

EVALUATION OF THE EU REGULATION 261/2004 ON RIGHTS OF AIR PASSENGERS IN THE EVENT OF DELAYED AND CANCELLED FLIGHTS*

Abstract

In contracts of carriage by air, there are bound to be challenges, disagreements and possible recourse to litigation. There is no complete uniformity in substantive and procedural laws binding air carriers and passengers in the event of disagreement as the Warsaw and Montreal Conventions recognized the applicability of local circumstance and contractual peculiarity. To fill in this gap, the European Community Parliament enacted a common regulation 261/2004 stating the obligations of air carriers to passengers and the right of passengers in the event of certain categories of breach of contract of carriage within the region. Following conflicting interpretations of the regulation, an Interpretative Guidelines was established in 2016 to clarified grey areas in the regulation. Nonetheless, the substantive rights seem to be defective in certain areas. This paper therefore seeks to evaluate the provisions of the regulation by highlighting the inadequacies therein. The paper found out that there is no provision for delay of passengers at the tarmac, even as the distinction between a delayed and cancelled flight remained clumsy. This paper recommends the amendment of certain provisions of the regulation to meet the expectations of air passengers.

Keywords: EU Regulation 261/2004, Rights of Air Passengers, Delayed and Canceled Flights, Aviation

1. Introduction:

The European Union¹ (EU) has a common regime of compensation for air passengers in the event of breach of contract of carriage by air applicable to all Member States of the European Union. Similarly almost all disputes on the interpretation of the regulation gets to the European Community court even as it would appear that decisions of the courts have greatly influenced air passengers' regulations globally. The common compensation regime is the benchmark for all air passengers' compensation matters in the European Union member states.² The primary legislation establishing the policies of consumer protection in the European Union are Articles 4(2)(f), 12, 114(3) and 169 of Treaty on the Functioning of the European Union (TFEU) and Article 38 of the Charter of Fundamental Rights of the European Union. The Treaty is to the effect that the European Union in order to protect the interest of consumers and ensure a high promotion of consumer rights shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting consumer right to information, education and to organise themselves in order to safeguard their interests.³ The EU has developed a set of passenger rights in all modes of transport (air, rail, waterborne, bus and coach)⁴ with the aim of ensuring the same level of protection for passengers (compensation and assistance to passengers in the event of accidents, cancellations or delays) no matter which mode of transport they decide to use and

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¹European Union is not a country. It is a political and economic union of 27 member states that are located primarily in Europe. Its members have a combined area of 4,475,757 km² and an estimated population of about 513 million people. The member states of the European Union are subjected to binding laws in exchange for representation within the common legislative and judicial institutions. It is a generally principle that member states must be at consensus in taking decisions regarding foreign policies and defence. See, F., A. (2010). Best Practice in Meeting the Needs of Disabled People: Findings of the Euroaccess Project. Paper delivered at The 12th International Conference on Mobility and Transport for Elderly and Disabled Person (TRANSED), held in Hong Kong on 2-4 June, 2010.

²Other members of the EU are Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. The UK formally left the EU at 11 p. m GMT on the 31st January, 2020.

³ Article 4(2)f, Treaty on the Functioning of the European Union.

⁴ A. Mogyoro, European Bus and Coach Passenger Rights: experiences from the first three years, 19th October, 2016 available at European Bus and Coach Passenger Rights: first three years experiences (intelligenttransport.com) last accessed 2nd April, 2021.

regardless of their nationality.⁵ In the case of carriage of air passengers, there are general legislative acts adopted for the protection of air passengers.⁶ Of specific relevant to this article are Regulations (EC) No.261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights⁷ and Regulation (EC) No.1107/2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air.⁸

2. EC Regulation 261/2004⁹

This Regulation provides a minimum level of rights to air passengers in the event of being denied boarding, cancellations and long delays of flights. It applies to all passengers and flights departing from an airport located in the territory of a European Member State, regardless of the nationality of an airline, or departing from an airport outside the EU to a destination within the EU, only where the airline is registered in a Member State.¹⁰

Essential Provisions in EC 261/2004

Regulation EC.261/2004 expressly recognized five major challenges in the carriage of passengers by air to *wit*: (a) Denied Boarding – Article 4, (b) Delay in Departure Time of Flight – Article 6, (c) Cancellation of Scheduled flight – Article 5, (d) Downgrading or Upgrading of Seat – Article 10, (e) Passengers with reduced mobility/in special need. – Article 11. For each of the above occurrences, there is a corresponding obligation on the part of the carrier. Consequently, the Regulation equally and expressly provides for five categories of right for the passenger to *wit*: (i) Right to Sufficient Information- Article 14, (ii) Right to Care – Article 9, (iii) Right to Reimbursement and Re-routing – Article 8, (iv) Right to Compensation – Article 7, (v) Right to Further/Adequate Compensation. – Articles 12 and 15(2). The paper shall now proceed to discuss the Regulation and thereafter consider the various interpretations by the courts.

Denied Boarding

Article 1(j) of the Regulations defines ‘denied boarding’ to means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation. This means that refusal to carry passenger on ground of health, security, safety or travel documentation is different from denied boarding, as the law presumed that the passenger was not eligible for the particular flight. It follows that such ‘ineligible passenger’ couldn’t have any seat to give up on the aircraft.

Regulation 261/2004 therefore requires that when an operating air carrier reasonably expects to deny boarding on a flight, it shall first call for volunteers to surrender their reservations in exchange for benefits under conditions to be agreed between the passenger concerned and the operating air carrier. Where a passenger with confirmed reservation therefore volunteered to vacate his or her seat to enable another passenger occupy same in the expectation of benefit from the air carrier, it is called voluntary denial of boarding. The elements under this Regulation include the fact that the passenger must have a confirmed ticket for that particular flight. Secondly, the passenger is given up his right to occupy his

⁵ Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 Concerning the Rights of Passengers in Bus and Coach Transport and Amending Regulation (EC) No 2006/2004, Chapters II-III.

⁶Regulation (EC) No.300/2008 on Common Rules in the Field of Civil Aviation Security; Directive 90/314/EEC on Package Travel, Package Holidays and Package Tours, (currently under review and covering all means of transport); as well as Directive 2008/122/EC on the Protection of Consumers in Respect of Certain Aspects of Timeshare, Long-term Holiday Product, Resale and Exchange Contracts. Others include Regulation (EC) No.2027/97 of the European Parliament and of the Council on air carrier liability in the event of accidents as modified by Regulation (EC) No.889/2002, and Montreal Convention, 1999.

⁷ Official Journal of the European Union, 11th February, 2004.

⁸ Official Journal of the European Union, 5th of July, 2006.

⁹Regulation (EC) 261/2004 of the European Parliament and of the Council dated 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 actually came into effect in 2005.

¹⁰S.3(1), Regulation 261/2004.

seat for another because there is no space on the aircraft. By the tenor of the rule, given up seat when there is space for another passenger to use without anticipating benefit, or due to the unsuitability of the seat would not constitute denied boarding.¹¹ Thirdly, the passenger has a right to negotiate the terms and conditions for vacating the seat, and such terms if agreed shall be binding on the air carrier. Additionally, the passenger by relinquishing his seat is automatically entitled to the other benefits provided in the regulation.¹² Where a passenger voluntarily relinquished his seat, he has a choice to demand for any of the following:

- i. To be reimbursed for the cost of the ticket at the rate at which the ticket was purchased.¹³
- ii. A return flight to the first point of departure, at the earliest opportunity.
- iii. Re-routing, under comparable transport conditions, to their final destination¹⁴ at the earliest opportunity
- iv. Re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.¹⁵
- v. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative.¹⁶

The Regulation used the word ‘denied boarding’ to include a situation where the passenger voluntarily relinquished his or her seat. To deny simply means to take away; it professes a negative connotation, where someone is made to lose something.¹⁷ While it is conceded that the passenger may in the circumstance not be able to travel at the time, but the decision is that of the passenger. Whatever the argument may be, this article argues that it is a self-denied boarding. A passenger with confirmed ticket may be disallowed from boarding the aircraft against his will. That is, for no fault of his own. Article 4(2) of the 261/2004 regulation provides that if an insufficient number of volunteers¹⁸ come forward to allow the remaining passengers with reservations to board the flight, the operating air carrier may then deny boarding to passengers against their will, irrespective of the feeling and disposition of the air passengers or the reason for the overbooking. This paper is unable to agree with the draconian provision of article 4(2). The provision is unevenly pro-carrier and seeks to sacrifice the convenience of the passengers for the economic benefit of the carrier. First, denied boarding occurred when the carrier overbooked the aircraft on the assumption that some passengers may not show up for departure.¹⁹ There is no known law positively establishing the right of the carrier to overbooking. It is a mere customary

¹¹ *Ibid*, Article 4(1); Geert Plas, ‘Denied Boarding : More Rights For Air Passengers’, available at Denied boarding : more rights for air passengers | European Parliamentary Research Service Blog (epthinktank.eu) last accessed 4th April, 2021.

¹² *Ibid*, Articles 4 and 8. See also G. Koen, ‘Guide: EU Rights and Compensation when Denied Boarding’, 17th February, 2010 available at Guide to Denied Boarding Rights and Compensation in the EU - Paliparan last accessed 6th April, 2021.

¹³ *Ibid*, Article 8(1)a; Cornell Law School, ‘Written explanation of denied boarding compensation and boarding priorities, and verbal notification of denied boarding compensation’, Legal Information Institute available at 14 CFR § 250.9 - Written explanation of denied boarding compensation and boarding priorities, and verbal notification of denied boarding compensation. | CFR | US Law | LII / Legal Information Institute (cornell.edu) last accessed 2nd April, 2021.

¹⁴ Article 8(1)(a); Article 1 of the Regulation defines ‘final destination’ to means the destination on the ticket presented at the check-in counter or, in the case of directly connecting flights, the destination of the last flight; alternative connecting flights available shall not be taken into account if the original planned arrival time is respected.

¹⁵ Article 8(1)c; J McLaughlin, ‘Overbooking and Denied Boarding: Legal Response in the Last Decade’, 54 *J. Air L. & Com.* 1135 (1989) pp. 1136-1142.

¹⁶ Article 8(3); D. Bertsimas and S.S. Patterson, ‘The Air Traffic Flow Management Problem with Enroute Capacities’, Massachusetts Institute of Technology, Cambridge, Massachusetts, available at The air traffic flow management problem with enroute capacities.pdf (mit.edu), last accessed 2nd April, 2021,

¹⁷ J. Francisco, J. Serrano, A. Kazdab, ‘Airline Disruption Management: Yesterday, Today and Tomorrow’, International Conference on Air Transport (INAIR) 2017 available at Elsevier Enhanced Reader last accessed 2nd April, 2021.

¹⁸ Article 2(k) defines ‘volunteer’ as a person who has presented himself for boarding under the conditions laid down in Article 3(2) and responds positively to the air carrier’s call for passengers prepared to surrender their reservation in exchange for benefits; J.L. Brudney, ‘The Effective Use of Volunteers: Best Practices for the Public Sector’, *Journal of Law and Contemporary Problems* Vol. 62: No. 4, (2000), pp. 220-221.

¹⁹ J McLaughlin, ‘Overbooking and Denied Boarding: Legal Response in the Last Decade’, 54 *J. Air L. & Com.* 1135 (1989) pp. 1136-1142.

or trade practice among transporters.²⁰ Such practices that undermined the sanctity of contract are clearly inimical to economic development.²¹

Also, the Regulation did not state the requirement or the classes of those that could be denied boarding involuntarily as Article 11²² of the regulation dealing with passengers with reduced mobility and unaccompanied infant is not excluded from possible denied boarding.²³ It is absurd for Regulation 261/2004 to empower the carrier to deny boarding to air passengers under the guise of overbooking.²⁴ Also, the Regulation is unclear in situations where there is a change in the size of the aircraft from say, a large aircraft to a smaller one. For instance, where a passenger made reservation with a Boeing 737 aircraft with about 300 seats and the carrier on the day of the carriage produced a smaller aircraft with 200 aircraft, and consequently denied boarding to large number of about 100 passengers, should that be treated as a simple case of denied boarding under Regulation 4, or flight cancellation under Regulation,²⁵ breach of contract or gross negligence?²⁶

Pursuant to Article 4(3) of the Regulation, air passengers who are denied boarding against their will are entitled to three basic rights to *wit*: compensation, reimbursement and care.²⁷ The first is the right to care which is in the form of:

- i. Meals and refreshments in a reasonable relation to the waiting time;
- ii Hotel accommodation in cases - where a stay of one or more nights becomes necessary or even more;
- iii. Transport between the airport and place of accommodation (hotel or other).

In addition to these free cares, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.²⁸ The second class of right enjoyed by a passenger who is denied boarding against his will is the right to reimbursement²⁹ and or re-routing to his destination or back to where he came from.³⁰ The third class of right of right is the right to compensation. Article 7 provides that the passenger shall be entitled to specific sums in the following ratios:

- (a) EUR 250 if the intended journey is not more than 1 500 kilometres in distance;
- (b) EUR 400 for all flights within the European Union community, which distance is beyond 1 500 kilometres but not more than 3 500 kilometres; and
- (c) EUR 600 for all flights not falling under (a) or (b).

These amounts are accruable to air passengers in the event of delayed or cancelled flight or denied boarding, and subject to circumstances may be reduced by 50%. The problem with this provision is its emphasis on the difference in the time of arrival. A passenger who is denied boarding against his will is automatically exposed to losses and inconvenience. Such passengers should be assured of his right to recover all his losses, as against reducing the losses to different in time of arrival. Also, having a

²⁰ P.P. Polanski, 'Common Practices in the Electronic Commerce and Their Legal Significance', 18th Bled eConference eIntegration in Action Bled, Slovenia, June 6 - 8, 2005 available at Common Practices in the Electronic Commerce and Their Legal Significance (uni-mb.si) last accessed 2nd April, 2021.

²¹ D. Shepherdson, 'American, Southwest Airlines Bump more Passengers after 737 MAX Grounding', Reuters, available at American, Southwest Airlines bump more passengers after 737 MAX grounding | Reuters last accessed 2nd April, 2021.

²² *Ibid*, art. 11(2).

²³ Frye, A. (2010). Air Passenger Rights for Disabled People. Conference Paper delivered at the 12th International Conference on Mobility and Transport for Elderly and Disabled Persons (TRANSED) held in Hong Kong on 2-4 June, 2010.

²⁴ Frye, A. (2010). Best Practice in Meeting the Needs of Disabled People: Findings of the Euroaccess Project. Paper delivered at The 12th International Conference on Mobility and Transport for Elderly and Disabled Person (TRANSED), held in Hong Kong on 2-4 June, 2010.

²⁵ Article 7, EU 261/2004; B. Ganglmair, 'Efficient Material Breach of Contract', *The Journal of Law, Economics, and Organization*, Volume 33, Issue 3, August 2017, Pages 507–540, <https://doi.org/10.1093/jleo/eww020>

²⁶ Montreal Convention, Article 21(2); R Ritorto *et al.*, Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261) — A Bumpy But Navigable Ride, *82 J. Air L. & Com.* 561 (2017), p. 573.

²⁷ Regulation 261/2004, articles 7, 8 and 9.

²⁸ EC 261/2004, art.9.

²⁹ S. Plitt, 'Understanding the Right of Reimbursement for Defense Costs When Reserving Rights', (2012), available at Understanding the Right of Reimbursement for Defense Costs When Reserving Rights (claimsjournal.com) last accessed 3rd April, 2021.

³⁰ *Ibid*, Art.8.

uniformed and exact amount of compensation as provided in Article 7 of the Regulation undermined the peculiarity of individual loss of the party involved.

From another perspective, Article 7(c) appears uncertain as to the inclusion of flights beyond 3500 kilometres in any part of the world, particularly as ‘Community Carrier’ as used in the preceding paragraphs refers to airline registered in any of the Member State of the European Union. This is further supported by Article 3 which provides the scope of the Regulation as passengers departing from an airport located in a third country to an airport situated in the territory of a Member State to which the Regulation applies,³¹ unless they received benefits or compensation and were given assistance in that third country, if the operating air carrier of the flight concerned is a Community carrier. Similarly, the lack of clarity as to the procedure or benchmark to be adopted in determining involuntary denied boarding poses a challenge to the right of air passenger. In other words, there is no rule to be followed by the carrier in giving effect to the provision of Article 4(3). It thus appears that the carrier has the discretion to adopt any rule, which is convenience for it. This paper argues that it would be inequitable and unfair for a passenger who booked his flight earlier to be denied boarding for those who possibly booked on the day of the departure. While it is conceded that passengers have right to cancel and or re-schedule their flight, and thus may affect the permutation of the operating carrier, a better framework which provides the time and conditions for such would protect the carrier from loss. Air passengers should not be made to suffer for the wrong judgement or decision of another.

3. Delay of Flights in the EU

Air passengers whose flights are delayed in the EU are entitled to the right of care, possible reimbursement or re-routing as provided in Article 6 of the Regulation. There is however no definition of delay in EC.261/2004.³² Delay of flight means a period after the expected time that passengers have to wait before departure or arrival; the length of time by which something is late.³³ It also means the non-departure of the air passengers’ aircraft from the airport at the scheduled time or late arrival at the destination contrary to the stipulated time on the Boarding Pass.³⁴ It may be due to unplanned deferment of a scheduled activity because of something or occurrence that impedes its commencement or continuation.³⁵ The nature of the remedy which the passenger is entitled to in the event of delay differs according to the expected distance of the flight and the length of the delay. For flight which intended distance is *not more than* 1500 kilometres the passenger would be entitled to meals and refreshments in addition to two telephone calls, telex or fax messages, or e-mails, if the delay is for a period of two hours and above.³⁶ Similarly, where the delay is from three hours and the flight was within the European Community with a *minimum distance* of 1500 kilometres or a maximum distance of 3500 kilometres for all other flights, the remedy will be the same meals, refreshment, phone calls, emails or fax messages.³⁷ In every other circumstance where the delay is from 4hours, the same remedy will apply.³⁸

Where a flight scheduled for a particular day could not depart until the next day, the Regulation provides that the passengers shall be entitled to free hotel accommodation and transportation to and fro the hotel.³⁹ There is no mention in the regulation that these category of passengers shall be entitled to meals or whether this remedy is in addition to the remedy of meals, phone calls and emails. This makes the provision insufficient. However where the flight is delayed beyond five hours from the scheduled time, the passenger shall be entitled to reimbursement within seven days of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel

³¹ R Ritorto *et al.* supra, p. 475.

³² Yamaguchi, Mikio (2004) ‘The Problem of Delay in the Contract Formation Process: A Comparative Study of Contract Law,’ *Cornell International Law Journal*: Vol. 37: Iss. 2, pp. 369-372.

³³ D Crocker, *Dictionary of Aviation* (2nd edn: London, A & C Black Publishers Ltd, 2007), 68.

³⁴ J. Stannard, *Delay in the Performance of Contractual Obligations*, (2nd edn, Oxford University Press: 2018) 280.

³⁵ AO. Adediran, ‘Air Carriers’ Liability for Delay of Passengers under Nigerian Law’, *NIALS Journal of Air and Space Law*, Maiden Edition, 2013, p. 29.

³⁶ EC Regulation 261/2004, Art. 6(1)a.

³⁷ *Ibid.*, Art. 6(1)b.

³⁸ *Ibid.*, Art.6(1)c.

³⁹ *Ibid.*, Art. 6(1)(c) i & ii.

plan, together with, when relevant, and where the latter apply a return flight to the first point of departure, at the earliest opportunity.⁴⁰

The re-imburement is the cost at which the ticket was purchased; not the cost of the same ticket at the material time of breach of contract of carriage. The re-imburement is not immediate.⁴¹ It is within seven days; meaning the law is disinterested in whether the affected passenger has alternate source of fund to continue his journey. The remedy for re-imburement for delay appears to be automatic the moment is delay is up to five hours, irrespective of the distance to be covered or the choice of the passenger. It is also unclear whether the passenger who had waited for the five hours is automatically presumed to enjoy the benefit of meals, refreshment and phone calls. Put differently, whether the passenger while waiting for five hours could ask for refreshment, etcetera which are available for those of two hours and above. Secondly, it is a common knowledge that cost of flight ticket is usually higher on the day of departure than previously.⁴² It is also not in dispute that passengers could purchase their tickets online and make reservation long ahead of departure date.⁴³ In such circumstances, the cost of those early reservations, are far less. It follows that the refunded cost of ticket can rarely purchase the same ticket at the time of the refund. There is no guideline to calculating the five hours and it could therefore be confused with the provision on departure taken place the following day. If a flight was scheduled to depart by 8pm and ended up departing by 1am; that is a period of 5hours dovetailing into another day different from the day it was meant to depart. In such situation, is the passenger entitled to re-imburement because of the five hours delay as provided in Article 6(c)(iii) or to hotel accommodation because it is another day as provided in Article 6(c)(ii)?

Another issue of concern is that re-imburement envisaged a failure of the contract.⁴⁴ By refunding the cost of the ticket, the operating carrier is relinquishing on its obligation to carry the passenger under their contract. A breach of contract of more than five hours is enough to attract damages.⁴⁵ A failure by an air operating carrier to carry a passenger to the agreed destination is a breach of the contract,⁴⁶ knowing that by which time the passenger apart from parting with money as consideration had also suffered some inconveniences⁴⁷ by coming to the airport, waiting at the airport and returning without carriage. A breach of contract, no matter what form it may take, always entitles the innocent party to maintain action for damages.⁴⁸ Besides, it is incongruous why a non- departure of flight culminating into re-imburement should not be classified as cancellation (termination) of the contract rather than delay.⁴⁹ The simplest understanding of reimbursement arising from delay is that the contract has been terminated, either unilaterally or mutually.⁵⁰ It is therefore submitted that air passengers should take advantage of the provision of Article 12 of the Regulation recognizing right to further compensation to sue the operating airline. Re-imburement is not the same as compensation. Reimbursement means a repayment of money.⁵¹ On the other hand, compensation is the payment of damages⁵² or any other act

⁴⁰ *Ibid*, Art.6(1)(c) iii.

⁴¹ *Ibid*, Art. 8(1)a.

⁴²B. McGuigan, 'Why Do Airline Prices Change So Much?', available at <https://traveltipsusatoday.com> last accessed 5th April, 2021.

⁴³A. Rueda, 'The Warsaw Convention and Electronic Ticketing', *Journal of Air Law and Commerce*, Vol. 67, Iss.2, 2002, pp. 406-409.

⁴⁴ Cheshire, et al, 'Law of Contract (16th edn, Oxford University Press 2012) 673.

⁴⁵ *Bentsen v. Taylor, Son & Co. (No. 2)* 1893 2 QB 274 at 281.

⁴⁶ BS Kokpan, 'Critical Analysis of the Remedies Available to Air Passengers in Nigeria: A Review of Post Covid-19 Era', *Port Harcourt Law Journal*, 2020 available at < <https://ssrn.com/abstract=3745755>>;

Mekwunye v. Emirates Airliness [2019] LPELR 46553 (SC).

⁴⁷*Sturgeon vs. Condor Flugdienst GmbH and Böck and Lepuschütz V Air France* [2012] 2 All ER (Comm) 983 C-402/07 and C-432/07, 19th November, 2009.

⁴⁸ Cheshire, et al, 'Law of Contract (16th edn, Oxford University Press 2012) 673.

⁴⁹ Garner defined 'cancellation' as 'the annulment or termination of a promise or an obligation or the purposeful ending of a contract'. See B.A. Garner, *Blacklaw Dictionary*, 10th edn, p. 247.

⁵⁰ As Cheshire, et al, (supra) at page 667 puts it, 'when one person has failed to perform on time, the other party can sue'.

⁵¹ B.A. Garner, 'Blacklaw's Dictionary' 10th edn, at pp. 1490 and 1476.

⁵² The Nigerian Court of Appeal in *Olusoga v. Adetola* [2018] 12 NWLR ((Pt. 1634) 483 at 504 held that 'in cases of breach of contract, the principle upon which the award of damages is predicated is restitution in *integrum, id est*, restoration of the claimant to the condition he was before the breach occurred...'

that a court orders to be done by a person who has caused injury to another.⁵³ In compensation, the air passenger is expected to be made whole, that is, recover all losses incidental to the failed contract of carriage. It follows in a general sense that compensation may not always be money.

4. Cancellation of Scheduled Flights in the EU

Cancellation of flight is provided in Article 5 of Regulation 261/2004. Generally, the Regulation provides that air passengers are entitled to care, re-imbursment or re-routing and compensation in the event of cancellation of scheduled flight. However, whether a passenger would be entitled to these rights or not depends on the nature and timing of the cancellation. For instance, the EU Interpretative Guidelines to Regulation 261/2004, which sought to clarify grey areas in Regulation explained that indeed a flight may experience such a long delay that it departs the day after it was scheduled and may therefore be given an annotated flight number (e.g. XX 1234a instead of XX 1234) to distinguish it from the flight of the same number on that subsequent day. However, such flight could still be considered as a delayed flight and not a cancellation according to the given circumstances.⁵⁴ Article 5 is to the effect that where a scheduled flight is cancelled the passengers may be reimbursed as to the cost of their ticket or re-routed to their final destination.⁵⁵ Where continuing the journey on a later flight after the cancellation will be useless for the passenger, the operating carrier in the case of 'mid or connecting flight' cancellation shall re-route the passenger back to enable him return at the earliest opportunity. Where the passenger cannot be rerouted to his destination on the same day, the carrier shall provide him with free hotel accommodation and where necessary transportation to and fro the hotel.⁵⁶ Additionally, the carrier is obligated to provide free meals, two phone calls, emails or telex for the passenger.⁵⁷ This is necessary to enable the passengers have ready means of communicating with their family, relative, employer or whosoever.

A passenger whose flight is cancelled may also has a right to financial compensation,⁵⁸ the amount of which is to be determined by the duration of the flight.⁵⁹ In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger's arrival after the scheduled time. However, air passengers are not entitled to compensation for cancellation if they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival.⁶⁰ This envisaged (1) the cancellation of the particular aircraft originally booked (2) passenger is informed of the cancellation at least seven days before the intended departure date (3) the provision of another aircraft either by the same operator or at their instance (4) a change in the departure time of the new aircraft (5) the departure time for the new aircraft would be late by two hours compared to the time of the cancelled one (6) the re-routed (new) flight will be late in arrival but less than four hours compared to the arrival time of the cancelled flight.⁶¹ A passenger will not be entitled to compensation for cancellation if he is informed of the cancellation of the flight within a period of seven days and additionally offered re-routing, provided the new flight on which the passenger is to be re-routed will not be more than one hour late from the originally departure time and not more than two hours late in the new arrival time.⁶² For instance, that the passenger will be departing by 10GMT as

⁵³ Garner, *supra*, p. 343.

⁵⁴ Clause 3.2.2 of Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council (2016/C 214/04) available at EUR-Lex - 52016XC0615(01) - EN - EUR-Lex (europa.eu) last accessed 5th April, 2021.

⁵⁵ EU Regulation 261/2004, Art. 5(1)a.

⁵⁶ *Ibid*, Art. 5(1) b.

⁵⁷ *Ibid*, Art. 9(2).

⁵⁸ *Ibid*, Art. 5(1)c.

⁵⁹ *Ibid*, Art. 7(1)(2).

⁶⁰ Art. 5(1) (c) ii.

⁶¹ *Ibid*, Art 5(c)(ii).

⁶² *Ibid*, Art. 5(1) (c) iii.

against 9GMT (stated for the cancelled flight), and arriving at 15GMT as against 13GMT (stated for the cancelled flight).⁶³

Another instance where the passengers will not be entitled to the compensation provided in Article 7 despite the cancellation of their flight is when the cancellation was due to the extraordinary circumstances⁶⁴ beyond the contemplation and control of the operating carrier, even if all reasonable preventive measures were taken.⁶⁵ This exemption of liability accords with the provisions of the Montreal and Warsaw Conventions.⁶⁶ When passengers are informed of the cancellation of their flight, an explanation shall be given concerning possible alternative transport.⁶⁷ Furthermore, the burden of proving whether the passenger has been informed of the cancellation of his flight is on the operating air carrier.⁶⁸ An operating air carrier denying boarding or cancelling a flight shall provide each passenger affected with a written notice setting out the rules for compensation and assistance in line with this Regulation.⁶⁹

Fundamentally, it is submitted that although Article 5 requires that the passenger must be informed of the cancellation, there is no provision stating the mode of the information. There is no provision as to how the court will authenticate that a passenger was duly informed of the cancellation within the period alleged. Similarly, the regulation provides for payment of compensation, but did not state the period within which the compensation is to be paid to the passenger. Unlike reimbursement which is payable within seven days, there is no timing for payment of compensation arising from cancellation.⁷⁰ It may however appear pursuant to Article 7(2) that the philosophy behind compensation for certain classes of cancellation is the fact that the passenger is unable to travel on the booked flight for the particular trip. Otherwise the one, two and maximum four hours difference in the departure and arrival times of the cancelled flight would have clearly made it a case of delay. In practice the only difference between delay and cancellation thus appears to be information that the flight has been cancelled. In other words, there is an obligation on the operating carrier to formally declare the flight cancelled. Until such is done, it may still be treated as a case of delay. Unlike cancellation, the length of time amounting to delay is specified, known and automatic. Flowing from this, it is unclear if passengers can claim the benefits for cancellation after a long delay of the flight or must wait for the flight to be declared cancelled before activating the right under cancellation. Conversely, it is clear that flight could be cancelled before or at the time of departure, which envisaged the absence of delay.⁷¹ Whereas there may be little difficulty in flight cancelled under the provisions of two week and above or one week to two weeks, uncertainty and mischief characterizes flights which are cancelled on the day of departure as the operating carrier could simply disguise a case of cancellation as that of delay in order to avoid payment of compensation under Article 7. Similarly, the EU Regulation is not clear if the passenger could treat the cancellation of flight before the departure day as a form of rescission of the contract of carriage.⁷² Where the operating carrier, who contracted with the passenger is different from the actual carrier, the former would still be liable notwithstanding that the carriage was performed at its instance by another carrier.⁷³ Also, the EU Regulation is silent on the fate of the passengers where the delay of the flight was due to the negligence

⁶³ *Supra*, Art.5(c)(iii).

⁶⁴ Regulation 261/2004 do not define 'extraordinary circumstances'. See also, Richard Ritorto *et al.*, 'Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261) — A Bumpy But Navigable Ride', 82 *J. Air L. & Com.* 561 (2017), pp. 573-574.

⁶⁵ *Supra*, Art.5(3).

⁶⁶ Montreal Convention, Art.19; Warsaw Convention, Art. 20(1). See also, BS Kokpan, 'Covid-19, Extraordinary Circumstances and Cancellation of Flights in Nigeria', *International Journal Of Comparative Law and Legal Philosophy (IJOCLLEP)*, Vol 1, No 1 (2019)

⁶⁷ EU 261/2004, Art 5(2).

⁶⁸ *Supra*, Art.5(4).

⁶⁹ *Supra*, Art.14 (2).

⁷⁰ Cf, *supra*, Arts.5(1)(c), 4(3); 7 and 8.

⁷¹ EC Regulation 261/2004, Art. 5(1)c.

⁷² Cheshire, *et al*, *supra*, p. 683.

⁷³ *Graham, Harris Elton Ltd. v. Alfred W. Ellis (Transport) Ltd.* [1967] 2 ALL ER 940; cf, Clause 2.2.3 of the 2016 EU Interpretative Guidelines on Regulation (EC) No 261/2004 which provide that in accordance with Article 3(5), the operating air carrier is always responsible for the obligations under the Regulation and not, for example, another air carrier which may have sold the ticket.

of the carrier.⁷⁴ It is submitted that where the delay is solely due to the negligence of the carrier as to amount to a fundamental breach, damages would accrue in favour of the passengers.⁷⁵

5. Passengers with Reduced Mobility or in Special Need in the EU

Apart from making special provision for passengers whose flights are delayed, cancelled or who are denied boarding or downgraded⁷⁶ from their preferred seat on the aircraft, the EU Regulation 261/2004 seek to protect air passengers with reduced mobility or in special need. A passenger's mental or physical condition might affect the timing of his carriage. Article 2(i) of the Regulations defines 'person with reduced mobility' to 'means any person whose mobility is reduced when using transport because of any physical disability (sensory or locomotory, permanent or temporary), intellectual impairment, age or any other cause of disability, and whose situation needs special attention and adaptation to the person's needs of the services made available to all passengers'.

Disability in the context of passenger right under regulation 261/2004 is not limited to physical disablement but also include mental impairment, infants, very older people and even young persons who cannot walk freely and therefore require special assistance in the course of flight. They need not be persons with long time physical ailment in the context of the definition in the United Nations Convention on Rights of Persons with Disabilities (UNCRPD)⁷⁷, nor as contemplated by the EU courts.⁷⁸ The European Regions Airline Association identified this category of passengers to include passengers who are unable to walk long distance; ascend stairs or completely immobile.⁷⁹ In another report, this special categories of passengers (SCPs) were identified to comprise any person requiring special assistance, conditions and/or equipment, including disabled persons (e.g. with paralysed lower limbs) and persons with reduced mobility (e.g. aided walking, deaf, mute, blind); extremely overweight passengers; expectant mothers; infants and children up to the age of 12; mental deficient passengers; sick passengers and passengers on stretchers; inadmissible passengers, and deportees or persons in custody.⁸⁰ Thus, passengers with reduced mobility including things they rely upon to make the journey are recognized under the regulation and conferred with special rights.

The regulation provides that 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.⁸¹ This is the general rule. In particular, it is provided that 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 as soon as possible.⁸² The visually impaired passenger is entitled to be informed in the way he understand his right to compensation under the regulation. Thus, in applying the principle of care to air passenger, the operating air carrier is required to pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.⁸³ Curiously, there is no penalty for the infraction of these provisions by the air carrier, even though the regulation used the word 'shall'. It would appear that the provisions of Articles 11 and 9(3) are merely declaratory, and may be violated

⁷⁴ *New Zealand Shipping Co. Ltd. Ltd. vs. A.M. Salterthwaite & Co. Ltd.* (The Euromedon) [1975] A.C. 154.

⁷⁵ *Hunt & Winterbotham (West of England) Ltd. vs. BRS (Parcels) Ltd.* [1962] 1 Q.B. 617; cf, *Levison vs. Patent Steam Carpet Cleaning Co. Ltd.* [1977] 3 ALL ER 498.

⁷⁶ EC 261/2004, Art. 10.

⁷⁷ Article 1 of the UNCRPD define Persons with disabilities to include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

⁷⁸ The Court of Justice of the EU has defined disability as an impairment that is 'long-term' and which, in the field of professional life, 'hinders an individual's access to, participation in, or advancement in employment'. See (Joined Cases C-335/11 and C-337/11, Ring; Case C-363/12, Z; Case C-354/13, Kaltoft).

⁷⁹ European Regions Airline Association, 'Passengers with Reduced Mobility (PRMs)' available at 180924_th_era_prm_brochure_online.pdf (eraa.org) last accessed 6th April, 2021.

⁸⁰ M Sperber, *et al*, 'Carriage by Air of Special Categories of Passengers', TÜV Rheinland, available at EASA 2008.C.25 Final report Issue 1.1 (europa.eu), last accessed 6th April, 2021.

⁸¹ EU 261/2004, Art 11(1).

⁸² *Ibid*, Art. 11(2).

⁸³ *Ibid*, Art. 9(3).

without qualm.⁸⁴ There is no punishment for the breach. There is equally no specific remedy accruable to such classes of passenger. At best, the inclusion of the provisions appears to be a mere recognition of the special status of such classes of passengers, and the need to treat them appropriately.⁸⁵

6. Conclusion

This paper notes that air passengers have right to claim further and adequate compensation from the carrier under the regulation.⁸⁶ Except for cases of voluntarily denied boarding, the passenger's right to further compensation is not extinguished by the receipt of an earlier benefit. This must be understood in contradiction with passengers seeking double compensation.⁸⁷ Consequently, passengers who feel the need for further compensation could take advantage of the provision of Articles 12 (further compensation) and 15 of the regulation prohibiting derogatory or restrictive clauses in contract of carriage. Also, Article 6 of the Regulation dealing with right of passengers in the event of delay make no provision for flight delayed at the tarmac even as there is no compensation to passengers with reduced mobility when their right as provided in Article 11(1) is breached. Air passengers on successive carriage involving at least a non -Community Carrier are not covered by the compensation regime under the Regulation. It is accordingly recommended that Articles 4, 5, 7, 8 and 9 of EU Regulation 261/2004 be amended to state that any flight delayed beyond three hours or delayed beyond the day of departure be treated as cancelled for the purpose of determining compensation, while delay at the tarmac beyond one hour should attract the right to care. Secondly, in the event of reimbursement, the value of the flight ticket at the time of the reimbursement should be considered. Also, payment of compensation to passengers for breach arising from voluntarily denied boarding and cancellation of flight should be made immediate to enable the passenger to continue with the journey. Furthermore, the regulation should derecognize the right of carriers to overbooking and involuntarily denied boarding in Article 4, as such undermines integrity in contract of carriage. Also, in view of the provision of Article 13 of the regulation and Article 37 of the Montreal Convention, third parties to contract of carriage by air should be granted correlated and concomitance right to recover damages from the carrier for losses arising from breach of contract of carriage by air with their passengers.

⁸⁴ P. Lyadnoya *et al*, 'Interpreting Sanctions Clauses and the EU Blocking Regulation: The High Court of England Weighs In', available at Interpreting Sanctions Clauses and the EU Blocking Regulation: The High Court of England Weighs In | Cleary International Trade and Sanctions Watch (clearlytradewatch.com), last accessed 6th April, 2021; V. Mihaela, 'Mandatory Clauses in the Public Procurement Contract', *Law Review*, Vol. III, Special issue 2017, pp. 237-257; I.O. Tajudeen, 'Case Review: SPDC VS. Amadi & Ors.', *International Journal of Humanities and Social Science* Vol. 3 No. 7; April 2013, p. 247.

⁸⁵Convention on the Rights of Persons with Disabilities, 2006, art. 20.

⁸⁶*Supra*, Art. 12.

⁸⁷EU 261/2004, Art. 3(1)b.