The Split Air Passenger

Inconsistencies and Approximations between European Passenger Rights and the Montreal Convention

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Air carrier liability in the European Union is governed by two different legal instruments: the Montreal Convention[1] *on the one hand and the European Air Passenger Rights Regulation (Regulation No. 261/2004)*[2] *on the other. One should think that the two instruments constitute a coherent system of provisions which fit together and supplement each other. Actually, there seem to be more contradictions than similarities and in particular the judgements of the CJEU have a tendency to keep the two instruments completely separate in order to justify why Regulation No. 261/2004 can be upheld despite the exclusivity of the Montreal Convention as provided for in its Article 29. Air passengers who have a claim against a carrier therefore find themselves 'split' between the two regimes. Recently, however, a certain approximation seems to take place which, perhaps, could lead into a reconsideration of*

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1 Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signature at Montreal on 28 May 1999 (ICAO Doc No 4698).

2 Regulation (EC) No 261/2004 of the European Parliament and of the Council of 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.

the relation of the two legal instruments. This article intends to provide an analysis of CJEU case law and give a perspective on potential further developments.

1. Compatibility of Regulation No. 261/2004 with the Montreal Convention

When Regulation No. 261/2004 came into force in 2005, one of the first issues that arose was its relation to the provisions of the Montreal Convention. It is therefore no surprise that the first preliminary ruling of the CJEU on the Regulation[3] addressed the compatibility of the Regulation – in particular its Article 6 – with the Montreal Convention. In this judgement, the Grand Chamber of the CJEU held that any (long) delay in the carriage of passengers by air may cause two types of damage:

- damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls; and
- individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.

While the Montreal Convention only governed the conditions under which passengers concerned may bring actions for damages by way of redress on an individual basis but did not intend to shield carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, damage that is constituted by the inconvenience that delay causes. Community legislature was therefore free to lay down the conditions under which damage linked to the aforesaid inconvenience should be redressed.

At that time, however, it was the dominant opinion that the right to compensation according to Article 7 only applied to cases of denied boarding or cancellation – but not to delays.

This situation was changed by the *Sturgeon* judgement[4] which, by applying the principle of equal treatment, extended the right to compensation to passengers who suffer, on account of a delayed arrival at the final destination, a loss of time equal to or in excess of three hours. With this new situation, air passengers who suffered such delay suddenly could claim for both, the standardised compensation under Regulation No. 261/2004 and the actual damage under the Montreal Convention. However, the Court still reconfirmed that Regulation No. 261/2004 was compatible with the Montreal Convention because a loss of time could not be categorised as 'damage occasioned by delay' within the meaning of Article 19 of the Montreal Convention, and therefore fell outside the scope of Article 29 of that convention.

This subtle distinction, however, is a contradiction to the *IATA and ELFAA* judgement where the court explicitly spoke of *'two types of damage'*. From a dogmatic point of view it therefore doesn't seem very convincing.

2. Interpretation of Regulation No. 261/2004 and terminology of the Montreal Convention

In *Emirates v Schenkel*[5] the CJEU held that Regulation No 261/2004 must be interpreted as not applying to the case of an outward and return journey in which passengers who have originally departed from an airport located in the territory of a Member State travel back to that airport on a flight from an airport located in a non-member country whereas the fact that the outward and return flights are the subject of a single booking has no effect on the interpretation of that provision.

On the contrary, the Montreal Convention applies to all international carriage, meaning any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party.[6] If a round trip from the territory of a State Party is subject to a single booking, the Convention therefore applies.

The Court conceded that the Montreal Convention formed an integral part of the Community legal order and had primacy over secondary Community legislation but it did not determine the extent of the obligations under the Regulation by any reference to the concept of 'flight', a term which would not appear in the text of the Convention. Successive carriages were regarded under the Montreal Convention as 'one undivided carriage', inter alia if they had been agreed upon in the form of a single contract because the Convention rather followed the concept of a "journey" which attached to the person of the passenger, who chooses his destination and makes his way there by means of flights operated by air carriers. The term 'journey', however, would not appear in Regulation No 261/2004 – and therefore had no effect on the interpretation of the Regulation.

In the context of the defence of "extraordinary circumstances",[7] the CJEU again emphasised that the Montreal Convention could not determine the interpretation of Regulation No. 261/2004 because the standardised and immediate compensatory measures under the Regulation were unconnected

3 CJEU Jan. 10, 2006, Case C-344/04, *IATA and ELFAA v Department for Transport*.
4 CJEU Nov. 19, 2009, Cases C-402/07, *Sturgeon v Condor*, and C-432/07, *Böck ea v Air France*.
5 CJEU Jul. 10, 2008, Case C-173/07, *Emirates v Schenkel*.
6 Article 1 of the Montreal Convention.
7 Article 5(3) of Reg. No. 261/2004.

with those measures whose institution is governed by the Montreal Convention.[8]

3. Approximation of interpretation?

A more recent judgement seems to take a slightly different approach: in *Wegener v Royal Air Maroc*,[9] the court held that Article 3(1)(a) of Regulation No 261/2004 must be interpreted as meaning that the regulation applies to a passenger transport effected under a single booking and comprising, between its departure from an airport situated in the territory of a Member State and its arrival at an airport situated in the territory of a third State, a scheduled stopover outside the European Union with a change of aircraft.

The plaintiff had concluded a contract for carriage by air with Royal Air Maroc, allowing her to travel from Berlin (Germany) to Agadir (Morocco) with a scheduled stopover at Casablanca (Morocco) and a change of aircraft, booked as a single unit. In Casablanca, Royal Air Maroc refused to allow her to board, informing her that her seat had been reassigned to another passenger. Royal Air Maroc argued that Regulation No. 261/2004 would not apply to the merely domestic flight from Casablanca to Agadir.

The court referred to the concept of 'final destination' as defined in Article 2(h) which in the case of directly connecting flights, meant the destination of the last flight taken by the passenger concerned.[10] A transport such at that at issue in the main proceedings had to be regarded, taken as a whole, as a connecting flight and thus had to come within the scope of Article 3(1)(a) of Regulation No 261/2004.

The destinction made in *Emirates v Schenkel* between

- a 'journey' as attaching to the person of the passenger, who chooses his destination and makes his way there by means of flights operated by air carriers on the one hand; and
- a 'flight' as a 'unit' of an air transport, performed by an air carrier which fixes its itinerary on the other hand,

isn't even mentioned in the new judgment. It seems, however, that the two flights booked by the plaintiff rather form a 'journey' in the meaning quoted above than a single 'unit' of transport because it was the choice of the plaintiff to travel on from Casablanca to Agadir with a connecting flight.

By referring to *'a passenger transport effected under a single booking'* the court seems to approximate the scope of application of Regulation No. 261/2004 to that of the Montreal Convention relating to *'a carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State'*.

However, by limiting the application of Regulation No. 261/2004 to *'directly connecting flights'* and not including any flight subject to a single booking of an air carriage, there is still a significant difference to the concept of the Montreal Convention. Moreover, the new interpretation raises more questions than it provides solutions as it remains unclear which flights can be regarded as '*directly connecting*'. It is therefore no surprise that a new reference for preliminary ruling lodged by the Commercial Court Vienna[11] is seeking clarification whether two flights with a stopover of 13 hrs can still be regarded as *'directly connecting'*.

4. Conclusions

Despite several judgements of the CJEU, the relation between the Montreal Convention and Regulation No. 261/2004 as two legal instruments covering issues of air carrier liability still remains a source of doubts and uncertainties. CJEU case law is – at least to a certain extent – lacking the necessary consistency. It seems that the CJEU is more concerned about a potential incompatibility of Regulation No. 261/2004 with the Montreal Convention than about the contradictions which result from the attempt to keep the two instruments completely separate. The reasonings of most judgements relating to the issue therefore focus on producing the impression as if the two instruments were regulating different issues without any overlap.

Nevertheless, the judgments show how closely issued dealt with by Regulation No. 261/2004 and by the Montreal Convention are actually connected. It is too early to say whether the approach taken in *Wegener v Royal Air Maroc* could lead into a more consistent interpretation of the two legal instruments as a whole. At least, it seems to be a first step to an approximation – which is a welcome development.

8 CJEU Dec. 22, 2008, C549/07, *Wallentin-Hermann v Alitalia*.
9 CJEU May 31, 2018, Case C537/17, *Wegener v Royal Air Maroc*.
10 CJEU Feb. 26, 2013, Case C11/11, *Air France v Folkerts*.
11 Case C289/18, *KAMU v Turkish Airlines*.

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