of Carriage’, air carriers may refuse carriage of any passenger or passenger’s baggage for reasons of safety or if they determine that:

*“the conduct; age; mental or the physical state of the passenger is such as to cause discomfort; or to make himself or herself objectionable to other passengers; or involves any hazard or risk to himself or herself or to the other persons and property of the passengers; or has refused to submit to a security check”*²⁷

It has been said about the airlines that they are *“Common carriers who have a duty to accept all passengers without discrimination, those who apply for transportation and offer to pay the customary fare, but there are exceptions to it. Airlines can refuse to accept passengers, if they have reasonable ground(s) to believe that such a passenger is posing a threat or annoyance to*

²⁴ Supra Note 22 at pp 49.

²⁵ Prof. Peter Turribull, ‘Deregulation, Regulation or Re-regulation of Transport?’, information available online at: <http://www.ilo.org/public/english/dialogue/sector/techmeet/sdpt99/sdpt4.htm> and was accessed on 23/08/2006.

²⁶ 49 U.S.C //44701(d) 1 (A) (1994), Blair J. Berkley and Mohammad Ala, ‘Identifying and Controlling Threatening Passengers, Cornell Hotel and Restaurant Administration Quarterly’, Cornell University Press, August 2001, at pp 6.

²⁷ Article 8.1.2.2, 8.1.2.3, 8.1.4 of Recommended Practice 1724, IATA Passenger Service Conference Resolution Manual, 24th Edition of June 2004, at pp 910

the other passengers."²⁸ 'Furthermore, the airline is not expected to wait till the offender commits the offensive act to exclude such a passenger(s).'²⁹

Airlines and the state complement each other in safety-related duties for the welfare of the travelling masses (the consumer as per our paper). It is in this context that the practice of racial profiling is now discussed.

The assassins involved in the 9/11 attacks, all of whom were of Middle Eastern descent, sparked a new racial angle to the genre of terrorism they practiced. The governing Bush regime was quick to label the culprits of the offense, and in 2001 a new act called 'Aviation and Transportation Security Act' was enacted. The Act brought to the fore a new body called Transport Security Administration (TSA) that would oversee the security arrangements of all modes of public transportation systems.

Various departments of the US Government acted swiftly to bring in new security regulations and policies subsequent to the 9/11 attacks. Many of the policies and regulations that were issued targeted few races, mainly persons of Middle Eastern and South Asian descent, who are subject to selective application of immigration laws: tighter scrutiny from the law enforcement agencies at the immigration check points at airports. Many people have been deported, leading to the biased displacement of people belonging to certain races, adding to the humiliation of law-abiding citizens, as well as to the immigrants of this race. *"The National Security Entry-Exit Registration System (NEERS) was introduced that required a 'special registration' requirement of persons above the age of 16 years belonging to certain Muslim countries (from 25 Muslim countries and North America), subjecting them to INS questioning, fingerprinting and photographing."*³⁰

It has been said about the system that it has forced many people of these communities to seek asylum in neighboring Canada.³¹ The Airport Security Federalization Act was enacted into law in 2001, a development that led to the use of new improved methods for airport security such as baggage matching, use of computers and x-rays in bomb detections, and sniffer dogs. But the most important feature of this Act was the introduction of the ICAO promoted CAPPS

²⁸ Pittsman vs. Grayson No:93 Civ 3974 (JSM), U.S District LEXIS 9274, at 5 (July, 1997).

²⁹ Supra Note 26 at pp 8

³⁰ Dalia Hashad, 'Stolen Freedoms: Arabs, Muslims and South Asians' in wake of 9/11 Backlash', 2004 Denver University Law Review, Volume 81:4 at pp 743.

³¹ Ibid Note 30

(Computer Aided Passenger Prescreening System), a technological aid for screening all passengers in order to identify a select few who need to be searched more intensely, thereby reducing the chances of racial profiling. Apart from the introduction of these technological tools to security, additional measures such as airport profiling were introduced that allowed the authorities to collect, match and detect past records of passengers to track the movement of suspicious goods and baggage. Slowly, these profiling techniques deteriorated as race and ethnicity came to be used for profiling passengers to prevent aerial terrorist attacks. The effectiveness of profiling depends on the quality of the databases and incident reports that drive up the statistical model. Commenting on 'Constitutionality of Profiling', the court in *US vs. Lopez*³² case held that "*Profiling in anti-hijacking procedures is constitutionally valid, if it does not use characteristics which discriminate against any group on the basis of religion, origin, political views or race used in creation of the profile.*" The introduction of new security measures was followed by the demand for clarification issued by the various departments, requiring unbiased use of the aforesaid systems.

The FAA has issued many new directives introducing new security measures at airline checkpoints, passenger screening locations, and at boarding gates. In their Fact Sheet, the FAA has clarified that these measures should not be used to discriminate against air travelers on the basis of race, ethnicity or national origin. In fact, passengers selected for additional search were to be chosen from technology centric CAPPS (Computer Aided Passenger Prescreening System) process and enforcement authorities were to use 'but for' test in screening the passengers from a particular race.³³

In 2003, the Department of Justice issued a 'Guidance regarding the use of race by federal enforcement agencies'. Apart from categorically forbidding the use of the practice of racial profiling by the federal enforcement agencies, a clause was introduced that permitted its use for the identification of terrorists in the interests of national security, to the extent permitted by the laws and the constitution of US.³⁴ But Amnesty International, in its report on racial profiling, has pointed out that these rules are not of a binding nature; further, they are very narrow as they do not mention any enforcement mechanism, they leave out the state law enforcement mechanism from its scope, do not mention punishments for violating officers and have blanket exceptions in

³² *US vs. Lopez* 328 F. Supp1077 (EDNY 971)

³³ Fact Sheet issued by the Department of Transportation, Senior Counsel of Aviation Consumer Protection Division, dated 19/11/2001.

³⁴ Fact Sheet on Racial Profiling, Department of Justice, introduced on June 17th, 2003.

the form of 'national security' and 'border integrity'.³⁵ The report further points out that on February 2001, President Bush promised 'to put an end to the practice of racial profiling in America, as he regarded it wrong'.³⁶ But in American airports, as in other public places, racial profiling continues unabated.

Furthermore, the AIR-21 Act provides that: "*An air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry...*"³⁷ Note that this provision applies to persons connected to the air carriers but does not apply to security personnel who are not connected to an air carrier. The Transport Security Administration (TSA) has been entrusted the enforcement of the AIR-21 Act. The maximum penalty for each infraction by an air carrier is \$2500.³⁸ In 2001, the FAA issued 'Guidance for Screeners and Security Personnel', who conduct or supervise the screening of passengers and accessible property (e.g., screeners and screener supervisors). This includes, but is not limited to, any personnel responsible for security duties that require direct interaction with passengers at airport facilities (e.g., passenger service personnel, local station managers, and airport operators). It was re-emphasized that in performing critical duties, personnel may not rely on generalized stereotypes or attitudes or beliefs about the propensity of members of any racial, ethnic, religious, or national origin group to engage in unlawful activity: "*Though the guidelines do not have the force of law, violation of the procedure set forth in the guidelines may be the basis for asserting a violation of AIR-21 Act § 706.*"³⁹

It is also imperative to recall that the practice of racial profiling violates the mandates of the provisions of many General Assembly resolutions such as the International Convention on Civil and Political Rights (ICCPR). For example, it violates Article 2, Article 3 and Article 4 of ICCPR⁴⁰

³⁵ Supra Note 3, at pp 7

³⁶ Supra Note 34

³⁷ The Sikh Coalition, 'Your Rights and Avenues as victim of airport profiling' available online at <http://www.sikhcoalition.org/Airportprofiling.pdf> as accessed on 23/08/06

³⁸ Ibid Note 37

³⁹ Ibid Note 38

⁴⁰ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No.16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976. Article 2: "*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its*

Moreover, the airport security measures based on racial profiling violate the mandates of many provisions of the UN Convention for Elimination of All Forms of Discrimination.⁴¹

The American Civil Liberties Union has been taking up the cause of racial minorities who have been victimized at immigration and airport screening checkpoints. The organization has expressed great concern over the harassment faced by these targeted racial minorities who are subjected to humiliating and embarrassing intrusive searches at the airports. Branding this form of search as 'blatant forms of racial discrimination', the organization made a representation

constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Article 3: "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

Article 4: "Article 4 that states "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin.

No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation."

⁴¹ United Nations Declaration on the Elimination of All Forms of Racial Discrimination, Proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963

Article 1 that states "Discrimination between human beings on the ground of race, color or ethnic origin is an offence to human dignity and shall be condemned as a denial of the principles of the Charter of the United Nations, as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, as an obstacle to friendly and peaceful relations among nations and as a fact capable of disturbing peace and security among peoples."

Article 2 that requires "No State, institution, group or individual shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons, groups of persons or institutions on the ground of race, colour or ethnic origin.

No State shall encourage, advocate or lend its support, through police action or otherwise, to any discrimination based on race, colour or ethnic origin by any group, institution or individual.

Special concrete measures shall be taken in appropriate circumstances in order to secure adequate development or protection of individuals belonging to certain racial groups with the object of ensuring the full enjoyment by such individuals of human rights and fundamental freedoms. These measures shall in no circumstances have as a consequence the maintenance of unequal or separate rights for different racial groups."

before the Aviation Subcommittee of the House of Representatives Committee on Transportation. It called for ending race-based profiling, stating that *"even if effective security measures of the nation were paramount, in no way should they be achieved at the cost of fundamental civil liberties."*⁴² The following suggestions were made to the Subcommittee for their consideration as the basic minimum measures required for ensuring parity between antagonistic ideals of security and civil liberties.⁴³

The practice of racial profiling at airports has time and again been challenged in the US courts on the grounds of the violation of 4th Amendment 'Equal Protection' clause of the US constitution and Civil Rights statutes. Courts seem to have been inconsistent in their decisions on the issue. In some cases like *Whren vs. United States*, and *Choi vs. Gaston*⁴⁴, courts have held *"intentional discrimination and selective investigation by state actors against minorities because of their racial identities; and especially where there is no particularized suspicion, this violates the constitution."* However, in *Whren vs. United States*,⁴⁵ the Supreme Court also inconsistently held that *"the Fourth Amendment is not offended if the police choose to make a traffic stop because of the driver's race, as long as the police have a probable cause to make the stop."*⁴⁶ Federal courts in many cases like *Chavez vs. Illinois State Police*⁴⁷ and *United States vs. Armstrong*⁴⁸ have held

⁴² ACLU Representation made to Aviation Subcommittee of House of Representatives, Committee of Transportation on 27 February, 2002, available online and was accessed on 25/08/06 from the following link: <http://www.house.gov/transportation/aviation/02-27-02/corrigan.html>

⁴³ Include a complete bar to profiles based on race, religion, national origin, gender, sexual orientation or political opinion – and proxies for such characteristics – as an element in any profile or other scheme used to identify which passengers (or which passengers luggage) are to be subjected to heightened security measures.

Require the DOT to commission an adequate, independent study of the discriminatory effects of the passenger profiling system as implemented.

Establish an independent entity to receive and investigate complaints of discriminatory or other inappropriate security screening that would supplement, not supplant, existing court remedies.

Urge passage of H.R. 2074 the "End Racial Profiling Act" and any additional legislation necessary to address the racial discrimination currently happening in our nation's airports.

Direct DOT to track and report passenger complaints of inappropriate, overly intrusive security screening measures so that the DOT and passengers know which airports commit security-related abuses and the DOT can retrain problem agents.

Bar carriers from sharing personal information without the passengers knowing and informed and uncoerced consent and limit disclosure of information for security purposes. Maintain protections for the privacy of personal information.

Mandate that a passenger Bill of Rights be posted at ticket counters to inform passengers of their rights such as (i) what triggers intrusive security measures, such as pat down and strip searches, and how to avoid such searches; (ii) the consequences, if any, of exercising these rights; (iii) who to contact with complaints of security-related abuses.

Searches arising from the use of a profiling system should be no more intrusive than search procedures that could be applied to all passengers. For example, the courts have consistently held that a magnetometer examination is a search for Fourth Amendment purposes. Body scanners that project an image a person's naked body onto a screen are far more intrusive.

Prohibit the use of trusted passenger programs.

⁴⁴ *Choi vs. Gaston* 220 F.3d 1010, 1012 (9th Cir. 2000)

⁴⁵ *Whren vs. United States* 517 U.S. 806(1996).

⁴⁶ *Supra* Note 2 at pp117

⁴⁷ *Chavez vs. Illinois State Police* 251 F.3d 612, 635 (7th Cir. 2001).

⁴⁸ *United States vs. Armstrong* 517 U.S. 456, 464 (1996)

that: *“Any general policy of utilizing impermissible racial classifications in determining who to stop, detain, and search, would violate the Equal Protection Clause.”*⁴⁹

It was held in one of the cases that the *“Right of the people to be secure in their persons, houses, papers, and effects, against (general warrants) shall not be violated, and no warrants shall be issued, but upon probable cause, supported by oath, affirmation and particularly describing the place to be searched or person or things to be seized.”*⁵⁰ The court reviewed the administrative actions such as searches and seizures, which involve intrusion into the privacy of the citizens by the state on the ‘criterion of reasonableness’. The actions were further viewed within the matrix of “public interest” versus “personal liberty” to gauge its seriousness. In *Ohio vs. Terry*,⁵¹ the court held that *“the ‘Stop and the Frisk doctrine’ can proceed without any suspicion at all. The touchstone of our analysis of the Fourth Amendment is always the reasonableness of the government’s invasion of a citizen’s personal liberty.”*⁵² It was suggested that *“when the court balances public interest with intrusion into liberty in the above case, the public interest would weigh more in the bomb case than in the drug case? Drawing on a modern, relativistic definition of ‘reasonableness’, perhaps it means “reasonable compared to the harm sought to be avoided”*⁵³

In *Martinez vs. Mt. Prospect*⁵⁴ the court held that *“it is critical that our legal system assists in the elimination of all forms of discrimination. We should strive to ensure that race plays no role in the day-to-day operation of our justice system.”*⁵⁵ However, by signing the Executive Order 9066, President Roosevelt gave the Secretary of War the power to intern 110,000 Japanese Americans, two-thirds of whom were US citizens. In *Hirabayashi vs. U.S.*,⁵⁶ the court held that *“all distinctions made between citizens solely on the basis of their ancestry are by their very nature odious to free people whose institutions are founded on the basis of ‘doctrine of equality’.”*⁵⁷ In *Korematsu vs. U.S.*,⁵⁸ the court held that *“all legal restrictions that curtail the civil right of a single racial group are immediately suspect and must be subjected to the most*

⁴⁹ Chrystie Flournoy Swiney, Racial Profiling of Arabs and Muslims in the US: Historical, Empirical, and Legal Analysis Applied to the War on Terrorism, Muslim World Journal of Human Rights, 2006, Volume 3, Issue 1, Article 3 at pp 32

⁵⁰ George C. Thomas III, Terrorism, Race and A New Approach to Consent Searches, Volume 73, Mississippi Law Journal, 21/01/2005, at pp 528.

⁵¹ 392 US 1 (1968)

⁵² Ibid Note 50 at pp 541

⁵³ Ibid Note 49, at pp 530.

⁵⁴ Martinez vs. Mt. Prospect 92F. Supp 2d 780, 781 (N.D III 2000)

⁵⁵ Supra Note 2 at pp 118

⁵⁶ Hirabayashi vs. U.S 320 US 81, 85 (1943)

⁵⁷ Supra Note No: 56 at pp123

⁵⁸ Korematsu vs. U.S 323 U.S 214, 216 (1944)

rigid scrutiny."⁵⁹ But the court took a contrary view in the conclusion of the above two cases, when it stated that at the time of Japanese internment there existed a very serious threat to America from Japanese American citizens. The so called petitioners in these cases might be loyal to America; but since it was difficult to segregate the loyal from the disloyal Japanese American citizens, the administrative directive to relocate some Japanese was justified and valid constitutionally. These two cases are not seen as favorable civil liberties decisions. When race, ethnicity, national origin, age, and gender are generally used to single out individuals for greater scrutiny, discrimination concerns increase.

However, in keeping with this trend, profiling is seen to generally withstand legal challenges unless it is solely based on one or more criteria such as race and ethnicity: "*Private citizens or airlines engaging in racial profiling may be subject to discrimination claims under Title II of the Civil Rights Act of 1964 or Section 706 of the Wendell H. Ford Aviation Investment and Reform Act of 2000 or AIR 21.*"⁶⁰

For example, in Title II cases, the plaintiff must establish the following⁶¹:

- (1) A *prima facie* case of racial discrimination,
- (2) the burden shifts to the defendant to come forth with evidence of a legitimate, non-discriminatory reason for its action, and
- (3) the plaintiff must then prove by a preponderance of evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Hence, to defeat such claims, airlines need only to prove that profiling was used for the non-discriminatory purpose of identifying potential threats, focusing security resources, or assuring passenger safety. Thereby, the above indicates that claims of discrimination made under the equal protection and other private Civil Right statutes can be incongruous and one-sided.

Dr. Ruwantissa Abeyratne points out that, "*under Article 13 of the Chicago Convention, 1944, the Contracting States are under obligation to provide laws and regulations for admission to and departure from its territory of passengers, crew or cargo of aircraft, as such regulations relating to entry, clearance, immigration, passports, customs and quarantine shall be complied with by*

⁵⁹ Supra Note 54 at pp123

⁶⁰ Supra Note 26

⁶¹ Supra Note 5

or on behalf of passengers, crew or cargo upon entrance into or departure from, or while within the territory of that state and Article 44 which requires ICAO, to ensure the safe and orderly growth of the international civil aviation, to meet the needs of the people of the world for safe, regular, efficient and economical air transport and avoid discrimination between the Contracting States. Annex 17 on 'Security' to the Chicago Convention in Paragraph 2.1.1, identifies the main aim of aviation security as safeguarding international civil aviation operations against acts of unlawful interference. These aims have been established by the international community with the view to ensuring that safety and security of civil aviation apply not only in the context of individual states, but also of their people, in accordance with the distinction made in the Preamble of the Chicago Convention."⁶² Abeyratne also points out that racial profiling at airports violates the mandate of Amendment 10 to Annex 17⁶³ notified to the Contracting States by ICAO. Moreover, he suggests that the ICAO and the international community should give the term 'unlawful interference' a very broad interpretation, encompassing a wide range of offensive activities which have been strongly condemned by the Resolution A33-2 passed by the 33rd session of the ICAO Assembly of 2001.

Attempts have been made to reduce the effects of profiling based on race or ethnicity or nation of origin by making use of technological tools like biometrics. In fact, the House of Transportation and Infrastructure Committee introduced a bill called 'Aviation Biometric Technology Utilization Act' that required the Department of Homeland Security to make use of biometrics and establish standards for their usage at airports across the US.⁶⁴ The Act aimed at introducing the 'Universal Biometric ID' that creates an electronic chip profile of individuals. This enables bearers to directly access the gates, once the authenticity of his or her identity is established by the routine background check on a biometric screener. Similarly, the Air Transport Association (ATA), the industry group representing US airlines, is promoting a 'National Traveler's ID'. This card allows individuals the convenience of bypassing security screening lines at airports if they submit to a basic background check. The UK Government plans to introduce Biometric IDs in a manner similar to the United States, but is concerned that the US standards are above the ICAO standards for biometric passports.⁶⁵ Also, in the European Union, some countries such as

⁶² Ruwantissa Abeyratne, 'Profiling of Passengers at Airports-Imperatives and Discretions', Vol XXXVIII No: 3, 2003, European Transport Law.

⁶³ Amendment 10 Annexure 17 deals with measures relating to screening of passengers and their baggage prior to boarding an aircraft. It advises the States that security controls and procedures should cause minimum interference with, or delay to the activities of civil aviation.

⁶⁴ Information downloaded from <http://www.govtech.net/news/news.php?id=91054>, accessed on 10/09/2006.

⁶⁵ In 2003, it was agreed by the International Civil Aviation Organisation (ICAO) that the initial international biometric standard for passports would be facial mapping, although additional biometrics such as fingerprinting could be included.

Spain, France, Netherlands, Germany and Italy are considering the introduction of 'Biometric ID's to facilitate information-sharing within the European Union for tracking suspicious movements.⁶⁶ Contracting States of ICAO are currently considering improving border security measures at airports and also ensuring the smooth flow of passengers and cargo by switching to the MRTD (Machine Readable Travel Documents) as per the mandate of 33rd Assembly of ICAO held in 2001.

In the wake of the September 9/11 attacks, the Department of Justice introduced the Advance Passenger Information System (APIS), based on the Australian and New Zealand models. This requires passenger data such as name, date of birth, gender, passport number, and address before entering the US, to be transmitted on the standard format called (EDIFACT) UN Electronic Data Exchange for Administration, Commerce and Transport. Implementation of APIS is not without controversy: despite the reduction of the insistence on race or ethnicity or nation of origin, the information disclosed by the airlines under the system is reviewed in the US vs. EU Data Protection debate.⁶⁷ It was pointed out that 'the US had no data protection legislation and no guarantees for the use of the data provided by the airlines; its position stood in contradiction to the 1995 EU Data Protection Directive.'⁶⁸

*"The European Data Protection Directive, which has been given effect to in October 1998, is far more stringent than the US ones. This has become a major point of contention between the commercial entities on both sides of the Atlantic trying to access each other's data over the internet. As of July 2000, the European Parliament, representing 15 member states, had rejected the data protection deal made between European Commission and United States that would shield the US companies from European Regulations of Privacy In fact, the European Parliament wanted a new provision that would allow Europeans the right to sue American companies for damages resulting from infringement of their right to privacy."*⁶⁹

"European Commission's letter on the 6 October, 2006 approved of an agreement with the United States on the sharing of passenger data; an agreement that will allow airlines to meet

⁶⁶Biometric ID may snare Travelers, downloaded from <http://edition.cnn.com/2005/TRAVEL/02/23/bt.security.snares/>, accessed on 12/09/2006.

⁶⁷ According to the Article 29 data protection working group adopted on October, 2002, which questioned whether it would be legal to transfer the passenger data not required for the purpose of booking a ticket. Where there is no limits on the use of the data and no guarantees that it would not be amended for other purposes and to whom it would be passed on to.

⁶⁸ Virginie Guirandon, 'Enlisting Third Parties in Border Control', Conference Paper presented at Managing International and Inter-Agency cooperation for border control, Geneva 13-15 March, 2003.

⁶⁹ Michael A. Caloyannides, 'Privacy Protection and Computer Forensics', Legal Issues, Arctech House, 2nd Edition, 2004, US.

US data provision requirements without contravening Europe's privacy laws. This is an important agreement that will ensure normal operations for the 105,000 passengers who fly⁷⁰ between these two jurisdictions each day."

The Interim Agreement of October 2006 expires on the 31 July 2007, and negotiations are taking place between the US and the EU to come up with a permanent legal solution for the passenger data sharing issue, subsequent to the aforesaid date.

Studies of the criminal justice systems of many European countries have found inconsistent evidence of ethnic and religious discrimination, particularly in the wake of the terrorist attacks in the United States in 2001 and in Spain in 2003. Irrefutable evidence of ethnic profiling is hard to come by due to many countries' overly strict interpretation of data protection laws that preclude the gathering of any ethnicity-specific data. However, a 2000 European Commission Council Directive⁷¹ implementing the Principle of Equal Treatment of Persons irrespective of Racial or Ethnic Origin (the "EU Race Directive"⁷²) explicitly authorizes the gathering of statistical information necessary to prove discrimination, which provides an opportunity for collecting such data.

⁷⁰ Airlines applaud the US-EU Agreement on Passenger Data - More work needed on harmonization, IATA Press Note No: 27 of 06 October, 2006.

⁷¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin

⁷² Article 1

Purpose

The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2

Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on grounds of racial or ethnic origin shall be deemed to be discrimination within the meaning of paragraph 1.

In Europe, *“ethnic profiling has been under acknowledged and misunderstood, on the rare occasions when they have been examined head-on by the courts, the claims that the police should be barred from profiling based on race and ethnicity met with furious hostility.”*⁷³ Like the Spanish Constitutional Court case where a naturalized Afro-American Spanish citizen was stopped at the railway station to provide documentary proof, it was decided that it was legal to use ethnicity or race as a proxy for non citizen status and thus to single out ethnic minorities for identity checks for enforcement of immigration laws. ‘In the UK, the Department for Transport (DfT) is said to be designing a profiling system that would put the persons of Middle Eastern Origin and Muslims through extensive security checks. The Terrorism Act 2000 has authorized the DfT to consider certain passenger data for selecting persons for rigorous security searches.’⁷⁴ The European Convention for Human Rights prohibits racial discrimination in the pursuit of civil and political rights. This includes the right to the liberty and security of citizens, as well as the determination of civil rights and any criminal charges.

In Canada, the federal Canadian Air Transport Security Authority (CATSA) is responsible for ensuring the safety of air transportation and air passengers. In the wake of the foiled Heathrow plot that rekindled concern for air transport security, CATSA began subjecting all its passengers to a pre-screening boarding (PSB) Procedure. On contacting Mr. Ian Mackay⁷⁵ about whether racial profiling happens in Canadian airports, he stated the following:

“Racial profiling does not take place at any airport in Canada. As such there is no data or reports on this subject. Recently in Canada, there has been a discussion as to whether behavioral pattern recognition might be usefully added as a layer to protect travelers from terrorist attacks. At present this discussion is at a very early stage and no Canadian materials exist on the subject.”

Conclusion

Racial profiling has become a type of racial discrimination and is considered an anti-consumer behavior. If race were to be concomitantly used along with other parameters such as ‘national origin’, ‘gender’ etc., an effective airport security system could be established that would

⁷³ Ethnic Profiling by police in Europe, published by Justice Initiative in June, 2005, accessed on 2/09/2006. from http://www.soros.org/resources/articles_publications/publications/justice.pdf

⁷⁴ Joshua Pantesco, ‘British debate Racial Profiling of passengers after foiled Terror plot’, August 16, 2006, obtained from <http://jurist.law.pitt.edu/paperchase/2006/08/british-debate-racial-profiling-of-air.php> accessed on 21/08/2006.

⁷⁵ Mr. Ian Mackay is Vice President, Law and Strategy, CATSA via email dated 08/09/2006.

mitigate the legal effects of violation of privacy and provide equal protection clauses in the U.S. Constitution.

Besides the 'Conference on Racism, Racial Discrimination, Xenophobia and Related Intolerance of 2001', the United States was asked to implement or strengthen legislation and administrative measures that prohibit racial discrimination, making it imperative for them to deal effectively with racial profiling. In relation to this, it would be helpful if the US Congress reconsiders the passage of the End of Racial Profiling Act that would make racial profiling at airports illegal. Amnesty International points out that after the 9/11 attacks, the first attempts that were made to introduce this legislation languished, leading to its subsequent abandonment. However, a few states in the US such as New Jersey, Connecticut, Illinois, Montana, Nebraska etc. have enacted laws to prohibit racial profiling making it a criminal offence to practice it.⁷⁶ Courts could also play a crucial role in the elimination of Racial Profiling at airports through favorable interpretations. Apart from purely legal solutions, a policy initiative for reform at airports should also be taken.

The practice of racial profiling at airports poses a unique challenge to the air transport sector. Acknowledgement of the existence of racial profiling at airports may be the first step in the direction of reform leading to a detailed, well-documented policy statement which dismantles the practice of racial profiling. As explained earlier in the chapter, many authors presented the dilemma involved in the practice of 'Racial Profiling', by pointing out that without racial profiling an Arab terrorist's job is made easier. On the other hand, where racial profiling is implemented, many innocent people are subjected to humiliation, and racist stereotyping has increased. Moreover, none of this deters the perpetuation of terrorism; and any system of race based profiling will in any case, always be circumvented by the perpetrators.



⁷⁶ David N. Tanovich, 'E-Racing Racial Profiling', 2004 Atlanta Law Review, Volume 41:4, at pp 927.

Chapter V

RIGHTS OF DISABLED PASSENGERS

Introduction

The world today is home to some 650 million disabled¹ people and an estimated 10 percent of the population experiences some or other kind of disability.² These people are afflicted with some physical or mental impairment(s) that cause a reduction in their ability to interact with mainstream society, giving rise to issues such as their integration, attitude change, self advocacy, capacity building, and accessibility with other members of society. Thereby, the term 'disability' is often used *"to refer to an individual functioning with certain impairment(s) including physical or sensory impairment(s), cognitive impairment(s) or mental disorder(s)."*³ But most contemporary definitions see disability as a combination of a social construct and a medical reality. For example, the International Classification of Functioning, Disability and Health (ICF), a code developed by the World Health Organization (WHO) that classifies international components on health and disability, defines 'disability' as follows:

"the outcome or result of a complex relationship between an individual's health condition and personal factors, and of the external factors that represent the circumstances in which the individual lives. Impairments are defined as "problems in body function or structure such as significant deviation or loss."⁴

However, other terms such as 'Incapacitated Passengers'⁵ and 'Persons with Reduced Mobility'⁶ are also used to denote passengers with disability.

¹ Disability, downloaded from <http://en.wikipedia.org/wiki/Disability>, accessed on 12/10/2006.

² Disability and Rehabilitation WHO Action Plan 2006-2011, downloaded from http://www.who.int/disabilities/publications/dar_action_plan_2006to2011.pdf, accessed on 12/12/2006.

³ Ibid Note 1

⁴ Ibid Note No:2

⁵ Resolution 700 'IATA Acceptance and Carriage of Incapacitated Passengers' that defines 'Incapacitated Passengers' as those with physical and mental disability; or with medical condition, who require individual attention or assistance on enplaning/deplaning, during flight and during ground handling which is normally not extended to other passengers.

⁶ Article 2 of EC Regulation 1107/2006 defines 'Person with Reduced Mobility' or 'Disabled Person' as a person whose mobility when using transport is reduced due to any physical disability (sensory or locomotor, permanent or temporary), intellectual disability or impairment, or any other cause of disability, or age, and whose situation needs appropriate attention and the adaptation to his or her particular needs of the service made available to all passengers;

The air transport sector grew in terms of “passenger-kms performed at 6.1 percent in 2006 and is expected to grow at 5.8 percent and 5.6 per cent in 2007 and 2008 respectively.”⁷ This projected growth is expected to translate itself into growth in the traffic of passengers with ‘reduced mobility’ or ‘disability’.

Legal Accommodation of Disabled Air Passengers

Many airports and carriers have in the past been unfriendly and non-cooperative to air passengers with disabilities who have encountered the following: denied booking; denied boarding; denied special assistance or special in-flight assistance; over-charging; and being charged for an accompanying animal. At present, the carriers that are mindful of competition find it unfair to be asked to bear expenses for providing accessibility and accommodating the special needs of passengers with reduced mobility imposed on them through policy and legislation. Thus, airlines are dissatisfied with the legislative initiatives such as the EU legislation (EU 1107/2006) that aims at ensuring that disability accommodation happens at no charge on the grounds of equity and social inclusion.⁸ However, carriers maintain the right to deny boarding to such passengers for safety reasons.⁹ The fragmented, often confusing and overlapping airport and carrier rules and regulations pertaining to passengers with reduced mobility add to the challenges faced by disabled passengers. It has been said in relation to this that:

“For people with disabilities, air travel has often been infuriating and confusing, with different rules being implemented by various airlines and airports, leaving people unsure of their rights.”¹⁰

Transportation is an important integration tool for society’s disabled community. From a legal perspective, disability has been a widely acknowledged human rights issue for many decades. A disabled person’s right to be treated with respect, without discrimination, on an equal footing

⁷ Ambar Singh Roy, ‘Global air passenger traffic set to grow at 5.83 pc’, downloaded from <http://www.thehindubusinessline.com/2006/12/13/stories/2006121301690700.htm>, accessed from 20/12/2006.

⁸ EU Passenger Reduced Mobility Regulation 1107/2006, downloaded from PassengerswithReducedMobilityPRMRegulation.aspx, accessed on 12/12/2006.

⁹ Landmark EU Legislation adopted by Transport secretaries, downloaded from <http://www.edf-feph.org/en/news/press.htm#090606>, accessed on 21/12/2006.

¹⁰ People with Disabilities have a greater right when traveling by Air, downloaded from <http://www.ncbi.ie/news/ncbi-news-magazine/ncbi-news-july-august-2006/people-with-disabilities-to-have-greater-rights-when-travelling-by-air>, accessed on 21/12/2006.

with other individuals, has enjoyed wide acceptance. At the same time, the issues of accessibility, and integration of disabled people into society, have remained a socio-legal challenge for many years. These rights have been codified in many international and national legal regimes and have become the basis of the government regulations made for the welfare of travelling disabled passengers.

Multilateral Regimes on Disability

The United Nations has had many ground-breaking human rights conventions such as the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Covenant on Civil and Political Rights (ICCPR); The Convention for Elimination of all forms of Racial Discrimination; and the Convention for Elimination of all forms of discrimination against Women (CEDAW). An international organization has been set-up under each of these conventions to monitor and measure the national compliance with these rights. Any individual experiencing the violation of any of the rights upheld by the abovementioned conventions can report to the international organization. It is believed that *“greater and more targeted use of these instruments could lead to immeasurable acceleration of the Disability Reforms process.”*¹¹ These conventions could be used for the protection of the rights of the disabled persons, and in a wider context be used for the protection of disabled passengers. There are six such core conventions.

*“There are no international human rights treaties which apply solely to persons with disabilities. Rather, international human rights treaties apply to this category of individuals via the anti-discrimination clause which is included in each treaty. Under these provisions, States parties undertake to guarantee that the rights recognized in the treaty will be exercised without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Although disability is not expressly included among the prohibited grounds for discrimination, it is widely accepted that it falls under the heading ‘other status’ and is thus treated as a ground in respect of which discrimination is prohibited.”*¹²

¹¹Report of UN Human Rights Commissioner on Follow up to the World Conference on Human Rights, downloaded from [http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/9f03a35e473b33a0c1256_b8004e11d8/\\$FILE/G0211061.doc](http://www.unhchr.ch/huridocda/huridoca.nsf/e06a5300f90fa0238025668700518ca4/9f03a35e473b33a0c1256_b8004e11d8/$FILE/G0211061.doc), accessed on 12/12/2006.

¹² Instruments on Disability, UN High Commissioner on Human Rights, downloaded from <http://www.ohchr.org/english/issues/disability/instruments.htm>, accessed on 12/12/2006.

Article 2¹³ of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 and Article 7¹⁴ of the International Covenant on Civil and Political Rights (ICCPR) have an indirect bearing on the rights of the disabled passenger(s). The 1989 Convention on the Rights of the Child (CRC) encompasses provisions on civil, cultural, economic, political and social rights of a child. Article 2 of the Convention expressly prohibits any discrimination in the enjoyment of convention rights on the grounds of disability. There are provisions in the CEDAW and International Convention of Rights of the Child mentioned earlier that enable participation of disabled women and children in all areas of social and cultural life.

At the regional level, many human rights treaties aim at conferring participation and social integration rights on disabled people within the community. In its provisions,¹⁵ the European Social Charter provides for the full participation and social integration of disabled persons in the life of the community by ensuring Contracting parties overcome the barriers to communication, mobility and transport. The Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights specifically refers to the rights of persons with disabilities. According to Article 18 of the Protocol *"everyone affected by a diminution of his physical or mental capacities is entitled to special attention to help him to achieve the greatest possible development of his or her personality."* The State Parties have been asked to undertake programs aimed at providing people with disabilities with the resources and environment needed for attaining this goal, and to provide special training to the families of the handicapped.¹⁶ The Inter-American Convention on the 'Elimination of all Forms of Discrimination against People with Disabilities' requires the States parties to adopt legislative, social, educational, labor-related, or any other measures needed to achieve the goals of the Convention i.e. promotion of full integration within society.

¹³ Article 2 of the ICESCR states that "the States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability."

¹⁴ Article 7 of ICCPR provides right to freedom from torture and other cruel, inhuman or degrading treatment and punishment. It may be violated when persons with disabilities are placed in an inappropriate environment or when a person with a mental or psychiatric disability is subject to medical or scientific experimentation without his/her prior informed consent.

¹⁵ Article 15 of the Revised European Social Charter recognizes the "right of persons with disabilities to independence, social integration and participation in the life of the community", and commits Contracting Parties to (1) take the necessary measures to provide persons with disabilities with guidance, education and vocational training, (2) to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled, and (3) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

¹⁶ Supra Note 12

On the implementation front, the United Nations has taken positive steps for the implementation of its conventions through initiatives such as the UN Program on Disability. This has now been formally integrated and consolidated into the Secretariat work of the UN Convention on Persons with Disabilities of 2006. The primary aims of this work program are: to support the full and effective participation of persons with disabilities in social life and development; and to promote equal access to employment, education, information, goods and services.

The UN Convention on the Rights of Persons with Disabilities adopted on 13 December, 2006, re-affirmed faith in the universality, indivisibility, interdependence and interrelatedness of all human rights of people with disabilities, guaranteeing zero discrimination. It emphasized the importance of positioning disability issues as an integral part of relevant strategies of sustainable development. It recognized the importance of accessibility to the physical, social, economic and cultural environment, to health, education, information and communication, by enabling people with disabilities to fully enjoy all human rights and fundamental freedoms. The provisions of the Convention *"inculcate respect for inherent dignity, and individual autonomy including the freedom to make one's own choices, independence of the disabled person, non-discrimination, full and effective participation and inclusion in society, accessibility, respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities."*¹⁷

The UN Contracting States have also been asked *'to adopt and implement provisions for the protection and promotion of the human rights of the persons with disabilities by taking measures for the elimination of all forms of discrimination by any person on the basis of disability in any organization, personal and private enterprise, and to provide accessible information to people with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities.'*¹⁸ Furthermore, the States should seek to enable people with disabilities to live independently and participate fully in all aspects of life, and should take appropriate measures to ensure that people with disabilities have access on an equal basis to: the physical environment; to transportation; to information and communications, technologies and systems; and to other facilities and services open or provided to the public, both in urban and in rural

¹⁷ Article 3 of the Convention on Rights of the Persons with Disabilities

¹⁸ Article 4 of the Convention on Rights of the Persons with Disabilities

areas.¹⁹ The provision²⁰ also describes what the states should do to ensure accessibility to these facilities.

ICAO has made many regulations (Standards and Recommended Practices) pursuant to 'the goal of uniformity' enshrined in Article 37 of the Chicago Convention, some of which address the accessibility issues of disabled air passengers. *"Acting on its Article 37 mandate, ICAO has issued two Standards and fifteen Recommended Practices, contained in Chapter 8 of Annex 9 on Facilitation that specifically addresses accessibility to all elements of the air transport chain by persons with disabilities."*²¹ Chapter 1 of Annex 9 has defined a 'person with disabilities' as *"any person whose mobility is reduced due to a physical incapacity (sensory or locomotor), an intellectual deficiency, age, illness or any other cause of disability when using transport and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers."*²²

Some important Standards in Annex 9 to the Chicago Convention of 1944 are as follows:

- 1) The Contracting States have been required to take all the necessary steps to ensure that airport facilities²³ and air services²⁴ are adapted to the needs of persons with disabilities.
- 2) Other measures in the Recommended Practices²⁵ mention the kind of services that should be provided to the disabled passenger.

¹⁹ Article 9 of the Convention on Rights of the Persons with Disabilities

²⁰ States Parties shall also take appropriate measures to:

- a. Develop, promulgate and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public;
- b. Ensure that private entities that offer facilities and services which are open or provided to the public take into account all aspects of accessibility for persons with disabilities;
- c. Provide training for stakeholders on accessibility issues facing persons with disabilities;
- d. Provide in buildings, and other facilities open to the public, signage in Braille and in easy to read and understandable forms;
- e. Provide forms of live assistance and intermediaries, including guides, readers and professional sign language interpreters, to facilitate accessibility to buildings and other facilities open to the public;
- f. Promote other appropriate forms of assistance and support to persons with disabilities to ensure their access to information;
- g. Promote access for persons with disabilities to new information and communications technologies and systems, including the Internet;
- h. Promote the design, development, production and distribution of accessible information and communications technologies and systems at an early stage, so that these technologies and systems become accessible at minimum cost.

²¹ Comments of the IATA before the Department of Transportation, Washington, US, 4 March 2005.

²² Response by the ICAO, Downloaded from <http://www.un.org/esa/socdev/enable/rights/uncontrib-icao.htm>, accessed on 13/12/2006

²³ Standard 8.27 of Annex 9 to the Chicago Convention of 1944

²⁴ Standard 8.34 of Annex 9 to the Chicago Convention of 1944

The ICAO issued a document called the 'Guidance Circular' i.e. ICAO Circular 274 to ensure the abovementioned system works satisfactorily. Furthermore, another ICAO Document entitled the 'Technical Instructions for the Safe Transport of Dangerous Goods by Air' ("TIs") enumerated the details for the carriage of battery-powered mobility aids that came into effect in 1983. Initially, it acted as an advisory material; it came into legal force in 1984.

"The document has force, by virtue of being Annex 18 to the Chicago Convention. All States that are signatories to the Chicago Convention are legally obliged to adopt and enforce the provisions of Annex 18 and the Technical Instructions. Annex 18 and its associated Technical Instructions apply as a mandatory requirement for international operations of the civil aircraft. In addition, the Annex recommends that the States also comply with the Annex and the Technical Instructions for domestic civil aircraft operations."²⁶

IATA has developed detailed provisions for the acceptance and carriage of 'Incapacitated Persons' in accordance with IATA Resolution 700 (Not applicable to US and Canada where Recommended Practice (RP) 1700 is applicable).²⁷ Resolution 700 covers the following subjects: Definitions, Categories and Acceptance; Medical Clearance; Flow of Information and Reservation Procedures (which includes Medical Information Form (MEDIF) and Frequent Travellers Medical Card (FREMEC)); Feedback, Finalizing Action and Ticketing; and Handling on the Ground and In-Flight. A resolution has more binding value than a recommended practice. Furthermore, IATA has also established additional regulations to protect the interest of air passengers with disabilities in their 'In-flight Management Manual' (IMM), and designed to assist airlines in complying with their own company service manuals. Section 4 of the Manual covers a range of special needs passengers, including expectant

²⁵ That persons with disabilities, when traveling, be provided with special assistance to ensure they receive services customarily available to the general public; that all elements of a journey, from beginning to end, are made accessible to persons with disabilities; that persons with disabilities-particularly the hearing-impaired and vision-impaired-are given all necessary information, by travel agents, airlines, airports, and ground handling operators, to help them in their travel; that adequate training programs are established to ensure that trained personnel are available to assist persons with disabilities; that reserved points are located as close as possible to the main entrance of a terminal building, for ease of access for persons with disabilities; that aircraft have movable armrests, on-board wheelchairs, and other similarly user-friendly facilities for persons with disabilities; and that if such a person requires an escort, airlines are encouraged to offer discounts for the carriage of the escort.

²⁶ Comments of the IATA before the DOT Office of Secretary, downloaded from http://www.iata.org/NR/Content/Connector/CS2000/Siteinterface/sites/whatwedo/file/Part_382_Comments_04_March_2005.pdf, accessed on 21/10/2006.

²⁷ IATA Resolution 700 on Acceptance and Carriage of Incapacitated Passengers, IATA Passenger Services Conference Resolutions Manual, 23rd Edition at pp 15-20.

mothers, unaccompanied minors and visual or hearing-impaired, and autistic passengers. IATA Recommended Practice 1700c focuses on 'Seating Assignments for Individual Incapacitated Passengers and for Escorts'. IATA Resolution 745b deals with the acceptance of 'Power Driven Wheelchairs or other Battery Powered Mobility Aids as Checked Baggage'.

The European Union has a well-developed legal regime on disability. The non-discrimination clause of Article 13 of the Amsterdam Treaty of 1997 commits the European Union to address discrimination of disabled people. The following has been said about Article 13 of the Amsterdam Treaty:

*"Article 13 of the Amsterdam Treaty relates also to EU policy on air transport and the principle of free movement of European citizens as does Declaration 22 of the Amsterdam Treaty which requires the needs of disabled people to be taken into account for measures relating to Article 95 of the Treaty."*²⁸

²⁸ European Disability Forum's Response to the Proposal for Regulation establishing common rules on compensation and assistance to the Air Passengers in event of denied boarding and cancellation or long delay in flights, downloaded from <http://www.edf-fehp.org/Papers/pospaper/02.02/EDF-02-02-EN%20Air%20Passengers%20draft%20regulation%20on%20compensation.pdf>, accessed on 12/12/2006.

As per the IATA Economic Briefing, *“European airlines invested EUR 53 million²⁹ as of 7 March 2005 (period not specified), on staff training, capital investment in wheelchairs, and airport charges for providing special services to passengers with reduced mobility.”* The European Parliament and Council have passed many legal regulations to protect the interests of disabled passengers and to bring their status on par with that of other travelers. *“A regulation is a legal instrument of the European Community which has a direct legal effect on the member states without further enactment. It can also be relied on by individuals in national courts.”³⁰* The European Civil Aviation Conference (ECAC), established in 1955 to promote the continued development of safe, efficient and sustainable European air transportation in the EU. It is comprised of 42 members as of 2007 carried out commendable work on structuring regulations to enhance the status of air passengers with disabilities. The European guidelines for passengers with reduced mobility have been codified by ECAC in section 5 of ECAC Policy Statement on Civil Facilitation³¹ also called ECAC Document 30.

The EC Regulation 261/2004 of the European Parliament and Council was passed on 11 February 2004 and became effective on 17 February 2005.³² It establishes common rules for compensation and assistance of disabled passengers in the event of denied boarding and cancellation or long delay of flights, repealing Regulation (EEC) 295/91. The aforesaid regulation is said to apply to all scheduled and non scheduled air carriers arriving and departing from EU airports on EU carriers. Any complaint under the aforesaid regulation ought to be taken up at the first instance with the carrier flown; in the event of not obtaining a satisfactory response, the ‘National Enforcement Body’ that was created to implement the Regulation can be approached. Article 11 of the Regulation states as follows:

²⁹ There are a number of costs that this will impose on European airlines:

- ☐ Airline investment of over €3 million in staff training and capital equipment such as wheelchairs will have to be scrapped;
- ☐ Airports will charge airlines over €53 million a year for providing this service. However, this cost is based on the service previously supplied by competitive airlines (€24-30 per passenger). The concern is that a monopoly provider will deliver a more expensive and poorer quality service;

³⁰ European Disability Forum, Transport Policy Issues, downloaded from http://www.edf-feph.org/en/policy/transport/trans_pol.htm, accessed on 12/12/2006

³¹ Document 30 builds on existing multilaterally agreed elements:

- By accepting the ICAO definition of “persons with disabilities” as the definition for the ECAC and European term – “passenger with reduced mobility”.
- By expanding on the different recommended practices of Annex 9 with the agreement of all States.
- By incorporating the classification and codification of categories of passengers requiring special assistance set down in IATA Resolution 700 (see above) used by airlines worldwide to exchange information about passengers needs.

³² L46/1 , Official Journal of the European Union dated 17.2.2004

“Operating air carriers shall give priority to carrying persons with reduced mobility and any persons or certified service dogs accompanying them, as well as unaccompanied children. In cases of denied boarding, cancellation and delays of any length, persons with reduced mobility and any persons accompanying them, as well as unaccompanied children, shall have the right to care in accordance with Article 9 as soon as possible.”³³

On 9 June 2006, the European Council adopted further regulations to strengthen the rights of disabled passengers who traveled by air³⁴ called the PRM Regulation 1107/2006. The regulation gave the disabled passenger the right to non-discriminatory, effective and appropriate air travel. However, it provided grounds such as the safety of other passengers, and the size of the aircraft to refuse transportation to these passengers. In the case of such refusal, airlines have been asked to arrange for re-routing and re-imbursement of these passengers. The regulation also requires these services to be offered without imposition of any additional costs on the disabled passengers. It holds the airport managing body and the airlines responsible for providing assistance to passengers at the airport and on-board the aircraft respectively. The need for assistance should be communicated to the carrier, agent or tour operator 48 hours before the scheduled departure. For the purpose of funding this, it was proposed that a specific charge be levied on the air carriers using the airport. This charge is then shared among the air carriers using the airport, in proportion to the total number of disabled passengers carried by them to and from that airport.³⁵ “This leads to continued proliferation of new charges and fees on international air transport which is likely to have a negative impact on airline operations and their economic viability.”³⁶ Regarding the enforcement of the Regulation, the following has been stated:

“the enforcement of the Regulation will begin with the non-discrimination provisions on 26 July 2007 followed by assistance provisions onboard and at airports on 26 July 2008.”

³³ Supra Note 34

³⁴ EU Council Regulations to strengthen the Rights of the Disabled Passenger, downloaded from http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/misc/89962.pdf, accessed on 22/11/2006

³⁵ Parliament strengthens the right of air passengers with disabilities, downloaded from http://www.europarl.europa.eu/news/expert/infopress_page/062-3828-349-12-50-910-20051216IPR03827-15-12-2005-2005-false/default_en.htm, accessed on 12/12/2006.

³⁶ Adrianus D. Groenewege, from the unreleased Fourth Edition of the Compendium of International Civil Aviation, Canada.

There has been intense debate in the European Union over who should bear responsibility for the costs of providing assistance to disabled passengers, i.e. whether it should be the airline, airports authority or the passenger with reduced mobility himself. The debate continued over several years but was resolved by Regulation 1107/2006 dated 9 June 2006. The debate took place on the following lines:

“According to the Commission there was fierce disagreement in the consultation phase over whether airports or airlines should be responsible for providing assistance at airports. Airlines tended to believe that airports should provide assistance before and after the flight, as this was their competence. This assistance should be organized centrally at each airport and funded through a charge on each airline proportional to the number of passengers it carries to and from that airport. Airports argued that carriers should take responsibility, since it was they that had contacts with passengers and possessed information about passengers with reduced mobility and their needs. In the end the Commission decided to put forward proposals of the kind favored by the airlines.”

Additionally, European airports and airlines voluntarily adopted many commitments to ensure better service for air passengers with disabilities. The Special Protocol to meet the needs of people with reduced mobility contains few, very specific commitments addressing this.³⁷ These

³⁷ Definition of a person with reduced mobility (PRM)

A person with reduced mobility (PRM) is understood to mean any person whose mobility is reduced due to any physical disability (sensory or locomotory), an intellectual impairment, age, or any other cause of disability when using transport, and whose situation needs special attention or adaptation of services ordinarily made available to all passengers.

Basic assumptions:

- PRMs have the same rights as other citizens to freedom of movement and freedom of choice. This applies to air travel as to all other areas in life.
- Airports and related service providers have a responsibility to meet the needs of PRMs. PRMs also have responsibilities to identify their needs through the proper channels at the proper time.
- Information, using accessible formats, must be made available to enable PRMs to plan and make their journey.
- Disability should not be equated with illness and therefore PRMs must not be required to make medical declarations about their disability as a condition of travel.
- Organizations representing PRMs will be consulted on all issues relevant to PRMs.
- Staff will be given appropriate training in understanding and meeting the needs of PRMs.
- Control and security checks will be undertaken in a manner which respects the dignity of PRMs.
- PRMs must be enabled to remain independent to the greatest possible extent.
- The cost of providing for the needs of PRMs must not be passed directly to PRMs.

Provision of infrastructure

Each airport will ensure that its infrastructure is compatible with the needs of people with reduced mobility:

- Access to landside and airside ground transport;
- Parking, pick-up, drop-off and transfer arrangements;
- Information provided both audibly and visually.

commitments are not legally binding, but EU airports intend to give effect to these rules.³⁸ Furthermore, the Joint Aviation Authority (JAA) in Europe has developed rules called the 'Joint Airworthiness Regulations' or JAR-OPS. The JAR-OPS 1.260³⁹ oblige air carriers to respect certain requirements while carrying PRMs. These JAR-OPS, although not mandatory in nature, become mandatory on their incorporation into the national law of a JAA Member State.

*"The purpose of this document is to improve the accessibility of air travel to people with reduced mobility by ensuring that their needs are understood and provided for, and that their safety and dignity are respected. It forms the basis on which a voluntary Code (or Codes) of Practice may be prepared by airports. When preparing Codes, the appropriate provisions of the European Civil Aviation Conference (ECAC) Document 30 (Section 5), and the International Civil Aviation Organization (ICAO Annex 9) will be incorporated."*⁴⁰

Conclusively, to ensure effectiveness in the operation of disability jurisprudence, multilateral regulatory regimes on disability are preferred to unilateral regulatory national regimes of regulation due to this underlying reason:

*"The unilateral approaches to the regulation of international air transport led to jurisdictional disputes and resulted in operational and commercial difficulties for the airlines, conflict between nations, and, sadly, stalled progress on legitimate policy goals such as safe air transportation of disabled passengers on a non-discriminatory basis with dignity and with the full rights of all passengers."*⁴¹

³⁸ Airport Voluntary Commitment on Air Passenger Service, The Voice of Europe's Airports, ACI Europe at pp 1.

³⁹ JAR-OPS 1.260 sets out the requirements to be respected regarding the Carriage of Persons with Reduced Mobility and states that:

b) An operator shall ensure that PRMs are not allocated, neither occupy, seats where their presence could:

- impede crews in their duties
- obstruct access to emergency equipment
- impede the emergency evacuation of the aeroplane

c) the Commander must be notified when PRMs are to be carried on-board. The relevant Interpretative/Explanatory Material (IEM) issued by the JAA with regard to the provision of JAR-OPS 1.260 states the following:

2. In normal circumstances PRMs should not be seated adjacent to an emergency exit

3. In circumstances in which the number of PRMs form a significant proportion of the total number of passengers carried on board:

a) the number of PRMs should not exceed the number of able bodied persons capable of assisting with an emergency evacuation.

⁴⁰ Rights of Air Passengers, CAA Finland, http://www.finavia.fi/files/finavia/matkustajille_pdf/LM_oikeudetENG.pdf, accessed on 13/12/2006.

⁴¹ Supra Note 26

Unilateral National Regulation on Disability

This chapter also discusses national regimes that have aided passengers with disabilities. A comparative study of the national regimes of law and regulations in the United States of America, the United Kingdom and Canada is now outlined to highlight the difference of approaches in these countries regarding the accommodation of air passengers with disabilities.

The United States as a Contracting State to the Chicago Convention has developed detailed procedures for ensuring that disabled air passengers are integrated with other services. The air carriers in the US are regulated by the DOT rules made under the Air Carrier Access Act (ACAA) that prohibits discriminatory treatment (49 U.S.C. § 41705)⁴² of a disabled passenger. The DOT has made rules under the Act that initially applied to all US operators offering air transport services, excluding foreign carriers who were not regulated by the Act. These regulations were published in March 1990 and have been amended several times since then.⁴³ The Title 14 rules CFR 382 were made to implement the ACAA and also serve as its interpretative guideline.⁴⁴ As its primary features it has provisions on the prohibition of discriminatory practices and the accessibility of facilities.

⁴² a) In General— In providing air transportation, an air carrier, including (subject to section 40105 (b)) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds:

(1) the individual has a physical or mental impairment that substantially limits one or more major life activities.

(2) the individual has a record of such an impairment.

(3) the individual is regarded as having such an impairment.

(b) Each Act Constitutes Separate Offense.— For purposes of section 46301 (a)(3)(E), a separate violation occurs under this section for each individual act of discrimination prohibited by subsection (a).

(c) Investigation of Complaints.—

(1) In general.— The Secretary shall investigate each complaint of a violation of subsection (a).

(2) Publication of data.— The Secretary shall publish disability-related complaint data in a manner comparable to other consumer complaint data.

(3) Review and report.— The Secretary shall regularly review all complaints received by air carriers alleging discrimination on the basis of disability and shall report annually to Congress on the results of such review.

(4) Technical assistance.— Not later than 180 days after the date of the enactment of this subsection, the Secretary shall—

(A) implement a plan, in consultation with the Department of Justice, the United States Architectural and Transportation Barriers Compliance Board, and the National Council on Disability, to provide technical assistance to air carriers and individuals with disabilities in understanding the rights and responsibilities set forth in this section; and

(B) ensure the availability and provision of appropriate technical assistance manuals to individuals and entities with rights or responsibilities under this section.

⁴³ New Horizons for Air Passengers with Disability, downloaded from <http://airconsumer.ost.dot.gov/publications/horizons.htm>, accessed on 12/12/2006.

⁴⁴ James Strawinski, Where is the ACAA Today? Tracing the law developing from ACAA, 68 J. Air L. & Com. 385 2003

The DOT established rules that cover the rights of passengers⁴⁵; features of accessibility and facilities to be provided⁴⁶ and grounds for the refusal of transportation⁴⁷ to disabled and less mobile air passengers. A few provisions of these rules require that the screening time for passengers with disabilities is kept to the minimum and that they are allowed a private screening, if required. Moreover, there are other important provisions in the rules such as those that require carriers to make available specially-trained complaints resolution officers (CROs) to respond to these passengers' written complaints. Additionally, the rules make the DOT enforcement mechanism available to these passengers. Carriers need to obtain an assurance of compliance from contractors who provide services to passengers.⁴⁸ The DOT has also published 'Industry Letters' from 1998 to 2003, issuing guidance for the implementation of statutes and rules pertaining to disabled passengers.

An amendment to the DOT rules under the Air Carrier Access Act (ACAA) introduced many extraterritorial provisions, placing them at the center of a fierce debate. For example, the November 4, 2004 amendment through which the United States Department of Transportation (DOT) issued new proposed regulations for the reorganization, clarification and amendment of the existing Air Carrier Access Act (ACAA, 49 U.S.C. § 41705) required, in many respects, the application of the rules to foreign air carriers.⁴⁹ An earlier instance of extraterritorial application of this Act took place in 2000 when the Wendell H. Ford Aviation Investment and Reform Act (AIR-21) extended the scope of the ACAA and the guidelines to incorporate foreign air carriers; however, this extension was expressly 'subject to section 40105(b)', i.e. the Act was to apply consistently with the obligations of the United States Government under an international agreement and with the applicable laws and requirements of a foreign country. The newly

⁴⁵ **Prohibition of Discriminatory Practices** - No discrimination to persons with disability, exclusion only on limited number of grounds, carrier may not require advance notice and 48 hour notice in certain instances such as respirator hook ups, transportation of electric wheelchair, no limitation per carrier on number of disabled passengers to be carried, carrier may not request the accompanying of attendants.

⁴⁶ **Features of Accessibility** - New aircraft with more than 30 seats to be fitted with movable aisle seats, the new wide body aircrafts to have accessible lavatories, aircraft with more than 100 seats to give priority spacing for storing a passenger's folding wheelchair in the cabin.

⁴⁷ **Grounds for Refusal of Transportation** - Carrier personnel, as authorized by 49 U.S.C. 1511, 14 CFR 91.8, or 14 CFR 121.533, may refuse to provide transportation to any passenger on the basis of safety, and may refuse to provide transportation to any passenger whose carriage would violate the Federal Aviation Regulations. In exercising this authority, carrier personnel shall not discriminate against any qualified individual with a disability on the basis of disability and their actions shall not be inconsistent with the provisions of this part. In the event that such action is inconsistent with the provisions of this part, the carrier shall be subject to remedies provided under Sec. 382.65.

⁴⁸ Passengers with Disabilities, downloaded from <http://airconsumer.ost.dot.gov/publications/disabled.htm>, accessed on 12/12/2006.

⁴⁹ Air Carrier Access Act, Cordon and Forsyth LLP, September/October 2005, downloaded from http://www.cordonlaw.com/newsletters/sept_oct_2005.pdf, accessed 12/12/2006.

proposed rules of 2004 were meant to extend the scope of extraterritorial application further than was allowable under the Wendell H Ford Aviation Investment Act.

These rules have been vehemently opposed by many in legal circles due to the underlying reason:

“the new or revised provisions undoubtedly will economically impact the operations of air carriers and, in particular, foreign carriers and also may conflict with the laws and regulations of other countries.”⁵⁰

For example, the amended ACAA Regulations of 2000 were used by the DOT to investigate and obtain consent orders against British Airways in May 2006 for alleged violations of the provisions of ACAA and US Federal laws. It was alleged that *“British Airways, in four separate instances, had denied boarding to some disabled passengers unaccompanied by attendants, traveling between destinations in US and a foreign country in clear transgression of Section 382.35 of Title 14 of C.F.R rules.”* The section of the regulations provided that a carrier must not require a qualified individual with a disability to travel with an attendant as a precondition for providing transportation unless the carrier determines that an attendant is essential to his or her safety.⁵¹

Furthermore, the Wendell H. Ford Aviation Investment and Reform Act required the Secretary of Transportation to review all discrimination complaints⁵² filed by disabled passengers and to report annually on the results to Congress. The Report made to Congress in October 2006 indicated that:

“56 U.S. carriers that submitted data for the 2005 calendar year reported receiving 12,194 disability-related air travel complaints, and the 100 foreign air carriers reported receiving 1,390 complaints during the same time period, for a total of 13,584

⁵⁰ Supra Note 50

⁵¹ Judith Nemsick, ‘DOT and Foreign Airline Reach Agreement on Alleged Violations of the Air Carrier Access Act, downloaded from <http://www.hklaw.com/Publications/Newsletters.asp?IssueID=709&Article=3730>, accessed on 12/12/1006.

⁵² On 8 July 2003, the Department published a final rule to implement the requirements of AIR-21 (See 14 CFR 382.70, 68 FR 40488). This rule requires certificated U.S. air carriers and foreign air carriers operating to, from, or within the United States, conducting passenger operations with at least one aircraft having a designed seating capacity for more than 60 passengers, to record complaints that they receive alleging discrimination or inadequate accessibility on the basis of a disability.

*complaints received by these 156 carriers. Similar to last year, more than half of the complaints reported (7,106), concerned the failure to provide adequate assistance to persons using wheelchairs. Overall disability-related complaints received by carriers for calendar year 2005 increased more than 15 percent over complaints received by carriers for calendar year 2004, with 2,000 more complaints received by U.S. carriers and 65 more complaints received by foreign air carriers. As noted in last year's Report to Congress, although the overall number of complaints may appear to be large, it must be noted that approximately 17 million persons with disabilities in the United States travel by air each year, and the vast majority of them do not file a disability-related air travel complaint.*⁵³

Apart from issues of accessibility, a passenger with disability is often intimidated by the rigorous security procedures enforced post 9/11 at airports across the United States. The ACAA offers no relief to disabled passengers, subjecting him or her to the same level of scrutiny as other passengers. However, the Transport Security Administration (TSA), the federal body in charge of security of US airports, recognizes the special requirements of a disabled passenger and his or her need and right to be treated with the dignity, respect, and courtesy. It has established a special program for screening people with disabilities and their associated equipment, mobility aids and devices. The TSA claims the following about their special program for screening disabled passengers:

*"As part of that program, we established a coalition of over 60 disability-related groups and organizations to help us understand the concerns of persons with disabilities and medical conditions. These groups have assisted TSA with integrating the unique needs of persons with disabilities into our airport operations."*⁵⁴

FAA has issued guidelines for the use of devices assisting disabled persons, and continues to do so in order to respond to changing technology.

As early as 1977, the FAA recognized the need for guidance regarding the use of assistive devices by people with disabilities on an aircraft. To a limited degree, AC 120-

⁵³ Annual Report on Disability - Related Air Travel Complaints, Downloaded from <http://airconsumer.ost.dot.gov/publications/Report%20To%20Congress%202006-Oct%206.doc>, accessed on 25/12/2006

⁵⁴ TSA Memorandum of 25th September of 2006, downloaded from http://www.tsa.gov/assets/pdf/special_needs_memo.pdf, accessed on 21/11/2006

32 discusses issues surrounding the use of assistive devices, such as crutches, splints, casts, and braces by passengers on aircraft. However, the FAA issued this guidance well before the Department of Transportation (DOT) published 14 CFR part 382 in 1990. In addition, there have been many innovations in the scope and type of assistive devices since 1977. OPDs are one of the more recent examples of innovation in assistive devices”⁵⁵

In relation to this, the Federal Aviation Administration (FAA) issued a bulletin on the Flight Standards Service’s Safety and Enforcement Policy regarding the use of Orthotic positioning devices (OPD) for people with disabilities in all aircraft operated under Title 14 of the Code of Federal Regulations (14 CFR) parts 121 and 135.

The United Kingdom’s primary disability legislation, the Disability Discrimination Act (DDA) of 1995, aims to prohibit discrimination of any kind against disabled people. Part 3 of DDA 1995 covers access to goods, services, facilities and premises, and excludes by way of an exemption the transport services. However, this exclusion is not entirely a blanket one. The following has been said in relation to the scope of the applicability of DDA to disabled air passengers:

“The Disability Discrimination Act 1995 (DDA) applies to air travel in relation to the use of booking services and airport facilities and services. The actual means of transport – the aircraft – is exempt from the Act’s provisions. So, for example, shops and check-in facilities in the airport are covered by the Act, but in-flight services or entertainment on the aircraft is not.”⁵⁶

“For air travel that means aircraft and the provision of onboard services are excluded. It also gave the Secretary of State the power to lift the exemption and introduce regulations.”⁵⁷

⁵⁵ Bulletin on FSAT Use of Orthotic Positioning Devices by People with Disabilities in Aircraft Seats, downloaded from http://www.faa.gov/safety/programs_initiatives/aircraft_aviation/cabin_safety/disabilities/, accessed on 12/12/2006.

⁵⁶ Access to Air Travel for Disabled People - Code of Practice, Department of Transport, UK, March 2003 at pp 6.

⁵⁷ Jo Sentinella, Access to Air Travel for Disabled People: 2005, Published Project Report, Published by Mobility and Inclusion Unit, Department of Transport, UK at pp 1.

Thus, the air transport industry in the United Kingdom in 2003 developed a 'Code of Voluntary Practices.' This code is applicable across the board to all those involved in the air travel industry, such as travel agents, tour operators, UK airlines (scheduled, "no frills" and charter), UK airports (including architects and designers are involved in their design), ground handling companies and retailers. Furthermore, the Code lays down the minimum standards for all the abovementioned operators in the air transport industry, encouraging them also to exceed these standards when it becomes feasible. The code covers all aspects of air travel for disabled persons from the point at which the passenger arrives at the airport terminal, through to the point when they disembark at their destination. The Disabled Passenger Transport Advisory Committee⁵⁸ further issues guidance to passengers with reduced mobility to make flying a more positive experience for them.⁵⁹

The UK Government has been attempting to convert the code of voluntary practices into a piece of legal legislation to strengthen it⁶⁰ and to make the process of monitoring compliance easier. The Disability Discrimination Board would be asked to monitor the parts that fall within the scope of the Disability Discrimination Act (DDA) that it administers, even if the Code remains voluntary. The Code is said to complement the European Voluntary Commitments on Air Passenger Rights of 2002 to which many airports and airlines in the EU are signatories. In fact, in a recent case, the Disability Rights Commission backed a legal challenge by a person of reduced mobility, Mr. Robert Ross, regarding the charge levied upon him for the use of a wheelchair on the 'airside' at Stansted airport. The Court of Appeal held that both the operator of the airport and the airline, Ryanair, had unlawfully discriminated against Mr. Ross. Thereby, Stansted Airport Ltd was ordered by the Court of Appeal to contribute 50 percent of Ryanair's liability to pay damages to Mr. Ross, together with interest.⁶¹

In Canada, the needs of air passengers with disabilities are taken care of by a federal body called the Canadian Transportation Agency. Under the Canada Transportation Act, the Canadian Transportation Agency (CTA) is responsible for ensuring that undue obstacles to the

⁵⁸ An independent body that was set up to advise the Secretary of State for Transport in the Transport Act 1985.

⁵⁹ DPTAC Guidance for Air Travel to persons with Reduced Mobility, downloaded from <http://www.dptac.gov.uk/pubs/aviation/access/01.htm>, accessed on 15/12/1006.

⁶⁰ Supra Note 58 at pp 7

⁶¹ Proposals on Persons with Reduced Mobility traveling by Air, downloaded from http://www.dft.gov.uk/stellent/groups/dft_aviation/documents/page/dft_aviation_037894-05.hcsp#P164_23852, accessed on 14/12/2006. (Court of Appeal judgment: Ross v Ryanair Ltd and Anor [2004] EWCA Civ 1751)

mobility of persons with disabilities are addressed by the federal transportation network.⁶² The Canadian Transportation Agency, under the powers vested in it by the Canada Transportation Act, is able to, make regulations and prescribe standards of practice that meet with the needs of disabled air passengers. Furthermore, the agency has also been conferred adjudicatory powers under section 172 of the aforesaid Act to examine disabled passengers' complaints, particularly focusing on the grounds of the existence and imposition of obstacles restricting disabled passengers accessibility. The Canadian Transportation Agency has also produced many 'Guidance Materials' for persons with disability to help them prepare for travel.

Conclusion

Over 600 million people, or approximately 10 percent of the world's population, have a disability of one form or another. Because of the ageing and the increase in population the numbers of disabled passengers will increase substantially, with nearly two-thirds of disabled people living in developing countries. A real link exists between disability and social exclusion. This clearly denotes that accessibility of transportation for the disabled community should be given increased priority, a challenge for both the developing and developed worlds. In the era of air transport liberalization, often hailed as 'a common man's transport', there is heightened awareness among air passengers of their rights. An important consequence is that the rights of disabled air passengers, as a corollary to the rights of the disabled persons in general, have also acquired prominence. Thereby, the rights of disabled passengers to fair, non-discriminatory air transportation have become fully recognized at the legal and practical level.

This chapter explored many significant international and national systems which have been developed to protect the rights of disabled air passengers. The international response to disability issues has resulted in rigorous forms of regulation. This contrasts with national regimes which differ widely, for example those in the UK as compared to those adopted by the US. In the latter, Title 49§ 46301 has made acts of discrimination against disabled air passengers (under Title 49 USC, 41705) an offence, attracting a civil penalty of not more than USD 10,000, whereas in the UK, a Voluntary Code of Practice was adopted which does not impose any monetary penalty for such acts.

⁶² Letter to Travel Agents and Airline Operators in Canada on how to make Air Transportation accessible, downloaded from http://www.cta-otc.gc.ca/access/letter_e.html, accessed on 14/12/2006.

International air transport carries people and goods across the globe. However, the fragmented regime of laws and policies adopted by different airports and airlines could defeat a universal goal: that of creating a seamless network of accessibility for the less privileged disabled passengers, due to jurisdictional, operational and commercial difficulties. The demands as well as the hopes of today's society point towards the integration and harmonization of national and international regimes of disability, ensuring easy access for the disabled community to air transportation, the latter being the underlying purpose of the Chicago Convention of 1944. Disabled passengers are entitled to enjoy an obstacle free travel experience. Meanwhile, the pro-reform regimes of some developed countries should try and bridge the gaps in their policies, regulations and approaches between themselves, as indeed should countries of the developing world.



FINAL CONCLUSION

Trade and liberalization are powerful drivers of growth and opportunities for people, improving the quality of their lives, by increasing the gamut of choice. This has the consequent possibility of making livelihoods more secure. Liberalization means, however, that governments promote the private sector assiduously, often to the extent that social obligations may then be sidelined. In a study conducted by *Consumer International* in 2004, entitled 'Consumer Rights, Poverty and Trade Liberalization', it was pointed out that, "*in the formulation of trade policy, governments have traditionally only considered the interest of the private sector, particularly the formal business sector. Consumer interests are seen as incidental to trade policy, as it is assumed that any benefits accruing to the nation as a whole would trickle down to consumers.*"¹ However, governments still have an obligation to ensure that the rights of consumers are protected. Thus, effective consumer protection policy should be included in trade policy. A consumer protection policy should cover aspects of safety, information dissemination, choice, representation, and a forum for redress of customer grievances.

The air transport industry is moving towards liberalization, deregulation and consolidation, as other industries are, but at a relatively slower pace. Liberalization in the airline industry offers an excellent opportunity for increasing consumer growth. Michael E. Levine explains that "*the airline sector deregulation was a policy that principally benefited poorly organized consumers and was adopted over the opposition of a relatively small and very well organized group of regulated airlines.*"² The deregulation of the airline sector in the US and the EU led to a dramatic change in the regulatory structure of the sector.

The aim of the thesis has been to review and compare the regulations made by the governments of the US, the EU and Canada for protecting airline passengers. These regulations have been trailblazers as they constitute a good model of legislations (regulations) tested over time. The new

¹ Consumer Rights, Poverty and Trade Liberalization: Key concerns for the Consumer Commission of Africa, downloaded from <http://www.commissionforafrica.org/english/consultation/submissions/before/sb-jul-aug04-009.pdf>, accessed on 13/03/2007.

² Add source

deregulated markets of Asia, especially China and India, stand to benefit from the regulatory experience of the west.

Most of the regulations introduced by the US, the UK and Canada offer protection to consumers on areas such as airline service quality issues; safety issues; deceptive airline practices; deceptive advertising; airline fares; air passenger health issues; disability discrimination; and racial discrimination. The US Department of Transport (DOT) Regulations, the European Union (EU) and the European Commission (EC) Regulations, as well as the Canadian Federal Regulations implemented by an agency called the Canadian Transportation Agency (CTA), have effectively covered the areas listed above in their law making and implementation process. Most of these regulations have concentrated on areas such as data assimilation and publication; substantive provisions regarding violation and relief; and forums for prosecution, as effective means of consumer protection.

Most of the regulations on consumer protection emanate from international as well as national organizations. Indeed, most of the national regulations for the protection of airline consumers are based on regulatory guidelines provided by international organizations such as the ICAO's Standards and Recommended Practices, the ICAO's guidelines on consumer service quality issues, the IATA's fares construction guidelines, and the WHO's International Health Regulations. Furthermore, these regulations provide a means of alternative recourse, as forums, for addressing air passenger grievances, if the substantive provisions of the regulations are violated. Such forums are a welcome respite and usually adopt alternative sources of dispute resolution such as arbitration, and particularly mediation, to bring about a mutually agreeable solution between the passenger and the airline. The regulations support the use of airlines 'Customer Relations Representatives' for remedy when an air passenger feels his right has been violated. In such instances, the airline offers a solution based on its 'Conditions of Carriage'. A customer who is dissatisfied with the outcome of airline's dispute settlement process, can then approach the agencies referred to by the regulations. This process eases the burden on the formal court system and ensures an effective, speedy resolution of customer disputes. This demonstrates how the regulations operate as an effective instrument of consumer protection.

The thesis covers some emerging, non-traditional, consumer protection issues like health, racial discrimination and the rights of disabled passengers, along side traditional trade and service practices issues. Although these issues are of a social nature, they can have a big impact on the

costs of an airline; thus airlines need to tackle these issues in order to sustain and increase passenger volumes, as per the regulations. For example, the IATA Economic Briefing states that the EU Disability regulations cost the airlines in the EUR 53 million Euros per annum.³ The trend reveals an increase in costs for airlines which adopt the aforementioned regulations, making these regulations critical elements of consumer protection.

Therefore, it can be seen that the ongoing process of liberalization and deregulation has not had for air passengers the effect of diluting government regulated consumer protection regulations. Indeed, there is general acceptance of the statement made by Michael E. Levine that deregulation has led to the strengthening of the largely scattered and poorly organized consumers. In the era of liberalization and deregulation, passengers have been seen as large beneficiaries of the gamut of services offered at reduced fares; on the other hand the role of the airlines has been marginalized. The airlines of the deregulated market lack the power wielded by the monopoly supplier, since they face the prospect of bankruptcy, if their consumers do not find their services satisfying. Thus, it can be said that today airlines operate in fear of competition, consumer switch and the policing eye of the regulatory bodies, as consumer power flourishes.



³ The cost of EU regulation, IATA Economic Briefing of 7th March, 2004.

TABLE OF ABBREVIATIONS

ACAA.....	Air Carrier Access Act (USA)
ACLU.....	American Civil Liberties Union
ACI.....	Airport Council International
AEA.....	Association of European Airlines
AED.....	Automatic External Defibrillators
AHM.....	Airport Handling Manual (IATA)
APHI.....	Aviation Passenger Health Issues (ECAC)
APIS.....	Advance Passenger Information System
AQS.....	Airline Quality Rating Survey
ASA.....	Air Service Agreement
ATA.....	Air Transport Association of America
ATAG.....	Air Transport Action Group
ATUC.....	Air Transport Users Council (UK)
BTS.....	Bureau of Transportation Statistics (USA)
CAA.....	Civil Aviation Authority (UK)
CAB.....	Civil Aeronautics Board (USA)
CAP.....	Commercial Aircraft Protection
CAPPS.....	Computer Aided Passenger Prescreening System
CAPRS.....	Community Air Passenger Reporting System (EU)
CATSA.....	Canadian Air Transport Security Authority
CBRN.....	Chemical, biological, radiological and nuclear
CEDAW...	Convention for Elimination of all forms of Discrimination against Women
CFR.....	Code of Federal Regulations (USA)
CRC.....	Convention on the Rights of the Child
CRO.....	Complaints Resolution Officer
CRS.....	Computer Reservation System
CTA.....	Canadian Transportation Agency
DDA.....	Disability Discrimination Act (UK)
DOH.....	Department of Health (UK)
DOJ.....	Department of Justice (USA)
DfT.....	Department for Transport (UK)
DVT.....	Deep Vein Thrombosis
DHS.....	Department of Homeland Security (USA)
EASA.....	European Aviation Safety Agency (Replacing Joint Aviation Authority)
EC.....	European Commission
ECAC.....	European Civil Aviation Conference
ECJ.....	European Court of Justice
EDIFACT.....	UN Electronic Data Interchange for Administration
ELFAA.....	European Low Fares Airline Association
EMK.....	Emergency Medical Kit
EPR.....	Epidemics and Pandemics Alert and Response
EU.....	European Union
FAA.....	Federal Aviation Administration (USA)
FDA.....	Food and Drug Administration (USA)
FTC.....	Federal Trade Commission (USA)
GATS.....	General Agreement on Trade in Services (WTO)
HSPD.....	Homeland Security Presidential Directive

IATA.....	International Air Transport Association
ICAO.....	International Civil Aviation Organization
ICESCR.....	International Covenant on Economic, Social and Cultural Rights
ICCPR.....	International Covenant on Civil and Political Rights
IHR.....	International Health Regulations (WHO)
IMM	In-flight Management Manual (IATA)
JAA.....	Joint Aviation Authority (ECAC)
JAR	Joint Aviation Regulations
LBCs.....	Local Baggage Committees
LCCs.....	Low Cost Carriers
LL.....	Local lost and found office (IATA)
LZ	Central Baggage Tracing system (IATA)
PRM	Passengers with reduced mobility
RFID.....	Radio Frequency Identification
RP	Recommended Practice
MRTD	Machine Readable Travel Documents
NAAG.....	National Association of Attorneys General (USA)
NEERS.....	National Security Entry-Exit Registration System (USA)
OPD.....	Orthotic Positioning Devices
SARPs.....	Standards and Recommended Practices (ICAO)
SDRs.....	Special Drawing Rights (IMF)
TI.....	Technical Instructions for the Safe Transport of Dangerous Goods (ICAO)
TSA.....	Transport Security Administration (USA)
US	United States of America
USC.....	United States Code
USDOT	United States Department of Transportation
WHO	World Health Organization

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APPENDICES

Dear Ms. Balasubramaniam,

Quite often it is assumed that IATA plays a greater role in many industry areas than is in fact the case. Nonetheless, the various fields that you cite are areas in which IATA has provided comment to governments (with the exception of racial profiling) and our comments should be accessible on their respective web sites. We do not keep statistics.

Various governments maintain web sites for the tracking of complaints related to undue barriers to mobility etc... as well as general consumer complaints with regard to air transport. To that end, I would suggest that you look at the following URLs:

<http://airconsumer.ost.dot.gov/reports/index.htm>
<http://airconsumer.ost.dot.gov/DiscrimComplaintsContacts.htm>
http://www.cta-otc.gc.ca/cta-otc2000/menu_e.html
http://www.cta-otc.gc.ca/access/common/plaint_e.html
http://ec.europa.eu/transport/air/rules/rights/index_en.htm

I am also enclosing a list of recent airline submissions to U.S. Notices of Proposed rule Makings (NPRMs) on matters related to passenger transportation and disabled passengers:

1] 14 CFR Part 382 NPRM on Disabled Passengers (Docket: 19482)
- Comments deadline was end of March 2005, but still no final rule in sight due to the massive adverse response to the NPRM.

2] 14 CFR Part 382 on Provision of Medical Oxygen on-board (Docket 22298)
- Comments deadline was in January 2006, but no final rule in sight for reason cited above.

3] 14 CFR Part 382 on Deaf, Hard of Hearing Passengers (Docket 23999)
- Comments deadline was 26th June 2006.

The above can be found in the U.S. Dept. of Transport docket management System (DMS) at: <http://dms.dot.gov/search/searchFormSimple.cfm> All you need do is insert the relevant docket numbers.

IATA has filed extensive materials with courts in the U.K. regarding denied boarding compensation. I will seek to find these submissions during the week.

The most relevant IATA manuals setting out procedures are the Passenger Services Conference Resolutions Manual and the Airport Handling manual. I can provide you with copies on a short term loan from the Legal Department.

Sincerely,

Mark MACKEIGAN

-----Original Message-----

From: usha.balasubramaniam@mail.mcgill.ca
[mailto:usha.balasubramaniam@mail.mcgill.ca]
Sent: August 14, 2006 16:10 PM
To: MACKEIGAN Mark

Subject: Research , guidance

Dear Mr. Mackeigan,

I am student at the Institute doing my thesis on "Consumer Protection in the new aviation era" under the supervision of Professor.P. Dempsey. I am collecting some data on delays, denied boarding, overbooking, airline regulations on disabled passengers , racial profiling , regulations regarding pregnancy, aspects of baggage handling etc...I am seeking to look at Government/airline regulations on the aforesaid topics (non Warsaw-Montreal Convention issues). Other day on contacting IATA Costumer Services wing, I was told that the IATA publications are priced publications and there is no library at IATA from where students like me could procure some data and reports of IATA on the said topics. In relation to above, I request your goodself to help me in the following respects:

- 1) Procure the latest data on the above topics.
- 2) Work undertaken by IATA on the above topics/issues , can I have the reports , papers produced by IATA in relation of the above.
- 3) Could you also please refer me to other sources like Consumer protection Wings/organisations, International organisations in US and Europe that have worked on these areas.

I request you to please help me in the above relation. Would it be possible for me to meet you at any time at your convinience to get the above inputs.

Thanking You,

Usha Balasubramaniam

Dear Usha,

Is there a phone number that you can be reached at? I would prefer to have a phone conversation to begin with.

Sincerely,

Claude THIBEAULT MD

You are welcomed to visit our web page: www.iata.org/health

-----Original Message-----

From: Usha Balasubramaniam [<mailto:usha.balasubramaniam@mail.mcgill.ca>]

Sent: December 11, 2006 10:58 AM

To: THIBEAULT Claude

Subject: Help with research

Dear Sir,

A very good morning. I wish to introduce myself as Usha Balasubramaniam, a student of Institute of Air and Space Law, McGill University, Canada. I am pursuing my LLM (Masters in Law) in Aviation and Space Laws and I am currently writing my thesis on 'Consumer Protection of Air Passengers in the New Aviation Era'. In this relation, I am writing my second chapter on 'Health Issues affecting Air Passengers' where I am trying to cover all the international regulations that have a bearing on air passengers health. Having realised the major leadership role IATA has assumed in drawing an international framework of regulations that protect the unassuming air passengers. I request you to please give me information on the aspects mentioned below:

- 1) I would like to know about the latest developments in the field of regulating 'Air Passenger Health' at IATA.
- 2) Please let me know the latest developments in the field of 'Prevention of Communicable Diseases' in aviation. How effective they have been so far (some statistics in this relation would really be helpful)? and how have the Member airlines of IATA received these regulations.
- 3) What are the important IATA Regulations that have a bearing on 'Air Passenger Health'?
- 4) How does IATA ensure the implementation of its Regulations, Proposals and Notices?
- 5) How effective have partnerships with other international organizations like ICAO, WHO, ACI proven so far in dealing with air passengers health issues?
- 6) Would it be possible for me to get a hold of IATA Medical Manual, Reports of IATA Medical Advisory Group, IATA Inflight Services Manual as these publications are extremely expensive for a student like me to procure. Kindly let me know of alternate sources for procuring the same.

Thank you in advance for the help and guidance. Looking forward to hear from you.

Sincerely,

Usha Balasubramaniam

Thank you for your e-mail. ICAO has gone some way down the path of regulating passenger health. The ICAO Assembly agreed a resolution (A 35-12) on the subject in 2004 - see attachment. It also made a resolution on smoking (two attachments on the subject) but no Standards were developed. Most States introduced national law to curtail on-board smoking or airlines voluntarily introduced a ban.

The latest event is the posting of guidelines on control of communicable disease the ICAO web site, along with some FAQs.

<http://www.icao.int/icao/en/med/healthrisks.html>

States are about to be notified of these guidelines by means of a State letter that will be distributed to all 189 contracting States this month. Further, some changes have been made to Annex 9. See attached working paper detailing Annex 9 proposals, which was accepted by ICAO Council without changes.

Regarding statistics, there are some papers that question the importance of airport screening. Here is one:

Published May 02, 2006 - RESEARCH ARTICLE

Delaying the International Spread of Pandemic Influenza Cooper BS, Pitman RJ, Edmunds WJ, Gay NJ
PLoS Medicine Vol. 3, No. 6, e212 doi:10.1371/journal.pmed.0030212

You can find it, along with some other useful publications on the PLOS website:

<http://medicine.plosjournals.org/perlserv/?request=index-html&issn=1549-1676>

ICAO does not have any regulatory authority per se. It relies on contracting States to introduce national legislation in accordance with the International Convention and its Annexes and then implement these in the normal way, using national law. However, ICAO does audit contracting States and from 2008 will publish either an executive summary or the full results of such audits on the ICAO web site. Some States already publish the audit results voluntarily.

ICAO works closely with WHO and other international organizations to ensure that a consensus view is developed. Working groups developing guidelines and Standards will usually include representatives of all relevant organizations. Such cooperation is invaluable.

I hope this is of assistance to you with your research.

Tony Evans

Dr Anthony D B Evans
Chief, Aviation Medicine Section
International Civil Aviation Organization
Montreal
Canada, H3C 5H7
Tel: +1 514 954 8150

-----Original Message-----

From: Usha Balasubramaniam [<mailto:usha.balasubramaniam@mail.mcgill.ca>]
Sent: 15 December 2006 12:25 PM
To: Evans, Anthony
Subject: Inputs needed for Research

Dear Mr. Evans,

A very good afternoon. I wish to introduce myself as Usha Balasubramaniam, a student of Institute of Air and Space Law, McGill University, Canada. I am pursuing my LLM (Masters in Law) in Aviation and Space Laws and I am currently writing my thesis on 'Consumer Protection of Air Passengers in the New Aviation Era'. In this relation, I am writing my second chapter on 'Health Issues affecting Air Passengers' where I am trying to cover all the international regulations that have a bearing on air passengers health. Having realised the major leadership role ICAO has assumed in drawing an international framework of regulations that protect the unassuming air passengers. I request you to please give me information on the aspects mentioned below:

- 1) I would like to know about the latest developments in the field of regulating 'Air Passenger Health' at ICAO.
- 2) Please let me know the latest developments in the field of 'Prevention of Communicable Diseases' in aviation. How effective they have been so far (some statistics in this relation would really be helpful)? and how have the Member States of ICAO received these regulations.
- 3) What are the important ICAO Assembly Regulations that have a bearing on 'Air Passenger Health'?
- 4) How does ICAO ensure the implementation of its Regulations, Proposals and Notices?
- 5) How effective have partnerships with other international organizations like WHO, IATA, ACI proven so far in dealing with air passengers health issues?

Thank You in advance for the same.

Kind Regards,
Usha Balasubramaniam

Usha:

Racial profiling does not take place at any airport in Canada. As such there is no data or reports on this subject. Nor does racial profiling take place anywhere in the world to my knowledge. Israel and the United States engage in a process of assessing passenger behaviour to look for signs of suspicious activity. These programs are not based on racial profiling. Recently in Canada there has been discussion on whether behavioural pattern recognition might be usefully added as a layer to protect travellers from terrorist attacks. At present this discussion is at a very early stage and no Canadian materials exist on the subject. You may want to have a look at what the Americans and Israelis are doing.

Thank you for contacting me,

Ian S. MacKay

Vice-President, Law & Strategy
Vice-président, Affaires juridiques et stratégie

Canadian Air Transport Security Authority
Administration canadienne de la sûreté du transport aérien

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Tel/Tél: (613) 998-4515
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E-mail/Courriel: ian.mackay@catsa-acsta.gc.ca

-----Original Message-----

From: Usha Balasubramaniam [<mailto:usha.balasubramaniam@mail.mcgill.ca>]
Sent: Friday, September 08, 2006 10:52 AM
To: MacKay, Ian
Subject: Inputs needed

Dear Mr. Mackay,

A very good morning. I would like to introduce myself as a graduate student doing my LLM at the Institute of Air and Space Law. I am currently writing my thesis on 'Consumer Protection in the New Aviation Era', in which I have a chapter on 'Racial Profiling at Airports'. As my professor supervisor Professor Paul Dempsey had asked me to get in touch with your goodself with a request to provide me with some inputs on the topic of Racial Profiling at Airports. I am looking forward for CATSA's data and reports on profiling at Airports and request your goodself's help in the above relation.

Looking forward to hear from you,

Sincerely,
Usha Balasubramaniam