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CONSUMER PROTECTIONS AND LIMITED LIABILTY: GLOBAL ORDER FOR AIR TRANSPORT?

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I. Introduction

The proliferation of air passenger rights regimes around the globe, at least half of which were introduced in the past seven years, presents a real challenge for many stakeholders in air transport. On the one hand, national rules often vary from state to state; they overlap and are often complex or conflicting, which can be seen as creating rather ambiguous liability for the air transport sector, in particular for airlines and airports. On the other hand, the inherent nature of air transport is that it is international. A passenger holding a common itinerary may have rights under one or more air passenger rights regimes during his or her journey. If the travel does not go exactly as planned, attempts by the affected passenger to acquire information about, understand and enforce his or her consumer rights may prove onerous. National authorities could also fail to provide adequate complaint handling and compliance checking procedures. What results ultimately flies in the face of the purported aims of national and regional regimes, which surely is to provide consumer *protection*.

This comment identifies recent developments at the International Civil Aviation Organization (ICAO), a UN specialized agency, within the sphere of consumer protection for air transport. The current state of affairs is considered alongside discussion on certain aspects of the current air passenger rights in the European Union (EU) and the limited air carrier liability regime of the Convention for the Unification of Certain Rules for International Carriage by Air ('Montreal Convention') 1999, and the issues that arise with respect to interpretation and application of the law. The following reveals the significance of the intersection of consumer protection for passengers at national and regional levels, and limited liability for airlines at international law, that has given rise to a recent call for global order vis-à-vis core principles on air passenger rights at international law.

II. Core Principles

At its 38th General Assembly ('the Assembly'), held between 24 September and 4 October 2013 in Montréal, ICAO's Economic Commission called on the Council to 'develop, in the short term, a set of high-level, non-prescriptive core principles on consumer protection, for use as policy guidance, which strike an appropriate balance between protection of consumer and industry competitiveness and which take into account the needs of States for flexibility,

given different State social, political and economic characteristics; with existing instruments, in particular that of the [Montreal Convention]'.[1] At the Assembly, on the basis of recommendations made at the Sixth Worldwide Air Transport Conference (ATConf/6) held in March 2013, representatives from Columbia, the Dominican Republic, Singapore and Lithuania, on behalf of the 28 Member States of the European Union (EU) and 16 additional European Civil Aviation Conference (ECAC) States, with the support of key industry organisations such as International Air Transport Association (IATA), Airports Council International (ACI) and the World Tourism Organization (UN WTO), each presented working papers in support of core principles for consumer protection in air transport. Several other ICAO States and observers offered oral submissions that were widely supportive.

Interestingly, ICAO Member States also adopted the Montreal Convention as successor to the Warsaw Convention 1929; to date, only 103 of the 191 ICAO Member States have ratified it.[2] According to IATA, the Montreal Convention 'creates an exclusive and uniform legal framework for air carrier liability in the international air carriage of passengers and baggage, including damages caused by flight delays.'[3] This, as will be shown below, aligns with the purported compatibility of the EU regime with international law. Scholars argue that the Convention deals specifically with the misfeasance of the contract of carriage; leaving 'non-feasance' to the law of obligations.[4] It follows that air passenger rights regimes, however, seek to provide redress to the affected passenger; they do not necessarily question what happens to the flight.

III. The EU Regime: Regulation 261/2004

The current air passenger rights in the European Union (EU) serve as a useful regime to compare and explore how international law in this area, the Montreal Convention, has been interpreted and applied by national courts of EU Member States and the Court of Justice of the EU (CJEU).

Aviation was the first sector to benefit from passengers rights in the EU following the Package Travel Directive (90/314/EEC)[5] and Denied Boarding Regulation (295/91/EEC)[6],

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[1] ICAO, *Report of the Economic Commission on Agenda Item 40* (Working Paper, A38-WP/409, 2013) 40-6.

[2] The EU has also ratified the Montreal Convention; Council Decision (EC) 2001/539 on the conclusion by the European Community of the Convention for the Unification of Certain Rules for International Carriage by Air (the Montreal Convention) [2001] OJ L194/38.

[3] ICAO, *Consumer Protection: A Joined Up Approach Required Between Governments and Industry* (Working Paper, ATConf/6, WP/68, 2013) 2.

[4] PPC Haanappel, 'The New EU Denied Boarding Compensation Regulation of 2004', 54 Zeitschrift fur Luft- und Weltraumrecht [2005] 22.

[5] Council Directive (EEC) 90/314 on travel, package holidays and package tours [1990] OJ L158/59; *See also* European Commission, *Commission Working Document on the Council Directive 90/314/EEC of 13 June 1990 on travel, package holidays and package tours* (2007); The Package Travel Directive was one of eight directives covered by the Review of the Consumer Acquis. In the light of the outcome of the consultation on the Green

the latter of which was repealed by the current EU rules under Regulation (EC) No 261/2004. Since coming into force in early 2005, Regulation 261/2004 has been both topical and contentious.

According to the European Commission, 'Europe's success in securing and upholding passenger rights is one of the resounding achievements of EU transport policy.'[7] With that said, the CJEU has on numerous occasions, in response to references made by national courts of EU Member States, interpreted the meaning and applicability of Regulation 261/2004. It should come as no surprise, therefore, that critics from both consumer groups and industry have been vociferous in their concerns from the very start. On the whole, CJEU jurisprudence on the ambiguities of Regulation 261/2004 can be seen as lacking certainty, from which ensues confusion around the extent of air passenger rights and air carrier liability.

Over the past two years alone, the CJEU's interpretation and expanded jurisprudence have included such crucial matters as compensation for flights cancelled owing to technical failures[8] and airport strikes[9], or even following closure of airspace owing to 'extraordinary circumstances' occasioned by a volcanic eruption[10]; time limits for passengers to bring claims[11]; the freedom to opt–in to flight cancellation insurance[12]; and most recently, air carrier liability for baggage containing personal property of one party checked in under another party's name.[13]

IV. Conflict or Inconsistency?

There are a number of instances of potential conflict or inconsistency between the EU air passenger rights regime where interpretation and application of the Montreal Convention are concerned. In *IATA and ELFAA*, for example, the CJEU held on the question of the EU regime's consistency with international law as follows: 'Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such *standardised and immediate compensatory measures*, they are not

Paper and the input to the consultation in this working document, the Commission will consider the need for a reform of the Directive.

[6] Regulation (EEC) 295/91 establishing common rules for a denied–boarding compensation system in scheduled air transport [1991] OJ L36/5.

[7] European Commission Press Release, 'Top News' (12 March 2013) Agenda/13-9.

[8] Case C–549/07, *Friederike Wallentin–Hermann v Alitalia*, ECR 2008, P. I–11061, 2 December 2008; Case C–83/10, *Aurora Sousa Rodríguez and Others v Air France SA*, 13 October 2011 (a preliminary ruling).

[9] Case C–22/11 *Finnair Oyj v Timy Lassooy* [2012] (preliminary reference).

[10] Case C–12/11 *Denise McDonagh v Ryanair Ltd* [2012] (preliminary reference).

[11] Case C–139/11 *Joan Cuadrench Moré v Koninklijke Luchtvaart Maatschappij NV (KLM)* [2012] (preliminary ruling).

[12] Case C–112/11 *ebookers.com Deutschland GmbH v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV* [2012] (preliminary ruling); It should be noted that this case was brought on the interpretation of Regulation (EC) 1008/2008 on common rules for the operation of air services in the Community OJ [2008] OJ L293/3.

[13] Case C–410/11 *Pedro Espada Sánchez and Others v Iberia Líneas Aéreas de España SA* [2012] (preliminary ruling).

among those whose institution is regulated by the [Montreal] Convention. The system prescribed in Article 6 simply operates *at an earlier stage* than the system which results from the Montreal Convention'.[14] (emphasis added)

There also appears to a considerable divide between EU air passenger rights and the Montreal Convention in terms of the actual application and general applicability of the two regimes to individual cases. For instance, the United Kingdom (UK) courts apply the provisions of the Montreal Convention without, or at most with little, interpretation whereas the CJEU tends to take what has been called a 'hybrid approach' [15]; historically, the CJEU has taken jurisdiction to interpret substantive rules of the Convention so as to clarify, or arguably even expand the scope and broaden the logic of Regulation 261/2004.

In Europe, but also beyond Europe insofar as preliminary rulings of the CJEU concern flights operated by non-EU carriers and passengers from third countries, the CJEU's judicial intervention has indeed caused a confusing state of affairs for industry and consumers, and is in desperate need of legislative recast. In essence, three areas of consumer protection require urgent review: (1) 'extraordinary circumstances', (2) burden sharing and (3) compensation.

First, legislative clarification of the ambiguous phrase 'extraordinary circumstances' contained in Regulation 261/2004 and the impact of such situations is needful. In *Wallentin–Hermann*, the CJEU held that the words 'extraordinary circumstances' in Art. 5(3) of Regulation 261/2004 should be interpreted strictly, commenting that 'a technical problem in an aircraft which leads to the cancellation of a flight is *not* covered by the concept of "extraordinary circumstances" [...], unless that problem stems from events which, by their nature or origin, are *not inherent* in the normal exercise of the activity of the air carrier concerned *and* are beyond its actual control'.[16] (emphasis added)

In response to a tendency amongst airlines to let passengers sit out the delay rather than to cancel flights in the wave of its ruling in *Wallentin–Hermann*, the CJEU's Grand Chamber confirmed the joined cases of *Sturgeon and Others*[17] and *Böck and Lepuschitz* in *Nelson and Others*[18], and held that inconvenience to passengers resulting from long delay is comparable to inconvenience brought about by cancellation, and results in damage (i.e. loss of time) that

[14] Case C–344/04 *The Queen on the Application of International Air Transport Association, European Low Fares Airline Association v Department for Transport* [2006] ECR I-403, para 46.
[15] Jeremias Prassl, 'Case C–410/11 Pedro Sanchez v Iberia: Shared Baggage, Single Interpretation' (*Eutopia Law*, 3 December 2012) <http://eutopialaw.com/2012/12/03/case-c-41011-pedro-sanchez-v-iberia-shared-baggage-single-interpretation/> accessed 13 May 2014.
[16] Case C–549/07 *Friederike Wallentin–Hermann v Alitalia* [2008] ECR I–11061; (*See* Jochem Croon, 'Placing Wallentin–Hermann in line with continuing airworthiness, a possible guide for enforcers of EC Regulation 261/2004' [2011] 36(1) Air & Space Law 1.
[17] Joined Cases C–402/07 and C–432/07 *Christopher Sturgeon and Others v Condor Flugdienst GmbH* (C–402/07) and *Stefan Böck and Cornelia Lepuschitz v Air France SA* (C–432/07) [2009] (references for preliminary rulings).
[18] Joined Cases C–581/10 and C–629/10 *Emeka Nelson, Bill Chinazo Nelson, Brian Cheimezie Nelson v Deutsche Lufthansa AG* (C–581/10) and *The Queen, on the application of: TUI Travel plc, British Airways plc, easyJet Airline Company Ltd, International Air Transport Association v Civil Aviation Authority* [2012] ECR I-1.

must be redressed in accordance with the principles of equal treatment and non-discrimination.

The CJEU explained in *Nelson and Others*, referring to its earlier decision in *IATA and ELFAA*, that nothing in the Montreal Convention indicates an intention by the Convention's authors 'to shield air carriers from any form of intervention other than those laid down by those provisions, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts'.[19]

For reference, Art. 19 of the Montreal Convention provides as follows: 'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for *damage occasioned by delay* if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures'.[20]

Whilst the phrase 'damage occasioned by delay' is not defined in the Montreal Convention, Art. 22 of the Convention provides an upper limit to the damage.[21] Taking a literal interpretation of that provision, it would appear that damage occasioned by delay is the cost of toiletries, clothing, etc., rather than the loss of time that causes inconvenience.

According to CJEU interpretation, however, Art. 19 of the Montreal Convention 'implies [...] that the damage arises as a result of a delay, [and] that there is a causal link between the delay and the damage and that the damage is individual to passengers depending on the various losses sustained by them'[22], whereas the obligation for an air carrier to pay compensation under Regulation 261/2004, 'does not arise from each actual delay, but only from a delay which entails a loss of time equal to or in excess of three hours in relation to the time of arrival originally scheduled ... [and] ... whereas the extent of the delay is normally a factor increasing the likelihood of greater damage, the *fixed compensation* awarded under that regulation remains unchanged in that regard, since the duration of the actual delay in excess of three hours is not taken into account in calculating the amount of compensation payable under Article 7'.[23] (emphasis added)

The CJEU therefore deems the obligation to pay a fixed compensation as compatible with Art. 29 of the Montreal Convention on basis of claims.[24] It is also worth nothing that the CJEU has ruled that the seemingly ever-present right to care obligation under Art. 9 of

[19] *Nelson and Others* (n18) para 4.
[20] [2001] OJ L194/39.
[21] The limit was originally set at 1000 Special Drawing Rights (SDRs) and is currently at 1131 SDRs, which is roughly equivalent to USD 1750.
[22] *Ibid* para 50.
[23] *Ibid* para 54.
[24] *Ibid* para 56.

Regulation 261/2004 operates at an earlier stage than the Montreal Convention.[25] The CJEU stressed that 'like the inconveniences referred to in *IATA and ELFAA*, a loss of time cannot be categorised as "damage occasioned by delay" within the meaning of Article 19 of the Montreal Convention, and, for that reason, it falls outside the scope of Article 29 of that convention'.[26]

Thus, in *Nelson* and *TUI Travel and Others*, the CJEU summed up the requirement to compensate passengers and settled the matter: Regulation 261/2004 is consistent with the Montreal Convention since, *inter alia*, 'the *loss of time* inherent in a flight delay constitutes an inconvenience which is not governed by the Montreal Convention. Consequently, the obligation to compensate passengers whose flights are delayed falls outside the scope of that convention, but remains *additional* to the system for damages laid down by it'.[27]

It would be interesting to put the questions above to the drafters of the Montreal Convention to determine the extent of CJEU finesse.

What is more, if an 'extraordinary circumstance' does arise and passengers are stranded, as were seven million when the volcanic ash from the Eyjafjallajökull volcano required closure of European airspace that incidentally also led to a USD 5bn loss of global GDP, there is a lack of information available on the possible implications of burden sharing between airlines, airports and hotels in such situations. Clearly, an impact assessment is necessary.

Finally, a closer look at proportionality of compensation is essential.

In *McDonagh*[28], an Irish court questioned, on the basis that 'extraordinary circumstances' is not defined in Art. 2 of Regulation 261/2004, whether Art. 5 must be interpreted as meaning that 'circumstances such as the closure of part of European airspace as a result of the eruption of the Eyjafjallajökull volcano'. A passenger, McDonagh, claimed EUR 1129 for incurred expenses when delayed for several days following cancellation of her Ryanair flight; the cost of the ticket was only EUR 98.

The CJEU ruled that the closure of airspace constituted 'extraordinary circumstances' within the meaning of Regulation 261/2004, which *do not attract* Art. 7 compensation but also *do not release* air carriers from their obligation laid down in Articles 5(1)(b) and 9 of the Regulation to provide care[29], effectively for as long as the circumstances persist. As regards the limit of reimbursement, the CJEU commented that this should be 'in the light of the specific circumstances of each case, proved necessary, appropriate and reasonable to make up

[25] *Wallentin–Hermann* (n16) para 32; *Nelson and Others* (n18) para 57.
[26] *Nelson and Others* (n18) paras 49, 55.
[27] CJEU Press Release, 'Judgment in Joined Cases C–581/10 Nelson and Others v Deutsche Lufthansa AG and C–629/10 TUI Travel and Others v Civil Aviation Authority' (23 October 2012) CJEU/135/12 2.
[28] Case C–12/11 *Denise McDonagh v Ryanair Ltd* [2012] (preliminary ruling).
[29] *Ibid* para 34.

for the shortcomings of the air carrier in the provision of care to that passenger, a matter which is for the national court to assess'.[30]

By way of comparison, compensation available under current EU legislation for passengers travelling by railway, sea/inland transport and bus/coach transport is far more proportionate to the cost of the ticket with tiered stages of delay. With that said, it is important to note that proportionality in these instances is most certainly linked to the availability of substitutable modes of travel and 'modern' enacted EU legislation for passengers on land and sea modes of transport.

Within the past few months, European Parliament has taken steps towards consolidating the existing legislation, prompted by European Commission proposals announced in March 2013 to amend Regulation 261/2004; progress has been made yet, politically, it has been no easy task[31].

V. United States

The United States (US) regime on air passenger rights and applicability of the Montreal Convention in US courts may offer a useful albeit simpler example for comparison, too. On the question of whether the Warsaw Convention pre-empts claims brought under domestic law, the US Supreme Court held in *El Al Israel Airlines v Tseng:* 'Given the Warsaw Convention's comprehensive scheme of a liability rules and its textual emphasis on uniformity, we would be hard put to conclude that the delegates at Warsaw meant to subject air carriers to the distinct non-uniform liability rules of the individual signatory nations'.[32]

The *Tseng* judgment has been applied, *mutatis mutandis,* in subsequent cases brought in the US courts which involved interpreting similar provisions of the Montreal Convention. *Nobre v American Airlines*[33] is a semi-recent example. Whilst these cases deal with damages claims for personal injury, it is clear that in the post-*Tseng* era in the US, the Montreal Convention provides an *exclusive* cause of action for claims; other claims under local law are pre-empted. Clearly this is not the current position in Europe.

V. Conclusion

This comment has identified two regimes that impact on and implicate airlines, airports and air passengers, concurrently. A brief examination of the two reveals that they have different

[30] *Ibid* para 51.
[31] In February 2014, MEPs backed changes amidst 400 or more proposed amendments. The changes are pending adoption.
[32] *El Al Israel Airlines v. Tseng* 525 US 155, 161 (1999)
[33] *Nobre v American Airlines* WL 5125976 SD Fla (2009)

purposes. Current international law aims to provide a system of limited liability for airlines under contracts of carriage, whereas consumer protection regimes, such as the EU's Regulation 261/2004, seek to require airlines to offer air passengers care, assistance and compensation if they are stranded or even inconvenienced.

Do they work in tandem? Are they in competition? Can they co-exist?

The CJEU has, in short, concluded that the rights granted to air passengers under Regulation 261/2004 are *consistent with* but *additional to*, or simply operate *at an earlier stage than that of* existing international law, in particular the Montreal Convention, though this surely boils down to the creation of brilliant finesse rather than disrespect for, or evidence of an intention to undermine, international law.

In the light of the recent call for core principles for the protection of air passengers as consumers at the international level, it will be needful to consider the approaches taken by other national and regional courts with respect to interpretation and application of the Montreal Convention as that policy guidance is developed.

A review of the Montreal Convention should not be ruled out. Indeed, it may no longer be fit for purpose given the proliferation of air passenger rights regimes that, as the CJEU jurisprudence on Regulation 261/2004 evidences, may challenge the effectiveness of international law.

At every turn to date, the CJEU has interpreted the EU regime as being entirely consistent with the Montreal Convention, so what is to prevent *national* courts from coming to the same conclusions in future? In other words, without global, core principles on consumer protection, legislators and courts the world over may resort to less textual, more teleological interpretations of the provisions of the Montreal Convention, an international law that has a *very different purpose* from that of consumer protection, namely to establish a *limited liability* regime for airlines.