THE MONTREAL CONVENTION AS PART OF EUROPEAN UNION LAW AND ITS INTERPRETATION BY THE CJEU

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ABSTRACT: Air travel is an essential part of modern tourism. The regulation of the liability of air carriers for travellers and their baggage in international travel is thus of high importance for the tourism industry, not only for airlines but also for tour organisers offering air package tours, because they thus also act as contractual air carriers and as such are subject to the Montreal Convention.

The article provides an analysis of the implications of the legal nature of Montreal Convention of 1999 as a multilateral state treaty and part of the international law on the one hand and as part of the European Union law on the other. It focusses on the CJEU judgments on the interpretation of various provisions of the Montreal Convention of which it provides a comprehensive summary and critical analysis. These include the concepts of "accident", "bodily injury", the concept of damage and other important problems of interpretation of the MC. The respective case law of the CJEU is compared and contrasted with judgments from other MC Member States, in particular the United States and Canada. In the process, both similarities and serious differences are highlighted.

Finally, it is examined how the CJEU, due to its importance within the EU, can also contribute to a unification of the case law on the MC and thus to international legal certainty outside the EU, but on the other hand, its case law also carries the risk of further fragmentation of the interpretation of the MC if the CJEU disregards established case law of supreme courts outside the European Union.

KEYWORDS: Montreal Convention, Liability, Air Carriers, Passengers, Air Carriage, Accident, Bodily Injury, Death, Baggage, Loss, Damage, Delay, EU Law, European Court of Justice, Interpretation, Conventions, International Law, Applicability, Exclusivity.

EL CONVENIO DE MONTREAL COMO PARTE DEL DERECHO DE LA UNIÓN EUROPEA Y SU INTERPRETACIÓN POR EL TJUE

RESUMEN: Los viajes aéreos son una parte esencial del turismo moderno. La regulación de la responsabilidad de los transportistas aéreos por los viajeros y su equipaje en los viajes internacionales es, por tanto, de gran importancia para la industria del turismo, no solo para las líneas aéreas sino también para los organizadores de viajes que ofrecen viajes combinados aéreos, ya que también actúan como transportistas aéreos contractuales y como tales están sujetos al Convenio de Montreal.

El artículo ofrece un análisis de las implicaciones de la naturaleza jurídica del Convenio de Montreal de 1999 como tratado estatal multilateral y parte del derecho internacional por un lado y como parte del derecho de la Unión Europea por el otro. Se centra en las sentencias del TJUE sobre la interpretación de varias disposiciones del Convenio de Montreal, de las que proporciona un resumen exhaustivo y un análisis crítico. Estos incluyen los conceptos de "accidente", "lesión corporal", el concepto de daño y otros problemas importantes de interpretación del MC. Se compara y contrasta la respectiva jurisprudencia del TJUE con sentencias de otros Estados miembros del MC, en particular Estados Unidos y Canadá. En el proceso, se destacan tanto las similitudes como las serias diferencias.

Finalmente, se examina cómo el TJUE, por su importancia dentro de la UE, también puede contribuir a una unificación de la jurisprudencia sobre el MC y por tanto a la seguridad jurídica internacional fuera de la UE, pero por otro lado, su jurisprudencia también conlleva el riesgo de una mayor fragmentación de la interpretación del MC si el TJUE hace caso omiso de la jurisprudencia establecida de los tribunales supremos fuera de la Unión Europea.

PALABRAS CLAVE: Convenio de Montreal, Responsabilidad, Compañías aéreas, Pasajeros, Transporte aéreo, Accidente, Lesiones corporales, Muerte, Equipaje, Pérdida, Daños, Retraso, Derecho de la UE, Tribunal de Justicia de las Comunidades Europeas, Interpretación, Convenios, Derecho internacional, Aplicabilidad, Exclusividad.

1) THE CONVENTION FOR THE UNIFICATION OF CERTAIN RULES FOR INTERNATIONAL CARRIAGE BY AIR OF MONTREAL, 1999

The Montreal Convention was adopted in 1999 and it applies to all international carriage by air, of persons, baggage or cargo. It was meant to “modernise” its predecessor, the Warsaw Convention (WC), signed in 1929, and to re-establish unified rules on air carrier liability after the WC had become fragmented by various supplementary conventions and protocols.[1] Furthermore, incidents like the shooting down of Korean Airlines Flight KAL 007 in 1983, the 1988 bombing of Pan Am Flight 103 over Lockerbie, Scotland, the 1995 American Airlines crash in Cali, Columbia, and the 1996 explosion of TWA Flight 800 off Long Island, New York, had increased awareness of the liability of international air carriers under the outdated Warsaw System, and specifically the resulting paltry damage awards.[2]

The European Regulation 2027/1997 and the IATA "Intercarrier Agreement on Passenger Liability" of 1995[3] were the models for the new Convention,[4] which maintained the structure of the WC and its scope of application. The six authentic language versions of the MC are the French, English, Arabic, Chinese, Spanish and Russian version. An essential core area of the MC is the liability regime for passenger damage. It came into force on 4 November 2003, sixty days after it was ratified by the United States of America as the 30th State Party to the Convention.[5]

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[1] See REUSCHLE Fabian, Berlin (2011), Montrealer Übereinkommen, p. 18-21.

[2] PICKELMAN Matthew R., Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time, 64 Journal of Air Law and Commerce (1998), p. 273-306 (p. 277).

[3] See ATHERTON Trevor, Unlimited Liability for Air Passengers: The Position of Carriers, Passengers, Travel Agents and Tour Operators under the IATA Passenger Liability Agreement Scheme, 63 Journal of Air Law and Commerce (1997), p. 405-421; and PICKELMAN Matthew R., Draft Convention for the Unification of Certain Rules for International Carriage by Air: The Warsaw Convention Revisited for the Last Time, p. 289-293.

[4] JAHNKE, Manja, Hamburg (2008), Haftung bei Unfällen im internationalen Luftverkehr, p. 10.

[5] Article 53(6) of the Montreal Convention.

Unlike most other international conventions which provide for state obligations, the MC and its predecessor, the WC, regulate private rights.[6]

Since the MC itself defines its scope of application in Articles 1 and 2, it does not require implementation in national law but is directly applicable in the territories of all State Parties. Furthermore, it even has direct effect, i.e. it can be directly invoked by individuals in court.[7]

Deviating from the WC, the MC created a two-tier liability system for cases of death or injury of passengers by accident. For claims up to SDR 100.000 - the first tier - the air carrier's liability is strict. For claims exceeding this amount - the second tier - the air carrier's liability is based on fault but is not limited in amount. The MC also provides for a revision of the liability limits every 5 years[8] to ensure that they can be adjusted for inflation; under this procedure, the limit of SDR 100.000 has now been raised to SDR 128.821.[9]

Under the MC, an action for death or personal injury can be brought in the court of the passenger's permanent residence under certain conditions, which was not possible under the WC.[10]

An urgent necessity was to include electronic tickets.[11] Other than the WC, the MC allows for Regional Economic Integration Organisations which have competence in respect of certain matters governed by the Montreal Convention to be parties to it.[12]

Another noteworthy difference between the WC and the MC is that the latter explicitly recognises in its Preamble “the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution”. A direct consequence of this endeavour is the elimination of liability limits for death and bodily injury in case of fault on behalf of the air carrier, a general increase in liability limits and their regular review and adjustment. The purpose of balancing interests as opposed to unilaterally protecting the interests of air

[6] McLEAN David, EU Law and the Montreal Convention of 1999, in BOBEK, Michal and PRASSL, Jeremias, Oxford and Portland Orgeon (2016), Air Passenger Rights: Ten Years On, p. 57-64 (p. 59).

[7] ROSAS, Allan, Strasbourg (2018), The European Court of Justice and Public International Law, Statement delivered at the Meeting of the Council of Europe Committee of Legal Advisers on Public International Law (CAHDI), p. 5.

[8] Article 24 MC.

[9] Applying from 28 Dev. 2019.

[10] Article 33(2) MC.

[11] Article 3(2) MC.

[12] Article 53(2) MC.

carriers can, however, also have significance for the interpretation of the MC - even where it has taken over provisions of the WC.

2) THE MC'S EMBEDMENT IN EU LAW

The MC was signed by the (then) European Community on 9 December 1999 and approved on its behalf by Council Decision 2001/539/EC of 5 April 2001,[13] and has been an integral part of the EU legal order from the date it entered into force. It was regarded as beneficial for European Community air carriers to operate under uniform and clear rules regarding their liability for damage and that such rules should be the same as those applicable to carriers from third countries.[14] The relevant provisions of the Convention have been incorporated into Regulation 2027/1997[15] through its amendment by Regulation 889/2002.[16] The amended version has applied since 28 June 2004, the date on which the MC entered into force for the Community.

The original version of Regulation 2027/1997 came into force on 17 Oct. 1998 (one year after its publication in the Official Journal). Its recitals state that the limit set on liability by the Warsaw Convention was too low and a complete review and revision of the Warsaw Convention was long overdue. Hence, the Regulation anticipated some of the innovations that the MC brought over the WC system, such as

- an absolute liability death or bodily injury of a passenger up to an amount of SDR 100.000 and fault-based liability above that limit (Article 3);
- the obligation of the air carrier to maintain adequate insurance (Article 3(1) b); and
- the obligation of the air carrier to make advance payments (Article 5).

The Regulation, which applied only to Community Carriers, has subsequently influenced the drafting of the MC in this respect.

In its current, consolidated, version, Regulation 2027/1997 extends the application of the provisions of the MC to carriage by air within a single Member State: the legislator regarded it as appropriate to have the same level and nature of liability in both international and national transport within the Community, because the distinction

[13] OJ 2001 L 194, p. 38.

[14] Council Decision 2001/539/EC of 5 April 2001, Recital (1).

[15] Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents.

[16] Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents, OJ 2002 L 140, p. 2-5.

between national and international transport had been eliminated in the internal aviation market.[17] Furthermore, it would be impractical for Community air carriers and confusing for their passengers if they were to apply different liability regimes on different routes across their networks.[18] While the Convention itself requires an international carriage of persons, baggage or cargo, within the EU it therefore equally applies to any domestic air carriage.

The incorporation of the MC means that it is not only an international treaty to which the EU is bound but has also become part of the Union law. Since the institutions of the Union are bound by the agreements concluded by the Union, these agreements have primacy over secondary Union law, i.e. directives and regulations,[19] but not with respect to the founding Treaties and other parts of primary law.[20]

3) THE CJEU'S AUTHORITY TO GIVE BINDING INTERPRETATION OF THE MC

While the European Union is not bound by the provisions of the WC, and, accordingly, the CJEU does not have jurisdiction to interpret the provisions of that convention in preliminary ruling proceedings,[21] the provisions of the Montreal Convention are an integral part of the legal order of the European Union, so that the CJEU has jurisdiction to rule on its interpretation,[22] in accordance with the rules of international law which are binding on the EU, and in particular Article 31 of the Vienna Convention, providing that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. EU secondary law must be interpreted as far as possible in keeping with the terms of the international agreements that are binding to the EU.[23]

The CJEU confirmed that international conventions concluded by the Union have primacy over secondary EU legislation and form an integral part of EU law. Consequently,

[17] Regulation (EC) No 889/2002, Recital (8).

[18] Regulation (EC) No 889/2002, Recital (13).

[19] CJEU judgment of 10 Jul. 2008, C-173/07 - *Emirates Airlines*, para. 43.

[20] ROSAS, Allan, Strasbourg (2018), The European Court of Justice and Public International Law, p. 5.

[21] CJEU judgment of 22 Oct. 2009, C-301/08 - *Bogiatzi*.

[22] CJEU judgment of 12 Apr. 2018, C-258/16 - *Finnair.*

[23] ROSAS, Allan, Strasbourg (2018), The European Court of Justice and Public International Law, p. 5.

for the CJEU, international conventions concluded by the European Union bind Member States by virtue of their duties under EU law and not international law.[24]

Although the EU is not a Party to the 1969 Vienna Convention, in its case law on the interpretation of the MC, the CJEU nevertheless regularly considers the principles of interpretation laid down in the 1969 Vienna Convention as international customary law.[25]

4) CJEU CASE LAW RELATED TO THE MC

It is noticeable that out of the fifteen cases of the CJEU on the interpretation of the MC reported below, no less than seven were initiated by Austrian Courts. They apparently see a particular need for clarification in the interpretation of the MC. The case law of the CJEU to date, which is presented below, covers the scope applicability and exclusivity, the concept of an 'accident', the defence of contributory negligence, the term 'bodily injury', the compensable damage, the group of persons entitled to claim and the liability for baggage.

4.1) Scope of applicability

According to Article 1(1) MC, the 'Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking. Article 1 of Regulation No 2027/97 extends the application of these provisions to carriage by air within a single Member State.

The scope of applicability of the MC according to its extension to domestic flights by Regulation No 2027/97 was an issue in the case of *Prüller-Frey*:

In August 2010, Ms Prüller-Frey, at that time domiciled and habitually resident in Austria, took a flight aboard an autogyro over an aloe vera plantation in Spain, which she was considering to purchase. The autogyro took off from Medina Sidonia and was involved in an accident near Jerez de la Frontera as a result of which Ms Prüller-Frey was physically injured. She brought an action for damages in Austria against the nominal holder of the autogyro and the insurer.

The Regional Court Korneuburg, inter alia, had doubts about the applicability of the MC and/or Regulation No 2027/97 respectively and referred the matter to the CJEU.

In its respective judgment,[26] the court considered that that Regulation No 2027/97 only applies to 'air carriers' within the meaning of Article 2(1)(a) thereof, namely air transport

[24] GRIGORIEFF, Cyril-Igor, Leiden (2021) The regime for international air carrier liability: to what extent has the envisaged uniformity of the 1999 Montreal Convention been achieved?, p. 42.

[25] Ibid., p.43.

undertakings with valid operating licences, and to 'Community air carriers' within the meaning of Article 2(1)(b), namely air carriers with a valid operating licence granted by a Member State in accordance with the provisions of Regulation 2407/92.[27] The defendants would not fall within that meaning of an 'air carrier' since they were not air transport undertakings with valid operating licences. Neither would they fall within the meaning of 'Community air carriers', given that they were not air carriers with a valid operating licence granted by a Member State in accordance with the provisions of Regulation 2407/92.

Furthermore, the flight in issue was operated free of charge within a Member State with a view to the possible conclusion of a real-property transaction and did not involve the carriage of passengers between different airports or other authorised landing points. It therefore was a 'local flight' within the meaning of point (6) of Article 2(1) of Regulation No 1008/2008[28] and thus not subject to the requirement of a valid operating licence.

As the MC was applicable to flights within a single Member State only if those flights fall within the scope of Regulation No 2027/97, it was not applicable to the case before the referring court.

In a similar case in which a person had died in an aircraft accident during a flight performed for courtesy reasons by a private entity, the Italian Supreme Court also held that the MC - and in particular: the two years limitation period as provided for in Article 35 - did not apply because in case of a gratuitous carriage. The transport must be performed by a licensed air carrier for the MC to apply.[29]

As Regulation No 2027/97 in its consolidated version as amended by Regulation 889/2002 extends the application of the provisions of the MC to carriage by air within a single Member State but doesn't change the other requirements for application, the CJEU might have been able to achieve the same result with less justification and without recourse to further secondary Union law. The ruling therefore also shows how much the CJEU assesses the MC from a European perspective.

4.2) Exclusivity

Article 29 MC, entitled 'Basis of Claims', provides that '*In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this*

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[26] CJEU judgment of 9 Sep. 2015, C- 240/14 - *Prüller-Frey*.

[27] Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers; no longer in force since 31 Oct. 2008; repealed by Regulation (EC) No 1008/2008.

[28] Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community.

[29] Italian Supreme Court (Corte Suprema di Cassazione) judgment 32778 of 13 Dec. 2019.

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. …'.

This provision is understood to provide for an exclusive application of the MC liability rules in the carriage of passengers, baggage and cargo. The purpose of the provision is to ensure that the liability regime of the MC, which serves an appropriate balance of interests, is not undermined by other regulations.[30]

However, there is no consensus on how far the scope of this exclusivity extends. Courts in the Anglo-American legal sphere have traditionally tended towards a rather broad interpretation of exclusivity, according to which in the temporal scope of the Montreal Convention - i.e. between embarking and disembarking - there is only either a claim under the Montreal Convention or no claim at all. Or, as the UK Supreme Court had put it: '*The Convention intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation*'.[31] For this reason, claims by passengers for discrimination on board,[32] defamation,[33] or breach of contract during their stay on board[34] were rejected.

A comprehensive review carried out by JAHNKE[35] and taking into regard the wording of Article 29 MC in different language versions and in comparison with Article 24 WC, the context of the provision, its purpose and history, also comes to the conclusion that within the time frame of liability under the MC, only the Convention applies. Any recourse to national law is only possible in relation to incidents occurring before or after that time frame. The review emphasises in particular that Article 29 MC (unlike Article 24 WC) refers in general to claims "in the course of carriage" and that the wording of Article 17-19 is intended to regulate the carrier's liability exhaustively. This is also supported by Article 3(4), according to which the MC, if applicable, regulates the carrier's liability for death or injury of the passenger, destruction, loss or damage of luggage or delay, as well as Article 49, which provides for a mandatory application of the MC.

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[30] GIEMULLA, Elmar in Giemulla/Schmid, Frankfurt (2022),Frankfurter Kommentar zum Luftverkehrsrecht Bd. 3 Montrealer Übereinkommen, Article 29, margin 1.

[31] *Stott v. Thomas Cook Tour Operators Ltd*., [2014] UKSC 15, para 61.

[32] See *Alam v. American Airlines Group, Inc*., 2017 WL 1048073 [E.D.N.Y. Mar. 17, 2017].

[33] See *Mc Auley v. Aer Lingus Ltd & others* [2011] IEHC 89.

[34] See *Rogers v. Continental Airlines* [D.N.J. Sept. 21, 2011]; *Walton v. MyTravel Can. Holdings* [2006], 280 Sask.R. 1 (QB)

[35] JAHNKE, Manja, Hamburg (2008), Haftung bei Unfällen im internationalen Luftverkehr, p. 371-385.

However, European courts outside the common law system, tend to see exclusivity as being limited to those matters governed by the Montreal Convention. For matters not governed by the Montreal Convention, recourse to the applicable national law should be permissible.

In the view of the Austrian Supreme Court,[36] other (national) bases of claims are excluded by Article 29 only within the scope of the MC. Claims for damages arising from other damage - not regulated by the MC - remain unaffected by the "blocking effect" of Article 29 MC. Referring to German doctrine, the Supreme Court quotes the example that the MC wanted food poisoning caused by spoiled food served on board to continue to be compensated under the applicable national law, even though it was a personal injury not caused by an accident. The aim was to avoid a situation where damage for which the MC does not provide compensation remains inconsequential under both the MC and national law.

The German Federal Supreme Court noted that however extensive and detailed the provisions of the MC may be, it does not follow from the regulatory purpose that the legal relationships between an air carrier and its passengers or the parties involved in a cargo must be completely, comprehensively and conclusively regulated by the Convention.[37]

4.2.1) The IATA and ELFAA judgment

The first time that the CJEU had to address the issue of the exclusivity of the liability rules of the MC was in the case of *IATA and ELFAA v. Department for Transport*:[38]

The two associations representing different sectors of the airline industry sought to challenge the (then fairly new) European Air Passenger Rights Regulation[39] by arguing, inter alia, that Article 6 of that regulation was inconsistent with the MC: they referred to Articles 19 and 22(1), excluding and limiting the air carrier's liability in the event of delay in the carriage of passengers, and Article 29, according to which any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention.

Article 6 of the European Air Passenger Rights Regulation provides for the right of passengers to be assisted by the operating carrier if their departure is delayed beyond a

[36] Austrian Supreme Court (OGH) judgment of 17.12.2012, 10 Ob 47/12b.

[37] German Federal Supreme Court (BGH) judgment of 13.10.2015, X ZR 126/14.

[38] CJEU judgment of 10 Jan. 2006, C-344/04 - *IATA & ELFAA.*

[39] 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.

certain time (depending on the distance to the final destination). This assistance includes meals and refreshments in a reasonable relation to the waiting time, hotel accommodation, transport between the airport and place of accommodation and two free telephone calls, telex or fax messages, or e-mails.[40] In addition, it provides for a choice of the passenger between reimbursement or re-routing when the delay is at least five hours.[41]

In his opinion of 8 Sept. 2005, Advocate General Geelhoed argued that it was clear that Article 6 of the Regulation did not concern civil liability or actions for damages, since any action for damages would require consideration as to whether damage had occurred in the first place, whether there was a causal link between the delay and the damage, the amount of the damage and whether or not the carrier could invoke a defence.[42] None of these considerations was relevant in the context of Article 6 of Regulation No. 261/2004.[43] The public nature of the obligations imposed on air carriers by Regulation 261/2004 was further underlined by the fact that the enforcement mechanism was different, as this would be the responsibility of the national enforcement bodies to be designated by the Member States.[44] The Advocate General, however, could not have known at the time that the CJEU would hold that these bodies were not required to take enforcement action against a carrier to enforce individual claims of passengers.[45]

In its judgment, the CJEU considered the preamble to the Montreal Convention according to which the State parties recognized '*the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution*'.[46] Regarding damage caused by delay, the court then distinguished between damage that is almost identical for every passenger and individual damage, inherent in the reason for travelling. While damage in the first category could be redressed through standardised remedies like assistance and care for everybody concerned, damage in the second category required a case-by-case assessment. It was clear form Articles 19, 22 and 29 of the MC that they only governed the conditions for bringing action for individual damages. The MC, therefore, could not prevent the European legislator to redress, in a standardised and immediate manner, as

[40] Article 9 of Regulation (EC) No. 261/2004.

[41] Article 8 of Regulation (EC) No. 261/2004.

[42] AG CJEU, Opinion of 8 Sept. 2025 in case C-344/04 - *IATA & EALFA*, para. 46.

[43] Ibid., para. 47.

[44] Ibid., para.52.

[45] CJEU judgment of 17 Mar. 2016 in joined cases C-145/15 and 146/15 - *Ruijssenaars and Jansen.*

[46] CJEU judgment of 10 Jan. 2006, C-344/04, para. 41

in Article 6 of Regulation (EC) No 261/2004, the damage that was constituted by the inconvenience that delay in the carriage of passengers by air would cause. The system prescribed in Article 6 simply operated at an earlier stage compared to the MC system.[47]

Although the judgment does not contain a detailed discussion of the interpretation of Article 29 MC, it can be taken from it that the CJEU does not follow the strict approach that one can only have either a claim under MC or none at all.

4.2.2) The Nelson judgment

The judgment in *IATA and EALFA* was passed at a time when Regulation (EC) No 261/2004 was not yet interpreted as providing a claim for standardised financial compensation to passengers of delayed flights, and there was consensus that a claim for non-perfomance of a promised carriage falls outside the scope of the WC.[48] The *Sturgeon* judgment,[49] however,changed the situation by extending the Regulation's fixed compensation for passengers of cancelled flights[50] to passengers who suffered a delay in arrival of three hours or more, which again raised the question of compatibility with the MC.

This was dealt with by the CJEU in *Nelson ea*.[51] The air carriers involved in that case as well as the governments of Germany and the United Kingdom contended that if Regulation (EC) No 261/2004 were to confer a right to compensation on passengers whose flights are delayed, that regulation would conflict with the very wording of the second sentence of Article 29 of the MC.

Once again, the court therefore had to consider the scope of exclusivity that Article 29 provides for. Quite sophistically, the Court points out that denied boarding and cancellation also regularly lead to delayed carriage and the passengers affected by this would be compensated, without the air carriers, Germany or the United Kingdom opposing this - but would indirectly call in question the very right to compensation provided for by Regulation (EC) No 261/2004, and, ultimately, the compatibility of Articles 5 to 7 of that regulation with the MC.

While the CJEU acknowledges that its decision in *IATA and ELFAA* concerning compatibility with the Montreal Convention was limited to the standardised and immediate

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[47] Ibid., para. 46

[48] McLEAN, David, (2016) EU Law and the Montreal Convention of 1999, p.61.

[49] CJEU 19 Nov. 2009, joined cases C-402/07 - *Sturgeon v. Condor* and C-432/07 *Böck/Lepuschitz v. Air France.*

[50] Article 5 in connection with Article 7 of Regulation (EC) No. 261/2004.

[51] CJEU 23 Oct. 2012, joined cases C-581/10 -*Nelson ea v. Deutsche Lufthansa* and C-629/10 - *TUI Travel plc ea v. CAA*.

measures of assistance and care laid down in Article 6 of Regulation (EC) No 261/2004, the Court points out that it did not rule out that other measures, such as that of compensation laid down in Article 7 of that regulation, may fall outside the scope of the Montreal Convention.

Subsequently, the CJEU seeks to establish a difference between the "inconvenience" of the loss of time associated with a flight delay on the one hand and the damage in the meaning of the MC on the other. The CJEU emphasises that the said inconvenience could not be categorized as 'damage occasioned by delay' to be compensated under Article 19 MC. *Balfour* calls that an 'artificiality and weakness' that was self-evident'[52] - a criticism I can agree with. The Court reiterates that Regulation (EC) No 261/2004 operated 'at an earlier stage' than the system laid down in Article 29 MC. While this may be true with regard to care and assistance during the time passengers spend waiting for their delayed departure, it is hard to understand why a compensation that relates to a delayed arrival concerned an "earlier stage" than compensation for damage occasioned by delay.

It is also not entirely clear why the so-called 'inconvenience' should not be regarded as non-material damage - which, according to the CJEU's *Walz* decision,[53] is covered by the concept of damage in the MC. Finally, the deductibility provision of Article 12 of Regulation (EC) No 261/2004 also makes it difficult to understand the CJEU's reasoning: if the standardised compensation does not serve to compensate for any damage, why should it be deducted from any further compensation?

In German doctrine the view is shared that claims which are not or not fully regulated by the MC may be the subject of other (national or supranational) legislation. It is therefore possible to provide for compensation for the inconvenience of a delay because the MC only covers damage "occasioned by delay".[54]

Anyway, in the given context, it must be noted that the CJEU interprets Article 29 MC as not precluding additional compensation for an inconvenience that affects all passengers equally. The approach that there can only be either a claim under the MC or no claim at all was thus once again rejected at European Union level.

[52] BALFOUR, John, Luxembourg v. Montreal, in in BOBEK, Michal and PRASSL, Jeremias, Oxford and Portland Orgeon (2016), Air Passenger Rights: Ten Years On, p. 65-73 (p. 70).

[53] CJEU 6 May 2010, C-63/09 - *Walz v. Clickair*.

[54] GIEMULLA, Elmar in Giemulla/Schmid, Frankfurt (2022), Article 29, margin 9a.

4.2.3) The Canadian judgment IATA ea v. CTA

At this point, it is worth mentioning that the Canadian Federal Court of Appeal has recently also dealt with the compatibility of air passenger rights regulations with the MC:[55]

In 2019, the Canadian Transportation Agency had adopted Air Passenger Protection Regulations[56] which imposed obligations on air carriers in case of tarmac delays, flight cancellations, flight delays, denial of boarding and damage or loss of baggage in domestic and international air travel. These Regulations recently were challenged by IATA, the Air Transportation Association of America and several air carriers all of whom inter alia claimed that the regulations would contravene Canada's international obligations under the MC.

The main issue in this regard was whether the minimum compensation to passengers required by the Regulations in the case of delay, cancellation, denial of boarding and lost or damaged baggage, was compatible with the MC when applied to international carriage by air.

The court identified a well-established principle of statutory interpretation that legislation is presumed to be in conformity with Canada's international obligations under treaty or customary international law. The court then went on quoting the Canadian Supreme Court's judgment in *Thibodeau v. Air Canada*[57] according to which overlapping provisions do not necessarily conflict, so long as they can both apply, unless there is evidence to the effect that one of the provisions was meant to provide an exhaustive declaration of the applicable law. The court found that the standards of treatment and the minimum compensation levels for delays and cancellations at stake were comparable to those established in the European Union regime.

Regarding the principle of exclusivity, the court again quoted the *Thibodeau* judgment which noted that "any action for damages" in the carriage of passengers, baggage and cargo were subject to the conditions and limitations set out in the Convention and argued in this regard that "[t]he provision could hardly be expressed more broadly; it applies to 'any action for damages, however founded".

However, on the basis of the systematics of the Convention, the court then held that the exclusivity principle would *not* apply to matters falling outside Chapter III, nor indeed to matters falling outside the MC such as domestic flights, claims filed by employees, subcontractors or suppliers, or critically, claims not covered by the circumstances contemplated by Articles 17 to 19.

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[55] *IATA ea v. CTA*, 2022 FCA 211.

[56] Air Passenger Protection Regulations, S.O.R./2019-150.

[57] *Thibodeau v. Air Canada*, 2014 SCC 67.

Similar to the CJEU, the Canadian Court came to the conclusion that the scheme of the Regulations with regards to air carrier liability was of an *entirely different nature* than what was contemplated by the MC, as the carrier's liability for delay, as contemplated by Article 19 of the Convention, was meant to address individualized damages while under the Regulations, the amount of compensation to which a passenger is entitled was fixed by the Regulations and was the same for all the passengers on a particular flight as soon as certain objective conditions were met. Contrary to the MC, which was concerned with the period of time after the delayed arrival, the Regulations covered the time period before the delayed arrival. The Regulations were '*closer to a consumer protection scheme than to an action in damage*' and were to be enforced through administrative measures.

Overall, the impression is that the courts are making rather sophisticated dogmatic differentiations in order to avoid the exclusive effect of the MC on consumer protection provisions. The fact that the Canadian Federal Court of Appeal repeatedly refers to the decisions of the CJEU is not only due to the similarity between the respective passenger rights regulations but also shows that the case law of the CJEU has significance beyond the borders of the Union and can thus influence the interpretation of the MC in general.

4.2.4) The pending Austrian Airlines case

The scope of exclusivity also is a key issue in a case still pending before the CJEU:[58]

The case concerns the injury of a passenger caused by hot coffee from a jug that fell from a service trolley during a flight from Tel Aviv to Vienna. The claim was filed after the expiry of the two-year limitation period provided by the MC[59] but within the three-year limitation period according to Austrian civil law[60]. The plaintiff argues that inadequate first aid administered on his injuries after the incident was a separate and autonomous cause of damage that did not fall within the scope of Article 17 (1) of the MC and was therefore not subject to exclusivity under Article 29.

These case facts are somewhat similar to those in *Abramson v. JAL*[61] where the plaintiff suffered an attack from a pre-existing paraesophageal hiatal hernia and alleged that his condition worsened because he was denied the opportunity to employ "self-help". In that case the U.S. Court of Appeals for the Third Circuit had concluded that the plaintiff's injury was not covered by Article 17 WC because there was no "accident" and

[58] C-510/21 - *Austrian Airlines*.

[59] Article 35 MC.

[60] Sec. 1489 Austrian Civil Code (ABGB).

[61] *Stanley Abramson v. Japan Airlines Co., Ltd.* 739 F.2d 130 (3d Cir. 1984).

Article 24(2) WC did not by its express terms limit maintenance of actions brought under local law. The Warsaw Convention's limitation and theory of liability was exclusive when it applied (i.e., when there was an accident), but it would not preclude alternative theories of recovery.[62]

Nevertheless, the Austrian Supreme Court referred the present case to the CJEU. It asked for clarification of the question whether first aid administered on board an aircraft following an accident within the meaning of Article 17(1) of the MC and which leads to further bodily injury to the passenger which can be distinguished from the actual consequences of the accident, was to be regarded as a single accident, together with the triggering event. If that was to be answered in the negative, the CJEU is asked to clarify whether Article 29 of the MC precluded a claim for compensation for damage caused by the administration of first aid where that claim was brought within the limitation period under national law but outside the period for bringing actions which is laid down in Article 35 of that Convention.

In his opinion delivered on 12 January 2023,[63] Advocate General EMILIOU provides a comprehensive overview of the legal theories on the exclusivity of the MC and the respective case law.[64] He then continues emphasizing that since the CJEU is but one of many jurisdictions throughout the world that are competent to interpret the MC, and since the uniform application of that convention in all States Parties is an aim to be pursued, it is appropriate for the CJEU to duly take into account, and give the required weight, to the decisions handed down by the courts of those States Parties.[65]

A similar - and in my view: convincing - approach is taken by the Ontario Superior Court of Justice which has repeatedly emphasized the high importance of the MC and its purpose of creating a uniform system of liability and has therefore called for a consistent interpretation across countries which should only be departed from with a very sound reason.[66]

The Advocate General of the CJEU also points out the complexity of the issue. Even the applicable rules of interpretation, as codified in the Vienna Convention on the Law of

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[62] Affirmative: GIEMULLA, Elmar in Giemulla/Schmid, Frankfurt (2022), Article 29, margin 9a.

[63] AG CJEU, Opinion of 12.01.2023 in case C-510/21 - *Austrian Airlines*.

[64] Ibid., para. 24-36.

[65] Ibid., para. 38.

[66] *Connaught Laboratories Ltd. v. British Airways*, 2002 CanLII 4642 (ON SC), para. 50; *Gontcharov v. Canjet*, 2012 ONSC 2279, para. 20; *O'Mara v. Air Canada*, 2013 ONSC 2931, para. 41.

Treaties of 23 May 1969,[67] would not lead to a clear answer. The object and the purpose of the Montreal Convention were equally equivocal.

Although he acknowledges that the issue of the scope of exclusivity of the MC calls for serious reflection on the part of the CJEU, Advocate General Emiliou regards it not to be necessary for the CJEU to take a complete position on the scope of exclusivity of the MC in the present case: At the very least, pursuant to Article 29 of the MC, a claim against an air carrier, however pleaded, which objectively related to death or bodily injuries sustained by a passenger during an international flight falling within the general scope of that convention, because of an accident that took place on board the aircraft, as envisioned in Article 17(1), was, without any doubt, governed exclusively by the MC.

In the present case, the accident of the fallen coffee jug had at least been a link in the chain of causes that lead to the injury at stake. Under the law of the Contracting States, among all the factors that contributed to a particular injury, a particular course of conduct or event was considered to be an "adequate" or "proximate" and therefore actionable cause of the injury if the latter was a natural consequence of the conduct or event. In the context of Article 17 (1) of the MC, it means that the reach of that provision, and the carrier's scope of liability thereunder, are limited to injuries that are the foreseeable consequences of the relevant 'accident'. Those should be regarded, in law, as having been 'caused' by the 'accident' in question, for the purposes of that provision. In a situation such as the one in the main proceedings, that interpretation of the causation requirement set out in Article 17(1) of the MC, was perfectly in line with the system, object, and purpose of that convention.

It is highly understandable that, in the circumstances of the case, the Advocate General recommends that the question of causation (also) of the aggravation of the injury by an accident be answered in the affirmative and thus avoid a determination on the scope of exclusivity.

4.3) Accident

The pending case reported above perfectly leads to another key issue of air carrier liability under the MC:

The relevant basis for the carrier's liability for death and personal injury is the concept of "accident". The MC does not define this term any more than the WC did previously, which is why its interpretation by the courts is still subject to different approaches.

However, there is extensive case law on the issue. One of the leading decisions on the definition of an 'accident' certainly is the US Supreme Court's judgment of 1985 in *Air*

[67] *United Nations Treaty Series*, Vol. 1155, p. 331 ('The Vienna Convention'), Article 31 and 32.

France v Saks.[68]. According to that judgment, the term 'accident' in the meaning of the WC is to be interpreted as an unusual or unexpected event that is external to the passenger and (at least as part of a chain of causes) causes the injury or death. In contrast, an injury resulting from the passenger's own internal reaction to the usual, normal and expected operation of the aircraft is therefore not based on an 'accident'.

To qualify as an 'accident', the respective event must

- be unexpected or unusual
- be external to the passenger; and
- at least as part of a chain of causes, have led to the passenger's injury or death.

Very similar definitions have been applied by the German Federal Court (BGH) and the Austrian Supreme Court (OGH). According to these definitions, 'accident" means 'any sudden event resulting from an external cause which kills or injures the traveller',[69] or 'a sudden event based on an external cause, determined in time and place, as a result of which the passenger is killed or injured'.[70]

The quoted interpretations have in common that there must be an *external event* that the passenger must prove in order to have a valid claim under the Warsaw Convention or Montreal Convention.

There is also controversy among the courts of the contracting states as to whether the Warsaw Convention and the Montreal Convention only regulate liability for aviation-related risks[71] or, more generally, for any type of accident that occurs during the liability period. German courts in particular had assumed that the Warsaw Convention was only intended to regulate liability for aviation-specific incidents. Therefore, for instance, claims for injuries caused by spilled coffee were denied.[72] Contrary to that approach, the England and Wales Court of Appeal *rejected*, in *Morris v KLM*, any suggestion „*that an 'accident' had, in some respect, to be related to or be a characteristic of air travel"*.[73]

However, the German Federal Supreme Court (BGH) already somewhat departed from the traditionally restrictive interpretation for the Montreal Convention to the extent

[68] US Supreme Court 04.03.1985, *Air France v Saks*, 470 U.S. 392 [1985].

[69] German Federal Supreme Court (BGH), judgment of 21.11.2017, X ZR 30/15.

[70] Austrian Supreme Court (OGH), judgment of 30.01.2020, 2 Ob 6/20a.

[71] Doctrine of aviation-specific causality; see REUSCHLE Fabian, Berlin (2011), p. 25-26.

[72] Regional Court Frankfurt (LG Frankfurt), judgment of 16.12.2005, 2-01 S 182/01; see also SCHMID, Ronald, in "Montreal Convention", Kluwer, the Netherlands (2006), Article 17 para. 16 and 17 and FÜHRICH, Ernst, in Staudinger/Führich "Reiserecht" Munich (2019), p. 802-804.

[73] *Morris v. KLM Royal Dutch Airlines*, [2001] EWCA Civ 790.

that it no longer required a risk or danger that is unique in air transport and cannot occur in any other area of life. The BGH held that it was sufficient if a risk materialised that resulted from the typical nature of the condition of an aircraft or of an aviation facility used for embarking or disembarking.[74]

4.3.1) The Niki Luftfahrt judgment

An injury caused by spilled coffee was also the starting point for the first CJEU decision on the concept of 'accident' under the MC:[75] the then 6 years old plaintiff, travelled on board an aircraft with her father, from Mallorca to Vienna. During the flight, the plaintiff's father who was sitting next to her was served a cup of hot coffee which, while it was placed upon the tray table, tipped over onto the plaintiff's chest, causing her second-degree scalding. It could not be established whether the cup of coffee tipped over due to a defect in the folding tray table on which it was placed or due to vibration of the aircraft.

In the light of the controversy mentioned above, the Austrian Supreme Court decided to stay proceedings and to refer the question to the CJEU for preliminary ruling, whether it constituted an 'accident' triggering a carrier's liability within the meaning of Article 17(1) of the MC, where a cup of hot coffee, placed on the tray table attached to the seat in front of a person on an aircraft in flight, for unknown reasons slides and tips over, causing a passenger to suffer scalding.

The CJEU first noted that, in order to engage the liability of the carrier, the event causing the death or bodily injury of the passenger must be classified as an 'accident' and that accident must take place on board the aircraft or in the course of any of the operations of embarking or disembarking. Since the concept of 'accident' was not defined in the MC, reference had to be made to the *ordinary meaning* of that concept in its context, in the light of the object and purpose of the MC. The ordinary meaning given to the concept of 'accident' was that of "*an unforeseen, harmful and involuntary event*".

The Court then concluded that it was neither compatible with the ordinary meaning of the term "accident" in Article 17(1) of the MC nor with the objectives pursued by that Convention to make the air carrier's liability conditional on the damage being caused by a hazard typically associated with aviation or on there being a connection between the "accident" and the operation or movement of the aircraft. Moreover, limiting the air carrier's obligation to pay compensation to accidents related to a hazard typically

[74] German Federal Supreme Court (BGH), judgment of 21.11.2017, X ZR 30/15.

[75] CJEU judgment of 19 Dec. 2019, C-532/18 - *Niki Luftfahrt*.

associated with aviation was not necessary in order to avoid an excessive compensation burden on air carriers.

Article 17 (1) of the MC therefore had to be interpreted as meaning that the concept of 'accident' covers all situations occurring on board an aircraft in which an object used when serving passengers has caused bodily injury to a passenger, without it being necessary to examine whether those situations stem from a hazard typically associated with aviation.

Even if this interpretation seems justified by the wording and objectives of Article 17(1) of the Convention, the reference to the ordinary meaning of the term 'accident' as an unforeseen, harmful and involuntary event is not really convincing, as will be demonstrated below. Even on the occasion of this ruling, however, the CJEU's interpretation of the term "accident" was already rightly criticised because it lacks the requirement of a causation external to the passenger.[76]

4.3.2) The Altenrhein judgment

The next case referred to the CJEU, again by the Austrian Supreme Court, concerned a 'bumpy' landing of a flight from Vienna to Altenrhein. The passenger claimed that she had suffered a spinal disc injury as a result of that landing.

However, during the landing, the flight data recorder noted a vertical load of 1.8 g while, according to the aircraft manufacturer's specifications, the maximum load that can be borne by the landing gear and the structural parts of the aircraft in question is 2 g. Nevertheless, the plaintiff argued that that landing had to be classified as 'hard' and, consequently, as being an accident within the meaning of Article 17(1) MC.

The main issue was whether such kind of landing could be regarded as "unforeseen" (or, in the words of the *Saks* definition: "unexpected or unusual"). This of course, immediately raises the question of the relevant perspective: is it the perspective of the passenger concerned, the perspective of an average traveller - or the perspective of the airline industry. A question which was already discussed in the oral hearing of the proceedings in *Air France v. Saks*.[77]

In its referral for preliminary ruling,[78] the Austrian Supreme Court considered the perspective of the passenger concerned versus the compliance with the limit values

[76] PHIPPARD, Simon and STONEHAM Sophie, Newcastle upon Tyne (2020): "ECJ: Airlines are liable for accidents to passengers in flight in the absence of an aviation-related hazard", [2020] TLQ 59.

[77] Audio recording of the oral proceedings available at https://www.oyez.org/cases/1984/83-1785, accessed on 19 April 2023.

[78] Austrian Supreme Court (OGH) order of 30.01.2020, 2 Ob 138/19m.

specified by the aircraft manufacturer as an objective view on what constituted a 'normal operation' of the aircraft. While the word "unforeseen" (as opposed to "unforeseeable") suggested a relevance of the perspective of the passenger concerned, the court, however, tended to exclude all events from the definition of an accident that are within the scope of the aircraft's normal technical operation.

In its judgment of 12 May 2021,[79] the CJEU reiterated its approach according to which the ordinary meaning of the concept of 'accident' is that of an unforeseen, harmful and involuntary event.[80] It then held that interpreting the concept of 'accident' provided for in Article 17(1) of the MC as meaning that the assessment of the unforeseen nature of the event in question depends solely on the relevant passenger's perception of that event could extend that concept in an unreasonable manner to the detriment of air carriers.[81] Even though the State Parties to the MC had recognized the importance of ensuring protection of the interests of consumers in international carriage by air and had laid down a system of strict liability for air carriers, it had to be taken into regard that air carriers, according to Annex IV of Regulation No. 216/2008[82] were obliged to perform a flight in accordance with the operating procedures in the Flight Manual and the Operation Manual and the aircraft had to be operated in accordance with its airworthiness documentation,[83] provisions which aimed at ensuring a landing accomplished in accordance with the applicable procedures and limitations.[84]

Accordingly, a landing that did not exceed the limits laid down by the applicable procedures, and which took place in accordance with those procedures and the rules of the trade and best practice in aircraft operation, could not be regarded as 'unforeseen' when assessing the condition laid down in Article 17(1) MC relating to the occurrence of an 'accident'.[85] Consequently, the CJEU concludes that Article 17(1) MC must be interpreted as meaning that the concept of 'accident' laid down in that provision does *not* cover a landing that has taken place in accordance with the operating procedures and limitations applicable to the aircraft in question, including the tolerances and margins stipulated in respect of the performance factors that have a significant impact on landing,

[79] CJEU 12 May 2023, C-70/20 - *Altenrhein Luftfahrt GmbH*.

[80] CJEU 12 May 2023, C-70/20 - *Altenrhein Luftfahrt GmbH*, margin 33.

[81] CJEU 12 May 2023, C-70/20 - *Altenrhein Luftfahrt GmbH*, margin 36.

[82] Regulation (EC) No 216/2008 of the European Parliament and of the Council of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC (no longer in force, repealed by Regulation (EU) No. 2018/1139).

[83] CJEU 12 May 2023, C-70/20 - *Altenrhein Luftfahrt GmbH*, margin 37 f.

[84] CJEU 12 May 2023, C-70/20 - *Altenrhein Luftfahrt GmbH*, margin 39.

[85] CJEU 12 May 2023, C-70/20 - *Altenrhein Luftfahrt GmbH*, margin 40.

and taking into account the rules of the trade and best practice in the field of aircraft operation, even if the passenger concerned perceives that landing as an unforeseen event.

A somewhat deviating approach was recently taken by the U.S. Court of Appeal for the First Circuit in a case where a passenger fell on the mobile staircase while disembarking. The court considered that the *Saks* formulation simply would not confine the inquiry to whether the event was unusual; even though "unusual" and "unexpected" were somewhat overlapping, it also required the court to ask whether the event was unexpected, a synonym for unforeseen. The court argued that the plain meaning of the word "accident" in Article 17(1) MC suggested a focus on the perspective of the passenger, rather than that of the airline. Consequently, it held that whether an event is unexpected under the Saks definition of "accident" should be judged from the perspective of a reasonable passenger with ordinary experience in commercial air travel.[86]

4.3.3) The Austrian Airlines judgment

The fall of a passenger in *Moore v. British Airways* directly leads to the most recent CJEU judgment interpreting the term ‘accident’:[87]

The case also involved a fall of a passenger on a mobile staircase. The plaintiff who had watched her husband almost fall in the lower third of the stairs, fell herself in the same place shortly thereafter and broke her left forearm. Although the staircase was a little wet due to previous rain, it was neither slippery nor dirty. The Austrian court therefore could not determine any particular reason for the fall. As the plaintiff's husband had been carrying the hand luggage trolleys, and the plaintiff herself was carrying her handbag in one hand and her two-year-old son in the other, neither of them had used the handrail of the stairs.

The national court filed a reference for preliminary ruling of the CJEU as to whether the concept of ‘accident’ within the meaning of Article 17(1) MC covered a situation in which a passenger falls on the last third of a mobile boarding stairway when disembarking from an aircraft - *for no ascertainable reason* - and sustains an injury, which was not caused by an object used when serving passengers,[88] and there was no defect in the quality of the stairway, which, in particular, also was not slippery.[89]

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[86] *Moore v. British Airways PLC*, 32 F.4th 110 (1st Cir. 2022).

[87] CJEU judgment of 02. Jun. 2022, C-589/20 - *Austrian Airlines*.

[88] Reference to CJEU judgment of 19 Dec. 2019, C-532/18 - *Niki Luftfahrt*.

[89] LG Korneuburg (Regional Court Korneuburg) 15.09.2020, 22 R 122/20a.

In his opinion,[90] AG Nichoals Emiliou referred to the international case law on the concept of accident in the Warsaw and Montreal Convention, and the judgment of the CJEU in the *Niki Luftfahrt* case. In his analysis, he concluded that the interpretation of the term ‘accident’ chosen by the CJEU in the *Niki Luftfahrt* ruling differs from that of the U.S. Supreme Court in the *Air France v. Saks* case essentially in that the criterion of an event external to the sphere of the passenger is missing in the former.

AG Emiliou pointed out that it was obvious that a passenger could not assert a claim against the air carrier if he fell for a reason within his own sphere (such as a stroke) and that there was therefore a good reason for the criterion of an event or occurrence external to the passenger's sphere. Even if the term ‘accident’ was initially based on its ordinary meaning, it remained an autonomous term that served the purpose of the Montreal Convention to protect consumers' interests, but at the same time to provide a ‘fair balance’. He therefore recommended the Court to interpret Article 17(1) MC as meaning that the term ‘accident’ covers a case in which a passenger falls while disembarking on the boarding stairs, *provided that* the fall was triggered by some unexpected or unusual factor that is *external to the passenger*.

Regardless of this comprehensive and convincingly reasoned opinion of the Advocate General, the CJEU, however, merely reverted to its definition of an 'accident' as unforeseen, harmful and involuntary event, which had already been used in the two previous judgments. Accordingly, the Court held that Article 17(1) of the Montreal Convention had to be interpreted as meaning that a situation in which, for no ascertainable reason, a passenger falls on a mobile stairway set up for the disembarkation of passengers of an aircraft and injures himself or herself constitutes an ‘accident’, within the meaning of that provision, including where the air carrier concerned has not failed to fulfill its diligence and safety obligations in that regard.

The CJEU neither considered the argumentation of the Advocate General nor did it take into regard the case law in other State Parties to the MC.

In a very similar case, for example, the Austrian Supreme Court had upheld the dismissal of a claim by the lower courts concerning the fall of a passenger on a fold-out staircase, the exact cause of which could not be determined.[91] In other ‘trip and fall’ cases courts had always considered whether an external cause for the fall could be proven.[92] In

[90] AG CJEU, opinion of 20.01.2022 in case C-589/20 - *Austrian Airlines*.

[91] Austrian Supreme Court (OGH) judgment of 01.06.2010, 1 Ob 11/10i.

[92] See *MacDonald v. Air Canada*, 439 F.2d 1402 [1st Cir. 1971]; *Barclay v. British Airways*, [2008] EWCA Civ 1419; *Labbadia v. Alitalia*, [2019] EWHC 2103; *Moore v. British Airways*, No.21-1037 [1st Cir 2022].

related doctrine, it was regarded as clear that the 'event' has to be external to the passenger and cannot be the passenger's slip or trip itself.[93]

If the specific reason for a passenger's fall remains not ascertainable, intrinsic causes like neurological causes, cardiovascular causes, orthopedic causes, etc. can no more be excluded than extrinsic causes. While according to the wording of Article 17 (1) MC the burden of proof for a damage-causing accident on board an aircraft or during boarding or disembarking rests with the passenger, the CJEU seems to relieve passengers of their respective burden of proof by considering the fact of the fall itself as an 'accident' - regardless of its non-ascertainable reason.

It is therefore more than understandable that Advocate General Emiliou, in his recent opinion in the pending case C-510/21,[94] explicitly recommends to the CJEU to duly take into account, and give the required weight, to the decisions handed down by the courts of other State Parties 'since the Court is but one of many jurisdictions throughout the world that are competent to interpret the Montreal Convention, and since the uniform application of that convention in all States Parties is an aim to be pursued'.[95]

4.4) Contributory negligence

The main defense of the air carrier that the MC provides for is that of "contributory negligence" of the passenger as laid down in Article 20, according to which the carrier shall be wholly or partly exonerated from its liability to the extent that the claimant's own negligence or wrongful act or omission caused or contributed to the damage.

The reference for preliminary ruling by the LG Korneuburg as reported above, in its second question also sought clarification by the CJEU regarding the concept of contributory negligence, namely whether Article 20 MC was to be interpreted as meaning that any liability on the part of the air carrier ceased to exist in its entirety if a passenger who, for no ascertainable reason, fell on a mobile boarding stairway when disembarking from an aircraft and was not holding on to the handrail of the stairway at the time of the fall.

In this regard, the CJEU held that the referring court must, in accordance with the principle of procedural autonomy, to which recital 18 of Regulation No 889/2002 referred in particular, apply the relevant rules of national law, provided that those rules comply with the principles of equivalence and effectiveness, as defined by the CJEU's settled

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[93] Saggerson on Travel Law and Litigation, 7th edition, London [2022], p. 431 (10.51).

[94] AG CJEU, opinion of 12.01.2023 in case C-510/21 - *Austrian Airlines*; see 4.1.5) above.

[95] Ibid., para. 38

case-law.[96] It was therefore for the referring court to determine whether the air carrier concerned has proved negligence or a wrongful act or omission by the passenger concerned and if so to assess the extent to which that negligence, act or omission caused or contributed to the damage suffered by that passenger in order to exonerate, to that extent, that carrier from liability towards that passenger, taking account of all the circumstances in which that damage occurred.

While the fact that the passenger was not holding one of the handrails of the mobile stairway set up for the disembarkation was indeed capable of causing or contributing to the bodily injuries suffered by that passenger, the national court should not disregard that a passenger travelling with a minor child must also ensure the safety of that child. That may lead that passenger not to hold that handrail, or to stop doing so, in order to take the necessary measures to prevent the safety of that child from being compromised.[97] Furthermore, it should not be overlooked that the passenger claims that the sight of her husband's near fall caused her to be particularly careful when going down the stairs.

Similarly, it could not be ruled out that the fact that the injured passenger did not seek medical treatment immediately after the accident had contributed to the aggravation of the physical injuries she had suffered. However, the degree of severity that these injuries appeared to assume immediately after the accident event and the information given to the passenger on the spot by the medical staff with regard to delaying medical treatment and the possibility of receiving such treatment nearby must also be taken into account.

The first sentence of Article 20 MC therefore had to be interpreted as meaning that, where an accident which caused damage to a passenger consists of a fall of that passenger, for no ascertainable reason, on a mobile stairway set up for the disembarkation of the passengers of an aircraft, the air carrier concerned may be exonerated from its liability towards that passenger only to the extent that, taking account of all the circumstances in which that damage occurred, that carrier proves, in accordance with the applicable national rules and subject to the observance of the principles of equivalence and effectiveness, that the damage suffered by that passenger was caused or contributed to by the negligence or other wrongful act or omission of that passenger, within the meaning of that provision.

In summary, the CJEU leaves it to the national court to assess whether negligent conduct on the part of the passenger at least contributed to the damage in the specific case, but at the same time encourages the national court to proceed rather cautiously in this assessment in favour of the passenger.

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[96] CJEU judgment of 02. Jun. 2022, C-589/20 - *Austrian Airlines*, para. 29.

[97] Ibid., para. 31.

4.5) Bodily Injury

Article 17(1) MC provides for carrier liability only for death or bodily injury. A liability to pay compensation for purely mental damage has therefore been largely rejected up to now.

In *Eastern Airlines v. Floyd*,[98] a plane had narrowly avoided crashing during a flight between Miami and the Bahamas, after one of the plane's three jet engines had lost oil pressure and soon thereafter, the second and third engines failed due to loss of oil pressure. Passengers of that flight filed separate complaints seeking damages solely for mental distress arising out of the incident. The U.S. Supreme Court held that Article 17(1) WC did not allow recovery for purely mental injuries. Neither the Warsaw Convention itself nor any of the applicable legal sources demonstrated that the relevant Article 17 phrase, "lesion corporelle," (in the original French version of the convention) should be translated other than as "bodily injury" -- a narrow meaning excluding purely mental injuries. This conclusion was not altered by an examination of Article 17's structure, whereby "lesion corporelle" might plausibly be read to refer to a general class of injuries including internal injuries, in contrast with other language in the Article covering bodily ruptures.

A similar approach was taken by the Ontario Superior Court in *O'Mara v. Air Canada*:[99] the plaintiff filed a class action on behalf of passengers of an Air Canada flight from Toronto to Zurich during which the first officer had forced the aircraft into a sudden and steep dive after mistaking the light of the planet Venus for another aircraft. As a result, passengers were catapulted into the aircraft's ceiling and interior and suffered physical and psychological injuries. The court ruled out any claims for purely psychological injuries and mental distress, holding that these were not recoverable under the MC.

However, the U.S. Court of Appeals for the Sixth Circuit showed a somewhat more differentiated view in *Doe v. Etihad Airways*[100] that dealt with a passenger who was pricked by a hypodermic needle that lay hidden within the seatback pocket. She sought damages for her physical injury and her "mental distress, shock, mortification, sickness and illness, outrage and embarrassment from natural sequela of possible exposure" to various diseases. The court referred to the wording of Article 17(1) MC whereas the carrier is "liable for damage sustained in case of death or bodily injury of a passenger" and argued that "in case of" did not mean "caused by". Mental anguish therefore was not

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98 *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991).

99 *O'Mara v. Air Canada* 2013 ONSC 2931.

100 *Doe v. Etihad Airways*, P.J.S.C., No. 16-1042 (6th Cir. 2017)

only compensable if caused by the bodily injury but also if it results from an accident that also caused bodily injury, even though the mental anguish might not have derived from that bodily injury.

A related case referred to the CJEU by the Austrian Supreme Court,[101] was based on an incident concerning the engines of the aircraft:

During the take-off of a flight from London to Vienna, one engine of the aircraft exploded and the passengers were evacuated via an emergency exit. The jet blast from the other engine, which was still in motion, hurled the plaintiff several metres through the air while she was disembarking. Subsequently, she was diagnosed with post-traumatic stress disorder and received medical treatment.

In line with the Advocate General's Opinion, the CJEU stated in *Laudamotion*[102] that the term 'injury' refers to the alteration of an organ, tissue or cell due to a disease or an accident, whereas the term 'bodily' refers to the material part of an animate being, i.e. the human body. The term "bodily injury" could therefore not be interpreted to include a medically proven mental impairment which had no connection with bodily injury in the ordinary meaning of that term, because this would blur the distinction between bodily injury and mental impairment.

However, CJEU Court is of the opinion that one cannot yet infer from this that the authors of the MC intended to exclude liability on the part of the carrier for psychological injuries which were not connected with any bodily injury caused by the same accident. Although proposals aimed at expressly including the concept of ‘psychological injury’ in the text of the MC had not been successful, it was apparent from the preparatory works that the concept of ‘bodily injury’ was adopted ‘on the basis that, in certain States, damages for psychological injuries can be recovered under certain conditions, that case-law develops in this area, and that it is not envisaged that there will be interferences with that development, which depends on case-law in areas other than international carriage by air’.[103]

Moreover, one had to keep in mind the MC’s purpose to ensure the protection of the interest of the consumers and the need for equitable compensation based on the principle of restitution. The need for fair compensation requires equal treatment for passengers who have suffered injuries, whether bodily or psychological, of the same severity as a result of the same accident and therefore would be called into question if

[101] Austrian Supreme Court (OGH) order of 28 Jan. 2021, 2 Ob 131/20h.

[102] CJEU judgment of 20 Oct. 2022, C-111/21 - *Laudamotion*.

[103] CJEU judgment of 20 Oct. 2022, C-111/21*,* margin 26, referring to the minutes of the 6th meeting of the Plenary Commission of 27 May 1999, International Conference on Air Law, Montreal, 10 to 28 May 1999, Vol. I, minutes, p. 243.

Article 17(1) were to be interpreted as excluding as precluding compensation for psychological injuries caused by an accident but not linked to any bodily injury.

As the situation of a passenger who has suffered a psychological injury as a result of an accident may, depending on the seriousness of the harm, be comparable to that of a passenger who has suffered bodily injury Article 17(1) of the Montreal Convention had to be interpreted as allowing compensation for psychological injury also. However, in order to preserve an 'equitable balance of interests' of air carriers and of passengers the liability of the air carrier can be incurred, on the basis of Article 17(1) of the Montreal Convention, only if the aggrieved passenger demonstrates, to the requisite legal standard, by means in particular of a medical report and proof of medical treatment, the existence of an adverse effect on his or her psychological integrity suffered as a result of an 'accident', within the meaning of that provision, of such gravity or intensity such that it affects his or her general state of health, particularly in view of its psychosomatic effects, and that it cannot be resolved without medical treatment.

While parts of the reasoning, by mentioning psychological injury and bodily injury caused by the same accident, remind on the approach taken in *Doe v. Etihad Airways*, the operative part of the judgment goes beyond this because, according to its wording, it does not require bodily injury caused by the same accident in order for psychological injuries to be compensable.

The judgment once again shows the high value that the CJEU attaches to the principle of equal treatment and therefore gives priority to its observance over the wording of the legal provision to be interpreted.

4.6) Compensable Damage

Article 22 MC sets out limits of liability in relation to delay, baggage and cargo. The concept of "damage" in that Article was the issue of a preliminary ruling initiated by the Commercial Court of Barcelona.[104]

The plaintiff brought an action against the operating carrier claiming damages for the loss of checked baggage within a flight from Barcelona to Oporto. The amount of EUR 3200 which he claimed for consisted of EUR 2700 for the value of the lost baggage and EUR 500 or non-material damage resulting from that loss. The carrier objected to the claim arguing that the amount claimed for exceeded the limit of liability for loss of baggage as set out Article 22(2) MC, of (then) 1000 SDR.[105]

[104] Juzgado de lo Mercantil n° 4 de Barcelona.

[105] The liability limit for lost baggage has been increased to EUR 1288 as from 28 Dec. 2019.

The Commercial Court of Barcelona referred to case law of the Provincial Court of Barcelona according to which the limit of 1000 SDR would not include non-material damages but these were subject to a further limit of another 1000 SDR, hence resulting to a combined limit of 2000 SDR. The referring court did not find this interpretation convincing and therefore sought clarification by the CJEU.

In the judgment of 6 May 2010,[106] the CJEU emphasized that the MC did not contain any definition of the term 'damage', but, in the light of the aim of that convention, which was to unify the rules for international carriage by air, that term had to be interpreted in a uniform and autonomous way, notwithstanding the different meanings given to that concept in the domestic laws of the States Parties of the MC. Once again, the CJEU referred to Article 31 of the Vienna Convention on the Law of Treaties according to which a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[107]

The Court then continued by referring to Article 31(2) of the Articles on Responsibility of States for Internationally Wrongful Acts[108] which provides that '[i]*njury includes any damage, whether material or moral …*'.´These two aspects of the concept of damage may thus be regarded as jointly expressing the ordinary meaning to be given to the concept of damage in international law.[109] In accordance with Article 31 of the Vienna Convention on the Law of Treaties, the term "damage" therefore had to be construed as including both, material and non-material damage. As a result, the liability limit laid down in Article 22(2) MC must be applied to the total damage caused and is therefore an absolute limit which includes both non-material and material damage.

It is interesting, however, that the CJEU derives the broad concept of damage in particular from the term "injury", which is used in the MC in connection with personal injury but not in connection with damage due to loss of baggage or otherwise related to baggage. In connection with the *Laudamotion* ruling, it follows that psychological stress and impairments due to an accident are only compensable if they are equivalent in intensity to bodily injury, whereas in the case of damage in connection with luggage, even less intense immaterial damage such as 'lost holiday enjoyment' must be compensated within the liability limit.

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[106] CJEU judgment of 6 May 2010, C-63/09 - *Walz*.

[107] CJEU judgment of 6 May 2010, C-63/09, margin 23.

[108] Drawn up by the International Law Commission of the UN and taken note of by the UN General Assembly in Resolution 56/83 of 12 December 2001, accessible at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N01/477/97/PDF/N0147797.pdf?OpenElement (accessed 5 May 2023).

[109] CJEU 6 May 2010, C-63/09, margins 27 and 28.

A similar decision was made in 2008 by the Sheriffdom of Grampian Highland and Islands at Aberdeen[110] when it came to two pieces of luggage that were delayed by 48 hrs. on a flight from Aberdeen to Dublin. Apart from their out-of-pocket expenses, the plaintiffs also sought compensation for their stress, inconvenience, frustration and disruption to their holiday. The judge rejected the argument of the defendant's representative, that the word “damage” where it appears in Article 19 MC would not be apt to include damages for stress and inconvenience occasioned by the delay in the carriage of passengers, baggage or cargo. It was perfectly clear that damages in respect of stress, inconvenience, frustration and disruption to holiday were not “punitive, exemplary or non-compensatory” as they were not intended to punish the defendant or to make an example of them, nor were they non-compensatory. While such kind of damages may have been excluded under the Warsaw Convention, it had to be taken into regard that the MC was more oriented towards consumers and there was no suggestion that the damages sought by the plaintiffs were in any way excessive.

4.7) Persons entitled to compensation

Another issue that required clarification by the CJEU is the question to whom the air carrier is liable under the articles of Chapter III of the MC.

4.7.1) The Air Baltic judgment

The first respective case, referred to the CJEU by the Supreme court of Lithuania,[111] involved two agents of an Investigation Service who were supposed to travel with Air Baltic from Vilnius via Riga and Moscow to Baku for business reasons. While the flight from Vilnius to Riga was on schedule, the connecting flight to Moscow was delayed and the two agents missed their further connection to Baku. Air Baltic rebooked them to another flight and they arrived in Baku one day later than originally scheduled. Due to this delay, the Investigation Service had to pay additional travel expenses and social security contributions, for which they demanded compensation from Air Baltic.

Air Baltic argued that a legal person, such as the Investigation Service, may not invoke the liability of an air carrier under Article 19 MC. They may be held liable only in respect of the passengers themselves and not of other persons, even more so if these were no natural persons and therefore could not be considered as consumers.

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[110] *O’Carroll v. Ryanair*, [2008] SA1059/07.

[111] Lietuvos Aukščiausiasis Teismas.

In its judgment *Air Baltic* of 17 Feburary 2016[112], the CJEU considered that it had to be determined first whether the damage at issue came within the scope of the Convention. With reference to the various language versions and their slightly different wording, the court noted a tendency supporting an interpretation of Article 19 MC as not only applying to damage cause to passengers themselves but also to damage suffered by an employer who is the contractual partner of the carrier in the contract of international carriage.

In addition, Article 1(1) MC defined the scope of application as any international carriage of persons, baggage or cargo performed by aircraft for reward. Although that provision did not define who retain the services and might, in that capacity, suffer damage, Article 1(1) should be interpreted in the light of the third recital and could not be construed as excluding persons who retain the services of an international air carrier for the purpose of carriage of their employees as passengers from the scope of application of the convention and, consequently, any damage they may suffer in that connection.

Finally, the MC established a link between the air carrier's liability and the presence of a contract of international air carriage of that carrier and another party and it therefore could not be regarded as of particular relevance for the purposes of liability whether or not that other party was itself a passenger. The limitation of liability "for each passenger" would ensure that air carriers cannot be held liable beyond this limit, regardless of whether a claim is brought by the passengers themselves or by an employer who has contracted with an air carrier for the international carriage of passengers who are its employees.

Articles 19, 22 and 29 MC therefore must be interpreted as meaning that an air carrier which has concluded a contract of international carriage with an employer of persons carried as passengers, such as the employer at issue in the main proceedings, is liable to that employer for damage occasioned by a delay in flights on which its employees were passengers pursuant to that contract, on account of which the employer incurred additional expenditure.

The reasoning is comprehensible and convincing: in effect, it is merely a case of shifting the damage. If the passengers had not been transported in their capacity as employees, they themselves would have been burdened with the adverse consequences of the delay. The fact that the employer paid them for this damage cannot lead to an exemption of the tortfeasor, i.e. the air carrier, from liability.

[112] CJEU judgment of 17 Feb. 2016, C-429/14 - *Air Baltic Corporation*.

4.7.2) The Wucher judgment

In the case of *Wucher*, Mr. Santer, a member of the avalanche commission, responsible for safety in the glacier area and his employer's ski pistes, was seriously injured on a domestic helicopter flight over glacier territory. The operator of the helicopter was engaged by Mr. Santer's employer for an 'avalanche blasting flight'. Mr. Santer's tasks were to direct the pilot to the places where the explosive charges were to be thrown out and to open the helicopter door when the pilot gave the word and to hold it open as wide and for as long as the blaster sitting behind him needed to throw out the charge. During that procedure, a sudden gust of wind gripped the slightly opened door, causing it to fly open. Mr. Santer was unable to let go of the door loop in time and consequently suffered a serious injury to the elbow joint. He claimed for compensation.

The Austrian Supreme Court regarded it as crucial for the application of the liability regime of the Montreal Convention whether the injured person was to be considered a 'passenger' and referred the issue to the CJEU, as the concept of 'passenger' was not defined in the MC or in the case-law of the CJEU. Mr. Santer could have the status of a 'passenger', on the one hand, or possibly the status of 'member of the crew' or 'third party', on the other. The CJEU therefore was asked to clarify whether Article 3(g) of Regulation No 785/2004[113] had to be interpreted as meaning that the occupant of a helicopter held by a Community Carrier was a 'passenger' and, if answered in the affirmative, whether Article 17(1) MC had to be interpreted as meaning that the term 'passenger (German: "Reisender") in any event included a 'passenger' (German: "Fluggast") within the meaning of Article 3(g) of Regulation (EC) No 785/2004.

In its judgment of 26 Feb. 2015,[114] the CJEU held that the occupant of a helicopter held by a Community air carrier, who is carried on the basis of a contract between that air carrier and the occupant's employer in order to perform a specific task, such as that at issue in the main proceedings, was a 'passenger' within the meaning of Article 3(g) of Regulation No 785/2004.

The CJEU further considered that the MC became applicable to flights within a single Member State by virtue of Regulation No 2027/97, the purpose of which was to endure the same level and nature of liability for air carriers and EU air carriers in international and national transport throughout the European Union. Wucher came within the definition of 'Community air carrier' to which Regulation No 2027/97 applied, since it was an air transport undertaking holding a valid operating licence issued by the Republic of Austria.

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[113] Regulation (EC) No 785/2004 of the European Parliament and of the Council of 21 April 2004 on insurance requirements for air carriers and aircraft operators.

[114] CJEU judgment of 26 Feb. 2015, C-6/14 - *Wucher Helicopter and Euro-Aviation Versicherung*.

It had to be determined whether the purpose of the flight at issue was the 'carriage of passengers' within the meaning of the MC. Although under Article 3(1) and (2) MC the status of 'passenger' within the meaning of the convention was linked to the issuance of an individual or collective document of carriage, it followed from Article 3(5) MC that non-compliance with the provisions of the preceding paragraphs would not affect the existence or the validity of the contract of carriage, which, none the less, was to be subject to the rules of that convention including those relating to limitation of liability.

The purpose of the flight at issue was the carriage of employees of the client to the places where they had to perform their usual tasks. Thus, Article 17 MC had to be interpreted as meaning that a person who comes within the definition of 'passenger' within the meaning of Article 3(g) of Regulation No 785/2004, also comes within the definition of 'passenger' within the meaning of Article 17, once that person has been carried on the basis of a 'contract of carriage' within the meaning of Article 3 of that convention.

It was rightly criticized that the CJEU's reasoning in this case was unclear and mixed up the provisions of MC convention with pure EU law concepts, an approach which infringes on the concept of autonomy of the Conventions and prevents their uniform application.[115]

4.8) Liability for baggage

4.8.1) The Espada Sánchez judgment

According to Article 22(2) MC, in the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to (now) 1288 SDR for each passenger. But what if passengers share one piece of baggage or a passenger checks in more than one piece?

The CJEU case Espada Sánchez concerned a couple and their two children, both minors, who boarded a flight from Barcelona to Paris. The baggage of that family of four had been packed into two suitcases, which both were lost during the flight and have not been recovered. They sought damages of four times the limit provided for in Article 22(2). The Provincial Court of Barcelona referred the case to the CJEU for preliminary ruling.[116]

[115] GRIGORIEFF, Cyril-Igor, (2021) The regime for international air carrier liability: to what extent has the envisaged uniformity of the 1999 Montreal Convention been achieved?, p. 176.

[116] Audiencia Provincial de Barcelona.

In its judgment of 22 November 2012[117], the court once again referred to the Vienna Convention on the Law of Treaties, according to Article 31 of which states that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose. It was apparent from Article 17(2) MC, providing for a liability of the carrier for damage sustained in the event of loss of baggage, and Article 22(2), limiting that liability to (then) 1000 SZR "for each passenger", that it was the *passenger* who was entitled within the limit, to compensation for the damage sustained. Even though Article 3(3) referred to a baggage identification tag for each piece of baggage that only imposed an obligation to ensure that checked baggage is identifiable but from this it could not be concluded that the right to compensation for loss of baggage and the limitations on this right referred to in Article 22(2) MC only applied to passengers who have checked in one or more pieces of baggage.

The court then referred to the system of strict liability imposed by the MC which implied an 'equitable balance of interests'.[118] It could validly be argued that granting a right to compensation under Article 22(2) of the Montreal Convention to a passenger whose items were in baggage checked in by another passenger would compromise the equitable balance of interests in that it would impose a very heavy compensatory burden on air carriers - which would be difficult to determine and calculate - and would be liable to undermine, if not paralyse, the economic activity of those carriers, thereby breaching the convention:[119] granting such a right in no way prevented air carriers from being able to identify and calculate clearly, in respect of each passenger, the burden of compensation liable to be imposed upon them.[120]

All in all, Article 22(2), read in conjunction with Article 3(3) therefore had to be interpreted as meaning that the right to compensation and the limits to a carrier's liability in the event of loss of baggage apply also to a passenger who claims that compensation by virtue of the loss of baggage checked in in another passenger's name, provided that the lost baggage did in fact contain the first passenger's items.

In Canada, the Superior Court of Justice of Ontario, however, took a different view:

In *ACE Aviation Holding v. Holden*,[121] only Mrs. Holden had checked a piece of baggage while Mr. Holden had not. The checked bag, however, contained articles that belonged to Mrs. Holden and articles that belonged to Mr. Holden of which they advised

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[117] CJEU judgment of 22 Nov. 2012, C-410/11 - *Espada Sánchez.*

[118] Ibid., para. 30.

[119] Ibid., para. 32.

[120] Ibid., para. 33.

[121] *ACE Aviation Holding Inc. v. Holden* [2008], 240 O.A.C. 184 (DC).

the airline's agent when checking in. The bag was lost and was never recovered and they both sought damages arising from the loss of his and her respective articles contained in that piece of baggage.

There was a dispute as to how the term "passenger" in Article 22(2) should be understood: the air carrier argued it denoted an individual who is on the flight and who has checked the piece or pieces of baggage lost while the passengers claimed it denotes an individual who is on the flight without regard to whether he or she has checked a piece of baggage.

The court concurred with the carrier's approach: construction of the word "passenger" advanced by the defendant air carrier was consonant with the purposes of uniformity, certainty and predictability whereas the construction advanced by the claimants would allow for the anomalous result that any passenger on a flight could advance a claim for compensation arising out of loss of another passenger's baggage.[122] The proper construction of the word "passenger" in the context of Article 22(2) therefore was the one which denotes an individual who is a passenger and who has checked the piece of baggage that is lost. That construction was consonant with the purposes of the Convention and results in all of the language of the Article having meaning and internal logic. It avoided the potential for exposure to an uncertain quantum of liability and exposure to an uncertain number of claimants. There was no prejudice to the passenger as he or she was at liberty to check his or her own bag and/or make the special declaration contemplated in the Article.[123] The air carrier's appeal therefore was granted.

Naeini v. Air Canada,[124] similar to *Espada Sánchez*, concerned a family trip from Bogota to Toronto, with a stop-over in Miami. Mr. Naeini, the father, checked eight pieces of luggage at the counter in Miami and produced luggage tags in his name for seven pieces of luggage. When the family arrived in Toronto, five pieces of luggage were missing. Only one bag was later delivered to the claimants, the four other pieces of luggage remained lost.

The court held that the circumstances here were quite different from those in *Holden*: while the ration of the latter simply was that two passengers cannot check the same bag the claimants in the present case claimed that they were each passengers who have separately checked baggage. *Holden* wouldn't say anything at all with regard to the significance of baggage tags nor would it address the concept of "checking" baggage.[125] The trial judge had had ample evidence to conclude, as a matter of law, that each of the

[122] Ibid., margin 20.

[123] Ibid., margin 21.

[124] *Naeini v. Air Canada* [2019] ONSC 1213.

[125] Ibid., margin 25.

other family members checked their own bags when the father handed them to the air carrier's representative at the counter. It was significant that the carrier's representative did not treat all of the bags as belonging to the father alone, as evidenced by the fact that he was not charged extra baggage fees.[126] As a result, each of the family members was a passenger who checked luggage with the air carrier that was lost while under the control of the carrier.[127]

In my view, the interpretation of Article 22(2) as taken by the CJEU is more convincing. The provision speaks about "each passenger" without explicitly requiring that it must have been the passenger claiming compensation who checked in a piece of baggage. According to the Canadian court's opinion, there would have to be a checked-in piece of baggage for each passenger that could be individually assigned to him or her, which may often not correspond to the reality of life for family travel, especially with younger children. Strict application of the limit per passenger (regardless of whether a passenger has himself or herself checked in baggage) also seems preferable to me for reasons of legal certainty. In order to successfully assert a claim in court, each passenger must in any case prove that he or she has suffered an actual damage due to the loss, damage or delay of a piece of checked-in baggage.

4.8.2) The Vueling judgment

As the term "limit" suggests, it denotes a maximum amount and not a standard amount to be reimbursed in any case. Notwithstanding this, the trial court in *Naeini* had awarded each of the claimants the maximum amount under Article 22(2), even though they had declared the value of the lost luggage to be only USD 6,800. The Superior Court of Justice of Ontario therefore reduced the award to this value.

Although the situation seems quite clear, the CJEU also had to deal with the issue in the case of a passenger whose baggage was lost on a flight from Ibiza to Fuerteventura. The passenger claimed for the full amount of the limit without indicating details of the content of the baggage or providing documents proving any purchases made to replace the lost items. The passenger only submitted that "loss" was the most serious case of baggage damage under Article 22(2) MC and therefore the maximum amount should be awarded - a concept which was obviously applied by some courts in Spain. The Commercial Court No. 9 of Barcelona[128] had justified doubts about this interpretation and referred the issue to the CJEU.

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[126] Ibid., margin 26.

[127] Ibid., margin 27.

[128] Juzgado de lo Mercantil No 9 de Barcelona.

In its judgment in *Vueling*,[129] the CJEU first dealt with the admissibility of the reference for a preliminary ruling, as the air carrier had quite understandably objected that the answer was obvious anyway and could be derived in particular from the *Walz* judgment,[130] so that there could be no reasonable doubt. In this regard the CJEU held that it was solely for the national court before which the dispute had been brought, to determine, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the CJEU. The Court therefore rejected the carrier's argument in this regard.[131]

On the substance, the CJEU distinguished between the question of whether the compensation under Article 17(2) in conjunction with Article 22(2) MC was to be paid on a fixed-sum basis and the question of how the amount of compensation was to be determined if it was not an automatically payable fixed sum.

In relation to the first question, the Court referred to its *Espada Sánchez* judgment,[132] according to which the limit laid down in Article 22(2) MC constitutes a maximum limit for compensation which cannot accrue automatically and in full to any passenger, even in the event of loss of his or her baggage. It further referred to the *Walz* judgment, clarifying that the limitation of compensation laid down in Article 22(2) of the Montreal Convention must be applied to the total damage caused, regardless of whether that damage is material or non-material.

It would not follow from either Article 17(2) or Article 22(2) MC that loss of baggage must be regarded as the most serious case of damage to baggage, so that compensation corresponding to the sum laid down in the latter provision would be automatically payable to the passenger harmed merely because such a loss has been established.[133] Rather, the amount of compensation payable to a passenger whose checked baggage (which has not been the subject of a special declaration of interest in delivery) has been destroyed, lost, damaged or delayed had to be determined, within the limit laid down in Article 22(2) MC, in the light of the circumstances of the case.[134] That limit, therefore, constituted a maximum amount of compensation which the passenger concerned does not enjoy automatically and at a fixed rate. Consequently, it was for the national court to determine, within that limit, the amount of compensation payable to that passenger in the light of the circumstances of the case.

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[129] CJEU judgment of 9 Jul. 2020, C-86/19 - *Vueling.*

[130] CJEU judgment of 6 May 2010, C-63/09 - *Walz*; see 4.5) above.

[131] CJEU judgment of 9 Jul. 2020, C-86/19, para. 23.

[132] CJEU judgment of 22 Nov. 2012, C-410/11 - *Espada Sánchez*; see 4.7.1) above.

[133] CJEU judgment of 9 Jul. 2020, C-86/19, para. 33.

[134] Ibid., para. 34.

In this respect, it had to be noted that neither the MC nor Regulation No. 2027/97, which implements the relevant provisions of this Convention on the Carriage of Passengers and their Baggage by Air, contain specific provisions on the proof of damage referred to in this Convention. In accordance with the principle of procedural autonomy, the relevant provisions of national law must therefore be applied, but they must not be less favourable than those applicable to similar domestic actions (principle of equivalence) and must not be framed in such a way as to render practically impossible or excessively difficult the exercise of the rights conferred by the legal order of the European Union (principle of effectiveness). It was for the passengers concerned to establish to the requisite legal standard, in particular by documentary evidence of expenditure incurred in order to replace the contents of their baggage, the harm suffered in the event of destruction, loss and delay of, or of damage to, that baggage, and for the competent national courts to ascertain that the applicable rules of national law, in particular in relation to evidence, do not render impossible in practice or excessively difficult the exercise of the right to compensation that passengers derive from those provisions. Factors such as the weight of the lost luggage and whether the loss occurred during an outward or return journey could be taken into account by the national court, but the national court was obliged to use all the procedures available to it under national law, including ordering the necessary investigative measures, in particular the production of a specific document by one of the parties or a third party, if it found that the burden of proof might make it impossible or excessively difficult for the passenger to provide that evidence.

The CJEU's judgment is convincing. According to the wording of the MC, it was not intended to set any standardised compensation, but to set maximum limits up to which passengers can claim compensation for their actual damages. It is also an important clarification that national courts must use the possibilities offered by their procedural rules to enable passengers to obtain adequate compensation in the event of difficulties in providing evidence.

4.8.3) The Finnair judgment

With regard to checked baggage, Article 31 MC provides for very short deadlines to make a written complaint to the air carrier in case of damage (seven days) or delay (twenty-one-days).[135] If no complaint is made within these time limits, the carrier can no longer be held liable, unless there was fraud.[136]

[135] Article 31(2) MC.

[136] Article 31(4) MC.

There is no international consensus on whether a so called “Property Irregularity Report” (P.I.R.) as usually filled in at the lost and found desk. It was argued that such a P.I.R. only serves for the computerised search for the piece of baggage in question, but not for the assertion of a claim.[137]

In the case *Finnair*, a passenger on a Finnair flight from Málaga to Helsinki found on arrival that several items were missing from her checked baggage. She notified a Finnair customer service representative by telephone that same day, identified the lost items and informed that representative of their value. The representative entered the information into Finnair’s electronic information system. Two days later, the passenger again telephoned the Finnair customer service to obtain a certificate for her insurance company. Finnair issued her with a certificate of the lodging of a declaration of loss.

The insurance company covered the damage and claimed redress against Finnair. Finnair objected to the claim and argued that no written complaint had been made within the seven-day time limit of Article 31(2). While the court of first instance followed this view and dismissed the claim, the Court of Appeal considered that the instructions on Finnair's website were unclear and potentially misleading and that a consumer could therefore reasonably assume that a complaint submitted by telephone and registered by an employee of the company would also meet the requirements for a formal written complaint. The written certificate of the lodging of a declaration of loss issued by Finnair proved that the passenger’s complaint had been recorded timeously in Finnair’s information system. Moreover, Finnair had not informed the passenger that it considered such a statement insufficient for filing a claim and had not pointed out that the passenger also had to file a written complaint. The Court of Appeal therefore set aside the first instance judgment and ordered Finnair to compensate the insurance company.

On appeal of Finnair, the Finnish Supreme Court[138] referred the matter to the CJEU.

In its judgment of 12 April 2018,[139] the CJEU held that Paragraphs 2 and 3 of Article 31 of the Montreal Convention are complementary in nature and, read in conjunction, must be interpreted as requiring that a complaint be made in writing and sent to the air carrier within the periods set out in Article 31(2). A person who takes the view that he has incurred loss caused by damage to baggage or cargo must complain to the air carrier within the periods set out in Article 31(2) of the Montreal Convention, failing which no action may be brought against the carrier.

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[137] REUSCHLE Fabian, Berlin (2011), Montrealer Übereinkommen, p. 379; opposite view: GIEMULLA, Elmar in Giemulla/Schmid, Frankfurt (2022), Article 31, margin 16.

[138] Korkein oikeus.

[139] CJEU judgment of 12 Apr. 2018, C-258/16 - *Finnair Oyi*.

The ordinary meaning of the term 'in writing' involved a set of meaningful graphic signs. In view of the third paragraph of the preamble to the MC, which emphasises the importance of protecting the interests of consumers in international air transport, and the principle of 'fair balance of interests' referred to in the fifth paragraph of the preamble to that Convention, the requirement of the written form cannot have the effect of excessively restricting the specific manner in which a passenger may make his complaint, provided that that passenger remains identifiable as the one who made the complaint. A complaint recorded in the information system of the air carrier therefore had to be regarded as meeting the requirement of a written form under Article 31(3) MC.[140]

Although the responsibility for lodging a complaint lay exclusively with the passenger, it could in no way be inferred from the wording of Article 31 MC that the passenger was deprived of the liberty to benefit from the assistance of other persons, in particular the assistance of a representative of the air carrier, for the purposes of making his complaint. Thus, Article 31(2) and (3) MC had to be interpreted as not precluding the requirement of the written form from being deemed to have been fulfilled if a representative of the air carrier, with the knowledge of the passenger, recorded in writing the declaration of loss either on paper or electronically in the carrier's information system, provided that the passenger can check the accuracy of the text of the complaint, as taken down in writing and entered in that system and can, where appropriate, amend or supplement it, or even replace it, before expiry of the period provided for in Article 31(2).[141] As far as the content of the complaint was concerned, there were no further substantive requirements apart from the notification of the damage to the air carrier.[142]

As a result, the CJEU has once again used the preamble of the MC to answer a contentious question of interpretation in a consumer-friendly way.

5) CONCLUSIONS

With currently 139 parties, including 138 State Parties and the European Union,[143] the MC is of immense importance for the liability of air carriers. It is even more important within the EU because of the extension of its applicability to domestic travel. While the MC has brought significant improvements as compared to the WC, the language of its provision still is vague to a large extent and thus opens up a wide scope of interpretation for the courts of the State Parties.

[140] Ibid., para 36.

[141] Ibid., para. 47.

[142] Ibid., para. 54.

[143] https://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf, access 12 May 2023.

The lack of a body that could make a binding interpretation for all members has led to sometimes serious differences of opinion. On the other hand, however, in many areas the courts can fall back on the extensive and decades-long case law not only on the MC but also already on the WC, which in some areas has also led to an international consensus.

It seems obvious that the EU not only influenced the drafting of the MC, but also influences its interpretation through the integration of the MC into Union law and its supplementation and extension by European secondary law. The CJEU plays an important role in this respect, as it has already dealt with the interpretation of the MC on several occasions, as outlined above.

Not only because of its status as an international convention on the one hand and an integral part of Union law on the other, but also and especially because of its interpretation by the CJEU, the MC shows two faces:

On the one hand, the interpretation by the CJEU, which is binding on all EU Member States, can contribute to the intended uniform application of the liability provisions. The case law of the CJEU can even have an effect beyond the EU, because the courts of other State Parties pay particular attention to the rulings of the CJEU as the highest court of the 27 EU member states and (at least in part) follow them, which can at least lead to an approximation of case law within and outside Europe.

On the other hand, it seems that the CJEU, for its part, often takes little account of the case law of other courts, seeking a specifically European view rather than an international one. The examples from case law show that the CJEU itself sometimes simply pushes aside decades of case law, which is even quite uniform internationally, and focuses only on its own view. In doing so, the CJEU does not promote a unification but a fragmentation of MC jurisprudence, because it is not to be expected that courts outside the European Union will change their established case law if the CJEU does not even give specific reasons why it has not followed this case law.

The remarks of AG Emiliou are therefore to be fully agreed with:[144] The CJEU "*is but one of many jurisdictions throughout the world that are competent to interpret the Montreal Convention, and since the uniform application of that convention in all States Parties is an aim to be pursued, it is appropriate for the Court to duly take into account, and give the required weight, to the decisions handed down by the courts of those States Parties*."

The fragmentation of the WC was a major cause of the need for a new convention, the MC, in order to get closer to the goal of uniform regulations again. The CJEU should

[144] AG CJEU, Opinion of 12.01.2023 in case C-510/21 - *Austrian Airlines*, para. 38.

therefore always keep the international dimension of its judgments in mind and avoid creating new differences of opinion through its case law.

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