

CONSUMER PROTECTION

REGARDING ONLINE AIR TICKET BOOKING *

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ABSTRACT

Currently, many Air Travel Consumers face problem regarding online air ticket reservation service not only direct making reservation through the website of airline company but also through intermediary channels because of marketing strategies aiming for commercial benefits of entrepreneur e.g. publication of information which some are false statement or inequality of contractual terms stipulated by one party including the operation of online air ticket booking via electronic network has not distinct control measures.

In Thailand, even though there are several of laws concerning the protection of consumer's rights in connection with online air ticket reservation i.e. Consumer Protection Act B.E. 2522 as amended in B.E. 2556, Unfair Contract Terms Act B.E. 2540 including the Announcement of Ministry of Transport on Protection of Passenger's Rights Using Thai Air Carrier's Services for Domestic Schedule B.E. 2553 providing consumer protection of passenger's rights regardless of the method of air ticket reservation. Nevertheless, the protection of consumer's right in this issue is lack of not only practicable and proper measures but also appropriate legal punishment applied with current circumstance.

Keywords: Consumer Protection, Electronic Commerce, Online Air Ticket Booking.

บทคัดย่อ

ในปัจจุบัน ผู้บริโภคซึ่งเป็นผู้โดยสารสายการบินต่างประสบปัญหาอันเนื่องมาจากการให้บริการจองตั๋วโดยสารออนไลน์ ไม่ว่าจะเป็นการจองตั๋วโดยสารผ่านทางเว็บไซต์ของสายการบินโดยตรง หรือผ่านทางช่องทางอื่นๆ ที่มีการจัดทำหน้าโดยตัวแทนจำหน่าย และด้วยเหตุที่ว่าในปัจจุบัน การเดินทางโดยเครื่องบินได้รับความนิยมมากขึ้น จึงทำให้ธุรกิจสายการบินเป็นธุรกิจที่มีการแข่งขันสูง ผู้ประกอบการต่างวางแผนในการใช้กลยุทธ์ทางการตลาดเพื่อสร้างผลประโยชน์ให้แก่ธุรกิจของตนมากที่สุด เช่น การนำเสนอข้อมูลเพื่อ吸引ผู้ที่สนใจผ่านช่องทางออนไลน์ โดยอาจปกปิดข้อมูลบางส่วน หรือนำเสนอข้อมูลที่ไม่ตรงต่อความเป็นจริงเพื่อดึงดูดให้ผู้บริโภคตัดสินใจใช้บริการกับสายการบินของตน หรือความไม่เท่าเทียมกันของจำนวนในการต่อรองลักษณะ ซึ่งโดยมากมักเป็นลักษณะลักษณะที่กำหนดโดยผู้ประกอบการสายการบินเพียงผู้เดียว รวมทั้ง การดำเนินการจองตั๋วเครื่องบินผ่านช่องทางออนไลน์ในประเทศไทยนั้นยังขาดมาตรการที่เหมาะสมในการควบคุมและกำกับดูแลเป็นเด่น

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สำหรับประเทศไทยนั้น มีกฎหมายหลายฉบับที่เกี่ยวข้องกับการคุ้มครองผู้บริโภคในการจดจ่อตัวโดยสารเครื่องบินผ่านทางออนไลน์ ได้แก่ พระราชบัญญัติคุ้มครองผู้บริโภค พ.ศ. 2522 (แก้ไขเพิ่มเติม พ.ศ. 2556), พระราชบัญญัติข้อสัญญาที่ไม่เป็นธรรม พ.ศ. 2540 รวมถึงประกาศกระทรวงคมนาคม เรื่อง การคุ้มครองสิทธิของผู้โดยสารที่ใช้บริการสายการบินของไทยในเส้นทางบินประจำภายในประเทศ พ.ศ. 2553 โดยกฎหมายดังๆเหล่านี้ ได้ให้ความคุ้มครองแก่สิทธิของผู้บริโภคซึ่งเป็นผู้โดยสารสายการบินโดยไม่คำนึงถึงช่องทางการจดจ่อตัวโดยสาร แต่ต่ออย่างไรก็ตี การคุ้มครองสิทธิของผู้บริโภคของไทยในเรื่องดังกล่าว ยังขาดมาตรการทางกฎหมายที่สำคัญ รวมถึงวิธีปฏิบัติและบทลงโทษที่เหมาะสมกับสภาพการณ์ของปัจจุบันที่เกิดขึ้นในปัจจุบัน

คำสำคัญ: การคุ้มครองผู้บริโภค ธุรกรรมทางอิเล็กทรอนิกส์ การของตัวเครื่องบินผ่านช่องทางออนไลน์

Introduction

At the present time, tourism industry is an industry which is enlarged and plays a key role in Thailand's economic and social system. In addition, it is also a significant income source acquiring foreign currencies as well as it is conducive to the development of transportation infrastructure including trading and investment. According to above reasons; at the present, Thai Government launched the National Tourism Development Plan B.E. 2555-2559¹ in order to revive and invigorate tourism section as well as to speed up the potentiality to increase national income, distribute income and sustainable development coexistingly.

Aviation business is nearly the first one among tourism businesses which an electronic system is applied. The electronic system almost totally changes both form and method of business operation including but not limited to providing service information, marketing communication which satisfies the traveler. In accordance with the characteristic of the electronic system, it is the network globally connected which makes entrepreneur and traveler communicates conveniently even though they live in different hemisphere.² The electronic system is deprived of limitation of time zone and place. These make operators of air transportation business begin to establish online reservation channel not only operates directly through their official website (Direct Booking Channels) but the electronic air ticket booking is also conducted by agencies' websites (Intermediary Channels).

Due to the air transportation becomes popular and as a result of using electronic system for online air tick booking is substantially convenient and low cost, the number of online air ticket operators is significantly increased and the business situation is very competitive. Moreover, this online channel also increases customer in the future who is internet user; in the other word, any traveler who is interested in travelling by an aircraft could surf information on the internet for his consideration and in case of any inquiry, the

¹ Ministry of Tourism and Sports, แผนพัฒนาการท่องเที่ยวแห่งชาติ พ.ศ. 2555-2559 [National Tourism Development Plan B.E. 2555-2559] (2011), available at http://www.tica.or.th/images/plan_tourism2555-2559/2555-2559.pdf. (last visited July 29, 2015)

traveler could contact the entrepreneur via email or other contact channel provided³; finally; getting enough and sufficient information, the travel could immediately reserve air-ticket through online system. Thereby, each operator uses its best effort to attract customer and traveler's attention and the information or conditions of the agreement which is mostly an adhesion agreement may not be provided or set forth straightforwardly. Upon the process of online reservation, the agreement is formed over an internet network; by the operator's solely discretion without any negotiation or amendment proposed by the customer. Furthermore, most business operator tends to draft the adhesion agreement for its benefit where the inequality provisions are contained therein e.g. an exclusion clause which limits liabilities of the operator in case of flight delay, flight cancellation or in case of denied boarding which affect consumer's rights.

1. Fundamental right of aviation passenger as a consumer in the European Union

The fundamental rights of a consumer who is an aviation passenger travelling to the country which is a member state of EU or departing from any of EU member state is preserved in the Regulation No. 261/2004 of the European Parliament and of the Council.

In the Treaty Establishing European Economic Community (EEC Treaty), the major aim of the treaty is to establish a common market and stipulate the change of transportation policy under Clause 84(2)⁴. Later, the judgment of the European Court of Justice No. 209-213/84 ruled that the general provision of the EEC Treaty is applied to the air transportation.⁵

Subjected to this Regulation, the fundamental rights of consumer who is an air passenger are preserved regardless of the channel where the consumer makes an air ticket reservation. The airline which is a business operator shall be liable to the passenger for the denied boarding, Flight cancellation or long delay flight.

1. Denied Boarding

Upon the Regulation (EC) No. 261/2004; Article 4, the operator is entitled to deny boarding by calling for the volunteers to abandon their reservations and such volunteer shall receive benefits under the conditions to be agreed between passenger and operator as a consideration for his abandonment.

³ *PATA 60th Anniversary and Conference*: ความเป็นจริงใหม่ของการเดินทางท่องเที่ยว ปัจจุบัน และอนาคต, TAT Review, Nov. 28, 2011, available at <http://www.etatjournal.com/web/etat-journal/2011/2011-oct-dec/369-42554-pata-60th-anniversary-and-conference>. (last visited July 11, 2015)

⁴ “The Council may acting by a qualified majority decide whether to want procedure appropriate provisions may be laid down for sea and air transport.” (EEC Treaty cl. 84(2)).

⁵ Jacqueline Dutheil de la Rochère, *Contribution of the European Court of Justice to the Implementation of the EEC Treaty in the Field of Air Transport: Past and Future*, Air and Space Law, 161-163 (1992) as cited in Ananchai Sakdejayont, Protection of Airline Passenger Rights: The Case of Thailand (1983) (LL.M. thesis, Thammasat University).

In addition to this; with reference to Article 4(3) of the Regulation No. 261/2004⁶, the air carrier shall assist passenger who is refused to board against his will upon Article 8 and 9 thereof. In summary, the trader shall propose options to the passenger between a reimbursement within 7 days as from the denied boarding date for a full of air ticket fare which the method thereof shall be made in cash, bank order or bank cheques or with signed agreement or shall be made in form of travel voucher and/or other related service⁷ or offer a re-routing to a passenger together basic assistance such as food and beverage including communications, accommodation and transportation.

2. Flight Cancellation

With respect to the Regulation of the European Union No. 261/2004, in case of flight cancellation; whether the air ticket was booked by normal channel or by electronic channel, the passenger shall have same right as the denied boarding passenger plus a right to be compensated as the following;

- EUR 250 compensation for all flights of 1,500 km. or less⁸;
- EUR 400 compensation for all flights intra-European Union of more than 1,500 km. or for all other flights between 1,500 to 3,500 km.⁹;
- EUR 600 compensation for all flights which do not fall under the abovementioned conditions.¹⁰

In response to the aforementioned, we may see that the legal measures of the European Union regarding flight cancellation are interesting. They provide step-by-step of measures to heal consumer whose flight was cancelled.

3. Flight Delay

Not only denied boarding, flight cancellation but also flight delay is the important air transportation problems tending to affect the rights of consumer. Many consumers miss their flights without their faults while their traveling purposes are also failed.

Though, the EU Regulation No. 261/2004 does not contain a definition of ‘flight delay’, the concept may, however, be clarified in the light of the context in which it occurs. In that regard, it should be recalled, first, that a ‘flight’ within the meaning of Regulation No 261/2004 consists in an air transport operation, performed by an air carrier which fixes its itinerary (*Case C-173/07 Emirates Airlines [2008] ECR I-5237, paragraph 40*)¹¹. Thus, the itinerary is an essential element of the flight, as the flight is operated in accordance with the carrier’s pre-arranged planning.

⁶ “*If boarding is denied to passengers against their will, the operating air carrier shall immediately compensate them in accordance with Article 7 and assist them in accordance with Article 8 and 9.*” (*Id. at art. 4(3)*)

⁷ Regulation No. 261/2004, art. 8(1).

⁸ Regulation No. 261/2004, art. 7(1)(a).

⁹ *Id. at art. 7(1)(b).*

¹⁰ *Id. at art. 7(1)(c).*

¹¹ Christopher Sturgeon v. Condor Flugdienst GmbH & Stefan Böck v. Air France SA, C-402/07 & C -432/07 (Bundesgerichtshof & Handelsgericht Wien, Nov. 19, 2009), available at

In case of delay, the passenger is entitled to get compensation and basic assistance similar to the case of flight cancellation. In the other word, the air carrier shall provide meals and drinks properly including communication method, transportation and accommodation. Additionally, in case the delay is more than 5 hours long, the passenger has the right to get refund of all fares.

2. Fundamental right of aviation passenger as a consumer in Thailand

Even though, Thailand has the Consumer Protection Act B.E. 2522 as amended by the Act B.E. 2553, it is just a general law regarding the overview of consumer protection. There are certain defects as well as lack of proper legal measures in order to protect rights of consumer; especially the consumer in the online air ticket booking who is non-predominant party of the contract. In addition, these laws have no secondary law or enforceable regulation and the online air ticket reservation business; which is an electronic commerce as well as the adhesion agreement is contained as a partial of the booking procedure, has not yet been announced to be a business whose contract is controlled in order to create preventive measures. Nevertheless; though, there is the Announcement of the Ministry of Transport on the Protection of Passenger Right Using Thai Air Carriers' Services for Domestic Scheduled Air Service B.E. 2553 providing the protection of rights of customer who is an aircraft passenger regardless of the method of air ticket booking.

This Announcement had been enacted by virtue of the Order of the Revolutionary Council No. 58 dated January 26, 1972, Article 7 which the Transportation Minister assigned the Department of Air Transportation (currently is the Department of Civil Aviation) to be the authority to control aviation upon this Announcement providing protection of the rights of passengers as the following;

1. Denied Boarding

The definition of 'Denied Boarding' is defined in Section 2 paragraph 6¹² of the Announcement, it means a rejection to carry air passenger on a booked flight indicated in the air ticket even though such passenger have presented himself and ready to be boarded in accordance with Section 3 thereof; except the circumstance where the air carrier is reasonable to deny boarding e.g. the reason of health, safety or security or inadequate required travel documentation.

According to the Announcement, in case of denied boarding, the air carrier is obliged to offer curable options to passenger whose flight is denied by

- Refund all fares and related expenses; or
- Re-Routing

<http://curia.europa.eu/juris/document/document.jsf?docid=73703&doclang=EN> (last visited on Aug. 1, 2015). (last visited July 29, 2015)

¹² "Denied boarding means a refusal to carry passengers on a flight indicated in the ticket, although they have presented themselves for boarding under the conditions laid down in Section 3 ; except where there are reasonable grounds to deny them boarding, such as a reasons of health, safety, security or inadequate travel documentation." (The Announcement § 2, para. 6).

In the event that the passenger chooses refund option, the airline shall pay the refund only by cash, banking transfer or cheque¹³ within 7 days if the passenger purchased air ticket by cash¹⁴ or 45 days in case the ticket was paid by credit card.¹⁵ If the air carrier would like to refund in other method e.g. travel voucher or others instead of cash redemption, the passenger's consent is required.¹⁶

If the passenger chooses a re-routing, any fee or fare shall not be charged to the passenger. Furthermore, in case the fare of such re-routing is lower than the fare and related expenses which the passenger paid for his seat in the denied boarding flight, the differential shall be returned subjected to the same condition as the refund option.

2. Flight Cancellation

The cancellation of flight may be taken place at any time due to the airline does not operate the flight at all for a certain reasons. Upon the flight cancellation, a hundred of passengers miss their destination either for business or travelling purpose. The Ministry of Transportation perceives these problems then announced the Announcement as a curable legal measure to protect consumer's rights for flight cancellation circumstance.

With reference to Section 2, paragraph 5, the definition of 'Flight Cancellation' is defined as a cancellation of any flight of the schedule which has already been announced including the cancellation of any extra flight¹⁷. In case of flight cancellation, the airline shall treat the passenger by offering options to passenger whose flight is cancelled by

- Refund all fares and related expenses; or
- Re-Routing with an initial assistance

If the passenger do not wish to travel with the air carrier anymore and prefers a refund, the air carrier shall refund all fares and related expenses to the passenger with the same condition of the denied boarding circumstance.

Similarly, if the passenger prefers a re-routing, the airline shall perform a re-routing with the same condition of the denied boarding circumstance plus an initial assistance.

In this regard, an initial assistance which the air carrier shall provide the passenger are meals and drinks, communication method (i.e. free telephone or e-mail service), accommodation (if needed) and transportation between the accommodation and the airport.

3. Flight Delay

¹³ The Announcement § 6 (3).

¹⁴ *Id.* at § 6 (3)(a).

¹⁵ *Id.* at § 6 (3)(b).

¹⁶ *Id.* at § 5(1)(a).

¹⁷ "Cancellation means a cancellation of any flight of the time table that has already been announced including the cancellation of an extra flight." (The Announcement § 2, para. 5).

According to Section 2; paragraph 4 of the Announcement, the flight delay is defined as a flight which is operated later than the announced schedule¹⁸. In case of delay, the treatment which the airline is obliged to provide the passenger depends upon the duration of delay as the following;

1) In case the delay is more than 2 hours but not exceed 3 hours, the air carrier shall¹⁹;

- Provide food and drink; free of charge, at the amount compatible to the waiting time for new schedule.

- Provide communications by any means i.e. telephone, facsimile or e-mail etc. as proper without additional charge.

However, if the passenger does not wish to wait and travel, the air carrier shall return all fare and related expenses which the passenger paid for the delayed flight with the same condition of refund in case of denied boarding.

2) In case the delay is more than 3 hours but not exceed 5 hours, the air carrier shall provide food, drink and proper communication similar to the delay which is more than 2 hours but not exceed 3 hours as aforementioned. In addition to this, the air carrier shall also offer the passenger to choose an option as the following;

- Receive refund of fare and related expenses in full or in partial for non-used ticket²⁰. In this occasion, the air carrier shall return all fare and related expenses which the passenger paid for the delayed flight with the same condition of refund in case of denied boarding, or;

- Re-routing within the same day or the next day or any other later day upon passenger's discretion, for travelling to the destination specified in the air ticket or any other destination nearly the destination of the cancelled flight²¹. In case the re-routing changes the destination, the air carrier shall be responsible for providing transportation to the passenger to go to the destination where the passenger wishes to travel before the cancellation is occurred.²²

Conclusion

According to the abovementioned statement, even though this Announcement seems to provide a proper protection to air transport passenger; upon the author's point of view, it is still not practicable in certain portions. It is to say that this Announcement does cover only for a passenger travelling on domestic scheduled flight whose air ticket reservation has already been confirmed. Hence; according to this Announcement, there is a gap of protection because other passengers travelling by international air carriers' service or by Thai air

¹⁸ "Flight delay means a flight that operates later than from the scheduled flight timetable." (The Announcement § 2, para. 4).

¹⁹ *Id.* at § 4 (1).

²⁰ The Announcement § 4 (2) (c)(1).

²¹ *Supra* note 236 at § 4(2)(c)(2).

²² *Id.* at para. 2

carriers' services but on an international routes shall not be protected under this Announcement. In addition, this Announcement is lack of the punishment measure applied to an airline violating this Announcement which makes this Announce to be unenforceable in practice.

Moreover, although the Unfair Contract Terms Act B.E. 2540 aims to protect consumer's rights regarding entering into the fairness agreements; to provide protection, the judicial procedure is required which it takes a long period and a burden of expense shall be bear upon the consumer who is damaged from such unfair terms.

Due to online air ticket booking is a kind of electronic transaction becoming widespread acceptance and provides lots of information to consumers for their consideration. Consumers have risks when making online reservation. According to the abovementioned; even if Thailand has general laws of consumer protection, it is also lacking of the appropriate legal measures to provide sufficient protection in connection with the online air ticket booking in practice. In this regards, the Committee on Contract should be taken into account to determine online air ticket reservation as a business which its contract is controlled as well as the Announcement of the Ministry of Transport on the Protection of Passenger Right Using Thai Air Carriers' Services for Domestic Scheduled Air Service should be considered for further amendment set forth in Section 3(1) thereof on the scope of the passenger whose rights shall be preserved thereunder in order to include all passengers whether travels domestic or international route as the following;

“Section 3 Air passenger has the rights to be protected under this Announcement as follows:

(1) a passenger travelling on domestic or international scheduled flights who has a confirmed reservation on the flight concerned and have paid for the tickets, including the passenger travelling on the frequent flyer program or any other supportive program offered by an airlines; and, ... ”.

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