

ADVISORY NOTE 14: OVER-SELLING AND OVER-BOOKING¹

This note is provided by the office of the Consumer Goods and Services Ombudsman to guide suppliers and consumers as to their rights and obligations under the Consumer Protection Act (CPA) with regard to over-selling and over-booking.

Introduction

Overselling or overbooking is sale of a volatile good or service in excess of actual supply. Overselling is a common practice in the travel and lodging industry, in which it is expected that some people will cancel...The practice occurs as an intentional business strategy where sellers expect that some buyers will not consume all of the resources they are entitled to, or that some buyers will cancel. The practice of overselling ensures that 100% of available supply will be used resulting in the maximum return on investment. However, if most customers do wish to purchase or use the sold commodity, it may leave some customers lacking a service they expected to receive.

Overbooking is regulated (though rarely prohibited) in many countries and industries...An alternative to overbooking is discouraging consumers from buying services they do not actually intend to use. This can be done by making reservations non-refundable, a common practice among low-cost carriers and railways, or requiring customers wishing to cancel their right to a service to pay a termination fee.²

The International Air Transport Association (IATA) advocates an approach to passenger rights that strikes a balance between ensuring adequate consumer protection and overburdening the industry with the costs of regulatory compliance.³

Consideration of section 47

In terms of Section 47 of the CPA (Annexure "A"), a supplier must not accept payment for any goods or services unless the supplier has a reasonable basis for believing he or she will be able to supply those goods or provide those services. The supplier may not supply goods or services that are materially different from the goods or services paid for. A supplier must honour a commitment to supply goods or services on a specified date or at a specified time.

¹ **Warning:** This information is not intended to constitute legal advice and should not be relied upon in lieu of consultation with appropriate legal advisors.

² <https://en.wikipedia.org/wiki/Overselling>

³ <http://www.iata.org/policy/Documents/pax-rights.pdf>

If the supplier fails to do so because of insufficient stock or capacity to supply those goods or services, the supplier must refund to the consumer the amount, if any, paid in respect of that commitment or reservation, plus interest at the prescribed rate, as well as compensate the consumer for costs directly incidental to the supplier's breach of the contract.

It is a defence if the supplier offered to get another person to supply the consumer with comparable goods or services and the consumer either accepted the offer or unreasonably refused it. If the shortage of stock or capacity is due to circumstances beyond the supplier's control and the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances, the supplier is liable only to refund (with interest) the consumer but not to compensate the consumer for directly incidental costs.

A supplier cannot escape liability easily: a shortage of stock or capacity is not 'due to circumstances beyond the supplier's control' if the shortage results in some way from the supplier's lack of diligence or a failure to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.

Guidance as to "circumstances beyond the supplier's control" is to be had from the precedents of foreign courts:

Peralta v. Continental Airlines, Inc., No. C 98-1252 MJJ, 1999 WL 193393: Airliner not liable for delay caused by security measures;

Helge Management, Inc. v. Delta Airlines, Inc., No. 11-10299-RBC, 2012 WL 2990728, (D. Mass. July 19, 2012): Airliner not liable for delay costs due to maintenance issues;

Cohen v. Delta Air Lines, Inc., 751 F. Supp. 2d 677 (S.D. N.Y. 2010): Airliner not liable for delay costs due to weather.

To these can be added:⁴

- Air traffic control strike action
- Manufacturing defects
- Unexpected damage to aircraft
- Air traffic control⁵

⁴ <http://www.theguardian.com/money/2015/sep/19/flight-delay-claims-compensation-airlines-passengers>

⁵ <http://airconsumer.ost.dot.gov/publications/flyrights.htm>

The Guardian lists the following causes of the delay as being reasonably possible to foresee and prevent:

- Technical issues that should have been spotted during routine maintenance⁶
- Airline strikes where due notice is given
- Knock-on effect of earlier strikes
- Poor timing of flight and turn-around times
- Inadequate official paperwork required before a flight can depart.

A number of issues arise in the practical application of the provisions of section 47:

- 1) What does the section cover?
- 2) What are comparable goods or services?
- 3) What is interest at the prescribed rate?
- 4) What does compensate for costs directly incidental to the supplier's breach of the contract cover?
- 5) Are there monetary limits to the amounts that can be claimed?
- 6) Is there a time limit for claiming?
- 7) Booking through an agent.

Consideration of issues

1) What does the section cover?

At first sight, the section appears only to apply to situations where a supplier has taken more orders or bookings than the supplier knows or believes it will be able to meet. Subsection (2) certainly covers this situation, prohibiting a supplier from accepting payment for goods or services that the supplier has no reasonable basis to assert an intention to supply or if the supplier intends to supply goods or services that are materially different from those ordered.

⁶ In *Lee v. American Airlines* 2004 WL 2624647 (N.D. Tex. Nov. 17, 2004), the District Court denied, in part, the carrier's motion for summary judgment, finding that there was an issue of fact as to whether the airline took "all reasonable measures" to avoid a delay caused by mechanical problems.

Subsection (3) spells out the consequences of making a commitment or accepting a reservation to supply goods or services on a specified date or at a specified time and failing to meet the commitment because of insufficient stock or capacity. Following on as it does from subsection (2), it might be assumed that subsection (3) applies only to the scenario described in subsection (2). On closer consideration, however, it is apparent that subsection (3) is broader than subsection (2) in that it does not confine its operation to situations where the supplier has no reasonable basis to assert an intention to supply the goods or provide the services. Instead it deals with a failure owing to insufficient stock or capacity to supply the goods or services. Intention does not appear to be a requirement.

This interpretation is strengthened by the existence of subsection (5), which talks about circumstances beyond the supplier's control- that cannot refer to a knowing overbooking of the sort described in subsection (2). It also suggests that, unlike the position in subsection (2), which refers to the state of knowledge of the supplier at the time the transaction was entered into, a supplier may be responsible also for a failure that was caused by the subsequent negligence of the supplier. To illustrate this with an example, if at the time the transaction the supplier believed he would order the goods and be able to make them available, he would not be liable under subsection (2), but if he subsequently neglected to order the goods in time, he could be liable under subsection (3).

It would in any event be anomalous were a supplier who wilfully or negligently caused the incapacity to supply the goods or services to escape liability if he initially had a reasonable basis to assert an intention to supply the goods or services.

It is submitted that as subsection (3) can reasonably be construed to have more than one meaning, a court or the Tribunal would be obliged under section 4(3) to accept the meaning that best promotes the spirit and purposes of the Act, in other words, favours the consumer. A broad interpretation that included any failure to supply the goods and services because of insufficient stock or capacity would obviously benefit the consumer. This would cover scenarios such as an airline putting someone on a flight a day later due to a change in aircraft size or flights being postponed due to volcanic activity.

2) What are comparable goods or services?

This seems self-evident until one considers examples such as the first scenario mentioned immediately above: Is a flight the following day comparable to a flight booked on a particular day of the consumer's choice an entire year in advance?

As far as we are aware, the view expressed by American Attorney David J. Braiterman that there is no legal definition of the word "comparable"⁷ holds true also in South Africa. This makes it necessary to apply common sense and consider the particular circumstances of each case.

⁷ www.nhfamilylaw.com

If subsections 47(2) and (3) are read together, it may be concluded that goods or services are not similar or comparable if they are materially different from the goods or services ordered. The definition of “defect” in section 53(1)(a) provides a useful context for the term “material”: any material imperfection in the manufacture of the goods or components, or in performance of the services, that renders the goods or results of the service less acceptable than persons generally would be reasonably entitled to expect in the circumstances.

“Material” accordingly means significant or substantial.⁸

With regard to delayed or cancelled flights, in the EU, Article 8(1) of the Denied Boarding Regulation 261/2004 considers three possible solutions:

- (a) a refund within seven days of the full cost of the flight;
- (b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
- (c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

It is to be noted that it is the transport conditions and not the time or date of transport that is to be comparable.

In *Joined Cases C-581/10 Nelson and Others v Deutsche Lufthansa AG and C-629/10 TUI Travel and Others v Civil Aviation Authority*, the Court of Justice of the European Union reiterates that the principle of equal treatment requires that passengers whose flights are delayed and those whose flights are cancelled ‘at the very last moment’ must be regarded as being in comparable situations as regards the application of their right to compensation for loss of time, because those passengers suffer similar inconvenience, namely, a loss of time.

Nevertheless, in adopting Regulation No 261/2004, the EU legislature was seeking to strike a balance between the interests of air passengers and those of air carriers. Accordingly, such a delay does not entitle passengers to compensation if the air carrier can prove that the long delay is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken, namely circumstances beyond the actual control of the air carrier.

The Court also found that the requirement to compensate passengers whose flights are delayed is compatible with the Montreal Convention. In that connection, the Court found that the loss of time inherent in a flight delay constitutes an inconvenience which is not governed by the Montreal Convention. Consequently, the obligation to compensate

⁸ <http://legal-dictionary.thefreedictionary.com/material>

passengers whose flights are delayed falls outside the scope of that convention, but remains additional to the system for damages laid down by it.⁹

In South Africa, the position is in line with the Montreal Convention,¹⁰ which was ratified by South Africa on 21 January 2007, as there is no provision in section 47 for compensation for loss of time.

3) What is interest at the prescribed rate?

The Prescribed Rate of Interest Act 55 of 1975 prescribes the maximum rate of interest that may be claimed. The Minister of Justice and Constitutional Development prescribes the rate of interest from time to time.¹¹ Interest must be calculated at the repo rate determined from time to time by the South African Reserve Bank plus 3.5%. From 1 March 2016 the rate is 10,50%.

4) What does compensate for costs directly incidental to the supplier's breach of the contract cover?

Here "incidental" clearly has the meaning of "happening as a result of".¹² The important word is "directly". This by implication excludes indirect or consequential damages (known as special damages in South African Law). In Canadian Law, direct damages are damages which flow directly, naturally and immediately from the breach whereas consequential damages are one step removed from the actual breach.¹³

Examples of costs that are directly incidental include meals, hotel accommodation, airport parking car hire and telephone calls to change arrangements.¹⁴ It is not clear whether missed concerts or missed connections would be included, as in New Zealand.¹⁵

Excluded would be loss of business opportunities, inconvenience and loss of enjoyment. As far as emotional injuries are concerned (shock, anxiety, disappointment, grief, embarrassment, humiliation etc), these are not claimable under the Montreal Convention for the Unification of Certain Rules for International Carriage by Air (The Montreal Convention) to which South Africa is a signatory.

⁹ Available on

<http://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/cp120135en.pdf>

¹⁰ The Convention for the Unification of Certain Rules for International Carriage by Air.

¹¹ <http://www.polity.org.za/article/new-prescribed-rate-of-interest-2014-08-18>

¹² <https://www.google.co.za/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=+incidental+>

¹³ Ralph H. Kroman: Canada: Contracting With Suppliers – A Balanced Approach to Indemnities and Limitations of Liability available on:

<http://www.mondaq.com/canada/x/134582/Contract+Law/Contracting+With+Suppliers+A+Balanced+Approach+To+Indemnities+And+Limitations+Of+Liability>

¹⁴ These are claimable in Europe when a flight is delayed until the next day: https://en.wikipedia.org/wiki/Regulation_261/2004.

¹⁵ <http://www.consumerprotection.govt.nz/for-business/compliance/providing-airline-passenger-services>.

Article 29 of the Convention sets certain limits to the type of claim permissible:

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, *punitive, exemplary or any other noncompensatory damages shall not be recoverable.* [Emphasis added]

In the Southern District of Florida case of *Campbell v. Air Jamaica Ltd.*, No. 11–CV–23233, 2012 WL3562126 (S.D. Fla. August 17, 2012), the court dismissed the plaintiff's claim for \$5,000,000 for emotional injuries as a result of the delay of his flight from Kingston, Jamaica to Fort Lauderdale, Florida. Specifically, Plaintiff claimed that he "had to remain at the airport overnight outside the terminal building, which was under repairs, under adverse weather and became ill at the airport in Kingston, Jamaica." He also alleged that he had suffered "anxiety to make the flight since his permanent resident alien card would expire on September 9, 2009, and he would encounter problems with immigration upon arrival in the United States."¹⁶

The High Court of New Zealand held in the case of *Air New Zealand v Disputes Tribunal* [2016] NZHC 393 that the Convention overrode New Zealand law. It came to this conclusion after considering the decisions of various jurisdictions to the same effect. It is probable that a South African Court would reach the same conclusion.

An American case that illustrates the different treatment of different types of claims is *Lee v. American Airlines, Inc.*, 03-10178, 2004 WL 18008 (5th Cir. Jan. 14, 2004). The Court held that non-refundable vacation expenses such as vacation resort, car rentals, or hotel accommodations could be recoverable under Article 19, but damages for any emotional impact of the delay, such as the loss of a "refreshing memorable vacation", are a re-characterization of mental anguish damages, which are not recoverable.

¹⁶

<http://www.mondaq.com/unitedstates/x/198844/Aviation/Damages+for+Delay+of+International+Flights+under+Article+19+of+the+Montreal+Convention>.

5) Are there monetary or other limits to the amounts that can be claimed?

In respect of claims for cancelled or delayed aircraft flights, Article 19 of the Montreal Convention, to which South Africa is bound, states that a carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo, unless it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 22(1) permits a passenger to recover damages caused by delay as specified in Article 19 in the carriage of persons up to the limit of 4,694 Special Drawing Rights (SDRs).¹⁷ The maximum liability on the part of the carrier for lost or delayed baggage is 1,131 SDRs under Article 22(2). A domestic court may also award, in accordance with its own law, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest.

Article 26 renders null and void any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention. A carrier may, however, contractually offer a greater amount of compensation than that provided for in the Convention (Article 27).

There are other possible limitations to a claim. Under Article 21 of the Warsaw Convention (Article 20 of the Montreal Convention), the carrier may escape or reduce liability if the delay was caused by the contributory negligence or other wrongful act or omission of the passenger. An example would be when a passenger fails to comply with time requirements for check-in.

A passenger's claim can also be reduced or blocked if the passenger failed to mitigate his or her loss. Thus a passenger whose flight is cancelled would be expected to take the next available flight to the destination on the same day and would not be able to claim for transportation by limousine to a luxury hotel if he or she decided rather to take a flight the following day.

¹⁷ The value of SDRs can be found on the internet and is fixed daily by the International Monetary Fund. As at 25 April 2016, a SDR was worth R 20.36.

6) Is there a time limit for claiming?

In respect of claims for cancelled or delayed aircraft flights, Article 31(2) of the Montreal Convention states:

In the case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within seven days from the date of receipt in the case of checked baggage and fourteen days from the date of receipt in the case of cargo. In the case of delay, the complaint must be made at the latest within twenty-one days from the date on which the baggage or cargo have been placed at his or her disposal.

A failure to claim within the time limits precludes a passenger from claiming (Article 31(4)).

7) Booking through an agent

There is a danger that an airline or provider of accommodation may attempt to escape responsibility by claiming it never received the reservation from the agent or online travel service that the consumer booked through. To avoid lengthy multi-party disputes, consumers should ensure their online/ booking includes a confirmation number direct from the airline or hotel and call the airline or hotel to confirm the reservation—especially if the consumer is in transit and perhaps missed a notification from the supplier.

In the EU, the Package Travel Regulations (90/314/EEC), which are on the point of being updated, offer protection to travellers who take up package deals for transport, accommodation and tourist services. Regulation 14 thereof requires that the consumer be compensated by the tour organiser for the difference between the services to be supplied under the contract and those supplied. The new regulations, which Member States will have 2 years to implement, will include online bookings.

Over-selling and over-booking

47. (1) This section does not apply to—

- (a) a franchise agreement; or
- (b) a consumer agreement pertaining to the supply of any special-order goods.

(2) A supplier must not accept payment or other consideration for any goods or services if the supplier—

- (a) has no reasonable basis to assert an intention to supply those goods or provide those services; or
- (b) intends to supply goods or services that are materially different from the goods or services in respect of which the payment or consideration was accepted.

(3) If a supplier makes a commitment or accepts a reservation to supply goods or services on a specified date or at a specified time and, on the date and at the time contemplated in the commitment or reservation, fails because of insufficient stock or capacity to supply those goods or services, or similar or comparable goods or services of the same or better quality, class or nature, the supplier must—

- (a) refund to the consumer the amount, if any, paid in respect of that commitment or reservation, together with interest at the prescribed rate from the date on which the amount was paid until the date of reimbursement; and
- (b) in addition, compensate the consumer for costs directly incidental to the supplier’s breach of the contract, except to the extent that subsection (5) provides otherwise.

(4) It is a defence to an alleged failure to supply any goods or services, as contemplated in subsection (3), if—

- (a) the supplier offered to supply or procure another person to supply a consumer with comparable goods or services of the relevant kind to satisfy the consumer’s request; and
- (b) the consumer—
 - (i) accepted the offer, and the supplier has supplied or procured another person to supply the goods or services so offered and accepted; or
 - (ii) unreasonably refused that offer.

(5) Subsection (3)(b) does not apply if—

(a) the shortage of stock or capacity is due to circumstances beyond the supplier's control, subject to subsection (6); and

(b) the supplier took reasonable steps to inform the consumer of the shortage of stock or capacity as soon as it was practicable to do so in the circumstances.

(6) Without limiting the generality of subsection (5)(a), a shortage of stock or capacity is not “due to circumstances beyond the supplier's control” if the shortage results partially, completely, directly or indirectly from a failure on the part of the supplier to adequately and diligently carry out any ordinary or routine matter pertaining to the supplier's business.